Ngāti Hāua Iwi Trust Preliminary Analysis Report of the Conservation System's Policy Setting

"**Unuunu te puru o Tūhua mā ringirngi te wai o puta**"

'If you withdraw the plug of Tūhua, you will be overwhelmed by the flooding hordes of the North'
'If you withdraw the plug of Tūhua, you empty the Whanganui River'

This analysis report is preliminary in nature and subject to change following the wider engagement agenda being released, undertaken and completed to our satisfaction by the Department of Conservation. We anticipate that further information from the Department may influence a change or alteration in the positions stated in this document. We reserve the right to amend this paper to account for that.

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1 Introduction

1.1 Executive Summary

The Department of Conservation (**DoC or the Department**) is charged with the central role of conservation with respect of unique, significant and highly valued land and waters both to New Zealand and for Māori. Much of the conservation estate is land identified as holding those qualities and in our particular rohe, as being tupuna to our whānau, hapū and iwi. When we as iwi/hapū engage in processes related to the use and "enjoyment" of the conservation estate, we are clear that conservation takes absolute precedence.

This necessitates our involvement in decision making but also the independence of the Department itself from the political spheres that pollute the system with what is popular during an election cycle. Against those expectations, it is clear that the conservation system is broken at its core. Much of this can be attributed to the wilful retention of powers by DoC, the lack of creativity and appetite to make changes that shift that power, underfunding, and ignorance to the core functions of the Department.

Despite this, the proposed reforms only take us further away from the solutions we need. Through the removal of checks and balances, and an overwhelming shift in focus from conservation to fiscal economics, conservation values are being lost and undermined. Any reform must reflect the dual role that iwi/hapū already have and amplify that so it can be sustained within the system itself.

To achieve this, the current framework and directives of section 4 need to be implemented into every aspect of the Conservation act, which also requires an

understanding of Treaty Settlements, their evolving nature and ensuring that the system has avenues for these matters to "speak" to one another. Changes then need to occur across the structural hierarchy, conservation management regimes/frameworks, policy directives, operational functions and of course to the way the system is resourced. From there, aligning other statutory regimes or were possible merging them, can be done (e.g. the Wildlife Act).

We have set out in this review, how this can be achieved and where relevant, have indicated how currently proposed reforms can be adapted to take into account our recommended drivers for the conservation system. Having the correct policy setting in place, so that operationally, the system can thrive to the benefit of the conservation estate and the environment as a whole, is the only means for a sustainable system of conservation management.

The scope of this analysis report has focused on how to improve the policy setting rather than on every aspect of the system. This approach has been adopted because there are elements of the current reform that present as logical. However, as we have seen in the current system, such changes will fail as a result of the overarching direction shifting towards unrelated matters. If conservation is not at the heart of the system, then the reforms are not structural or about policy, but rather about monetising our unique conservation environments. That approach does not fit nor align with of the available commentary, case law, and system review reports. In our minds, focus on the high level policy issues is key to a successful reform agenda and policy proposals.

1.2 What We Know

The Issue

It is an accepted reality that the conservation system is clunky and dysfunctional. The issues stem from a number of sources, and at a high level can be attributed to the difference in understanding, acceptance and implementation of section 4 Conservation Act 1987. We know that the policy tier, both in the planning and organisational structure and hierarchy, resist giving effect to section 4. In doing so, the Department has manipulated its functions, altered its policy application and defaulted to a Crown centric agenda whereby iwi/hapū are secondary or only form part of the wide range of considerations when undertaking any one function, duty or power. Many have suggested that this is a result of the Department not knowing what section 4 means or does and the effect of that trickling down through the planning documents and into operations.

We disagree and align our views with that of the Waitangi Tribunal in its Wai 262 "*Ko Aotearoa Tenei"* report. That is to say, there are systemic and policy disconnects between Te Tiriti and the conservation system. Institutional racism underpins this disconnect and whether the Department accepts it or not, the reality is that as a Crown department it always places iwi/hapū outside the equation, rationalising that by its self-appointment as the scale holder that determines the balance between the positions of iwi/hapū and that of the rest of the Aotearoa. Such an approach is wrong because the Crown has obtained dominance in the exercise of power and by acting in this way, iwi/hapū always come off second best. So how can we address that? Well, its helpful to take a stock take of the available commentary on this very issue.

The Conservation Act

Focusing on the Conservation Act, its clear there are many gaps within the legislation alone. Matters like indigenous biodiversity, climate change, freshwater etc are all externally regulated or driven, making it difficult to drive from within the conservation system and resulting is their deterioration. As we know with law, without explicit legislative provision/direction, things do not get done easily. Even where there is an opportunity to approach the application of the legislation in a different way, barriers go up for want of explicit reference to a legislative provision that speaks to the exact issue in question. That is fair but more so problematic. Problematic from the sense that it is always the Department reconciling the ability to do something versus not, and fair because the cost and consequences are not fully identified. The fairness of that position is quickly defeated once you appreciate those systemic issues we noted earlier. The *Ngāi Tai* case is a clear example of this very issue which we discuss later.

What we know from the Conservation Act are three very simple conceptual ideologies:

Tiriti Ideology. Section 4 requires that the entire Act must give effect to the principles of the Treaty of Waitangi in its interpretation and administration. This framework is a front and back door that encapsulates the system. It follows that section 4 introduces the necessity for iwi/hapū decision making and as having a dual authority within the system alongside the Crown. This supports the implementation of Treaty Settlement arrangements and enhances them, rather than seeing them as separate or as a challenge.

Conservation Ideology. Preservation and protection are core ideologies, targeted at a network of conjunctive matters: 1. maintaining intrinsic values associated with natural and historic resources (values focus); 2. Providing for their appreciation and recreational enjoyment by the public (present day focus); and 3. Safeguarding the options of future generations (forward focused). Layering section 4 over the top, this becomes a hierarchy of obligations because matters 2 and 3 can only occur if the natural or historical resource exists to begin with, reiterating that emphasis must be given to the preservation and protection of maintaining intrinsic values associated with those resources at all costs.

Function Ideology. Naturally the system requires functionality and that must stem from an operative structure. The Department provides this, and section 6 sets out its role in a clear hierarchical way that aligns with the Conservation ideology above. Section 4 again, provides an encapsulation around the Departments functions, requiring iwi/hapū to be authoritative on what section 4 means and whether it's been met/upheld. This signifies the difference between function (being the department) and legitimacy (being the dual authority of iwi/hapū and the Minister).

The above have no explicit statutory provision. This has created an unwillingness to entertain this correct reading of the Act and has forced iwi/hapū to leverage Settlement legislation to achieve an arrangement as close to this kind of interpretation as possible. That is different than saying the system cannot provide for all these matters in an appropriate way, and it seems a cop out to suggest that is the sole cause. Responsibility must be taken by the Departments senior officials, including the Minister, who take advantage of the cultural disparity to retain an odd sense of control.

Ko Aotearoa Tēnei

When the Waitangi Tribunal conducted its inquiry into the Conservation system, it made an important statement:

> **The right of the government of the day to govern is well established as a principle of the Treaty, but so is the Māori right of tino rangatiratanga and the concomitant duty on the Crown to protect that rangatiratanga principle. Similarly, there is an obligation on the Crown to actively protect the Māori interest and to act reasonably, honour ably, and in good faith in dealing with Māori under the Treaty. The Crown's duty is akin to that of a fiduciary. For their part, Māori owe an obligation of loyalty, reasonable cooperation, and respect for the Government's role. All of these ideas are woven together through the over-arching Treaty principle of partnership. Thus, although neither the general policies nor the CMRI guidelines make reference to that principle, it is nonetheless one DOC must give effect to.**

Naturally that report undertakes an analysis of several areas in the conservation system which highlights a theme or pattern of denial for the partnership intended by Te Tiriti from the Department. Unsurprisingly, that remains the case today, with a reliance on unfounded negative views. One particular reference was to the discriminatory view that Māori traditions and practices would cause harm to indigenous species, and result in their decline. The Tribunal wades away from this and labels them as scaremongering, noting its an unfounded conclusion to draw with no evidence to rationalise it. That said, it is our view that the Department (or the Executive branch of government) exploits those fears, regardless of the opportunity for positive outcomes if iwi/hapū were properly accounted for in the systems drivers.

Some of the main slumps in the system that the Tribunal zeroed in on were the conservation general policy and the conservation planning policy (including the role of Conservation Boards and the Conservation Authority (**NZCA**)). Again, its unsurprising that the Tribunal criticised the way these areas had been development and the subsequent exclusion of iwi/hapū that they perpetuated. Like our review, the Tribunal focused on the system drivers at the highest level, while also identifying the challenges faced by Māori in realising them. A dual role in decision-making was a central recommendation from the Tribunal.

Ngāi Tai ki Tāmaki Trust v Minister of Conservation

It was the case that shook the system, much in the same way that the *Whales* case did in the 1995. The importance of *Ngāi Tai* highlights the very real issue that DoC continue to perpetuate, even now in its proposed reform agenda, that section 4 is meaningless (or has a Crown meaning). It's clear that DoC seek a solid black and white decision-making framework that to them, creates certainty about decisions and the rationale (both policy and legal) that sits behind them.

As we know, when dealing with Te Tiriti and Tikanga, as it is with the environment; **context is everything**. That is exactly the nature of the Ngāi Tai decision, essentially requiring the context raised before the decision making in a conservation setting to be fully considered, including all options under section 4 (in terms of process and outcome) and whether in that context a particular outcome is preferable, regardless of its nature and scope. For us an example would be , where there are matters related to concessions, planning documents or decisions generally over Te Kahui Maunga, the interaction of section 4 with the context of the continued exercise of ahi kā and mana i te whenua by iwi/hapū at place, the many relationship arrangements within the national park, five Treaty Settlements and historical Waitangi Tribunal findings, would all be a reasonable basis for decision makers to reach an outcome akin to preference afforded the iwi/hapū position or even in some cases a veto. In our view, the contextual shift is one of authority, and where DoC have and continue to fail, is in its acceptance that that reality is already in existence.

The constant resistance to the principles of the Ngāi Tai decision (among others) is why we say the DoC reforms currently proposed tilt in the wrong direction – to provide the Crown with a sense of rationalised authority regardless of the reality.

Reviews of the System

There have been a number of reviews of the system, and a handful of those were initiated by DoC. We want to touch on these very briefly, being:

> The concurrent and partial reviews in 2019 by the Options Development Group (**ODG**) that related to the Conservation General Policy (**CGP**) and the General Policy for National Parks Te Tiriti provisions. This review focused particularly on the way the Ngāi Tai case had changed the understanding of the landscape; and
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> The reviews in 2023 and 2024 by the Environmental Defence Society (**EDS**) which were a deeper dive into the whole system but raised similar (if not identical) issues about the application and understanding of section 4.

Firstly, the current reform programme ignores these reviews. The high-level recommendations from the ODG have been ignored but with other recommendations taken on board. That approach has led to a risky decontextualisation of the issues and the adoption of recommendations that now have no basis. Of real concern is the denial for recommendations related to the need for iwi/hapū to have decision making powers in the system, centring of mātauranga, kawa and tikanga in the system, and for a significant level of devolution to occur. The same applies to the recommendations from EDS.

We have touched on areas later on, where these reviews have missed the mark, but as a general comment, the need for a full Māori/iwi/hapū review is necessary. Both of the reviews above, approach the system from the Crown's perspective. Although there are recommendations for devolution and iwi/hapū being provided powers within the system, they start from the wrong rationale/basis.

What Needs to Happen?

What this highlights, is that reform is required to address the Departments culture of poor interpretation of the Act by including explicit provision to ensure the above conceptional ideologies have teeth. We know then that a clear purpose section (and possibly a preamble), provisions related to how section 4 must be implemented through dual decision-making, and functional structures that effect that dual role, must all feature in the reform agenda as the starting point. How this happens is not rocket science, but rather a simple acceptance of the new reality we operate in. We set out in this analysis report the correct starting point and rationale for this to occur, as well as ways to ensure its longevity.

2 Tiakitanga and Conservation – Purpose and Objectives

2.1 Kawa, Tikanga and Treaty Settlements are Conservation Mechanisms

An appreciation for the dual role of iwi/hapū and the need for the system to provide decision making powers to iwi/hapū, starts with an understanding of kawa, tikanga and Treaty Settlements, in so far as they provide rationale for such decision making provision. There is ample literature regarding what kawa and tikanga are, and we don't restate or even address that here. What we draw attention to is the overwhelming power of the kawa that underpins the application of tikanga in a conservation setting. Tiakitanga (as opposed to kaitiakitanga) relates to the protective role of people to the environment, better understood as the protective and reciprocal responsibility and obligation to our tupuna, tupua and/or tipua. Kaitiakitanga is the exercise of a similar (although more wairua centered) protective role by katiaki themselves, not people. The diagram below, attempts to provide a visual representation of this. Its important to note the reciprocal nature of the responsibilities, and their broad range.

The diagram above, creates two important cornerstones: the first is that the operation of kawa/tikanga as a conservation mechanism, takes into account the whole cycle. This removes any risk of one area being fully focused on at the detriment of another. The second is that the proper operation of kawa/tikanga values such as manaakitanga and whanaungatanga reinforces the need to preserve and enhance relationships. These are things the current legal system cannot achieve, because at its heart, there is a denial of the wider responsibilities and obligations that exist in addition to those of people. Because the legal system is always people focused, it places people above environment, which is wrong.

For Māori the proper operation of kawa/tikanga values is a law unto itself. As with the legal system, only law can defeat law, the same is true of kawa/tikanga, however with respect of the latter, there are wider implications for breaches to those and their operation is enhancement focused of combative. It is this fact, that provides an initial rationale for the necessary decision-making provision within the system that must be applied to iwi/hapū. We reiterate that, provision for decision making within the system is not the same as the system being the root of the authority that iwi/hapū have to make decisions. What we are saying is that the two systems of law (tikanga and legislation) must speak to each other, and currently it is only tikanga opening any form of dialogue. Unsurprisingly, it must be said

that the legal system (which places the Crown at the center) will never be able to achieve the system represented by the above diagram, hence the real need for iwi/hapū to be in a position to exercise their dual, in the conservation system itself.

The reciprocal nature of the cycle represented above, needs fueling. We say that Treaty Settlements are fuel for the system. They provide the following:

- Recognition and acknowledgments of the breaches of Te Tiriti by the Crown. These are in fact operative parts of a Treaty Settlement and act as a reference point for behavioral norms and regulation of Treaty obligations. From these, the Settlement relationship and any operational outcomes that occur, can and should evolve as a direct response to the commitment in the Settlement to never allow those breaches to occur again.

- Bespoke legal arrangements (like the interpretation of laws (see Te Awa Tupua), redress related to CMS's, CMP's and NPMP's, membership on the NZCA and Conservation Boards andother provisions for pre-existing rights. These provide legally binding frameworks for decision-making that shift authority for decisions on compliance to the iwi/hapū side of the Treaty Settlement arrangement. These legal arrangements are not additional or a subset of the conservation system, but rather a Treaty based attempt to fill a void in the system in an enduring way. The relationship arrangements with DoC are part of the intended platforms for the realisation of the above and a way to operationalise the evolution of the Treaty Settlement in a conservation context.

Viewed in this way, Treaty Settlements are not layers or challenges in the system, but rather opportunities and benefits within the system that should be tapped into to achieve better outcomes. Where the problem arises (and this is relevant to the way EDS framed the issue as well, which we disagree with) is that there is a view that the conservation system needs to be its own solid legal framework, and anything else is a subset of that. Again, this is an incorrect way to view the system. Treaty Settlements are new mechanisms for conservation, that go towards upholding conservation ethic, and not merely conservation law. The real issue here, is that the conservation policy setting has not kept up with Treaty Settlements. That is a Crown failing and cannot be framed any other way, and so cannot be used to rationalise a departure from the Treaty Settlement or the ethic behind it (i.e. as an evolving mechanism). Approaching the world in this way, turns our minds to three necessary policy setting reform themes:

CONSERVATION ETHIC | **ADAPTIVE AND MANAGED POLICY** | **DECISION MAKING BY IWI/HAPŪ**

2.2 Central Conservation Concepts

A Central Purpose: The Environment

The definition of conservation in the current Act is (as described earlier) partially reflective of many ideologies founded in the Māori world. What needs to be included, is an explicit statement related to the environment or to conservation as understood by Māori. This could be achieved by direct reference to people as tiaki of the environment, with an obligation statement accompanying this. Another approach could be a preamble that sets the scene and combined with the current definition of conservation. This will need to be in Māori and English (with the Māori version taking preference). In any case, the conservation meaning needs to become a purpose/objective provision in the Act. Why we have landed on this type of construction, is because section 4 already requires the Act to be interpreted and administered to give effect to Treaty Principles. Based on *Ngāi Tai,* that requires the same outcome we seek here.

By constructing the Act in a way that has section 4 speaking to and reinforced by a stated purpose, we consider this makes the system less weighted on the Crown's interpretation and application of the arrangements that follow and avoids the repetition of the Departments past and current failings. This also ensures the flow on into policy planning documents.

Independence

Independence in conservation is critical, because the focus of the system is preservation, not use. If the opposite was true (of which we say the current reform proposals seeks to implement), then this would just be the Resource Management Act system applied over Public Conservation Land, and political independence would be a thing of the past. Therefore, independence from any sphere of decision making that seeks use over preservation (for whatever reason) is a must in conservation terms. We address this more later.

3 Decision Making and Policy Hierarchy

3.1 Iwi and hapū Decision-Making Function

The system currently has no explicit provision for iwi/hapū decision making at every layer. Treaty Settlements have provided mechanisms for bespoke decision-making functions, but nothing broader. For instance, in a concession process only the Department can make decisions and there is no ability for iwi/hapū to be

delegated that role. Instead, the Department have used informal arrangements to provide advice to decision makers, which in practice has always been followed, but these types of arrangements can be compromised if the Department were disinterested in following them or if the political will of the day sees them as barriers or limitations of the exercise of authority within the system. The current reform proposals center the Minister of Conservation in every decision-making role, even those currently held by the NZCA and/or Conservation Boards. This is also inappropriate.

What's needs to occur is a dual functionary decision making avenue at the higher levels of the system, with the lower parts (say in a concession process) to have available shared and delegated decision-making where required by the context. The latter should be a shared decision to delegate. This type of flexibility in the lower tiers of the system takes into account the higher-level provision noted earlier and the flow on effects this has through the planning documents/policies, that can lead to iwi/hapū having resolve that the system is functioning correctly from the top down. Once you remove the higher-level decision-making provision, the lower tier decision-making becomes congested, and in most cases combative, because all parties are trying hard to reconcile what little there is to work with in policy terms, against a context that requires so much more then tokenism.

3.2 Policy Hierarchy, Planning and Management

We have reviewed the proposed planning system reforms and see real benefit in the approach, save for the decision-making element (as noted above). If the decision-making is not shifted, the proposed planning hierarchy will fail. Further, success can only be achieved if the legislative setting is correct (as recommended earlier) and combined with a decision-making matrix to that we have suggested earlier. From there, the approach to a national policy statement and area plans will flourish. We accept that the way to approach planning needs to be clear and certain, however, it also needs to be adaptive and provide for unknown circumstances. In this regard, the system needs to allow for regular reviews but also provision for this to be budgeted outside the annual budget.

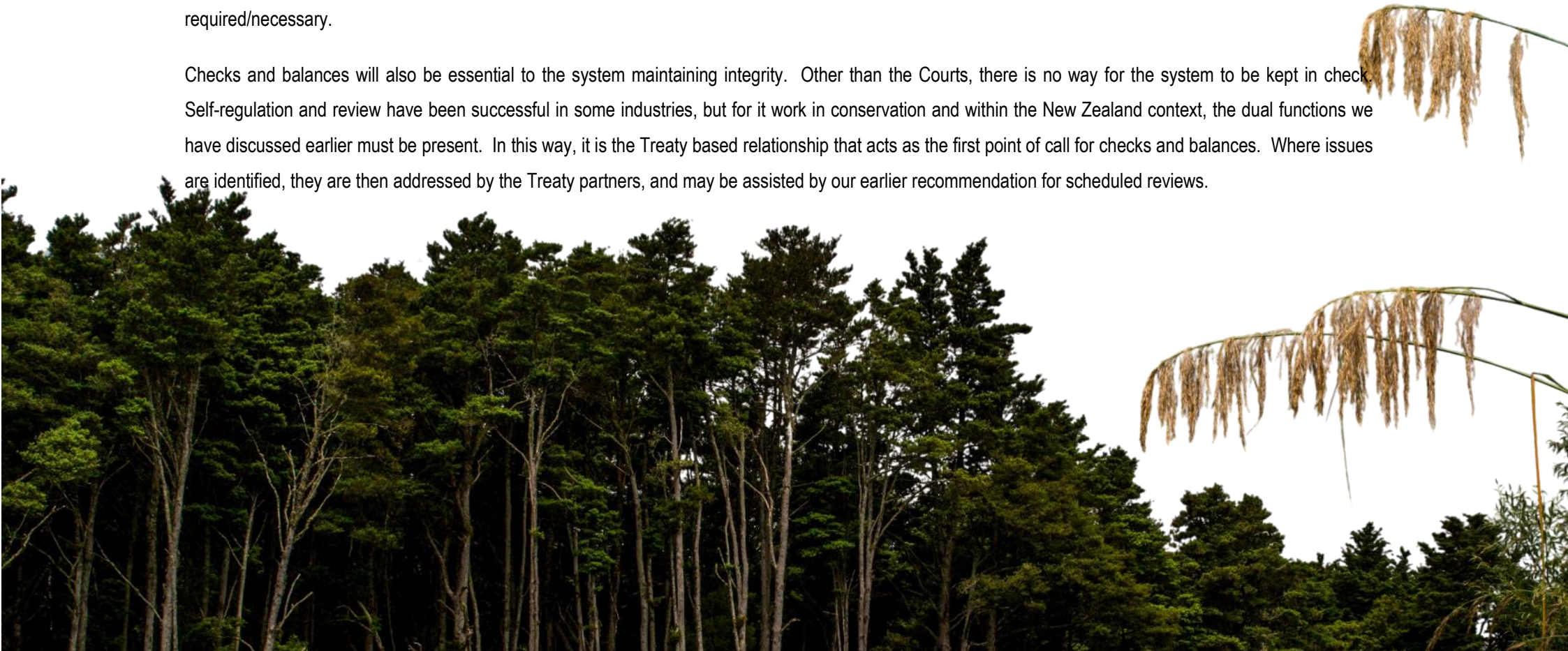
Treaty Settlements would be openly provided for at the national policy statement level and depending on the Settlement (like Te Awa Tupua which spans an entire catchment) may also form the national policy direction. This ensures that the statutory hierarchy of Settlement legislation is properly given effect to. What would secure the network of Settlements within the conservation system is a hook back into the Conservation Act itself. The Conservation Act must make clear that Treaty Settlements take precedence in the system. From there, it would follow that the national policy statement and area plans would either just insert the Settlement arrangement or framework directly into the relevant planning instrument, and then through the dual decision-making function of iwi/hapū those instruments (more likely to be the area plans) could deal with those arrangements in context, again either by simple insertion (which would be the default) or by insertion and accompanied by an agreed set of other provisions/policies that reflect or allow the Settlement arrangement to also evolve. The process that sits

behind the above, would follow the same theme in terms of duality and Tiriti centricity. We see real benefit in the proposed consultation process, but the addition of iwi/hapū representation in the process is required (in terms of powers). We do not agree that the Minister should hold sole decision-making powers. That is at odds with the current system, which omits that ability by the Minister in recognition of the political nature of the Ministers role and risk of corruption associated with wide ranging policy decision making powers. It also suggests that a Minister of the Crown knows how to give effect to Te Tiriti. Instead, we are proposing a dual role in both the policy and plan tiers, as a way to uphold the section 4 obligations and achieve independence in the system, thus realising the reciprocal model noted earlier.

3.3 Delegation of Authority and Checks and Balances

The ability for broader delegations of powers by agreement with iwi/hapū is essential for the efficiency of the system. We suggest that dealing with this requires statutory reform, simply to empower the option, but that the national policy statement and/or area plans must also make clear where delegation is required/necessary.

Checks and balances will also be essential to the system maintaining integrity. Other than the Courts, there is no way for the system to be kept in check. Self-regulation and review have been successful in some industries, but for it work in conservation and within the New Zealand context, the dual functions we have discussed earlier must be present. In this way, it is the Treaty based relationship that acts as the first point of call for checks and balances. Where issues are identified, they are then addressed by the Treaty partners, and may be assisted by our earlier recommendation for scheduled reviews.



The other checks and balances exist by virtue of the duality of decision making we have discussed in this report. In the current system, that dual function is exercised by the NZCA and Conservation Boards. They may still have a role yet, but there would need to be a robust revisit to their membership or a whole other arrangement created.

4 Comments on Reform and Conclusion

Before we close, we want to address a couple key aspects of the reform agenda. The first is the shift in focus to tourism and recreational use, which also includes the monitisation of conservation land. We are not clear about the effects of these proposal and have serious concerns with what is proposed, because it is not clear what ethical starting point has been adopted or whether (and we assume this is the case) money/economic/financial matters are now the priority. We wish to engage more on this because it seems conservation will take a back seat and the system will open the door to private exploitation. In this regard, the land disposal proposals are problematic. If it was the case that the proposal was solely to allow for iwi/hapū to have significant lands return to them, then the reform should just state that. Instead, this type of scenario is used as a sales gimmick to insight support from iwi/hapū with the real intention not entirely clear.

The same goes for the concession process, which currently fails across the board, not because its unworkable, but because it is governed by all the wrong policy starting points. That issue is conflated by the inconsistency between old and less aged plans and strategies, as well as the real deficiency of thought with respect of Treaty Settlements.

We labour the point that, the above reform themes (those of monitising the system in some way and addressing the concession process) are more likely to succeed, both in pitch and intended outcome, if the overarching policy setting is correctly established. This means that if duality and Treaty centricity is used to drive reform, then these two aspects become reforms angled at “achieving better opportunities for resourcing conservation”, with conservation taking on the more kawa based definition we have couched in this report.

That nicely segues to our final point that iwi/hapū are not time barred. We are enduring and the only force in New Zealand guaranteed to exist forever. If the Department (and the Crown generally) accepts that sooner rather than later, then the conversations between us are more focused on outcomes rather than responding to issues. The principle here is giving life to the Treaty relationship within the system, not outside or as a second thought. We look forward to engaging in more details about the reforms and expect the same in due course.