

1. OVERVIEW

1.1 INTRODUCTION

This report examines Crown legislation, policies, and practices in relation to flora and fauna between 1983 and 1998. The Waitangi Tribunal commissioned this report on 24 September 1999 as part of the Wai 262 inquiry. The report was to cover the following matters:

- (a) Legislation, policies and actions of the Crown relating to conservation.
- (b) Legislation, policies and actions of the Crown relating to resource management.
- (c) Legislation, policies and actions of the Crown relating to new organisms.
- (d) Legislation, policies and actions of the Crown relating to customary fisheries.
- (e) Maori petitions to Parliament regarding matters concerning indigenous flora and fauna.
- (f) Maori views, as expressed to and in Government, including those of Maori Members of Parliament, regarding legislation, policies and practices of the Crown related to indigenous flora and fauna.¹

1.1.1 The flora and fauna aspects of the Wai 262 statement of claim

The Wai 262 claim concerns issues relating to flora and fauna, cultural property and taonga, and intellectual property rights. This report and discussion of the Wai 262 claim is limited to the flora and fauna aspects of that claim. The Waitangi Tribunal received the first Wai 262 statement of claim on 9 October 1991. The claim concerns the ‘protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use of and transmission of the knowledge of New Zealand indigenous flora and fauna and the genetic resources contained therein.’² The claimants are Dell Wihongi (Te Rarawa), John Hippolite (Ngati Koata, now deceased), Kataraina Rimene (Ngati Kahungunu), Haana Murray (Ngati Kuri), Tama Poata (Whanau a Rua, Ngati Porou) and others. The claim states that the claimants ‘have been, and are, prejudicially affected by the actions and omissions of the

1. Direction Commissioning Research, 24 September 1999, Wai 262 record of inquiry, doc #3.18, Waitangi Tribunal
2. Statement of Claim, 9 October 1991, Wai 262 record of inquiry, doc #1.1, Waitangi Tribunal

Crown and its representatives in denying te tino rangatiratanga of te iwi Maori.³ In particular, the statement of claim states that te tino rangatiratanga is an absolute authority and includes:

the right of development which permits the Iwi to conserve, control, utilise and exercise proprietary and ownership rights over natural resources, including indigenous flora and fauna.

decision making authority over the conservation, control of, and proprietary interests in natural resources, including indigenous flora and fauna.

the right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna, in the preservation of biodiversity, and in the ongoing development of a philosophy of eco-ethno ethics.

the right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna.

the right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna.

the right to protect, enhance and transmit the cultural, medicinal, and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna.

the right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna.

In addition, the claim states that the exercise of te tino rangatiratanga o te iwi Maori 'as it relates to indigenous flora and fauna was and is a recognition of an Iwi interest in the continued existence of flora and fauna as particular species and as interconnected threads of te ao turoa'. Such recognition vests in iwi 'all rights relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna and the genetic resources contained therein.'⁴ These rights are 'absolute'

3. *ibid*, p 1

4. *ibid*, p 2

so ‘any exercise of kawanatanga by the Crown in relation to indigenous flora and fauna [is] a denial of te tino rangatiratanga o te Iwi Maori and is therein an act in breach of the Treaty of Waitangi.’

The claimants believe the following Crown actions are in breach of the Treaty of Waitangi:

- ▶ provisions of Crown legislation, regulations, orders, proclamations, notices, and statutory instruments as they concern protection, conservation, management, treatment, sale, dispersal, and restrictions upon the use of New Zealand indigenous flora and fauna;
- ▶ past and proposed policies and practices, by or on behalf of the Crown, in relation to indigenous flora and fauna; and
- ▶ past or proposed omissions and actions by or on behalf of the Crown in relation to indigenous flora and fauna.⁵

Specific Crown actions cited include:

- ▶ creation of protected areas;
- ▶ establishment of protected species;
- ▶ delegation of powers to acclimatisation societies, Fish and Game councils, and Government departments;
- ▶ sale, disposal, and export of indigenous flora and fauna species and their genetic material; and
- ▶ sale, disposal, patenting and issuing of proprietary rights in indigenous flora species and export of indigenous timbers.⁶

The statement of claim also lists eight species that are of special significance to the claimants. These taonga species are:

- ▶ kumara (*Ipomoea batatas*)
- ▶ pohutukawa (*Metrosideros spp*)
- ▶ koromiko (*Hebe spp*)
- ▶ puawananga (*Clematis spp*)
- ▶ pupu harakeke (*Placostylus hongii*)
- ▶ tuatara (*Sphenodon punctatus*)
- ▶ kereru (*Hemiphaga novaeslandiae*).

The statement of claim says that Crown acts and omissions relating to these species and indigenous forests generally can be classified into four broad areas of complaint. These include:

- ▶ a denial of the right to development, including the right to control and develop new cultivars and varieties;
- ▶ loss of the right to conserve, preserve and protect species;

5. *ibid*, pp 2–3

6. *ibid*, pp 5–6

- ▶ loss of the right to use and dispersal of the species; and
- ▶ the denial of rights to cultural and spiritual concepts.

Some examples of alleged breaches of the Treaty contained in the statement of claim include:

- ▶ the transfer of pre-European kumara varieties to Japan by the DSIR in 1964;
- ▶ the granting of a plant variety right for a new variety of pohutukawa called 'carousel';
- ▶ the sale and exploitation of koromiko, puawananga, and hebe species in the horticultural and nursery trade;
- ▶ the collaborative research project between New Zealand and France relating to native species;
- ▶ the protection of indigenous timbers by conservation measures;
- ▶ Ngati Kuri being denied access to pupuharakeke by the creation of scientific reserves;
- ▶ Ngati Koata being denied access to tuatara of Takapourewa (Stephens Island); and
- ▶ Maori being denied access to kereru by the establishment of protected areas.⁷

In September 1997 the Wai 262 claim was amended. The amended statement of claim states that the claimants represent the tangata whenua of Ngati Kuri, Te Rarawa, Ngati Koata, Whanau a Rua, Ngati Porou, Ngati Kahungunu, and Ngati Wai.⁸ The first amendment added a number of new parts to the claim. One addition was a statement saying that:

te tino rangatiratanga o te Iwi Maori in respect of indigenous flora and fauna me o ratou taonga katoa (and all their treasures) includes, but is not limited to 'matauranga, whakairo, waahi tapu, biodiversity, genetics, Maori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation of such taonga.'⁹

The GATT:TRIPS agreement was also included in the amended statement of claim as an alleged breach of the Treaty. Other Crown practices, policies and legislation adversely affecting Maori rights to indigenous flora and fauna were identified. These include:

- ▶ Intellectual Property Rights Law Reform Bill;
- ▶ Moveable Cultural Heritage Bill;
- ▶ the Biosecurity Act;

7. *ibid*, pp 9–28
 8. First Amendment Statement of Claim, 10 September 1997, Wai 262 record of inquiry, doc #1.1(a), Waitangi Tribunal
 9. *ibid*, p 2

- ▶ the Hazardous Substances and New Organisms Act;
- ▶ He Taonga Maori Bill;
- ▶ the national policy on Maori customary use of native birds, plants, and other traditional materials developed by the New Zealand Conservation Authority;
- ▶ conservation management strategies;
- ▶ Priorities for 2001, Public Good Science Investment;
- ▶ patentability of biotechnology and bioprospecting;
- ▶ the Department of Conservation's bioprospecting policy;
- ▶ the OECD Multilateral Investment Agreement; and
- ▶ the failure of the Crown to support the adoption of the United Nations Draft Declaration on the Rights of Indigenous Peoples.¹⁰

The Wai 262 second amended statement of claim was lodged by and on behalf of Ngati Porou in July 1998. This amended statement of claim focuses on the rights of Ngati Porou to all dimensions of matauranga Ngati Porou. The dimensions include a wide range of elements including knowledge, heritage, oral traditions, oral arts, history, symbols, images, and cultural taonga. The amended claim states that the tino rangatiratanga and kaitiakitanga of Ngati Porou:

includes, but is not limited to the control, access and guardianship of Ngati Porou taonga. It encompasses all species, which are Ngati Porou taonga including plants, animals, and forests and specifically includes the ecosystems of such species.¹¹

The Ngati Porou claimants believe that the Crown has failed to 'actively protect the tino rangatiratanga of Ngati Porou in respect of plants, animals, forests and management of ecosystems.' This claim includes, but is not limited to:

- ▶ the introduction of exotic species including without limitation the opossum;
- ▶ protection given to exotic game species to the detriment of indigenous species;
- ▶ destruction of biodiversity of flora and fauna;
- ▶ destruction of or degradation of ecosystems including Hikurangi, Te Motu o Paikea, Waiapu River Catchment Area and Whangaokena;
- ▶ denial of cultural harvest rights in particular in relation to the kukupa/kereru.¹²

10. *ibid*, pp 27–34

11. Second Amendment Statement of Claim, 31 July 1998, Wai 262 record of inquiry, doc #1.1(b), Waitangi Tribunal, p 9

12. *ibid*, pp 9–10

Ngati Porou state that they have the right to ‘develop or to limit development of processes such as genetic technology, genetic manipulation, bioprospecting and biotechnology as those practices impact on plants, animals and their ecosystems.’ The claimants state that the Crown has failed to actively protect these rights, especially in relation to genetic research carried out by agencies such as the Forest Research Institutes and the DSIR. The Crown has also ‘failed to protect Ngati Porou rights to native plants and animals and their genetic resources through misappropriation and inappropriate use.’¹³

Apera Clark on behalf of Ngati Kahungunu lodged the Wai 262 third amended statement of claim.¹⁴ This amended claim concerns the rights of Ngati Kahungunu to exercise kaitiakitanga and tino rangatiratanga over indigenous flora and fauna in their rohe. The amended statement of claim alleges that the Crown has failed to protect:

- ▶ the exercise by Ngati Kahungunu of tino rangatiratanga and kaitiakitanga in relation to indigenous flora and fauna and rongoa within the Ngati Kahungunu rohe;
- ▶ indigenous flora and fauna within the Ngati Kahungunu rohe;
- ▶ Ngati Kahungunu cultural knowledge; and
- ▶ Ngati Kahungunu rights to exercise a development right in respect of rongoa.¹⁵

Examples of more specific alleged breaches of the Treaty include:

- ▶ the introduction of exotic species of flora and fauna into the Ngati Kahungunu rohe;
- ▶ restrictions on Maori exercising harvesting rights in relation to indigenous flora and fauna;
- ▶ the introduction of settlement, agriculture and horticulture to the detriment of Ngati Kahungunu’s tino rangatiratanga and kaitiakitanga in respect to indigenous flora and fauna;
- ▶ destruction or substantial modification of indigenous flora and fauna habitats;
- ▶ destruction of, and damage to, indigenous flora and fauna used in rongoa; and
- ▶ actual or potential harm to indigenous flora and fauna used in rongoa from genetically altered flora and fauna.¹⁶

The amended claim alleges that a number of policies and laws have been implemented that prevent or hinder Ngati Kahungunu from exercising tino rangatiratanga and kaitiakitanga in relation to indigenous

13. *ibid*, p 11

14. Third Amendment Statement of Claim, 23 May 2000, Wai 262 record of inquiry, doc #1.1(c), Waitangi Tribunal

15. *ibid*, pp 2–18

16. *ibid*

flora and fauna within their rohe. Some examples of these legislation and policies include:

- ▶ Native Plants Protection Act 1934;
- ▶ Forests Act 1949;
- ▶ Wildlife Act 1953;
- ▶ Marine Reserves Act 1971;
- ▶ Reserves Act 1977;
- ▶ Wild Animal Control Act 1977;
- ▶ Marine Mammals Protection Act 1978;
- ▶ National Parks Act 1980;
- ▶ Environment Act 1986;
- ▶ Plant Variety Rights Act 1986;
- ▶ Conservation Act 1987;
- ▶ Trade in Endangered Species Act 1989;
- ▶ Resource Management Act 1991;
- ▶ Crown Research Institutes Act 1992;
- ▶ Biosecurity Act 1993;
- ▶ Hazardous Substances and New Organisms Act 1996;
- ▶ New Zealand Coastal Policy Statement; and
- ▶ New Zealand Biodiversity Strategy.¹⁷

The amended claim also states that the Crown has breached the principles of the Treaty by adopting international instruments either wholly or partially ‘which adversely affect the ability of Ngati Kahungunu to exercise tino rangatiratanga and kaitiakitanga over indigenous flora and fauna within the Ngati Kahungunu rohe’ without either consulting with, or gaining the permission of, Ngati Kahungunu.¹⁸ Some examples of international instruments mentioned in the claim include:

- ▶ International Plant Protection Convention 1951;
- ▶ International Convention for the Protection of New Varieties of Plants 1961;
- ▶ International Covenant on Economic Social and Cultural Rights 1966;
- ▶ International Covenant on Civil and Political Rights 1966;
- ▶ Convention on Wetlands of International Importance 1971 (RAMSAR);
- ▶ World Heritage Convention 1972;
- ▶ Convention on International Trade and Endangered Species 1973 (CITES);

17. *ibid*, pp 3–6

18. *ibid*, p 7

- ▶ International Tropical Timber Agreement 1983;
- ▶ Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1990 (SPREP);
- ▶ Convention on Biological Diversity 1992;
- ▶ General Agreement on Tariffs and Trade – Trade Related Aspects of Intellectual Property 1993 (GATT:TRIPS);
- ▶ Rio Declaration on Environment and Development 1992; and
- ▶ Agenda 21.¹⁹

The claimants also allege that the ‘Crown has failed to implement into domestic legislation and policy aspects of international instruments which are consistent with, or would otherwise give effect to the Crown’s obligations under the Treaty of Waitangi.’ Some instruments mentioned in this regard, include the Convention on Biological Diversity 1992 (particularly section 8(j)); Rio Declaration (particularly principle 22); the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993; ILO Convention concerning Indigenous Peoples in Independent Countries 1989 (Convention 169); and FAO Code of Conduct on Plant Germplasm collecting and transfer.²⁰

In summary, the Wai 262 statements of claim add up to a comprehensive claim, which covers many aspects of Crown legislation, policies and practices relating to flora and fauna, including matauranga Maori in respect of such biota.

1.2 PROJECT SCOPE

As the Wai 262 claim covers a large number of issues, this project has taken a broad approach. Consequently this report provides a general overview of major Crown policies and practices that relate to flora and fauna between 1983 and 1998.²¹ These policies and practices have been divided into the following six themes:

- ▶ international law;
- ▶ resource management;
- ▶ conservation;
- ▶ Crown science and research;
- ▶ new organisms; and
- ▶ policy developments after 1992.

19. *ibid*, pp 7–8

20. *ibid*, pp 8–9

21. The 1983 to 1998 period was chosen in order to cover Crown policy since the election of the Labour Government in 1984. Some recent policy matters, such as New Zealand’s Biodiversity Strategy 2000, are also briefly noted.

These themes are examined at the national level, with each thematic narrative focusing on the central Government level and describing the development of national legislation, policy, and practice. Maori participation in these processes is noted. In some themes, the authors have described the implications of national legislation, policy, or practice at the district or regional level.

Chapter 2 provides an overview of those international declarations and treaties that may impact on the ownership or management of flora and fauna in New Zealand. Types of international law covered include treaties, declarations and strategies relating to the global environment; biotechnology; agricultural plant protection; trade and property rights; and indigenous peoples. The chapter does not include treaties and declarations relating to the marine environment or fishing. Little research was undertaken on the development and implementation of the treaties and declarations in terms of consultation with Maori. Despite these limitations, the chapter identifies those treaties and declarations affecting New Zealand's indigenous species or ecosystems, and that influenced the development of New Zealand's environmental policies and practices.

Chapters 3 and 4 focus on resource management. They discuss the management of New Zealand's indigenous flora and fauna that exists outside formally protected areas or that is not legally protected. The focus of these chapters is, therefore, the management of unprotected flora, fauna and ecosystems outside the conservation estate.²² Chapter 3 gives an overview of resource management and forestry policy in the 1980s, including the development of the Resource Management Act 1991 (RMA) which resulted from a systematic reform of environmental administration in New Zealand. Chapter 4 gives an overview of resource management policy during the 1990s under the RMA and associated legislation. Since the RMA covers activities in the coastal marine area, these chapters will include a discussion of coastal environment regulation. In order to restrict the scope of this project, a full discussion on marine legislation and policy, as well as legislation and policy relating to commercial freshwater species, is not included. These chapters identify key legislation and policies governing resource management and any provisions for the protection of Maori interests and values.

Chapters 5 and 6 identify key conservation legislation and policies that govern protected flora and fauna. They describe any initiatives that

22. The term 'conservation estate' is used in this report to refer to Crown land that is managed for conservation purposes.

provide for Maori customary use of those protected species and Maori participation and involvement in the management of protected areas. Conservation policy addressed in these chapters includes those affecting protected species both within and outside conservation areas, including protected marine species and marine reserves. Chapter 5 is an overview of conservation policy and legislation between 1983 and 1996. It also covers the many acts and regulations governing protected flora and fauna that were established before 1983 that remain in force. Chapter 5 includes an overview of protected species and reserve policy in the early 1980s, the conservation administration restructuring between 1984 and 1987, the Conservation Act 1987, Conservation Law Reform Act 1990, and subsequent conservation legislative reforms since 1990.

Chapter 6 focuses on the implementation of conservation policy and legislation during the 1990s. This theme is divided into four main parts: an overview of the Department of Conservation (DOC); species management policy; conservation area management; and DOC's Maori customary use policy. This chapter describes specific conservation policies and issues such as recovery plans, the use of 1080, kiore management, regulation of whale watching, taonga species in claim settlements, national and forest parks, marine reserves, bioprospecting in protected areas, and Maori customary use provisions in conservation management strategies.

Chapter 7 describes Crown-funded science and research relating to flora and fauna. Science policy is examined in three time periods. The first part describes the Department of Science and Industrial Research (DSIR) and other Crown research agencies that existed in the 1980s. This discussion includes the Nga Mahi Maori O Te Wao Nui a Tane (International Workshop on Ethnobotany). The second part of the chapter examines the reforms of Crown research providers during the early 1990s and the concerns and interests of Maori with regard to those reforms. The third part of the chapter includes a description of current Crown science policy and research involving Maori and flora and fauna.

Chapter 8 provides an overview of Crown legislation and policy governing the development or introduction of new organisms into New Zealand. The term 'new organism' in this chapter includes genetically modified organisms, pests, introduced species, and plant variety rights. The main legislation described in this chapter includes the Biosecurity Act 1993, the Hazardous Substance and New Organisms Act 1996, and the

Plant Variety Rights Act 1987. To illustrate some of the issues relating to new organisms, the chapter includes a discussion on the AgResearch application to develop genetically modified cattle at Hamilton. New varieties of indigenous plants that are protected under the Plant Variety Rights Act are also identified.

Chapter 9, entitled ‘recent developments’, discusses environmental policies and programmes initiated by the Government since 1992. This chapter includes the Environment 2010 Strategy, the State of the Environment Report, the Environmental Indicators Programme, and the New Zealand Biodiversity Strategy. These policies have been selected for inclusion in this report since they have the potential to affect developments relating to all the preceding themes. This reflects a trend in policy to better integrate the different strands of environmental policy to achieve certain Government objectives.

The main findings from this research project are summarised in the final chapter of this report (chapter 10). These conclusions comment on the key issues relating to the relationship of Maori and Crown in relation to flora and fauna in the period that is the subject of this report.

Each chapter was authored as follows:

Chapter 1	Overview	Robert McClean / Trecia Smith
Chapter 2	International Law	Robert McClean
Chapter 3	Resource Management (1)	Robert McClean
Chapter 4	Resource Management (2)	Robert McClean
Chapter 5	Conservation (1)	Robert McClean
Chapter 6	Conservation (2)	Robert McClean
Chapter 7	Crown Science and Research	Trecia Smith
Chapter 8	New Organisms	Trecia Smith
Chapter 9	Recent Developments	Robert McClean
Chapter 10	Conclusions	Robert McClean / Trecia Smith

1.3 METHODOLOGY

This report gives an overview of Crown legislation, policy and practices in relation to flora and fauna. The topic is huge since there is not one easily defined set of Crown fauna and flora laws or policies. Instead Crown fauna and flora legislation and policy is ‘pepper-potted’ among laws and policies relating to resource management, conservation and preservation,

new organisms and hazardous substances, fisheries, pest management, research and patent rights. The immensity of the topic has meant that the authors have not been able to cover all facets of Crown flora and fauna legislation and policy in exhaustive detail. Hence a national perspective has been adopted to broadly establish what the Crown has done between 1983 and 1998 with regard to flora and fauna. The overview approach is also intended to identify any issues or areas that might require further in-depth research. This focus means the authors have generally concentrated on central government legislation and policy rather than local government. In particular, this project has attempted to answer the following research questions for the period 1983 to 1998:

- ▶ What international law has been developed relating to flora and fauna, and how has this influenced or affected domestic policies?
- ▶ What domestic policies, relating to flora and fauna, were developed by central government, and how have Maori participated in the development of these policies?
- ▶ What legislation, relating to flora and fauna, was passed by Parliament, and how did Maori respond to this legislation?
- ▶ How have relevant legislation and policies been implemented and what do Maori see as the implications of this legislation for their interests in flora and fauna?

In order to describe how legislation and policies have been implemented, the authors have included relevant examples of environmental issues at a regional or district level. For example, chapter 4 will describe some objectives and policies contained in regional policy statements and plans developed under the RMA by local authorities. Wherever possible this discussion is restricted to those statements and plans that are related to the Wai 262 claimants' rohe. In addition, this report includes a discussion of a number of conservation and resource management issues as illustrative examples. Issues over DOC's eradication of kiore, for example are discussed in chapter 6. While these examples are drawn from the Wai 262 claimants' rohe, other well-documented examples that are related to areas outside of these regions have also been included. The authors' emphasise that these illustrative examples have not been thoroughly researched and a fuller account would require further research and investigation.

In order to restrict the wide scope of this project, the authors did not examine Crown laws and policies with regard to marine fisheries.²³

²³ Marine fisheries was selected to be dropped from this project since the Wai 262 statement of claim focuses on terrestrial flora and fauna and the Waitangi Tribunal cannot report on commercial fisheries.

Instead the authors have concentrated on terrestrial flora and fauna. However, as noted above, some information on marine flora and fauna laws and policy has been included in relation to coastal marine planning under the RMA, and the management of protected marine species and marine reserves under the Conservation Act.

Another methodological aspect of this project is that research has been concentrated at the central government level, and only a limited amount of primary research has been undertaken. As a result, most information contained in the report is drawn from secondary sources available from the National Library of New Zealand; Department of Conservation (Head Office); the Ministry for the Environment; the Ministry of Research, Science and Technology; and the Waitangi Tribunal. Of the primary research that was carried out, this research focused on Government files held at National Archives, Wellington, and at DOC national office, the MFE library, and the Department of Internal Affairs.

Many of the people involved in the legal and policy processes discussed in this report are still living and remain involved in issues relating to flora and fauna. It is with regret that time did not allow the authors to conduct in-depth interviews with these people as their knowledge of the events could have considerably enhanced this report. Limited contact was made with Government officials to obtain information on recent developments or clarify some aspect of a policy. Without information gained from persons who were directly involved in various legal and policy processes, the perspectives and views contained in this report are limited by relying on information obtained from Government files and published reports. Hence Maori views have only been included in this report when those views have been recorded and retained in Government files. Generally, these Maori views are related to the development of a policy or law, and are recorded by the medium of a memo, file note, letter, submission, or transcript from a consultative hui. This means that they have often been interpreted by Government officials, and they are also those expressions of opinion and belief which are likeliest, therefore, to have influenced policy.

Ton Buhrs and Robert Barlett suggest that any comprehensive research into environmental policy requires a meta-policy analysis approach. Meta-policy analysis is an 'analysis of how policy processes work and outcomes are produced, sometimes indirectly, within a large institutional framework that is *created in part by policies* and within which policies

are made and remade.²⁴ Such an analysis of the institutional framework would require a detailed examination of the values, policy knowledge systems, and world-views of those key groups that have driven environmental policy since 1983. In view of the constraints detailed above, this report does not have the capacity to undertake a meta-policy analysis of the policy making process for each theme. Thus, the authors' analysis will be limited to a purely policy process approach. This approach is limited to describing the content of each policy or law and the process of how that policy or law was developed. Within this approach, the authors' note the type of Maori consultation or participation in the development of the law or policy, the main outcomes of the law or policy, and the subsequent views of Maori where those were noted or recorded by policy-makers (sometimes Maori themselves).

Finally, the conclusions drawn and opinions expressed in this report are those of the authors. Robert McClean is responsible for those views contained in chapters 2, 3, 4, 5, 6, and 9, and Trecia Smith is responsible for the views contained in chapters 7 and 8. Both authors take responsibility for the views expressed in the overview and conclusion chapters.

1.4 SOCIAL AND POLITICAL CONTEXT

The development and implementation of legislation, policy, and practice do not occur in a vacuum, but are situated and affected by the social and political context in which they occur. This section gives a brief background on the social and political contexts associated with flora and fauna between 1983 and 1998, in particular this section discusses issues relating to the naming of flora and fauna, political and economic change, changes in Maori policy and the State, and policy making processes.

1.4.1 What's in a name?

Flora and fauna are the two great kingdoms at the top of the Linnaean taxonomic hierarchy that pervades all Western inquiry and practice in relation to natural phenomena. Flora is the original name of a Greek goddess of flowers, and has come to mean all plants. Fauna was another Greek god relating to the countryside. In modern lexicons fauna means animals.²⁵ Carolus Linnaeus developed the basic rules of taxonomy

24. Ton Buhrs and Robert Barlett, *Environmental Policy in New Zealand, The Politics of Clean and Green?* Auckland, Oxford University Press, 1993, p 34 (emphasis in original)

25. R E Allen (ed), *The Concise Oxford Dictionary of Current English*, Oxford, Clarendon Press, 1990, p 427, p 451

in 1758. These rules were adopted by scientists internationally by the International Botanical Congress in 1867 and the Fifth International Botanical Congress in 1930. The rules, called the international code, means the only international 'legal' name for plants and animals is its scientific or Latin name. This name designates a particular kind of organism and is recognised by biologists throughout the world. Any species, once 'discovered' is placed within the taxonomic classification system. This system involves a number of hierarchical layers that include kingdom, class, order, family, genus, and species.²⁶ It is noted that there is on-going debate among scientists about the usefulness of the international code regarding 'what species are and what criteria should be used in distinguishing them.'²⁷

An important trend in science is to study species as part of ecosystems and habitat, thus placing species within an ecological context. This trend has been expressed in the concept of biodiversity. As will be illustrated in this report, biodiversity has become an important concept adopted in international law and domestic laws and policies in order to describe the variety of habitats and species together as a unified ecological system. In other words, biodiversity is the variety of life living on the planet.²⁸

Wendy Pond, an ecological historian, has conducted research into how nature is understood and 'known' by Pacific peoples. In research on insects in Samoa, Pond has found that Pacific peoples have used a non-hierarchical system of classifying species. Instead of hierarchy, Pacific taxonomy tends to emphasize patterns and interconnections in the biota. In relation to Northland, Ponds comments that the 'Tai Tokerau people remarked that they were not accustomed to think of insects as a separate subject.'²⁹ Thus, Pond illustrates that the scientific international code is not the only way of knowing the natural environment, and indigenous peoples have their own discipline of science and understandings of flora and fauna. The nature of matoranga Maori or Maori knowledge systems in respect to flora and fauna is discussed in chapter 7 of this report in the context of Crown science laws and policy.

Indigenous (or native) generally means something that occurs naturally in a region or place.³⁰ In the context of biology, the indigenous label is given to any flora and fauna that arrived to a place without human intervention. Hence a species may be indigenous to New Zealand but could also be found in Australia or another country. Endemic is a term used to describe a species that is found only in one location. Therefore an

26. Robert Leo Smith, *Ecology and Field Biology*, New York and London, Harper and Row, 1976, p 478

27. Ian Atkinson, 'Biodiversity: What is it, and why is it important', in B McFadgen and P Simpson (eds), *Biodiversity: Papers from a Seminar Series on Biodiversity, hosted by Science and Research Division*, Wellington, DOC, 1996, p 11

28. *ibid*, p 8

29. Wendy Pond, 'Parameters of Oceanic Science' in John Morrison (et al), *Sciences of Pacific Island Peoples, Fauna, Flora, Food and Medicine*, Institute of Pacific Studies, 1994, p 115

30. R E Allen (ed), *The Concise Oxford Dictionary of Current English*, Oxford, Clarendon Press, 1990, p 602

endemic New Zealand species is indigenous and found only in New Zealand.³¹ Those species introduced into a place or an area by humans are termed exotic or ‘introduced’. These classifications are used to define plants and animals living in New Zealand and come from a specific cultural background and context.

New Zealand, including its offshore islands and seas, contains a mixture of introduced and indigenous species, a large number of which are endemic. However, these definitions have not been without contention. In the early days of the Department of Conservation, Philip Simpson, a DOC ecologist, attempted to define native forest. In this attempt, Simpson found the boundaries between native and introduced forest were difficult to define. For example Simpson states that:

Many species which are indigenous to New Zealand as a whole are not ‘natural’ in certain regions. Pohutukawa for instance, is widespread in coastal North Island but is indigenous only north of about 39°S. Both Maori and Pakeha have moved plants around and they have become ‘naturalised.’ Obviously such plants should be considered ‘native forest’ because they are now operating independently of human influence.³²

Simpson also entered the debate about trees and plants introduced to New Zealand by Maori, such as the karaka.³³ Simpson thought these species were not strictly speaking indigenous. Simpson concludes by saying that ‘our perception of “native” and “exotic” will change so that the matter is inherently subjective from a conservation point of view.’³⁴ Simpson’s memo on the problems associated with defining native forests was circulated to all DOC regional managers.

Problems with the concept of indigenous meant that the term was not included in key conservation legislation. For example, during the drafting of the Conservation Act 1987 officials and politicians could not agree on what actually indigenous species and landscapes were. One DOC memo states that:

There were some protracted debates on what indigenous was and how it would apply to the various elements of New Zealand. Many scientific minds gave definitions, some in response to invitations by the Select Committee, but interestingly nearly everyone’s definitions were different. Some people meant endemic, but this would have excluded self-introduced ‘natives’. Another tack was to exclude species

31. Philip Simpson, ‘The Consequences of Human Settlement’ in B McFadgen and P Simpson (eds), *Biodiversity: Papers from a Seminar Series on Biodiversity, hosted by Science and Research Division*, Wellington, DOC, 1996, p 63

32. Philip Simpson to Mark Neeson, ‘Definition of Native Forest’, 10 October 1988, PALR, box 1781, DOC Wellington, p 11

33. Gerard Hutching says that while Maori may have carried karaka seeds to New Zealand, the tree is also native to New Zealand and the Chatham Islands. Karaka was also one of the few trees deliberately cultivated by Maori and groves of karaka trees indicate the existence of early Maori settlement. Gerard Hutching, *The Natural World of New Zealand*, Auckland, Penguin Books Ltd, 1998, p 173

34. Philip Simpson to Mark Neeson, ‘Definition of Native Forest’, 10 October 1988, PALR, box 1781, DOC Wellington, p 12

introduced through human agency, but this would exclude species which have self-established purely because of the human modified landscape in New Zealand.³⁵

As a result of this debate, DOC was given responsibility for all natural and historic resources on the conservation estate. Natural and historic resources means ‘plants and animals of all kinds.’³⁶

A key theme in this report is the ongoing debate over what exactly is ‘indigenous’ flora and fauna. For example chapter 5 discusses DOC’s culling of kaimanawa wild horses in order to preserve threatened indigenous flora. Ngati Tama Whiti and other groups opposed the planned horse cull saying that the wild horses had a right to roam free and were part of the ‘natural’ Waiouru environment. Chapter 6 includes a discussion on DOC’s eradication programmes of kiore on offshore islands and attempts by Maori to overturn the kiore’s status as an introduced pest. Chapter 8 comments on the proposal to insert human myelin protein genetic material into cattle DNA, and the view of Ngati Wairere who perceive cattle as a valued species. The Wai 262 statement of claim also places kumara within the term ‘indigenous.’ Other debates exist in relation to concepts such as ‘natural resources’, ‘environment’, ‘sustainable use’, and ‘sustainable development.’ For example, chapter 3 notes, that when the Environment Bill was being drafted, a request was made to include the concept of a ‘Maori environment’ in the Bill’s definition of ‘environment.’

1.4.2 Identifying social, political, and economic change

As stated earlier, legislation and policy are to a large extent shaped by the social, political, and economic contexts in which they exist. From the early 1980s, the role of the State and its agencies in New Zealand has changed dramatically as a consequence of shifts in ideology that led the reform of administrative regimes and the public sector more generally. Fundamental changes in society, the economy and the role of Government have occurred as a result.

Steve Britton, Richard Le Heron, and Eric Pawson have described the New Zealand situation in the early 1980s in terms of the restructuring process.³⁷ Britton argues that New Zealand’s restructuring experience was the outcome of changes in global capitalism. This means that:

35. Director of Land and Fauna, ‘indigenous’ 6 December 1988, ACT0058, vol 3, DOC Wellington

36. s 2, Conservation Act 1987

37. Steve Britton, Richard Le Heron, Eric Pawson, *Changing Places in New Zealand, A Geography of Restructuring*, Christchurch, New Zealand Geographical Society, p 2

Restructuring must be situated in its global historical context; that restructuring is the outcome of actions made by key economic agents and institutions (companies, workers and the state) in response to global, national and local pressures; and that restructuring signifies both the dismantling and reassembling of activities at several spatial scales.³⁸

As part of creating a new nexus between regulation and accumulation, the New Zealand Government shifted from directive and supportive forms of regulation to facilitative regulation.³⁹ This meant the Government withdrew from playing a ‘hands-on’ role in the New Zealand economy. In terms of economic policy, this change in Government regulation resulted in eight key changes:

- ▶ reduced tariffs on imported goods;
- ▶ floating the exchange rate;
- ▶ removal of producer subsidies;
- ▶ delicensing of industries;
- ▶ deregulation of monopolies and protected activities;
- ▶ financial deregulation;
- ▶ taxation reform; and
- ▶ labour market reform.⁴⁰

In 1984, New Zealand’s public service consisted of 34 departments. Jonathan Boston, a lecturer in public policy, notes that in this period the Government was characterised by a ‘heavy reliance on ministerial departments for the conduct of the business of government’ and most departments undertook ‘a range of advisory, delivery, and regulatory functions.’ These functions included both commercial and non-commercial responsibilities.⁴¹ Changes in Government regulation meant the reshaping of the Government itself. As Britton sees it, this reshaping of Government involved:

- ▶ the separation of policy formulation and service delivery;
- ▶ development of new models of management and accountability in the public service;
- ▶ commercialisation of functions within government departments;
- ▶ corporatisation of State trading functions;
- ▶ privatisation of selected corporatised activities; and
- ▶ the reform of local and regional government.⁴²

These objectives were implemented by the introduction of key legislative reforms, including the State-Owned Enterprises Act 1986,

38. *ibid*, p 10

39. *ibid*, p 8

40. *ibid*, p 12

41. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, p 6

42. Steve Britton, Richard Le Heron, Eric Pawson, *Changing Places in New Zealand, A Geography of Restructuring*, Christchurch, New Zealand Geographical Society, p 12

the State Sector Act 1988, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994. These laws have been called the ‘central legislative building blocks’ of the new public service.⁴³ The general objective of the new public service under these laws was to improve the efficiency and effectiveness of Government by improving lines of accountability, reducing Government expenditure, encourage transparency in decision-making, and improving the quality of Government goods and services.⁴⁴ The outcome of this reform was a ‘radical refashioning of the departmental landscape’, as noted by Boston:

In the eleven years to July 1995, twenty-six new departments (mainly small, sector-based policy ministries) were created, twenty-three departments were abolished, corporatised or privatised, and most of the remainder were extensively reorganised . . . As a result, the number of departments increased to thirty-four in July 1995.⁴⁵

While the number of Government departments increased, these departments are mainly small, policy-orientated agencies.

Public service restructuring resulted in the demise of large development-orientated Government departments. In particular, the focus on the separation of policy formulation and service delivery created new Government environmental agencies and departments. For example, the Department of Lands and Survey was restructured into four agencies: Land Corporation (a ‘State Owned Enterprise’ or SOE), Department of Survey and Land Information (which later become Land Information New Zealand), Department of Lands (dissolved in 1990), and the Department of Conservation. Meanwhile the New Zealand Forest Service was disbanded and its previous roles taken up by the Ministry of Forestry (now part of Ministry of Agriculture and Forestry), Forestry Corporation (SOE) and the Department of Conservation. Some aspects of this restructuring are described in chapter 5 of this report. In 1984 the Government agencies in the first table on the next page were responsible for environmental-related legislation and policy.

By 1994 all of these departments or agencies had been restructured and transformed into smaller ministries or State-owned enterprises. In 1996, the Government agencies in the second table over were responsible for environmental-related legislation and policy.

These new agencies were established by Cabinet direction or environmental legislation such as the Environment Act 1986,

43. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, p 6

44. *ibid*, p 4

45. *ibid*, p 78

Government environment-related agencies, 1984

<i>Agency</i>	<i>Environmental role</i>
Department of Lands and Survey	Survey, Crown lands, national parks and reserves
Ministry of Works and Development	Public works
nZ Forest Service	Crown forests: production and non-production
Ministry of Energy	Energy production
Ministry of Transport	Transport, harbours and shipping
Commission for the Environment	Environmental policy
Wildlife Service (Dept of Internal Affairs)	Wildlife management
Ministry of Agriculture and Fisheries	Agriculture and fisheries
Health Department	Environmental health
Department of Maori Affairs	Maori interests in land and resources
DSIR	Environmental research

Government environment-related agencies, 1996

<i>Agency</i>	<i>Environmental role</i>
Ministry for the Environment	Environmental policy
Commissioner for the Environment	Independent environmental policy and advice
Department of Conservation	Conservation policy and administration of protected Crown land and wildlife
Ministry of Fisheries	Commercial fisheries management
Ministry of Agriculture and Forestry	Agriculture and forestry
Ministry of Health	Environmental health
Te Puni Kokiri	Maori policy
Ministry of Research, Science and Technology	Crown research policy
Transport Safety Authority	Transport and shipping safety
Land Information NZ	Land and survey policy

Conservation Act 1987, Resource Management Act 1991 (RMA), and the Hazardous Substances and New Organisms Act 1996. Thus a particular mix of public service restructuring objectives and environmental objectives generated the new environmental laws and Government agencies. For example, Kerry Grundy, a commentator on resource management issues, believes that neo-classical ideology, specifically that the market should be left to decide social and spatial outcomes, drove the development of the RMA.⁴⁶ However, from Grundy's perspective the purpose of sustainable management in the RMA, as derived from sustainable development, meant more rather than less Government intervention was required in the economy. This position led to a public debate between Grundy and the Minister for the Environment in 1994 over the meaning of sustainable management and the definition of environment in the RMA.⁴⁷

The concepts of sustainable development, sustainable management and sustainable use arise throughout this report in relation to both international treaties and declarations and domestic legislation and policy. As noted above, influenced by both global and domestic factors, the Government has changed regulatory approaches. In the past the Government's direct approach meant the State took an active role in planning for all activities in order to achieve their objectives. Now the facilitative approach means that the economy is the primary allocative mechanism for resource use. Government intervention is justified on the basis of providing any public goods, managing any externalities, or dealing with environmental costs not captured by the market. Thus a key purpose of the Government is to generally promote sustainable economic activity.

1.4.3 Maori policy and the State during restructuring

An important theme within this report is the participation of Maori in the development of environmental policy within the State. A key 'inside' player in relation to this participation is the central Government's advisor on Maori policy. Between 1983 and 1998 this role was performed by the Department of Maori Affairs, Manatu Maori, and Te Puni Kokiri. This report illustrates that these agencies played an important role in the development of environmental policy and environmental administration restructuring.

46. Kerry James Grundy, 'Re-examining the Role of Statutory Planning in New Zealand', *Urban Policy and Research*, vol 13, no 4, 1995, p 237

47. Kerry James Grundy, 'Section 5 – In Search of Logic', *Planning Quarterly*, December 1994, p 22

In 1984, Maori policy within Government was managed by the Department of Maori Affairs. The department was a large agency and was responsible for a range of functions, including housing, land development, and policy advice to Government. Thus the department's functions involved both policy advice and service delivery. In the early days of the fourth Labour Government, the Department of Maori Affairs facilitated two national hui – one at Turangawaewae Marae in September 1984 and the National Treaty of Waitangi Hui held at Waitangi in February 1985. Both hui called for greater recognition by Government of the Treaty of Waitangi and that 'all proposed legislation be consistent with the Treaty of Waitangi.'⁴⁸ As a response to this request, in April 1986 Cabinet directed all departments to 'give recognition to the Treaty of Waitangi as if it were part of domestic law of New Zealand in all aspects of administration and in preparation of legislation.'⁴⁹ In addition, Cabinet decided on 23 June 1986 to recognise the implications of the Treaty of Waitangi in all proposed legislation.⁵⁰ This meant that:

- i. all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;
- ii. that departments should consult with appropriate Maori people in all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary; and
- iii. that the financial and resource implications of recognising the Treaty could be considerable and should be assessed whenever possible in future reports.⁵¹

The result of this decision was that references to the principles of the Treaty of Waitangi were included in legislation related to the reorganisation of environmental administration and environmental law reform in 1986 and 1987. Chapters 3 and 5 of this report describe how the Treaty of Waitangi clause was inserted into the Environment Act 1986 and the Conservation Act 1987. The implications of these and other Treaty of Waitangi clauses in legislation became apparent in the Court of Appeal's 1987 decision in *The New Zealand Maori Council v Attorney-General*. This case involved an application by the New Zealand Maori Council for a judicial review of the proposal to transfer land on behalf of the Crown to

48. David Williams, 'The Constitutional Status of the Treaty of Waitangi: An Historical Perspective', *New Zealand Universities Law Review*, vol 14, June 1990, p 13

49. Treasury circular, Treaty of Waitangi: Implications of Recognition, 16 April 1986, AAUM W4044, box 30, NA Wellington

50. For background information on this Cabinet decision, see Geoffrey Palmer, *New Zealand's Constitution in Crisis, Reforming our Political System*, Dunedin, John McIndoe Ltd, 1992, p 82

51. David Williams, 'The Constitutional Status of the Treaty of Waitangi: An Historical Perspective', *New Zealand Universities Law Review*, vol 14, June 1990, p 31

State-owned enterprises under the State-Owned Enterprises Act 1986. Section 9 of this Act held that ‘nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.’⁵² The five Appeal Court judges found in favour of the New Zealand Maori Council and declared that the principles of the Treaty of Waitangi overrode ‘everything else in the State-Owned Enterprises Act’ and that ‘those principles require Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.’⁵³ Under the State-Owned Enterprises Act, this ruling meant the Crown could not transfer any State assets without first establishing a system to ensure such transfers were consistent with the principles of the Treaty of Waitangi.⁵⁴

In 1988 the Government embarked on a programme of restructuring Maori policy and services within the State sector. This programme was managed by an Officials Committee on Maori Development was established. This committee prepared two key policy documents: *He Tirohanga Rangapu: Partnership Perspectives* and *Te Urupare Rangapu: Partnership Response*.⁵⁵ As a result of these documents and consultation with Maori, the Government decided to separate the functions of Maori policy advice and service delivery. It was envisaged that service delivery functions would be devolved to iwi authorities. This meant the establishment of the Ministry of Maori Affairs (Manatu Maori) to advise the Government on Maori matters, and the creation of the Iwi Transition Agency. This agency would facilitate transferring to iwi authorities the function of delivering certain Government services. On the completion of this task, the Iwi Transition Agency was to be disbanded. Cabinet established Manatu Maori on 1 July 1989 and the Iwi Transition Agency was established under the Maori Affairs Restructuring Act in October 1989.⁵⁶ In 1989, the Government also released its statement on the *Principles for Crown Action on the Treaty of Waitangi*.⁵⁷ These principles included:

- ▶ Government or kawanatanga: the Government has the right to govern and make laws;
- ▶ self-management or rangatiratanga: iwi have the right to organise as iwi, and under the law to control their resources as their own;
- ▶ equality: all New Zealanders are equal before the law;
- ▶ reasonable cooperation: both the Government and the iwi are obliged to accord each other reasonable cooperation on major issues of common concern; and

52. *The New Zealand Maori Council v Attorney-General* unreported, 29 June 1987, CA54/87

53. *The New Zealand Maori Council v Attorney-General* NZAR, vol 6, 1987, p 373

54. *ibid*, p 372

55. State Services Commission *He Tirohanga Rangapu: Partnership Perspectives*, Wellington, ssc, 1989; State Services Commission, *Te Urupare Rangapu: Partnership Response*, Wellington, ssc, 1989

56. Tom O’Reilly and David Wood, ‘Biculturalism and the Public Sector’ in Jonathan Boston (et al), *Reshaping the State, New Zealand’s Bureaucratic Revolution*, Auckland, Oxford University Press, p 325

57. Department of Justice, *Principles for Crown Action on the Treaty of Waitangi*, Wellington, Department of Justice, 1989

- ▶ redress: the Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.⁵⁸

In a commentary on the principle of self management or rangatiratanga, contained in the document, the Government stated that the:

Second Article of the Treaty guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain. The preservation of a resource base, restoration of iwi self-management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.⁵⁹

The document stated that while the balance between the principles of kawanatanga and rangatiratanga needed to be worked out on a case by case basis, te tino rangatiratanga, or full chieftainship 'will generally take precedence in matters concerning material or cultural resources and taonga which have been retained.'⁶⁰ A key question throughout this report is what flora and fauna resources have Maori retained te tino rangatiratanga over? To assist in answering this question, chapters 3, 4 and 6 include a discussion of the concept of rangatiratanga as described by the Waitangi Tribunal in reports relating to flora and fauna. For example chapter 3 notes the findings of the Waitangi Tribunal with regard to rangatiratanga in the Manukau and Muriwhenua fisheries reports, and chapter 4 gives an overview of the findings of the Tribunal's Ika Whenua and Whanganui River reports.

In order to devolve services to iwi, the Government introduced the Runanga Iwi Bill in December 1989. Despite opposition from some Maori, this Act was passed in late August 1990. The Runanga Iwi Act aimed to provide for the establishment of iwi authorities to deliver services to their constituents. The essential characteristics of an iwi as defined in the Act included:

- ▶ whakapapa descent from tupuna;
- ▶ existence of hapu;
- ▶ marae;
- ▶ a tribal takiwa or territory; and
- ▶ having traditional acknowledgment by other iwi.

58. *ibid*, p 2

59. *ibid*, p 5

60. *ibid*

The Runanga Iwi Act was short lived and was repealed by the National Government shortly after it came to power in January 1991. The new Minister of Maori Affairs, Winston Peters established a Maori Ministerial Planning Group to review the 'policy options and objectives in the area of Maori affairs and to make recommendations on strategies for improving the position of Maori in New Zealand society.'⁶¹ This planning group published its *Ka Awatea* report in March 1991.⁶² As a result of this report, Manatu Maori was disbanded and a new Ministry of Maori Development also known as Te Puni Kokiri, was created. This meant a change to the previous Government's plans to devolve certain responsibilities to iwi, and re-focus on mainstreaming the delivery of services to Maori and policy advice in respect of such matters.

1.4.4 Identifying policy making processes

Changes in the role of the State, economy and society have also changed the nature of Government management, policy development and planning. One of the most common methods of public policy development in the past was the rational comprehensive model. This model involves several sequential steps:

- ▶ identify the problem;
- ▶ determine goals and objectives;
- ▶ review alternative strategies;
- ▶ estimate potential impacts; and
- ▶ select the preferred plan.⁶³

The rational comprehensive model assumes that the decision maker, using this 'scientific' method, can select the optimum solution. The model is comprehensive in that a full range of solutions are assessed. Changes in society have meant a shift away from rational comprehensive or formalist forms of policy development to legal pluralism. Two key assumptions of legal pluralism are that 'power should be decentralised or delegated, as this enables better bargaining between interest groups', and 'that interests, not just individuals, should be represented in decision making processes.'⁶⁴ David Robinson, a planning theorist, notes that legal pluralist forms of government are characterised by the following principles:

- ▶ good government needs parliament, judges and bureaucrats checking and balancing each other;

61. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, p 153

62. Minister of Maori Affairs, *Ka Awatea, A Report of the Ministerial Planning Group*, Wellington, 1991

63. Graham Smith, *Impact Assessment and Sustainable Resource Management*, London, Longman, 1993, p 57

64. David Robinson, 'Public Participation in Environmental Decision-Making', *Environmental Planning Law Journal*, vol 10, 1993, p 321

- ▶ majority democracy is regarded as insufficient – participation in decision-making by a plurality of interest groups is desirable;
- ▶ administrative justice necessarily involves procedural fairness, but also questions of merit and substance. Administrative justice involves ‘green light’ considerations as well as judicial review;
- ▶ positivism inadequately accommodates the participation of ‘subjects’ in decision-making;
- ▶ additional avenues of accountability to that of ministerial responsibility are advocated;
- ▶ the expertise model of decision-making is regarded as needing legitimisation through public involvement.⁶⁵

Legal pluralist forms of Government thus promote public participation in the formulation, passage and implementation of public policies. Participation in policy processes may mean a variety of actions: notification, submissions, public meetings, advisory committees, seminars, workshops, and surveys. This type of policy development has been termed interactive planning.⁶⁶ Interactive planning generally means there is opportunity for information feedback, consultation, and negotiation, and interaction with stakeholders occurs early on in the process. Examples of interactive planning are the planning processes used by regional councils in the development of regional policy statements and plans described in chapter 4.

Critical social theory views interactive planning as part of the political power structure of government. Richard Mulgan, a Professor of Political Studies, uses the term policy communities to describe various social groupings connected to the policy process. ‘Insider’ groups share common values and maintain personal contact with decision makers on a largely informal basis. These ‘insider groups, who are treated as part of the political system, can expect to be consulted and listened to as a matter of course.’⁶⁷ Some formal consultation arrangements are usually offered to ‘outside’ groups in an attempt to co-opt the group into the policy community. Outside groups, however, usually have a different set of values and organisational systems than ‘insider’ groups. This situation means that offers of formal consultation require outside groups to reorganise themselves to conform more to the wishes of the inside group. As Martin Painter, a planning theorist, says ‘part of the ideology of consultation is the view that spokes-people should be genuinely representative and that

65. *ibid*

66. R Lang, *Integrated Approaches to Resource Planning and Management*, The Banff Centre for Continuing Education, 1986, p 10

67. Richard Mulgan, *Politics in New Zealand*, Auckland, Auckland University Press, 1995, p 206

they should be prepared to negotiate reasonably.⁶⁸ Painter suggests that often outsider groups, in being co-opted into the policy community, lose their 'grass roots' support because of organisational requirements of accountability and representivity. Painter concludes that outsider groups 'have to make a calculation about whether they can win under the rules of that particular game or whether they should be playing the game altogether.'⁶⁹ Not 'playing the consultation game' means the outside groups need to use strategies such as confrontation and protest to change the values of the policy community.

New Zealand's policy process is founded on the constitutional conventions of the Government. One of the principles of these conventions is the need for consultation and participation. The State Service Commission states that:

The legitimacy of the decision making process and its outcomes depends ultimately on the extent to which it is based on the informed consent or at least consultation with those immediately affected by the decisions. In a democracy legitimacy refers mainly to the respect or proper regard that might attach to the process or the outcomes . . . Consultation requires decision makers to ascertain the concerns of interested parties, and consider and weigh up those concerns before making a final decision.⁷⁰

The Crown creates policy and laws by a system involving the Executive and Cabinet committees, the Legislature, the public service, and the judiciary. Generally a new policy may be generated from issues arising from an existing policy or could be generated from a range of international or domestic developments. Chapter 2 of this report describes the increasing role of international environmental law and its influence on New Zealand's domestic policy and legislation. After Cabinet has decided to introduce a new policy (or review an existing one), a Cabinet committee then develops the policy. The purpose of Cabinet committees is to 'ensure that matters going to Cabinet have been fully considered beforehand and to permit a wide range of input for issues whose implications run across a range of Cabinet portfolios.'⁷¹ One of the most important Cabinet committees is the Cabinet Policy Committee. This committee considers all major policy and strategic issues, including budget issues, the Treaty of Waitangi and other issues referred by the Prime Minister, Cabinet or other committees. During the term of the

68. Martin Painter, 'Participation and Power', in Margaret Munro-Clark, *Citizen Participation in Government*, New York, Hale and Iremonger Ltd, 1992, p 29

69. *ibid*, p 33

70. State Services Commission, *The Constitutional Setting*, a paper in the Guidance Series 'Public Service Principles, Conventions and Practice', Wellington, SSC, September 1995, p 7

71. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, p 46

1990-1999 National Government, the equivalent committee was the Cabinet Strategy Committee.⁷² Cabinet committees are sometimes serviced by officials' committees. The role of the officials' committee is to 'coordinate officials' advice and to ensure that officials look beyond the concerns of their own departments.'⁷³ Boston notes the importance of the officials' committee:

Officials' committees encourage compromises and pragmatic recommendations to ministers. The other side of this is that options considered and rejected by officials' committees may not get presented to Ministers. Thus, they may play a powerful and important gatekeeper role.⁷⁴

During the policy development phase, the Cabinet committee, officials' committee, the Minister, or the Government agency generally makes some provision for public consultation and participation. This report illustrates various types of this participation in relation to environmental policy. For example, chapter 9 illustrates the degree of Maori participation in the New Zealand Biodiversity Strategy before the final strategy was approved by Cabinet. Usually, this phase of policy development involves some type of discussion paper, opportunity for submissions, hui or public meetings, and publication of a draft paper. In some instances, Maori advisory groups have been established to enable further input into the policy.

After a period of policy development and consultation, the policy is then presented to the relevant Cabinet committee and Cabinet for approval. In some cases, policies are not approved despite years of preparation. For example, chapter 5 describes the protected areas legislation review. This review began in April 1988 and involved a series of consultation hui in collaboration with the resource management law reform. As a consequence of this review, a new Protected Areas Bill was prepared but this Bill was not progressed by the incoming National Government in 1990.

All major policy decisions by Government can be challenged by a judicial review under the Judicature Act 1908. This Act allows the High Court to review any decision 'affecting others made by a statutory officer or a chief executive of a Public Service department.'⁷⁵ Chapter 4 will illustrate the importance of the judicial review provision in relation to non-notification resource consent procedures under the RMA. Another example of a judicial review will be examined in chapter 6 with regard

72. Under the fourth Labour Government, this committee was also called the Cabinet Policy Committee or abbreviated to POL.

73. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, p 46

74. *ibid*

75. State Services Commission, *The Constitutional Setting*, a paper in the Guidance Series 'Public Service Principles, Conventions and Practice', Wellington, SSC, September 1995, p 7

to Ngai Tahu's interests in whale watching, and the review of the Minister of Conservation's decision to grant a new whale watching permit in 1993.

If approved policies require legislative implementation, an officials committee or Government agency prepares a Bill and the Cabinet Legislation Committee coordinates the new legislation. After being approved by the Cabinet Legislation Committee and then Cabinet, the new Bill is introduced to Parliament. Each Bill that becomes law, receives three readings in Parliament. After the first reading of the Bill, the proposed legislation is then referred to a select committee. The role of a select committee is to examine all bills and make improvements in the proposed legislation by providing a forum for public participation.⁷⁶ After hearing public submissions, the select committee makes a recommendation to Parliament on any changes to the Bill.

If Parliament passes the Bill and the Governor-General gives his or her assent to the new legislation, the Bill becomes an Act and becomes law. Sometimes laws initiate the development of a new round of policy processes. For example, chapter 4 will examine the development of policy statements and plans that are required under the RMA. These policy statements and plans are prepared at both the central government and local government level and include provisions for Maori participation and consultation.

In summary, New Zealand's method of policy making involves three main types: policies developed and approved by Cabinet; policies implemented by legislation; and policies developed as a result of legislative requirements. All of these policy processes involve some form of public consultation or participation. 'Playing the consultation game' for Maori is a key theme in this report. Each chapter includes commentary on a huge number of draft discussion documents, stakeholder groups, draft policy documents, submissions, hearings, hui, and appeals. Geoffrey Palmer, in reflecting on Maori policy development during the fourth Labour Government, indicates the importance of consulting Maori:

We [politicians] do learn from experience. Consultation can solve many problems when it comes to dealing with Maori issues. Extensive consultation at the beginning of the process of selling the Crown forest assets yielded up a smoother process than was encountered in other areas.⁷⁷

76. Jonathan Boston, John Martin, June Pallot, Pat Walsh, *Public Management: The New Zealand Model*, Auckland, Oxford University Press, 1996, pp 50–51

77. Geoffrey Palmer, *New Zealand's Constitution in Crisis, Reforming our Political System*, Dunedin, John McIndoe Ltd, 1992, pp 97–98

This report will illustrate that some Maori have become frustrated with New Zealand's policy-making processes. Many Maori perceive that there is inadequate consultation or that although Government officials note their concerns, Maori views do not influence policy outcomes. Other Maori speak of consultation 'overload' and the massive number of policy statements and plans that are circulated to Maori for feedback. There are instances where Maori have taken the confrontational or protest route in order to voice their concerns over the management of a resource. For example, chapter 6 notes protests against DOC's management of the national parks at Urewera and Whanganui. It seems that the Crown's strategy of consulting with Maori is becoming more difficult as Maori aspire not only to have input into the policy process, but seek to manage their resources in accordance with their own values and practices.