

## 10. CONCLUSIONS

The Wai 262 claim involves issues relating to the ownership, control, management and use of New Zealand's indigenous flora and fauna. This report looks at Crown policy, legislation and practices in relation to flora and fauna between 1983 and 1998. Seven themes are covered in this report: social and political context; international environmental law; resource management; conservation; Crown science and research; new organisms; and environmental policy developments after 1992. In this concluding chapter, key issues arising within each of these themes are summarised and a number of conclusions are drawn.

### 10.1 THEMATIC SUMMARY

#### 10.1.1 Social and political context

Policies and laws are generated within complex social and political contexts. Hence, a thorough analysis of Crown policies, practices and legislation requires an investigation into the dominating and conflicting values and social movements that are operating in society at the time of their conception and/or alteration. Time and resource constraints have precluded an analysis of such values and beliefs. Instead, this report focuses on the process of policy formation. This approach included a description and content of each policy and law, the process of how the policy or law was developed including how Maori participated (or not) in the development of the policy or law, and the process of how the policy or law was implemented.

Chapter 1 briefly outlines some of the social and political factors that were influential between 1983 and 1998 in relation to issues surrounding the classification and 'naming' of species, economic and political reforms, the relationship between Maori policy and the State, and policy making processes. This chapter suggests that a key 'driver' of environmental legislation, policy, and practice during this period was the Government's new public service imperatives, which aimed to achieve greater public service efficiency, accountability, transparency, and reduce Government spending. By the mid 1990s, the public service had been restructured

so that economic and social activities were facilitated or managed rather than 'planned' for. In relation to the environment, the new public management ethic was that the Government's role should be limited to managing any externalities or costs generated by the economic and social system, and providing any public goods that were not adequately provided for by the private sector.

The growth of a management rationale for environmental policy has been accompanied by an increasing recognition of Maori interests in that policy. But, this trend has been characterised by a struggle between the Crown and Maori regarding whom has the authority to own and manage certain resources. The resources relevant to this report include land, forests, wetlands, lakes, rivers, coastline, and the sea. The Crown asserts, on the basis of *kawanatanga* conferred by article 1 of the Treaty of Waitangi, that it has the authority to own and manage these resources in the interests of conservation and sustainable use. Maori assert that their *tino rangatiratanga*, guaranteed by article 2, affords them ownership and management rights over these same resources. Tensions and conflicts often surround these different interpretations and positions relating to *kawanatanga* and *rangatiratanga*. These are played out within the policy and legislation making process.

New Zealand's legal pluralist form of government generally values policy and legislation making processes that include methods that allow for informed consent, consultation, and public participation. This means that most of policy and law development discussed in this report has included opportunities for public submissions to be made. Sometimes policy making procedure has also provided for Maori participation. This has usually been through the use of consultation hui or the circulation of draft policies to Maori groups. A recurring issue, throughout this report, is what the most appropriate form of Maori participation in the development of the Government's environmental policy. In some instances major policies, such as the Government's 'Environment 2010 Strategy', have been developed with little or no consultation with Maori. Other policy development processes, such as the RMLR, involved extensive Maori participation. But at the end of the RMLR, many Maori felt that their concerns were not taken account of, especially in relation to issues over ownership of resources. Poorly designed consultation procedures generally achieve unsatisfactory outcomes and can contribute towards 'consultation overload'. Sometimes Maori have adopted protest

as an alternative way of achieving input into Government environmental policy and law.

### 10.1.2 International law

During the 1980s and 1990s, there was a massive increase in international environmental law. This law included multilateral declarations, strategies and treaties. International environmental law has had an increasing influence on the development of New Zealand's domestic environmental policy. The Wai 262 statement of claim expresses a concern that Maori interests are not adequately being protected by New Zealand's international treaty ratification procedures, and that Maori are not adequately being represented in international treaty-making fora. The rise of international environmental law has also been accompanied by global trade liberalisation. Maori perceive that this liberalisation could undermine their interests and values and have adverse effects on indigenous flora and fauna. The New Zealand Government has been a promoter of 'free trade' and has ratified the GATT and is a member of the WTO. The authors have noted that recent WTO agreements may result in domestic governments being able to restrict trade only on the basis of a 'scientific' risk assessment. Thus, the WTO may not accept, for example, that Maori values and interests are a reason to restrict the importation into New Zealand of a new type of organism. However, under the recently developed Cartagena Protocol, New Zealand can restrict the import of a living modified organism on the basis of the perceived impact on indigenous peoples and local communities, and risk to biological diversity. The relationship between trade and environmental international laws will continue to be debated and tested, and it seems that the New Zealand Government has a role to play to ensure that international trading laws become compatible and integrated with international environmental laws. Clearly processes relating to Maori participation in international law making, and New Zealand's process of international treaty ratification, are becoming critical policy issues that will continue to require further domestic attention. In becoming a party to some international agreements, the Crown's ability to respond to Maori concerns could be compromised or restricted.

Chapter 2 outlines some examples of international environmental law that have influenced, or will continue to influence, domestic

environmental policy and legislation. Some of these laws include the Stockholm Declaration, Brundtland Report, Rio Declaration, IUCN species and protected areas programme, CITES, World Heritage and Ramsar conventions, the Convention on Biological Diversity, and the International Undertaking on Plant Genetic Resources. These international environmental laws have produced concepts that underpin many domestic environmental laws around the world. The concepts include the value of:

- ▶ biodiversity and the variety of life on Earth;
- ▶ sustainable development of economic and social activities and the environment;
- ▶ sustainable use of environmental goods and services;
- ▶ protection and preservation of significant and threatened species and ecosystems;
- ▶ the precautionary principle (that caution should be exercised in managing the environment in the context of uncertain information);
- ▶ the rights of nation-states to exercise sovereignty over their resources; and
- ▶ the rights of indigenous peoples and local communities to own, manage, and control their resources.

This report has found that international environmental law influences New Zealand's domestic environmental policy at a number of different levels. Some international environmental law has had a direct and explicit influence. For example, the establishment of the three world heritage sites (Tongariro National Park, South West New Zealand, and New Zealand's Sub-Antarctic Islands) resulted from the World Heritage Convention. The Trade in Endangered Species Act 1989 was a consequence of New Zealand's ratification of the CITES Convention. Other influences, although less direct, are still significant. For example, the working papers associated with the RMLR illustrate that the World Conservation Strategy 1980 and the Brundtland Report 1987, in particular, influenced the development of the RMA, and that the IUCN threatened species programme has influenced the way the Department of Conservation manages threatened species in New Zealand. This means that, in part, domestic environmental policy and laws have been developed not only as a result of domestic issues and 'drivers', but also as a result of issues, trends and factors generated at an international level.

### 10.1.3 Resource management

Resource management relates to policies and legislation that manage land, air, water, rivers, lakes, the sea and the coast. The most important resource management laws are the RMA 1991, Forests Act 1949, Fisheries Act 1986, and the Fisheries Act 1996. This legislation aims to ensure the sustainable management of all land and water uses and activities, including the sustainable use of commercial indigenous forestry and commercial fisheries. Generally, within resource management laws, the objective is to avoid, mitigate and reduce any adverse environmental effects arising from activities on land, air, water, and the sea. Resource management legislation tends to regulate the adverse effects of activities rather than the activities themselves. However, certain activities, such as coastal reclamation for example, are regulated because they may have a number of adverse effects on the environment.

In 1983 there was no definable set of resource management policies or laws. Instead the Crown had developed a number of planning policies and laws that were designed to achieve the wise use of national resources, direct economic expansion, and provide for regional infrastructure and services. During the late 1970s and early 1980s, the Commission for the Environment, the Environment Council, the Nature Conservation Council and a number of non-governmental environmental groups challenged the Government's planning regime and argued for greater recognition of environmental costs and outcomes resulting from Government decision-making. This position also found support from the Treasury and the OECD. The Treasury successfully advocated for a major overhaul of New Zealand's planning system in order to create a more competitive and efficient economy. This overhaul was achieved in three main ways:

- ▶ by public service restructuring and the creation of new agencies such as the Ministry for the Environment and the Parliamentary Commissioner for the Environment;
- ▶ the comprehensive reform of local government including the creation of new regional councils which could take on key regional environmental management responsibilities; and
- ▶ the massive reform of environmental laws and regulations by the RMLR.

The RMLR process reviewed all planning-related laws and gave birth to the RMA 1991. This Act aims to promote sustainable management

of all land, water, coast, air, lakes and rivers. The major resources not covered by the RMA are: waters outside the territorial sea (including the continental shelf); commercial fisheries managed under the Fisheries Act 1996; commercial forestry logging managed under the Forests Act 1949; extraction of minerals managed under the Crown Minerals Act 1991; and conservation land and protected species managed under the Conservation Act 1987. Under the RMA, resources must be managed in a way that promotes social, economic, and cultural well-being while meeting the needs of future generations, safeguarding the life-supporting capacity of ecosystems, and avoiding, remedying, or mitigating any adverse effects on the environment. In addition, significant indigenous vegetation and fauna habitats are to be protected under the Act as a matter of national importance. In relation to flora and fauna, the RMA enables local authorities to protect or regulate the use of significant indigenous habitats on land, rivers, lakes, and the coast.

Under the RMA, the key method of protecting significant indigenous habitats is by policies and rules in district and regional plans, and by requiring resource consents. Most plans identify those habitats in a district or region that have significant conservation values. Sometimes these habitats are also significant for cultural reasons. Rules in plans prescribe that certain uses or modifications of these habitats may be classified as discretionary, non-complying or prohibited. A resource consent is required in order to carry out a discretionary or non-complying activity. Resource consents cannot be granted for prohibited activities. For example, a patch of indigenous bush on a private farm may be classified in the relevant district plan as a significant habitat and any clearing of the bush may require a resource consent. Often local authorities use non-statutory measures to protect significant habitats on private land. Additional protection of habitats on land or waterbodies may be achieved by a heritage protection order or water conservation order under the RMA.

Via legislation, the Crown has vested in itself a right to manage the land, water, air, and sea in order to achieve sustainability objectives. Use and management of flora and fauna within these areas is regulated by the Crown in the following ways:

- ▶ significant indigenous habitats may be protected on private land by rules in district plans;

- ▶ the use and management of flora and fauna (excluding commercial fisheries) in rivers and lakes is regulated by the RMA and regional plans;
- ▶ the use and management of flora and fauna (excluding commercial fisheries) in the coastal marine area is regulated by the RMA and regional coastal plans;
- ▶ the commercial logging of indigenous forests on private land is regulated by the Forests Act 1949; and
- ▶ commercial fishing is regulated by the Fisheries Act 1983 and 1996.

While the Crown has vested in itself the right to manage various resources, it has also vested in itself ownership of certain areas. For example, all navigable rivers, the foreshore and the seabed are vested in the Crown under section 354 of the RMA, section 7 of the Territorial Sea and Exclusive Zone Act 1977, and section 9A(1)(b) of the Foreshore and Seabed Endowment Revesting Act 1991. As a consequence of these provisions, the Crown is said to own all flora connected with these environments.

The RMA recognises and provides for the 'relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'. People exercising powers under the Act are also required to have particular regard to kaitiakitanga and to take into account the principles of the Treaty of Waitangi. These (and other provisions) in the RMA establish a framework for integrating Maori interests and concerns into local and central government resource management decision-making. The inclusion of a responsibility for the Crown to take into account the principles of the Treaty of Waitangi was in part a consequence of the findings of the Waitangi Tribunal in the Kaituna, Manukau, Motunui, and Muriwhenua reports. These reports affirmed that Maori had the right to expect active protection of their resources by the Crown, and that, in some instances, Maori retained tino rangatiratanga over their resources.

One meaning of tino rangatiratanga is that Maori have rights to control, own, manage, and develop their resources. The RMLR, however, did not attempt to define the resources that Maori retained tino rangatiratanga over so issues over Maori ownership were excluded from consideration under the RMA. The result has been that Maori claims to ownership are left to be dealt with by the Waitangi Tribunal or by direct negotiation between Crown and claimants. Many Maori have been

dissatisfied with this non-recognition of Maori resource ownership under the Act. Uncertainty over the degree of Maori interests in indigenous flora and fauna on the land, sea, rivers, lakes tends to prevail in all environmental policy. Many groups look to the Waitangi Tribunal's Wai 262 inquiry to provide some greater certainty or clarification in this area.

Chapter 4 of this report illustrates some of the progress and problems relating to the Crown's policies and strategies providing for Maori participation under the RMA. Most of the plans and policy statements viewed for this report make some provision for Maori customary use and the protection of Maori interests related to significant habitats of flora and fauna. Usually this recognition results in certain activities being restricted if they are found to be incompatible with Maori interests and views. An example noted in chapter 4 was the restriction on the discharge of treated sewerage into Te Uruti Bay on the basis of the perceived adverse effects to Maori interests. The ability of the RMA to protect and provide for Maori commercial use and development of resources is, however, in doubt. Few district or regional plans provide for such use and recently the Environment Court has determined that Maori use and development of resources must also avoid, safeguard, or mitigate any adverse effects on the environment. The RMA tends to make no special provisions for Maori as commercial developers of resources.

The Waitangi Tribunal has been critical of the RMA. It has expressed the view that the Act does not require parties exercising powers under it 'to comply with the Crown's Treaty duty to protect the claimants' rangatiratanga over their highly valued taonga'.<sup>1</sup> In order to ensure that this rangatiratanga is protected, the Tribunal considers that particular self-management or co-management type arrangements are necessary to manage significant resources such as Te Whanganui-a-Orotu, and the Whanganui River. In other words, the 'one size fits all' approach of the Act undermines Maori tino rangatiratanga over specific taonga resources. In some cases, the RMA has been amended in order to implement Treaty claim settlements. The Ngai Tahu Claims Settlement Act 1988 is the main example used in this report. It seems the Crown prefers regional or district solutions, and claim settlements may continue to amend the RMA in various ways around the country.

The Wai 262 claim, however, began as a national 'generic' claim concerning all indigenous flora and fauna throughout New Zealand.

1. Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Wellington, Brooker and Friend, 1993, p 144

The claim also attracted national attention and support from various Maori groups and organisations around the country. As noted in this report, discussion about the Wai 262 claim tends to be included in Government environmental policy documents and at various consultative hui. The critical question is whether Wai 262 is still a national claim or the claim of a number of iwi over their own regions? If the claim is a national claim, then the extent of Maori interests in indigenous flora and fauna at the national level must be queried. As would the question: do Maori retain rangatiratanga over all indigenous flora and fauna? If Maori do retain tino rangatiratanga over all indigenous flora and fauna, then it is suggested that the RMA would need to be amended on a national basis so that Maori could exercise a degree of ownership and control of all indigenous flora and fauna on private, Crown and Maori land.

#### 10.1.4 Conservation policy

This report looks at conservation policy, legislation and practice between 1983 and 1998. For the purposes of this report, conservation means a programme to protect and preserve certain species and habitat from human activities and from introduced pests. A key characteristic defining all conservation laws and policies is the limitation or restriction of human activities to some degree. Statutes, regulations, or management plans prescribe which activities are allowed or disallowed in order to preserve or protect certain environments. To achieve this, the Crown has vested in itself the right to own and manage both absolutely protected wildlife and conservation areas.

In 1983 there were a range of laws that dealt with the conservation and protection of ecosystems and habitats. These laws included the Native Plants Protection Act 1934, Forests Act 1949, Wildlife Act 1953, Marine Reserves Act 1971, Reserves Act 1977, Marine Mammals Protection Act 1978, and the National Parks Act 1980. The Wildlife Service of the Department of Internal Affairs, the New Zealand Forest Service, the Department of Lands and Survey, and the Ministry of Agriculture and Fisheries administered these laws. Some of these agencies had both conservation and development objectives and responsibilities. There was some limited provision in these laws so that Maori could take flora and fauna from conservation areas under a permit for traditional purposes.

Conservation administration reform was driven largely by public service restructuring objectives rather than the development of any new conservation policy. The general aim of this restructuring was to separate commercial and non-commercial activities and regroup all protected species and land under the care of one Government conservation-orientated department. Maori participation in the conservation administration reform was limited since Treaty of Waitangi issues were not considered to be of much relevance at this time. The regrouping of the conservation legislation was achieved by the Conservation Act 1987. This Act established DOC with a strong mandate to manage certain Crown land and protected species for the purposes of conservation and preservation. Section 4 states that the 'Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi'.

Between 1987 and 1990, the Minister of Conservation and DOC initiated a number of conservation law reforms. These reforms included protected species law reform, protected areas law reform, conservation quango reform, and coastal law reform. The protected species and protected areas law reform were abandoned by the incoming National Government in 1990. The conservation quango reform led to the Conservation Law Reform Act 1990. This Act established the New Zealand Conservation Authority, regional conservation boards, the Fish and Game Council, district fish and game councils, and it introduced new planning mechanisms by providing for conservation management strategies, conservation management plans, and sport fish and game management plans. The quango reform did not consider the idea of establishing a separate Maori organisation to represent Maori views in national conservation planning. Other amendments to the Conservation Act and Wildlife Act since 1990 have reformed the concession system, introduced freshwater fisheries responsibilities, provided for protected marine species, and made changes to how the taking of plants from conservation areas is managed by DOC.

Under the Conservation Act, the department has the responsibility to administer a variety of conservation-related legislation. Most of this legislation pre-dates 1983 and is listed in the First Schedule of the Conservation Act. In terms of species, the primary legislation is the Native Plants Protection Act 1934, the Wildlife Act 1953, the Wild Animal Control Act 1977, the Marine Mammals Protection Act 1978, and the

Fisheries Act 1996. In summary, this legislation legally protects the following:

- ▶ almost all indigenous birds, animals, reptiles and amphibians;
- ▶ a number of terrestrial and freshwater invertebrates including bush and ground weta, a grasshopper, various types of beetles, the Nelson cave spider, and various snails;
- ▶ all black coral, all red coral, and the spotted black grouper;
- ▶ all marine mammals;
- ▶ all native plants living on Crown land, except for scrub plants, all algae, fungi, liverworts, mosses and a number of plants considered to be weeds such as bracken and nettle; and
- ▶ marine turtles.

Any taking of absolutely protected wildlife requires a permit issued by the Director-General of Conservation. These permits have not been issued for Maori to take such wildlife for traditional purposes.

A variety of species cannot be exported or imported unless a permit has been issued under the Trade and Endangered Species Act 1989. The species covered by this Act include seals, whales, dolphins, brown teal, New Zealand falcon, Buff weka, pukeko, kakariki, laughing owl, tuatara, snails (*Parayphantidae* spp) and coral.

Of these species, the Crown, under the Wildlife Act, vests in itself ownership of all protected wild animals, protected terrestrial and freshwater invertebrates, all black coral, all red coral, and the spotted black grouper. The Crown also vests in itself ownership of all wild animals declared under the Wild Animals Control Act 1977. This means that species such as deer, thar, wallaby, opossum, feral goats and pigs are owned by the Crown, unless they have been lawfully taken or killed at which time they become the property of the person who took or killed them.

A variety of habitats are protected and preserved under the Wildlife Act 1953, Land Act 1948, Forests Act 1949, Marine Reserves Act 1971, Local Government Act 1974, Reserves Act 1977, Queen Elizabeth the Second National Trust Act 1977, Marine Mammals Protection Act 1978, National Parks Act 1980, Conservation Act 1987, and specific local legislation such as the Lake Wanaka Preservation Act 1973 and the Sugar Loaf Islands Marine Protected Area Act 1991. Crown land protected under this legislation includes:

- ▶ national parks (including specially protected areas and wilderness areas within national parks);

- ▶ forest parks;
- ▶ conservation areas;
- ▶ specially protected areas, conservation parks, wilderness parks, ecological areas, sanctuary areas, watercourse areas, amenity areas, and wildlife management areas;
- ▶ marginal strips along rivers and lakes;
- ▶ stewardship areas;
- ▶ historic, scenic, nature, and scientific reserves;
- ▶ Government purpose reserves; and
- ▶ wildlife management reserve, wildlife refuge and wildlife sanctuary (these reserves may also cover private land, rivers, lakes, wetlands, and estuaries).

Under the Conservation Act 1987, DOC manages most of these protected areas. In addition, DOC manages marine reserves and marine mammal sanctuaries. Local authorities may own and manage reserves under the Reserves Act 1977 and regional parks are managed by regional councils under the Local Government Act 1974. Within these areas, any use and taking of flora and fauna requires a permit issued by DOC or the administration body.

Conservation legislation and regulations provide for private land to be protected by:

- ▶ conservation covenant and protected private land agreements;
- ▶ open space covenants;
- ▶ nga whenua rahui covenants; and
- ▶ Maori reservations under section 338 of Te Ture Whenua Maori Land Act 1993.

Under these protection arrangements the landowner agrees to set aside an area of land for conservation purposes. The landowner generally agrees to ensure the protection of the flora and fauna on that land and regulates access to these protected areas. Flora which are 'fixed' to the land within a registered historic place are also given a degree of protection under the Historic Places Act 1993.

Each type of protected area is established for a variety of purposes and involves varying degrees of protection under the various Acts. The 'most' protected areas are those areas for which public access is allowed only with the permission of the relevant Government authority. These include specially protected areas within national parks and nature reserves. Other conservation areas generally allow public access but do

not allow the taking of any flora and fauna unless a permit has been obtained from the relevant Government authority or administration body. Generally, all taking of flora from reserves, including taking for Maori traditional purposes, requires a permit from the Director-General of Conservation.

Some legislation and regulations, pre-dating 1983, also provided for recognition of Maori interests and uses in relation to specific resources. Examples include the right of Ngati Tuwharetoa to take fish indigenous to Lake Taupo under the Maori Land Amendment and Maori Land Plans Adjustment Act 1926; the Land Act regulations that allow Rakiura Maori to take muttonbirds from the Titi Islands, and recognition of Mua-Upoko's ownership of Lake Horowhenua under the Reserves and Other Lands Disposal Act 1956.

While section 4 of the Conservation Act requires that DOC must give effect to the principles of the Treaty of Waitangi, there is little guidance in the rest of the Act on exactly how this is to be done. Until 1995, DOC officials were uncertain about how section 4 applied to the conservation legislation listed in the First Schedule of the Act. This uncertainty fuelled tension and conflict between Maori and DOC during the 1990s. In particular, various Maori hapu and iwi have called for the return of the conservation estate as part of Treaty claim settlements and challenged the right of DOC to exclusively manage the conservation estate. For example, Maori have protested against the use of 1080 poison in conservation areas and opposed the eradication of kiore from offshore islands. Some Maori have also challenged the protected status of the kereru, and demanded greater participation in the management of some national parks. In addition, DOC has faced Government fiscal restrictions, opposition from some recreational lobby groups, and pressure from 'right-wing' advocates who believe the Government should withdraw from hands-on management of the conservation estate.

In 1995, the Court of Appeal declared that section 4 of the Conservation Act also applied to those statutes specified in the First Schedule of the Conservation Act. This means that DOC must give effect to the principles of the Treaty of Waitangi when administering legislation such as the Reserves Act 1977, Marine Mammals Protection Act 1978, and the National Parks Act 1980. This has been reflected in certain policies and objectives in conservation management strategies and conservation management

plans. Examples of the type of policies currently implemented by DOC include:

- ▶ Maori representation on marine reserve management committees;
- ▶ involvement of tangata whenua in the transfer of threatened fauna between offshore islands and the mainland;
- ▶ consultation with tangata whenua during the preparation of a conservation management plan;
- ▶ involving tangata whenua in the management of the taking of flora from within conservation areas; and
- ▶ the development of protocols relating to the use of bone and tooth material from beached whales.

While policies in conservation management strategies and plans generally provide for tangata whenua involvement in managing the taking of plants from conservation areas, the taking of such plants still requires a permit from doc. Thus, doc does not interpret section 4 of the Conservation Act as allowing Maori to manage and take protected species without a permit. Maori rights to take freshwater fish for customary purposes without a permit have generally been confirmed by the courts, but the Court of Appeal has declared that this customary right is limited to indigenous fish.<sup>2</sup>

In some areas, Treaty claim settlements are improving Maori involvement in conservation at a regional level. The most significant conservation-related settlement law is the Ngai Tahu Claims Settlement Act 1998. This Act, amongst other things, provides: for the recognition of Ngai Tahu's taonga species and significant landscapes within conservation areas; returns some conservation land to Ngai Tahu; and vests ownership and/or management responsibilities of reserves in Ngai Tahu. The Act also allows Ngai Tahu Whanui to possess material from legally obtained protected wildlife.

Conservation management in New Zealand is now tending towards a type of concentrated conservation with a focus on specific areas. Examples of this trend noted in this report are the development of mainland habitat islands and the identification of significant areas in conservation management strategies. Private conservation initiatives are also increasing, such as the Karori Sanctuary project, and both Government and private conservation management is becoming more closely tied to economic development, especially tourism. This trend

<sup>2</sup> *Taranaki Fish and Game Council v McRitchie* unreported decision, CA184/98

is also providing opportunities for Maori conservation and tourism initiatives and some of the complex issues surrounding such developments were illustrated in the Ngai Tahu whale watching case study discussed in chapter 6. Clearly many Maori perceive the conservation estate and protected species as assets that will provide the raw material for future economic, social, and tribal development.

### 10.1.5 Crown science and research

Between 1983 and 1998 the way the Government managed and funded science and research changed dramatically. Chapter 7 describes these changes in relation to Maori participation in Crown science and research. The changes are grouped into three phases: the centralist ‘traditional’ phase of Crown science and research, which was dominated by the DSIR; the ‘paradigm shift’ phase which saw the disbanding of the DSIR and the development of the Crown Research Institutes and Ministry of Research and Science Technology; and the ‘process change’ phase which involved the implementation and development of the new Crown science and research regime.

Crown science and research reforms generally reflected other public service reforms with the separation of policy, funding and service delivery functions. The general rationale of the Government-funded science and research programme was to maximise the economic potential of New Zealand’s resources and increase productivity. In the traditional period the DSIR was the main player in of this research programme. During restructuring, the Government restricted its involvement in science and research by setting up a funding-provider framework, with the Ministry of Research and Science Technology taking a limited policy advisory role. By introducing contestable funding, the Government has attempted to more closely align research outputs with the Government’s strategic objectives. While economic development remains the primary Government objective for research, environmental protection has also emerged as an important objective. Thus Government priorities in science and research funding incorporates the priorities established by the RMA, and conservation management and biosecurity objectives. Some of this research involves flora and fauna and chapter 7 notes research involving plants such as the kumara, cabbage tree, horopito, and manuka.

In the traditional period, it seems that the DSIR carried out research without any participation by or involvement of Maori. This situation led to tensions between Maori and the DSIR. During the 1998 International Workshop on Ethnobotany, Maori stated that scientists were taking Maori knowledge, particularly of the medical properties of plants, for commercial use and then selling the results back to Maori for a profit. Thus the workshop participants called for a halt to any programmes involving plants traditionally used by Maori.

Such tensions remained during the restructuring of the Crown science and research sector during the early 1990s. During that restructuring, Maori called for the inclusion of a Treaty of Waitangi clause in the Crown Research Institutes Bill, and wanted provision for active Maori participation in research and recognition of the value of local knowledge and *matauranga* Maori. Chapter 7 concludes that while the new Crown science and research regime has made progress in taking into account Maori values and interests, there is still a need for adequate mechanisms to identify research involving indigenous flora and fauna of relevance or interest to Maori. An example given in chapter 7 is a research bid seeking to isolate the bioactive compounds in *pohutakawa*, *manuka*, and *rata*. If trees used in this research are on private land, Maori may not be informed about that research, or have any ability to influence and provide input into the research project. Other research involving Maori land or involving species in which Maori have legally recognised interests has had significant Maori involvement. An example of this noted in chapter 7 is the research into *titi* (muttonbird) harvesting by Otago University and Rakiura Maori on the Titi Islands. Facilitating and protecting Maori knowledge of flora and fauna is not the primary Government objective, but it appears that such knowledge is often viewed as being a valuable contribution toward sustainable management or environmental objectives.

#### 10.1.6 New organisms

The new organisms theme of this report (chapter 8) includes a discussion of biosecurity, genetically modified organisms, and legislation and policies relating to plant variety rights. Since 1983, public concern relating to the regulation and management of new organisms has increased to the extent that a Royal Commission of Inquiry into Genetically Modified

Organisms was established in 2000. Before 1993, Biosecurity legislation and policy was largely concerned with protecting the agricultural economy from threat of disease. This legislation included the Animals Act 1967 and Plants Act 1970. Between 1988 and 1993, biosecurity legislation was reviewed and this led to the passing of the Biosecurity Act 1993. This Act consolidates functions relating to exclusion, eradication, and effective management of pests and unwanted organisms. Maori had only limited participation in the development of the Biosecurity Act, and reference to the principles of the Treaty of Waitangi were removed from the Biosecurity Bill in December 1992. While the protection of the agricultural economy remains a primary objective of biosecurity policy, the Biosecurity Act also aims to protect the 'viability of threatened species of organisms, the survival and distribution of indigenous plants and animals, or the sustainability of natural or developed ecosystems, ecological processes, and biological diversity', and the 'relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu, and taonga'.<sup>3</sup>

While biosecurity policy has been dominated by the need to protect the agricultural industry from introduced pests and diseases, insofar as there have been policies on new organisms, they have historically been concerned with the promotion of biotechnological research in order to improve New Zealand's international agricultural competitive advantage. Thus the DSIR and the Ministry of Foreign Affairs and Trade have encouraged research into agriculturally related genetically modified organisms. The Hazardous Substances and New Organisms Act 1996 was developed to further manage the development of genetically modified organisms and minimise the risks associated with such research. The Hazardous Substances and New Organisms Act 1996 established ERMA to make decisions on applications to import, develop, field test or release new organisms in New Zealand. Some of this authority has been delegated to a number of Institutional Biological Safety Committees. To aid ERMA in Maori matters, Nga Kaihautu Tikanga Taiao was established as a Maori advisory committee.

Apart from input Maori had into the aspects of the RMLR that dealt with biosecurity, the preparation of the Hazardous Substances and New Organisms Act involved little Maori participation. Despite this lack of participation, the Act does provide a framework for taking into account the principles of the Treaty of Waitangi. Chapter 8 notes some issues

3. s 71(1)(c), Biosecurity Act 1993

relating to the implementation of the Act. Under the Act, Maori values must be considered when an application concerns an indigenous species. In such cases ERMA generally requires consultation with Maori. More uncertainty exists in relation to introduced species. This uncertainty is illustrated by the case study on the application to field test genetically modified organisms in cattle at Ruakura. Maori opposed this application and during the consultation process, Ngati Wairere asserted that their kaitiakitanga role extends to non-indigenous species such as cattle. The ERMA Maori advisory body, Nga Kaihautu Tikanga Taiao, also called for wider consultation in regard to the cattle application since the application was considered to be a national Maori issue.

Chapter 8 also briefly looks at laws relating to plant variety rights. These laws grant certain rights to persons who develop new and distinct forms of plant varieties. During the development of the Plant Variety Rights Act 1987, Maori argued that Maori had a prior interest to native genetic resources, and that Maori interests in native plants had not been voluntarily surrendered. The Plant Variety Rights Act 1987, however, gives no recognition to Maori interests in indigenous flora, and grants the owner or a discoverer of a plant variety the exclusive right to produce for sale and sell propagating material from that variety. Under this regime, a number of indigenous plant varieties have been developed and these varieties are sold by plant nurseries around the country and overseas.

#### **10.1.7 Policy developments after 1992**

Since 1992 there have been a number of significant developments in environmental policy. These developments include the Environment 2010 Strategy, New Zealand's State of the Environment Report, the National Environmental Indicators Programme, and the New Zealand Biodiversity Strategy. These developments relate to all spheres of flora and fauna policy, including resource management, conservation, biosecurity, research, and new organisms. They reflect a trend in Government policy to view environmental matters in a more integrated fashion and they also reflect the influence of international environmental law. Most of these initiatives were developed with some consultation with Maori. However, as illustrated during the preparation of the New Zealand Biodiversity Strategy, tensions arose with regard to the most appropriate level and

type of consultation process. Thus Government, it seems, has a difficulty in providing for Maori interests and participation when dealing with national or international issues. For example, the rma provides a mechanism to ensure that the tangata whenua are consulted when a regional or district plan is prepared or resource consent is processed. However, when it comes to issues such as genetic modification of cattle, a national biosecurity issue, or the development of a new international environmental or trade treaty, it is not clear what the proper consultation process is. There is little in the new initiatives to indicate how Maori participation will be provided for at these levels. It seems that some thought needs to be given to the establishment of a forum for dealing with national Maori issues in a way that does not undermine the authority of iwi and hapu. The authors note that Dr Mason Durie has called for a national Maori body to deal with national (and international) policy matters.<sup>4</sup>

#### 10.2 KEY CONCLUSIONS

It would be a generally uncontested statement to say that in 1983 the Crown developed and implemented policies and laws relating to flora and fauna without any 'real' involvement or participation by Maori. The Department of Lands and Survey and the New Zealand Forest Service managed most Crown-owned indigenous forests. The Marine Division of the Ministry of Transport managed use and management of the coastal marine area. The Water and Soil Conservation Authority and the regional water and catchment boards managed most lakes and rivers, and the local authorities managed the use and subdivision of private land via district schemes.

During the mid-1980s, three important trends in town and country planning occurred. Firstly, the extent of the Town and Country Planning Act 1977's ability to regulate activities was broadened. Thus district schemes became a tool for managing not only subdivision and land use, but also things such as clearance of forest, water pollution, river and lake use, wetland drainage, aquaculture, and coastal reclamation. With this trend, planning went beyond the confines of 'town' and 'country' to become a method for managing a range of resources at a regional and district level (resource management).

4. Mason Durie, *Te Mana Te Kawanatanga, The Politics of Maori Self-Determination*, Auckland, Oxford University Press, 1998, p 237

The second trend involved a shift in government objectives. Conservation and sustainable use objectives became the dominant rationales for the management of Crown-owned or common resources. Before this shift, rivers, lakes, the coast, and Crown-owned indigenous forests were managed on a multiple use philosophy. For example, Crown-owned indigenous forests were managed by the New Zealand Forest Service for production, conservation, recreation, water supply and soil protection values equally. Now DOC manages these forests for the primary purpose of conservation, with other uses (such as recreation) being of secondary importance.

Sustainable use, and conservation ethics in law have meant that the rights of property owners (including the Crown) to use their property 'as they like' has become increasingly restricted. Under the RMA 1991 and Forests Act 1949: resource consents and/or sustainable management permits are required to clear large areas of indigenous forests; discharge consents are required to discharge into any water; large earthworks require land use consents; and any significant uses of the coastal marine area requires coastal permits. Within the conservation estate, concessions are required to carry out any commercial activity and any other activities are directed by conservation management strategies and conservation management plans. Thus the Crown, as the owner of the conservation estate cannot effectively use this land for other purposes (such as commercial logging) without a change in law.

A third trend has been an awareness by the Crown that Maori interests were not restricted to Maori-owned land. Under section 3(1)(g) of the Town and Country Planning Act 1977, local authorities were required to recognise and provide for the 'relationship of the Maori people and their culture and traditions with their ancestral land' as a matter of national importance. However the term 'ancestral land' was not thought to include resources such as rivers, lakes, the coast and other land not actually held in title by Maori. The changing point was the 1987 Planning Tribunal decision of *Royal Forest and Bird Protection Society v Habgood*.<sup>5</sup> This decision found that the term 'ancestral land' could mean any land that has been owned by ancestors. This decision effectively meant that Maori could have a remaining interest in anything that could have been owned by their ancestors. Thus, this remaining or residual interest may exist even if the land or resource was actually owned by someone who was non-

5. *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* 31 March 1987, High Court M655/86

Maori. The implication was that Maori could have an interest in rivers, lakes, the coast and non-Maori land.

Conservation and resource management laws and the concept of Maori extra-territorial interests have essentially challenged the concept of 'ownership'. By definition, ownership means that a person has possession of something or that something belongs exclusively to someone.<sup>6</sup> Within the traditions of English common law, real estate or immobile property means land that is owned exclusively by someone, and the Crown still retains certain rights. Yet attitudes towards property are not only about law, but about how people value things such as the ability to 'do what they like' with their real estate. Thus property ownership law is related to social beliefs and values in society.

Maori claim exclusive ownership to some 'common' resources currently held by the Crown. This claim relates to rivers, lakes, the coast and the conservation estate. Maori also claim Crown-owned species under the Wildlife Act 1953 and Marine Mammals Protection Act 1978. In reality, the Crown's property right in absolutely protected species is restricted by control and ownership of their habitats and the ecological health of a particular habitat depends on a range of factors, including global environmental health and local disturbances. Maori and private property rights are also affected by similar factors. For example, the quality of a freshwater fishery is determined by factors such as water quality, water quantity, and access. Other examples are indigenous petrels and albatross, whose survival is dependent upon the need for international action to reduce the accidental by-catch associated with tuna fishing on the open seas. Thus in reality, possession or ownership of wildlife is mediated by a range of social, bio-geographical and environmental factors.

To a certain extent, Maori land-related claims have been supported by some groups who wish to see the greater specification of property rights over common resources. For example, Peter Hartley and the New Zealand Business Roundtable have expressed a view that Maori and other sections of the community should gain property rights over resources currently in Crown ownership. They argue that this would create a more certain property interest, reduce Government spending, and achieve better conservation objectives.<sup>7</sup> Other recreational or environmental groups, such as the Federated Mountain Clubs and Public Access New Zealand,

6. J B Sykes, *The Concise Oxford Dictionary of Current English*, Oxford, Clarendon Press, 1984, p 732

7. P Hartley, *Conservation Strategies for New Zealand*, Wellington, New Zealand Business Roundtable, 1997

steadfastly oppose any return of the conservation estate to Maori as part of a claim settlement. They state that such an action would lead to 'privatisation' of the conservation estate, coast, rivers and lakes. Maori also claim an interest in resources currently under private ownership. Public concerns about these claims led to the National Government restricting the ability of the Waitangi Tribunal in 1993 with regard to making recommendations concerning the return of private land in its reports to Government.

The Crown has responded to Maori demands for greater recognition in resource-related issues by including references to the Treaty of Waitangi in a range of environmentally related legislation. Since 1983 these references have been included in key legislation such as the Environment Act 1986, Conservation Act 1987, RMA 1991, and the Hazardous Substance and New Organisms Act 1996. However, references to the Treaty of Waitangi in environmental legislation are worded in a way that fails to require conformity with the Treaty. They use such phrases as 'to take into account' and 'have regard to' the Treaty. Also there is often little guidance in legislation to show how, in practice, Maori interests can be taken into account. Despite the lack of guidance, some progress has been made in involving Maori in management of Crown resources. One example is the participation of local tangata whenua in the management of harvesting from protected areas. Policies in conservation management strategies and plans indicate that local Maori do have a voice in regulating access to specific resources within the conservation estate. Further research would be necessary to determine how such policies are being implemented.

The Crown has also ensured that Maori are consulted over a range of policy and implementation initiatives. This consultation involves both the development of policy at the central government level, preparation of new legislation, and policy and legislative implementation. Yet, despite the Crown's good intentions, for the most part participation and consultation initiatives in Crown flora and fauna policy have been met with dissatisfaction from Maori. In fact, nearly all the consultation initiatives mentioned in this report have been criticized by Maori as 'token' gestures or as not complying with the principles of the Treaty of Waitangi. Thus for many Maori, consultation alone does not result to tino rangatiratanga. A major development has been the return of some mahinga kai and significant sites as part of claim settlements, such as the

Ngai Tahu settlement. This settlement also contains a system for the recognition of certain species as taonga. However, the great majority of the conservation estate has been deemed to be unavailable for settlement. This policy was released as part of the Crown's 'fiscal envelope' strategy and was met with widespread protest from Maori.

So, despite these initiatives, has anything really changed in respect of Crown flora and fauna policy and practice between 1983 and 1998? In some respects, no. The Crown still asserts its right to manage most indigenous forests as part of the conservation estate and local authorities have been delegated the responsibility to regulate land, water, and coastal use. In respect to the conservation estate, the Crown asserts that it has a continuing duty to manage natural resources in the interests of conservation. Hence, Maori remain powerless to manage resources other than those on their own land unless the Crown grants them a right to do so. The use of those resources on Maori land may also be restricted by rules in a district plan and the need for sustainable forest permits under the Forests Act 1949. The Crown asserts that it owns most wild animals, marine mammals, some terrestrial invertebrates and marine species; and restricts the taking or use of these species. The Crown also claims ownership of flora living in navigable rivers, on the foreshore and on the seabed; and it restricts the right of Maori to access and use flora within Crown conservation areas. Maori generally cannot own protected animals, including the feathers of such animals. The one exception is material possessed by members of Ngai Tahu Whanui under section 296 of the Ngai Tahu Claims Settlement Act 1998.

The Crown also manages the conservation estate for the main purpose of preservation and intrinsic values. This management rationale restricts human activity in protected areas. For Maori, this means that there is little scope for initiatives aimed to achieve the sustainable and customary harvest of protected flora and fauna, such as godwits and kereru. Maori are also restricted from initiating eco-tourism type developments within the conservation estate. There does seem to be a reluctance to accept that there are possible compromises that allow for the use of biota but that do not necessarily jeopardize conservation objectives.

Maori are also powerless to restrict activities such as bioprospecting on private or Crown land since access for such activities is generally determined by the land owner. Thus, Maori do not currently have any 'gatekeeping' role in respect to bioprospecting and related commercial

application such as plant variety rights, genetic modification and patenting. The control of such activities is also complicated by the fact that many New Zealand plants are available overseas in botanical gardens, genetic material is held in gene banks, and much research and experimentation on New Zealand's flora and fauna is conducted in research institutions in Europe, North America, and Asia.

Further, despite Treaty of Waitangi references in legislation, little explicit provision has been made to allow Maori to exercise developmental rights. The Crown tends to treat Maori no differently from anybody else in regard to development or commercial activities. For example, there are no special procedures that allow Maori to carry out bioprospecting activities or to research and patent a new genetic variety themselves, or to develop their flora and fauna resources on a commercial basis. This expression of tino rangatiratanga has yet to be specifically provided for in New Zealand law.

The Waitangi Tribunal has defined tino rangatiratanga as meaning the mana and the authority to possess, control, and manage a resource. It has also said that the Crown has a duty to manage natural resources in the interests of conservation, but that these rights are qualified by the tribe's tino rangatiratanga.<sup>8</sup> So an issue raised by the Wai 262 claim is: where does the Crown's right to manage natural resources end and where does Maori rights to exercise tino rangatiratanga begin? Flora and fauna are heterologous constructs and any answer to this question must be situated in both place and social context. For example, systems and processes that provide for Maori tino rangatiratanga over marine flora will be different to those that provide for Maori tino rangatiratanga over flora on Maori land, or flora within the conservation estate. As Lyke Glowka, states the Convention on Biological Diversity means that processes and systems must be developed that determine 'whether indigenous and local communities will have a right entitling them to be providers of genetic resources found in the areas they inhabit or use'.<sup>9</sup> There is little information to suggest that such a system is currently being developed by New Zealand.

In summary, the extent to which Maori can manage and control flora and fauna is regulated by land ownership, land status, and legislation. The table in the appendix of this report entitled 'Maori interests in Flora and Fauna as regulated by Land Ownership Categories and Protected Species Legislation' illustrates the implications of land ownership, protected area

8. Waitangi Tribunal, *Mohaka River Report*, Wellington, Brooker and Friend Ltd, 1992, p 65

9. Lyle Glowka, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources*, Gland, Switzerland, IUCN, 1998, p 38

and species protection provisions in relation to Maori rights to indigenous flora and fauna.

The flora and fauna aspects of the Wai 262 claim are about a struggle between the right of the Crown to govern flora and fauna, and the right of Maori to exercise rangatiratanga. This is a sovereignty issue and it is the Crown that asserts that it has indivisible sovereignty over flora and fauna within New Zealand. Within this context a few concessions to Maori have been made. A most notable concession, after long negotiation, was the Crown's compensation of the Maori owners of the Waitutu forest in order to achieve preservation objectives. Without many other examples, the ideal of partnership between the Crown and Maori in managing flora and fauna resources seems Utopian. Whatever that Utopia ends up being, the increasing globalisation of economies and societies means that both Maori and the Crown need to work together to safeguard indigenous flora and fauna interests at the international level.