

CHAPTER 1. INTRODUCTION

This report has been commissioned by the Waitangi Tribunal for the Indigenous Flora and Fauna and Maori Intellectual and Cultural Property claim (Wai 262).¹ It is both a chronological and issues-based overview of Crown policies, actions and omissions in relation to flora and fauna in New Zealand in the period 1840 to 1912. The report has been co-authored by Dr Robin Hodge, Cathy Marr, and Ben White. It is one of three overview reports that look at Crown actions in relation to flora and fauna over three consecutive periods. A fourth report examines the effect of Crown actions and policies on matauranga Maori.

1.1 The claim

The Wai 262 claim was lodged in 1991 by Dell Wihongi (Te Rarawa), Haana Murray (Ngati Kuri), John Hippolite (Ngati Koata), Tama Poata (Whanau a Rua, Ngati Porou), Katarina Rimene (Ngati Kahungunu), and Te Witi McMath (Ngati Wai).² Since the claim was originally lodged, three amended statements of claim have been filed with the Waitangi Tribunal. Whereas the first amended statement of claim is on behalf of all the claimants,³ the second and third are specific to the Ngati Porou and Ngati Kahungunu claimants respectively.⁴ Although the issues raised in the statements of claim are specific to the six named iwi, to a large extent they involve matters of national policy and thus are relevant to all iwi.

In its broadest sense the Wai 262 claim is about te tino rangatiratanga and the failure on the part of the Crown to allow Maori to exercise such rights in respect of their taonga, including indigenous flora and fauna. The first amended statement of claim for Wai 262 states that te tino rangatiratanga over flora and fauna includes rights and responsibilities in relation to the protection, management, conservation, control, use, sale and dispersal of such.⁵ In the first statement of claim it is asserted that the claimants have been 'prejudicially affected by the actions and omissions of the Crown and its representatives in denying te tino rangatiratanga of te iwi Maori.'⁶ Eight examples of flora and fauna are cited in the statement of claim as instances of how Crown actions, policies and legislation have affected such taonga. These examples are pohutukawa, koromiko, kumara, puawananga, indigenous forests, kereru, tuatara and

1. Direction commissioning research, Wai 262 Record of proceedings, papers 3.23, 3.24, 3.25
2. First statement of claim, Wai 262 record of proceedings, paper 1.1
3. First amended statement of claim, Wai 262 record of proceedings, paper 1.1(a)
4. Second amended statement of claim, Wai 262 record of proceedings, paper 1.1(b); Third amended statement of claim, Wai 262 record of proceedings, paper 1.1(c)
5. First amended statement of claim, Wai 262 record of proceedings, paper 1.1(a), s 2. Similar issues are raised in Ngati Porou's Wai262 statement of claim (Second amended statement of claim, Wai 262 record of proceedings, paper 1.1(b)), and Ngati Kahungunu's Wai 262 statement of claim. (Third amended statement of claim, Wai 262 record of proceedings, paper 1.1(c))
6. First statement of claim, Wai 262 record of proceedings, paper 1.1, p 1

pupuharakeke.⁷ Specifically it is claimed that provisions of Crown legislation, policies, and practices concerning the protection, conservation, management, treatment, sale, and ability to use New Zealand's indigenous flora and fauna are in breach of the Treaty of Waitangi. Specific actions cited include the creation of protected areas, establishment of protected species and the delegation of powers to acclimatisation societies.⁸ It is this general level of national policies and practices identified in the statements of claim that this report addresses.

1.2 The commission

The decision to commission this report resulted from a scoping exercise undertaken by Ben White and Richard Moorsom.⁹ On the basis of that scoping report, the Waitangi Tribunal commissioned the present authors – Robin Hodge, Cathy Marr and Ben White – to research and co-author an exploratory overview report on Crown laws, policies, and practices regarding Maori rights in indigenous flora and fauna in the period 1840 to 1912.¹⁰ Specifically we were asked to examine and report on: customary and English common law as it applied to flora and fauna; how flora and fauna was dealt with when the Crown purchased Maori land; how the Native Land Court dealt with rights to flora and fauna; statutes that applied to flora and fauna; scenery preservation and protected areas; State protection of plants and animals; the Crown's role in habitat transformation; and the role of Maori in habitat transformation.

The terms of reference of this report are defined both by period and objective. The period covers the 70-odd years between the signing of the Treaty of Waitangi to the fall of the Liberal Government in 1912. In the scoping report the overall objective was seen as having two broad defining features. Firstly, it is comprehensive, including all matters relevant to the general topic of Crown actions in relation to flora and fauna. Secondly, it is to present an overview rather than a definitive account of the issues it covers. The project has therefore been designed so that our primary effort has been devoted to covering all aspects of the topic fairly evenly, and to developing an integrated approach that searches out common threads and interrelationships. Although we think that a comprehensive approach would ideally have been adopted, during the scoping

7. First amended statement of claim, Wai 262 record of proceedings, paper 1.1, ss 5(1)–(2), 6–13

8. First statement of claim, Wai 262 record of proceedings, paper 1.1, p 1

9. Richard Moorsom and Ben White, 'Crown laws, policies and practices in relation to flora and fauna, 1840–1912: Scoping report', Wai 262 record of documents, doc 1 9. The scoping report has to a large extent informed this introductory chapter. Although neither Cathy Marr or Robin Hodge participated in the preparation of the scoping report, they were commissioned to research and write the present report in accordance with the parameters and principles set out in the scoping report.

10. Direction commissioning research, Wai 262 Record of proceedings, papers 3.23, 3.24, 3.25

exercise it became apparent that the limited time available to complete the substantive report meant that this scope had to be truncated. Two themes that we would originally have included have been omitted – namely coastal ecosystems and customary fisheries. This omission is justified by the small emphasis given to these themes in the Wai 262 statements of claim. Our commission also required us to report on the Crown's role in scientific enterprise relating to flora and fauna. However, after undertaking extensive research on this matter, we decided that the chapter that the scoping report had proposed would deal with this matter should be omitted. The reasoning for this omission was twofold: there was very little, if any, relationship between Crown-patronised science and its actions and policies in relation to indigenous flora and fauna; and the Crown, with only one minor exception,¹¹ never recognised the existence of mātāuranga Māori relating to indigenous flora and fauna in its science policy and practice.

Ben White, in his role as project manager for the Wai 262 inquiry, has coordinated the work undertaken on the report. Due to unavoidable time constraints during the final stages of completing this report, Cathy Marr, through no fault of her own, was unavailable to make final revisions to her chapters. This has meant that Ben White has made some minor amendments and additions to her chapters, and written the conclusion to chapter 13 on inland waterways.

1.3 Conceptual framework

This project lies broadly within the field of environmental history – a discipline that to date has received little attention from New Zealand scholars. Environmental history can be understood as being the study of how people have altered the natural landscapes in which they live, and in turn how those landscapes have affected them. In contrast to conventional historical discourses, the nature of environmental history is more interdisciplinary; incorporating elements of what some may consider to be geography and ecology. It seeks to establish the physical environmental context in which human history occurred, and the interrelationships between that context and human actions. This *prima facie* suggests that the introduction of new economic systems – such as capitalism was to nine-

11. The one exception was when the head of the Colonial Museum, James Hector, undertook an investigation of flax. In this enquiry Hector considered the Māori classification system and cultivation methods for harakeke. James Hector (ed), *Phormium Tenax as a Fibrous Plant*, Wellington, New Zealand Government, 1872

teenth century New Zealand – are hugely significant. As the eminent historian Donald Worster has put it, in writing environmental history ‘the *reorganization of nature*, not merely of society, is what we must uncover.’¹²

As noted above, a principle that has informed the design of this report is that as far as possible, it should be comprehensive. The interconnections between ecology, economy and society are such that in order to fully establish how and why the Crown acted in the ways that it did, regard must be had not only to the acts themselves, but also to the socio-economic, intellectual and cultural forces that informed those actions. From the outset the diversities and complexities of New Zealand’s environmental history must be appreciated.

But establishing and understanding the contexts in which the Crown acted is no easy task. Viewing New Zealand’s past from the present, it is easy to fall victim to the simple moral appeal of ‘nature’ and ‘the natural’ – the idea that unmodified nature is some universal good, and any modification of it is therefore intrinsically bad. But rather than project this elegiac vision onto the past, we must attempt to understand the values of historical actors – both Maori and Pakeha – in order to appreciate why they did what they did. This requires a consideration of various value systems such as philosophy, religion and economics. Important in this is the modernist view of the world, through which most European immigrants to New Zealand would have seen civilisation as the endpoint towards which wild nature or wilderness was inevitably destined to move.

Generally, early Pakeha settlers saw New Zealand as a wilderness: a landscape devoid of geographical meaning inhabited by a people without history. This view of pre-contact New Zealand as a sort of intellectual *terra nullius* is in many ways what lies at the heart of the Wai 262 claim – the non-recognition and abrogation of Maori knowledge systems and rights over the natural world. Obviously Maori had both histories and geographies at the point of European contact; and in respect of flora and fauna, complex systems of values and rights existed.

Maori customary law in relation to flora and fauna needs to be considered in trying to arrive at an understanding of New Zealand’s environmental history. For example, trying to deconstruct cross-cultural encounters such as land sales in terms of their environmental implications and significance, is a redundant exercise unless you bring to that analysis some sense of the values and assumptions of both parties. However, constraints of time have meant it was impossible to undertake a sys-

12. Donald Worster, ‘Transformations of the Earth: Toward an Agroecological Perspective in History’, *Journal of American History*, 1990, p 1100 (emphasis in original)

tematic survey of early nineteenth century sources to arrive at such an understanding of Maori world views. Consequently we have relied upon what credible historical literature tells us about such things and if nothing else, simply drawn attention to the issue and posed questions.

Another aspect of dealing with the complexities of New Zealand's past is coming to terms with the nature and extent of Maori agency in shaping history. Clearly the 'fatal impact' view of New Zealand history – the assumption that Maori were passive victims of European colonialism – has been largely abandoned by contemporary scholars. But despite this shift in thinking, it remains no less problematic to establish the nature and impact of Maori agency. This is perhaps especially so in relation to environmental change – a phenomenon central to this project. Such an enterprise is made all the more complex for the fact that there is a tendency amongst some to see indigenous peoples as the forbears of modern environmentalism. This can be viewed as recasting the Romantic notion of the 'noble savage' to incorporate the idea that indigenous people are intuitively 'close to nature' and as such have a latent ecological sensibility. One interpretation of the Wai 262 statements of claim could give the idea that Maori have historically always wanted to preserve New Zealand's flora and fauna in its 'indigenous' state. The historical record, though, clearly suggests otherwise. Maori actively sought to engage in the new economic opportunities that the presence of Pakeha created, and this often involved effecting significant ecological changes such as deforestation in order to sell trees for timber, or to practise more extensive agriculture. Although we have been constrained in the extent to which we can substantively address the question of such Maori agency through limitations of time and sources, we consider it a crucial consideration in relation to issues raised by the Wai 262 claim.

Unlike a large number of claims before the Waitangi Tribunal, the Wai 262 claim is not about land passing out of Maori ownership and control. But notwithstanding this, the theme of land loss has been identified in the design of this project as being very important to many of the issues raised by the claim. Importantly, access to flora and fauna is to a large extent determined by who owns the habitat in which it exists. Therefore a principle that has influenced this report is that through the Crown acquiring Maori land, or facilitating the acquisition of it by others, the habitat of large amounts of indigenous biota passed out of Maori ownership and control. And with the passing of the ownership of that habitat often also

went Maori rights to access and use indigenous flora and fauna. In view of this nexus between ownership of habitat and access to flora and fauna, this report devotes some attention to Crown purchase activity, general Crown land policy, and the operations of the Native Land Court.

1.4 Methodology

As noted above, in undertaking this project we have placed emphasis on covering the vast thematic and topical scope of the commission. This broad coverage has been at the expense of depth of coverage. We therefore adopted a methodology that enabled us to cover all aspects of the project in the time available. We believe an emphasis on breadth rather than depth is appropriate for an overview report such as this.

The major consequence of this approach is that we have undertaken little archival research. Some targeted archival research has been completed, most especially using Native Land Court minute books. We have also been able to draw on specific primary documents that we have come across in previous work. This is particularly the case with Cathy Marr's chapters.

Yet substantial primary research has been undertaken drawing upon official published sources; namely the *Appendices to the Journals of the House of Representatives* (AJHR), *Appendices to the Journals of the Legislative Council* (AJLC), the *New Zealand Parliamentary Debates* (NZPD), *British Parliamentary Papers* (BPP), *New Zealand Statutes*, and Crown purchase deeds published in Turton and Mackay's compendia. The use of these resources has to a large extent been abetted through the employment of a research assistant to compile resources from the primary documents.¹³ There were three aspects to this research assistance:

- ▶ Assembling photocopied indexes of the AJHRs, AJLCs, statutes, and BPPs to enable potentially relevant sources to be easily identified. This means that most major Government reports and all statutes pertaining to flora and fauna have been identified and studied.
- ▶ Producing a paper copy of all Crown purchase deeds published in Turton's deeds and Mackay's companion volume for the South Island, and then highlighting all references to flora and fauna in those

13. The research assistant was Vanessa Brown..

deeds. This enabled a systematic analysis of how the Crown dealt with rights to flora and fauna when it purchased Maori land (see chapter 7).

- ▶ Copying the Native Affairs Committee's summaries and reports on all Maori petitions to Parliament in the period 1840 to 1912, and then highlighting all petitions that in some way concerned flora and fauna. This material formed the basis of chapter 15.

Two further research tools used in the preparation of this report have been the Crown Forestry Rental Trust's Maori Land Legislation database, and a similar database developed by Waitangi Tribunal research officer Evaan Aramakutu, that contains summaries of all statutes that affect flora and fauna.

But it was from secondary sources that we have gleaned the majority of evidence for this report. Although there are no general environmental histories of New Zealand,¹⁴ there is a relatively rich secondary literature that deals with various themes covered in this report. Other important secondary texts which we have draw upon in various ways include local, general, and institutional histories. In addition to these, the sizeable body of MA and doctoral theses in both history and historical geography dealing with subjects within the ambit of this report have proved invaluable. In places we have also used historical reports received as evidence by the Tribunal in other inquiries, as well as the published reports of the Tribunal.

Although the Wai 262 claim has been made by only six iwi, and is therefore not a national claim, we have taken the view that in order to understand the actions and policies of the Crown in the rohe of the claimant iwi, a focus on central Government institutions and national policy is both necessary and appropriate. In terms of examples of the implementation of such policies and legislation, we have wherever possible drawn these from the claimants' rohe. However, where good examples exist outside of these areas that are well documented in secondary sources, or that were critical to the development of national policy, we have used them freely. Although ideally we would have only used illustrative examples from the claimants' rohe, our limited ability to undertake extensive primary research has precluded that approach from being adopted.

14. Alan Grey's *Aotearoa and New Zealand: A Historical Geography* (Christchurch, Canterbury University Press, 1994) is perhaps the closest thing to such a history. The Oxford University Press will this year publish an environmental history of New Zealand, co-authored by various geographers and historians.

1.5 Report structure

The organisation and structure of this report is by and large that which was proposed in the scoping report prepared by Richard Moorsom and Ben White. The structure reflects a combination of narrative and topical approaches. The narrative chapters are primarily concerned with establishing contexts – legal, cultural and ecological – in which to view and understand the later topical chapters that deal with such things as inland waterways, forests, and acclimatisation. Within the topical chapters we consider Crown policy, action, and legislation, as well as Maori responses to these, in an integrated manner because of the clear interconnections that exist between these phenomena. This methodology is premised on the idea that legislation does not develop in a vacuum, but in response to the relative success or failure of policies on the ground.

The first substantive chapter of the report (**chapter 2**) is a historical survey of ecological change in New Zealand. In writing an environmental history such as this, we have considered it necessary to establish the broad phases and character of environmental change that transpired in New Zealand in order to better understand Crown actions in respect of indigenous flora and fauna and the environment more generally. An important theme in this chapter is the contrasting impact of different modes of pastoralism. Other themes include the extent to which landscapes were changed in response to market forces and individual desires. For Pakeha there was an elision of these interests, such as bucolic ideals, demand for agricultural products, and cheap land for settlement.

The next three chapters deal with the values, cultural traditions and legal systems in which Maori, Pakeha and Crown agents were grounded. These contextual chapters undertake a cursory exploration of what can be viewed as the essential differences between Maori and Pakeha views and conceptions of environment in 1840. The chapters consider Maori customary law and practice, Western views of nature, and English common law. They are necessarily schematic and based entirely upon secondary sources.

Chapter 3, authored by Cathy Marr, is a survey of the nature of pre-contact Maori rights and practices in relation to flora and fauna. In attempting such a project as this we thought it important to at least adduce some broad principles about Maori customary rights in order to facilitate a better understanding of the possible significance and impacts of Crown actions and policies that affected flora and fauna. But in attempting such

an account, we are acutely aware of some very real problems and limitations. Above all else is the fact that as Pakeha with no ability to read or speak Maori, we are confined to English language sources. Also it is very hard to try and understand customary law and rights without forcing them into paradigms that exist within one's own culture. A classic example of this is the tendency to conceive of customary Maori rights to natural resources in terms of Western proprietary rights. The study aims to establish, to the extent that it is possible to do so from a present-day perspective and using English-language sources, how such rights were conceived and exercised at 1840.

A similar rationale lies behind Robin Hodge's chapter on international perspectives and doctrines (**chapter 4**). This chapter presents what, by the end of the eighteenth century, can be seen as the dominant Western views of nature. As such it explores the religious, economic, political and scientific traditions that informed Western views of the natural world. The chapter also undertakes an examination of the history of the environmental effects wrought by British colonialism elsewhere in the world. We have considered it important to locate the New Zealand experience in this context to gain some sense of the extent to which colonial officials may have developed an awareness of the environmental consequences of Crown policies and actions in other British colonies.

Chapter 5, written by Ben White, presents a broad summary of the system of law that was imposed after Britain's acquisition of sovereignty in New Zealand. It describes aspects of English common law and statute law as they applied to such things as wildlife, fisheries, use rights to common property resources, and game on private lands. The chapter also examines the extent to which escaping what some historians have seen as the oppressive machinations of common law and statute law as it applied to such things as fisheries and game, was a motive for Britons to immigrate to New Zealand. This raises the important question as to whether law makers in New Zealand consciously sought to modify common law in establishing regulatory regimes in relation to flora and fauna.

As discussed above, a theme that runs through this report is that the history of Crown action in respect of flora and fauna is inextricably tied up with its wider objectives in terms of land. This principle has given rise to chapters 6, 7 and 8 that deal with general land policy, Crown purchases, and the Native Land Court respectively. The interrelationship between the Government's objectives in terms of land and settlement, and its ac-

tions affecting flora and fauna, demands that we present a summary of the Crown's general land policies. This forms the subject of **chapter 6**, written by Cathy Marr. The chapter sketches a broad chronology of the Crown's land policies throughout the nineteenth century and pays particular attention to policy on waste land, reserves, assisted immigration and settlement, public works, and the promotion of agricultural land uses.

Given the nexus between the ownership of land and access to flora and fauna upon it, the Crown's acquisition of Maori land was perhaps the single biggest determinant in Maori losing access to and control over their flora and fauna. We have therefore devoted a chapter to examining nineteenth-century land transactions in terms of how rights to flora and fauna were dealt with. This chapter, (**chapter 7**) authored by Ben White, looks at the respective parties' understandings of both pre-Treaty and Crown purchases. Crucial questions revolve around what the purchase deeds actually stated in relation to flora and fauna. In connection with this, a systematic analysis of Crown purchase deeds has been undertaken in order to establish what references, if any, were made to biota and other natural resources in purchase deeds. The third chapter dealing with land-related issues is Cathy Marr's study of the Native Land Court (**chapter 8**). This chapter looks at how the land court process facilitated the alienation of Maori land and the extent to which it may have undermined Maori authority over indigenous flora and fauna. It also considers how the court dealt with rights to flora and fauna.

Maori participation in, and opposition to habitat change is the subject of **Chapter 9**. The key objective underpinning this chapter is to establish the nature of Maori agency in effecting habitat change in the period 1840 to 1912. It seeks to document instances where Maori engaged in such practices as forest clearance and swamp drainage in order to undertake European-style agriculture, as well as where they voiced opposition to such environmental transformations. This chapter has been written by Cathy Marr.

The next chapter (**Chapter 10**) is about the introduction and management of exotic species and the protection of indigenous fauna. It charts the history of acclimatisation in New Zealand, and the closely related history of New Zealand's animal protection policy that developed in the 1860s as a consequence of the perceived need to afford protection to introduced species. The chapter then proceeds to examine how around the

beginning of the twentieth century, animals' protection policy evolved to afford protection to some indigenous species. Within the chapter, attention is also paid to some of the ideologies that underpinned acclimatisation – particularly the idea of creating a 'Britain of the South' in New Zealand – and the genesis of a movement to protect and preserve indigenous flora and fauna.

Chapter 11 examines the history of scenery preservation and protected areas – that is, discrete reserves within which flora and fauna received some measure of protection. This chapter has been written by Robin Hodge. The development of New Zealand's first offshore island bird sanctuaries, national parks, and scenic reserves are chronicled. In charting the history of such protected areas in New Zealand, careful attention is paid to the intellectual and cultural attitudes that gave rise to them. In particular, the history of the two national parks established before 1912 – Tongariro and Egmont – is covered in some detail. And the history of Little Barrier Island is examined as an example of an early offshore island bird sanctuary, part of which was compulsorily acquired from its Ngati Wai owners.

The Crown's involvement in indigenous forest management is the subject of **chapter 12**, authored by Robin Hodge. The chapter also looks at Crown actions in relation to the gum and flax industries. It begins with recounting how timber reserves were established in the 1840s and 1850s – one of the earliest environmental interventions by the State in New Zealand. However, in terms of Crown policy in nineteenth-century New Zealand, forestry and forest management was always secondary to settlement. In this regard the chapter pays some attention to the cultural imperatives that meant the clearance of forest was about much more than just bringing land into agricultural production. As well as charting the legislative history of forestry and forest management in New Zealand, the chapter also describes the institutional history of forestry. Beginning with the appointment of a Conservator of Forests in 1876, it proceeds to detail the subsequent establishment of the Forestry Branch of the Colonial Lands Office and later the Forestry Department within the Department of Lands and Survey.

Chapter 13, written by Cathy Marr, details the history of Crown actions in relation to lakes, rivers and swamps. In terms of looking at how flora and fauna was affected by these actions, the author of this chapter has adopted a habitat-focussed approach. Consequently the emphasis is

on freshwater environments that supported flora and fauna such as fish, birds, rushes, and flaxes; and the effect that Crown actions had upon this biota. A major theme of the chapter is the drainage of wetlands and lakes – works that were often enabled by legislation with the object of bringing land in to agricultural production. As well as describing the legislation that enabled waterways to be lowered, the history of conflicts that resulted from the Government or settlers interfering with waterways of value to Maori are considered. Although contests for the ownership of particular waterways are not a primary concern of the chapter, they are covered where they had implications for Maori access to indigenous flora and fauna. In this regard the history of the conflicts for the control and ownership of the Wairarapa and Rotorua lakes, and the Whanganui River, are examined.

The final substantive chapter of the report is **chapter 14**, written by Ben White. This chapter looks at petitions from Maori to Parliament that concerned rights to indigenous flora and fauna. It comprises a systematic survey and analysis of all such petitions received by Parliament between 1840 and 1912, and provides additional evidence on Maori views of Crown actions in relation to flora and fauna, to that contained in the main thematic chapters.

The report's conclusions are contained in **chapter 15**. It is made up of sections that revisit the conclusions drawn in each of the substantive chapters. A final section draws together the findings of the study as a whole and seeks to integrate the narrative and topical arguments developed throughout the report. All of the report's three authors contributed the sections on their substantive chapters, and Ben White wrote the final integrating section.