THE PLANNING FRAMEWORK FOR MAORI LAND

A thesis presented in partial fulfilment of the requirements for the degree of Master of Resource and Environmental Planning at Massey University.

Janet Rhona Stephenson

March 2000

Abstract

The thesis examines the relationship between Maori land and the resource management planning framework within New Zealand, within an analytical framework of the Treaty of Waitangi and contemporary indigenous collaborative management regimes.

Maori land is a unique class of land in New Zealand, representing the remains of tribal lands still in Maori ownership. Maori traditional forms of resource management were integrally linked with tenure and the allocation of use-rights, but legislation and practices introduced following the signing of the Treaty of Waitangi transformed the tenure system and gave no recognition to Maori resource management practices. Maori land and Maori needs were virtually ignored by planning legislation while the Maori Land Court carried out a central role in planning decisions relating to Maori land. From 1977, planning law gave some recognition of Maori values, which over time influenced the development of district scheme provisions relating to the use of Maori land. The 1991 Resource Management Act gave Maori issues greater prominence, but when translated into district plan provisions failed to give Maori any significant role in resource management on their own land. Contemporary Maori concerns about the planning framework include its lack of recognition of Maori as a legitimate resource authority, the lack of incorporation of the principles of the Treaty of Waitangi, and the failure to give any real effect to the concept of rangatiratanga. The Waitangi Tribunal has also identified shortcomings of the current planning framework in terms of the principles of the Treaty. These findings, together with current trends such as the development of iwi/hapu management plans; the growth of parallel services for Maori in education and health; and the increasing international recognition of indigenous land and resource management rights, challenge the current planning regime as it relates to Maori land.

Contemporary planning needs to recognise its basis in a dual heritage by reshaping its institutions and laws so as to accommodate the co-existence of an indigenous planning system. It is suggested that this be by way of collaborative management agreements whereby resource management planning responsibilities for Maori land are largely devolved to iwi within a framework delineating national requirements for sustainable management.

Acknowledgements

There are many people to thank for their assistance and support during the research and writing of this thesis. Firstly, my thanks to Te Runanga o Te Rarawa who supported the project, and particularly to Gloria Herbert for her wisdom and tautoko. My thanks to Peter Horsley, my supervisor, for believing I could tackle this huge topic and offering support throughout. A special thanks to Judy Reinken for her very helpful and timely comments as I was completing the thesis.

I would like to acknowledge the many people who gave up their time to share their knowledge and experience with me, including Tina Ngatai, Pita Paraone, Daran Ponter, Hamish Rennie, Robert McClean, Peter Nuttall, John Laurie, Hirini Matunga, Bridget Allan, Bronwyn Gibbs, Greg Phillips, Klaus Bosselmann and the team at Surveyors North. Many thanks also to the Far North District Council for allowing me access to their files.

I would finally like to pay tribute to my family – Guy, Erin and Bron – who supported me all the way, took on all those extra jobs and put up with my occasional abstracted responses to family life.

CONTENTS

		Page No:
Acknowledgements		iii
Contents		iv
Figures and tables		v
Introduction		1
Chapter 1	The characteristics of Maori land	6
Chapter 2	The Treaty of Waitangi	28
Chapter 3	Theoretical context	46
Chapter 4	Maori customary tenure and resource management practices	57
Chapter 5	Planning-related law affecting Maori land 1840-1985	76
Chapter 6	Resource management law reform and the Resource Management Act 1991	93
Chapter 7	The planning role of Te Ture Whenua Maori Act 1993	120
Chapter 8	District Plan provisions	140
Chapter 9	Contemporary Maori approaches to planning	172
Chapter 10	International trends	188
Chapter 11	Conclusions	209
Bibliography		230

FIGURES

		Page No:
Fig 1:	Geographic Distribution of Maori Land 1996	7
Fig 2:	Maori land compared to total land area of New Zealand	8
Fig 3:	Maori land 1840 – 1996	13
Fig 4:	Maori land use capability 1996	20
Fig 5:	Comparative areas of Maori land, Crown conservation land and other land.	24
Fig 6:	Relative proportion of land in different tenures in indigenous forest	107

TABLES

Table 1:	Area of Maori Land by Maori Land District 1996	6
Table 2:	Maori land Use Capability 1996	20
Table 3:	Levels of Collaborative Management	56
Table 4:	Types of District Scheme provisions for Maori land use	151
Table 5:	Comparison of District Scheme rules for multiple housing	151
Table 6:	District Plan provisions for Maori land use	155
Table 7:	Objectives, policies and methods relating to rangatiratanga and kaitiakitanga	164
Table 8:	Current planning framework for different classes of land	221
Table 9:	Potential future planning framework for Maori land	223

INTRODUCTION

This thesis sets out to examine the relationship between Maori land and the resource management planning framework within New Zealand.

Maori land is a unique class of land, representing the remains of Maori tribal lands still in Maori ownership. The thesis begins by describing the physical, socio-cultural and tenure characteristics of Maori land which differentiate it from general land. These include the genealogical and spiritual connections between Maori and their land; the limited property rights of Maori land; the multiple ownership structure; the poorer quality of the land; its high biodiversity values; and the range of obstacles which inhibit Maori aspirations for the use of their land. These characteristics have given rise to a number of current issues and problems relating to the use and development of Maori land.

The Treaty of Waitangi is the foundation of any study of Maori land and planning. Chapter 2 explores the implications of the Treaty and its principles in light of modern findings of the Court of Appeal, Waitangi Tribunal and contemporary commentators. Critical comments by the Tribunal regarding the Resources Management Act suggest a number of shortcomings in terms of the Treaty. The central issue for planning is the application of Article 2 of the Treaty – which promised rangatiratanga would be retained over Maori lands – in relation to the sovereignty granted to the Crown in Article 1.

While the roots of the thesis lie in the Treaty, it has also been nourished by a number of academic writers in the field of planning, and in the interstices of planning and indigenous self-management. These theoretical approaches and their application to the planning framework for Maori land are discussed in Chapter 3.

Maori customary methods of environmental management were exercised by iwi and hapu prior to European settlement, but have been poorly recognised in planning practice to date. By the time of European contact, Maori had generally developed a fine-tuned

approach to management of the environment to ensure the ongoing availability of food and other resources. Customary land tenure was a pivotal aspect of the resource management system, and its replacement with contemporary Maori land tenure changed the nature of the relationship between Maori and resources. Traditional Maori cultural and spiritual attitudes towards the environment, systems of land tenure and customary methods of resource management are outlined in Chapter 4. An appreciation of these methods is relevant in light of Maori calls for returning to traditional practices of resource management.

Following the signing of the Treaty of Waitangi in 1840, European law began to alter both Maori land tenure and its administration, largely ignoring Maori values and traditional methods of resource management. Early planning-type legislation was concerned with the orderly development of townships and services for settlers, and at times specifically targeted Maori land for these purposes. From the first Town Planning Act in 1926 until 1977, Maori land and Maori needs were virtually ignored by planning legislation, while the Maori Land Court had a central role in planning-type decisions relating to Maori land. From 1977, planning legislation gave some recognition of Maori values, which over time influenced the development of district scheme provisions relating to the use of Maori land. However Maori had increasingly strong disquiet about the planning framework including its lack of recognition of Maori values and the imposition of a level of control which some considered was inconsistent with the Treaty.

Maori were given an opportunity to express their concerns during the resource management law review during the 1980s. As described in Chapter 6, some of the issues raised by Maori were provided for to a limited extent in the Resource Management Act 1991 (RMA). Provisions of particular relevance to Maori land included certain sections within the principles of the RMA, the exemption of Maori land from most subdivision controls, the reference in the Act to iwi management plans, and the potential for transfers of powers to iwi authorities. However the apparent promise of these provisions has not been borne out by any significant changes in planning for Maori land except in the requirement to 'consult' at various junctures.

The Maori land planning framework is made more complex by the role of the Maori Land Court, which controls certain aspects of the use and development of Maori land under Te Ture Whenua Maori Act 1993 (TTWMA). Chapter 7 describes the Court's quasi-planning functions and compares the purpose and principles of TTWMA to those of the RMA.

Local planning documents drawn up by territorial local authorities have the most direct impact on the use and development of Maori land. Chapter 8 examines provisions relating to the use of Maori land in district schemes developed under the Town and Country Planning Act 1977, and compares these to provisions developed under the Resource Management Act 1991. District plans are also surveyed to assess how they provide for the practical expression of rangatiratanga and kaitiakitanga over Maori land.

Chapter 9 assesses contemporary Maori views on a proposed district plan and analyses the level of involvement in resource planning sought by Maori submitters. Using a theoretical framework developed by Berkes, Maori aspirations were compared to the level of involvement provided for in district plans. The results show a significant disparity between the level of involvement sought by Maori and the level provided in District Plans. Maori consider that the practical expression of *rangatiratanga* and *kaitiakitanga* mean that a greater degree of self-determination is appropriate for Maori land.

This suggestion is not as radical as it sounds. Modern international law acknowledges the special role of indigenous peoples in achieving sustainable development, and encourages a degree of self-determination, particularly in areas inhabited by indigenous peoples. There are numerous examples of indigenous control of resource management planning on indigenous lands. Co-operative resource management agreements with government agencies for both indigenous lands and state conservation lands are also increasingly common. Chapter 10 examines current international trends in indigenous rights, international environmental law and indigenous resource management and their implications for the New Zealand context.

Solutions to the issues raised require changes to the current planning framework. Such changes could occur within the current legislative structure, or may involve changes in

law and practice. Within the current structure of the RMA there is the potential for a more significant role for Maori in resource management planning aided by a number of extra-legal actions and projects. However these would be of limited effect, and it is proposed that ultimately changes to both the RMA and TTWMA may be required to give better recognition of the Treaty of Waitangi and to provide for greater control by tangata whenua of indigenous resources on indigenous lands.

Research methods

The main information sources for this thesis have been from secondary research. The initial approach was an extensive examination of secondary information sources to determine the extent of existing research and writing on the planning framework for Maori land. The results were disappointing. There appears to have been very little research focusing on Maori land and the planning framework, apart from a few references by current academic commentators (such as Matunga 1997, Tomas 1994), brief comments by those examining Treaty issues (Crosson 1992, Marr 1997) and some work relating to the Resource Management Law Reform process in the 1980s. This left the field wide open. The question then was whether to carry out in-depth research on a single aspect of the planning framework for Maori land, or whether to attempt to cover a wider range of the issues involved but in less depth. Having chosen the latter approach, it is hoped that the value of the thesis will lie in highlighting areas for future research, and in suggesting some possible approaches for future development by others.

Following the initial literature search, an analysis was carried out of historical and contemporary planning-related legislation. From here, the broad issues became apparent and research then focused on the relevant literature, ranging from early accounts of Maori resource management techniques to recent developments in international environmental law.

Primary research was carried out using methods which are compatible with the key assumptions of qualitative research. Sarantakos (1993: 45) proposes that qualitative research tries to approach reality without pre-conceived ideas and pre-structured models and patterns, studies a small number of respondents, employs no random sampling

techniques, uses no quantitative measures or variables, and employs research methods that produce descriptive data. This form of research was used in two main areas.

Firstly, semi-structured interviews were carried out with a small number of specialist informants where contemporary comment or up-to-date information was required. The individuals interviewed were chosen because of their known experience and knowledge.

Secondly, analysis was undertaken of district plan provisions and Maori submissions to a district plan. Random sampling techniques were not used. In the former a selection of district plans was chosen according to their availability and whether the district had significant amounts of Maori land. Given the 'overview' approach of this thesis, it was considered that it was more important to identify themes and issues than to make numerically precise conclusions based on representative samples. In the latter, a single proposed district plan was chosen because it was known that the Far North area had a high Maori population, and that a submissions had been received from a wide range of Maori submitters. Again, although not representative of Maori views as a whole, the findings are useful in indicating a range of views held by Maori towards the planning process.

CHAPTER 1

THE CHARACTERISTICS OF MAORI LAND

Maori land is a significant resource in the overall context of New Zealand's land use planning. It occupies 6.1 per cent of New Zealand's land area, totalling 1,515,071 hectares[1] of New Zealand's 24.8 million hectares.

	Total land area per Maori Land District (ha)	Maori land area (ha)	Percentage of Maori land by Maori Land District
Tai Tokerau	1,592,842	139,873	8.76 %
Waikato-Maniapoto	2,019,874	143,388	7.10 %
Waiariki	1,780,502	426,595	23.96 %
Tairawhiti	1,075,041	310,631	28.89 %
Takitimu	1,780,706	88,608	4.98 %
Aotea	1,180,967	334,207	28.30 %
Te Wai Pounamu	15,370,489	71,769	0.47 %
TOTAL	24,800,421	1,515,071	6.1 %

Table 1: Area of Maori Land by Maori Land District 1996

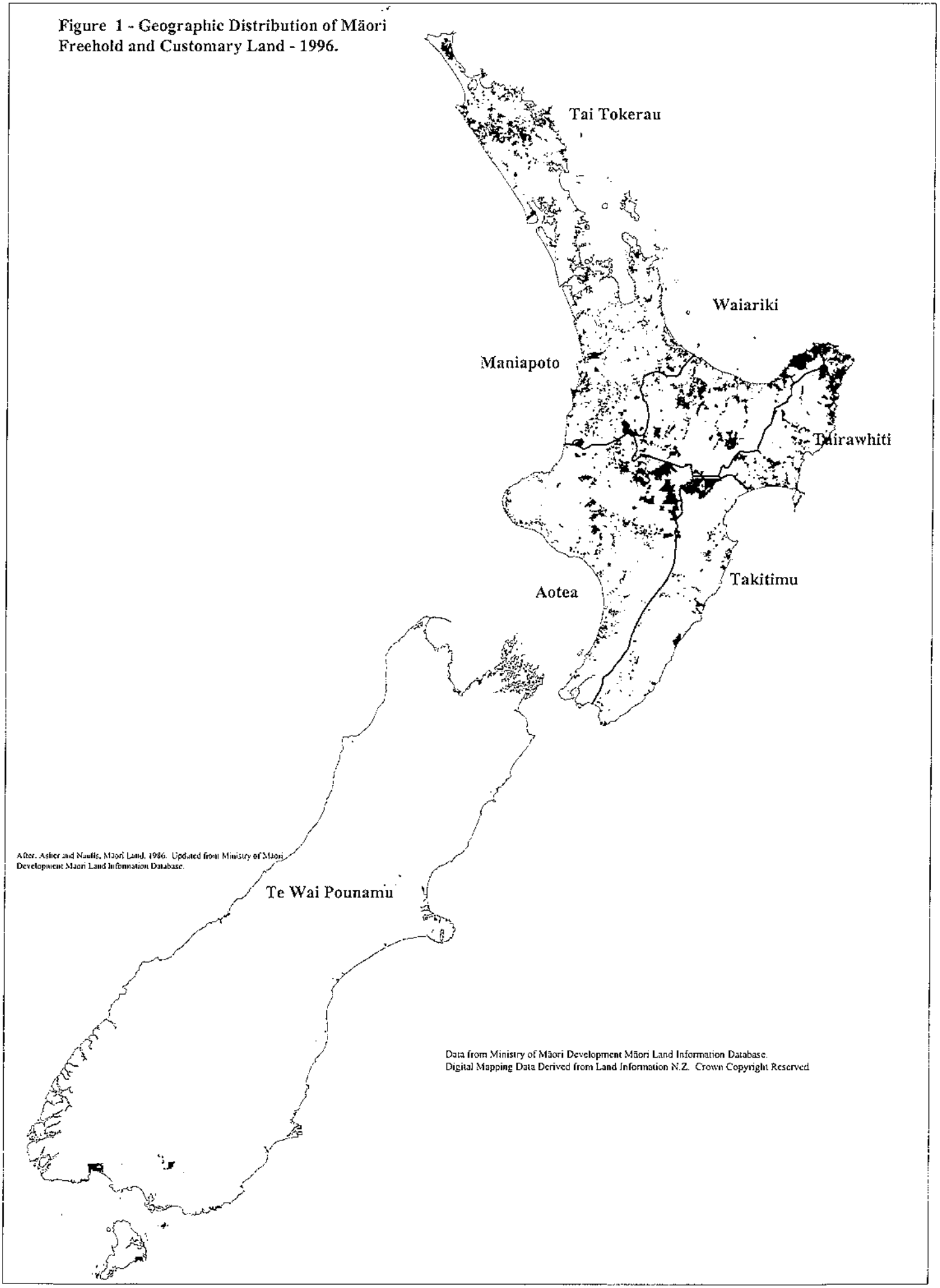
(Source: Te Puni Kokiri Land Information Database 2000)

Maori landholdings in the North Island are significantly greater than those in the South Island: Maori land makes up 15.3 per cent of the North Island but only 0.47 per cent of the South Island[2]. The North Island contains over 95 per cent of all Maori land (1,443,302 hectares) while the South Island has only 5 per cent (71,769 hectares). Within the North Island, Maori landholdings are concentrated around Northland, East Cape, Hawkes Bay,

[1] 1,515,071 ha in 1996 (Te Puni Kokiri website 2 Feb 1999 www.maoriland.govt.nz). This figure does not include unsurveyed Maori land blocks, so the true figure may be closer to 1.7 million ha (D. Ponter, Te Puni Kokiri, pers. comm.)

[2] Te Puni Kokiri Land Information Database 2000

Figure 1 - Geographic Distribution of Māori Freehold and Customary Land - 1996.



After: Asher and Naulls, Māori Land, 1986. Updated from Ministry of Māori Development Māori Land Information Database.

Data from Ministry of Māori Development Māori Land Information Database.
Digital Mapping Data Derived from Land Information N.Z. Crown Copyright Reserved

Bay of Plenty, Taupo and Taranaki, although scattered Maori landholdings lie throughout the island (Figure 1). As can be seen in Table 1 below, in some districts Maori land makes up a relatively large portion – for example in the Tairawhiti and Aotea Maori Land Districts[3], over one quarter of the land area is Maori land.

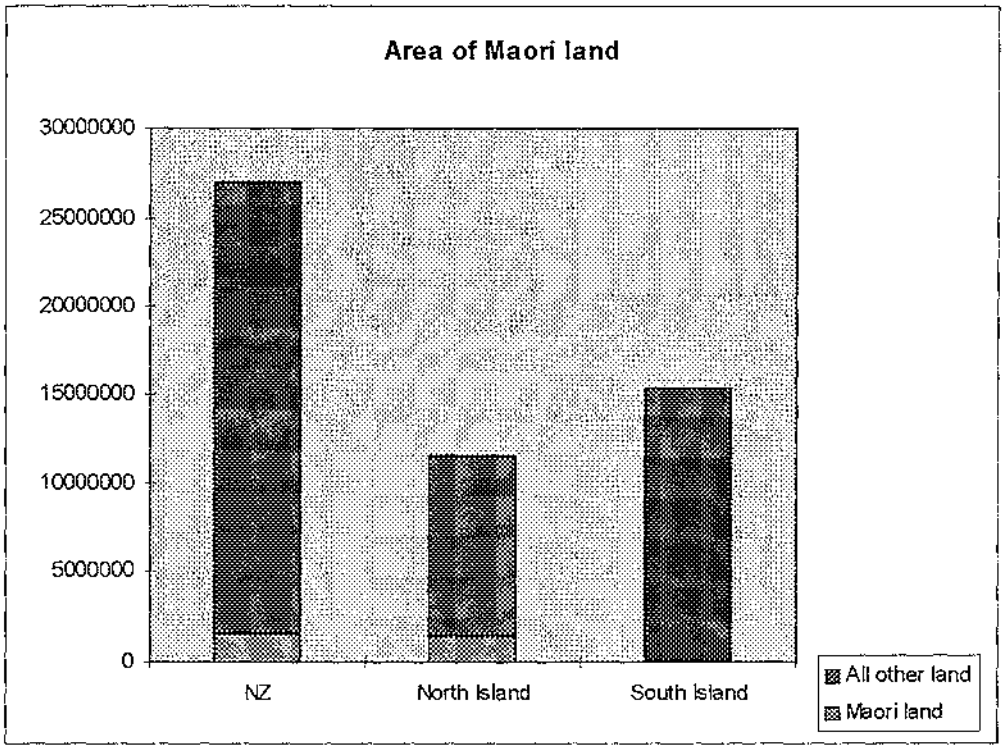


Figure 2: Maori land compared to total land area
(Source: Te Puni Kokiri 1999)

The legal definition of Maori land

Maori land is largely land that has never been alienated from Maori ownership and is still held in multiple ownership, predominantly by Maori (Royal Commission on the Maori Land Courts 1980:2). The term "Maori land" encompasses all Maori freehold land, Maori customary land, and Crown land reserved for Maori. Of these categories, the vast majority is held as Maori freehold land.

All Maori land comes under the jurisdiction of Te Ture Whenua Maori (Maori Land) Act 1993 (TTWMA) which divides all land in New Zealand into six statuses (s129 TTWMA):

[3] See Figure 1 for location of Maori Land Districts.

- Maori customary land;
- Maori freehold land;
- general land;
- general land owned by Maori;
- Crown land;
- Crown land reserved for Maori.

A brief description of these forms of tenure is necessary to identify the unique characteristics of Maori land and to also provide a background to a later examination of the historical changes in tenure from Maori customary land to the current patterns of ownership.

Customary land

All land in New Zealand was originally Maori customary land. The forms of tenure and property rights traditionally associated with customary land will be discussed in Chapter 4; suffice to say at this point that the land was 'owned' communally (although the meaning of ownership did not coincide with later European concepts).

Following the signing of the Treaty of Waitangi in 1840, Maori customary land became available for sale to the Crown if the owners wished to sell. A major disadvantage as far as the Crown was concerned was that such land had neither surveyed boundaries nor a formal list of owners who could agree to sale of the land. This was resolved by the establishment of the Native Land Court in 1865, to which the Crown could make an application for a determination of the owners. The Court could then issue a certificate changing the status of the land to Maori freehold land and listing the owners who had power to sell (Bennion 1997). By the early 1900s the vast majority of customary land had changed to Maori freehold land and thence to Crown and general land, although there were still some large customary blocks in the Tokaanu area around 1917 and the East Cape in 1920 (Bennion 1997).

Today, customary land is that still held by Maori in accordance with tikanga Maori, where the ownership of the land has not been defined by the Maori Land Court (Feist et

al 1997). A very small but unknown quantity remains. A submission to the 1980 Royal Commission on the Maori Land Courts claimed that if any customary land still remained it would by and large consist of 'rocky, barren islands and some tapu land excluded from Crown Grants' (Asher and Naulls 1987). In Northland, known examples are the Cavalli Islands and a few very small areas of land in Hokianga[4].

Maori freehold land

The vast majority of Maori land today is held as Maori freehold land. This status has been created as a result of Maori Land Court or the earlier Native Land Court determinations of ownership and interests in an area of customary land, and declaring it to be Maori freehold land. Maori freehold land does not just consist of dry land – in some instances it can include the beds of lakes and land below Mean High Water Spring.

Multiple ownership is a feature of Maori freehold land. Shares in Maori land were usually granted equally to the owners originally established by the Court at the time the title was created, but became fragmented as generation succeeded generation. The system devised by the Crown required that shareholdings descend bilaterally (ie equally from paternal and maternal lineages to all of their children) unless specified otherwise in a will. As a result most Maori land has multiple owners, at times numbering into the thousands for a single block (Royal Commission on the Maori Land Courts 1980:31).

General land

General land is defined in TTWMA as land (other than Maori freehold land and general land owned by Maori) that has been alienated from the Crown in fee simple.

The majority of land in New Zealand is held as general land. General land is almost exclusively registered in the Land Transfer Office, and the ownership and other details are recorded in Certificates of Title.

General land owned by Maori

[4] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.

If General land is owned by more than four persons of whom a majority are Maori, it has the special status under Te Ture Whenua Maori Act of "General land owned by Maori" (s129 (2)(d) TTWMA). Title to this land will be recorded under the land transfer system.

General land owned by Maori is not Maori land, but it is relatively simple to revert its status. The Maori Land Court has the jurisdiction to change general land back to Maori freehold land upon request, where the land is beneficially owned by one or more Maori and "*it is desirable that the land become Maori freehold land having regard to this history of the land, and to the identity of the owners and their personal association with the land*" (s133(3) TTWMA).

An increasing trend noted in the Taitokerau (Northland) Maori Land Court is for General land owned by Maori to be converted back to Maori land, particularly where its general land status was incurred through some legislative means such as the 1967 Maori Affairs Amendment Act, which automatically changed all land held by 4 owners or less from Maori land to general land[5]. (This provision has since been repealed). The fact that Maori land totalled some 4.9 per cent of all landholdings in 1993, and now totals 5.63 per cent. may be at least partially indicative of the amount of general land changing back to Maori land.

Crown Land

Crown land (as defined in s 129(2)(e) TTWMA) is land which has not been alienated from the Crown for a subsisting estate in fee simple, which is not otherwise Maori freehold land or general land owned by Maori.

The majority of Crown land today is held for conservation purposes, and totals around one-third of New Zealand's land area (Te Puni Kokiri 1998:10).

Crown land reserved for Maori

This is land (other than Maori customary land) that has not been alienated from the Crown in fee simple but is set aside or reserved for the use or benefit of Maori (s129(2)(f) TTWMA). Today, relatively small areas exist but at the time of large-scale nineteenth-century land purchases, significant areas of land were reserved for Maori use, or reserves were created if the Crown believed that tribes had been left virtually landless. Other land was reserved following the confiscations after the land wars of the 1860s, and again when the Crown established townships on Maori land such as at Tokaanu, Te Kuiti and Rotorua. Vested lands resulted from various government investigations into Maori land at the turn of the century, when land considered unusable or excessive to a tribe's needs was vested in a board for leasing to settlers.

All reserved and vested lands were administered by the Crown (and later the Maori Trustee) in trust for the Maori owners. The amount of Crown land reserved for Maori has diminished rapidly in the past 50 years. In 1960 there were 117,005 ha of reserved and vested lands. A commission of inquiry into Maori Reserved Land in 1974-5 resulted in special legislation allowing most of this land to be vested in Maori incorporations and trusts as Maori freehold land. By 1977 the area had dropped to 27,600 ha (Asher and Naulls 1987). More recent figures were not available.

Historical loss of Maori land

The relatively small proportion of the New Zealand's land area that is still Maori land is indicative of its rapid alienation since the signing of the Treaty of Waitangi. Alienation boomed between 1840 and 1920, then subsequently tailed off until its virtual halt in the 1980s. Sales of land were a large cause of loss, but confiscations, the taking of land for public works and rating sales were also significant factors. Within 100 years from 1840, Maori ownership of New Zealand dropped from close to 100 per cent to 6 per cent. The rapid change in tenure is shown in Figure 3.

[5] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.

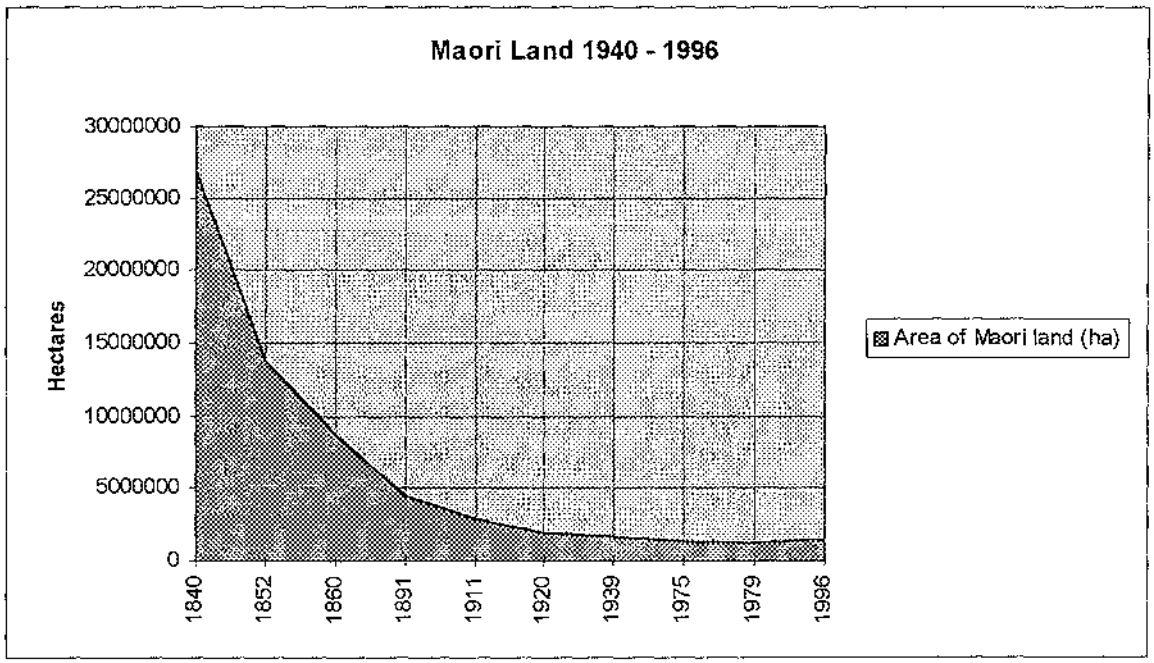


Figure 3: Maori Land 1840 - 1996

(Source: Te Puni Kokiri 1999)

Attributes of Maori land

A wide range of attributes can be identified which characterise Maori land. Some of these relate to its form of tenure and its controlling legislation; others to its geographical and physical aspects, and yet others to genealogical connections. While a few of these characteristics may be shared by other land, the overall pattern consistently relates to and characterises Maori land. These attributes are discussed briefly below, and some in greater depth in subsequent chapters.

1. Genealogy

There is in most cases a continuous genealogical link between the current owners of Maori land and their ancestors who occupied, used, and controlled these lands prior to European settlement. These ancestral links can be traced through Maori Land Court records, as shareholdings mostly pass automatically down through successive generations.

Genealogical links extend even beyond this, as shareholders can frequently trace their genealogical links to land to a founding ancestor and beyond that to the land itself (Jarman et al 1996). Extreme importance is placed by Maori on these genealogical connections, which are also closely associated with cultural and spiritual matters.

2. Cultural and spiritual concepts

The attitude of Maori towards land and its resources is a complex subject which is discussed in Chapter 4, but which it is impossible to do justice to in this thesis. Other writers (Kawharu 1977, Marsden 1989, Waitangi Tribunal reports) have covered this area in depth. Aspects include the genealogical relationship between tangata whenua and the land, its role in *mana* and *rangatiratanga*, and the functions of *kaitiaki*. While many areas of land and resources may be valued for these and other reasons, Maori land is specially treasured as the fundamental basis for tribal mana.

The use of the term 'land' is perhaps a misnomer, as in its European context this means bare land. To Maori the corresponding word '*whenua*' incorporates the life forms dependent on the earth, the earth itself, the ancestors incorporated into the whenua and the people dependent on all of these things (Pond 1997). In essence, Maori land is a *taonga tuku iho* - a treasure to be retained forever - and is the more jealously guarded because it represents such a small proportion of the original lands of the hapu or iwi.

3. Te Ture Whenua Maori Act

The defining difference between Maori land and general land is that Maori land is administered under Te Ture Whenua Maori (Maori Land) Act 1993. The Act is administered by the Maori Land Court, which has as its primary objective the retention of both Maori land and general land owned by Maori in the hands of its Maori owners, and to ensure its effective use, management and development by, or on behalf of, its owners (Maori Land Court 1996). The Court is required to administer the Act in a manner that 'facilitates and promotes the retention, use, development and control of Maori land as *taonga tuku iho* by Maori owners, their whanau, their hapu, and their descendants' (Section 2 TTMWA 1993).

The Court has extensive powers which include the control of alienation of land, Maori land partitions, roadways, occupation orders and the creation of reserves. In carrying out its functions it must ensure the protection of the rights of all owners, so in many cases must take a conservative approach towards new proposals. The Court must also approve the setting up of trusts and incorporations to manage land, and has powers to determine succession and representation.

The Court's role includes certain planning-related responsibilities. In some matters it is the sole arbiter, and in other cases consent would be required from both the Court and the territorial authority. This apparent duplication of authority over Maori land is not only confusing for Maori landowners; it also means that multiple consents may be needed for Maori land in situations where a single consent would be required for general land.

The 'planning' role of the Maori Land Court is a significant theme of this thesis and is covered in more depth in Chapter 7.

4. Barriers to alienation of land

The concept of selling Maori land is generally regarded by Maori as abhorrent - both because of the cultural and spiritual links between tangata whenua and their land, and also because of the continuing sense of loss arising from the sale and confiscations of Maori land over the past 150 years.

Legislation has now followed suit. Whereas the original Maori Land Court was established in order to facilitate the alienation of Maori land (see Chapter 4), its role now is to '*recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, promote the retention of that land in the hands of its owners, their whanau and their hapu*' (preamble to Te Ture Whenua Maori Act 1993).

The provisions of TTWMA now make it extremely difficult to alienate Maori land to persons outside of the hapu kin-group. Even if the proposed sale meets the Act's provisions, alienation can only occur following the confirmation of the Maori land Court. The Court is directed in the preamble to the Act '*to promote the retention of*

land in the hands of its owners, their whanau and their hapu'. In practice, alienation of Maori land today is almost unknown[6].

5. Barriers to changing the status of Maori land

Under Te Ture Whenua Maori Act there are now significant barriers to changing the status of Maori land to general land. To change its status, the Maori Land Court must be satisfied that the land is beneficially owned by not more than 10 persons; that the land is not subject to a trust, that the title is registered or capable of being registered under the Land Transfer Act; that the land can be managed or utilised more effectively as general land; and that the owners have had adequate opportunity to consider the proposed change of status and a sufficient proportion agree (s136 TTWMA). All these requirements must be met before the court has jurisdiction to change the status to general land, and in practice make a status change close to impossible. The Maori Appellate Court has stated: "*We go so far as to suggest that any order sought of the Court the effect of which could endanger the continued relationship with the land of whanau and hapu associated with it must be treated as being of grave concern*"[7].

Today, even if Maori freehold land succeeded in passing out of Maori ownership it would usually be necessary to seek a court order changing it to general land, otherwise it will remain classed as Maori freehold land (Feist et al 1997).

6. Multiple Ownership

Current Maori land tenure is significantly different to both customary Maori tenure and the tenure of general land.

As explained in more detail in Chapter 4, customary tenure involved communal title with rights to occupation and resource use that were closely linked with occupation. Following European settlement, lands held according to Maori custom were brought under a system as near as possible to ownership in British law through successive Native Affairs and Maori Affairs Acts and related legislation. The result was

[6] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.
[7] Re Cleave Appeal 1995/5, 22 May 1995

individualisation of title, with children succeeding to the shares of both parents upon the death of those parents. Inevitably, the numbers of owners per block mushroomed. The most detailed study was the 1965 Pritchard Report which found some 10,287 blocks had 11-100 owners; 1411 blocks had 101-1000 owners and 56 blocks had over 1000 owners (Royal Commission on the Maori Land Courts 1980). Today, a generation later, most shares will have passed to the children of previous shareholders and the numbers per block will have greatly increased yet again. The Royal Commission noted that the repercussions of this fragmentation for the Maori Land Courts included difficulties in keeping ownership lists up to date; calling meetings of owners, and in even getting all owners into one place to discuss land use or land management matters. Problems for the owners themselves include communicating with other owners (or even knowing who they are), and in reaching agreement particularly between those who live on the land and in the vicinity and others who live elsewhere[8]. The situation can only get worse. A recent report to Cabinet noted that the number of Maori landowners was increasing by an estimated 185,000 per year (Berry 1998).

The imposed system of multiple ownership therefore creates enormous difficulties in administration and management of Maori land. This can be compared to general land tenure where land is predominantly held in sole, partnership or company ownership and has no comparable legislation or court controlling its inheritance, management and ownership structure, or preventing its sale on the open market.

7. Maori land titles and records

Most Maori land titles are held and managed by the Maori Land Court under a different system to general land. The system of records has been described as a 'cumbersome, inefficient system ... which puts Maori people in their land dealings at a considerable disadvantage compared with Europeans' (Royal Commission on the Maori Land Courts 1980: 38).

General land is held under a completely different land title system, introduced by the1879 Land Transfer Act. The principal features of this 'Torrens' system are the registration of title in a public records system and the guarantee of that title by the State.

[8] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.

All general land titles are registered with the Land Transfer Office and a Certificate of Title is granted to the registered owner. The Certificate of Title is the legal core of the system - it describes who holds or has interests in the land, gives the exact boundaries of the land and notes any encumbrances such as mortgages or easements. The owner of the land is recorded as having a legal interest in the land specified on the title. Virtually all privately owned land in New Zealand is registered in the Land Transfer Office (Asher and Naulls 1987).

Most Maori land, however, is not registered in the Land Transfer Office – an estimate for Northland is that 80 per cent of Maori land there is not registered[9]. For such land, title cannot be guaranteed and frequently there has been no full survey. Maori land legislation has always required that new titles be registered with the Land Transfer Office following a court order for a partition or title determination, and that a Certificate of Title be issued. However in practice this has occurred only very infrequently due to the costs involved in the survey required by the LTO, and in Land Transfer registration fees. Additionally, the LTO would not accept registration of land where it had more than ten owners (Asher and Naulls 1987). The result is that in 1980 some 29 per cent of Maori land titles were unsurveyed (Royal Commission on the Maori Land Courts 1980). That figure is unlikely to have changed significantly[10]

Today, only approximately 10 per cent of Maori land blocks have a certificate of title[11]. Most Maori owners therefore do not have guaranteed title under the New Zealand land transfer system, which severely disadvantages them in seeking loan finance.

The Maori Land Court does provide a means of recording titles and lists of owners through its record system. However this is not the same as a certificate of title:

> *It has been convenient to summarise those orders in what are called "Title Binders" but they are administrative things only with no legal significance in themselves, and they are not meant to be substitutes for Land Transfer titles* (Durie cited in Asher and Naulls 1987: 61).

---

[9] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.
[10] Ibid.
[11] Ibid.

Additionally, the Court system has historically been poorly funded, resulting in a cumbersome manual system of record-keeping (currently being partially computerised) and an inability to keep up to date with successors to Maori land[12].

Attempts have been made to improve the situation, such as a joint project between the Maori Land Court and District Land Registrar in 1992-3, and a current computerisation of ownership schedules (1998-99). However the quality of the information systems still fall well below that of general titles, and it is unlikely that Maori land titles will be registered in the near future (a recent cost estimate to register all Maori land titles was $3.5 million).[13]

Other features of Maori land

In addition to its distinguishing attributes described above, there are a number of other characteristics of Maori land which are relevant to any consideration of planning issues.

1. Land use capability

Maori land has poorer soils and less arable land than average land in New Zealand. Figure 4 and Table 2 below provide an indication of the quality of Maori for agricultural purposes using Land Use Capability classes[14]. Maori land is under-represented in the higher classes 1-3, and over-represented in the lower classes.

[12] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.
[13] Ibid.
[14] Te Puni Kokiri website 2 Feb 1999 www.maoriland.govt.nz

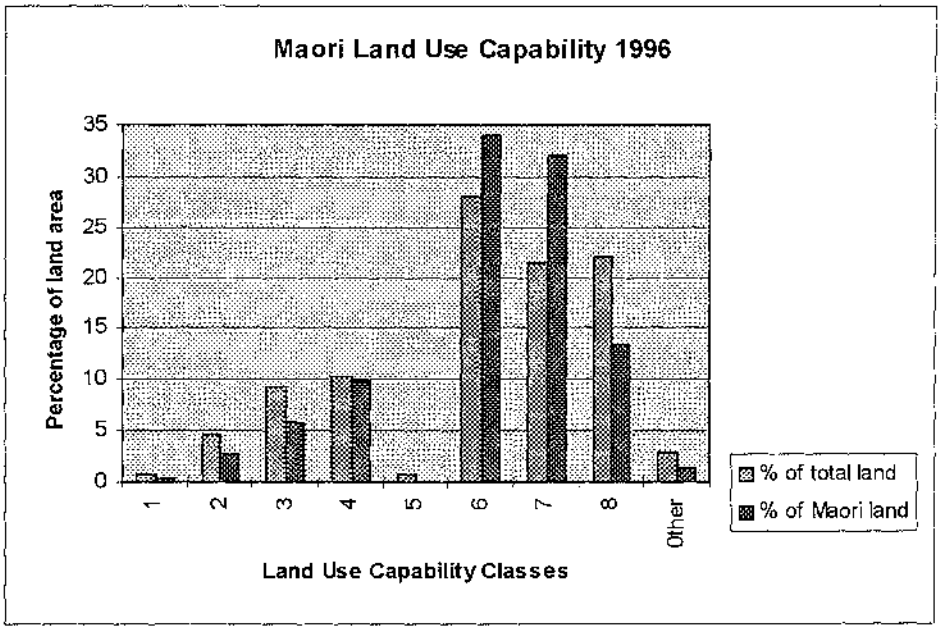


Figure 4: Maori land Use Capability 1996
(Source: Te Puni Kokiri 1999)

Maori land's comparative over-representation in the poorer land classes would be even more severe if Crown land managed for conservation purposes was omitted from the total figures for New Zealand, as the majority of conservation land would be in the poorer classes, particularly the extensive holdings in the Southern Alps and Fiordland. Unfortunately the figures for land use capability for Crown conservation lands were not available so this comparison could not be made.

Land use capability class	% of total land	% of Maori land	Description of Land Use Capability
1	0.71	0.4	Most versatile multiple-use land - virtually no limitations to arable use
2	4.55	2.69	Good land with slight limitations to arable use
3	9.22	5.75	Moderate limitations to arable use restricting crops able to be grown
4	10.31	9.81	Severe limitations to arable use. More suited to pastoral and forestry
5	0.79	0.038	Unsuitable for cropping. Suitable for pastoral or forestry
6	27.98	34.04	Non-arable land. Moderate limitations and hazards when under a perennial vegetation cover
7	21.45	32.19	With few exceptions can only support extensive grazing or erosion control forestry
8	22.1	13.28	Very severe limitations or hazards for any agricultural use
Other	2.97	1.43	
TOTAL	100	100	

Table 2: Maori land Use Capability - New Zealand - 1996
(Source: Te Puni Kokiri 1999)

Overall, close to 80 per cent of Maori land is non-arable (Class 6 or worse). The reason for this over-representation in poor land classes is historical - land acquisition by the Crown and settlers over the past 150 years has focused on land most suitable for economic use, leaving the poorer quality and more isolated land in Maori ownership.

2. Servicing

In general, Maori land is poorly serviced with road access, power, telecommunications and other services compared to general land. While there do not appear to have been nationwide studies on access, a useful indicator is that over 2000 blocks of Maori land within the Far North district have either no vehicular access or impracticable access (Judge Spencer, cited in VK Consulting Environmental Engineers 1997: 11). As a consequence, more than 60,000 hectares of land in the Far North District alone are economically unproductive or underproductive. These blocks have become landlocked through past shortsighted partitions by the Maori Land Court or by the actions (or failure to act) by central and local government on access issues. Examples of the problems are partitions of blocks without providing legal or practical access, closing of roads leaving titles without access, and titles with access by water only (ibid.).

A further problem is the historical selective provision of public utilities and services by central and local government, such as roads, bridges, and telephone and power services. Over the past 150 years, the main beneficiaries of state and local body investment in these services have been those sections of the community that exerted the strongest pressure on "roads and bridges" politics in Parliament and local bodies. Inevitably, the more closely settled parts of the country gained the majority of state assistance whilst outlying rural areas were neglected. As three quarters of the Maori population lived in remote communities until migration and urbanisation accelerated in the 1960s, they benefitted least from public works and utilities (Waitangi Tribunal 1992).

An issue which has been raised at hui on many occasions is the lack of local government services to Maori land. At a NZ Institute of Valuers conference, Dr Margaret Mutu noted:

> *At the various Iwi o Taitokerau hui convened by the Judge of the Maori Land Court, speaker after speaker from all parts of Te Taitokerau has detailed the*

services, or more accurately, lack of services, provided to their ancestral land by the local authority. Each spoke of services such as road formation and/or maintenance, power and water supply, rubbish collection, sewerage services and so on. A disproportionate number of Maori land blocks appear to have been completely overlooked in the matter of services. (Mutu 1991: 39).

3. Historical lack of development

In the early years of colonial settlement Maori enthusiastically adopted the new crops and farming methods (Belich 1996), but this era of development foundered from around the 1860s. Mismanagement and lack of development of Maori land were directly related to Maori land tenure and to deficiencies in land management and investment systems to accommodate the complexities of Maori land ownership. Maori land legislation vested much of the responsibility for land management in the Native Land Court, Maori Land Councils. Boards, the Public Trustee and later the Maori Trustee. Between the 1890s and 1953, Maori land incorporations and limited Land Trust schemes were two of the few options available for owners who wished to farm their land. This paternalistic approach continued under the Maori Affairs Act 1953, with Maori land development schemes such as consolidation schemes, whereby smaller multiple-owned blocks were consolidated into larger units under the management and control of the Board of Maori Affairs. Many of the development schemes were poorly managed. In many instances the owners had to leave their land and work elsewhere during the time the schemes were in place, leading to a generation of owners who had lost direct connection with their land (Maori Land Court 1996).

A further problem was a lack of adequate Government assistance for Maori land development. While the mainstream farming sector was able to take advantage of schemes such as Land Development Encouragement Loans, Livestock Incentive Schemes and Rural Bank assistance, Maori land was generally only eligible for Maori Affairs assistance which was tied to a high level of departmental intervention and direction.

Major restructuring of the state sector in the 1980s resulted in the removal of land development subsidies and schemes, both from Maori land and general land. Maori

land must now seek development finance from lending agencies in the private sector, and theoretically is equally eligible to general land. However lending agencies still have a resistance to lending on Maori land, which could be due to a reluctance to deal with a multiple owned land, a reluctance to mortgage land where there is no security of title (where the title is not registered with the Land Registry Office) and a mistaken belief that Maori land cannot be sold under a mortgagee sale[15]. Loan finance for housing on Maori land is a case in point. Currently, the only agency willing to lend on housing on Maori land is the Housing Corporation of New Zealand. However where land is in multiple ownership they will not accept the land as collateral to a housing loan. The Papakainga lending scheme developed in the 1980s in association with Te Puni Kokiri provides for the house itself being the collateral; the proviso being that the house is removable from the site[16]. This restricts the type of housing to relocatable dwellings, and severely limits the amount that can be borrowed for site development.

4. The state of Maori land today

The result of the factors described above is that a high proportion of Maori land today is not used for productive purposes. By some, this is viewed as a problem. A committee formed by Maori Affairs Minister Tau Henare recently reported to Cabinet that about 600,000 hectares of Maori land is currently under-developed or unclaimed, and that more blocks are being abandoned. The committee estimated that 40 per cent of the 1.5 million hectares of Maori land is not well developed or used. Twenty per cent of the land area (64% of all land blocks) is not being managed by anyone. The report noted that while some of the land was not economically viable to use, much is believed to have forestry or farming potential. (Sunday Star-Times 10 May 1998).

The findings of this committee are very similar to those of other committees and commissions in the past. It blames the lack of development on Maori land tenure, the failure of unsuitable land use attempts, poor land types, economic hardship, urbanisation, lack of management skills and poor ownership records. Additional reasons are the generally poorer quality land to start with, complexities of Maori land administration, and difficulties in gaining access to development finance. Another factor

[15] Tina Ngatai, Registrar Tai Tokerau Maori Land Court pers. comm.
[16] Pita Paraone, Manager Te Puni Kokiri, Whangarei pers. comm.

is the different attitude of Maori towards their land - in a general sense it is not viewed as something which requires owners to create an income, but rather as a treasure to be protected.

Other land with comparative legislative limitations

Maori land differs from general land in New Zealand in many aspects, including its form of tenure and the legislative controls on its use and sale. In these respects, the only other significant landholding with similarly unique characteristics is the Crown conservation lands managed by the Department of Conservation.

Within the North Island, the area of Maori land (1,443,302 ha) is of the same order of magnitude of the area of land managed by the Department of Conservation (DOC) for conservation purposes (1,953,490ha)[17]. In the South Island, however, the difference is extreme with 5,806,700ha (38% of the land area) managed by DOC compared to the 71,769ha of Maori land (0.47 per cent of the land area).

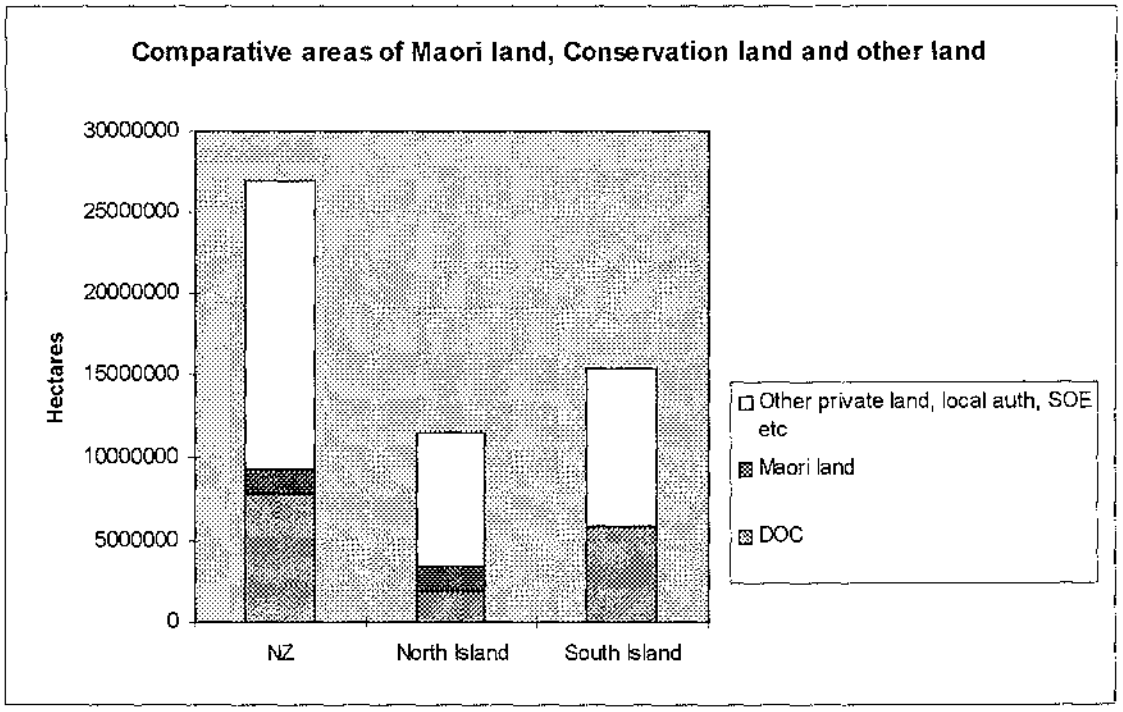


Figure 5: Comparative areas of Maori land, Conservation land and other land.
(Source: Te Puni Kokiri 1999; Department of Conservation1998b)

[17] Department of Conservation, Northland Conservancy

Crown conservation lands have a different resource management regime to all other land. To a large extent, these lands are exempt from land use planning controls once a Conservation Management Strategy has been approved by the Conservation Authority and the Minister of Conservation[18]. District Plans developed under the Resource Management Act 1991 (RMA) are limited in their application to general land, Maori land and relatively small areas of Crown land. This means that Maori land makes up a far greater relative proportion of the land to be managed by local authorities under the RMA land use regime. Maori land makes up 8.89 per cent of all non-conservation land in New Zealand, and 19.3 per cent of non-conservation land in the North Island. This makes Maori land very significant percentage of the land area over which land use controls must be developed under the RMA.

There are a number of points of similarity between Maori land and Crown conservation land. Both lie outside of the property market, in that their sale is made extremely difficult under law. Maori land frequently has high conservation values due to its historical lack of development. At the same time, much of the Crown conservation land has significant cultural and spiritual values for Maori. Additionally, a tension exists in that much of the Crown landholding is under Treaty claim, and Maori are currently seeking ways to express their interest in the Crown estate through options ranging from ownership to an active role in conservation management.

Possibly the most significant parallel is that each has a separate quasi-resource management regime imposed by legislation other than the RMA – the Conservation Act in the case of conservation lands, and Te Ture Whenua Maori Act in the case of Maori land. These laws are developed under principles other than sustainable management, which heavily influence the manner of use and development of the land. The close relationship between land tenure and resource management is recognised in the case of Crown conservation land through its different resource management regime under the RMA, which takes cognisance of the limitations imposed by other legislation and by its manner of ownership. Maori land, on the other hand, is for the most part treated identically to general land under the Resource Management Act. Some implications of the comparative resource management regimes for Maori land and Crown land will be explored in later chapters.

---

[18] See Chapter 6 for a more detailed explanation

Discussion

The differences between Maori land and land under general title includes differences in cultural/spiritual values, legislative control, tenure, property rights, ownership structure, servicing and physical characteristics. These differences are briefly summarised below:

- Shareholders of Maori land can generally trace their genealogy with that land to pre-European times. This can be compared to general land, where there are not necessarily any genealogical links between subsequent sets of owners. It would be rare to find general land held in the same family for the past 160 years.

- Compared to most general land, Maori land is imbued with cultural and spiritual values over and above its value as an economic resource. It value is both to the owners and to the hapu and iwi as a whole. Additionally, the concept of *whenua* carries with it a far broader meaning than the European meaning of 'land'.

- General land has no legislation or land control authority equivalent to TTWMA or the Maori Land Court.

- Compared to general land, Maori land cannot be bought and sold on the open market. In this sense the property rights attached to Maori land differ to those attached to general land.

- Compared to general land, Maori land has significant limitations created by its status under TTWMA. It would be very difficult to change the status of Maori land to free itself of these limitations.

- Maori land will generally have many more owners. In many cases not all owners will be known. These factors make decision-making extremely difficult. This can be compared to general land which is more likely to have one or two owners at the most, or be owned by a formally structured company or trust where more owners are involved.

- Maori land has a different (and poorer) system of title recording to general land, is more likely to be unsurveyed, and records of owners are likely to be out of date.

- Compared to general land, Maori land is often poorly provided with roading, power, telecommunications and other services.

- Significantly more Maori land is in Land Use Capability classes 6-8 (non-arable land) than land in general. It is likely that the difference between Maori land and general land is even more marked.

- Maori land has a history of state control and intervention in land management which is today recognised as inappropriate and paternalistic. Proposals for land use on Maori land are still severely hampered by the difficulties of raising finance.

Maori land is a singular resource with numerous significant differences to land in general title. It makes up a significant proportion of the land resource to be managed under district plans, particularly when Crown conservation lands, which have a different land use regime, are excluded. In addition to this, particular regard must be had to Maori land in relation to the provisions of the Treaty of Waitangi, as it is possibly the only resource over which Maori have unquestionably retained ownership and use since the pre-European period, and over which they could arguably claim to have tino rangatiratanga.

For these reasons, the planning framework for Maori land, both at the level of national legislative development, and at the local level of district plan development, requires careful consideration by planning authorities. It is also appropriate to consider what steps are necessary to encourage Maori to develop their land in a sustainable way in a manner which is in accordance with their cultural preferences. A parallel land use planning system may need to be developed that reflects the unique attributes of Maori land, its cultural importance and its status under the Treaty of Waitangi.

CHAPTER 2

THE TREATY OF WAITANGI

The Treaty of Waitangi is central to any discussion of Maori land and the planning process. This chapter will examine interpretations of the Treaty and the 'principles of the Treaty' by the Waitangi Tribunal and Court of Appeal, and discuss their application to Maori land.

The Treaty, signed in 1840 between the British Crown and numerous Maori chiefs, was developed by Crown agents in response to a perceived need to protect both Maori and Pakeha interests from unorganised and unregulated settlement (McClean 1998). The advantage of a Treaty to the British was that it would give them access to land and provide for ordered settlement and the ability to enforce laws. For Maori, there were also advantages to be gained by forming an alliance with the British, including the need for protection against unordered and unscrupulous land dealings (Orange 1987).

The Treaty is not part of New Zealand's internal legal framework but is rather a treaty of cession that has standing under international law. In essence it is an agreement between two sovereign nations as to the grounds on which one nation would allow the other to occupy their land. The agreement is in three parts. Under Article 1, the Chiefs ceded to the Crown the complete kawanatanga (government) (Maori version) or sovereignty (English version) of their territories. Under Article 2, the Crown agreed to protect Maori in the unqualified exercise of te tino rangatiratanga (chieftanship) over their land, villages and treasures (Maori version) or in the full exclusive and undisturbed possession of their lands, estates forests fisheries and other properties (English version). Additionally the Crown gained the right to purchase land from those whose wished to sell. Article 3 guaranteed that Maori would have the same rights and duties of citizenship as other British subjects.

The intended meaning of the Treaty has been in contention almost from the date it was signed, not least due to the fact that it was written in both English and Maori, each with a with different meaning. Both versions must both be considered in any interpretation, although rules of interpretation of international law give precedence to the version in the native language.

In the Maori version (Prof. H Kawharu translation) the chiefs gave 'absolutely to the Queen of England forever the complete government [kawanatanga] over their land' (Article 1) while retaining, under the protection of the Queen, the 'unqualified exercise of their chieftanship [tino rangatiratanga] over their lands, villages and all their treasures'. In the English version, the chiefs ceded to the Queen of England 'absolutely and without reservation all the rights and powers of sovereignty' over their respective territories, while retaining the 'full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'.

It is generally agreed that Article 1 of the Treaty gave the Crown the exclusive right to make laws for the governance of the country as a whole (Crengle 1993). The major matter of debate is the degree to which the Crown's sovereignty is limited by the Treaty requirement to allow the unqualified exercise of te tino rangatiratanga. The Court of Appeal in Ngai Tahu[19] noted

> *Clearly whatever version or rendering [of the Treaty] is preferred, the first article must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority.* (p558)

At the same time, contemporary analysis of the Treaty through the judicial process is concluding that the Treaty agreement that Maori should retain tino rangatiratanga does give Maori a special role within the sovereign state. The Radio Frequencies report of the

[19] Ngai Tahu Maori Trust Board v Director-General of Conservation (1995) 3 NZLR 553

Waitangi Tribunal found that the Treaty creates a hierarchy of interests in natural resources:

> *Based on the twin concepts of kawanatanga and tino rangatiratanga, first in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.* (Waitangi Tribunal 1990: 42).

This interpretation of the meaning of Article 2 of the Treaty has currency with the views of many iwi, for whom tino rangatiratanga means a major emphasis on local control of local resources (Maaka in Coates and McHugh 1998). Matunga (1997) takes this a step further and suggests that tino rangatiratanga over resources owned by Maori means recognition of iwi/hapu rights of self-government over resources under Maori title.

The first major report of the Waitangi Tribunal, the Motonui-Waitara claim, discussed the meaning of 'rangatiratanga' as used in the Treaty (in relation to fishing grounds). The Tribunal noted the Maori text

> *...confirms to the Chiefs and the hapu 'te tino rangatiratanga' of their lands etc. This could be taken to mean 'the highest chieftanship' or indeed 'the sovereignty of their lands.' ... We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in possession of their fishing grounds, but in the mana to control them, and then in accordance with their own customs and having regard to their own cultural preferences. We consider that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing that view, and because the English text, referring to a 'full exclusive and undisturbed possession' also permits of it.* (Waitangi Tribunal 1983: 59-60)

The Tribunal has found that the Crown's guarantee in Article 2 of the Treaty was not only a guarantee of possession, but also a guarantee of the authority to control their possessions (Waitangi Tribunal 1985) and it conveyed an intention that Maori would retain full authority over their lands, homes and things important to them (Waitangi Tribunal 1987). The concept of rangatiratanga is not confined to ownership but also

includes elements of management, control and self-regulation of resources. This was recently reiterated in the Whanganui River report, which found:

> *The 'full, exclusive and undisturbed' possession of properties connotes all rights of authority, management, and control.* (Waitangi Tribunal 1999: 338)

According to Matunga (1997) there is no disputing that the Treaty recognised the primacy of the relationship between iwi/hapu and natural resources within their tribal rohe, and consequentially the central role they could expect to play in environmental decisions about these resources.

Incorporation of the Treaty into NZ law

The status of the Treaty as an international treaty means that it cannot be literally applied within the framework of New Zealand law unless it is incorporated into domestic law. So far, this has not been attempted, although the more liberal regime from the 1970s saw attempts to incorporate reference to the Treaty within domestic legislation. Problems with giving effect to exact translations of the Maori and English versions of the Treaty, and the conflicting interpretations of the two versions, led to Parliament introducing the phrase 'the principles of the Treaty of Waitangi' into New Zealand legislation in 1975 in the Treaty of Waitangi Act. This phrase has since been incorporated into a number of other laws including the Conservation Act 1987 and Resource Management Act 1991. Its use intends to overcome the disparities in meaning by looking beyond the literal translations of both versions of the Treaty to the meanings and intentions that lay behind it.

The first reference to the Treaty in national legislation was in the Treaty of Waitangi Act in 1975, which set up the Waitangi Tribunal to investigate current breaches of the Treaty (later extended in 1985 to include historical breaches back to 1840). From the 1980s, reference to the principles of the Treaty began to be incorporated into various pieces of legislation. The two Acts which gave the strongest recognition were the State-Owned Enterprises Act 1986, which provided that 'nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'; and the Conservation Act 1987 which provided that 'the Act is to be

interpreted and administered so as to give effect to the principles of the Treaty'. Other recent legislation (eg Environment Act 1986, Resource Management Act 1991) requires decision-makers to have regard in some way to the principles of the Treaty.

The Treaty has also been drawn into the legal framework through judicial interpretation. The decision of Mr Justice Chilwell in the Huakina case[20] was the landmark, in drawing on the Treaty as an extrinsic aid to interpretation of the Soil and Water Conservation Act 1967 even though that Act made no reference to the Treaty. The Court found that the Treaty was part of the fabric of New Zealand society and as such it was proper to use it to assist in the interpretation of statutes which impinge on its principles. The Waitangi Tribunal (1992), quoting Sir Kenneth Keith, called the case a striking example of the changing attitude of courts, counsel and the wider public to Treaty issues. How far the trend will go and how wide its scope will be are unknown, but the Tribunal noted that the central importance of the Treaty in New Zealand's constitutional arrangements is likely to receive growing recognition by the courts, legislature and executive in the foreseeable future.

Principles of the Treaty

The Treaty principles are not defined in statute, but are evolving through the deliberations of the Waitangi Tribunal and Courts (particularly the Court of Appeal). The number of 'principles' and their precise meaning vary according to the situation, but there is strong commonality on the following five principles:

1. The Principle of Sovereignty / Kawanatanga

The essence of this principle is that Article 1 of the Treaty gave the Crown the exclusive right to make laws for the governance of the country, but that the cession by Maori of kawanatanga/sovereignty was exchanged for the obligation by the Crown to protect Maori interests.

---

[20] Huakina Development Trust v Waikato Valley Authority (1987) 2 NZLR 188, 210

The Waitangi Tribunal reports have examined the meaning of kawanatanga and its limitation by rangatiratanga in a number of contexts. In the Maori Electoral Option Report the Waitangi Tribunal (1994) started with the premise that the right to kawanatanga includes the right of Parliament to legislate. It then observed that tino rangatiratanga and kawanatanga must be reconciled, one with the other, which in constitutional terms could be seen as entitling Maori to a measure of autonomy, but not full independence outside the nation state that they helped to create in signing the Treaty. The Tribunal envisaged that the kawanatanga role of the Crown was limited to the extent that Maori could have a 'qualified autonomy' within the nation state.

This was explored further in the Turangi Township Report, in which the Waitangi Tribunal examined whether the Crown was entitled under the Treaty principles to enact the statutory regimes complained of (Public Works Acts). It found that the Crown could only be justified in exercising its power to govern in a manner inconsistent with the guarantee of rangatiratanga (in this case the compulsory taking of Maori land for public works) in exceptional circumstances and as a last resort in the national interest. It was not sufficient for the Crown to simply satisfy itself that compulsory acquisition was justified for reasons of convenience or economy. The Tribunal observed that the cession of Maori sovereignty was 'conditional', limited by the guarantee of rangatiratanga (Waitangi Tribunal 1995).

The Department of Justice has also noted that rangatiratanga imposes restraints on the extent of the Crown's sovereignty:

> *In the Crown's view, the First and Second articles of the Treaty are both strong statements which necessarily qualify one another.... Clearly, "te tino rangatiratanga" (or "full chieftanship") will generally take precedence in matters concerning material and cultural resources and taonga which have been retained. Equally, however, where there can be clearly demonstrated a danger to all, or a general need which can be managed at the level of national action, the Crown must exercise its powers on behalf of all New Zealand citizens* (Department of Justice 1989: 11)

Additionally, the Department noted 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* (Dept Justice 1989: 10).

In these and other reports, the Waitangi Tribunal has made it clear that it believes the assumed absolute power of Parliament is constrained by Article 2. The degree of constraint appears to alter according to the resource or issue, being at its least qualified where the Crown is addressing matters of danger (presumably including health and safety) and general public needs, and at its most qualified where dealing with resources retained by Maori, or over which Maori can claim to exercise rangatiratanga.

2. The Principle of Rangatiratanga

Article 2 of the Treaty guaranteed that hapu would retain te tino rangatiratanga or chieftanship, and would continue to manage and control their resources in accordance with their customs and having regard to their cultural preferences.

The meaning of rangatiratanga is fundamental to any discussion of this Treaty principle. Matunga (1989) has described rangatiratanga as having historically been a form of regional self-government based on some 50 iwi throughout Aotearoa. Each iwi regarded itself as a sovereign political unit, controlling a defined geographic area. Within this, each hapu had control of a defined area of the iwi territory and was the main unit for managing resources, using land and carrying out various forms of production.

In practice, rangatiratanga denoted the authority held by tangata whenua collectively to control all aspects of the use of resources. Aspects of rangatiratanga include overseeing the management of iwi lands, including the allocation of land to hapu, whanau and individuals; the eviction of unauthorised or unwanted occupiers; the imposing or lifting of rahui, and the tuku [gifting] of parts of the land for ends beneficial to the iwi.

Rangatiratanga was fundamental to the exercise of any resource management controls, and an essential precursor for kaitiakitanga (Burrows cited in Park 1998).

There is still a lack of certainty as how to apply a modern interpretation to rangatiratanga, or the "full, exclusive and undisturbed" possession promised to the Maori owners of lands, forests and fisheries. On its literal meaning, it could be argued that any legislation restricting the use of land still retained by Maori, such as planning Acts and compulsory acquisition under the Public Works Act, would be in breach of the Treaty. A Cabinet Briefing paper in 1986 (Preston 1986) raised this as an issue of serious concern, stating that if this were to include the Town and Country Planning Act, "islands" of territory would exist within which the Maori owners would be free of zoning restrictions while neighbouring non-Maori owners would be bound by district and other schemes. This interpretation was carefully steered away from, with the paper noting that the government departments mainly dealing with land considered it would be difficult to maintain a different policy in respect of land to which the Treaty applies and legislation such as the Town and Country Planning Act.

A number of Waitangi Tribunal reports have examined the principle of rangatiratanga, both in the context of historical grievances (Orakei 1987, Muriwhenua Fisheries 1988, Ngai Tahu 1991, Taranaki 1997) and contemporary issues (Motonui-Waitara 1983, Manukau 1985). Milroy (1997) traces a change over this period in the Tribunal's interpretation of tino rangatiratanga. In the Orakei Report the Tribunal found that the Maori text 'conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them' carrying with it in respect of land 'all the incidents of tribal communalism and paramountcy' (Waitangi Tribunal 1987). Nine years later, in the interim Taranaki Report (Wai 143) the Tribunal equated the Treaty guarantee of tino rangatiratanga with autonomy or self-government, and considered the loss of tribal autonomy to be a breach of the Treaty itself. The Tribunal considered that autonomy included the right of a people to determine domestic matters such as their membership, leadership and land entitlements (Waitangi Tribunal 1996). In the subsequent year, the Muriwhenua land report found that the Treaty undertook that Maori custom and law would be respected, and that the recognition of rangatiratanga included the right to have acknowledged and respected the hapu's system of land tenure,

and also the hapu's customary preferences in the administration of their affairs or the management of natural resources (Waitangi Tribunal 1997).

These findings indicate that the exercise of rangatiratanga should be most strongly recognised where resources are and have traditionally been owned and managed by Maori. It can be concluded that the rights of Maori to exercise rangatiratanga is strongest in respect of Maori land, which is a resource over which Maori have retained ownership and control since prior to 1840.

3. The Principle of Partnership

The Treaty is an agreement between Maori (predominantly as hapu) and the Crown as an entity. This creates a special relationship between the two parties which in the State-Owned Enterprises case[21] was described as a partnership (Lord Cooke) or like a partnership (the other Judges) which created responsibilities and duties between the parties. This relationship included obligations one would expect to see in a partnership such as a duty to act in a spirit of reasonableness and with the utmost good faith towards one another.

Findings of the Court of Appeal and the Waitangi Tribunal support the concepts of reasonable cooperation, partnership and good faith between the parties to the Treaty. In the Muriwhenua report the Waitangi Tribunal put it thus:

> *The Treaty extinguished Maori sovereignty and established that of the Crown. In doing so it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based on their pledges to one another* (Waitangi Tribunal 1988: 192)

Both peoples were to gain from the Treaty, but in doing so each side had to make a mutual concession. As a result, each of the exchanges in the Treaty acts as a limit on the exercise of the other. For example, the right to fisheries resources was described in the Muriwhenua report as being unqualified except to the extent necessary to conserve the resource.

---

[21] New Zealand Maori Council v Attorney-General 1987 1 NZLR 641

> *The cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control, resource protection being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in light of Article II or the authority of the tribes to exercise control* (Waitangi Tribunal 1988: 230)

It can be concluded that the Crown has the right to control the use of resources to the extent necessary to conserve or protect the resource from harm or depletion. At the same time, the recognition of rangatiratanga rights may mean that tribes should have control over their own resources (including land), qualified only by a national requirement to conserve resources in a sustainable manner. Application of the principle of partnership implies that the resource management role should be shared between Crown and Maori for Maori-owned resources.

4. The Principle of Active Protection

The Crown has a duty to actively protect those interests that are guaranteed to Maori by the Treaty, which are primarily the continued authority to exercise rangatiratanga over natural and cultural resources. The Waitangi Tribunal has referred to the principle of active protection when examining the management regime for natural resources. In the Motonui Report (Waitangi Tribunal 1983) the Tribunal found that the protection envisaged by the Treaty involves at one level the physical protection of resources (in this case fishing grounds) from pollution or destruction. At another level, protection involves recognising the rangatiratanga of Maori to both use and control their fishing grounds in accordance with their own traditional culture and customs and any necessary modern extensions of them.

Application of the principle of active protection indicates that the Crown is bound to take action to ensure Maori can exercise rangatiratanga over resources in their ownership. It also suggests that the Crown should actively protect the special relationship of Maori with their land which may, for example, involve allowing activities on Maori land which would enhance that relationship.

5. The Principle of Equality

Article 3 of the Treaty guarantees the rights and privileges of New Zealand citizens to Maori. This includes not only legal equality but also rights which New Zealand is bound to accord its citizens as a result of acceptance of other international treaty obligations, such as rights of equal treatment, free speech, freedom of religion and peaceful assembly. The principle also includes equal enjoyment of social benefits such as health, education and housing (Department of Justice 1989).

This principle has been the basis of positive action in areas such as health and education, where poor health and education status among Maori has been addressed by setting up different and more culturally appropriate systems to attempt to reach equality of outcome. It can also be applied to Maori land planning, where historical factors have created a land-bank of generally poorer quality land but with frequently high conservation values; and with an imposed ownership regime which has retarded decisionmaking. The result is that Maori land has generally not contributed to Maori economic development at an equivalent level that general land has contributed to European economic development.

Application of the Treaty principles to Maori land planning give rise to fundamental questions about the appropriate resource management regime for resources owned by Maori, or in which Maori have an interest. How these Treaty principles can be properly recognised, and in particular in relation to resource management for Maori land, is the major question underlying this thesis. Some assistance can be gained by examining the findings of the Courts and the Waitangi Tribunal where they have applied Treaty principles to planning issues.

Planning law and the Waitangi Tribunal reports

The interrelated nature of planning law and Treaty issues has been evident from the inception of the Waitangi Tribunal. In its early years the Waitangi Tribunal heard a number of claims which related to the adverse effects of sewage and waste discharges. The cases, which include Motonui-Waitara (Waitangi Tribunal 1983), Kaituna (Waitangi Tribunal 1984), Manukau (Waitangi Tribunal 1985) and Mangonui Sewerage

(Waitangi Tribunal 1988) have been described by Professor Oliver as the 'planning claims' (Oliver 1991). While none of the claims was specifically about Maori land, the Tribunal's assessment included a useful review of provisions of the Water and Soil Conservation Act 1967, the Town and Country Planning Acts, and the actions of relevant agencies. The Tribunal's reports found in general that there was an urgent need for legislative change concerning planning law and waste disposal, to ensure the protection of Maori interests in the environment (McClean 1998). The Kaituna Report, for example, recommended

> *That the Water and Soil Conservation Act 1967 and related legislation be amended to enable Regional Water Boards and the Planning Tribunal to properly take into account Maori spiritual and cultural values when considering applications for grant of water rights, the renewal thereof or objections to such applications.* (Waitangi Tribunal 1984: 33)

The Mangonui Report differentiated between the higher degree of protection owed to Maori interest in their own lands, as compared to Maori interest in resources in general. It found that there was a priority to protect the Maori interest in resources owned by Maori, in comparison to other resources where there needed to be a balancing of Maori interests with other values and considerations. The report found, in relation to a proposed sewerage disposal scheme:

> *It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori land or particular fisheries, for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases, however, it is a careful balancing of interests that is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also the objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for and, where necessary, reconciled.* (Waitangi Tribunal 1988: 60)

The Resource Management Act 1991, developed subsequent to the Tribunal's findings on the 'planning claims', appears to have taken some account of these matters in its

inclusion of sections 6(e), 7(a) and 8 in the Act. However, the Tribunal has subsequently found that the RMA did not go far enough to protect Treaty rights.

The Ngawha Geothermal report focused particularly on rangatiratanga over a geothermal resource, and in relation to the RMA examined the role given to regional councils for the allocation of water rights. The claim (Waitangi Tribunal 1993a) covered two main issues: the first was regarding the acquisition by the Crown of land and hot springs on a small block of land at Ngawha, and the second was the inconsistency of certain provisions of the Geothermal Act 1953 and the Resource Management Act 1991 in relation to the rights of claimants under the Treaty of Waitangi. The claimants maintained the Resource Management Act and in particular the management regime established by that Act did not ensure that their Treaty rights were protected in respect of the underlying geothermal resource. The Tribunal, in its findings, emphasised that the Treaty was between Maori and the Crown, and that the Crown's obligation under Article 2 to protect Maori rangatiratanga is a continuing one which cannot be avoided or modified by the Crown delegating powers or Treaty obligations to local or regional authorities. The Tribunal found that the Crown, in delegating extensive powers to local and regional authorities through the Resource Management Act, had failed to ensure that its Treaty duty of protection of Maori interests would be implemented, or that authorities would be required to act in conformity with the principles of the Treaty.

> *...it appears that in promoting [the Resource Management Act] the Crown has been at pains to ensure the decisionmakers are not required to act in conformity with and apply Treaty principles.... For this reason we believe the 1991 Act to be fatally flawed* (Waitangi Tribunal 1993a: 154)

The Tribunal further found that the claimants had been or were likely to be prejudicially affected by the absence of any provision in the RMA giving priority to the protection of their taonga or confirming their Treaty rights to exercise rangatiratanga and kaitiakitanga in managing and controlling the resource as they wished. It recommended an amendment to the RMA such that all persons exercising functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources, should act in a manner that is consistent with the principles of the Treaty of Waitangi (as opposed to the current wording of section 8, which is to 'take into account' these principles). The Tribunal could see:

> ... *no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act* Waitangi Tribunal 1993a: 155).

The Waitangi Tribunal report on the Whanganui River claim investigated claims by the Atihaunui tribe primarily regarding the ownership and management of the river. The Tribunal found that the claim was well founded, and one of the central issues was the role of the Resource Management Act 1991 in vesting control of the use of river in the hands of regional and territorial authorities. The Tribunal noted the desirability of having a single Act which brought about a coherent national strategy, but considered this uniformity cannot prevail over the need to do justice in the particular case. It noted that the authority to transfer powers to various bodies, including iwi authorities, was discretionary and limited in scope, and that all processes within the Act left ultimate power and control in the hands of local authorities. On the other hand, the authorities had competence and experience in resource management. The Tribunal concluded that there was a need for collaboration between the parties for the management of the river (Waitangi Tribunal 1999).

The Whanganui River Report reached a similar conclusion to the Ngawha Geothermal report regarding the effect of the RMA on the exercise of rangatiratanga. The Tribunal found

> *To the extent that the Resource Management Act vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles.... 'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away.* (Waitangi Tribunal 1999: 339).

Amongst its proposed solutions, the Tribunal suggested

> *The Resource Management Act would need further amendment, first and foremost because it does not reflect the Crown's Treaty obligations. It needs to provide that, in achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources, shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.* (Waitangi Tribunal 1999: 344)

Proposals by the Tribunal to achieve appropriate collaboration included

1. the authority of Atihaunui in the Whanganui River to be recognised in legislation
2. any settlement to protect existing use rights and public access
3. recognition of Atihaunui's rangatiratanga by one of two options:
   - The Whanganui river to be vested in Atihaunui, and any resource consent application to require the approval of the Whanganui River Maori Trust Board, or
   - Maori Trust Board to be a consent authority under the RMA to act together with the local consent authority in deciding on resource consent applications; the consent of both authorities to be required
4. Drafting of a plan specific to the river, either a joint plan or one by each consent authority
5. Funding for the Maori Trust Board for these responsibilities built into local authority levies (Ibid: 342)

At this stage these are nothing more than proposals, but they do provide a useful indication of the types of arrangements which the Tribunal believes would give appropriate recognition to rangatiratanga while at the same time allowing the Crown to retain its overarching role in resource management.

There is a particular significance in the Tribunal's findings in that in this instance the tribe were claiming ownership of the river as well as challenging the resource management regime. The Tribunal's proposals (in addition to compensation) focused

on setting up a resource management regime that would better provide for rangatiratanga, whereas the dissenting opinion of member John Kneebone suggested shared ownership of the bed of the river. Clearly, in giving recognition to rangatiratanga, there is a close relationship between ownership and management of a resource.

The Treaty principle of equality has been drawn on by the Court in the Te Roroa report in relation to shortcomings in the socio-physical planning role of the Crown and local authorities in relation to Maori land (Waitangi Tribunal 1992). The claim itself was lengthy and detailed, but included the failure to provide legal access to the Maori settlement at Waipoua and to wahi tapu, and the failure to provide basic electricity, water, telephone and mail services to the settlement. The Tribunal, in its findings, considered that the Crown had a special duty over and above its duty to all its citizens to provide services and legal access for Te Roroa:

> *We have seen how the Waipoua Settlement was greatly disadvantaged economically and socially by the Crown's decision to close the coastal road, taking away access to surveyed allotments for which it had granted title and should therefore have provided legal access. We have also seen how the lack of legal and adequate access to the settlement impeded the delivery of social services. Lack of access and lack of services in turn contributed to the general exodus of people from the settlement and discouraged people from returning home* (Waitangi Tribunal 1992: 207).

To assist resolution of these findings, the Tribunal recommended (amongst other things) that the Crown provide financial resources to provide legal and adequate access to the settlement and coast, install a reliable method of radio telephone communications, and meet the special educational and health needs of the people in the valley. It also recommended that the Crown take urgent action to amend the procedural provisions of the RMA 1991 to ensure that all Maori with interests in multiple-owned Maori land have the right to be informed on all matters affecting their land; and that the Crown resource an advocacy service to represent all Maori with interests in multiple-owned land and provide advice to Maori on resource management and conservation issues.

The Waitangi Tribunal has not been required to specifically investigate the impact of past planning law on Maori land in terms of the Treaty. Neither do there appear to be any claims currently lodged with the Waitangi Tribunal that have as a central theme the impact of the planning regime on Maori land, although a number of statements of claim transcend the question of resource ownership and refer instead to the restoration of tribal mana in the context of resource management (Solomon 1992), or include the planning regime as part of an overall concern about the impact of legislation[22]. However the Rangahaua Whanui National Theme G study carried out on behalf of the Tribunal has identified possible Treaty shortcomings in the historical application of planning law (Marr 1997). Although the focus of the research was on public works takings of Maori land, Marr briefly overviewed the history of planning-type legislation and outlined some effects of the historical administration and application of town planning processes on Maori land. She noted that town planning legislation, and processes such as designated uses, zoning, subdivision requirements and public reserves contributions, all had significant impact on Maori land. Her investigation was necessarily limited as the focus of the study was public works takings of Maori land, and she noted that this area required a great deal more research.

Discussion

The Treaty of Waitangi established a relationship between two peoples, from which the enacting of legislation, including planning legislation, was made possible. But while the Crown was granted the 'kawanatanga' right to make laws for the good of the nation, its absolute power was constrained by Article 2 – the agreement that Maori should retain rangatiratanga over resources in which they have an interest. Rangatiratanga should be most strongly recognised where resources have been customarily owned and managed by Maori, and nowhere is this relationship stronger than on their own land where Maori have had continuous ownership as well as genealogical and spiritual links. The Whanganui River report has been particularly significant in identifying the close relationship between ownership and management of a resource required when giving recognition to rangatiratanga.

[22] email, B Gibbs, Waitangi Tribunal librarian

An analysis of the principles of the Treaty in relation to Maori land planning leads to a number of related conclusions. The Crown's kawanatanga is at its most qualified where it is dealing with resources retained by Maori, over which they can claim rangatiratanga. The Crown has the right to control such resources to the extent necessary to conserve the resource or protect it from harm or depletion, but beyond this the Crown may need to recognise rangatiratanga. The Treaty principle of protection requires that the Crown must take positive action to ensure rangatiratanga can be appropriately exercised. Additionally the principle of equality indicates that the Crown needs to take positive action to assist with reaching an equality of outcome for owners of Maori land, given its current poor physical and economic status, and the Crown-created tenure arrangements which are responsible for many of the difficulties associated with its management.

The Waitangi Tribunal certainly has noted shortcomings in the form of the Resource Management Act, particularly the way the principles of the Treaty are weakened through the statutory requirements. Section 8 of the Act only requires the Treaty principles to be 'taken into account', and only as a means of achieving the overriding objective of promoting the sustainable management of natural and physical resources. Additionally, the local government agencies and persons subject to the Part II obligations under the RMA are further removed from the Crown than in other legislation which incorporates references to the Treaty (eg Conservation Act 1990, Environment Act 1986). The RMA's failures in this respect have been criticised by the Waitangi Tribunal in several reports (Ngawha Geothermal Report (1993), Whanganui River Report (1999), Te Arawa Geothermal Claims Report (1993)). In the former, the Tribunal found that the obligation of the Crown to protect Maori rangatiratanga cannot be avoided or modified by the Crown delegating powers or Treaty obligations to local or regional authorities. In enacting the RMA, the Crown had failed to ensure that its Treaty duty of protection of Maori interests would be implemented.

A tentative conclusion from these findings is that Maori land requires a different planning approach to other land – one which takes into account the complexities of Maori land tenure and law, the spiritual and cultural relationships between Maori and their land, and one which is able to give effect to rangatiratanga aspirations.

CHAPTER 3

THEORETICAL CONTEXT

This thesis examines, in relation to Maori land, both historical and contemporary mechanisms of 'planning', and its more recent derivative (in New Zealand at least), of 'resource management'. The theoretical context for the thesis was required to be robust enough to encompass a wide range of planning processes from pre-European kaitiakitanga to current planning practices, and to support an examination of the appropriateness of these systems in light of both the Treaty of Waitangi and current developments in international law and indigenous resource management.

A major drawback with using current planning theories is that the focus is predominantly on urban planning, due in large part from its genesis in urban design. Planning systems are established by the state and operated under western paradigms of development and conservation, with decisionmaking power typically concentrated in state and/or local government hands. Additionally, planning theory has drawn heavily from the intellectual history and practice of planning in Britain and the United States. To date there appears to have been little planning theory that specifically addresses the involvement of indigenous groups in planning for indigenous lands, despite numerous contemporary international examples. It is thus an area ripe for theory development.

Planning is a very broad term, the meaning of which can be approached from a simple dictionary definition such as "a detailed scheme, method etc for attaining an objective" (Collins Dictionary 1986) or from the multiple perspectives of planning academics in the fields of physical and social planning. Friedmann (1987:84) describes planning as the link between knowledge and action. Low (1991:58) suggests that it is a process which involves adapting ideas and concepts developed in the natural sciences for use in the political world. He notes that governments, organisations and other social groups use the process of planning to determine actions to achieve some future state of affairs. Burchell and Hughes (1981) state that planning encompasses physical development,

economic control, social responsibility and policy formulation. Physical planning emphasises the control of form and function over the physical development of an area; social planning emphasises the needs and preferences of people; economic planning is concerned with the planned rather than market distribution of goods and services, and policy planning deals with decisionmaking in both the private and public sectors.

Focusing more on the goals of land use planning, Thornley (1991) examined a number of definitions of planning and developed from these a list of its purposes. These are:

1. *To improve the information available to the market for making its locational choices;*
2. *To minimise the adverse 'neighbourhood effects' created by a market in land and development;*
3. *To ensure the provision of any 'public goods' including infrastructure or actions that create a positive 'neighbourhood effects', which the market will not generate because such activity cannot be rewarded through the market;*
4. *To ensure that short-term advantage does not jeopardise long-term community interest;*
5. *To contribute to the coordination of resources and development in the interest of overall efficiency of land use;*
6. *To balance competing interests in the use of land to ensure an overall outcome that is in the public interest;*
7. *To create a good environment, for example in terms of landscape, layout or aesthetics of buildings, that would not result from market processes;*
8. *To foster the creation of 'good' communities in terms of social composition, scale or mix of development, and a range of services and facilities available;*
9. *To ensure that the views of all groups are included in the decision-making processes regarding land and development;*
10. *To ensure that development and land use are determined by people's needs not means;*
11. *To influence locational decisions regarding land use and development in order to contribute to the redistribution of wealth in society*

(Thornley cited in Rosier 1998)

These purposes are helpful in identifying the numerous roles that planning can take, and can assist in assessing the 'planning' component of the laws which affect the use of Maori land - Te Ture Whenua Maori Act 1993 and the Resource Management Act 1991.

Fowler (1984) describes planning law as being a component of environmental law, which includes common law and statutes relating to land use planning and control, pollution control, environmental impact assessment and nature conservation. The forms these laws take can be conceptualised as rules for the protection of the environment from undue degradation by human activity, rules for the conservation of natural, built and cultural items, rules for the disposition of natural resources and rules which promote or facilitate development activity. The activity of planning encompasses all of these aspects, although is predominant focus at any particular time may change. For example, in the early stages of New Zealand's colonial development, the promotion and facilitation of development activity was the primary focus of legislation. "Planning" law focused on providing land for the growth of townships, subdividing land for farming settlement, and acquiring land for roads, reserves and services. Later, the dominance of the farming sector meant that their needs dominated the planning process in rural areas. In the latter half of the 20th century, the strongly physical bias of previous planning law changed so that social and cultural issues were equated with physical land use planning matters. Towards the end of the 20th century, the paradigm changed yet again so that the 'common good' was the sustainable management of resources, largely withdrawing planning from its previous involvement in social needs.

Effects of changes in ideology

In the New Zealand context, then, the introduction of the Resource Management Act has narrowed the focus of planning from Burchell and Hughes' broad socio-economic and physical definition to predominantly dealing with the physical environment. Grundy (1993) aligns this change with the national move to a deregulated market economy, dominated by a neo-classical economic libertarian doctrine. Under this ideology, the traditional role of planning was equated with unacceptable government intervention into societal affairs and a distortion of the efficient functioning of the

market, and hence the efficient allocation of resources. The view was that government should only make minimal interventions in the market, and sustainable resource management should depend not on specific policy and planning procedures within resource management legislation, but on reforms to the institutional arrangements within which market systems operate. The excising of social and economic planning from planning legislation followed from this ideological shift. Nevertheless other legislation and processes outside of the RMA still have a role in land use control and in influencing social and economic decisions, and it will be argued that in a many respects the Maori Land Act (Te Ture Whenua Maori Act 1993) is a piece of planning legislation which focuses on both physical and social planning.

The focus of contemporary planning on market systems, with its attempts to correct market failures, is based on an apparent assumption that the resources to be controlled are part of the market economy. These matters could be left to the market to resolve, but the planning system intervenes and attempts to influence property right structures that currently define the 'market'. Intervention, generally through techniques of zoning, development standards and identifying adverse externalities, attempts to achieve desired outcomes by influencing the scale, nature and location of development and creating economic incentives and disincentives to use and develop property. Patterns of land use reflect the rights that landowners have to develop their land, and changing these rights can change the patterns of land use.

Under a 'pure' private property rights structure, a landowner has three main rights:

1. the right to benefit from the use of the resource,
2. the right to control the resource and decide what uses to which it may be put,
3. the right to trade the property rights in the market place (Stewart 1988:22).

In reality, no property is completely privately owned, as the right to freely use it is limited by law, and in particular by the planning regime. Planning largely achieves its ends through influencing the rights associated with property, changing the balance of rights and responsibilities so that individual property owners are required to amend their natural behaviour so as to achieve ends that are defined by the planning regime as being for the common good. Rights of property allow the owner of those rights to use the

environment, but at the same time the rights are subject to legal mechanisms that can be used for controlling access and protecting the environment. Planning law is predominantly fulfilled through administrative control over the exercise of property rights, and the manner in which these rights themselves are controlled or regulated (Fisher 1993:179-182). There is a limit, however, to the degree to which rights can be controlled, and under New Zealand's current legislation there is a right of appeal where property rights are unreasonably restricted by the imposition of planning controls.

Planning law, then, affects the right to control the use of property, the second of Stewart's 'rights'. The use-rights of Maori land are largely affected in the same way as other land. However Maori land is also subject to significant restrictions of Stewart's third 'right': the right to trade ownership and property rights in the market place. This has a number of planning implications which are explored in Chapter 7. In brief, the property rights of owners of Maori land are diminished both by the non-alienation provisions of TTWMA and by whatever planning controls are placed over their land. The planning system is increasingly focused on market-based instruments and incentives to achieve its goals, but the location of Maori land outside the market economy means that such controls have an inequitable effect on owners of Maori land.

Equity

Should planning concern itself with equity? In terms of the market model, equity and social justice are irrelevant, but some theorists suggest that planning should be based in a different ideological and philosophical context. Planning, by its very nature, involves political intervention into social affairs, allocating scarce resource between competing ends to reach a desired end state. This end state is generally referred to in planning literature as the "common good" or the "public interest" (Grundy 1993). Under neo-classical ideology, the "common good" is incapable of being socially determined and is, instead, equated with what the market deems efficient. Grundy suggests planning in New Zealand was founded in a concept of 'common good' based on the Keynesian social democratic welfare state, whereby resource allocation and distribution decisions were based within a wider context of relative equality and social justice. These concepts were embodied in the 'matters of national importance' in the 1977 Town and

Country Planning Act. Later, the Resource Management Act redefined the 'common good' by deleting reference to social and economic goals and focusing predominantly on biophysical planning and the promotion of sustainable management. Issues of equity and social justice are no longer part of the planning philosophy and current planning law does not provide a philosophical basis from which to address them.

The relatively recent concept of environmental justice is a useful tool with which to examine this situation. Although there is no universally accepted definition, it covers concepts of social justice, environmental responsibility and environmental protection, and has the common denominators of equity, fairness and access to environmental decisionmaking (Rowe in Bosselmann 1998:216). Rowe suggests it involves intragenerational (social) justice, intergenerational justice and interspecies justice, although there is still little agreement over these last two. Bosselman (1998) noted that in so far as the quest for environmental justice is a quest for environmental quality and social justice, there is a natural tension between environmental justice and market mechanisms. He suggests that within New Zealand at least, environmental justice and market mechanisms contradict each other and cannot be reconciled unless environmental justice and ecological sustainability are the clearly defined parameters for market-orientated instruments.

Issues of environmental justice have a direct relationship with Maori land. The owners of Maori land are in an inequitable situation compared to other landowners. Not only is the land held in a complex form of tenure and subject to the dual control of the Maori land court and planning agencies, but its property rights are severely diminished compared to other land. Rowe's environmental justice concepts of equity and fairness indicates that the loss of rights in one arena should be balanced by providing greater rights in another, but this does not appear to have been addressed in the legal tenure arrangements that have been developed by the Crown. The result has been a group of landholding citizens who have diminished rights compared to others.

Rowe's third common denominator, access to environmental decisionmaking, is also a relevant factor for Maori. Any planning system is based on a particular structure and control of knowledge, the rhetorical use of ideology, and the exercise of power (Lane

1997). Where the knowledge structure is alien to indigenous forms, and power is held within the dominant culture, indigenous people are likely to have poor access to environmental decisionmaking. Within New Zealand, Maori are one of the most vulnerable groups in society in terms of their economic base, involvement in the economy and participation in decisionmaking structures. In the field of planning, owners of Maori land have been marginalised as a result of the market ideology in planning processes, their historical lack of capacity for participation in planning, the complexities of Maori land use management, and through the lack of recognition within the planning framework of Maori cultural perspectives and practices in resource management.

Lane (1997) makes a contribution to planning theory in the context of Australian Aboriginal marginalisation in resource management processes and decisionmaking. He identifies three main reasons for the lack of indigenous involvement in planning. First, the dominant planning ideology of developmentalism has a tendency to marginalise Aboriginal perspectives. Secondly, economic, cultural and geographic factors have worked to inhibit Aboriginal participation. Thirdly, the dominant epistemology of planning - the rational-comprehensive paradigm - tends to overlook or misinterpret Aboriginal cultural perspectives as irrational and historic.

Arguing for change, Lane (1997) considers that the recognition of native title in Australia demands that both the planning profession and the institutions within which planners work need to consider how they can redress the historical marginality of indigenous peoples in land use decision-making. A communicative approach to examining planning practice shows how the ideologies, tools, data sets and models used by rational-comprehensive planners are not neutral, but are institutionalised structures of meanings which channel thought and action in certain directions (Hillier cited in Lane 1997:253). This can work to disempower indigenous groups in resource planning. Lane suggests that the consistent failure of planning to address the social, environmental and economic needs of indigenous people is due to a lack of indigenous control of and participation in planning. He concludes that a model of community-based planning would overcome marginalisation and misinterpretation of indigenous perspectives and aspirations.

Lane's approach is consistent with Friedmann's suggestion that planning needs to be redefined in a 'civil society' tradition, in which community empowerment and social justice are central themes (Douglass and Friedmann 1998). Friedmann distinguishes between traditional 'Euclidean' planning which is linked directly to the actions of the state and is focused on societal guidance, and 'post-Euclidean' planning which he suggests can and should be located within all sectors of society, operating a multiple levels with multiple perspectives, and acknowledging a variety of equally valid forms of knowledge. In Friedmann's 'civil society', the role of planning and planners is to enable citizens to have the right to be heard in matters affecting their interests and concerns; a right to have their social and cultural difference being recognised in public policies, and rights to the basic conditions of livelihood and human flourishing. Friedmann pictures an inclusive democracy whose primary practice is specifically at the local level, asserting these fundamental rights. Marris (Douglass and Friedmann 1998: 9) suggests that planning should, above all, represent the needs of that part of civil society that is most vulnerable, whether from economic or political disadvantage.

Lane (1997) examines various possible ways to improve indigenous participation in planning and suggests that community development could be facilitated through community control of the planning activity. Such planning is instigated, controlled and conducted at the local community level, and goals for development are derived locally. For protected areas and other resources such as fisheries, Lane proposes the use of collaborative management whereby formal arrangements are made for the sharing of management and decision-making responsibilities among professional resource managers and local resource claimants (such as traditional guardians). The advantage is that the range and capability of resource management is extended, while at the same time local claimants are empowered with formally recognised rights for participation in management.

Collaborative Resource Management with Indigenous Peoples

Co-management (or collaborative management) agreements represent a formalisation of local participation in resource management, empowering local (frequently indigenous) people to share in the management of natural resources in their area (IUCN 1997).

While there is no widely recognised definition of co-management, the term broadly refers to various levels of integration of local and state-level management systems, including the sharing of power and responsibility between the government and local resource users. Internationally, methods of collaborative management are being adopted where both indigenous people and the state have an interest in the management of a resource. The concept has been widely explored in Canada and Australia, usually in relation to resources which are part of a 'common property' regime such as game and fish on state-held lands. It is also being examined within New Zealand in relation to the management of Crown conservation estate in New Zealand between iwi and the Department of Conservation (Sunde et al 1999).

Some writers (eg Borrini-Feyerabend 1996, Stevens 1997) limit the concept of co-management to protected areas, and few studies to date appear to apply co-management principles to situations where land is in indigenous ownership and where management issues are wider than resource use. However these principles are equally applicable to any form of management, whether relating to natural resources or any other field. A degree of self-management is at the core of the social and economic health of many native communities, whereby

> ... *the co-operative management of resources becomes a key issue ... in the implementation of principles of environmentally sustainable, culturally appropriate economic development* (Berkes 1991: 12)

In the same vein, McHugh (1994) notes that whereas co-management arrangements in Canada have arisen where the Crown and indigenous peoples are seeking more efficient and equitable management of natural resources, the main goals are community-based economic and social development, decentralisation of resource management decisionmaking, and reduction of conflict through participatory democracy.

While some indigenous groups seek autonomy within their traditional areas, complete indigenous self-management within a nation state is rarely possible due to political imperatives and national standards, and in practice a range of approaches is evolving which involve some intermediate combination between local-level and state-level

management systems (Berkes 1991). State-level management is carried out by some centralised authority (state or territorial level), based on western knowledge systems and enforced centrally, whereas local-level management systems, where they exist, are decentralised, tend to be consensus-based and are enforced through social sanctions. They may be based on customary practice, cultural traditions and on local knowledge land and resources. Agreements can include data gathering, harvesting decisions, resource allocation, protecting the health of the resource (conservation), enforcing resource-use regulations, and long-term planning and policy.

Berkes (1981, 1991) suggests there is a continuum of co-management arrangements from those that merely involve, for example, some local participation in research, to those in which the local community holds all the management power and responsibility. To assist with analysis of these various forms of co-management, he and his colleagues redeveloped Arnstein's (1969) concept of stages of citizen involvement into one which reflected levels of power and information sharing in collaborative management regimes:

> *Levels of co-management can be depicted as rungs of a ladder, each corresponding to the degree to which citizens share power in government decisionmaking. The upper rungs indicate increasing degrees of real power sharing, in which joint decisionmaking is institutionalised in a partnership of equals.* (Berkes 1991)

The "ladder" shows a gradual shift in power and responsibility from total government control with token participation (Level 1) to partnership with community control where feasible (Level 7).

7	Partnership / Community Control	Partnership of equals; joint decision making institutionalised; power delegated to community where feasible
6	Management Boards	Community is given opportunity to participate in developing and implementing management plans
5	Advisory Committees	Partnership in decisionmaking starts: joint action or common objectives
4	Communication	Start of two-way information exchange: local concerns begin to enter management plans
3	Co-operation	Community starts to have an input into management; eg use of local knowledge, research assistants
2	Consultation	Start face to face contact; community input heard but not necessarily heeded
1	Informing	Community is informed about decisions already made.

Table 3: Levels of Collaborative Management (Berkes 1981)

The planning regime in New Zealand is implemented through national resource management legislation and through policies and plans at a local authority level. The development of plans and policies must take into account certain Maori interests, but the way in which these interests are to be recognised is not prescribed. There is room, therefore, for unique responses to be developed to suit particular local conditions and situations. Berkes' Ladder creates a useful theoretical context within which to assess the degree to which the planning system provides for the Maori interest in Maori land.

The concept of collaborative management spans a variety of management arrangements that involve various degrees of power sharing. It involves partnerships between groups and institutions with an interest in a resource, and formalised agreements detailing rights, obligations and rules for decision-makers and resource users, as well as the structure and balance of decisionmaking. Collaborative management has been widely used to establish resource management regimes with indigenous groups in many countries around the world. It offers potential for resolving many of the difficulties surrounding resource management planning for Maori land, and may assist in addressing the currently unresolved issue of how to give appropriate recognition to rangatiratanga over resources in Maori ownership.

CHAPTER 4

MAORI CUSTOMARY TENURE AND RESOURCE MANAGEMENT PRACTICES

Techniques of planning and resource management began long before the legislative practices of the twentieth century. The regulation of people's relationship with the environment through formal or ritualised processes has been practiced by many, if not all indigenous societies (Durning 1992). Indigenous resource management practices develop from a long association with a local environment, and from the necessity to create patterns of use which ensure the ongoing survival of humans, and hence the sustainable management of local resources.

When the first Polynesians arrived on New Zealand's shores the environment was in many ways completely different from their tropical homeland. Not only were the plants and animals quite different, but the weather was colder and the growth rates were nothing like those in the tropics. There is abundant evidence that the first Polynesians used resources in an unsustainable way which led, for example, to the extinction of bird species such as the moa and the loss of one third of New Zealand's forest cover (Department of Conservation 1998b). However as the pioneering phase passed, methods of conserving and sustaining crucial resources were developed. A few domestic plants from the Pacific were cultivated, but the mainstay of diet and use were indigenous plants, both cultivated and gathered from the wild (Park G 1995).

Maori world view

Pre-European Maori life was dependant on an intimate understanding of the physical environment, and a detailed knowledge of plants, animals, rocks, the sea, fish, the weather and the stars (Salmond 1991). Such knowledge, and associated practices guiding the use of food resources, would have been essential to ensure the continued sustenance of the hapu. The techniques of sustaining life were entwined with religious and cultural practices, and were passed from generation to generation through a

complex code of practice, myth and taboo. A distinctly Maori 'world view' towards the environment and its appropriate management developed and is still strongly adhered to within Maori society. The Waitangi Tribunal (1988) has summarised the Maori world view as including

- a reverence for the total creation as one whole
- a sense of kinship with fellow beings
- a sacred regard for the whole of nature and its resources as being gifts from the gods
- a sense of responsibility for these gifts as the appointed stewards, guardians and rangatira
- a distinctive economic ethic of reciprocity; and
- a sense of commitment to safeguard all of nature's resources (taonga) for future generations

Any discussion of Maori customary resource management practices must begin first in the spiritual tradition, on which the approach to the environment and practices of resource conservation are based. Although there may be tribal variations in the specific practices of resource management, the spiritual beliefs underlying them appear to be consistent.

Two aspects fundamental to the Maori world view are whakapapa (genealogy) and the personification of natural phenomena:

> *Genealogically, Maori descent traces its origins back to the origins of the natural world and the universe as a whole, and to the primal parents Rakinui, the Sky-Father and Papatuanuku, the Sky-Mother, and other atua or 'gods' 'spiritual agents' all of whom arose out of the procreative powers and genius of Io Matua Kore - the Parentless "one", the Supreme Creator* (Jarman et al 1996: 90) (Kai Tahu).

Complex genealogical constructs are used to explain both the time before and the time after the origin of the universe, including the creation of life. Versions vary from tribe to tribe but typically consist of recitations of creation events arranged in a genealogical order, beginning with Te Kore (the realm of chaos, nothingness and potential being) in which dwelt Io, the supreme being from whose essence the subsequent voids were

conceived. From Te Kore arose Te Po (the night realm), and thence the twilight dawn, and then Te Ao Marama (the full light of day). Io then created a single being from which emerged Ranginui (the sky father) and Papatuanuku (the earth mother). Ranginui and Papatuanuku gave birth to Tanemahuta (God of the Forests), Tawhirimatea (God of the Winds), Tangaroa (God of the Seas) and many others, each responsible for, or guardians of, particular natural phenomena. From this progeny arose the living world and all its inhabitants, including humans (Roberts et al 1995). Papatuanuku is embodied in the physical form of the land (whenua) and provides sustenance for all her children.

Arising from their position in the cosmic genealogy, an important theme of the Maori world view is that humans are an integral part of nature; that they belong with all other animate and inanimate things as part of the environment. The universe is holistic and dynamic, with a continuous process of continuous creation and re-creation, and the physical and spiritual dimensions form an indivisible entity (Jarman et al 1996). Everything in the universe, both living and non-living, has its own whakapapa. People are connected with the natural world through whakapapa and this interrelatedness makes impossible any separation of nature or superiority over it. The whanaungatanga (familial) relationship between people and other elements of the environment is exemplified by the relationship between Maori and land, to the extent that "at times it seems doubtful whether it is the tribe who owns the mountain or river or whether the latter own the tribe" (Gudgeon 1885 cited in Roberts 1995: 10).

> *Although the whakapapa of various tribes may vary as to the particulars, the process from which humans eventually emerge does not. Each begins with a series of abstract concepts, in genealogical form, emerging one from the other. The same order is used to describe the process of the physical universe as they unravel. The genealogy spreads in an every-increasing web of relationships from the single ancestral source. It includes the spiritual aspects of existence that are common to all things. The bond this creates between humans and the rest of the physical world is both immutable and unseverable. It finds recognition in a single word - whakapapa* (Tomas 1994: 40)

These close links mean that Maori see themselves as an intrinsic element of the environment, and as being both from and of the land. This is reinforced in the term tangata whenua, which embodies the nexus between people and the land (Park 1998).

The concept of mana is also central to the Maori world view. Mana represents spiritual authority and power and has been described by Maori Marsden as 'lawful permission delegated by the gods to their human agents and accompanied by the endowment of spiritual power to act on their behalf and in accordance with their revealed will' (King, Ed 1975). Human mana is indirectly derived from Ranginui and Papatuanuku who have their own mana, separate to and superior to humans. Since the authority is a spiritual gift delegated by the gods, people are never the source of mana, but only its agent or channel.

The environment, its resources and cultural and social properties are all taonga, which can be broadly defined to mean a highly valued object or resource. All things possess mauri (life-principle or life-essence) which links together all living things as one, without boundaries or division. Each resource and living thing has its own life force to sustain its existence, and when mauri is absent there is no life (Marsden 1989; Park 1998; Parliamentary Commissioner for the Environment 1998). The concept of mauri is fundamental to the ethic of environmental protection, management and development (Ngati Kahungungu in Parliamentary Commissioner for the Environment 1998). Mauri is protected by the exercise of kaitiakitanga.

Kaitiakitanga

Kaitiakitanga is the role played by kaitiaki. Traditionally kaitiaki are the spiritual assistants of the gods, who are themselves the spiritual minders of the elements of the natural world. These elements include the seas, sky, forests, birds, food crops, winds, rains, people and wars. The spiritual assistants are imbued with mana derived from the gods, and often manifest themselves in physical forms such as fish, animals, trees or reptiles. Through genealogy, people are related to all parts of the natural world and must ensure that the mana of kaitiaki is preserved. In this respect Maori become one

and the same as kaitiaki, as minders for their relations (Department of Conservation 1992).

According to Tomas (1994) Maori have always recognised that human welfare and environmental regulations are inextricably linked. However the reasons behind that recognition, and the duties to which it gives rise, are uniquely Maori. Kaitiakitanga, as a fundamental principle of Maori society, is a cultural and spiritual concept from which the rules and practices of regulating the environment arise. Tomas suggests that it encapsulated the whole of the Maori resource management regime, providing a code of rules for human interaction with other natural resources.

The role of kaitiaki is to ensure that the mauri or life force of their taonga is healthy and strong. The process of kaitiakitanga has a deep spiritual and elemental significance (Parliamentary Commissioner for the Environment 1998) and refers to the ethic and exercise of a Maori environmental management system, based on the tikanga (practices) developed and observed to maintain the mauri of parts of the natural world. The work of kaitiaki includes not only the duty to care for the physical and ecological wellbeing of the place or resource and the human communities dependant on them, but also to protect and nurture the equally important intangible dimensions (Park 1998). Where mauri is depleted, for example through pollution, the kaitaiki must do all in their power to restore the mauri of the taonga to its original strength.

Each whanau or hapu has kaitiaki responsibilities for the area over which they hold mana whenua (ie their ancestral lands and waters). Should they fail to carry out their kaitiaki duties adequately, it is believed that not only will mana be removed, but also harm will come to members of the whanau and hapu (Department of Conservation 1994). The traditional practices and scientific knowledge of kaitiakitanga are based on centuries of observation and experience, and invoked by those who have the necessary mana, training and discipline to serve as the interface between the spiritual dimensions and ordinary resource users (Parliamentary Commissioner for the Environment 1998)

Practices of kaitiakitanga were traditionally governed by laws or tikanga (culturally correct customary practices), which must be followed for fear of divine retribution or human acts of muru (confiscation of resources) (Roberts et al 1995). The word tikanga

is derived from tika, which is the major principle overarching and guiding the formalities and practices in Maori society:

> *Tika can cover a range of meaning from right and proper, true, honest, just, personally and culturally correct or proper to upright. From tika comes the term tikanga - customary, traditional and cultural aspects which are true and honest and just. Nga Tikanga Whenua links those meanings of tikanga to the meaning of whenua, so that the meaning goes beyond land to the right and proper customary ways of dealing with land.* (Hohepa and Williams 1996: 16)

Tikanga is based on the underlying principles and concepts of Maori culture such as tapu, mana, pono, whanaungatanga, aroha and utu. It relies on collective sharing of decisionmaking, tied to the community. In these respects it is very different from the European concept of 'law' which is tied to a world of individual rights and duties.

> *Maori law was an evolving process that punished wrongdoers, comforted victims, protected resources and sought harmony with and among Iwi ... People [were not seen as] isolated individuals but as interrelated parts of a communal whole, and that whole was the body politic* (Jackson cited in Hohepa and Williams 1996: 20).

In an environmental context, tikanga refers to the preferred techniques of protecting natural resources, exercising guardianship, determining responsibilities and obligations and protecting the interests of future generations (Matunga 1994). The way in which a tikanga is expressed will vary with the tribal group.

The concept of mutual dependency between people and the environment was upheld through a belief system based on muru (reciprocity) - that every gift requires a return gift; every insult requires retribution; every action inspires a reaction. This system operated using ritualised customs and practices, and underlay every aspect of tribal tikanga. Few iwi have committed tikanga to writing or reduced them to a single set of rules. The most appropriate tikanga for a group at a given time, and in response to a given situation, is more likely to be determined by a process of consensus, reached over time and based on both tribal precedent and the exigencies of the moment (Durie 1998).

An example of tikanga is kawa, which can describe the steps of a process or ritual for removal of tapu. All living species and natural phenomena contain mauri and for that reason are tapu to a greater or lesser degree. Traditionally, before a resource could be freely utilised, its tapu had to be removed and its god propitiated (Marsden 1989). Recognition of the tapu involved an appreciation of another life-force and of other life in general (Park 1998). Any mistake or contravention of the ritual or failure to complete it was a transgression (hapa) and taken as an ill-omen. Each resource had its own particular kawa, both to remove the tapu and to dedicate it for its use. The ritual was customarily performed before any activity or expedition was undertaken, and also during and after the activity. The process gave an opportunity to incorporate into action a reverence for life, the sense of the spiritual dimension and an understanding of the fitting and proper way to do things (tika). These perceptions prevent the careless, inconsiderate and wasteful use of resources and related disposal of wastes (Marsden 1989).

Resource management techniques

The practices of rahui and tapu are used to restrict the use of resources. Rahui is a form of temporary restriction relating to the condition of a resource and the nature of the tapu in or around a specific area (Park 1998). A rahui could be used to conserve a resource or allow it to replenish itself, for example by preventing fishing in a lake or river to allow the fish stocks to increase. The area would be monitored and when it was considered that the resource had regenerated sufficiently it would be lifted in accordance with the appropriate kawa (Marsden 1989).

Elsdon Best, an early writer on Maori customary life, made a number of observations of the exercise of rahui. He noted

> *The products of forest and stream were sometimes protected by an institution known as rahui, a form of tapu that was more effective than our game laws.* (Best 1924: 203).

In writing of Maori woodcraft, he explained:

> *Prior to the opening of the fowling season an expert would enter and examine carefully the forest to ascertain the quantity and condition of bird-life, and the*

> *numbers of the different species of game birds ...Certain trees were resorted to by birds every year when their berries were ripe, and the more famous of such trees received proper names. At least some of such trees were rendered tapu by experts, and in some cases its hau (vitality, productiveness) was protected by means of a mauri, or talisman.* (Best 1924: 195, 199)

The words rahui and tapu are sometimes used interchangeably. Sinclair (in King 1975) noted that laws of tapu were invoked to protect defined areas of land, lakes, rivers or stretches of coast from human exploitation or defilement, and would be applied for periods adequate to preserve or recover the sanctity of the soil or water.

Rahui could also be imposed following a drowning or death, over the area where it had occurred. It might be imposed for a month or whatever period was determined to be appropriate to allow time for the tapu associated with the death to be dispersed naturally by the cleansing powers of the natural elements.

Marsden notes that two functions must be exercised by stewards responsible for the exercise of rahui:

> *To prohibit exploitation, denudation, degeneration and pollution of the environment and its resources beyond the point of no return where the latent 'pro-life' processes within the biological functions and ecosystems of Papatuanuku collapse... That man as the conscious mind of Papatuanuku aid the pro-life processes of recovery and regeneration by focusing the mauri of particular species within that area. The means of accomplishing this was the task of the Tohunga...* (Marsden 1989: 27).

Tohunga had an important role in regulation and ritual. The report of the Royal Commission on the Maori Land Court noted:

> *Land was something to be used and cherished and kept in production for present needs, and held in trust for future generations. Care was taken to 'rest' those areas which were showing signs of over-use; in these cases a rahui was declared to allow that area to recover. Timber was reserved for special uses such as canoe building, houses, fencing and bridges. The taking of timber was controlled by a tohunga who*

directed the felling and removal of timber, thence under the direction of another tohunga who dealt in the craft of building houses or canoes or other products. (RCMLC 1980: 30).

Early European visitors to New Zealand noted the customs and practices of Maori to regulate the use of the environment

> *The New Zealanders have established here a wise custom, which prevents a great deal of waste and confusion, and generally returns to the planter a good crop, in return for the trouble of sowing; namely, as soon as the ground is finished and the seed sown, it is tabooed, that is, rendered sacred, by men appointed for that service, and its is death to trample over or disturb any part of this consecrated ground. The wisdom and utility of this regulation must be obvious to everyone* (Earle 1827: 21)

The Waitangi Tribunal's Te Roroa report (1992) contains a description of the Waipoua area which illustrates the close relationship between the people and their environment:

> *The settlement pattern...encompassed three zones: the pa on high ridges along the valley edge with their commanding views protecting the settlement against surprise attack; the lower slopes and river terraces with their storage pits; and the river flats by the coast. The people moved between these resource areas and those afforded by the forest and sea... Journeys to the coast for kai moana followed some well worn tracks ... Kawerua ... was a favourite fishing location, where people camped for short periods of time ... the forested mountains inland were intersected by winding paths which were discernable at a great distance 'though only a foot broad' ... some no doubt leading to pigeon landings like at Kohuroa where the birds were trapped during the season of the miro and where varieties of fern ... were harvested. In addition to delicacies like the forest rat, the forest could be harvested for the fruit of the kiekie ... Shellfish gathered along the coast complemented the ubiquitous kumara and other tubers grown in the cultivations ... while from the lakes of Taharoa, Kai iwi and Waikare a rich harvest of eel provided for a balanced diet.* (Waitangi Tribunal 1992: 15-16)

The report notes that although the boundaries of cultivations were defined by fences, feuding frequently occurred over less well-defined mahinga kai, such as rat runs or birding trees. Beyond the kainga, pouwhenua and rahui were erected at various points on the boundaries between competing groups.

Resource management practices were a basic part of the social organisation of Maori society. At the time of European contact, each hapu occupied and defended the boundaries of a territory on which it was dependent for its survival and nourishment, its continuity and identity. Status was accorded those who secured the wellbeing of the community by producing a surplus and distributing it (Pond 1997).

The Maori 'conservation ethic' is based on a world view in which humans and nature are not separate entities but are related parts of a unified whole. The management approach was essentially one of conservation for human use. Resource management practices were intended to ensure the sustainability of the resource for the benefit of people rather than because of any sanctity or intrinsic value of the resource.
Management of the environment has been described as "reciprocal utilitarianism", where utilitarianism is defined as "the ethical view that right conduct is determined by useful consequences, especially as is it tends to promote the most good for the most people". In this light the Maori conservation ethic is "*more akin to game management than to conservation, if conservation is seen strictly in the preservationist sense as the altruistic management of ... species for their own good rather than for the good also of the harvesters*" (Roberts et al 1995:16 citing Kirikiri and Nugent).

Roberts notes that the Maori conservation ethic is very similar to the IUCN (1980) definition of conservation as 'the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations'. There are also strong similarities between this ethic and the concept of sustainable management of natural and physical resources as defined in the Resource Management Act 1991. However there are some basic differences. The Maori environmental ethic is motivated by different philosophies to the western-based environmental ethic, and has different aims. Unlike the western conservation ethic, which has a conscious intention to sustain all local species for the enjoyment of future generations or because each is judged to have

intrinsic value, Maori resource management works through a locally-based familial relationship with the environment and an inherently conservative approach to its use (Roberts et al 1995).

Customary land tenure

The form of Maori customary land tenure is integrally linked with their methods of resource management. The Maori view of land was (and generally remains) quite distinct from the western view of it as a saleable commodity. The spiritual approach to the environment described above makes it clear that land was seen as a living entity, to which tangata whenua had genealogical links.

The Maori attitude towards land has been described by many commentators - most recently, and in great depth, in various Waitangi Tribunal reports. The Muriwhenua report, for example, states:

> *...Maori saw themselves as users of the land rather than its owners ... They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people. Similarly whenua, or land, meant also the placenta, and the people were the tangata whenua, which terms captured their view that they came from the earth's womb. As users of the earth's resources rather than its owners, they were required to propriate the earth's protective deities. This coincidentally, placed a constraint on greed* (Waitangi Tribunal 1997: 23)

The concept that land descended from ancestors was central. Land was associated with kin groups descended from those ancestors and could not pass outside of the descent group unless taken by force. Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law. The Waitangi Tribunal has noted that

> *... such was the association between land and particular kin-groups that to prove an interest in land, in Maori law, people had only to say who they were. While that is not the legal position today, the ethic is still remembered and upheld on the marae* (Waitangi Tribunal 1997: 24)

It is generally accepted that land was traditionally held tribally, and hapu and whanau groups within the iwi were allocated the right to use predetermined areas of land according to the needs of the individual and group. While individuals and groups could have the right to occupy and use land and resources, a veto existed on all alienation on land outside the tribe. According to Asher and Naulls (1987) this right was given to the paramount chief or tribal head, but was generally only exercised after a consensus decision by the tribe. Individuals or groups from other tribes could be given rights of access or use, but a payment (usually food produce) would be expected and the underlying ownership of the land would not pass to them.

The main right to resources lay with the community. An individual's right to those resources arose from his descent but also depended on residence, participation in the community and observance of its standards. Ancestors and the generations to come had as much interest in the land as the individuals living at any point in time. This view, according to the Waitangi Tribunal, compelled punctilious observance of constraints on resource depletion (Waitangi Tribunal 1997)

Land and its natural resources were seen as a common good. Group needs took precedence over those of the individual, and individual rights received little recognition. An individual's right to snare pigeons of rats, for example, would be based on the whanau's need for access to sufficient food resources to sustain life (Rei and Young 1991). Generally, individuals were allocated the right to use a particular resource, rather than the right to all uses within a defined parcel of land (Waitangi Tribunal 1997).

There was a significant difference between land rights and use rights. Land rights flowed from an abiding relationship between the land and the associated hapu. Use rights were conditional upon a regular contribution to the community and acceptance of its authority and norms (Waitangi Tribunal 1997). Rights of use therefore depended on occupation, and by extension, active and responsible membership in the landholding group (Kawharu in Grocombe 1971). An area for a house in a village may have been defined on the ground, but use-rights for activities other than housing typically covered specific food-producing resources rather than the land itself. Areas of use-rights would be identified by rahui, a warning mark against trespass, or by prominent natural

features. An individual or family would therefore typically hold a number of different use-rights such as village space for a sleeping hut and storehouse, a plot in a plantation, and a specified tree on common land for bird snaring (Kawharu 1977). An individual gained rights to land from both the maternal and paternal side, but the rights lay dormant in the area where he/she did not live and became less important with the passage of time. Descent gave right of entry, but use rights depended as well on residence, participation in the community and observance of its standards. An individual's rights to use land were reasonably flexible but there was no right to alienate land without the consent of the tribe or hapu (Kawharu 1977).

While land rights generally sprung from genealogy, they were not immutable. Various writers (Kawharu in Grocombe 1971; Royal Commission on the Maori Land Court 1980; Asher and Naulls 1987; Rei and Young 1991) concur that tribal rights to land could be established or altered in four main ways: through take taunaha, or discovery of unoccupied land; take raupatu or conquest; take tupuna or succession from an ancestor; and take tuku, gifting. Take tuku appears to have been reasonably common but took place within a well-understood framework of rules. The person giving the land had to have sufficient rights to be able to do so, and the tribe had to agree to the transaction. As well, the land had to be subsequently occupied or used by the person to whom they were given.

Most importantly, and relating to all of these forms of land acquisition, was the continuity of occupation and use described as ahi kaa - that the 'fires were kept burning' which was a co-requirement of all rights of occupation. It was generally accepted that the fires of occupation had gone out if an individual or the group itself had ceased to occupy and use a particular piece of land for three generations or more. Rights to land would then be lost. Using this principle, a defeated tribe could still lay claim to their land if survivors were still living within the tribal territory or even if they were still living there as slaves of the conquerors (Asher and Naulls 1987)

Post-Treaty changes to traditional land tenure

The Maori view of land is in sharp contrast to the Lockean concept of property which lay behind the law, tenure systems and land acquisitions which followed the signing of the Treaty of Waitangi. The concept of property as a political, moral and economic philosophy arose in the feudal period of European history and formed the basis for legally established land rights in the seventeenth century. John Locke (1632-1704) developed these concepts to define property rights, and in doing so generated moral justification for European migrants to colonise the lands of native peoples (Raine 1998). The New World, which was becoming within reach of European colonists from this time, was seen as being predominantly wastelands which were not 'owned' by their native peoples and were therefore available for the acquisition and use by colonising peoples. This view is epitomised by de Vattel:

> *"When the nations of Europe, which are too confined at home, come upon lands which savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them"* (cited in Raine 1998:44)

Western colonisers saw Maori land as being unused, and therefore rightfully available for their acquisition. They brought with them concepts about land and land rights that would have been incomprehensible to Maori. Land was a commodity which could be divided and sold. The multiplicity of rights and obligations under Maori land tenure and use were not relevant to the European concept of ownership, under which rights of property were almost absolute.

European settlement of New Zealand commenced in a small way from the 1800s and in increasing numbers from the 1840s. Europeans arriving on New Zealand shores seeking to acquire land brought with them a completely different (and initially incomprehensible) concept of land tenure and property rights. In the Muriwhenua Land Report, the Waitangi Tribunal (1997) found that early land transactions (seen as 'sales' from the Pakeha perspective) would have been perceived by Maori as the allocation of use-rights in terms of their principles of land tenure. In particular it noted that Maori law was directed to relationships, not property. The importance of the early land transactions to Maori lay in the creation and development of mutually supportive

community relationships, in which Europeans were seen as joining the Maori community. Land allocation was incidental to that and was perceived to operate only so long as each party was committed to the community's interest (Milroy 1997)

While there had been a number of European land acquisitions prior to 1840, the signing of the Treaty of Waitangi in that year set the scene for large-scale land purchases by the Crown to provide both for the growing streams of immigrants and to also form the basis of income to the Crown through the on-selling of land to settlers. It was agreed in the Treaty that the Government would have a monopoly on the purchase of Maori land, and in return the Governor was obliged to stand as protector of the Maori people and as a guardian of their interests. The Muriwhenua Report notes "*The government knew what Maori could not have known: 'sovereignty' for the British meant that the British land system applied and, under this system, the extensive alienation of land by Maori would not produce the results that Maori intended unless they kept sufficient land in reserve*" (Waitangi Tribunal 1997:5).

The period up until 1860 was one of relative peace between Maori and Pakeha. Maori were willing to sell land for the benefits they perceived would be forthcoming, often appearing to believe that they were granting only rights of occupancy. Land sales were also a way of publicly asserting a tribe's right to claim the land involved (Asher and Naulls 1987). In the 1850s settler pressure for land grew, especially in the North Island. Maori became increasingly reluctant to sell land as they came to understand the European concept of 'sale' as being forever. Concerns about the declining mana of chiefs, the alteration of traditions, the imposition of British law over Maori law, and the increased tempo of land sales led to a Maori reluctance to engage with land purchasers.

On their part, Europeans were frustrated by the uncertainty created by the communal nature of Maori land ownership. Difficulties arose from sales being made by those who did not have the right to sell, or did not have the sole rights to the land in question, which led to several 'sales' being possible for the same piece of land. Identification of the true 'owners' was almost impossible and even when found they did not necessarily want to part with their land. Anti-land-selling leagues were formed. Tension finally boiled over into the land wars in the 1860s, precipitated by an inter-hapu quarrel about the right to sell land at Waitara (Asher and Naulls 1987).

The Native Land Acts of 1862 and 1865 were the government's answer to these problems. The principle behind the Native Land Acts was bluntly stated by the Hon Henry Sewell in introducing the Native Land Fraud Prevention Bill:

> *The objective of the Native Lands Act was twofold: to bring the great bulk of the lands in the northern island which belonged to the Maori and which, before passing of that Act were extra commercium - except through means of the old purchase system, which had entirely broken down - within reach of colonisation. The other great object was the detribalisation of the Maori - to destroy - of it were possible, the principle of communism which ran through the whole of their institutions and upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into a social and political system. It was hoped by the individualisation of titles to land giving them the same individual ownership which we ourselves possessed, they would lose their communistic character and that their social status would become assimilated to our own* (Sewell cited in Feist et al 1997: 3).

The method chosen to carry out the detribalisation and individualisation of land was to set up a Native Land Court. Established in 1865, the Court had three main functions: to ascertain the owners of Maori land according to Maori custom; to transmute any title so recognised into one understood at English law, and to facilitate dealings in Maori land and peaceful settlement of the colony (Palmer 1987). The role of the Native Land Court initially reinforced traditional social systems even though it was through a novel legal system. The requirement laid upon the Court to ascertain the ownership of customary land according to Maori custom required the judges to grapple with concepts, traditions and language of a foreign culture and to try and translate that culture into a form which could be meshed with British common law, especially as it related to land tenure. For individual chiefs or heads of lineages the Court hearings gave an opportunity for rights to be confirmed and recorded, which gave a means for greater security for the group and its lands. According to Kawaharu (in Grocombe 1971) this opportunity seems to have been initially taken up with little hesitation.

However in several critical aspects the Court failed to set up a system which reflected Maori custom. Firstly, the assessment of ownership was determined by the "1840 rule".

In its early stages, the Court developed a number of principles to guide its work, one of which was that in determining ownership of land it could not recognise changes made by force after the superimposition of British sovereignty in 1840. This 'rule' failed to recognise that conquests which had occurred shortly before 1840 would have not normally have resulted in full ownership rights being transferred to the conquerors. For example the musket-related conquests which took place around New Zealand and the Chathams in the 1820s and 1830s would not under traditional conditions have created full rights unless the initial occupation had been associated with the conqueror's fires remaining alight on the lands for up to three generations. The result was that not only were the conquered groups denied the opportunity to regain their lands, but a highly abnormal situation was cemented into place through the Court's proceedings (Gilling 1994).

Another critical failing in the system was that the 1865 Act determined that there would be a maximum of ten owners listed on the title to any block of Maori land. The ten named on the title were to be trustees for the other un-named owners, in an attempt to recognise Maori tribal ownership. Unfortunately the ten named owners had the right to sell the land without consulting the other un-named co-owners, which happened frequently enough that the government passed another Act in 1867 to try to prevent it. This was unsuccessful, so in 1873 a new Act required memorials of ownership to be drawn up in place of certificates of title. The names of all owners had to be on the memorial and before sale took place all of the signatures had to be obtained. A result of this was a slowing of the rate of land sales to the government (Kawharu 1977). But the damage had been done, and many blocks passed out of Maori ownership with no record or consent of all of the true owners.

Thirdly, the 'Papakura rule' (stated by Judge Fenton in 1867 and followed by successive judges) determined that the succession of Maori land should be in favour of all children equally. The concept that all children would inherit shares equally from both parents was neither a customary Maori nor English law. As noted by Williams (1999: 180) the system did not reflect Maori customary succession in that it made no allowance for mana, for the status of members of a hapu, or for ahi kaa in occupation of land. Traditionally, descent and land-use rights did descend from both parents, but this was qualified by the fact that use-rights only existed in the village where they lived and were

active members. Rights in the other parent's land lay dormant and would usually be lost after 3 generations absence. The imposed Native Land Court system sheared away the qualification of active involvement in the land and community. It resulted in a system set up to fail - land interests that would divide upon each succeeding generation, so that they became smaller, more scattered and less economic as years went by.

The system of memorial schedules, with all original owners recorded with equal shares in all of the land, was entirely different from traditional tenure where the tribe owned the land communally and each individual or family unit had a right to use a specified part or specified resources. The result was that once each tribal member had a share in the land, they could do with it as they liked, including sales to outsiders, without reference to tribal authority. A further problem was that each shareholder had as much right to occupy as anyone else. Personal use for gardening or other uses was imbued with uncertainty as others could allege equal rights in the land or crop (Kawharu 1977). At the same time, the system of use-rights to specific resources was destroyed as 'ownership' came to refer to an area of land within set boundaries rather than the customary concepts.

In short, the Native Land Act 1865 introduced a form of the English property law system of tenancy-in-common into Maori land tenure (McHugh AG 1994), and in doing so made a clean sweep of two essential aspects of customary land rights: it vested ownership in individual hapu or whanau members, who could then sell their interests to anybody; and it also meant that use-rights no longer depended on residence and contributions to the community, but instead automatically were transferred with ownership. The identification of defined blocks of land identified by survey pegs and cadastral boundaries and with defined owners was completely at odds with the customary system whereby whanau and hapu had a range of overlapping rights in the same area (Gilling 1994). The concept of freehold title in no way reflected the realities of Maori land tenure.

While the Land Court nominally operated according to Maori custom, the 'custom' applied in the Court is derived from rules laid down by Maori Land Court judges, often bearing little resemblance to tikanga Maori (Hohepa 1996:46). For most of its duration, the role of the Native (later Maori) Land Court was to facilitate the passage of

customary land to Maori land, and to ease the subsequent sale of Maori land to the Crown and to settlers (Williams 1999). Over the years the law relating to Maori land and the jurisdiction of the Maori Land Court were altered and extended by many Acts, the major legislation being in 1908, 1931, 1953, 1967 and the current Te Ture Whenua Maori (Maori Land) Act of 1993. Today, the role of the Court has done a complete about-face. Rather than promote the sale of Maori land, it is required to promote its retention and development, and the Act's provisions effectively prevent the sale of Maori land to all but members of the same hapu as the owners.

Discussion

Traditional Maori society was profoundly and intimately connected with the land. Complex codes of behaviour were associated with the management of land under tribal control and in ensuring that food and other resources would be in ready supply. Maori saw themselves as users of the land rather than its owners - or put another way, they saw themselves not as owning the land but as being owned by it. Over time, Maori developed intricate systems of resource management to ensure the sustainability of resources for the benefit of people. The system was integrally linked with the system of land tenure, which allocated use and occupation rights but at the same time manipulated those rights in the interests of the group as a whole.

Following European settlement, a new system of land tenure was imposed which radically changed the relationship between people and the land, and between members of the hapu who owned the land. Once land was partitioned and owned as a commodity, the complex systems allocating use-rights to specific resources under specific controls could no longer operate. Additionally, as European commodities became available, there was less reliance on traditional food sources, and traditional systems of managing native food resources in a sustainable manner would have become increasingly irrelevant. At no point was there a formal recognition within the Crown system of laws of Maori traditional resource management techniques, except perhaps recognition of customary rights to fishing. In spite of this, Maori have passed down traditional concepts relating to environmental management, and appear to still practise at least some of the resource management techniques developed by their ancestors.

CHAPTER 5

PLANNING-RELATED LAW AFFECTING MAORI LAND 1840-1985

In the period immediately following the Treaty of Waitangi, there was a real possibility that Maori might retain rangatiratanga over their own lands. In 1842 the Attorney-General William Swainson suggested the establishment of Native Districts, where Maori could live under traditional custom, subject only to the moral influence of missionaries and Protectors (Ward 1974). Swainson envisaged that the Districts would still be regarded as British territory, but that Maori living in them would be exempt from the obligations of British subjects, at least for a time. His plan was opposed by George Clarke (Chief Protector) and never came to fruition. Ward notes that the declaration of the Native Districts would have involved a de facto acceptance of the Maori social system and allowed Maori to adapt to the Western world at a pace and manner more of their own choosing: "*the result would have been a very different New Zealand, an essentially Maori New Zealand, and this was an unpalatable prospect to missionaries, settlers and officials alike*" (Ward 1974: 61).

However the concept did not disappear. In 1852 the Constitution Act set up a representative central government, presided over by Provincial Councils, and at the same time provided for the 'setting apart of districts in which the laws, customs and usages of the Aboriginal or Maori inhabitants of New Zealand should for the present be maintained for the government of themselves, in all their relations and dealings with each other...' (s71 Constitution Act 1852). There is no evidence that this section was ever implemented.

Other attempts at formally recognising customary practices were also made. Section 4 of the Native Rights Act 1865 expressly recognised Maori customs and usages, and customary resource rights were referred to in section 8 of the Fish Protection Act 1873 (Tamihere 1984). In 1892, Sir George Grey suggested a Native Empowering Bill whereby:

> *The natives, where they inhabit villages, are to be authorised to establish municipalities with such power as the Governor-in Council may give them, such powers to be akin to those given to European municipalities.* (NZ Herald 12/9/92)

In spite of these attempts, Maori control of their own resources remained a reality only as long as they remained isolated in their own settlements, and European influence and desire to acquire land stayed at arm's length. While in 1840 there may have been some acceptance that Maori customs and values could continue, the Treaty of Waitangi soon dropped from settler consciousness - so far in fact that in 1877 Judge Predergast could rule that the Treaty was a 'simple nullity'[23].

Having obtained access to land through the Treaty, the settler government began to consolidate its authority and gradually subsume traditional tribal authority by a legal system based on British law (Gray et al 1988). The approach was to deny that Maori customs and values existed in any comparable sense to British law, and to give them no formal recognition in law. This was confirmed by Judge Prendergast in 1877 who denied the existence of 'any body of law or custom capable of being understood and administered by the Courts of a civilised country'. If it had been known to exist, 'the British government would surely have provided for its recognition'[24].

Maori control over their own resources, then, remained only until laws were developed which assumed or imposed national or council-level means of controlling land use and development. The formal practice of planning did not develop in New Zealand until the 1926 Town-Planning Act. However, from 1840 to that date there were many practices, laws and institutions that in effect directed and controlled the use of Maori land. Some of these were subtle. By 1880 the European population had risen from a tiny minority to a majority, had defeated Maori in the land wars, and had put in place a system of law and an economic system whose cornerstone was the concept of individual property rights (Gray et al 1988). Government settlement schemes aimed at opening up the country and promoting further European settlement were in essence 'planning' schemes. They strongly influenced the pattern of development of New Zealand and impacted

---

[23] Wi Parata v the Bishop of Wellington (1877) 3NZLR
[24] Ibid.

heavily on Maori land use and retention. The schemes started with the Bay of Islands Settlement Act 1858 and included the development of thermal springs districts and other areas in the interior of the North Island where land purchases were difficult to obtain otherwise (Marr 1997). Under the Native Townships Act 1875 the government could by proclamation declare any parcel of native land set apart as a site for a native township. There appear to have been no requirement to consult with or obtain the consent of Maori owners. Allotments allocated to the native owners were not to exceed twenty percent of the total site, and the rest of the allotments were to be leased, and rents to be paid into the public account and paid out to the Maori owners. In practice the government succumbed to pressure and allowed lessees to purchase the freehold (Marr 1997).

A significant attempt at providing for greater Maori control of townships was an amendment to the Native Townships Act in 1902, which allowed the governor to vest any parcel of Maori land in a Maori Land Council as a native township. Maori Land Councils had been previously set up at the instigation of Maori leaders Carrol and Ngata in 1900. Under the 1902 Act these Councils were given similar responsibilities to the Surveyor General and Commissioner of Crown Lands with regard to native townships, including arranging the survey of the township and 'planning' roles such as the laying out of streets, reserves and allotments, deciding on any disputes arising from the survey, dealing with the sale, lease or exchange of allotments and reserves, distributing the proceeds of the leases and providing allotments for Maori owners. Townships created under the Act included Otorohanga, Te Kuiti and Taumaranui (Woodley 1996). However, over time the degree of Maori 'planning' control diminished. In 1905 Maori Land Councils were replaced by Maori Land Boards, in which only one of the three members were required to be Maori. In 1910 settler interests became paramount and the Act was changed so that settlers could acquire the freehold. In the 1920s the Crown set about systematically acquiring interests in the three King Country townships following pressure from the lessees to do so on their behalf (Woodley 1996). The minor experiment in delegated planning was over.

During the second half of the 19th century, settlers were not only expanding into the more accessible rural areas but also congregating in villages and towns, and were expressing the need for facilities and services. This gave rise to quantities of municipal

corporations legislation, which was generally concerned with matters such as the width of streets, provision of sewerage, lighting and water supplies and amenities such as markets, community buildings and reserves. All local authorities had acts of this type by 1866. The Plans for Towns regulations 1875 provided for 'gridiron' town layouts, minimum street widths, recreation space, quarries and other facilities. The Land Act 1895 contained similar provisions. Both were concerned with town development rather than rural areas and hence had no specific impact on Maori land.

Over time, however, land-taking powers to provide for services and amenities were introduced, including the power to take Maori land (Marr 1997). Legislative and administrative policies of the 1880s and 1890s were designed to further settler interests, with little attention to the impact on Maori values and concerns. Roading and drainage projects favoured European settlement and farming development, and little attempt was made to prevent the resulting encroachment on reserves used by Maori for food sources, or the destruction of fishing grounds. As the scope of public works acquisitions broadened to include such things as scenic reserves, they began to encroach further on Maori land. In many areas Maori had chosen not to sell land where it allowed them access to traditional food supplies, such as adjacent to the coast. These were not prime agricultural lands so their retention had been agreed to. However when scenic reserves became a public works matter many of these Maori reserves were compulsorily taken. There was also often no attempt to gauge Maori concerns - for example drainage or river works could destroy ancient eel weirs which may have been used for generations. The excuse was often made that serving notice was impossible for Maori land owing to the large and scattered number of owners (ibid).

Public Works Acts, which sought to provide facilities for the 'common good', had a significant influence on the use and retention of Maori land. Both the Crown and local authorities had the power to take land (including Maori land) for public works. The definition of 'public work' was extended over the years as the need arose. The Public Works Act 1928 definition included any survey, railway, road, quarry, bridge, harbour, river works and mining. Land acquisition for public purposes was also possible for local body provision of recreational and associated social facilities (Physical Welfare and Recreation Act 1937); housing improvement, safety and associated land subdivision and development (Finance Act (No. 2) 1945); works associated with town and country

planning (Town and Country Planning Act 1953) and reserves (Reserves Act 1977) (ibid.).

Town Planning Act 1926

The Town Planning Act 1926 formalised and extended the responsibility of local authorities for planning for the common good. The Act provided for the preparation of planning schemes for boroughs with populations of over one thousand people. The schemes were to cover the land within the borough area and by the 1940s could also extend to the peri-urban area. Matters to be dealt with in planning schemes included roads, streets, footpaths, bulk and location of buildings, reserves for recreation and forestry, objects of historical interest or natural beauty, sewerage, drainage and water supply. A National Town Planning Board approved the planning schemes until 1947 when administration passed to the Ministry of Works and Development. The Act made no reference to Maori land and appears to have had little impact as most Maori land lay outside of urban areas.

More planning legislation began to appear from the 1940s. The Finance Act (No 3) 1944 gave the Ministry of Works or the local authority powers to prepare or promulgate schemes of development or reconstruction for specified areas. Slum clearance provisions were contained in the Housing Improvement Act 1945. The Land Subdivision in Counties Act 1946 linked subdivision to the 1926 Town Planning Act with a requirement that the subdivision could not be inconsistent with any town-planning or extra-urban planning scheme.

Town Planning Act 1953

Maori land did not become significantly affected by formal planning legislation until the Town Planning Act of 1953, which consolidated and revised previous town planing legislation, and applied for the first time to all land, not just urban areas. The Act required the Maori Land Court to have regard to the requirements of district schemes

when dealing with planning matters under its jurisdiction such as partitions[25], consolidation schemes and laying out roads and streets. Other forms of use and development not controlled by the Court came under the jurisdiction of the local authority's district scheme. The Act made no mention of a need to take into account Maori interests in developing district schemes - a situation that was not to change for another 24 years.

Maori land partitions came under the control of local authorities in 1967 through an amendment to the Maori Affairs Act. For the first time, local authority permission was required for partitions, and all requirements that could be applied to the subdivision of general land could also be applied to Maori land. But additionally, the partition of Maori land still had to be approved by the Maori Land Court, creating a double system of control.

The Town Planning Act 1953 not only began to control the use of Maori land, but also became increasingly important in decisions on the taking, control and use of Maori land for public purposes. Processes such as designated uses, zoning, subdivision requirements and public reserve contributions all had a significant impact on the retention and use of Maori land (Marr 1997). Legislation such as the Public Works Act, in conjunction with planning law and regulations, effectively enabled the alienation of Maori land, especially where it lay in coastal areas and alongside lakes and rivers and was 'required' for reserves. As well as the esplanade reserve provisions, zoning and designation could effectively remove land from Maori control.

Planning legislation began to be viewed by Maori as another vehicle for the alienation of Maori land, through processes such as designations for public works or through zonings which virtually 'sterilised' land use. An example quoted by Tamihere (1984) was the Whangarei City Council's proposed reviewed planning scheme in 1974, which rezoned all the remaining Ngati Wai coastal lands as Proposed Public Reserve and Open

[25] Judge RM Russell of the Maori Land Court described the difference between subdivision and partition. When subdivision occurs, the owner or owners of an area of land in one title separate the land into different titles, but it does not necessarily involve a change in ownership. In comparison, partition does involve a change in ownership. Partition occurs when the Maori Land Court makes an order vesting parts of multiple-owned land in one title in different people. A separate Court Order is drawn up for each part of the land, stating the person or person in whom it is vested. Each order is a new title, so that on partition land that had been held in one title is broken up into two or more titles (Russell 1982).

Space. In the Ngati Wai tribal area, Pakeha owned 87% of this coastal strip, but only 800 acres of the Pakeha land was so zoned compared to 5500 acres of Maori land. Proposed reserves around Lake Taupo raised similar concerns (ibid). Land identified in district schemes for public works during the 1928-1981 period appears to have targeted Maori land to a greater extent than general land:

> *Land taking policies for public purposes were not always based on objective criteria such as engineering requirements. There is ample evidence that other factors such as entrenched attitudes, financial and administrative imperatives, sector interest and the relative political clout of landowners likely to be affected were often just as important.... Features such as the marginalisation of Maori and difficulties associated with Maori title appear to have resulted in a significantly harsher impact on Maori land.... Relevant data is unfortunately not available but it seems apparent from official documents that relatively more Maori land was taken for public purposes for most of this time and the required procedures and protections were less likely to be properly carried out* (Marr 1997: 169)

Marr also notes that the fragmentation of shares and the large number of owners of Maori land meant that the process of acquisition by agreement routinely applied to general land was difficult to use. Instead, local authorities tended to move directly into applying compulsory taking provisions on the grounds that procedures such as negotiation and notification were 'too difficult'. This in effect made Maori land taking much easier (ibid.).

The migration of Maori during the 1950s-1960s to urban areas possibly exacerbated the lack of recognition of issues of importance to Maori in the early district schemes. Many rural areas were bereft of their usual Maori population during this period. As noted by Judge RM Russell of the Maori Land Court:

> *When the planners started preparing district schemes for counties, they found marae standing by themselves with only one or two houses nearby. The planners zoned the actual areas occupied by such marae as Marae Reserves and the surrounding land as rural. People who had left a rural area in their youth in search of work found that a rural zoning prevented them from returning and building a home to live by the marae in their retirement* (Russell 1982: 17)

The earliest commentary from a planner specifically addressing Maori land and planning appears to have been by Gerhard Rosenberg in the late 1960s. He noted that the dominant planning focus of the day was on encouraging the economic development of rural land. The generally undeveloped state of Maori land was viewed as deplorable and in need of remedy. The 1960 Hunn Report on Maori Affairs had been highly critical of the state of affairs with Maori land: "*Maori land quite commonly lies in the rough or grazes a few animals apathetically while a multitude of owners rest happily on their proprietary rights, small as they are*" (Hunn cited in Rosenberg 1966:212). Hunn advocated a bold policy of full land utilisation (including Maori land) in the national interest - which meant full production of exportable farm produce. Such views were also held by the judicial arm of the state: "*The land must produce food. The desire of the Maori to own uneconomic and unused land must be sacrificed for the good of the common weal*" (Judge Scott cited in Rosenberg 1966:211). Rosenberg argued for a modification of this approach, suggesting that "total land utilisation" as a policy for Maori land had to be subordinated to regional planning considerations. He called for a better understanding of Maori traditional tenure and succession, and consideration of the interests of owner-kinship groups rather than individuals (Rosenberg 1966, 1967).

Maori too were concerned about the effect of planning regimes on Maori in general, and on the uses to which they wished to put their land. The New Zealand Maori Council expressed the increasing concern felt by Maori about the 1953 Town Planning Act in a submission to the Select Committee on Town and Country Planning in 1977:

> *The existing statute has for far too long been a matter of grave concern and serious and continuing strife for the Maori race. Some of the effects of the existing statute have been very poor communications; lack of real participation; cumbersome machinery; incomprehensible district schemes; lack of clear objectives and policies; ... lack of provision and protection for marae* [and] *traditional and cultural usages of historic places.* (New Zealand Maori Council cited in Vari 1985: 7)

Town and Country Planning Act 1977

Maori concerns about planning and related law began to be given some credence in the 1970s. This period was marked by a gradual change in public opinion towards Maori issues, the success of Maori protests such as the Maori land march, and a more sympathetic government. This was capped by the insistence and perseverance of the NZ Maori Council during the review of the 1953 Town Planning Act, and finally resulted in the first recognition of Maori interests within planning law. Section 3(1) of the Town and Country Planning Act 1977 (TCPA) included a list of 'matters of national importance' to be recognised and provided for in the preparation, implementation and administration of regional, district and maritime schemes, and in the control of development in areas where there were no district schemes. The 'matters' predominantly focused on the primacy of the agricultural sector over other uses in rural areas, but, significantly, it included section 3(1)(g): "the relationship of the Maori people and their culture and traditions with their ancestral land".

For the first time, the relationship of Maori and their ancestral land was given recognition in planning legislation, albeit as a matter to be balanced against other matters such as the 'preservation of the natural character of the coastal environment', and the 'prevention of sporadic subdivision and urban development in rural areas'. Additionally, the 1977 Act redressed the strongly physical bias of the 1953 Act so that social and cultural issues were equated with physical land use planning matters. The TCPA included other recognition of Maori interests: matters to be dealt with in district schemes included "provision for marae and ancillary use, urupa reserves, pa, and other traditional and cultural Maori uses", and regional schemes had to deal with regional needs for the same.

The presence of s3(1)(g) soon began to have some effect on planning practices. By the late 1970s a few planning appeal cases began to identify the importance of Maori interests in planning decisions. An Appeal Board case in 1977[26] recognised the cultural needs of Maori to live on a marae as being relevant to a town planing decision. In another case, the Tribunal found that planning should allow the Maori people to

[26] Morris v Hawkes Bay County Council (1977) 6 NZTPA 219

positively identify with and occupy and use their ancestral land[27]. Section 3(1)(g) also was applied to prevent the acquisition of Maori land for a public esplanade[28].

However the inclusion of section 3(1)(g) in the 1977 Act as being of equivalent importance to the other 'matters' gave a potential for conflict between the public interest and Maori interests. This was noted in the report of the Royal Commission on the Maori Land Court:

> *Anomalies contained in Section 3 of the Act which lists those matters of national importance are of considerable concern in Tokerau [Northland] where the majority of Maori land is situated in coastal areas. We understand the same situation exists in other Maori Land Court districts where significant Maori land holdings are situated on riverbanks or the shores of lakes. Therefore, in any proposal for the development or settlement of Maori coastal, riverbank or lakeshore land, consideration of three matters of national importance come into conflict, namely:*
>
> *(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development;*
>
> *(e) The prevention of sporadic subdivision and urban development in rural areas; and*
>
> *(g) The relationship of the Maori people and their culture and traditions with their ancestral land.*
>
> *Considerable expertise is required to balance such considerations and unless the Maori applicant has recourse to such experience, the Tribunal being bound by laws of evidence, must decide accordingly.* (RCMLC 1980: 123)

In 1985 the Planning Tribunal found that '*by enacting section 3(1)(g) Parliament intended that land use planning should encourage the Maori people to use their land, and that planning should as far as possible remove impediments to their use of land, not only for the purposes of daily life, but also so that Maori culture and traditions may be strengthened*'[29]. This was interpreted by at least one planner to infer that a different set

---

[27] Quilter v Mangonui County (Appeals 296/77 and 38/78 D B1275)
[28] Knuckey v Taranaki County Council (1978) 6 NZTPA 609
[29] Bridgehouse v Dannevirke County D No A86/81 C3435

of standards for subdivision and housing could be applied to ancestral land in order to strengthen the culture and traditions (Birkinshaw 1982). On the other hand, the Tribunal commented in a separate case that section 3(1)(g) was not intended to free Maori ancestral land from ordinary planning restrictions or constraints which may lawfully be imposed under the Act[30].

Other cases followed a line of limiting the use of Maori land where it was in the 'public interest'. In Lewis v Minister of Works and Development[31] the Planning Appeal Board stated that the designation of Maori coastal land was based upon the principal objective "to ensure that in due course there is adequate coastal land which may be used and enjoyed by the 'public at large'". Commenting on another case[32] where the re-establishment of a Maori settlement was declined as it would mean the uneconomic extension of services, Tamihere (1984) noted that once again the economic rationale triumphed over the spiritual or Maori wairua point of view.

For the first ten years after the enactment of TCPA, the term 'ancestral land' in section 3(1)(g) was interpreted by councils and the Planning Tribunal as applying only to land which had never passed out of Maori ownership[33]. A significant change occurred in 1987 when the High Court found the Planning Tribunal had erred in limiting the interpretation of 'ancestral land' to land remaining in Maori tenure or ownership[34]. In Habgood, the Court found that ancestral land was any land which had been owned by ancestors, although there must be some 'factor or nexus' between the culture and traditions and the land in question which affects the relationship of Maori with the land. Continuous ownership of the land by Maori would often be a relevant factor, as would be the extent to which a special relationship with the land had been claimed throughout the generations, but in each case the nature of the relationship needed to be established. In the same year (1987) the High Court ruled that Maori spiritual values were important in assessing water right applications even though the Soil and Water Conservation Act

[30] Royal Forest and Bird Protection Society v Clutha County (1985) 10 NZTPA 449
[31] Lewis v Minister of Works and Development (1978) NZTPD B74
[32] McCready v Marlborough County (1978) NZTPD B1256
[33] eg Quilter v Mangonui CC (ibid.) and Re Application by NZ Synthetic Fuels Corp Ltd (1981) 8 NZTPA 138
[34] Royal Forest and Bird Protection Society v Habgood (1987) 12 NZTPA 76

made no mention of them[35]. These proved to be seminal decisions that shaped subsequent case law and later led into the form of the Resource Management Act.

While the requirement to give some recognition of Maori values and needs introduced by the 1977 Act may have been revolutionary at the time, many Maori considered they were inadequate. This is partly because prior to 1953, the Maori Land Court had a much wider planning-type jurisdiction over Maori land and had developed an intimate understanding of Maori needs. The New Zealand Maori Council, in a submission to the Royal Commission on the Maori Land Courts, was concerned that

> ... *important areas of jurisdiction formerly exercised by the Maori Land Court before the passage of the Maori Affairs Act 1953 should not have been removed, without providing a satisfactory alternative. The ... overriding power conferred upon the Town and Country Planning Act to limit Maori housing on papakainga areas are cases in point* (RCMLC 1980: 122).

When this role was taken over by councils, the understanding of Maori needs and processes to provide for these in a sympathetic way was largely lost.

During the 1980s there was an increasing focus on planning and Maori land issues. Records from hui, conferences and discussion papers on Maori land and planning show two main themes: one being that the present legislation was inadequate to provide for proper consideration of Maori concerns in all areas of environmental decisionmaking, the other that current planning provisions unreasonably restricted the use of Maori land. At a seminar on land use sponsored by the Land Use Advisory Council in 1980, Dr Evelyn Stokes stated:

> *In many cases the restrictions on residential development by rural zones in local district schemes is perceived as a restriction on Maori community development. Many Maori people are deterred by the apparently complex procedures of the Town and Country Planning Act, which are operated by Pakeha bureaucrats. And many feel that county councils which are dominated by Pakeha farmers have little sympathy with Maori aspirations. There is scope for a good deal more dialogue between county councillors and their Maori constituents in many New Zealand counties.* (Stokes 1980: 6)

---

[35] Huakina Development Trust v Waikato Valley Authority 1987(2) NZLR 188

At a seminar on Maori Land and Planning Law at Tapeka Marae, Tokaanu, a range of legislation which impacted on Maori land was targeted:

> *The Town and Country Planning process and mechanisms along with related legislation including the Public Works Act, Reserves Act, Local Government Act, Water and Soil Conservation Act, and Mining Act, to name some, have been imposed on Maori land and in areas of non-Maori land without due regard to the unique and peculiar relationships and characteristics associated with Maori people and their ancestral lands* (Asher 1982: 1).

Such seminars were indicative of new approaches to Maori land planning. In 1983, advice on how to provide for Maori needs was developed by the Town and Country Planning Division of the Ministry of Works and Development, which at that stage was the national planning advisory agency. The Ministry's publication "Planning for Maori Needs" advocated Maori community participation in the development of planning schemes and the inclusion of Maori Purposes zones in district schemes to provide for marae and Maori housing. The report noted

> *...the provision of housing on Maori land is one of the most pressing issues facing rural Maori communities. Many Maori families are not permitted to build houses on traditional land even in the vicinity of an existing marae, because the land is zoned rural. Yet, many Maori communities would claim they had the right to build housing on their ancestral land irrespective of the zoning. The task of planning is to marry the needs of rural Maori communities with other town planning considerations* (Anderson 1983: 61).

From around the early 1980s, some councils, particularly those in areas with high proportions of Maori land, made a genuine effort to provide for Maori needs to the extent that it was possible to do so under the TCPA. Taupo County Council, for example, introduced a Papakainga zone in their district scheme "to provide for the particular needs of Maori people who have strong traditional attachments to their ancestral lands and where provision of housing is necessary to utilise the family papakainga as established by the Maori Land Court". This allowed for up to twelve dwellings erected in accorded with a comprehensive development plan prepared by the trustees for the land (Crawford 1982). A number of other rural local authorities developed provisions in their district schemes which, to a degree, provided for specified

Maori needs in rural areas, either in a general sense or specifically relating to Maori land. The types of provisions which arose in District Schemes are discussed further in Chapter 8.

Maori dissatisfaction with the planning regime

However, Maori dissatisfaction with the planning regime remained. The NZ Maori Council, in a discussion paper on Maori Affairs legislation, reiterated its concern that local authorities were not the appropriate authority for control of land use of Maori land:

> *Fourteen years ago the Maori Land Court lost the power that it had had for some 100 years to partition land to provide for the housing and settlement of our people. The control of our traditional rights of occupation and shared use became vested in local authorities* (NZ Maori Council 1983: 24)

While the paper applauded the spirit of the Town and Country Planning Act 1977, it deplored the reality that it had not resulted in any significant relief to Maori owners seeking to build on their land. The Maori Council also noted that the Maori Land Court had an intimate knowledge of the complexities of Maori titles and owner groupings and was a more appropriate forum for land use decisionmaking. It was seen as anomalous that its jurisdiction was subject to the prior scrutiny of local authorities and Planning Tribunals with no specialist knowledge in these areas, and that those with little knowledge of Maori interests should be weighing it against the public interest.

The Maori Council submitted that town planning had inhibited the development of rural settlement on Maori lands, possibly because plans did not adequately cater for Maori circumstances, and also that the cost of planning consent and appeals served only the interests of those who can afford to speculate. They suggested an alternative approach whereby Maori owners be given the right to partition and/or build on their land, subject to a hearing by the Maori Land Court, at which the local authority would have the right to be heard on matters such as housing densities, roading standards, land suitability and design and appearance of houses. The Court could impose conditions on any of these matters, and any appeals on the conditions (by either party) would be heard by the Planning Tribunal. A town planning section within the Department of Maori Affairs

was also suggested, with town planners, architects and surveyors, to consult with local authorities, the Maori Land Court and Maori owners to promote residential development schemes and assist individuals and groups obtain homes through the system suggested above or through local authorities on town planning applications.

The system of subdivision control was also a matter of concern to Maori. Until the Resource Management Act 1991 was enacted, subdivision was not controlled under planning legislation but under completely different laws, even though in latter years subdivision standards fell within the scope of land use planning. Maori land subdivision fell outside of this, and was controlled under different legislation again to the subdivision of general land.

In the early part of this century, subdivision was controlled under the Land Act 1924, and required the approval of the Minister of Lands prior to deposit under the Land Transfer Act. However, these provisions do not appear to have applied to Maori land, the subdivision or partition of which was covered by Maori land legislation. The Land Subdivision in Counties Act 1946 clearly differentiated between the subdivision of Maori land and general land. Section 3 of this Act required that where rural land was subdivided into lots of less than 10 acres, the plan must first be approved by the local authority and/or Minister of Lands; however it was exempt this approval process if it was a subdivision "effected by orders of the Native Land Court for the purpose of providing Natives ... with sites for dwellings". Where Maori land was vested in the Native Trustee or a Maori Land Board the local authority was not involved, and the Native Minister approved subdivisions. No appeals rights to a refusal of consent were available in this instance (unlike general land) (s3(8)). A further distinction between Maori land and general land was that esplanade reserves were not required to be set aside upon subdivision of Native Land.

A double system of control of Maori land partitions was introduced in 1967, whereby approval was required from both the Maori Land Court and the local authority. The council's role include an assessment of whether the partition was in accordance with the district scheme and whether the lots were physically suitable for the proposed use, while the Maori Land Court needed to ensure that the Maori Affairs Act requirements were adhered to and that the necessary number of owners had agreed to the partition (Russell

1982). Under this double approval process it was by no means certain that the plan approved by the council would be approved by the Court, or vice versa. It was not uncommon for plans to be forwarded between the parties for some years before approval was finally gained[36].

The system was onerous, time-consuming and expensive. Additionally, the requirement for the vesting in the local authority of 20 metre esplanade reserves was seen by Maori as prejudicing land rights and amounting to an unfair acquisition of land for public use, contrary to Treaty promises (Walker 1987). Even further concern arose when a Local Government Amendment Act in 1981 introduced 'development' provisions, whereby esplanade reserves and recreational reserves contributions could be required for 'developments' as well as for subdivision. The definition of development included three or more new houses or two or more additional houses on a site (s271(a)) and would therefore apply to multiple housing (papakainga) on Maori land. The effect was that Maori land could be alienated through the requirement to give reserves as a condition of consent for subdivision and development.

Submissions from Tainui to the Environment Forum 1985 (Mahuta et al 1985) also stressed the need for change in resource legislation. The Environment Forum in 1985 coincided with the early stages of the Resource Management Law Reform process, which led ultimately to the development of the Resource Management Act 1991. Tainui argued for updating of the present legislation to include provision for Maori cultural and spiritual values; statutory representation of Maori interests at every level of decisionmaking; and an increased understanding of the Maori perspective of the environment at every level, from the person in the street to members of parliament. The submission also suggested that the incorporation of the Maori conservation ethic into resource management law would help achieve reconciliation between resource use and conservation.

Discussion

Historically, Maori land has been dealt with in a wide variety of ways by the planning system. In the halcyon period after the Treaty was signed, it appeared possible that

[36] N Ross, Surveyors North, pers. comm.

Maori would be able to continue to exercise rangatiratanga within their own territories, apparently in direct recognition of the Treaty (Article 2) agreement to protect Maori in the unqualified exercise of tino rangatiratanga over their lands. As settler pressure grew, laws which assisted with the orderly acquisition of land for townships and services were introduced, in practice frequently targeting Maori land. Initially, town planning legislation did not impact directly on Maori land as it was confined to municipalities and their needs, and the use of Maori land was supervised and controlled in any case by the Maori Land Court. By 1953 planning law applied to all land, but there was no recognition that the needs of Maori landowners might be different to those of the agricultural sector. This was compounded by the massive migration of Maori to towns and cities occurring in the 1950s and 1960s (a trend reversed in the 1980s-90s), which meant that Maori presence on their land and within the local authority consciousness was diminished. Change began with the 1977 Town and Country Planning Act which heralded recognition that there might be Maori needs not being provided for within district schemes.

This however was only a small step in the direction that Maori felt it was necessary to move. Providing for specifically Maori requirements on their land, such as marae and papakainga housing, was one thing, but the larger picture was still being ignored. The initiation of the Resource Management Law Reform process occurred at a time when Maori concerns about the planning process were being expressed in a number of forums. Maori had expressed grievance at planning constraints which had given priority to agricultural development and had made little or no provision for Maori needs. Some considered that local authorities were inappropriate bodies for making decisions relating to Maori land, which was so much more complex than general land. Partitions and some land uses required the consent of both the Maori Land Court and the local authority, placing Maori under a greater bureaucratic load than others in attempting to use their land. Planning processes had effectively alienated Maori land through esplanade and reserves contribution requirements, and through designating Maori land for public purposes. Additionally, Maori felt alienated by the planning system itself, and its lack of cognisance of fundamental cultural and spiritual matters of importance to Maori. Underlying all of this was the question of whether the planning system was in fact consistent with the promises of the Treaty of Waitangi.

CHAPTER 6

RESOURCE MANAGEMENT LAW REFORM AND THE RESOURCE MANAGEMENT ACT 1991

The Resource Management Law Reform (RLMR) process had its genesis in the World Conservation Strategy (IUCN 1980) and the New Zealand Conservation Strategy 1981 which was adopted by the New Zealand Labour Party as part of its 1984 election manifesto. Labour's campaign emphasised the need for a comprehensive environmental programme, which was sensitive to long-term ecological needs and reflective of traditional New Zealand values of conservation, social justice and protection of natural resources (Furuseth & Cocklin 1995). Following its success at the polls, the 1984 Labour government set up a consultative process to examine how the exceedingly fragmented elements of the existing planning and resource management law could be revised to better address these matters.

While the primary aim of RMLR was to establish a system of integrated resource management, the process provided a formal opportunity for Maori views on planning and resource management to be aired, both in discussion papers commissioned by the Ministry for the Environment, and as papers and submissions by Maori to the RMLR process. At the same time the Crown was beginning to examine the governance implications of giving recognition of the Treaty of Waitangi. A paper to Cabinet in 1986 identified some major considerations relating to implementing the Treaty. It questioned the force to be attached to the "full, exclusive and undisturbed" possession promised to the Maori owners of land, forests and fisheries.

> *It could be argued that this might mean that not only would the compulsory acquisition of Maori land no longer be possible but that other legislation restricting the use of that land might also become unenforceable. If this were to include the Town and Country Planning Act, "islands" of territory would exist within which the Maori owners would be free of zoning restrictions while neighbouring non-Maori owners would be bound by district and other schemes...* (Preston 1986: 1)

Three seminal reports by the Waitangi Tribunal (Motonui 1983, Kaituna 1984 and Manukau 1985) had laid the foundation for an analysis of resource management in terms of the Treaty principles. In keeping with this context, the RMLR review carried out by the new Ministry for the Environment began with a comprehensive and quite radical appraisal of the Treaty and resource management law. One of the four Core Groups was set up specifically to provide a Maori perspective, and a comprehensive consultation process was approved to seek out Maori views. These focused strongly on the Treaty of Waitangi and how this should be interpreted in the development of resource management law.

The meaning of tino rangatiratanga in the context of environmental law surfaced as possibly the most critical issue for Maori. A Ministry for the Environment (MfE) working paper on the Treaty of Waitangi and its significance to RMLR (Gray et al 1988) explored what this might mean in the modern context:

> *Tino rangatiratanga, as stated in Article II of the Maori text* [of the Treaty] *is the authority the tribe has over its natural resources and the right to determine how those resources should be managed.... The option for Maori to manage resources through traditional structures has, as history testifies, been denied by the introduction of successive laws and policies founded on a British legal system. Under this regime, the exercise of customary Maori authority has been gradually subsumed.... What is clear.... is that the natural resources which are recognised as being under Maori rangatiratanga should be managed by an institution which is appropriate to that Maori group. Each tribe, therefore, should determine its own structure for management.... It follows, therefore, that the Crown similarly should have the right to determine decision-making processes and administrative structures for the resources it owns.... Clearly there will be a need for a new set of arrangements that will enable both* [Maori and the Crown] *to work together for their common good and in the utmost of good faith* (Gray et al 1988: 15).

This was radical thinking for the time, and clearly had its genesis in Maori input into the RMLR process. Following a hui held at Taumutu marae the MfE study team noted:

> *Before the hui took place the study team had given priority to interpretations of the Treaty and particularly to the notion of partnership and how it might be applied to natural resource management and to law. However, the evidence and argument presented at the hui required the study team to give significantly greater emphasis to the Treaty itself. This shift in emphasis required the study team to go back and examine more closely both the Treaty and its implications for the RMLR* (Gray et al 1988: 3)

Maori at the Taumutu hui made it clear that they saw the Treaty as paramount and the issues of ownership and control as inseparable, being both part of the concept of rangatiratanga. A Ministerial briefing paper arising from the Taumutu hui noted

> *The Treaty is the very basis of the relationship between Maaori and Paakeha and therefore of the constitution of government in this country. The ownership question and all resource management questions therefore rest upon a clear contemporary definition of tino rangatiratanga. At this hui, as at every significant Maaori gathering in recent years, the restoration of tino rangatiratanga was the major issue.* (Gray et al 1988: 52)

A prerequisite to any management system was to settle the issue of ownership, which was simple when it came to Maori land but more thorny in relation to other resources under claim such as seabed, river beds and Crown lands. A series of RMLR hui in September and October 1988 reinforced these demands, as did the (rare) written Maori responses to discussion papers (Kelsey 1989).

A concurrent review by the Parliamentary Commissioner also focused on how the principles of the Treaty could be practically implemented in terms of environmental management. The report noted that implementation of partnership under the Treaty implies some greater share by Maori people in decisionmaking. The Commissioner's recommendations included:

> *That the Crown recognise generally, and particularly in the context of the current Resource Management and Local Government Law Reform programmes, that ... the implementation of the Treaty principles of partnership and tribal rangatiratanga requires a change in the existing power equation between the Treaty partners, giving tangata whenua an increased share in*

> *actual decision-making power at both central and regional levels* (Hughes 1988: 3).

A report published by the Ministry for the Environment during the Resource Management Law Reform process came up with a similar conclusion - that in the context of RMLR, rangatiratanga requires recognition of Maori ownership, control and authority over resources which are (or should be) vested in Maori hands (Barns 1988). Barns suggested that iwi authorities should be equivalent to territorial authorities and proposed that clearly identifiable Maori resources should come under the authority of tribal government decision-making

It is interesting, given such strong messages both from Maori and from the government's own working groups, that the Resource Management Bill should virtually ignore the need for a 'new set of arrangements' with Maori and fall back on the historical pre-RMA structures of central, regional and local government. The government's reluctance when it came to addressing the implications of tino rangatiratanga, over Maori resources, may well be due to the fact that many of the resources being referred to were at that time under claim or potentially under claim, and the determination of ownership was fraught with potential political, moral and economic pitfalls. According to Sir Geoffrey Palmer, a fundamental decision was taken early in the life of the RMLR project not to deal with issues relating to ownership of resources, as this would require resolution of a number of difficult Treaty of Waitangi issues (Palmer 1995). For the Crown to consider sharing the management of these resources with Maori was presumably too threatening. Additionally, as Kelsey notes, the documents published progressively through the RMLR review showed a steady erosion of the Ministry's apparent initial position, and a dilution of Maori input especially in relation to issues of ownership, the place of the Treaty in government policy, self-determination, spiritual relations with the environment and the role of iwi (Kelsey 1989).

Maori land appears to have been the casualty in this policy turnabout. It was the only resource that had always been unquestionably in the ownership of Maori. Hui, discussion documents and papers examining the application of the Treaty to resource

management appear to have focussed almost exclusively on its implications with regard to resources not owned by Maori rather than those already in Maori ownership (eg Maori land). The issue of a greater degree of control by Maori over their own land was apparently ignored.

Minor concessions to the Maori interest were made through the inclusion of reference to kaitiakitanga and the Treaty of Waitangi within the principles of the Bill, but there were no provisions for practical recognition of the concept of rangatiratanga. During the Select Committee stages of the Resource Management Bill, Maori submissions continued to focus on ownership and management issues. A submission by the National Maori Congress, NZ Maori Council and NZ Maori Women's Welfare League accepted and acknowledged the necessity and desirability to promulgate laws to protect the environment. However they held deep-seated concerns about the content of the Bill:

> *Firstly...the Bill presumes exclusive ownership rights are vested in the Crown, particularly in relation to minerals and the coastal estate. This is clearly contrary to Article II of the Treaty of Waitangi guaranteeing "exclusive and undisturbed possession" to Maori, and does not take into account existing Treaty claims or Waitangi Tribunal and judicial pronouncements to date on the Treaty.... Secondly, it is entirely unsatisfactory for the Crown to devolve its Treaty responsibilities to local authorities. The Crown has a responsibility to define the rights and obligations under the Treaty and must do so in full co-operation with its Maori partner. Regional Councils, District Councils and the Planning Tribunal are not properly equipped to determine questions relating to the Treaty of Waitangi* (National Maori Congress 1991: 12)

The submission by the Congress foresaw a greater role for iwi management plans than just being had 'regard to' by regional and district councils:

> *... continued funding by way of resource management grants, provision of consultancy services, ex gratia payments,* [should] *be provided to iwi to enable research and production of Iwi Management Plans. These plans will be of increasing importance where resources are handed back to Maori ownership following Tribunal recommendations and the Crown/Maori negotiations.... One suggestion is to introduce Iwi Management Plans as a necessary tier of the resource control and management process which could be drafted in*

> *consultation with local authorities. Another would be to integrate Iwi Management Plans into regional policy statements as a positive planning requirement.* (National Maori Congress 1991: 26)

The message coming from Maori during RMLR, then, was for a legislative and structural recognition of the Treaty and particularly recognition of tino rangatiratanga over Maori resources. Matunga (1997) summarised the themes emerging from Maori input into RMLR as

1. *the need to recognise Maori ownership of certain resources for which the Crown had simply presumed ownership (ie water, seabed, coastal habitat etc)*
2. *restoration of tino rangatiratanga over other natural resources which had been confiscated through various means by the Crown*
3. *protection of and access to resources, sites, waters, waahi tapu and other taonga important to hapu and iwi irrespective of ownership*
4. *provision for iwi/hapu involvement in resource decision-making processes at all levels of government as a Treaty right rather than a privilege*
5. *recognition of iwi/hapu rights of self-government over resources under Maori title*

These matters have been addressed in a low-key manner or not at all in the current Act. The first two issues have continued to be strongly pursued through Treaty claims, with some success in settlements that include the recognition of ownership or at least rights over certain resources, and compensation and apology for confiscations. The second two issues are given some recognition in the Act and there is now a considerable body of case law that outlines consultation requirements where Maori resources or interests may be affected.

However the issue of iwi/hapu rights of self-government over resources under Maori ownership has received little prominence, either within the RMA process or (apparently) in the wider forum. It may have been that concerns about the assumed ownership by the Crown of many natural resources, and the expressed desire of Maori to have a role in all resource decisionmaking blinkered a closer examination of the implications of the Treaty on those resources which had never left Maori ownership. Had discussions not focused so closely on the management of resources under claim,

the RMLR process might have given rise to a resource management regime that gave at least some recognition to tino rangatiratanga in relation to Maori land.

The Resource Management Act

The Resource Management Act was introduced in 1991 to govern the use of land, air and water and to provide a comprehensive framework for environmental decisionmaking. Under a guiding purpose of promoting 'sustainable management of natural and physical resources', the RMA moved away from planning's previous involvement in social and economic issues to focus almost exclusively on physical planning. Additionally, a major theme of the Act is that planning controls should focus on the effects of activities rather than the activities themselves. This is a significant change from the Town and Country Planning Act 1977 which was activity-oriented and had a strong emphasis on social as well as environmental planning.

The Resource Management Act introduced a number of positive obligations on persons exercising powers and functions under the Act, including reference to the principles of the Treaty of Waitangi and to Maori interests in general. While Maori concerns about planning and resource management, and particularly about recognition of rangatiratanga, were not implemented as many would have wished, the Act did include a number of provisions which (actually or potentially) gave improved recognition compared to previous legislation. Most of these are at the more general level of 'principles' of the Act and have the potential of affect Maori land only insofar as they influence the development of policy statements, plans and decisionmaking. A few provisions directly impact on the use and development of Maori land.

Purpose and Principles

The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources. Sustainable management is defined as:

> ... *managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to*

provide for their social, economic and cultural wellbeing and for their health and safety while-

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment (s5(2) RMA 1991)

The purpose of the Act does not make any specific recognition of Maori values and can be interpreted as being predominantly aimed at achieving a biophysical 'balance point' between human actions and the need to protect the environment. The relative weight intended to be given to ecological as opposed to anthropological values in section 5 has been strongly debated (Fisher 1991, Milligan 1992), but it has been argued that, taken together with the Act's definition of "environment", section 5 does encompass social, cultural and economic concerns (Grundy 1994). Such an interpretation would be more akin to Maori cultural perspectives in which humans and their cultural and spiritual aspects are part of, rather than apart from, their sustaining environment.

Section 6 of the Act lists 'matters of national importance', which shall be recognised and provided for by all persons exercising functions and powers under the Act. Most of the 'matters' focus on the protection and enhancement of the environment. The exception is section 6(e): '*The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga*'. This section is similar but broader to the equivalent provision in the Town and Country Planning Act which referred to 'the relationship of the Maori people and their culture and traditions with their ancestral land' as a matter of national importance.

Section 6(e) appears to have been predominantly used as the basis for Maori to express concerns about the use and development of resources not in current Maori ownership, but in which Maori have an abiding interest. Within district plans, its influence appears to have been to develop provisions that require consultation in certain circumstances,

and in some cases to develop objectives, policies and rules that differentiate between Maori land and other land. These will be discussed further in subsequent chapters.

Section 7(a) of the Act requires all persons exercising functions and powers under the RMA to have particular regard to 'kaitiakitanga', which the Act defines as '*the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship*'. Including the concept of kaitiakitanga within the Act was an attempt at giving practical recognition to Maori values under the new resource management regime. Although the concept implies authority over the use of a resource, in practice, there appear to be few or no examples of local authorities allowing kaitiakitanga to be practised in what Maori would consider to be its full form. Its inclusion in the Act has been described as something of an illusory promise, because of the difficulty of giving any real effect to a Maori resource management regime within the jurisdiction of the RMA (Tomas 1994).

The Treaty of Waitangi is referred to in the Act, but is given a lowly position in Section 8 which requires that all persons exercising functions and powers under the Act 'shall take into account' the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). It is notable that this is the first time the Treaty received a formal acknowledgement in planning law in New Zealand. However there have subsequently been many criticisms of the lack of priority accorded to the Treaty principles because of their minor importance in the context of the Act, as discussed in Chapter 2.

Development of Plans and Policy Statements

In developing policy statements and plans, central and local government are required to take account of issues that are important to Maori. Consultation with tangata whenua is required as part of the process of developing policy statements and plans. Local authorities are directed by Part I of the Second Schedule of the RMA to consult with 'the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga'.

Public notification of the proposed policy statement or plan must include a copy of the public notice being sent to 'every person whose name for the time being appears in the

occupier's column of the valuation roll for the area'. Where Maori land is concerned, s353 RMA states that Part X of the Maori Land Act 1993 shall apply to the service of notices on owners of Maori land. This Part allows notice to be given to the owners of Maori land by serving on the Registrar of the Maori Land Court, but generally only in cases where the land has more than 10 shareholders and is not vested in trustees. The Registrar then must notify every owner whose address is known to the Court, and bring the matter to the attention of the Court. The Court has various powers including appointing agents to represent the owners, and organising a meeting of owners. This section is presumably intended to assist the problem that councils and other bodies face with communicating with the multiple owners of Maori land.

Part V of the RMA gives the first formal recognition of iwi planning documents in New Zealand planning law. It states that in developing regional policy statements, regional plans and district plans, councils must 'have regard to' any 'relevant planning document recognised by an iwi authority' (s61, s66 and s74 RMA). The Act does not define what constitutes an iwi planning document, and to date there are few examples. This may be due to the lack of a committed fund for the development of iwi planning documents, the lack of any requirement for support by central or local government for their production, and the lack of expertise within many iwi groups. Essentially, in the few cases they have been produced, they are an information source for local authorities but carry no legislative power. Some of the few iwi planning documents that have been produced or are in the development stages will be touched on in Chapter 9.

Maori land subdivision

To a small extent, the Resource Management Act recognises differences between Maori land and general land, to the extent that it contains some provisions specifically relating to Maori land. The most significant of these is the process for Maori land partitions. Prior to the RMA, as explained previously, all partitions had to first be approved by the local authority in the same way as subdivisions, and subsequently approved by the Maori Land Court. The RMA ushered in a turn-around on Maori land partitions to something more akin to the pre-1967 situation, in which partitions were solely under the jurisdiction of the Maori Land Court.

Section 11 of the RMA describes the situations in which subdivisions will be controlled under District Plans. Two exemptions concern Maori land. One is where subdivision is effected by the establishment, change, or cancellation of a reserve under section 388 of TTWMA (Maori reservations for communal purposes). This means that Maori reserves can be created through an order of the Maori Land Court without the requirement for meeting District Plan standards or requiring subdivision consent. The second circumstance is that almost all subdivisions of Maori land (ie all partitions between members of the same hapu) are exempt from the need to comply with District Plan standards and the processes of subdivision approval under the RMA. The only time that compliance is required is when land is being alienated from the ownership of the shareholding hapu, and even then the RMA provisions are applied at the discretion of the Maori Land Court.

These provisions mean that there is no longer any requirement to vest Maori land in the Crown or local authority as a reserve contribution or esplanade reserve when a hapu partition is approved. Provisions for non-hapu partitions limit any reserve requirements to only the area of land being alienated, and give the option (where a reserve would be required) of it being set aside as a Maori reserve, or of no reserve at all being required.

The Maori Land Court therefore has sole jurisdiction over the creation of Maori reserves and generally sole jurisdiction over Maori land partitions. Consideration of such proposals is carried out under different legislation (TTWMA) with no requirement to carry out an assessment of whether the proposal meets the sustainable management objectives of the Resource Management Act. The TTWMA provisions for partitions are described in more detail in Chapter 7.

Financial Contributions

Maori land is exempt from certain financial contributions that can be imposed on resource consents under section 108(2)(a)). 'Financial contribution' means a contribution of

(a) Money; or

> *(b) Land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent) but excluding Maori land within the meaning of the Maori Land Act 1993 unless that Act provides otherwise; or*
>
> *(c) A combination of money and land* (s108(9))
>
> (emphasis added)

This provision means that whereas conditions of consent can require general land to be set aside as a financial contribution for subdivision or land use, Maori land cannot be so alienated (except insofar as provided for in TTWMA). It recognises Maori concern at the ongoing alienation of Maori land by excluding it from reserve contribution requirements.

Transfer of powers

Section 33 RMA allows local authorities to transfer many of their functions, powers and duties under the Act to another public authority. 'Public authority' includes any iwi authority, local authority, Government department, statutory authority or joint committee of territorial authorities. The only functions that cannot be transferred are the approval of policy statements and plans, and approval of changes to these; recommendations on requirements for designations or heritage orders; and the power of transfer. Both the local authority transferring power and the public authority accepting the powers must agree that the transfer is desirable on the grounds that:

- the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power or duty; and
- efficiency; and
- technical or special capability or expertise (s33(4)(c) RMA 1991)

The process for transfer of powers involves giving notice to the Minister for the Environment of the intention to transfer, and using the consultative procedure specified in s716A Local Government Act 1974. The local authority transferring power remains responsible for the exercising of the power and may change or revoke the transfer at any time.

The potential for transfer of powers to iwi was a significant innovation in the RMA - there was no equivalent in previous planning law. Initially, its promise appears to have been taken seriously, to the extent that it was included as a policy within the New Zealand Coastal Policy Statement. One of three policies in the NZCPS relating to the protection of the characteristics of the coastal environment that are of special value to the tangata whenua states:

> *Where characteristics have been identified as being of special value to tangata whenua, the local authority should consider:*
>
> *(a) The transfer of its functions, powers and duties to iwi authorities in relation to the management of those characteristics of the coastal environment in terms of section 33 of the Resource Management Act 1991...*
>
> (Policy 2.1.3 NZCPS).

Reality, however, has been different. A research project on section 33 transfers has been undertaken under the Department of Geography, Waikato University. A survey of all councils in New Zealand revealed that there had been no transfers of powers to iwi groups, although there have been a number of successful transfers between councils. Two formal written applications had been made by iwi but to date (April 1999) none had been approved[37].

Conflicts between 'matters of national importance'

The 'matters of national importance' contained in section 6 RMA are not given any hierarchy; hence their relative importance is only assessed according to the facts of a situation. Where the use of Maori land (supported by section 6(e) is at odds with another 'matter', conflicts can arise which are not easily resolved. Two examples are the protection of significant indigenous vegetation and habitats required by section 6(c) and the protection of the natural character of the coast required by section 6(a).

[37] Hamish Rennie, Dept Geography Waikato University, pers. comm.

Significant indigenous vegetation and habitats

The Act heralded a significant change in direction of New Zealand's planning legislation, whereby protection is now required of indigenous areas which were previously regarded by the dominant agricultural sector as 'wastelands'. Until the 1980s, clearance of areas of indigenous vegetation was encouraged through agricultural policies, grants, incentives and other mechanisms which make the conversion of habitat to farmland more economically profitable (Davis 1997: 27). This approach was reinforced by planning legislation which generally acknowledged the dominance of farming interests in rural areas - such as through the 'matters of national importance' in the 1977 Town and Country Planning Act.

During the 1980s and 1990s, concerns about declining quality and quantity of habitat gave rise to legislative and non-legislative changes such as the Resource Management Act 1991, the Forest Amendment Act 1993 and the Forest Accord, which expressed in word, if not in deed, a greater commitment to habitat protection. In particular, the introduction of a new 'matter of national importance' in the RMA had a major impact on how Maori land is viewed. Section 6 requires that all persons exercising powers under the Act shall recognise and provide for

> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*

A result of the codification of the conservation interest in the Act is that Maori land, once viewed as useless wasteland, became a valuable resource for its biodiversity and amenity values. The effect flowed through to the development of rules in district plans which require resource consents for clearance or development of significant natural areas, and an increase in the timber value of areas of available standing forest due to actual or perceived scarcity.

The proportion of Maori land in indigenous vegetation, for reasons that have been outlined in Chapter 1, is far higher than general land. Approximately half a million hectares (approximately 33%) of Maori land is in indigenous forest (Ministry for the Environment 1997). This represents 50 per cent of the remaining indigenous forest on

private land (Davis 1997). Figure 6 shows that, apart from Crown conservation lands, Maori land is heavily over-represented in its retention of indigenous forest.

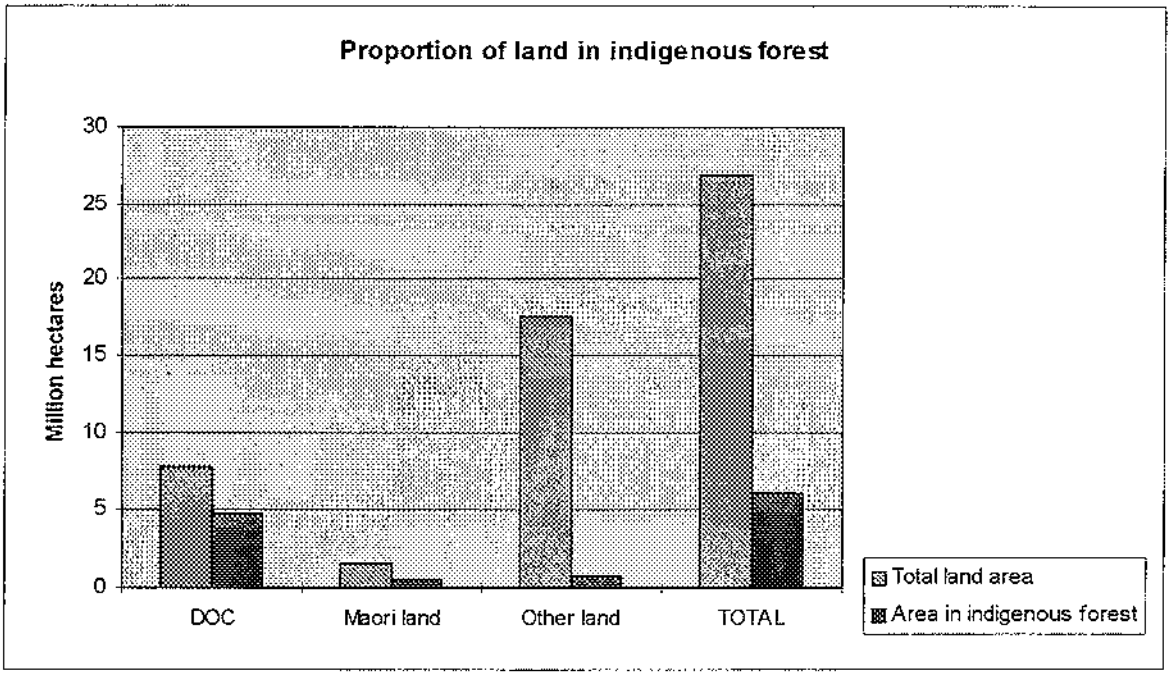


Figure 6: Relative proportion of land in indigenous forest

(Source: Ministry for the Environment 1997; Davis 1997)

Ironically, the increasing respectability of the conservation ethic and the influence of the Resource Management Act mean that over the past 10-15 years there has been a complete about-face in official attitudes towards land in indigenous forests. Rather than being viewed as wastelands in need of development these areas are now highly valued, both in their own right as significant natural areas, and also as a potentially valuable source of indigenous timber. This has led to its own set of pressures on Maori land, both through conservationists wishing to halt logging of indigenous forest on Maori land, and through District Plan provisions seeking to protect significant indigenous areas.

Of all land outside the state conservation lands, Maori land is therefore strongly over-represented in the degree to which it supports indigenous habitat. Thirty-eight per cent of all indigenous forest on non-DOC land is on Maori land. The effect of this disparity is that Maori landowners are more likely to experience disproportionate pressures to

preserve or develop indigenous areas. For example, where Maori landowners wish to carry out economic development (eg forestry or farming) of their undeveloped land they may find that the national or local interest in preserving their forest is given greater emphasis than their desire for new jobs and income. The fact that they have historically not cleared their land (or have allowed it to revert) counts against them. While this argument could be put forward by any owner of private land in indigenous vegetation, it is clear that a greater proportion of Maori land is in this position.

These issues are part of a crucially important debate which must occur over the future management of indigenous areas on private land. The issue is crucial because of the heavily disproportionate amount of such areas on Maori land. It could be approached very simply as a conflict between 'matters of national importance' in section 6 of the RMA to be resolved in terms of sustainable management, but is worthy of a wider examination encompassing historical issues, the relevance of the Treaty and the difference between western and indigenous views of conservation.

Coastal development

A similar conflict between the RMA's matters of national importance arises where Maori land is located in coastal areas, as for example in the Bay of Islands and Whangaroa areas of Northland. The '*preservation of the natural character of the coastal environment ... and the protection of [it] from inappropriate subdivision, use and development*' (section 6(a)) can conflict with the desire of shareholders to build on their ancestral land in coastal areas.

There are a number of examples of development proposals in these areas, and one illustrative of the issues involved is an appeal on a Council decision to approve 25-house papakainga housing development on 172ha of Maori land. The decision was appealed by owners of general land titles in the neighbourhood, with concerns such as the effects on the natural character of the coastal environment, houses in visually prominent locations affecting the coastal environment, and the setting of an undesirable precedent. The Planning Tribunal found that the development could go ahead if it was redesigned and made subject to conditions mainly relating to appearance and location of

buildings. The hearing was adjourned while the Trustees (at significant expense) prepared a new plan with amended house site locations, location of existing bush areas, the 50m contour and the central co-ordinates for each house defined by a surveyor. They also were required to submit a landscaping plan and a land revegetation report. The Tribunal accepted the amended plans and imposed conditions including the size, location, height and colour of buildings; the locations where power and telecommunications had to be buried; construction standard for the 750m long right-of-way; implementation of the landscape plan; and making application to the Maori Land Court to set aside a Maori reserve along the coast for esplanade/scenic purposes[38].

Two years later, only two of the houses have been built[39]. One of the problems for delays appears to be meeting the cost of the conditions of consent - the Trustees having already met the cost of the application and appeal. Additionally, decisions over who gets rights to build on each site have apparently been held up because of disagreements between shareholders. The time delays mean that the consent was due to lapse, but has recently been renewed for a further two years (with further costs).

This case shows how shareholders in Maori land can have a significant burden in gaining development rights in coastal areas. Firstly, the fact that there are multiple houses can count against them, even though the area of the land itself may mean that the density is very low. Secondly, the development standards required, while probably consistent with the development standards that would be required for a similar development on general land, place a large financial burden on the owners without the concomitant benefit of an increase in their asset value. Thirdly, the large number of shareholders means that it is difficult to gain agreement on matters as basic as who gets to live where. The Maori Land Court process requires a high level of agreement between parties prior to a decision being made - this means inevitable delays. Fourthly, although in this case the Trustees thought they were doing the right thing by preparing a comprehensive application for a large number of houses, the delays in getting occupation orders and financing means that the planning consent may well lapse again, with no certainty of reapproval.

---

[38] Mataka Station Ltd and others v Far North District Council (1995) 4 NZPTD 559
[39] Far North District Council files.

There are inherent conflicts between section 6(e) and other matters of national importance. Two examples have been briefly touched on here, and there are many others. This highlights one of the problems with the Resource Management Act – that while there is intended to be a 'balancing exercise' between matters of national importance, the only guidance within the Act as to the resolution of any conflict is its purpose – sustainable management – which has a strongly biophysical bias. This makes it incumbent upon decision-makers to weigh the scales in the direction of the physical environment, potentially at the cost of cultural or socio-economic needs. In relation to the coastal environment, the New Zealand Coastal Policy Statement provides assistance in giving a level of priority to papakainga housing (Policy 3.2.6) but there is a lack of guidance as to how to resolve other conflicts.

Environment Court findings on the Maori principles of the Act

The effectiveness of the Resource Management Act in providing for matters of importance to Maori, such as the management of Maori land or the degree to which Maori should be involved in plan development, can be at least partly assessed by examining decisions of the Environment Court and its predecessor the Planning Tribunal, in cases where they were called upon to interpret sections 6(a), 7(e) and 8 of the Act. The Court's decisions are necessarily limited to the cases that become before it - and notably there have been no cases in which the Court has had to consider rangatiratanga in relation to Maori land. Nevertheless the developing resource management case law is instructive, if only to show that very limited consideration has been able to be given to date to the majority of Treaty principles.

The current form of the Resource Management Act has a limited incorporation of the principles of the Treaty via section 8, which states:

> *In achieving the purpose of this Act, all persons functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

Decisions by the Environment Court and higher courts regarding the relevance of the Treaty to resource management are necessarily proscribed by the restricted reference to the Treaty principles in section 8 – as opposed to, say, the Conservation Act which requires that the Treaty principles must be given effect to.

Part II of the RMA incorporates other references which identify Maori interests in resource management; namely in sections 6(e) and 7(a). However these matters must be subservient to the overriding purpose of the RMA which is the promotion of sustainable management of natural and physical resources[40]. Additionally, the Maori matters within sections 6 and 7 are required to be balanced against other matters within those sections, which reinforces that there is no absolute protection of Maori interests under the RMA.

Most Environment Court judgements that have drawn on the principles of the Treaty relate solely or predominantly to consultation. There is some debate about whether consultation is actually a principle of the Treaty, and the degree to which it is implicitly required by the Act (Beverley 1997), but generally the courts appear to agree that a particular requirement for consultation with tangata whenua arises out of section 8 RMA.

The requirement for consultation in developing plans and policy is explicitly stated in the RMA (First Schedule) and is backed up by case law. For example, in Ngati Kahu v Tauranga District Council[41], the Council proposed a plan change which involved rezoning Maori-owned land to allow greater urban-type development. Ngati Kahu contended that the consequent land use, economic and environmental changes in Bethlehem would spell the community's demise in terms of its social structure and way of life. The Court found that the Council should have undertaken consultation with each of the local hapu prior to adopting its policy for the future planning directions of the area. The consultation would not necessarily have to produce consensus but should follow the process outlined in the Wellington Airport decision[42].

---

[40] NZ Rail Ltd v Marlborough District Council (1994) NZRMA 70, 85 (HC)
[41] Ngati Kahu v Tauranga District Council (1994) 3 NZTPD 789
[42] Wellington Airport Ltd v Air New Zealand (1993) 1 NZLR 671 at 675

Where resource consent applications involve resources in which Maori have a particular interest, the requirement for consultation is less clearly stated in the RMA but has developed through case law. The Environment Court has taken the stance that section 8 imposes on the local authority a duty of consultation with tangata whenua where issues of importance to Maori are at stake. A series of cases follows this line, disagreeing perhaps as to the situations in which consultation is required, and who should do the consulting, but not arguing with the basic premise that section 8 places an obligation to consult. Examples here include Gill[43], Quarantine Waste[44], Ngatiwai[45] and Worldwide Leisure[46].

More recently, there has been a shift away from the purely consultative interpretation of section 8. In the Taumarere[47] case a proposed town sewerage treatment system would have discharged treated effluent into Uruti Bay, which had high cultural, spiritual and economic significance to the tangata whenua. Despite the fact that the effluent would be so highly treated that it would not be a 'contaminant' as defined in the RMA, the Tribunal found that the Maori traditional relationship with the water and the principles of the Treaty were of sufficient importance to require the Council to research land-based options for effluent disposal. The Tribunal noted that while the applicant had satisfied the consultation principle, the proposal failed to honour the Treaty principle of active protection. The Tribunal however noted that the priority of Maori interests was not absolute. If a land-based disposal system was not proved feasible, the public health needs of the community "may have to prevail over even such important values as the cultural needs of the tangata whenua".

In the Mason-Riseborough case[48], the Court referred to the Treaty principle of rangatiratanga as the main reason why consultation should occur in relation to a resource consent application. Consent to establish a cellphone site on the slopes of Mt Te Aroha (conservation land), a waahi tapu, was appealed by tangata whenua. The Environment Court found that the situation obliged Council to initiate, facilitate and

---

[43] Gill v Rotorua District Council (1993) 2 NZRMA 604
[44] Quarantine Waste (NZ) Ltd v Waste Resources Ltd (1994) NZRMA 529 (HC)
[45] Ngatiwai Trust Board v Whangarei District Council (1994) NZRMA 269)
[46] Worldwide Leisure Ltd v Symphony Group Ltd (1995) NZAR 177 (HC)
[47] Te Runanga o Taumarere & Anor v Northland Regional Council & Far North District Council (1996) NZRMA 77
[48] Mason-Riseborough v Matamata-Piako District Council (1997) 3 NZED 33

monitor the consultation process as part of its duty to take into account the Treaty principles of active protection and rangatiratanga. However the principles required more than just consultation - there was the obligation to recognise tino rangatiratanga which includes management of resources and other taonga according to Maori cultural preference. Accordingly, the Court upheld the appeal. It is interesting to compare this decision with an almost identical one a year earlier[49] regarding an appeal over a television translator to be located on a waahi tapu, in which the Environment Court based its decision (to uphold the appeal) on section 6(e) RMA rather than section 8.

Involvement in post-consent processes such as monitoring is another way in which the Maori rangatiratanga interest in resources is being recognised by the Court. In Seatow[50], Ngatiwai claimed that their tino rangatiratanga over the sea, as well as the resources both in and below it, had been confirmed and guaranteed by the Treaty. Their role as kaitiaki of the resources was part of their tino rangatiratanga, which they claimed had never been surrendered. Representatives of Ngatiwai sought inquiries on recommendations to the Minister of Conservation made by the Auckland Regional Council concerning a number of applications to extract sand from the Manawhai-Pakiri marine area. They argued against the Crown's presumptive ownership of the seabed, and claimed that the RMA was inconsistent with the principles of the Treaty, citing the Waitangi Tribunal's geothermal resources report. The Planning Tribunal determined that it was not the appropriate forum to determine whether an action was in breach of the Treaty, and that argument about ownership were for the Crown to deal with in its executive capacity, not the Court. It found that consultation had been adequate and the tangata whenua had been involved in the decisionmaking process to the extent required by the RMA. Conditions of consent required ongoing involvement of Ngatiwai in monitoring the sand extraction. The Tribunal rejected a claim that neither the Crown nor the Regional Council had the sole right to make decisions about sand extraction, and held that under the law the Regional Council had the sole function and duty to hear the applications, and could not delegate the function to the Ngatiwai Trust Board or any other agency of the tangata whenua.

---

[49] Tainui Hapu and Tainui Awhiro Ngunguru Te Po, Ngunguru Te Ao Management Committee v Waikato District Council (1996) 1 NZED 612

[50] Seatow Ltd v Auckland Regional Council (1994) 3 NZPTD 123

The Tribunal also required the ongoing involvement of tangata whenua in conditions of consent in Haddon[51], another sandmining proposal. The Tribunal recommended that in recognition of the mana whenua of the tangata whenua, they be actively involved in monitoring the conditions of consent and in the development, management and protection of the sand resource at Pakiri

To date, there are still apparently divergent approaches being taken by the Environment Court as to how, and the degree to which, Treaty principles should be incorporated into planning matters. In Wellington Rugby Football Union[52], the Judge stated that the duty to take into account of the principles under section 8 is more than procedural and deliberative, and in fact is mandatory to the extent that council officers must be able to show to the council that they have carried out sufficient research or consultation. This can be contrasted with Hanton[53], where the Judge commented that although section 8 requires consent authorities to take into account the principles of the Treaty, its language does not impose on them any of the obligations of the Crown under the Treaty or its principles. This raises the important wider issue of whether the Crown can properly divest itself of its Treaty obligations by delegating responsibilities in statutes such as the RMA. Beverley (1997) quotes Professor Brookfield as stating that the distinction between the Crown and the consent authority in the Hanton decision is 'constitutionally questionable':

> *The Kawanatanga ceded in the Maori version of article 1 of the Treaty (whether or not expanded into the sovereignty of the English version) is exercised not only by the Crown and its Ministers and officers but by all authorities, officers and other persons exercising statutory powers of functions that depend ultimately on what was ceded or taken in 1840* (Beverley 1997: 155)

To date, then, interpretations of section 8 by the Environment Court have focused primarily on consultation - when it is required, who should do it, and the extent to which it should be pursued. Other principles of the Treaty have mostly been considered in general rather than specific terms (Beverley 1998), and the Court has not yet made

---

[51] Haddon v Auckland Regional Council (1994) NZRMA 49
[52] Wellington Rugby Football Union v Wellington City Council (1993) 3 NZPTD 70
[53] Hanton v Auckland City Council (1994) NZRMA 289

any extensive consideration of the Court of Appeal or Waitangi Tribunal findings on the principles, as they might apply under the RMA.

Different resource management regimes under the RMA

The concept of setting up a separate resource management regime for Maori land, incorporating possibly different principles, values and techniques appears to be flying in the face of the resource management law reform, which unified all resource management law under one Act. Currently, the Resource Management Act purports to offer a single regime with a single purpose – sustainable management - for all land. This is not in fact the case for the 28.8 per cent of New Zealand (DOC 1998b) which is Crown land managed for conservation purposes. Land use activities on this class of land are generally exempt from control under district plans and have no particular requirement to meet the 'sustainable management' test of the RMA.

The RMA has a limited application to work or activity of the Crown in three circumstances:

Section 4(2) This Act does not apply to any work or activity of the Crown which

(a) Is a use of land within the meaning of section 9; and

(b) The Minister of Defence certifies is necessary for reasons of national security.

Section 4(3) Section 9(1) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act (other than land held for administrative purposes) that -

(a) Is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act; and

(b) Does not have a significant adverse effect beyond the boundary of the area of land

Section 4(5) No enforcement order, abatement notice, excessive noise direction, or information shall be issued against the Crown.

Section 4(3) is of particular interest in the context of this thesis. Its effect is to exempt the Crown's conservation estate from the application of section 9(1) RMA, which states

> *No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is-*
>
> *(a) expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or*
>
> *(b) an existing use allowed by section 10 or section 10A.*

In simple terms, the Crown does not need to comply with the rules of a district plan if a conservation management strategy or management plan is in place for the land in question, and the activity is consistent with the CMS or management plan. Conservation Management Strategies are compulsory and are required to

> *...implement general policies and establish objectives for the integrated management of natural and historic resources, including any species, managed by the Department under* [various Acts] *and for recreation, tourism and other conservation purposes.* (s17D(1) Conservation Act 1989)

Conservation management plans are optional. Their purpose is to

> *...implement conservation management strategies and establish detailed objectives for the integrated management of natural and historic resources [within any area managed by the department under various Acts] and for recreation, tourism and other conservation purposes* (S17E Conservation Act 1989).

Conservation Management Strategies are developed in terms of the Conservation Act, not the RMA, and for the most part are general statements of goals and intended actions regarding the future management and use of the conservation estate. Significantly, the Conservation Act makes no reference to the promotion of sustainable management as being a necessary consideration in the development of conservation management strategies or management plans. This means that strategies and plans can be developed without the need to be measured against the stringent test of sustainable management.

While there is a public process involved in the development of both conservation management strategies and management plans, submissions are heard by a panel of DOC and Conservation Board representatives, rather than by any agency with a role under the Resource Management Act. There is no right of appeal to a higher authority.

Conservation management strategies and plans are therefore developed completely outside of the context of the Resource Management Act, and do not contain rules or environmental standards against which new developments are tested. In spite of this, these documents override district plans. Where they exist, activities on Conservation estate (if consistent with the strategy or plan) do not have to comply with the relevant district plan as long as there is no significant adverse effect beyond the boundary of the area of land. The RMA therefore sets an interesting precedent by creating an alternative resource management regime applying to a specific class of land.

Discussion

The Resource Management Act introduced a greater recognition of issues of importance to Maori than previous planning legislation. Some of the provisions appear to have been successful in achieving the outcome sought by Maori, but most appear to be of limited significance. The form of the Act has introduced potential conflicts between the matters of national importance in section 6, whereby, for example, the relationship between Maori and their land must be balanced against the requirement to protect areas of significant indigenous vegetation. While there is now some guidance on this in relation to the coastal environment in the New Zealand Coastal Policy Statement, there is as yet no similar assistance with other matters, although conflict relating to section 6(c) (indigenous flora and fauna) could usefully be addressed in the proposed National Policy Statement on Biodiversity.

The provisions within Part II of the Act offered a significant change from previous legislation in that it gave recognition to kaitiakitanga - customary resource management - and also to the principles of the Treaty. The Part II provisions, while not going as far as many considered appropriate, have resulted in at least a nominal requirement for consent authorities to consider Maori concepts and the Treaty principles. Whether they

are resulting in district plans which give them some practical recognition is questionable, and is a subject examined in Chapter 8.

The one apparently unqualified success of the RMA is the that alienation of Maori land through esplanade reserves and other reserves contributions has been successfully prevented through the RMA's specific exemptions for most Maori land partitions and financial contributions.

New provisions giving recognition to iwi planning documents have proved to be of limited effect. Few such documents have been produced. The fact the Act does not give them any legal standing, and that there is no dedicated funding source for their development, could lead the cynical to believe that the provisions were an empty promise. Nevertheless, some iwi groups do see value in producing planning documents, both for their own future planning and for the purpose of the RMA. Examples will be discussed in Chapter 9.

The provision for transfer of powers to iwi has been to date a promise with no reality. The concept may be one which is too threatening to local authorities, or it may be that iwi groups do not feel ready to take on the challenge. Nevertheless, the provision does hold out interesting possibilities for a greater degree of management by iwi of their own resources.

Rangatiratanga is also poorly recognised in the RMA. Section 8, backed up by sections 6(e) and 7(a), might suggest that tangata whenua would have at least limited rights to manage their resource in accordance with their cultural priorities; however the ultimate management decisions are vested in local authorities. This can be very frustrating to Maori, as pointed out by Mikaere (1997):

> *If Maori rangatiratanga were truly recognised by the Resource Management Act they would not be a 'party' to the action but would indeed be part of the decision-making body.... In this regard it is not surprising that Maori are seeking other pathways to recognition of rangatiratanga.*

To date, the Environment Court has interpreted the Part II provisions of the Act as primarily requiring consultation with iwi in relation to resource in which they have an

interest. While the issue of rangatiratanga over Maori land does not appear to have been required to be considered by the Court, the relatively minor importance given to the concept contrasts sharply with the degree of involvement in resource management that was considered appropriate by the Waitangi Tribunal in the recent Whanganui River report.

There are still ongoing questions as to the appropriateness of the RMA provisions in relation to resources in which Maori have an interest. This is an area that requires a great deal more research, particularly in light of the Waitangi Tribunal's repeated finding that current planning legislation is not in accordance with the principles of the Treaty of Waitangi. The separate resource management regime under the RMA for Crown conservation lands offers an interesting precedent and indicates the potential for the development of a regime specifically for Maori land as a class of land identifiable by its unique form of tenure.

CHAPTER 7

THE PLANNING ROLE OF TE TURE WHENUA MAORI ACT 1993

Te Ture Whenua Maori (Maori Land) Act (TTWMA) plays a central role in the use and development of Maori land. The preamble to the Act identifies the two main principles underpinning the Act, which are to promote the retention of Maori land in the hands of its Maori owners, their whanau and their hapu; and to facilitate the occupation, development and utilisation of Maori land for the benefit of its owners, their whanau and their hapu (Maori Land Court 1996). It also makes specific recognition of the Crown's requirement to protect rangatiratanga. The retention principle is again repeated in section 2(2), the section guiding the general interpretation of the Act:

> *...it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development and control of Maori land as a taonga tuku iho by Maori owners, their whanau, their hapu and their descendants.*

The Act replaced previous Maori affairs legislation which had a dominating and to some extent paternalistic approach to the management of Maori land. Several significant events in the 1970s had precipitated a change in philosophy and approach towards Maori land ownership and administration. These included a change in Maori Affairs policy under Hon. Matiu Rata, a change in the composition of the Maori Land Court Judges, and Maori activism culminating in the 1975 Maori Land March. Strong themes emerging during this period were that Maori land was more than a commodity to be traded or exchanged, and that it was central to the Maori way of life and therefore needed to be retained in Maori ownership for the benefit of future generations. In 1983 the New Zealand Maori Council released their report 'Kaupapa' which recommended a comprehensive review of Maori affairs legislation to promote Maori participation, control and management in all areas affecting their land (Maori Land Court 1996). Ten years later Te Ture Whenua Maori Act was enacted, with a dual philosophy of development and retention of Maori land. At the same time, the Maori Land Court retained a central role in the control of Maori land.

The provisions of the Act cover a mixture of judicial, social, administrative and land use functions. These include control over succession and alienation of land, occupation and partition of Maori land, the setting aside of reserves, setting up Maori land trusts and incorporations for the management of Maori land, reviewing Maori land trusts and enforcing the obligations of trustees, making succession orders, and determining who are appropriate representatives in any matter before the Court. Where the powers and functions of the Court are invoked, all decisions made by the Court must be made in a manner consistent with the principles of the Act, and the objectives listed in Section 17:

> ... *the primary objective of the Court shall be to promote and assist in –*
>
> *(a) The retention of Maori land and General land owned by Maori in the hands of the owners; and*
>
> *(b) The effective use, management and development, by or on behalf of the owners of Maori land and General land owned by Maori*

The Maori Land Court has powers and duties under TTWMA which give it a major role in assessing proposals and making decisions regarding the use of Maori land. In certain respects, the Court's role in approving land use mirrors that of a local authority, except on Maori land. In some instances, the Court's role replaces the council's role under the Resource Management Act as a result of provisions exempting Maori land from the RMA provisions; in other instances the Court's 'planning' role is in addition to the council's RMA role. The complexities of the dual system of control for Maori land were raised in Arawa Trust Board v Rotorua City Council[54], a case in which the Board had obtained permission from the Maori Land Court to give a licence to a tourist operator to construct and utilise an airstrip on Mt Tarawera. The Trust Board then had to obtain planning permission from the local authority, which was later appealed and finally granted by the Planning Tribunal. Crosson (1992), discussing the legal implications of the Treaty in respect of the RMA, stated that the case highlights the double system of control faced by Maori landowners under both the RMA and TTWMA. She noted that this issue was yet to be debated in the context of Treaty rights and resource management.

---

[54] Arawa Trust Board v Rotorua City Council (1979) 6 NZTPA 520

The Maori Land Court's 'planning' responsibilities, where they impact on the use and development of Maori land, are detailed below.

Partition and amalgamation

The word 'partition' is used to describe the subdivision of Maori land, where a block of multiple-owned land is divided up and vested in different people as specified on the new titles. In all respects a partition is like a subdivision - it is the division of Maori land into smaller or different parcels of land - but the word partition has historically been used, and its use makes a convenient distinction between the different processes involved in dividing Maori land and general land.

Partitions of land may be into parcels held by single owners, or by any number of owners as joint tenants or tenants in common. Partitions can be for a general purpose or can specifically be to create a dwelling site for an owner of the land. The Court can also amalgamate multiple titles, or 'de-amalgamate' previously amalgamated blocks.

Partitions of Maori land are either wholly or partly under the jurisdiction of the Maori Land Court, depending on whether they are 'hapu' partitions or not.

Hapu partitions

Where Maori land is to be partitioned into parcels to be held by owners who are members of the same hapu as the shareholders, the subdivision provisions of the RMA do not apply. In these cases the Maori Land Court has sole jurisdiction over partitions. The Court has powers to make a court order for the partition of any land into two or more defined separate parcels, or an order creating the title to any one or more defined parcels. A proposal and plan of the partition must be put before the Court for its approval, with evidence of the agreement of other shareholders.

In assessing the partition application, the Court is not required to assess it according to RMA provisions or District Plan standards. There are no standards for minimum lot sizes, and not necessarily any requirement for specialist advice on stability, effluent disposal or other matters, although in practice the Judge generally makes a site visit[55]. Following the Court order, a plan of partition is drawn up but is not required to be drawn to the same standard as a survey plan. The District Land Registrar can create title to the parcel of land through registration of the order, but in practice most partitions are not registered, and the Court order remains the only record of the partition.

The Court order for a hapu partition can contain conditions, and must impose a further restriction on the land that it shall not be alienated[56]. If an application is subsequently made to alienate the partitioned block of land, the Court may, if it considers it appropriate, publicly notify the application and invite submissions from the local authority and any other persons affected. (Note it is not a requirement to seek input from the local authority.) The Court also may refuse the alienation or confirm it subject to such conditions as the Court considers fair and reasonable, including giving consideration to any conditions which could have been required had the partition been through a subdivision consent process.

Non-hapu partitions

A partition is only deemed to come under the RMA's subdivision process if the parcels created are to be held by owners who are not members of the same hapu (s301 TTWMA). Where a partition is to be alienated it must be approved first by the local authority (under RMA) and subsequently the Maori Land Court (under TTWMA).

The local authority's ability to impose conditions for non-hapu partitions is limited by the provisions of s302 TTWMA. If a reserve contribution (in land) is required, it can only be set aside from the part of the land that is to be alienated. Additionally, a reserve contribution cannot be required of any land which the Court has certified is of special historical significance or emotional association to Maori. A survey plan of the partition

[55] T Ngatai, Registrar Tai Tokerau Maori Land Court, pers. comm.
[56] Alienation, in relation to Maori land, is defined at length in Te Ture Whenua Maori Act 1993, and includes disposition of any legal or equitable interest in Maori land, any lease or licence more than 3 years, and any taking of land under the Public Works Act.

cannot be required to be deposited with the District Land Registrar, unlike the usual requirement for subdivisions in the RMA.

Following subdivision consent under the RMA, a non-hapu partition must go before the Court for a partition order. The Court may, instead of setting apart any land as a reserve or esplanade reserve under the Reserves Act, recommend that it be set aside as a Maori reserve under section 338 TTWMA.

Assessment criteria for partitions

The powers of the Court in respect of hapu partitions are equivalent to that of a planning authority. The Court has sole jurisdiction over partitions except where the title to the land is to pass to people outside of the hapu to which the shareholders belong. For the vast majority of partitions, then, the Court is the only 'planning' agency and can impose any conditions it considers are appropriate.

By comparison, subdivisions under the Resource Management Act are assessed in terms of their compliance with the relevant District Plan. In deciding whether to grant consent to a subdivision, a local authority is required to take into account the environmental effects of the subdivision (unless it is a permitted activity) and the purpose and principles of the RMA. Furthermore, the transitional provisions of the Act state that a local authority shall not grant consent to a subdivision if it considers the land is not suitable for subdivision, or the subdivision would not be in the public interest. Additionally it may refuse consent if stormwater drainage, sewage disposal or (for non-rural lots) water and electricity supply cannot be achieved satisfactorily.

The Maori Land Court assesses partition by quite different criteria. Maori land titles are partitioned by order of the Court under Part XIV of TTWMA (Title Reconstruction and Improvement). The principal purpose of this part of the Act is:

> *to facilitate the use and occupation by the owners of land owned by Maori by rationalising particular landholdings and providing access or additional or improved access to land* (s286 TTWMA)

In making its decision on an application for partition, amalgamation or aggregation, s228 requires that the Court must consider:

- the opinion of the owners as a whole
- the effect of the proposal on all owners
- the best overall use and development of the land
- the degree of support, and
- the adequacy of notice

Furthermore,

> *...the Court shall not make a partition order affecting any land unless it is satisfied that the partition is necessary to facilitate the effective operation, development and utilisation of the land.* (s288(4))

Compared to the RMA provisions, the TTWMA approach towards partition is development-oriented and paternalistic. The requirement that other owners are consulted has equivalence to the RMA's 'affected party' provisions. But there is no requirement for the Court to look at either the suitability of the site for future development, or of whether the partition and subsequent development of the site might be sustainable in the long term. The basis of assessment of hapu partitions and subdivisions is therefore very different, although the effect of approving each is the same. In both cases a title is created, on which the landowners would expect to be able to carry out reasonable development including a dwelling.

Access

Another 'planning' arena in which the Maori Land Court has sole jurisdiction is in the creation of easements and roadways (sections 315, 316 TTWMA). Roadways are essentially private roads. The Court can restrict the use of the roadway to certain 'persons or classes of persons', otherwise all persons have the same rights of passage as on a public road. However the land comprised in the roadway remains in the ownership of the original owners.

The Maori Land Court can make an order laying out an easement or roadway over Maori land, or over general land (with the consent of the owners), if required to give access to Maori land. The Court may impose conditions as to formation or fencing of the roadway or any other matter it thinks fit (s318 TTWMA).

The comparative legislation for creating private roads and easements over general land is contained in the Resource Management Act 1991 (where associated with a subdivision) and the Local Government Act 1974. The LGA contains minimum widths and gradients which must apply to private roads and rights of way (except where subject to the RMA) and allows the imposition of conditions including formation standards, building lines, levels and entrances (s347, 348 LGA) by the local authority.

Where a Maori roadway connects with a council road or state highway, the consent of the local authority or Transit New Zealand is not required unless an alienation of land is involved (s317(7) TTWMA). In comparison, where private roads are laid out over general land the consent of the roading authority is required.

The Maori Land Court and local authority, therefore, have approximately equivalent jurisdiction with respect to private roads and easements. However the powers of the Maori Land Court are not constrained by the requirements of the Local Government Act.

Maori reserves

The creation of Maori reserves is also the sole domain of the Maori Land Court. Both Maori land and general land can be set aside as a Maori reserve through a notice in the Gazette issued upon the recommendation of the Court (s338 TTWMA).

Maori reserves can be for a wide range of purposes including a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve, place of cultural historical or scenic interest, or any other specified purpose (s338(1)). Such reserves can be held for the common use

and benefit of the people of New Zealand (s340) or can be held for the common use or benefit of the owners, or an identified group of Maori (s338(3)).

The ability to set aside Maori reserves gives the Maori Land Court powers that are akin to local authorities' powers of creating reserves under the Reserves Act and Resource Management Act. These include the ability to create or require the vesting of reserves for various purposes including recreation, scenic, esplanade, scientific, historic, utility or other local purposes. The exercise of these powers by local authorities is part of their planning role for the district in providing for the future social and servicing needs of their communities as well as protecting places for scenic, historic or scientific purposes.

The Maori Land Court's powers to set aside reserves is a further aspect of its 'planning' function. Te Ture Whenua Maori Act does not appear to give the Court any guidance as to where and when reserves should be set aside, apart from the preamble to the Act. The preamble refers to the retention of land in the hands of its owners, and facilitation of its occupation, development and use for the benefits of the owners, their whanau and hapu. This suggests that in deciding on setting aside Maori reserves the Court would have uppermost in mind the future needs of the owners and their hapu, although there is provision in setting aside reserves for the benefit of all New Zealanders.

Occupation orders

A further jurisdiction of the Maori Land Court is its ability to vest the exclusive use and occupation of an area of land as a house site (s328 TTWMA). The site can be vested in a shareholder or someone who is entitled to succeed in a shareholding. In this way, certain rights to multiple housing on Maori land can be created.

In making an occupation order, the Court shall have regard to:

- the opinions of the owners as a whole
- the effect of the proposal on the interests of the landowners, and
- the best overall use and development of the land (s329 TTWMA)

The occupation order itself usually makes reference to a specific area of land for the house site, shown on a plan. The plan is not required to be survey standard and the order does not create a separate title[57].

Unlike the case with hapu partitions, occupation orders do not exempt the shareholder from the provisions of the Resource Management Act. While the holder of an occupation order may well have the expectation that he will be able to build on the site, he is not exempt from any requirement to gain a resource consent.

Dual jurisdictions

The Court's dual role with local authorities in approving non-hapu partitions and occupation orders raises the possibility of conflict between the decisions of the Court and the council in their respective planning roles. In practice, it does appear that there is some tension between the roles of the two agencies.

One example, identified by an interview of surveyors[58], is where proposals for multiple (papakainga) housing come before the Court. The Court may approve a proposal for multiple houses on a site and request the applicants to instruct a surveyor to draw up a site plan showing house sites, roadways, garden areas etc, but will not necessarily make any reference in the terms of its decision to the requirements of the local authority. There is no requirement for the Court to take any district plan provisions (eg regarding siting, numbers of houses etc) into account. The upshot is that there is the potential for Maori landholders to assume that the Court's approval of a particular site layout has given them the 'right' to build. It is possible that a council under the RMA could subsequently decline consent for a house within an area set aside through a partition order or occupation order, if the proposal did not meet the council's planning criteria.

The absence of any requirement for the Court's decisions to relate to the relevant district plan means that owners (and councils) can find themselves in a cleft stick where the Court's orders have allowed a form of development not necessarily allowed under

[57] T Ngatai, Registrar Tai Tokerau Maori Land Court, pers. comm.
[58] An interview was carried out with Surveyors North, a firm of surveyors in Northland with extensive experience in Maori land partition and development.

RMA. For the owners, this may mean an extra bureaucratic procedure to gain a second consent; and for councils it may mean that they have little room to manoeuvre without appearing to be unhelpful, as the 'decision' as to the site development has already been made by the Court.

Another problem identified by survey practitioners was the absence of any requirement (in the TTWMA, or in practice) for expert professional input into proposals for occupation orders, roadways and partitions. In the Northland experience, a site would usually be visited by the Judge and shareholders, and they may be accompanied by a valuer. In some cases a surveyor may also be present. But it appears that decisions on partitions, house sites and roadways are able to be made without, for example, engineering advice as to flooding potential, stability or suitability for effluent disposal for chosen house sites or partitions, or the suitability for roading for chosen locations of roadways. This raises the question of who would be liable in the case of a hazard developing or a site being unsuitable.

Practitioners also identified a problem in the ability of the Court to approve occupation orders, hapu partitions and roadways with no assessment of the effects on other parties. For example, under the RMA, a new access on to a public road from multiple housing or from a new private roadway would need to have prior consideration by council or Transit NZ as an affected party. Similar developments are approved under TTWMA without this requirement and owners may subsequently have to seek consent for access.

A further problem identified was that, in practice, there is little or no communication between local authorities and the Maori Land Court on Maori land development matters. There have been occasions when shareholders have gained the approval of the Maori Land Court for multiple dwellings, only to find that the council requirements are at odds with the number or location of houses. On other occasions, shareholders have gained the council consent and then have difficulties in getting the necessary approvals through the Maori Land Court[59].

Ultimately, these issues are all related to the fact that although TTWMA works in many ways as a 'planning' Act, there is no requirement to assess the effects on the

environment of any proposal before the Court. Critical decisions as to the location and area of partitions and occupation orders can be made by the Court without the need to make an assessment under RMA criteria.

Alienation of Maori land

A further planning-related effect of TTWMA is its effective ban on alienation and the effect of this on property rights. The Act's provisions prevent the sale of Maori land except in the most exceptional circumstances. One of the purposes of the Act is the retention of Maori land, and this carries through to its provisions, which include wide powers of discretion in the Court to refuse alienation even if the owners wish to sell. Grounds for the Court's refusal include whether the owners have had adequate opportunity to give the proposed alienation proper consideration; whether the owners have demonstrated a proper assessment of the present value and future potential value of the land; and the application of the principle of ahi kaa. As discussed below, the High Court[60] found that that the Act was a significant barrier to alienation, and in practice it is now almost unknown[61].

These provisions impact heavily on the freedom to sell, generally considered to be a basic right of private property. But despite its apparent heavy-handedness the ban on alienation resulted from increasing Maori concern about the loss of Maori land that was occurring even during the 1970s and 80s. The 1993 TTWMA took these concerns into account in making retention of Maori land one of its twin principles.

The loss of the freedom to sell has flow-on effects which impact on the use and development of Maori land. Maori wish to retain ties to their ancestral land, and as Maori return to their turangawaewae they are likely to wish to build on their own land. In most cases that land will be in multiple ownership and there may well be more than one family wishing to build on the land. District Plans commonly require resource consents for more than one dwelling on a site.

---

[59] N. Ross, Surveyors North, pers. comm.
[60] Mangatu Incorporation v Valuer-General 2 NZLR 683, 684
[61] T Ngatai, Registrar Tai Tokerau Maori Land Court, pers. comm.

In this, Maori landowners are very different to most other New Zealanders, who when they wish to build or acquire a home will generally be in a position to buy and sell property in general title, and whose choice of location will be at least partly guided by the planning provisions relating to that land. For example, for coastal land where development options may be limited, most people would be able assess beforehand if the planning provisions were likely to allow them to use the land in the way they wished. This option is not open to Maori landholders. They do not have the luxury of choice as the land is all they have, and they cannot sell it to purchase an appropriately zoned piece of land.

Another associated problem is the cost of development. For example, if a resource consent imposes conditions on the development of Maori land to carry out works which are in the public interest (eg special design and location of buildings to minimise visual impact; high roading standards, landscaping to shield the view of buildings from certain locations) then Maori cannot hope to ever recoup the cost of the development through increased capital value of the land or its sale, because sale of the land is almost impossible under TTWMA. An owner of land in general title, by comparison, could sell the property and recoup at least part of the cost of that development through the increase in value.

The Court as a planning agency

It has been suggested in this chapter that the Maori Land Court carries out a number of planning functions. To test this proposal, the Court's functions were compared to the purposes of planning identified by Thornley (1991:19)(as italicised below). It was found that the Maori Land Court's functions include aspects of the following purposes:

3. *To ensure the provision of any 'public goods' including infrastructure or actions that create a positive 'neighbourhood effect' which the market will not generate.*

The Court makes decisions on the creation of Maori reserves and roadways, which are part of the public infrastructure.

4. *To ensure that short-term advantage does not jeopardise long-term community interest*

The Court's assessment of any proposal must take into account the interests of all shareholders, not just the proponents. However it is not required to look further to the interest of the community in general.

5. *To contribute to the coordination of resources and development in the interest of overall efficiency of land use*

The principles of the Act include the 'effective use, management and development' of Maori land and to 'promote practical solutions to problems arising in the use and management of any land' (ss17(1)(b) & (2)(f)).

6. *To balance competing interests in the use of land to ensure an overall outcome that is in the public interest*

A major role of the Court is to protect 'minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority' (s17(2)(d))

9. *To ensure that the views of all groups are included in the decision-making processes regarding land and development*

A further role of the Court is to 'provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal' (s17(2)(b)). Again there is no requirement to ascertain the views of others outside the landholding group.

10. *To ensure that development and land use are determined by people's needs not means*

The practice of the Court is to recognise the poverty of the Maori people it deals with. Practices such as not imposing high standards of formation on Maori roadways,

allowing plans to be submitted which do not reach survey standard, and not requiring a high level of 'expert' input into partition proposals are examples.

Although the Court takes on a number of the purposes of planning identified by Thornley, it is limited to the development and subdivision of Maori land (and general land owned by Maori), and in assessing each proposal on a case-by-case basis in relation to the interests of other owners. There are a number of wider planning purposes identified by Thornley (ibid.) that are not taken on by the Court:

1. *To improve the information available to the market for making its locational choices*

The Court deals with land that is predominantly outside of the market.

2. *To minimise the adverse 'neighbourhood effects' created by a market in land and development*

The Court's jurisdiction does not include examining the off-site effects of land use and subdivision.

7. *To create a good environment, for example in terms of landscape, layout or aesthetics of buildings, that would not result for market processes*

These aspects of development are not part of the Court's role under TTWMA and do not appear to be part of its practice.

8. *To foster the creation of 'good' communities in terms of social composition, scale or mix of development, and of a range of services and facilities available*

This is not a role of the Court or, for that matter, the role of any authority under the Resource Management Act 1991.

11. *To influence locational decisions regarding land use and development in order to contribute to the redistribution of wealth in society*

This too is neither a planning role under TTWMA nor the RMA.

In summary, the Maori Land Court carries out a number of the purposes of planning identified by Thornley. The main differences between the Court's role and that of local authorities under RMA is that local authorities provide market signals, attempt to minimise adverse offsite effects and ensure high development standards. They also seek to address issues in the wider community interest not just in relation to owners of Maori land.

The Maori Land Court, then, plays a curious role; on the one hand strongly influencing the use and development of Maori land, effectively limiting its property rights, and being the sole decisionmaker for certain activities; and on the other hand taking on certain planning activities but working to no recognised planning regime. While the Court does not develop 'plans' for the future of Maori land to guide it in its decisionmaking, it is directed by the principles and provisions of TTWMA and the combined objectives of the multiple owners of a given block of land.

Current Maori land tenure

A matter of perennial debate is how to deal with the huge problem of multiple owners created by the laws of succession. The NZ Maori Council (1983) submitted that Maori land law should be amended to give a much stronger sense of kin association with land without requiring all Maori who own individual interests in Maori land to relinquish their rights. In response to such concerns, Te Ture Whenua Maori Act now provides a framework within which Maori land interests may be recommunalised (Hohepa 1996). The Act provides new trust mechanisms such as Putea trusts, Whanau trusts and Whenua Topu trusts (ss 212, 214 and 216 TTWMA). Putea Trusts allow people with small, otherwise uneconomic interests to manage their interests collectively. Whanau Trusts allow a whanau to bring together their Maori land interests for the benefit of the whanau and their descendents, often naming the trust after a tupuna (ancestor). The trustees can manage the trust for the benefit of the whanau communally rather than as individuals. A Whenua Topu trust is for the management of land in the interests of an iwi or hapu.

Despite these new provisions, Hohepa (1996) suggests that further law reform is needed to reverse the undermining of tikanga Maori perpetrated by the Maori Land Court. He proposes that the Law Commission carry out consultation with Maori communities as to how this could be achieved. McHugh (1994) suggested there is a strong case for a return to tribal body corporate ownership of all multiple owned land with some safeguards to protect existing successful trusts and incorporations.

Effects of Maori land law on property rights

Te Ture Whenua Maori Act affects property rights in Maori land by virtually denying the right to sell to another party outside of the hapu. The retention of Maori land in the hands of descendents is a principle of the Act as a whole and carried out through provisions that significantly affect the ability to alienate or sell. This was borne out in Mangatu Incorporation v Valuer-General[62], in which the High Court found that it was 'reasonable to assume that the alienation of Maori land would present significant practical difficulties in the future' (p684). Although there is a process whereby alienation can be approved 'the presence of a statutory mechanism for alienation did not mean that the mechanism would be able to be employed with ease or regularity'. The non-alienability applies to all Maori land as a class of land, and cannot be compared to single instances of general land which are prevented from sale under a private trust deed. The High Court found that TTWMA 'was an Act with wide application through the country, and could not be compared to restrictions imposed under a private deed of trust'. As a class of land, therefore, Maori land essentially cannot be sold and is in this sense outside of the market economy.

This inalienability of Maori land has planning implications due to its effect on limiting choice. An underlying assumption of planning mechanisms controlling use-rights appears to be that people will choose to purchase land in areas that are zoned in such a way as to allow the activity they wish to carry out. If they do not, they are financially disadvantaged in having to apply for consents and designing the development so as to minimise its effects. Owners of Maori land do not have this luxury of choice. In coastal

areas, for example, if a zoning is imposed which protects the exclusivity and natural character of the area by limiting the number of dwellings or imposing high development standards, the owners of Maori land who wished to develop papakainga housing would not have the option of selling their land and buying in an area zoned for that purpose, but would have to meet the cost of resource consents and higher development standards applying to their coastal land. They have no choice but to accept the restrictions as they cannot sell the land. Owners of general land in the same area, by comparison, do have the choice to sell their land if they wish, and may also have the personal benefit of increased property values from the 'exclusive' zoning and hence increased asset value.

Similarly, Maori landowners are at a disadvantage where planning standards or consent conditions require high development standards, particularly where standards are imposed which have no practical benefit to the activity - for example, requirements for landscaping, design and appearance of buildings, and even roading standards where these exceed the practical requirement of access. Standards such as these may well have benefits to the wider community, through protection of landscape values, for example, but are inequitable for Maori owners as they cannot take advantage of any increase in property value, and cannot ultimately sell the land to recoup their investment in improvements. As noted by Fisher (1993) value in the economic sense depends upon the power of exclusive use and control, and the power to transfer title to someone else. In this way the creators of value receive the benefit of their actions. Where land cannot be sold, property value has no meaning, and money spent on meeting development standards cannot be recouped.

The property rights of owners of Maori land, then, are diminished both by the non-alienation provisions of TTWMA and by whatever planning controls are placed over their land. The planning system is increasingly focused on market-based instruments and incentives to achieve its goals, but as Maori land is outside the market economy this approach can lead to an inequitable outcome.

---

[62] Mangatu Incorporation v Valuer-General 2 NZLR 683

Planning principles

Where the Court has sole jurisdiction, its decisions are not required to take into account the purpose, principles and processes of the Resource Management Act. Instead, the principles and processes of Te Ture Whenua Maori Act apply. Rather than 'sustainable management' being the central criteria, the focus of TTWMA is on the retention and development of land, and its 'best overall use and development'. This phrase recalls the tenor of the 1956 and 1977 Town and Country Planning Acts, where the 'wise use and management' of resources was a matter of national importance. Like those Acts, the matter for judgement appears to be what is 'best' in economic and social terms, with no requirement for consideration of environmental effects or the tenets of sustainable management.

In spite of this central role in decisionmaking for Maori land, the Maori Land Court is not a planning agency in the traditional sense that it develops plans to shape future actions. The Court's actions are determined by the objectives of TTWMA and by the desires and proposals of the owners in any given situation, but it does not have a role in preparing plans or determining beforehand how these objectives might best be met for Maori land in general.

A review of Te Ture Whenua Maori Act by Feist et al (1997) concluded that in its three years of operation, the Act appeared to have achieved the goal of retaining Maori land in Maori hands, but that it was less certain that efficient land utilisation options had been implemented. Reasons given for this were:

1. *land which is taonga tuku iho by its very status denies or restricts commercial risk-taking necessary to achieve the best commercial development*
2. *the retention principle has been (justifiably) accorded a greater and more urgent priority by the Act, most owners and the MLC, than effective management and utilisation*
3. *the Act does not contain clearly developed principles necessary to enable owners and managers to achieve sound management and/or sustainable utilisation of their lands; and*
4. *the source of the problem is the imposition by the Colonial legislature in 1865 of English legal notions of land ownership and management* (Feist et al 1997)

Feist's third point is of particular relevance. The Court has been given broad powers of land use and subdivision control, largely independent of the land use planning mechanisms vested in territorial authorities under the Resource Management Act. The Court's legislative powers and practices make it an influential land management agency, with the ability to become involved in land use decisionmaking to a far greater extent than any agency in relation to general land. In spite of this, Te Ture Whenua Maori Act does not contain any guiding 'planning' principles and certainly makes no reference to sustainable management principles.

Discussion

Te Ture Whenua Maori Act 1993 strongly affects many aspects of Maori land planning. Firstly, it creates a land tenure regime that is completely different from that of general land and which has inbuilt management complexities imposed by the structure of ownership as well as the exacting requirements of the Act itself. Secondly, the effect of the Act in effectively preventing the sale of Maori land takes Maori land outside of the market economy, which in itself has further planning implications where market-based instruments are used, or where planning methods are based on the assumption that all land is potentially part of the market. The ultimate effect has been to create an inequitable situation for owners of Maori land – an issue that cannot be fully resolved by the planning framework but certainly requires recognition.

The powers of the Maori Land Court to approve partitions, roadways, house sites and reserves, in addition to its role in facilitating the occupation, use and development of land, make it a powerful quasi-planning agency in respect of Maori land. In some aspects (approval of hapu partitions, roadways and reserves) its powers mirror those of local authorities for general land. In other aspects it has a dual role with local authorities in approving land development (non-hapu partitions and occupation orders). This creates a complex system for Maori land whereby certain planning decisions are being made outside of the 'sustainable management' principles of the RMA; some are made by both agencies, and some are solely under the jurisdiction of the local authority.

Were the Maori Land Court to continue to carry out a central planning role in the use and development of Maori land, it would seem appropriate for Te Ture Whenua Maori Act to provide greater guidance as to how this could be achieved and for the Court to take on a more conscious and structured 'planning' role. Such changes might involve adoption of sustainable management principles, or a requirement to develop 'plans' for Maori land, or some other direction to be determined in accordance with Maori customary management of land. Alternatively, all planning functions relating to Maori land under both RMA and TTWMA could be unified and administered by a single body with a specialist focus on Maori land.

CHAPTER 8

DISTRICT PLAN PROVISIONS

The use of Maori land is most strongly affected by provisions in district plans developed under the Resource Management Act 1991, and district schemes developed under the Town and Country Planning Act 1977 (a number of which are still at least partially in force). In order to understand the types of approaches undertaken, it was necessary to review a number of district schemes and district plans. A brief review was undertaken, not with the intention of providing a statistically significant sample, but merely to sketch an initial picture of Maori land provisions. These provisions, it will be argued, currently fall far short of meeting Maori aspirations.

Given that district schemes were developed under different legislation to district plans, with different principles relating to matters of importance to Maori, they were analysed separately in order to compare the approaches taken under the TCPA to those developed under the RMA, and particularly whether the latter had resulted in an improved recognition of Maori land issues.

District Schemes developed under the Town and Country Planning Act 1977

The early 1980s saw a growing appreciation of the need to provide for "Maori needs" through the planning system, and almost undoubtedly initiated by provisions in the 1977 Town Planning Act. The most significant change was the introduction of the new 'matter of national importance':

> s3(1)(g) *The relationship of the Maori people and their culture and traditions with their ancestral land.*

Additionally, the Second Schedule to the TCPA included within its 'matters to be dealt with in district schemes': *"Provision for marae and ancillary uses, urupa reserves, pa and other traditional and cultural Maori uses, and Maori reservations ..."*

A further fundamental change was the fact that the Act redressed the physical bias of the 1953 Act so that social and cultural issues were equated with physical land use planning matters – a significant issue for Maori.

During the early 1980s there appears to have been the first widespread 'planning' recognition that Maori might have different aspirations for the use of their land to others, and that these should somehow be recognised in planning schemes. The new requirements of the 1977 Act appear to have given rise to thought and debate amongst planners as to just how this 'relationship' could be provided for within the confines of district schemes (eg Birkinshaw 1982, Crawford 1982, Asher 1982, Anderson 1983, Tamihere 1984).

At that time Maori migration to urban areas was probably at its peak, and planners were dealing with a situation of depleted Maori populations in rural areas. Birkinshaw (1982) noted that in 1945, 80% of Maori lived in rural areas, while by 1975, 80% lived in urban environments. Despite this huge urban migration, Maori still expressed a desire to live on traditional areas of land for both spiritual and economic reasons. Asher and Naulls (1987) noted the persistence of traditional Maori concepts, values and beliefs which have historically created a distinctive pattern of Maori land use: living on the family land rather than a nearby town, locating housing and economic development around the marae, protecting land and water of ancestral significance and developing land in the interests of all the family and tribal members.

Recognition of these differences appears to have emerged earliest in rural districts with high proportions of Maori land, where some local authorities seriously sought planning solutions to the "Maori land issue". Crawford (1982), a planner working in the Taupo district, noted that a problem faced by many local authorities was how to recognise the relationship of Maori with their land, and then how to reflect this concern in some practical way in the district planning scheme to give 'guidance and encouragement' to land owners. Many district schemes by that time made provision for marae, and some also provided for kaumatua flats and community buildings (Crawford 1982). However, the wish by Maori to use their land for papakainga (multiple housing on family land) was slow to be recognised, with farmer-dominated local authorities apparently being

concerned that the 'public interest' in protecting rural land for agricultural economic development would be offended if village-type developments were permitted.

Although some councils may have appreciated some of the aspirations of Maori for their land, they still had difficulties coming to grips with just how to fit such aspirations within their district schemes. Papakainga housing created a particular conceptual difficulty. In a discussion of Maori land in Rodney county, Winder (1982) equated papakainga with 'communes' and suggested that they could be dealt with via a 'marae development plan' approach or considered as an alternative lifestyle. In either case the major 'use' consideration would be housing, which at that time was not permitted under the conventional rural zone regulations. Winder suggested either a special zone for Maori land providing for marae, reserves and residential housing, or amending the rural zone provisions with special provisions for marae and residential development.

George Asher, in a paper given at Tapeka Marae in 1982, attempted to lift the debate out of the European cultural context. He considered that planners needed to step outside of the entrenched value systems and work towards alleviating the pressures imposed on Maori through the planning system. He was emphatic that

> *... if existing policy and legislative provisions continue to be designed and imposed without acknowledgment of the existence of a distinct Maori culture, characterised by a common language; identifiable cultural institutions and social structure; and unique land tenure structure; then the assimilative mechanism of the majority culture will be perpetuated with the resultant loss of Maori identity.... It is imperative that planners have due regard to the negative cumulative effects that their policies and legislation have imposed on Maori ancestral land and the unique and significant relationship that exists for its owners and trustees. Most of the anomalies and injustices of the past cannot now be redressed in full, but planners should recognise that they are still a source of discontent and frustration. Further persistence in policies and decisions which serve to compound or aggravate these wounds would be a backward step in the progress that has already been achieved to the credit of some local and regional authorities and government departments.* (Asher 1982: 1)

On top of land use controls that did not provide adequately for Maori needs, an additional source of pressure at the time was the requirement (dating from 1967) that Maori land partitions be processed as subdivisions. District schemes of the 1970s and 1980s were heavily weighted in favour of preventing 'sporadic subdivision and urban development in rural areas' (s3(f) TCPA). Most district schemes in this period did not provide for the creation of small lots in rural areas, such as might be required for shareholders of Maori land partitioning for house sites. Winder (1983) highlighted this problem when he noted that the crucial issue of land tenure was missed when partitions were assessed purely on the basis of 'economic unit' criteria. He questioned whether the issue of economic units was relevant to Maori land, and argued that in many cases the shares in a property were too small to allow partition into economic units, which automatically disadvantaged the Maori landowner. District scheme policies and objectives for subdivision, he considered, should recognise the tenure difference and the different development objectives of Maori owners.

An appreciation was signalled at the national level of the need to provide for Maori aspirations in regional and district schemes by the publication of "Planning for Maori Needs" (Anderson 1983) by the Town and Country Planning Division of the Ministry of Works and Development (at that stage the state's planning agency). The report challenged those involved in the planning field to give effect to these broad legislative requirements of the TCPA. It outlined attempts that had been made within existing urban district schemes to provide for Maori needs and suggested ways to incorporate these within district schemes, although it stopped short of 'model ordinances'. "Maori Purposes" spot zones for marae in urban areas were suggested, as well as providing for marae as conditional or controlled uses in residential zones. In some locations, marae were incorporated into the definition of 'places of public assembly' or similar. Kokiri (skills training) centres were also identified as a specific "Maori need" to be provided for through specific inclusion in ordinances in appropriate zones, or inclusion within the definition of a marae.

In many rural areas, Maori were simply unable to build houses on their ancestral land, and Anderson identified this as needing urgent attention:

> *My understanding is that the provisions of housing on Maori land is one of the most pressing issues facing rural Maori communities. Many Maori families are not permitted to build houses on traditional land even in the vicinity of existing marae, because the land is zoned rural. Yet many Maori communities would claim they had the right to build housing on their ancestral land irrespective of the zoning. The task of planning is to marry the needs of rural Maori communities with other town planning considerations* (Anderson 1983:61)

The 'other town planning considerations' were the identified conflicts between the 1977 Act's matters of national importance:

> *The desire to build houses on Maori-owned ancestral land in rural areas for example may conflict with the requirement to protect land having a high actual or potential value for the production of food or with the requirement to protect the character of the coastal environment. It is envisaged that these areas of conflict will be best reconciled in terms of the local circumstances with regard also to regional and national planning objectives. For instance, if a County has a strong need to encourage rural resettlement so that the existing services and infrastructure can be maintained it may consider relaxing some of its subdivisional standards for housing development* (Anderson 1983: 9)

Anderson considered that local circumstances, such as settlement patterns, demographic factors, regional and district scheme policies and the local economy needed to be considered before developing policies and ordinances for rural Maori housing. The clear message was that local government should attempt to provide for traditional and cultural Maori uses in district schemes, but only where it was appropriate to the circumstances of the district.

District Scheme provisions

Many district schemes developed in the 1980s did give a degree of recognition to Maori needs on Maori land. A survey of twelve district schemes (mostly from Northland, where Maori land has a significant presence, but also a few from rural and urban areas

elsewhere[63]) was carried out to assess the degree of recognition of Maori land issues, and the types of techniques used to provide for Maori needs on their land. The survey was not random and is not necessarily representative of district schemes as a whole, but does give some idea of the range of approaches used. Having been developed under the 1977 Act, these district schemes were for the first time grappling with the meaning of s3(1)(g) TCPA and its relationship with the other matters of national importance.

Some district schemes made a point of including in the scheme statement a discussion of how the potentially conflicting matters of national importance would be approached. For example, Vari quoted the Whakatane District Scheme:

> *Although some villages may be located about a marae in the very fertile areas ... it is considered that the social advantages that would accrue to the Maori people and their heritage outweigh the need to protect a proportionately small amount of fertile land from nonfarming development* (Vari 1985: 171).

The Hokianga County Operative Reviewed District Scheme (1985) outlined the problem thus:

> *District Schemes have always been based on control of land by zoning for some particular purpose to the exclusion of other uses. Fundamental to this procedure is the assumption that any potential land user can purchase an appropriately zoned piece of land, since district schemes must provide for all reasonable uses. Conflicts arise when a Maori land owner wishes to settle on his ancestral land. Because of his close cultural ties to this land these is no question of being able to "buy a suitably zoned piece of land". The whole point is to live on the ancestral land.... In the past ... the use of land in a Maori way has not been contemplated in the planning controls. This scheme provides for such settlement of the land where it does not conflict with other objectives for the district.* (p 21)

Other district schemes flagged a more development-oriented approach to Maori land:

> *Maori land within the Council constitutes an important resource which could also, in those areas with potential for further development, be a source of*

[63] District Schemes surveyed were from the following local authority areas: Bay of Islands, Hokianga, Kaikohe, Kaitaia, Mangonui, Taupo, Whangarei County, Whangarei City, Whangaroa (see final page of bibliography for full references)

> *employment for some of the many unemployed in the district. The Council recognises the efforts being made by various authorities to remove impediments to the utilisation of Maori land and would encourage Maori land owners in the County to make use of trusts or other forms of organisation which would enable them to increase the productivity of their land.... The Council will encourage and look favourably on the fullest possible development of Maori land* (Mangonui County Operative First Review 1988: 32).

The Whangarei County District Scheme noted the trend from the mid-eighties of Maori returning from cities to family land. With high unemployment nationwide, rural homelands offered a better lifestyle for those on minimum incomes. In its objectives, the Council acknowledged the particular problems of settling Maori land, and stated that it would assist Maori who wished to live or work on their ancestral land by relaxing housing and subdivisional requirements for Maori land in rural areas (Whangarei Council District Scheme 1987)

Range of district scheme provisions

Councils used a range of provisions in their district schemes in an attempt to provide for Maori aspirations for the use of their land. The survey of district schemes identified six main planning techniques, described below. Some district schemes used just one approach, while others combined several of the techniques.

(a) No particular recognition of Maori aspirations for land use

Urban district schemes surveyed typically made no recognition of Maori land issues, and no special provision for Maori land, presumably as there would not often be Maori land within borough boundaries. Examples are Kaikohe, Kaitaia and Whangarei City schemes.

(b) Spot zones

Spot zones (ie those covering a single site only) for Maori purposes appeared to be used mainly where there was an established Maori reserve, urupa or marae. For example, Pukekohe Borough proposed a spot Maori Purposes Zone where all the uses likely to occur were made controlled uses as long as they complied with bulk, location and parking requirements (Anderson 1983). Council had discretion to control landscaping, design and external appearance of buildings.

The Mangonui District Scheme 1988 had a Marae Community Zone applying to relatively small areas around a marae and under the control of marae trustees. Permitted uses in these areas included marae buildings, camping grounds and residential buildings in accordance with an approved community development plan.

(c) Maori purposes zones

In a few instances, Maori Purposes zones were used, which applied solely to Maori land - either all Maori land in the county or selected areas of it.

The Taupo District Scheme contained provisions for 'kainga' and 'papakainga' zones. The Papakainga zone was a residential-style zoned applied to a single 11 ha site to provide for established residences as well as 'future development authorised by the Maori Land Court'. Up to twelve houses were permitted on the site, but the Trustees for the land were required to first prepare a comprehensive development plan. No subdivision was permitted in the zone. The Kainga zone was applied to certain rural Maori landholdings. Up to 12 houses per site were permitted at a density of no greater than one house per 4000m2. Again, a comprehensive development plan was first required, showing access, proposed uses, location of buildings, water supply, sewerage disposal, drainage and power supply.

The Mangonui District Scheme contained an anticipatory "Maori Purposes zone" which was never in fact applied to any land[64]. The zone was

[64] Greg Phillips, Planner, Far North District Council, pers. comm.

> *... intended to apply to areas of predominantly Maori population ... to provide for the particular needs of the Maori people who have strong traditional attachments to their ancestral land and where provision for rural land use, rural housing and family gathering places are necessary for them to settle on and develop their land* (Mangonui District Scheme 1988).

Prior to Council considering a scheme change to re-zone land, a comprehensive development plan had to be prepared for approval by Council. All subsequent development had to be in accordance with the approved development plan or would be treated as a conditional use.

The Whangarei County district scheme provided for the setting up of Marae Community zones, following the approval of a comprehensive development plan. It is not known whether any were ever set up.

(d) Development/Management Plans

In a number of cases, the development of Maori land for marae or multiple housing required the prior approval by Council of a "management plan" or "development plan". The information requirements varied but could include a written statement and plans of the siting of buildings, elevations and floor plans, existing and proposed land uses, ground stability, access and parking location and design, water supply, power and telecommunications, waste disposal and landscaping.

The role and planning status of these development plans varied. In the Mangonui District Scheme these plans were required prior to Council considering a scheme change to a Maori Purposes Zone. In Whangaroa, a management plan had to be submitted and approved by Council as a prerequisite to multiple housing being considered as a predominant use. A similar approach was used in the Bay of Islands District Scheme where up to five papakainga houses were a predominant use as long as the development was in accordance with an approved Papakainga Development Plan.

(e) Identified uses

A few district schemes also used the "identified uses" provisions of s73 TCPA, which stated

> *Where any land is specifically identified in the district scheme as being used for purposes of value to the community but not intended to be owned by the Crown, the Council, or any local authority, then -*
> *(a) The carrying out of any work on that land, including (i) The construction or alteration of any structure; or (ii) the making of any excavation; or*
> *(b) The subdivision of that land; or*
> *(c) The use of that land for any purpose which is inconsistent with the identified purpose -*
> *shall, in the absence of anything to the contrary in the district scheme, be deemed to be a conditional use of the land ...*

This provision was used in the Whangaroa and Mangonui district schemes to identify marae sites, urupa and/or other Maori reserves within a schedule and in the planning maps. Presumably the uses identified in the schedule were subsequently treated as predominant uses.

(f) Inclusion of Maori aspirations within general zone rules

Many district schemes did not make a special provision for Maori aspirations on Maori land, but instead contained provisions applying to all rural land which took account of Maori aspirations to a greater or lesser extent.

Hokianga County, for example, included in its Rural 1 and 3 zones the following predominant uses: *marae, urupa, and Maori reserves and buildings thereon consistent with the purpose of the reserve.* Up to two houses could be built on sites (regardless of tenure) of more than 4000m^2 and up to 3 houses on sites of more than 20 ha. A greater number of houses were a conditional use where they were "for Maoris to live on their ancestral land". These provisions however did not apply in certain coastal areas where conflicts with coastal protection were anticipated.

Whangaroa County's Rural Zone permitted more than 3 houses per site (regardless of tenure) as long as there was a minimum of 4000m2 per house, and Council had approved a management plan.

The Bay of Islands District Scheme's rural zones allowed up to 5 papakainga houses on a site as a predominant use (subject to density requirements). More than this (up to 25 houses) was a conditional use. Provision for non-papakainga multiple housing was far less generous.

Whangarei County made marae, urupa and Maori reserves predominant uses in rural areas. Papakainga housing (with no limit on numbers) was also a predominant use in rural zones but not in coastal or scenic protection zones.

Subdivision standards

Subdivision standards in district schemes surveyed generally did not treat Maori land as being any different to other land, even where the land use provisions did differentiate. This is curious given that the subdivision of Maori land had come under the control of local authorities in 1967.

However there are a few examples of differentiation. The Hokianga District Scheme had fairly flexible subdivision rules which were common to all land, but in the case of land classified as having the best potential for cropping, subdivision down to 2000m2 (rather than 6ha) was permitted *"in order to allow hereditary shareholders in Maori land to partition land to provide the security for them to build a house for their own use"*. The Mangonui District Scheme similarly allowed subdivision of rural-zoned land for *"the creation of home sites on ancestral Maori land for the purposes of hereditary beneficiaries, intending to settle the land"* as an exception to the general more rigid requirement for the establishment of a bona fide rural use.

The Bay of Islands District Scheme (1992) rural zones also had specific provisions for the subdivision of Maori land which were more relaxed than for other land, allowing partitions down to 2000m2.

Summary of district scheme provisions

The survey findings are summarised in Table 4 below.

District Scheme	Nil provision	Spot zones	Maori purposes zones	Develop-ment plans	Identified uses	Some provision within zone rules
Kaikohe	*					
Kaitaia	*					
Whangarei City	*					
Pukekohe		*				
Mangonui		*	*	*	*	
Taupo			*			
Whangarei County			*			*
Whangaroa				*	*	*
Bay of Islands				*		*
Hokianga						*

Table 4: Types of District Scheme provisions for Maori land use

A second survey of district scheme provisions was undertaken to give a 'reality test', to assess the degree of difficulty involved for Maori to gain consent for multiple housing on their land. Provisions for general rural zones in all of the district schemes were tested for three and fifteen papakainga houses on a 10ha site.

District Scheme	**3 units on 10 ha**	**15 units on 10 ha**
Kaikohe	Specified departure	Specified departure
Kaitaia	Specified departure	Specified departure
Whangarei City	Specified departure	Specified departure
Mangonui	Predominant use	Predominant use
Taupo	Predominant use	Conditional use
Whangarei County	Predominant use	Predominant use
Whangaroa	Predominant use	Predominant use (after approval of a management plan)
Bay of Islands	Predominant use (following approval of a development plan)	Conditional
Hokianga	Conditional use	Conditional use

Table 5: Comparison of District Scheme rules for multiple housing

Five out of nine district schemes allowed housing on Maori land as a predominant use at a density of 3 houses per 10 ha. Three district schemes allowed an even greater density as a predominant use. District schemes for predominantly urban areas gave no recognition to Maori land, even though the first three in the table did contain some Maori land within their boundaries.

Discussion on district scheme provisions

Most of the district schemes gave some recognition to Maori aspirations for the use of Maori land, but did require in many cases an involvement with complex planning processes in a system which is forbiddingly alien to many Maori. The provisions generally allowed marae to be established via a relatively simple application. Papakainga housing was more challenging as it represented a challenge to retaining the agricultural purity of rural areas. In the district schemes surveyed, admittedly a small sample, papakainga housing in rural areas ranged from as-of-right to requiring consent as a specified departure[65]. While many district schemes appeared, by listing 'Maori' activities, to provide for 'traditional and cultural Maori uses' as required by the second schedule of TCPA, the actual provisions in many cases set up obstacles to Maori desires for land use. Conditional uses[66] and specified departures required Maori to enter into a relatively expensive and time-consuming bureaucratic procedure, which is a strong disincentive, especially when public notification is part of the process.

On the other hand, predominant uses were not always what they seemed. In some district schemes, a development plan had to be approved prior to a proposal being considered a predominant use. The consent process for the development plan had no official status under the Town and Country Planning Act, although in at least one case it was treated as if it were a controlled activity (Far North District Council). For Maori, such provisions were an empty promise – the provision appeared to make certain uses a predominant activity whereas in reality a comprehensive development plan (which could require design input from surveyors, engineers and other professionals) was required before Council would give its approval and make the proposal a predominant use.

---

[65] Under the TCPA 1977, any use which did not comply with any of those listed in the district scheme as a predominant, controlled or conditional use was required to be considered as a specified departure. Council could only grant consent if the effect would not be contrary to the public interest, would have little planning significance beyond the immediate vicinity of the land concerned, and the district scheme provisions could remain without change.

[66] In considering an application for a conditional use, the council was required under the TCPA to have regard to the suitability of the site determined by reference to the provisions of the district scheme, and the likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and the economic, cultural, social and general welfare of the people of the district.

A related problem was the inflexibility given by a development plan. If future development had to be in accordance with the plan, changes resulting from new people or new ideas would require a new development plan and a new approval.

Maori aspirations for multiple housing on rural land, then, were subject to a varying degree of regulation and control within the overall town and country planning framework which focused on 'wise' land use and the appropriateness of various uses in various locations.

District Plans developed under the Resource Management Act 1991

The Resource Management Act's change of emphasis to focusing on the effects of use might be expected to produce district plans which took a new approach to Maori aspirations on Maori land. Its retention (and broadening) of the matter of national importance referring to ancestral land, its more explicit references to kaitiakitanga and the Treaty, and its focus on the effects of activities rather than 'use' in its own right, might have been expected to introduce new approaches within district plans developed under the RMA.

To test this expectation, a survey was carried out of eleven proposed district plans and two draft district plans from districts that were likely to have a significant proportion of Maori land[67]. Again, this survey was not intended to be representative of all district plans, and given its bias towards a greater area of Maori land, is likely to show more positive approaches than those in areas with little Maori land.

Arising from the strong directives in Part II of the RMA, it was expected that the new district plan provisions might

1. recognise Maori land as a unique resource,
2. recognise that Maori had a particular cultural and spiritual relationship with their land, and particular aspirations that differed from the generality of landowners,

[67] District Plans surveyed were from the following local authority areas: Far North, Gisborne, Kaipara, Kawerau, Opotiki, Otorohanga, Rodney, Rotorua, South Waikato, Waikato, Waipa, Whakatane, Whangarei (see final page of bibliography for full reference).

3. provide for particular activities which Maori would be likely to wish to carry out on the land (eg papakainga), and
4. allow the desired activities to occur with the minimum of regulation

The plans were therefore surveyed to assess:

- whether the plan contained objectives and/or policies which raised issues to do with Maori land and the aspirations of Maori landowners
- whether the plan differentiated between Maori land and general land in the application of rules, and how it provided for Maori aspirations for the use of Maori land (using papakainga housing as an example)
- whether a resource consent would be required for papakainga housing on Maori land at two different densities

The results of this survey are tabulated in Table 6.

Table 6: District Plan provisions for Maori land use

	Objectives relating to Maori land	**Policies relating to papakainga and/or Maori land**	**Differentiation between multiple housing on Maori land and other land?**	**Rules relating to multiple housing on Maori land**	**3 units on 10 ha**	**15 units on 10 ha**
Whangarei Proposed District Plan	*Ensuring appropriate priority is afforded to the active protection of taonga ... within the respective domains of the exercise of rangatiratanga and kawanatanga..*	*Tangata whenua should be able to use, develop and protect their lands in accordance with their cultural preferences, consistent with the purpose of the RMA*	No differentiation between rules for Maori land and other land.	In Countryside and Coastal Countryside environments, more than 1 house per 10ha is a discretionary activity.	Discretionary	Discretionary
Kaipara Operative District Plan	*To recognise and protect the rights Maori people have over their lands, forests, fisheries and other taonga in accordance with the Treaty of Waitangi*	*To encourage the settlement and utilisation of Maori land in accordance with traditional values*	Maori Purposes zone provides for papakainga housing on Maori land.	In MP zone, up to 3 household units permitted provided each unit has a net site area of 1000m2. Four or more units are discretionary activity. However multiple housing intensity rules are identical to Rural zone rules	Permitted	Discretionary
Kawerau Proposed District Plan	Nil	Nil	No differentiation between rules for Maori land and other land.	In Rural Lifestyle zone, more than one house per site is a discretionary activity.	Discretionary	Discretionary
South Waikato Proposed District Plan	*Provision made in the District Plan for the cultural, economic, spiritual and social needs to the tangata whenua*	*To allow for marae developments and papakainga housing to provide recognition of ancestral ties to the land, special heritage values and to provide for associated uses including residential and community development*	No differentiation between rules for Maori land and other land	Papakainga housing is a discretionary activity in the Rural Zone	Discretionary	Discretionary

	Objectives relating to Maori land	**Policies relating to papakainga and/or Maori land**	**Differentiation between multiple housing on Maori land and other land?**	**Rules relating to multiple housing on Maori land**	**3 units on 10 ha**	**15 units on 10 ha**
Waipa Proposed District Plan	Nil	*To allow for the development of village settlements about any existing or proposed marae.* *To allow for the erection of dwellings on multiple-owned Maori land*	Some differentiation between housing on Maori land and other land.	Three additional dwellings on Maori land are permitted activity for persons who establish to Council's satisfaction that they have a traditional association with a marae in close proximity to the dwellings. Dwellings in a Maori village must first be granted consent as a discretionary activity with a development plan.	Permitted	Discretionary
Otorohanga Proposed District Plan	Nil	Nil	No differentiation between housing on Maori land and other land.	Multiple housing permitted on any land at a density of CHECK	Permitted	Permitted
Opotiki Proposed District Plan	Nil	*To allow housing on Maori land in multiple ownership, including larger scale development where a development plan has been approved by Council*	Different rules within Rural and Coastal zones for housing on multiple-owned land	Multiple dwellings on Maori land are a controlled activity; where more than 4 dwellings, a development plan must be lodged with the application.	Controlled	Controlled
Gisborne Proposed Combined Regional Land and District Plan	*Sustainable management of Maori land, consistent with the traditional and cultural relationships Maori may have with their ancestral lands, while ensuring appropriate health, safety and environmental standards are maintained.*	*Provide Maori the freedom to establish papakainga and marae activities on Maori land by recognising the significance of the location to Maori, consistent with their relationship with their ancestral lands and ensuring that any adverse effects on the environment are avoided, remedied or mitigated*	Papakainga and Marae Settlements rules are provided in the Plan - owners of Maori land may choose to apply these provisions or the appropriate zone rules.	Multiple housing on Maori land is permitted as long as certain development standards are met.	Permitted	Permitted

	Objectives relating to Maori land	**Policies relating to papakainga and/or Maori land**	**Differentiation between multiple housing on Maori land and other land?**	**Rules relating to multiple housing on Maori land**	**3 units on 10 ha**	**15 units on 10 ha**
Whakatane Draft District Plan	*To maintain and enhance the traditions, lifestyle and cultural identity of Maori*	*To recognise the value of and provide the opportunity for housing, marae and associated whare nui subject to the sustainable management of the district's land resource.*	Papakainga and marae development must be in accordance with an approved Iwi Development Plan	In all zones, approval of an Iwi Development Plan is a discretionary activity. Multiple housing not in accordance with an IDP is also a discretionary activity.	Discretionary	Discretionary
Waikato Proposed District Plan	*To promote policies that will enable the tangata whenua to provide for their social, economic and cultural well-being and for their health and safety*	*To provide for papakainga housing*	Plan provides for papakainga in rural and urban Pa Zones (on Maori land) and also in the Hopuhopu zone. Management Boards for these zones are responsible for a number of environmental standards.	Papakainga housing is a permitted activity in Hopuhopu and in Pa zones, subject to standards including density provisions. Expansion of Pa zones on to high quality land is restricted.	Permitted	Permitted
Rodney Proposed District Plan	*To provide for sustainable management of natural and physical resources in a manner which recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.*	*Provide for marae housing in recognition of the concept of ahi ka roa and the protection and preservation of the mauri of the community*	Allow multiple housing on Maori land at varying densities in some Rural and Rural Conservation zones	Papakainga housing is a permitted activity on Maori land up to 4 units, not exceeding 1 unit per hectare. Greater numbers or density is a controlled activity provided an outline plan is submitted.	Permitted	Controlled
Rotorua Proposed District Plan	*The principles of the Treaty of Waitangi be taken into account in Council's resource management practice.*	*To recognise the importance of the rangatiratanga principle when dealing with the management of Maori resources.*	No special recognition of Maori land.	Papakainga development is a discretionary activity in all Rural zones.	Discretionary	Discretionary

	Objectives relating to Maori land	**Policies relating to papakainga and/or Maori land**	**Differentiation between multiple housing on Maori land and other land?**	**Rules relating to multiple housing on Maori land**	**3 units on 10 ha**	**15 units on 10 ha**
Far North Draft District Plan	*To enable Maori to develop and manage their ancestral land in a manner which recognises the jurisdiction of the MLC, and which ensures sustainable management of the natural and physical resources of the District is promoted.*	*That whanau, hapu or iwi management plans, taiapure plans and mahinga mataitai plans will be recognised and encouraged.* *The development on whenua tuku iho will be provided for, consistent with the requirement for sustainable management of resources.*	No special recognition of Maori land; however application for approval of an Integrated Development plan for Maori land can be made.	Multiple housing is permitted at a density of 1 house per 4ha (General Rural zone) or one house per 12 ha (Coastal zone); a greater density is a discretionary activity. An Integrated Development plan is also a discretionary activity.	Discretionary	Discretionary

Survey Findings

Objectives and policies:

Objectives in district plans varied widely, from those that made a very general reference to the 'needs' of tangata whenua or rephrased s6(e) RMA; to those which made no reference whatever to Maori land or other resources under Maori ownership. The most explicit references are in the New Plymouth, Gisborne and Far North plans, which appeared to recognise the tension between allowing cultural uses of land and the perceived need to control such activities in the interests of sustainable management.

Almost all of the plans contained policies which directly referred to Maori land and/or papakainga housing. Generally the policies aimed to 'allow' or 'provide for' uses of Maori land which were in accordance with cultural preferences, or more explicitly referred to multiple housing, marae villages or papakainga. Two plans had no policies relating to Maori land or papakainga, although this did not necessarily reflect on the provisions, as one of these (Otorohanga) would allow multiple housing as a permitted activity at both densities tested.

Overall, twelve of the thirteen plans made specific reference to Maori land in their objectives and/or policies. Most of the plans also made some reference to the particular cultural and spiritual relationship that Maori hold with their land.

Rules

Eight of the thirteen plans differentiated in their methods between multiple housing on Maori land (usually using the term papakainga) to that on other land.

The plans used a similar range of methods to those already noted in the District Scheme survey, with the exception that identified uses were no longer used. Interestingly, no new methods had emerged. However a noticeable liberalisation of the housing intensity rules for most rural areas would tend to favour multiple housing on all land, including Maori land.

Maori purposes zones, where a set of zone rules are applied specifically to Maori land, are used in three plans. Interestingly, in at least one of the plans (Kaipara) the housing intensity allowed in the Maori Purposes zone is identical to that allowed in the Rural zone. In other words, the difference in this case is purely nominal.

Five plans require papakainga development plans (or a similar term) to be submitted, either in association with a resource consent application for multiple housing, or as an optional precursor to housing and other development of the land. Where a development plan is required as a precursor, the approach used (Whakatane and Far North) is that the development plan goes through a resource consent process and subsequent development must be in accordance with the approved plan.

Spot zones do not appear to have been used, except possibly with the Waikato's Hopuhopu zone, which is particular to one area of Maori land.

The most common approach was to 'provide for' papakainga or multiple housing within general zone rules (usually in rural zones). Papakainga housing, or housing on Maori land, got a specific mention in rural zone rules in ten of the thirteen plans. In other plans, multiple housing on rural land was provided for in a generic fashion without specific reference to Maori land or papakainga.

In summary, most of the plans contained provisions referring to papakainga housing either through a form of Maori purposes zone, a development plan approach or listing papakainga housing within rural zone provisions or standards. Four of the plans did not make any particular provision for multiple housing on Maori land - within these plans, generic multiple housing rules would apply.

Effect of rules

If a plan made a clear statement that it intended to 'recognise', 'encourage' or 'provide for' aspirations or particular types of activities, it could be reasonably assumed that it would contain rules that allowed this with a minimum of regulation. A common complaint from

Maori has been the degree of 'red tape' involved in gaining consent for activities on Maori land, particularly papakainga housing. The plans were therefore surveyed to find what form of resource consent process would be required to gain consent for two intensities of papakainga housing.

In the last two columns of Table 6, the plans were put to the test with a hypothetical 10ha block of Maori land. The first test was for three papakainga houses on the block, as at this scale it was considered that the environmental effects would typically be minimal. The second test was for fifteen houses on the block, as at this scale there could be a greater environmental effect. It was assumed that the relevant standards and terms in the district plan would be met by the proposals.

Interestingly, it was found that the fact that a plan makes specific provision for papakainga does not necessarily mean that it will be a permitted or controlled activity. In six out of the thirteen plans, 3 papakainga houses on 10ha would be a discretionary activity. In one plan it would be a controlled activity. In only seven would this low density of housing be a permitted activity.

In nine out of the thirteen plans, 15 papakainga houses on 10ha would be a discretionary activity. In two plans it would be a controlled activity, and in three plans it would be a permitted activity.

In terms of the expectation that plans would provide for papakainga with a minimum of regulation, the findings are surprising. Half of the plans require resource consent for housing at a very low density, and the five of these that made the lower density of papakainga a discretionary activity had used positive phrases in their objectives and policies such as:

> *...tangata whenua should be able to use, develop and protect their lands in accordance with their cultural preferences ....*
>
> *... to allow for marae developments and papakainga housing to provide recognition of ancestral ties to the land ...*
>
> *...to recognise the value of and provide the opportunity for housing ...*
>
> *...by providing for a wide range of activities that do not place unreasonable restrictions on the use of Maori land ...*

> *... to recognise the importance of the rangatiratanga principle when dealing with the management of Maori resources ...*

On the other hand, Otorohanga Plan, which had no policies relating to Maori land, allowed multiple housing at both densities as a permitted activity.

The variation in approaches ranged from a few plans which appeared to find to quite acceptable to allow papakainga housing at any intensity as a permitted activity (subject to certain predetermined standards), to others which retained discretion in the hands of the council and required a consent process. It is difficult to see the sustainable management justification in such a wide variation in rules for an identical activity in rural areas.

It is understandable that a more intensive development of 15 houses might require processing as a discretionary activity, but the degree of regulation for a minor intensity of development was surprising given the apparently positive objectives and policies in almost all of the plans.

This brief survey has highlighted some anomalies between statements made in plans about this issue of prime importance to Maori, and the level of planning control imposed. "Providing for" papakainga housing does not necessarily mean making it any easier to achieve in practice.

Half of the district plans provided for 3 houses on 10 ha as a permitted activity. This can be compared to the district schemes surveyed, in which half allowed the same density of housing as a predominant use. A tentative finding is that district plans developed under the RMA are in fact no more 'friendly' to Maori aspirations on Maori land that district schemes developed under TCPA, despite the greater emphasis in the RMA for consideration of issues important to Maori. This finding is questionable due to the small sample size and only a partial overlap of the areas surveyed, but would be worthy of further research.

The survey of district plans only touched the surface of how best to provide for Maori aspirations for their land within plans developed under RMA. More detailed comparative study is required on this as well as on the effectiveness of various approaches in achieving Maori aspirations while at the same time achieving sustainable management.

District Plans – providing for rangatiratanga and kaitiakitanga

Ultimately, providing for 'Maori' activities on Maori land in district plans is merely brushing over the more important issue to Maori of the recognition of kaitiakitanga and rangatiratanga.

While 'providing for' activities on Maori land can be seen as a logical outcome of applying s6(e) RMA to district plans, the influences of s7(a) and 8 RMA infer that there should be some real recognition to kaitiakitanga and rangatiratanga in district plans. If these matters were to be recognised anywhere within a plan, it was surmised that it would be in relation to resources that were and always had been in Maori ownership, and most particularly in relation to Maori land. A second survey of the thirteen district plans was therefore undertaken to examine the extent to which rangatiratanga and kaitiakitanga were recognised in relation to Maori land (or other resources owned by Maori).

The expectation in carrying out this survey was that the district plans would

1. contain objectives and policies referring to rangatiratanga and/or kaitiakitanga over Maori land or Maori resources in general, and
2. contain methods which gave practical effect to the policies

The plans were therefore surveyed to assess

- whether they contained objectives and policies relating to rangatiratanga or kaitiakitanga over Maori land or resources, and
- what methods were used to give effect to the policies

The survey findings were subsequently compared to the levels of co-management developed by Berkes et al (1981) (Table 3). The results of this second survey are shown in Table 7.

Table 7: Objectives, policies and methods relating to rangatiratanga and kaitiakitanga

	Objectives relating to rangatiratanga or kaitiakitanga over Maori land or resources.	**Policies relating to rangatiratanga or kaitiakitanga over Maori land or resources.**	**Methods proposed to give effect to rangatiratanga or kaitiakitanga over Maori land or resources**
Whangarei Proposed District Plan	*Enabling tangata whenua to exercise rangatiratanga and kaitiakitanga over ancestral lands, waters, sites, waahi tapu and other taonga in the district.*	*In the use, development and protection of natural and physical resources, the views and interests of the tangata whenua should be fully represented at every stage of the process, including the preparation and implementation of the Plan.* *Tangata whenua should be able to use, develop and protect their lands in accordance with their cultural preferences, consistent with the purpose of the RMA*	Holding resource management hearings on marae where appropriate. Appointment of experts on Maori culture to hearings for hearing matters of significance to tangata whenua.
Kaipara Operative District Plan	*To recognise and protect the rights Maori people have over their lands, forests, fisheries and other taonga in accordance with the Treaty of Waitangi*	*To consult with iwi on resource management matters which impact on tribal resources and ensure that associated decisions do not prejudice outstanding Treaty based claims.*	Consult with iwi on resource management matters of significance to Maori through formal and informal means
Kawerau Proposed District Plan	Nil	Nil	Nil
South Waikato Proposed District Plan	*Provision made in the District Plan for the cultural, economic, spiritual and social needs of the tangata whenua.*	*To recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.* *To have regard to relevant planning documents adopted by an iwi authority when reviewing, changing or administering the District Plan.*	Consultation will be undertaken for plan reviews and resource consents as appropriate. Iwi planning documents will be considered in conjunction with the district plan for resource use matters.
Waipa Proposed District Plan	Nil	*To ensure that Maori conservational ethics and issues are taken into account in the management of rural areas.* *To consult with Iwi on issues of cultural significance including kaitiakitanga and waahi tapu.*	Council-established iwi consultative committee will liaise with iwi on matters of concern. Applications for resource consent on Maori land will not be notified except where the Iwi Consultative Committee recommends.
Otorohanga Proposed District Plan	Nil	Nil	Nil

	Objectives relating to rangatiratanga or kaitiakitanga over Maori land or resources.	**Policies relating to rangatiratanga or kaitiakitanga over Maori land or resources.**	**Methods proposed to give effect to rangatiratanga or kaitiakitanga over Maori land or resources**
Opotiki Proposed District Plan	Nil	Nil	Nil [Plan noted that Council had initiated a Memorandum of Understanding to be agreed with Iwi and Hapu, separate to the plan process]
Gisborne Proposed Combined Regional Land and District Plan	*Sustainable management of Maori land, consistent with the traditional and cultural relationships Maori may have with their ancestral lands, while ensuring appropriate health, safety and environmental standards are maintained.*	*To enable Maori to direct the development of papakainga and marae complexes, subject to compliance with health, safety and environmental standards, while ensuring that the physical needs of the settlement, in terms of water supply and waste disposal shall be met without adverse effects on the environment.*	Nil except provide for development of papakainga on communally owned land.
Whakatane Draft District Plan	*To maintain and enhance the traditions, lifestyle and cultural identity of Maori*	*To take into account the deliberations of the tangata whenua*	Consultation with tangata whenua
Waikato Proposed District Plan	*To sustainably manage the use and development of the natural and physical resources identified within the Pa zone boundaries in a way that enables tangata whenua to fulfil their responsibilities of kaitiakitanga over their taonga and to reestablish their ancestral links with their iwi, hapu and whanau.* *To promote policies that will enable the tangata whenua to provide for their social, economic and cultural wellbeing and for their health and safety.*	*To recognise Management Committees as the tangata whenua for the District.* *Council will consult with the relevant Management Committees and this consultation will be the first point of contact. The second point of contact will be the hapu which holds Kaitiakitanga responsibilities for the resource at issue.*	Consultation with tangata whenua Relevant Management Board for Pa and Hopuhopu zones is responsible for a number of environmental standards.
Rodney Proposed District Plan	*To provide for the sustainable management of natural and physical resources in a manner which recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.*	*Recognise the concept of kaitiakitanga in the use and development of land or water*	Nil except provide for development of papakainga on communally owned land.
Rotorua Proposed District Plan	*The principles of the Treaty of Waitangi be taken into account in Council's resource management practice.* *Recognition of the importance of rangatiratanga to iwi.*	*To actively continue the development of partnership relationships between Council and iwi authorities. Recognise the importance of the rangatiratanga principle when dealing with the management of Maori resources. Effectively consult with tangata whenua when making decisions that affect them.*	Nil

	Objectives relating to rangatiratanga or kaitiakitanga over Maori land or resources.	**Policies relating to rangatiratanga or kaitiakitanga over Maori land or resources.**	**Methods proposed to give effect to rangatiratanga or kaitiakitanga over Maori land or resources**
Far North Draft District Plan	*To give effect to the rights guaranteed to Maori by Te Tiriti o Waitangi (Treaty of Waitangi)*	*Tangata whenua will be involved in the management of the natural and physical resources of the District where their knowledge about the resources would assist sustainable management of these resources. Whanau, hapu or iwi management plans, taiapure plans and mahinga mataitai plans will be recognised and encouraged.*	Nil

Survey findings

Only two of the thirteen plans made explicit reference to rangatiratanga in their objectives; and two further plans, by referring to recognition of rights guaranteed under the Treaty of Waitangi, make implicit reference to rangatiratanga.

Only two of the thirteen plans' objectives made explicit reference to the concept of kaitiakitanga. Two possibly made implicit reference, by referring to *traditions* and *traditional relationships*.

Policies were even more circumspect. The intention to consult with Maori on plan development, resource management matters which impact on tribal resources, and similar matters of concern was the most common approach. One policy referred to continuing to develop a partnership relationship between council and iwi authorities. Two plans proposed to take into account planning documents produced by iwi or hapu groups. One (Gisborne) had a policy which appeared to give some recognition of rangatiratanga by stating its intention ... *to enable Maori to direct the development of papakainga and marae complexes, subject to compliance with health, safety and environmental standards...* In practice this was achieved by making such developments a permitted activity. The Otorohanga plan, ironically, used the same method even though it contained no policies relating to rangatiratanga.

Methods proposed to involve tangata whenua in resource management on their land included:

- consultation (this was the most common method)
- holding resource management hearings on marae where appropriate
- taking into account iwi/hapu planning documents
- appointment of experts on Maori culture to hearings where appropriate

The first three of these methods equate to Levels 2 and 3 on Berkes' "ladder" (Table 3). Community input is heard through consultation, marae-based hearings and taking iwi/hapu plans into account, but the planning authority has no requirement to take heed of that input. The appointment of Maori members to hearings could be interpreted as level 5 or 6 on the "ladder', but for the fact that the choice of the appointees, and the occasions they will be involved, is still under the control of the planning authority and thus is more level 3 or 4.

Enabling tangata whenua to take a more active role in resource management decisionmaking, for example for developing papakainga on their own land, was not addressed, except in cases where papakainga is a permitted activity. Gisborne was one of only two plans assessed where papakainga at both densities assessed was a permitted activity. The other was the Waikato Plan, where the methods provided for a Maori Management Board in Hopuhopu to be responsible for a number of environmental standards in the Maori purposes zone. These approaches equate to levels 5 or 6, albeit within a very limited frame whereby the council determines the outer parameters of self-determination.

Some plans (Far North, Rodney, Whakatane, Waipa) required approval (as a discretionary activity) of some form of development plan drawn up by the landowners/applicants, following which housing development could proceed in accordance with the plan. While this could be claimed to be recognising rangatiratanga status, in effect it is no different to applying for resource consent and carrying out any other form of development under the terms of that consent. The development plan must be submitted and approved by the council, which retains the ultimate authority to approve or decline the application. This system, despite its apparent delegation to the Maori owners, in fact retains all essential control in the council hands and can be equated with Level 3 or 4 on Berkes' ladder.

The possibility of transfer of powers to iwi authorities as provided for under s33 of the Resource Management Act 1991 was not referred to in any of the plans assessed. If implemented, transfers of power would be at the highest level of Berkes' ladder, whereby power is delegated to the community and the approach is one of a partnership of equals.

Findings of the Parliamentary Commissioner for the Environment

In 1998 the Parliamentary Commissioner for the Environment released a report into factors affecting tangata whenua participation in environmental planning and resource management (PCE 1998). The findings strongly echo those of this chapter.

The report noted an increasing trend for tangata whenua to seek more direct participation and partnership in environmental management, and a desire to move beyond consultation systems and reactive processes to more meaningful strategic involvement. While the RMA provides a strong basis for Maori participation, tangata whenua are concerned that it does not establish sufficiently reliable frameworks for them to participate in council processes and contribute to environmental management. The report also noted that negative Maori perceptions of council processes were reinforced where there was a dichotomy between policies making positive statements about Maori involvement, and implementation methods that failed to provide the outcomes expected. Iwi and hapu surveyed for the report expressed dissatisfaction with the performance of councils and the lack of opportunities available for practical fulfilment of kaitiaki responsibilities (ibid.).

Discussion

The survey of plans, while non-representative and necessarily brief, did illuminate some interesting aspects of the practical expressions of planning for Maori land. The findings are extremely tentative and stand to illustrate the need for more detailed research in this area.

The last twenty years has seen significant changes in the approach to planning taken by local authorities. Guided by the first planning provisions to make reference to Maori land in the Town and Country Planning Act 1977, a range of methods to provide for various Maori aspirations on their land were developed in district schemes. The survey of a small number of district schemes suggests that generally there was some recognition given to the relationship of Maori with that land, and most provided for a stock range of activities which Maori might wish to carry out on their land including marae, Maori reserves, urupa and

papakainga housing. Low density multiple housing on Maori land was a predominant use in half of the district schemes.

District plans developed under the RMA, while containing objectives and policies apparently supportive of Maori interests, were no more flexible in relation to Maori aspirations with their land. Almost all of the plans contained objectives and policies which directly referred to Maori land and/or papakainga housing, usually stating an intent to 'allow' or 'provide for' papakainga on Maori land. However this did not reflect in easier processes for gaining consent for papakainga housing, and only half allowed for low-density housing as a permitted activity, while five required consent as a discretionary activity. In general, the apparently positive approach of objectives and policies was not carried through in a practical manner in the methods.

Even poorer recognition is given to kaitiakitanga or rangatiratanga in relation to Maori land, despite the RMA's explicit reference to kaitiakitanga, and its (limited) incorporation of the principles of the Treaty. Very few of the plans surveyed contained objectives or policies that addressed rangatiratanga or kaitiakitanga in relation to Maori land. Where they did, it was generally to be achieved through 'consultation' with Maori, although one plan proposed appointing Maori members to hearings panels on occasions.

When compared to Berkes' Levels of Collaborative Management, most methods adopted by plans were at about Level 2-4. In two instances, over a very narrow range of influence, Level 5 or 6 was reached. Although the RMA provides for methods which would enable Maori to exercise more self-determination in resource management decisionmaking, such as a transfer of powers under s33 RMA, or delegation of functions under s 34 RMA, which would equate to Berkes' Level 7, these approaches were not adopted. In reality, then, Maori exercise at most a minor level of co-operative management, whereby consultation and communication occur, but no real transfer of power.

Generally, the plans surveyed appeared to contain better provision for the matters identified by section 6(e) of the Resource Management Act, than the matters in sections 7(a)

(kaitiakitanga) and 8 (principles of the Treaty). This may partially relate to the hierarchy given to these matters within Part II of the Act, and partly to the fact that the TCPA contained an almost identical provision to s6(e), and so was less of a challenge for local authorities already accustomed to thinking about the relationship of Maori with their land. Sections 7(e) and 8 required new approaches which could be threatening to council established structures, especially as giving them practical effect could include concepts of partnership or shared decisionmaking for Maori land planning.

The Resource Management Act does not provide much direction in this regard for local authorities, particularly in placing the Treaty principles in a position equating to Level 2 on Berkes' ladder – a matter to be heard but not necessarily heeded. Additionally, there are many practical difficulties in establishing a more collaborative system of resource management on Maori land, not least of which are the lack of successful prototypes within New Zealand, the lack of resourcing, and the lack of an institutional structure to support such a system. Further problems are the means by which rangatiratanga and kaitiakitanga over Maori land could be practically recognised in today's world, and whether such recognition would more appropriately occur within the current Resource Management Act or would require a new approach. At the very least, further clarification is needed, perhaps in the form of a national policy statement under the RMA.

There is also the conceptual problem of the degree to which rangatiratanga is impacted on by the kawanatanga granted to the Crown. According to the Department of Justice (1989) 'te tino rangatiratanga' will take precedence in matters concerning material and cultural resources and taonga which have been retained, but equally where there can be clearly demonstrated a general need which can be managed only at the level of national action, the Crown must exercise its kawanatanga powers on behalf of all New Zealand citizens. This balancing exercise has been assisted by recent developments in international law and in other Commonwealth countries which are outlined in Chapter 10, but in brief it is apparent that there is a trend whereby Crown control of activities on indigenous lands is acceptable where it is in the interests of the conservation of species, but that beyond this it is appropriate to allow tribal self-regulation.

CHAPTER 9

CONTEMPORARY MAORI APPROACHES TO PLANNING

> *To many Maori people,* [the planning process] *appears to be a negative public sector activity which is designed to frustrate rather than accommodate the interests of Maori people. This unfortunate aspect of planning is brought about because the planning process itself contains values which do not take the Maori viewpoint into account, particularly when dealing with Maori people, Maori land and Maori culture. Planning imposes its own values on Maori people even though the principles of planning ...are basic to Maori people.* (Kingi P & Asher G 1982: 1)

Maori is an oral culture, and concerns about the planning system held by 'grassroots' Maori are frequently only heard voiced on marae or at other meetings. While commentary from Maori academics has been incorporated elsewhere into this thesis, it was considered important to gather views of those who live rural areas where they and their land are affected by the planning process.

The Far North District is an area with a high Maori population (41.4%) (Statistics NZ 1997) and significant areas of Maori land, in both coastal and inland areas. The proposed Far North District Plan (now withdrawn) received a great deal of media publicity, mainly due to its contentious approach on significant natural areas, and the level of publicity meant a high level of awareness in the district and hence many (4,433) submissions. It was considered that an analysis of the submissions by Maori would reveal something of current Maori views towards planning.

Analysis of submissions to Far North District Proposed Plan

The process of developing the Far North Proposed District Plan had included ongoing consultation with tangata whenua through a discussion document, two rounds of hui and

workshops at iwi and hapu levels, followed by four hui-a-iwi (Far North District Council 1996). Additionally, a pan-tribal resource management committee was contracted to write a section of the plan covering issues of importance to tangata whenua. The section identified matters of resource management significance to Maori as including:

- *recognition of and provision for customary authority and rights guaranteed by Te Tiriti o Waitangi (Treaty of Waitangi)*
- *input into monitoring, enforcement and compliance procedures of the Council*
- *account taken of Maori spiritual values including concepts of mauri, tapu, mana, wehi and karakia*
- *recognition of and provision for traditional Maori knowledge in the management of the district's natural and physical resources* (Far North District Council 1996)

This section was widely praised in submissions from Maori, but as noted by submitters the message of the Tangata Whenua section was only very minimally carried through into the Plan's objectives and policies. The effects-based rules did not differentiate between Maori land and general land, and did not make any particular provisions for Maori aspirations except to the extent that assessment criteria made reference to Maori values. Additionally, there was no direct recognition of kaitiakitanga or rangatiratanga in the body of the Plan.

Submissions were received from Maori individuals, groups representing multiple-owned blocks of land, and some tribal organisations. They provided a range of views on existing problems with planning and tenure, the provisions of the proposed plan and how they considered planning for Maori land should ideally be structured.

Unique land tenure

One theme of Maori submissions was that Maori land was different from other land, in terms of its tenure, ownership structure and values, and should therefore be treated differently in the Plan to other land. A submission by a large Maori land trust noted that problems included:

> *... failure by Council and the plan to take cognisance of Maori land issue in terms of tenure and processes. [The] scenario of multiple owned land and problems associated with achieving consensus has been ignored. Lack of notification of individual owners, so onus is on Trust to organise owners to meet on Council issues.* (Submission by Waima Topu B Trust)

For owners of Maori land, the difficulties in managing the land due to its multiple ownership, and in making decisions according to tikanga Maori, are sufficient to cope with.

> *The Plan has not taken into account the problem of multiple ownership of Maori land. Because of multiple owners it takes many discussions to reach an agreed consensus.* (Submission by Wood)

> *Tikanga Maori [is] enough for whanau to cope with as it involves many families, the process to handle each case can be very time consuming. Any further laws placed on these lands would make further decisions impossible to carry out. The fact that there is a great difference between Maori and non Maori land places a strain on Maori owners creating a feeling of further alienation from these rights. These lands should always be there for future settlement as it is intended* (Submission by Walker)

Maori land use aspirations

Other submissions wanted the Plan to better represent Maori values and desired uses:

> *[We wish] to participate effectively in the management of resources within the Te Mahurehure rohe* (Submission by Waima Topu B Trust)

> *Tangata whenua must be allowed to carry out customary use within their respective tupuna rohe, and Councils policies must reflect this* (Submission by Taniwha)

Many submissions listed the types of activities that they wished to carry out on their lands and asked that council make provision for these to occur as-of-right, or with minimal interference. Activities frequently listed included papakainga housing, marae and other cultural facilities, Maori education facilities, agriculture, horticulture, woodlot forestry and low-key tourism. A common approach was to request that the council make specific consideration of what the owners of a particular Maori land block wished to do in the future, and make provision for that.

> *As of right to tangata whenua should include papakainga housing, economic development, waahi tapu and other special places, cultural facilities and rahui conservation/preservation* (Submission by Te Taumata Kaumatua o Ngapuhi)

Iwi management plans

Methods suggested of providing for Maori aspirations under the umbrella of the RMA included better recognition of hapu or iwi management plans within the planning process:

> *Support tangata whenua initiatives to prepare iwi planning documents ... Make provision to enable tangata whenua to live on, develop and use their ancestral lands in accordance with Tikanga Maori ... Encourage participation by tangata whenua in environmental monitoring ... Consider opportunities for using traditional management methods as an alternative means of achieving sustainable management* (Submission by Kororareka Marae Society)

> *[We] seek exemption from resource management process due to the development of iwi management plans which have bottom lines of ecological principles which is consistent with Tikanga Maori* (Submission by Te Uri o Matangirau)

One submission included a copy of their hapu management plan, and requested that it be included in the District Plan. (Submission by Patukeha Kaumatua Committee)

Maori purposes zone

A number of submissions sought a separate Maori Purposes Zone:

> *Have a separate Maori purposes zone flexible enough to cover a range of Maori uses from conservation to waahi tapu and marae. Allow for communal papakainga developments upon submission of a detailed papakainga plan* (Submission by Waima Topu B Trust)

> *Needs to be a Maori purposes zone applicable to all Maori owned land under the Maori Land Court jurisdiction. Zone should make provision for Maori traditional uses and general uses having little impact on the environment as permitted activities. Consult Maori communities on the standards they wish to see applied* (Submission by Te Iwi o Te Roroa)

Treaty settlements

One submission considered that Treaty settlement outcomes should be taken into account:

> [The] *Plan should take cognisance of Treaty settlement outcomes and in recognition of future developments retain the discretion to not apply specific rules to situations which support Maori economic development or some mutually agreed modifications negotiated in the spirit of partnership* (Submission by Waima Topu B)

Transfers of power

A few submissions requested transfers of powers and functions to iwi groups pursuant to section 33 of the Resource Management Act:

> *Section 33 transfers [should] occur to Paraniora and Tuariki Trusts so that they may administer their lands independently* (Submission by Tuariki)

Transfer powers under s33 when hapu are sufficiently resourced and trained to carry out the mahi (Submission by Patukeha Kaumatua Committee)

Consider s33 transfer of powers to enable tangata whenua to exercise their cultural and traditional relationship with their ancestral lands etc (Submission by Kororareka Marae Society)

Rangatiratanga

Lack of recognition of rangatiratanga was another theme. Many of the submitters referred to the Treaty of Waitangi and in particular the promises of Articles 2 in relation to Maori land. Submitters felt strongly that the right to manage their own land and resources was a Treaty right, and that exercising kaitiakitanga required that rangatiratanga over the land and resources should be recognised.

A Treaty right involves both the ability to manage our own land and resources within the principle of tino rangatiratanga, and the necessity for Council to consult with iwi consistent with true meaning of partnership (Submission by Waima Topu B Trust)

Standards affecting Maori people and Maori land need to be Maori sourced, not Pakeha sourced - this is required by tino rangatiratanga and RMA s6(e) (Submission by Te Iwi o Te Roroa)

By zoning Maori land, our tino rangatiratanga has been taken away (Submission by Ambler)

Problems with the Plan were perceived to include *failure to give effect to Article 2; failure to ensure Maori retain full authority over their land, homes and things important to them both individually and collectively* (Submission by Hereora)

Te Taumata Kaumatua o Ngapuhi considered that since the partners to the Treaty were on equal terms, the District Plan (where it impacted on Maori land) should be negotiated as between equal Treaty partners rather than be the subject of consultation. This concept of negotiation to achieve an agreed approach to land use control arose in several other submissions.

Kaitiakitanga

A further area of criticism was the inadequacy of the Plan in providing for the tangata whenua role of kaitiakitanga

> *Kaitiakitanga is the formal method of management of hapu and tribal resources for the benefit of future generations... It is impossible to exercise kaitiaki responsibilities without tino rangatiratanga, as it requires controlling people's actions.* (Submission by Patukeha Kaumatua Committee)

> *The Kaitiaki* [of a particular block] *are a large whanau that have been functioning since time began.... It is important that tangata whenua continue the traditions of rahui / conservation and don't let any other body be the kaitiaki.* (Submission by Heke)

> *Each land has a kaupapa of its own and its own tikanga to guide it and known to each family handed down from tupuna.* (Submission by Walker)

There was a widely expressed desire by submitters to manage their own land in accordance with tikanga Maori:

> *Te Uri o Matangirau have sat at length and discussed the Proposed District Plan and how it affects our concept of Tikanga Maori... [The Plan should] recognise the special status of tangata whenua and make provision for the cultural and spiritual values and customary practices, and must not impede the relationship with*

turangawaewae... Tangata whenua will develop their own land use kaupapa consistent with tikanga Maori and ecological principles. (Submission by Te Uri o Matangirau)

The Plan contravenes [our] vision for tribal land, restricts the development and control by the tribe of Ngatikau (Submission by Roberts)

Remove zonings from ancestral Maori land (Submission by Karanga)

Council to have no say on how Maori lands are developed (Submission by Mei)

Levels of Maori involvement in resource management sought

It is enlightening to compare the levels of participation sought by Maori in resource management decisionmaking, compared to that provided in district plans. The submissions were compared to Berkes' 'Levels of Collaborative Management' ladder (Table 3) which has already been used in Chapter 8 to assess district plan provisions.

Overall, submissions ranged through several levels of power-sharing - from wanting sole control over their lands, to formal transfers of power under s33, to greater recognition of iwi planning documents, through to better recognition within the district plan itself of Maori aspirations.

In terms of Berkes' ladder, Levels 2 and 3 (consultation and co-operation) were the levels at which Maori were to be involved in the Proposed Far North District Plan. This is in the lower end of the range of Plans reviewed in Chapter 8, where most methods adopted by Plans were at Levels 2-4.

Maori submissions asked for a much higher level of involvement. At the lowest level, some asked for Maori aspirations to be provided for in the Plan. This can be equated with

Level 4 (communication) whereby local concerns begin to enter management plans. Some wished to see iwi management plans given formal recognition. This represents Levels 5-6, as the start of partnership in decisionmaking, and participation in developing and implementing management plans. A significant number of submissions sought Maori control of their own land in accordance with rangatiratanga or kaitiaki principles, or transfers of power under section 33 RMA. This is at the top end of Berkes' Ladder; Level 7, whereby partnership or community control is institutionalised and power is delegated to the community where appropriate.

It can be concluded that the Proposed Far North District Plan did not provide for Maori involvement in resource management at anywhere near the levels sought by Maori. Reflecting back to the district plans analysed in Chapter 8, few if any provided for the level of involvement sought.

It is clear, too, that Maori seek not only a higher level of involvement in management, but also the ability to base resource management planning for Maori land on Maori cultural and spiritual values and customary practices rather than western-centred concepts. An opportunity is sought by Maori to develop their own land use kaupapa consistent with tikanga Maori.

Some iwi and hapu groups have already begun the process of developing their own resource management plans, despite the fact that there is no formal role for such plans within the current planning system (apart from them having to be 'taken into account' by local authorities). The plans draw on both traditional knowledge and modern understandings, and may indicate a future direction in planning should opportunities arise in the future for a greater degree of iwi involvement. Although there are very few such plans to date, those that could be accessed assist further in understanding current Maori views towards planning.

Iwi management plans

Iwi management plans are useful vehicles to enable iwi to express their development and resource management objectives on a broad scale, not only for resource management issues but also ranging outside of the parameters of the Resource Management Act into social and economic development issues. The term 'iwi management plan' appears to be used by iwi as a generic term rather than specifically relating to a plan developed for the purposes of resource management. Dick (1993) describes an iwi management plan as one that articulates the vision of an iwi in respect of its physical and human resources. It may include any policies, goals and objectives for the future, based on values shaped in the past and realities created in the present. Iwi management plans have been prepared by many iwi, not in accordance with any legislative requirement but to address the aspirations and needs of iwi in one or a number of fields, including economic, social, health, employment, education and resource management.

It is only since the Resource Management Act was introduced in 1991 that regional councils and territorial authorities, in developing plans and policy statements, have been required to have regard to the 'relevant planning documents recognised by an iwi authority'. This is required in the preparation and change of regional policy statements (s61(2)(a)(ii); the preparation and change of regional plans, including regional coastal plans (s66(2)(c)(ii) and the preparation and change of district plans (s74(2)(b)(ii). The Act does not require iwi to produce iwi planning documents, does not prescribe the contents, and does not suggest that local authorities have any requirement to resource the production of such documents.

Where iwi planning documents are available they must be had regard to, but few have been produced to date. Dick (1993) concludes that common problems faced by iwi in the preparation of iwi plans have included a lack of time and resources to prepare information for tight local government deadlines, lack of access to technical advice, and the appropriate mandate to prepare such a plan.

Ngai Tahu

Ngai Tahu have produced two 'resource management strategies' for Canterbury and Otago-Southland respectively (Tau et al 1990; Garven et al 1997). These very comprehensive documents contain policies on a range of resource management issues such as mining, mahinga kai, rural land use, forests and marae, and detailed sections on sites of significance to Maori. The documents are notable for the use of the 'silent file' technique for certain sites of significance.

The documents contain a section on Maori Reserves - areas of land originally 'granted' to Ngai Tahu to provide an economic base for the communities living in those areas. These lands often remain undeveloped for a number of reasons including planning laws which have in the past forbidden people to build on blocks of land which do not fit the criteria of an 'economic unit', or do not comply with the minimum site area. Ngai Tahu maintain that planners should bear in mind the original intention of Maori Reserves to support the welfare and aspirations of their owners, and should also consider the problems associated with developing multiple-owned and communally-owned land, and help the respective individuals and communities overcome these. The Canterbury document includes a number of policies for Maori reserves including

> *4. That applications to initiate community-owned business ventures should be actively encouraged, and that unnecessary constraints should not be applied*
>
> *6. That applications to construct buildings for communal Ngai Tahu use, for example, whare runanga (meeting houses), should be viewed favourably and actively assisted*

Manukau

A Tribal Policy Statement developed by Awaroa ki Manukau (1991) aimed to "clearly state the social, cultural, environmental and political aspirations of Ngati Te Ata". The Statement based its authority on the 1835 Declaration of Independence, and stated "Ngati te Ata are a sovereign people ... [it] has the right to govern its own affairs ... and make all

decisions on matters which affect it as an iwi and resources which it owns". On the subject of district plans, it stated:

> *The relevant District Council shall recognise and provide for the following:*
>
> *(a) That only Ngati te Ata has the right to prepare district plans for natural and physical resources and other taonga within its tribal territories...*
>
> *(d) That the District Council allocate resources necessary to Ngati te Ata to carry out its kaitiaki responsibilities.*

Elsewhere the policy statement noted that its kaitiaki objectives included restoration of damaged ecological systems and ecological harmony; reducing risk and providing for the needs of present and future generations. The statement also considered that all resource management agencies should relinquish such 'legal' powers and resources to Ngati te Ata as are necessary to enable it to carry out its kaitiaki responsibilities over its natural and physical resources and other taonga. (Awaroa ki Manukau 1991).

Te Rarawa

There is no dedicated national or local resourcing for the development of iwi/hapu management plans, and iwi groups must generally rely on their own resources or whatever funds they can acquire from funding agencies. In some areas, district or regional councils are making resources or facilities available to iwi to assist in the development of plans. For example, in Northland the Regional Council produced a guide "Towards Developing Hapu/Iwi Management Plans" in conjunction with Te Kotahitanga o Te Taitokerau Resource Management Committee and sponsored a series of 10 workshops on developing management plans. At least two iwi have gained subsidies under the Sustainable Management Fund for developing iwi/hapu management plans, one of which is the Northland iwi Te Rarawa.

Te Rarawa are still in the process of developing their plan, and are currently analysing the input from a series of consultation hui at marae. The aim of the process is described by the co-ordinator of the process:

> *Our strategy was that we go back to the hapu / marae/ community base to encourage them to develop their own environmental plans and to map and record all sites of significance and their stories for posterity - nga uri a mua. And to retrieve their traditional place names and record those; to identify the environmental, cultural and spiritual values pertaining to our natural resources of whenua, maunga, awa, me te moana, and to the life forces of flora and fauna that are sustained in this natural environment. We want people to think about our responsibility to protect the world around us so that we pass on a heritage to our unborn generations that they will bless us for. What we are looking to do is to restore and strengthen the understanding and practice of kaitiakitanga amongst our people; to empower them to make and own their own environment plans; to put in place acceptable (to us) procedures to protect our waahi tapu and significant sites, and ultimately to establish iwi as the parallel territorial authority that Councils and DOC must recognise. And we tell everyone that while we are in a planning mode we might as well consider all the other aspects of our survival and plan for those at the same time. Like economic development and employment, education, health, cultural development .... whatever. And how to prioritise our planning to make things happen.* (Gloria Herbert, Te Rarawa 1999)

The outcome is to be a resource and economic management plan for Te Rarawa that comes from a Te Rarawa perspective and reflects the Te Rarawa world-view and environmental perspectives.

Patukeha Hapu

Not all management plans are necessarily tribally based. Some, such as the succinct Patukeha Hapu Resource Management Plan, is written from a hapu perspective. The plan starts with a clear statement of the kaitiaki role of the tangata whenua:

> *As kaitiaki, we of the present generation have a responsibility handed down to us by our tupuna; ancestors of previous generations to care for the natural resources and Te Taiao, the environment. We have obligations as Kaitiaki to not only care for the*

> *natural world but also to ensure that a viable livelihood is passed on to the next generation. .... According to our tribal tikanga, it is our responsibility to exercise rangatiratanga within our rohe potae. It is our right to make decisions regarding the use of the whenua and the moana, and the natural resources.*
> (Patukeha Kaumatua Committee 1997)

The plan draws on the 1835 Declaration of Independence as well as the Treaty to back up its claims of rangatiratanga over resources and customary practices.

The plan's land use objectives include

- *To protect the whenua for the hapu/whanau who can whakapapa to their tupuna rohe and for hapu/whanau use*
- *To ensure that mahinga mataitai, moana, awa, flora and fauna natural habitats are protected and conserved*
- *That the District Plan must provide for land use activities on our ancestral lands for the future social economic development of the people which includes papakainga, marae development and supporting activities.* (Patukeha Kaumatua Committee 1997)

For these iwi management plans the management of Maori land is not the prime focus, but rather a range of issues of importance to the iwi or hapu throughout their rohe (tribal area). The matters typically covered include

- a description of the relationship between the iwi or hapu and the local environment
- identification of sites of significance or resources that may be threatened by development (eg wahi tapu) or the processes by which such sites should be protected
- identification of resources with which the group have a rangatiratanga or kaitiakitanga relationship (eg awa, maunga)
- identification of the situations in which tangata whenua should be consulted

Generally, the iwi management plans appear to be developed with the intention of partially being internal documents for the tribe's own use, and partially being advisory documents, equivalent to Level 4 on Berkes' Ladder (although Awaroa ki Manukau considered that

district plans should be developed by the iwi for their tribal territories, which would equate to Level 7). The plans are however developed within a planning framework which gives them no opportunity of becoming anything more than advisory documents, so it is not surprising that they are written in this form.

Iwi planning documents represent a strong initiative by iwi to involve themselves in planning and to make it work for them, to protect resources and values of importance to them. From an iwi perspective they can be seen as a formal attempt to reintroduce the practices of kaitiakitanga to the management of resources within their rohe. Unfortunately there are as yet no mechanisms to make this a reality within the planning system.

Co-operative conservation agreements

To date, the only pathway to recognition of rangatiratanga/kaitiakitanga in resource management has been through the terms in Treaty settlements and co-operative conservation management agreements. For example, the Ngai Tahu Deed of Settlement introduces a range of statutory instruments which secure positions on boards with authority on matters relating to the environment, and provide for the active involvement of Ngai Tahu across most of the Department of Conservation's functions including representation on the NZ Conservation Authority. The introduction to the Deed states that both the Department and Ngai Tahu are seeking a relationship consistent with the Treaty principle of partnership that achieves over time the conservation policies, actions and outcomes sought by both parties as set out in the document. A similar approach is taken in the Ngatiturangitukua Deed of Settlement. Other examples of co-operative conservation management between iwi and DOC include a protocol for whale stranding, a joint management committee for Waitomo caves, and deeds of recognition for Aoraki (Mt Cook) and Tititea (Mt Aspiring) (Department of Conservation 1998a). However it is notable that to date no Treaty settlements have given a more significant role to iwi in resource management.

Discussion

The necessarily brief research exercise carried out on Maori views towards planning highlights a major discrepancy between the degree of participation offered to Maori within district plans, and that sought by Maori in submissions to the Proposed Far North District Plan. While district plans examined in Chapter 8 typically provided opportunities for involvement at levels 2-4 on Berkes' Ladder, Maori sought to participate at Levels 4-7, with possibly a greater emphasis at the upper end of the scale. Further research is needed on a more systematic basis, but it can be tentatively concluded that district plans are not providing the level of Maori involvement in planning that they would wish, and are not providing opportunities for the exercise of kaitiakitanga and rangatiratanga over Maori land.

Maori have shown that they are interested in picking up on the challenge of a greater degree of self-management. Submissions to the Far North District Plan, and the production of iwi management plans, show evidence not only of a willingness to become involved in resource management, but also the desire to develop new approaches to resource management incorporating the Maori world view and at least partially based on indigenous knowledge and customary practices.

Outside of the RMA, Maori are being given a greater role in resource management decisionmaking through protocols with the Department of Conservation relating to land and resources managed for the Crown for conservation purposes, and through the outcomes of Treaty settlements. Such initiatives may signal the beginning of an acceptance of a degree of power-sharing with Maori for resources in which they have an interest.

CHAPTER 10

INTERNATIONAL TRENDS

Internationally, indigenous peoples are becoming increasingly involved in resource management, both on lands which are owned by the indigenous group or over which they have usufructory rights. This chapter outlines examples of contemporary indigenous resource management arrangements, particularly in Australia, Canada and the United States.

The examples described have predominantly arisen only in the past 10 years but can be seen as part of a current trend within states towards granting greater self-determination or involvement in decisionmaking to indigenous groups. The trend arises from new approaches developing internationally as a result of both international environment law and international human rights instruments, and also new approaches to the interpretation of treaties and agreements within nations.

Indigenous peoples

Indigenous peoples populate parts of every continent and most countries. There is debate as to what constitutes an indigenous people, but measured by spoken languages (the best single indicator of distinct culture as each language encapsulates a unique view of the universe) all the world's people belong to around 6,000 cultures. Durning (1992) identifies between 4000 and 5000 of these as indigenous cultures. By his definition, roughly 200 to 600 million of the world's 5.5 billion people are indigenous people. The territory now occupied by indigenous peoples is an estimated 12 to 19 per cent of the earth's land area, although much of this is land owned by the state over which indigenous peoples have or claim some form of usufructory or management rights (Durning 1992).

Traditionally, indigenous societies were largely rurally based, and relied on resources gathered and farmed from the natural environment. Today, indigenous peoples who have not yet been overtaken by modern societies live mostly in places so rugged, inaccessible or remote that they have been little disturbed by the industrial economy. Those who had previously occupied more fertile lands or areas with valuable resources have mostly been eradicated or forced to retreat into urban areas or remote regions of refuge (Durning 1992). According to Stevens (1997) intact indigenous communities and little-disturbed ecosystems appear to regularly overlap - for example, Indian-held forested lands in Central America, tribally tended forest land in the Philippines and Thailand, coastal swamps of South America and the coral reefs of the South Pacific. In many parts of the world, the homelands of indigenous peoples are the best - and often the last - remaining places of wildness and biological diversity.

There is a strong geographic correspondence between indigenous lands and places of exceptional natural conditions, which has been called by Nietschmann (cited in Stevens 1997) the "Rule of Indigenous Environments": that is, wherever there are indigenous people with a homeland there are still biologically rich environments which generally have avoided exploitation due to their inaccessibility or inhospitableness. These areas are important nationally and globally for a range of functions including regulation of water cycles, maintaining climatic stability, and providing habitats for a wide range of flora and fauna. This pattern can also be seen in New Zealand, where one-third of Maori land is still in indigenous forest. As a result of their high biodiversity, many indigenous homelands are now sought after as sites for national parks, World Heritage sites, international biosphere reserves and other types of protected areas (Stevens 1997).

These biologically rich environments do not mean that the land and resources are left untouched or unchanged by their users. Historically, indigenous people played a significant role in modifying or shaping ecosystems and landscapes. While the western world over the past century has adopted the concept of the untouched wilderness, this has been based on ignorance of the interrelationships between people and their habitat, and the role people play in maintaining biodiversity in forests and savannas (McNeeley cited in Stevens 1997).

Indigenous management systems

Indigenous peoples have generally developed unique cultures based on their existence within a particular local environment which has, of necessity, integrated dimensions of sustainability. Their ecological knowledge has been gained through generations of interaction with their local environment. This knowledge base is of paramount importance in sustaining existing ecosystems, and also in providing models as to how sustainable development might be achieved (Durning 1992). Indigenous languages, customs and practices contain unique understandings of nature and people's place in nature, and patterns of resource use and management that reflect an intimate knowledge of local geography and ecosystems. Conservation of biodiversity is achieved through practices such as protecting particular areas and species as sacred; developing land use regulations and customs that limit and disperse the impacts of subsistence resource use, and partitioning the use of particular areas or resources between communities, groups and households. Species-specific cultural regulations may involve taboos on hunting and gathering, protection of individuals of a particular age or gender, and protection of breeding and nesting sites (Stevens 1997).

Although indigenous peoples are primary caretakers of their environment, they are not hands-off conservationists. Their interest lies in using nature for their benefit, and in fact in many areas of the world the concept of untouched nature is an illusion, as most areas have been inhabited, modified or managed throughout the human past. Animal and plant populations in most of the world reflect not just natural selection; they also reflect human selection. However the essential difference between indigenous and industrial societies' uses of nature is scale - indigenous peoples have generally maintained ecologically sustainable systems, sometimes through intricate local conservation regimes, and sometimes fortuitously arising from their low-impact technologies and small populations. This is not to say that indigenous peoples have a universally sustainable approach towards the environment - there are both historical and recent examples of adverse impacts on local ecology and biodiversity. But in today's context, most indigenous people care deeply about

the future of their environment, quite simply because their own ways of life and identity as a people are often at stake. To a considerable degree, the state of the environment and their continued rights to live from it are intrinsic to both their subsistence welfare and their cultural survival. Cultural survival and cultural diversity are often thus entwined with environmental conservation and biodiversity.

Much can be learnt about sustainable development from studies of indigenous societies which have functioned in the past as well as those that have survived relatively intact. While it is wrong to over-romanticise indigenous peoples' wisdom and harmony with the earth, Stevens (1997) considers it could be an even graver and more tragic error to underestimate the distinctive character and resilience of indigenous cultures, and the ways in which their values and knowledge often continue to make their ways of life different from and more environmentally sensitive that their non-indigenous neighbours.

Indigenous systems of environmental management are, like the societies themselves, being eroded. This is largely due to the impact of western civilisation, the lure of the western lifestyle and values, and a lack of opportunity to carry out and pass on indigenous practices. The knowledge can be difficult to interpret by those trained in western science because of the cultural and religious forms in which indigenous people record and transmit the knowledge - for example through myth and taboo passed from one generation to the next. Durning (1992) suggests that three conditions must exist for traditional systems of ecological management to persist in the modern world: the indigenous people must have secure rights to their resource base, enforced by the state and backed by international law; they must be organised politically and be able to take democratic initiatives; and they need access to information, support and advice.

International environmental law

Early international legal instruments make only isolated mention of the rights of indigenous peoples; however the last part of the decade of the eighties saw the start of a trend towards vigorous assertion of indigenous rights in legal instruments (Craig 1998), linked with the

developing paradigm of sustainable development. The concept of sustainable development was first popularised by the report of the World Commission on Environment and Development in 1987 (the Brundtland Report) (WCED 1987). The concept originated in relation to 'sustainable yield' from biological and physical resources, but has been extended over time to include not only a sustained level of stock or production from an ecosystem over time, but some sustained increase in the level of societal and individual welfare.

The Brundtland Report, and more significantly the Rio Declaration and Agenda 21 adopted at the United Nations Conference on Environment and Development (UNCED 1992), identified the fundamental role of indigenous peoples in strategies for sustainability. They emphasised the importance of indigenous methods of sustainable development in their own right, and also as a source of models for global sustainability (Dixon and Falloon cited in Craig 1998). The Rio Declaration, for example, acknowledged the special role of indigenous peoples in achieving sustainable development, in Principle 22 stating:

> *Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development* (UNCED 1992)

Chapter 26 of Agenda 21 deals specifically with indigenous peoples and sustainable development. It encourages states to develop national mechanisms to protect, strengthen and empower indigenous, traditional and local communities. The "Basis for Action" in Chapter 26 sets the scene for the subsequent objectives and activities:

> *Indigenous people and their communities have an historical relationship with their lands and are generally descendents of the original inhabitants of such lands ... They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.... Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. ....* [E]*fforts to implement environmentally sound and sustainable development should*

recognise, accommodate, promote and strengthen the role of indigenous people and their communities. (UNCED 1992)

Significant objectives include:

26.3(b) Establishment, where appropriate, arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes.

26.3(c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies...

Promoting strategies for sustainable development means more than learning from indigenous knowledge and culture. It requires the recognition of indigenous rights and customary law without which indigenous methods of resource management cannot flourish. A greater level of autonomy over the management of indigenous lands and resources was signalled in Agenda 21:

26.4 Some indigenous people and their communities may require ... greater control over their lands, self-management of their resources, participation in development decisions affecting them, including ... participation in the establishment or management of protected areas.

26.5(d) [Governments should] contribute to the endeavours of indigenous people and their communities in resource management and conservation strategies ... (UNCED 1992)

The Biodiversity Convention and Forest Principles, which arose from UNCED, also refer to the rights of indigenous peoples. Signatories to the Convention on Biological Diversity agreed to:

> *Article 8(j): Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.* (UNCED 1992)

The 1992 Rio Earth Summit highlighted the commonality between indigenous issues and environmental sustainability as a significant theme in international environmental law. The agreement arising from the conference for the first time attempted to integrate indigenous rights and environmental protection, acknowledging that indigenous peoples are in need of concrete measures to protect their rights and that these measures are also crucial for humanity's survival as a whole (Bosselmann 1997: 36). A further significant step was the release of the Draft International Covenant on Environment and Development[68] in 1995. Key provisions include respect for all life forms, the interdependence of environmental protection and human rights, intergenerational equity, and the role of indigenous peoples and local communities in environmental decisionmaking at all levels.

However, international agreements are only 'soft' law, which is not binding on states unless they choose to ratify and incorporate all or parts of the agreements within municipal law. While UNCED agreements clearly recognise the importance of indigenous people's knowledge and traditional practices, protection of indigenous values is not obligatory. Even the language of the legally-binding Convention on Biological Diversity only encourages rather than obliges States to protect the rights of indigenous people and to respect, preserve and maintain their knowledge, innovations and practices. At the same time they can usefully serve indigenous peoples as a persuasive mechanism and as a framework for

developing their own plans of action. As noted by Bosselmann (1997) the Rio Declaration is not legally binding, but it represents customary international law and may, where it goes beyond that, indicate emerging principles of international law.

It has become clear that the human rights of indigenous peoples cannot be protected without recognising both their rights to land, sea and other natural resources and their right to continue to sustainably develop and manage these resources. Recent international environmental law acknowledges that successful environmental management depends on, at least, some form of indigenous self-determination. At the same time, international human rights law and developing agreements refer to the rights of indigenous peoples to participate in environmental management according to their customary methods.

International human rights law

The evolving international awareness of global interdependency has been instrumental in the development of both international environmental law and what are known as 'third generation' human rights. Contemporary international legal theory suggests that indigenous people should have certain rights to protect them and their culture against assimilation and dissipation. Harhoff (1992) suggests such rights should include the right for indigenous peoples to participate on an equal footing at all levels of public government and in all sectors of society; the right to form institutions which are provided with authority to regulate matters of native importance; the right to receive education and public instructions in the native language; the right to form institutions which are provided with authority to regulate matters of native importance; the right to have sacred sites preserved; and the right to have certain land and sea areas reserved for traditional uses and subsistence. It is left to states to implement these rights into domestic law in accordance with local circumstances.

[68] Drafted under the auspices of the IUCN Commission on Environmental Law in co-operation with the International Council of Environmental Law and the UN Environmental Programme

This doctrine is closely associated with international human rights. While the central features of international human rights have been identified in the Universal Declaration of Human Rights and other related instruments, indigenous rights have not yet been codified in any international agreement even though they are referred to in a number of international legal instruments and court decisions (Harhoff 1992). Early international documents recognised a right of cultural preservation, such as the International Covenant on Civil and Political Rights and the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169). Bosselmann (1997:19) notes that while these documents have a paternalistic tone, they include reference to indigenous rights to autonomy, preservation of cultural integrity and control over natural resources and environmental preservation of the land. A 'right to development' of indigenous peoples was articulated in the Declaration on the Right to Development, adopted by the UN General Assembly in 1986. According to the Declaration, the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, and in which all human rights and fundamental freedoms can be fully realised (Article 1(1)).

Indigenous peoples themselves have placed emphasis on their right to instigate and control their own development. A Preparatory Meeting on Indigenous Peoples held prior to the 1987 session of the UN Working Group on Indigenous Populations adopted a Declaration of Principles, which included:

> *4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and sub-surface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.* (Cited by Kingsbury in Kawharu (Ed) 1989: 142)

The 1989 International Labour Organisation Convention, ILO 169, was the first international convention that attempted to protect indigenous peoples' rights in a comprehensive way. The Convention contains provisions on a wide range of international

rights, including a requirement for a systematic and co-ordinated action to protect the rights of indigenous peoples. Some of the articles focus on the need for a degree of self-determination, particularly in relation to areas inhabited by indigenous peoples; for example:

> Article 7
>
> *1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development....*
>
> Article 15
>
> *1. The rights of the people concerned to the natural resources pertaining to their lands shall be especially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*

In the past the quest for self-determination by indigenous people was viewed by states as a threat. International law did not allow for any interpretation of self-determination other than as a quest for secession, and there is still a deeply embedded fear that self-determination requested by indigenous peoples may result in independent statehood (Bosselmann 1997). However there is a new shape to self-determination emerging in the post-colonial era, exemplified by the Draft Universal Declaration on the Rights of Indigenous Peoples (1993). Craig (1998) has described this as the most comprehensive, integrated and strongest articulation of indigenous rights to date. A Working Group established by the Economic and Social Council of the United Nations in 1982 worked with hundreds of indigenous peoples to develop the draft. The Draft represents the aspirations of indigenous peoples rather than the aspirations of states, but the ratification required before it acquires formal international standing may be difficult to achieve (Coates 1998). The Draft Declaration spans both human rights and indigenous ecological management - for example, Article 26:

> *Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or*

otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources and the right to effective measures by States to prevent and interference with, alienation of or encroachment upon these rights.

The question remains how state sovereignty and the rights of indigenous people can be reconciled. This may be less challenging than in the past, for as Bosselmann (1997) notes the concept of absolute state sovereignty is no longer a reality. Environmental and economic realities have forced states into strategies of international co-operation, which have undermined their traditional autonomy. This redefinition of the doctrine of state sovereignty has so far been mostly observed in relation to international trade law and international environmental law, but as noted by Bosselmann it is increasingly being seen in newly developing relationships between states and indigenous populations - for example in the decolonisation of Africa and the break-up of eastern European states. Additionally, changes in international jurisprudence have meant longstanding treaties between states and indigenous peoples are being re-interpreted to give greater emphasis and recognition to indigenous customary laws, including those relating to resource management.

Indigenous resource management

In New Zealand to date, issues of resource ownership have dominated Maori claims to the Treaty settlement process, but for many indigenous groups around the world access to and management of resources shares equal priority with resolution of land questions. For example, in northern Canada the most significant features of claims relate to shared jurisdiction over resource development and access to fish and game. In areas where traditional harvesting still occurs, indigenous people are attempting to secure direct participation in resource management (e.g. Inuit co-management agreements). Many claims (for example in Australia, Canada and Alaska) are over harvesting rights to resources on land other than that held by the indigenous group. Some groups have started by seeking some form of self-determination in social services such as education and health

services, and have then moved to resource management and environmental projects (e.g. the Nisga'a in British Columbia, who have also an agreement in principle for further self-government rights).

Indigenous resource management agreements occur both on indigenous lands and on protected or government/Crown lands in which they have interests. Many agreements involve a degree of self-determination, but range from situations of almost total autonomy to those where consultation is at best symbolic. As well as recognising the interest that the indigenous peoples have in the resource, such agreements imply an acceptance of the contribution that traditional knowledge can make to regulation of harvesting and protection of the environment (Coates & McHugh 1998).

Canada

In Canada, recent constitutional and legal changes have redefined the relationship between indigenous peoples and the state. Until a series of landmark cases in the early 1990s, aboriginal title and rights were narrowly interpreted by the courts and government. The state had assumed responsibility for common property lands (Crown lands) and resources, and state management systems had largely replaced indigenous communal property management systems (Wolfe-Keddie 1995). Significant change began with the amendment to the Canadian Constitution Act in 1982 to recognise existing aboriginal and treaty rights, giving aboriginal peoples special collective rights in law. The Sparrow[69] case led to a widening of the concept of aboriginal rights. In that case, relating to the rights to fish for food and ceremonial purposes, the Indian leadership argued that treaty and aboriginal rights could only be extinguished by aboriginal consent; while the state argued that any aboriginal right to fish must have ended by the regulatory systems introduced in the Fisheries Act. The Supreme Court of Canada rejected the notion of 'extinguishment by regulation', and ruled that extinguishment required legislative measures showing a clear and plain intention to extinguish the rights in question. In this case the right had not been extinguished and could only be limited by the federal government on grounds set out in the judgement, concerned

[69] R v Sparrow (1990) 1 SCR 1

with conservation and the balancing of the interest of different users. The Court ruled that in managing the fishery, once conservation needs are met, the federal government had to accord Indians a priority over commercial and recreational fisheries. The Court also rejected the idea of "frozen rights", the idea that rights should only be seen as the continuation of old style traditional practices - the rights were not about preserving ancient practices, but securing rights that would help aboriginal peoples survive and develop, culturally and economically. The Sparrow decision confirmed that Aboriginal rights include involvement in the conservation, regulation and management of resources. This, in turn, meant that the state had some obligation to recognise the legitimacy of indigenous knowledge, principles of conservation and systems of resource management (Usher and Wagner (1991) cited in Wolfe-Keddie 1995).

Some of these concepts have been given effect to by the Canadian government, to a greater or lesser extent. From the mid-1990s, the Canadian federal government acknowledged the inherent right of Aboriginal peoples to self-government. The Federal Policy Statement in 1995 identified the scope of self-government for aboriginal peoples as "the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources" (Government of Canada 1995). Matters that could be assumed by aboriginal governments include "property rights, land management [and] natural resources management". A second list of areas of federal jurisdiction for which aboriginal governments could receive limited powers, subject to primary jurisdiction continuing with the federal government, included "environmental measures [and] fisheries co-management". (Sanders 1996)

Settlement of comprehensive aboriginal claims in Canada has given some groups outright title for parts of their traditional lands, and in some cases shared authority for land and renewable resource planning and management. For example, the Nisga'a Agreement in Principle 1996 sets up a form of self-government for the Nisga'a people. Under this agreement, the Nisga'a gain jurisdiction for a number of matters on their own lands including land use and management, and building standards. Other jurisdictions include

family law matters, culture and education. In many of these areas (including land use and management) Nisga'a law prevails over federal or provincial law. Non-native residents have the right to vote and be consulted by Nisga'an about decisions that will affect them (Sanders 1996).

Under the Inuvialuit Final Agreement signed in 1984, the Wildlife Management Advisory Council was required to develop a conservation and management plan for the Inuvialuit Settlement Region. The regional plan produced by WMAC recommended community-based conservation plans for each of the six Inuvialuit communities. The community-based planning documents have been produced as a result of this process utilise the indigenous knowledge that the residents have of their area. The Conservation Plans are intended to provide guidance to the residents and other organisations with an interest in the area, in order to assure long term environmental, social and economic benefits. The plans include identification of community values and goals, special areas defined for special management approaches, guidelines for activities such as tourism, and agreed conservation measures for wildlife management and research (Community of Paulatuk 1990; Community of Sachs Harbour 1992; Community of Tuktoyaktuk 1993; Community of Olohaktokmint 1994).

An even greater degree of self-determination has been achieved by the Nunavut in the eastern part of Northwest Territories, where a distinct territory has been set up with its own government. Inuit form 90 per cent of the population and have been given title to 20 per cent of the area, the remainder being vested in the Crown. The agreement puts in place numerous boards and commissions, set up jointly with territorial and federal levels of government and third-party interests, to plan and manage the lands, waters and associated resources. Amongst other things, Inuit are to establish an integrated environmental planning and management regime, in contrast to the current ad hoc resource development in the Arctic. Non-renewable resource development is to be subject to an environmental and social impact assessment process carried out by the Nunavut Impact Review Board. The Inuit participation on various statutory bodies means that they have influence over land management in territory that is far more extensive than the limited areas over which they have exclusive ownership and use. (Richardson et al 1994)

Compared to the Nunavut Agreement, which created a territory-wide government for the people of the region, the Yukon Umbrella Final Agreement is based on indigenous groups holding pockets of land that are non-contiguous. It provides for significant involvement of the indigenous people in environmental planning over the 41,439 square kilometres of settlement area (where the claimants were given fee simple title). Their sub-Agreement on Land Use Planning includes the following objectives:

- to ensure social, cultural, economic and environmental policies are applied to the management and use of land resources in an integrated and coordinated manner.
- to minimise actual and potential land use conflicts
- to fully utilise the knowledge and experience of the Yukon Indian People in order to achieve effective land use planning. (Richardson et al 1994)

Indigenous membership on various regulatory agencies will vary from one-third to two-thirds depending on whether the development will impact on non-settlement lands or settlement lands.

A mosaic of forms of indigenous self-government is beginning to develop across Canada through a range of agreements with aboriginal groups (Wolfe-Keddie 1995). These agreements are far broader than land tenure settlements for native land claims - they are designed to provide a legal framework and procedures to allow self-determination for social justice, economic development and environmental protection. Environmental management is an essential component of the agreements, both because of the central role the relationship with land in indigenous culture, and because social and economic self-development also requires control over forces which govern their natural resource base. The agreements are intended to establish an on-going policy framework whereby indigenous and non-indigenous interests can co-operate and co-exist through bicultural institutions for land management and planning (Richardson et al 1994). However it is notable that the general pattern among the regional agreements is that the allocation and licencing is delegated to co-management boards and harvest committees, but management for conservation is still reserved to governments (ibid.). With the exception of Nunavut,

indigenous groups have jurisdiction only over their settled areas, not the lands between, so their decisionmaking authority for land and resource management is limited to a relatively small area. Even so, aboriginal groups now have title to over 20 per cent of far northern Canada, and share land and resource decisionmaking authority with federal and territorial governments for the entire area covered by the claims agreements.

Australia

In Australia, there is no comparable experience to Canada in the negotiation of regional agreements. Serious consideration of Aboriginal claims by federal and state governments is a recent phenomena, arising largely from the Mabo[70] decision. In Mabo, the Australian High Court recognised for the first time the existence of native title, which entitles indigenous peoples in Australia to the use and enjoyment of ancestral lands in accordance with their unique laws and customs. The existence of native title, in spite of the acquisition of sovereignty by the Crown, had long been recognised and protected under British common law, and the Mabo decision belatedly brought Australia into line with other former British colonies (Lane et al 1997). The decision also noted that it was immaterial that the laws and customs had changed over time provided the general nature of the connection between the indigenous people and the land remained.

Lane (1997) notes that the impact of the Mabo decision on planning and natural resource allocation may mean that indigenous Australians, who have largely been marginal to resource planning and management, could find themselves within unprecedented influence in land and resource decision-making. He suggests major changes are ahead for the planning profession in redressing the historical marginality of indigenous people from land use decision-making, and taking into account the native title rights that may exist in many areas such as unalienated Crown lands, marine areas and pastoral leases. Options identified by Lane for a new planning regime include Aboriginal control of relevant resource management processes, community-based planning and co-management of protected areas and specific resources. Lane also puts forward his own 'co-existence' model of a resource

[70] Mabo v Queensland (1992) 175 CLR1

management regime which gives expression to native title rights, provides for co-existence with other interests and achieves agreed social, environmental and economic objectives.

To date, the main strategies for the empowerment of Aboriginal and Torres Strait Islander peoples have been statutory land rights, ad hoc participation and joint management of conservation areas, and social welfare programmes (Richardson et al 1994). Some Aborigines have successfully negotiated agreements for the co-management of conservation areas such as Kakadu and Uluru National Parks in the Northern Territory. In the Cape York region, the Kowanyama people are involved in co-operative catchment management of the Mitchell River with government agencies and resource users. In Torres Strait, regional marine management strategies are being negotiated with the Islanders and government conservation agencies. (Richardson et al 1994)

USA

In the United States, modern indigenous involvement in environmental management stems from the late 1980s, when the federal government acknowledged that the Environmental Protection Agency (EPA) shared jurisdiction over reservation environments with the tribes – rather than with the state governments as previously determined. In the 1990s, federal funding was made available to tribes for environmental protection programmes provided they had completed all of the EPA requirements. As with state environmental programmes, the tribal environmental standards must meet the federal minimum but may be stricter. An example is the Navajo EPA, which has responsibilities over the largest reservation base in the country (17 million acres). They are working towards a point where the tribe will function much as a state, setting tribal standards for water and air, and enforcing those standards. The staff work cooperatively with state environmental staff in some areas, exchanging training and technical information. (Amber 1992)

Smaller tribes have found it harder to fit into the EPA requirements which were designed for states with fully developed environmental departments, and instead tribal coalitions have been formed which may share watersheds and or where reservations are close to each

other. Together such coalitions have been able to carry out activities not possible for the smaller group such as the employment of full-time environmental staff, and the development of model standards and regulations which individual reservations adopt as necessary. An example is the Minnesota Chippewa Tribe, who have developed a Natural Resources Protection Law affirming the tribe's unique perspective of interrelationships within the environment. This law and its accompanying environmental standards can be applied to the six Minnesota Chippewa reservations but the individual reservations can also adopt their own. To support its environmental laws the Tribe established a water research laboratory that now serves tribes in six states and employs seven people, five of them tribal members (Amber 1992).

Far from relying solely of traditional management methods, tribes make extensive use of technology, incorporating Geographical Information Systems and remote servers. An example is the Flathead Nation Comprehensive Resources Plan, a multi-disciplinary reservation-wide plan which was developed with extensive involvement of the community, tribal council, elders and cultural committees. It covers all categories of land and natural resource management and provides a complete inventory and analysis of existing conditions, programs, policies and issues, tribal goals for the future, management alternatives and policies (Amber 1992)

Collaborative management arrangements

Wolfe-Keddie (1995) identifies three main types of co-management arrangements based on the legal basis for power sharing between the parties. The first is where the indigenous group has title to part of the lands and resources in question, and legally recognised interests in a wider area which they can exercise through co-management. An example is the planning and management boards being set up under the Canadian comprehensive land claims settlements. The second type is where indigenous claims to a resource or area is recognised by governments to be strong enough to be likely to be supported by the courts, and is therefore sufficiently strong to require governments to develop a formal agreement with the claimants. These may be in protected areas where no recognised title exists but

there may be usufructory rights. Such agreements usually occur when all parties agree on how resource management problems can be resolved. The third type of co-management is where simple agreements arise in response to local environmental, economic or allocation issues. These generally have little supporting expertise, funding or formality. The indigenous people involved often have unresolved claims and grievances, and little formal power.

Limitations of indigenous management

The devolution of responsibility for resource management and other forms of planning to indigenous groups can be problematic. Indigenous peoples do not necessarily have a sustainable approach to the environment, and some indigenous peoples today are having adverse environmental impacts through over-use and under-management of local resources, and through selling off resource rights to commercial operations (Stevens 1997). Recent changes in local values, ways of life, economies and land use practices have in some cases resulted in indigenous peoples using their land, or authorising other to, in ways that degrade habitat and decrease biodiversity. This may be tied to loss of indigenous knowledge, population growth, and changes in values leading to more acquisitive lifestyles. Generational change, increasing consumerism and involvement in the market economy can also have enormous impacts on traditional values and conservation practices (Stevens 1997). Some analysts maintain that indigenous sustainable management is a "false notion" (Little cited in Stevens 1997) or "politically correct" (Soule cited in Stevens 1997), who goes on to state:

> *it is risky to conclude that non-Western peoples are always the best stewards of relatively undenatured wildlands, particularly when they are being integrated into the growth and consumption mainstream ... some indigenous people can provide excellent guidance, some not* (Soule in Stevens 1997:23)

A similar conclusion is reached by Clay:

> *indigenous peoples are not preservationists in the sense that they are actively involved in manipulating their environment. They are conservationists because they know that*

> *they must use their resources while leaving enough to guarantee the survival of future generations. Some of their systems are sustainable over time, others are not. Some are sustainable under certain conditions, but become destructive under others* (cited in Stevens 1997: 23)

Despite the increasing emphasis on indigenous rights in environmental law as well as human rights law, it cannot be concluded that these rights include a privilege of unsustainable resource use. Bosselmann (1997) suggests that the right to self-determination does not come unrestricted, but with an obligation to accept a common responsibility for environmentally sustainable development. This is emphasised in Article 10(c) of the Biodiversity Convention:

> *The protection and encouragement of customary use of biological resources is provided only in so far as it is compatible with sustainable use requirements. Working out how sustainable use is to be achieved can only be done with the effective participation of indigenous peoples* (UNCED 1992).

Modern indigenous resource management agreements, therefore, must not equate to a carte blanche for unlimited resource use, but must be constrained by the ultimate requirement of sustainability.

Discussion

Over recent years there has been increasing recognition of the important role played by indigenous peoples in environmental management. These changes can be traced to the developing concept of sustainable development, the influence of international environmental law and the increasing recognition of indigenous rights in international human rights law. Recent international agreements such as the 1992 Rio Earth Summit have highlighted the commonality between indigenous issues and environmental sustainability, and have attempted to integrate indigenous rights and environmental protection.

Indigenous involvement in environment management is essential, not only because of the strong relationship between indigenous peoples and the environment, but also because indigenous peoples cannot be expected to determine their economic and social development without control over the forces which govern their natural resource base. Additionally, indigenous peoples have evolved knowledge and practices relating to their immediate environment which have the potential to contribute to the range of understandings and techniques necessary for the survival of the planet. At the same time, there must be a recognition that indigenous systems are not necessarily sustainable, especially given the different physical, social and economic circumstances now experienced by indigenous groups, and any agreements for indigenous management must be tempered by the ultimate global and local requirements for sustainability.

In its extreme form, indigenous management represents full decisionmaking authority over resources. Such devolution of power to indigenous groups can be challenging to states, and can appear to threaten state sovereignty especially where indigenous peoples within tribal territories are seeking some degree of autonomy. However settlement of indigenous claims throughout the world has rarely resulted in the indigenous people gaining sovereignty over their traditional territories. What has evolved is a range of political, economic and social institutions that involve degrees of self-management and autonomy within limits set by governments.

CHAPTER 11

CONCLUSIONS

Some distinctly constitutional issues have been found to underlie the planning framework for Maori land. A central feature of the Treaty of Waitangi was its mutual recognition of two peoples within the one nation, and subsequent Maori dissatisfaction and racial conflict (including the New Zealand Wars) can largely be attributed to a failure to maintain that recognition in subsequent Acts and policies by New Zealand governments (Durie 1999). The status of Maori in their own country is an issue that has not been resolved and continues to underlie modern claims to the Waitangi Tribunal despite substantial recognition now given to the Treaty itself (ibid.).

As noted in the Ngai Tahu report (Waitangi Tribunal 1991) there has been in recent years a significant shift in the way the Treaty is viewed both within New Zealand domestic law and internationally. Since World War II there have been radical changes in the character of international law, moving from the colonial tradition of excluding indigenous groups from the 'Family of Nations' to a strong focus on state sovereignty, indigenous self-determination and human rights. This shift was also fuelled by international agreements, declarations and debates on human rights - most significantly the United Nations Universal Declaration on Human Rights 1948, and the 1993 Draft Declaration on the Rights of Indigenous Peoples. The concept of indigenous peoples having an inherent right to self-development is becoming recognised as a norm under international law. The struggle by indigenous peoples for self-determination in nations all around the world has been based not only on historical treaties and agreements, but also on the more modern concepts of fundamental human rights (Bosselmann 1997).

Recent calls for self-determination by Maori are largely based on this more modern approach to treaty interpretation. At times these have been interpreted as calls for a divided state; suggesting (either directly or by implication) some form of separatism involving a joint Maori/Crown government or separate governments. Such suggestions have at times generated a strong reaction from the Crown. For example Sir Douglas Graham, Minister in charge of Treaty of Waitangi negotiations, stated:

> *...the Treaty created obligations on* [Maori and the Crown] *similar to those that partners have in a partnership. But it certainly did not create a partnership to govern the country. That function passed to the Crown. The Treaty guarantees to Maori may restrict the exercise of absolute sovereignty by the Crown but even that is debatable* (Graham 1999).

According to the World Court (1986), state sovereignty requires respect for the territorial boundaries at the moment when independence is achieved (cited in Bosselmann 1999). In terms of Article 1 of the Treaty of Waitangi, this implies that Crown and Maori must respect New Zealand's undivided territorial sovereignty. However this does not exclude the possibility of some forms of autonomy or self-determination for Maori. Where the concept of indigenous sovereignty or self-determination is viewed as requiring a purely separatist solution, it has the potential to be considered as threatening and divisive to the dominant culture or state. From the perspective of indigenous people, the form of sovereignty must achieve cultural survival and self-determination, and while this must lie within the confines of the nation-state it need not be limited by the 'politics of domination' whereby state and indigenous people are locked head-to-head in a struggle for dominance (Coates and McHugh 1998). Indigenous sovereignty can take a multiplicity of forms depending on the circumstances of the nation and the level at which it is to be expressed. Internationally, many states have evolved practices and constitutional doctrines with a less simplistic and antagonistic view of sovereignty, whereby zones of jurisdiction, capacities, participation and ownership are agreed between the state and indigenous peoples. This approach has some currency locally - Williams notes that Maori leadership has been urging for some time for a shift to 'organic agreements' which emphasise the quality of the relationship between Crown and Maori (cited in Coates and McHugh 1998).

These views are in accordance with the judicial arm of the state (Court of Appeal and Waitangi Tribunal) which have found that while the Treaty gave the Crown the exclusive right to make laws for the governance of the country as a whole, Maori have a special role within the sovereign state by virtue of the Treaty agreement that Maori should retain tino rangatiratanga. The Waitangi Tribunal is of the opinion that the limited grant of sovereignty acquired by the Crown under the Treaty does not create a constitutional problem as few, if any, western governments enjoy unqualified sovereign power due to constraints imposed on nation states both by their constitutions and through their international agreements (Waitangi Tribunal 1995). The question then arises as to how the degree of self-determination implicit in the concept of rangatiratanga should be manifest. As the Waitangi Tribunal (1988) found:

> *The Crown, in our view, has much to do to complete its Treaty undertakings. It must provide a legally recognisable form of tribal rangatiratanga or management, a rangatiratanga that the Treaty promised to uphold* (Mangonui Report).

A legally recognisable form of rangatiratanga has yet to emerge. Ward (1997) in the *National Overview of the Waitangi Tribunal Rangahaua Whanui Series* found that the most serious breach of the Treaty on a national level, based on a number of criteria, was loss of rangatiratanga. He suggested that the restoration of rangatiratanga should be a goal accepted by the Government, while at the same time noting that such restoration is the 'work of generations' and must be 'based on the most widespread and careful discussion between the Government and the Maori people and leadership'.

Rangatiratanga, kaitiakitanga and planning

The Treaty guarantee of retention of rangatiratanga was not only a guarantee of possession, but also a guarantee of the authority to control their possessions (Waitangi Tribunal 1985). It conveyed an intention that Maori would retain full authority over their lands, homes and things important to them (Waitangi Tribunal 1987), and included elements of management, control and self-regulation of resources (Waitangi Tribunal 1999). The Crown's

obligations of protection involved at one level the physical protection of resources from abuse and deterioration as a result of pollution or destruction, and at another level recognition of the rangatiratanga of the Maori people in both the use and the control of their resources in accordance with their own traditional culture and customs and any necessary modern extensions of them (Waitangi Tribunal 1983).

Traditional Maori society was intimately connected with the land, sea and resources and had evolved intricate systems of resource management to ensure the sustainability of resources to sustain people. These systems were integrally linked with the allocation of resource and property rights, and systems of social organisation, whereby rights to harvest, use and occupation were controlled in the interests of the groups as a whole. Maori society was tribally based, and different methods of kaitiakitanga or resource management are likely to have developed according to the local environment. There cannot therefore be said to be a single "Maori traditional approach" to kaitiakitanga – the approach would have varied according to the tribal group and their local circumstances. At the same time, the underlying spiritual, theological and genealogical approaches are consistent and have a high degree of commonality with the views of many other indigenous groups towards the environment.

As with most other indigenous peoples, the traditional methods of resource management and social organisation were given little or no recognition following the large influx of European settlers during the mid-nineteenth century. Laws focused on the needs of the growing colony. Customary land tenure was replaced by a form of tenure which was neither traditional nor equivalent to the tenure of general land, and which not only profoundly changed the relationship between Maori and their land, but also generated an ongoing burden of management complexities and limited property rights which continues to this day. Early 'planning' or 'resource management' law also failed to recognise traditional methods of self-regulation and environmental management, although shortly after the Treaty this was clearly considered a possibility in the 1852 Constitution Act. Planning-type laws focused predominantly on the acquisition of land for farming, settlement and servicing, and the orderly development of towns and reserves, largely at the

functions were devolved to iwi or hapu organisations. It would be flexible enough to incorporate traditional concepts of resource management but also could incorporate modern techniques where these would assist. Critical to the success of such co-management arrangements would include upper-tier government commitment; formal long-term agreements; authority for decision-making; sufficient human and financial resources; mutually acceptable accountability systems; ongoing monitoring of effectiveness; and recognition and use of indigenous information and resource management systems.

The concept of a collaborative management regime with iwi for resource management planning is not inconsistent with the Waitangi Tribunal's findings on resources that are, and always have been, owned by Maori. The Tribunal has found that the Crown's guarantee in Article 2 of the Treaty was not only a guarantee of possession but also a guarantee of the authority to control their possessions (Waitangi Tribunal 1985) and it conveyed an intention that Maori would retain full authority over their lands (Waitangi Tribunal 1987). The concept of rangatiratanga is not confined to ownership but also includes rights of authority, management and control of resources (Waitangi Tribunal 1999). At the same time, these rights are part of a hierarchy of interests in which the Crown has a prime obligation to control and manage resources in the interests of conservation and the wider public interest, after which the tribal interest in the resource must be recognised, followed by the interests of those who have a commercial or recreational interest (Waitangi Tribunal 1990). As Maori land does not have competing commercial or recreational interests, the hierarchy involves only Crown and Maori interests. The critical matters for consideration then become

- What are the interests of conservation and the wider public interest in relation to Maori land?
- Is it possible for these interests to be articulated or codified?
- Is it necessary for these interests to be protected through resource management by an agent of the Crown, or is it possible for them to be protected by way of standards that must be met by the resource management practices of an iwi group?

These are matters that would need to be widely explored by iwi and the Crown should such a regime eventuate. The concept of 'sustainable management' as defined in the Resource Management Act could be a starting point, given its consistency with international principles. It could also usefully represent the Crown's responsibility given the hierarchy of interests developed by the Court of Appeal and the Waitangi Tribunal.

A resource management regime addressing the range of issues raised above within a collaborative management framework could be conceptualised as follows:

	Land owner	**Principles underlying resource management regime**	**Resource management decision-makers for land use**	**Mechanisms for planning and regulation**
Maori land traditionally	Hapu, iwi	Kaitiakitanga	Kaumatua, tohunga	Tikanga, rahui, tapu, muru, utu
Possible future regime for Maori land	Hapu, whanau	Kaitiakitanga and sustainable management	Tribal authority either acting independently or jointly with the local authority	Planning documents developed by iwi which achieve sustainable management criteria through both traditional and modern planning mechanisms.

Table 9: Potential future resource management framework for Maori land

Implementation of such a regime could occur to a limited extent within the current structure of the Resource Management Act, but would require legislative change to give it proper effect.

Solutions possible under the current legislative regime

1. Within the RMA context, district plans should recognise the right for Maori to develop their resources in accordance with their cultural practices, in a manner that achieves the purpose of the Act. This might be done by removing barriers perceived by Maori as restricting their customary use of land, such as planning controls over uses of Maori land. The emphasis could be on facilitating

development within development standards which recognise the particular limitations of Maori land tenure.

2. Maori could be appointed to hearings panels for land use applications involving Maori land, so that their expertise and understanding in Maori land issues is incorporated into the decision. Iwi could also be given a formal role in decisionmaking on land use proposals for Maori land through the provisions of section 33, which provide for a transfer of powers under the Act to iwi authorities. The powers to approve policy statements and plans cannot be transferred, but decisionmaking following their approval could potentially by passed to iwi. The relevant iwi authority would then have powers for assessing and making decisions on all land use applications for Maori land.

3. The transfer of powers to iwi over Maori land would be a significant step in recognition of rangatiratanga. An important issue would be the degree to which the relevant district plan took into account issues of importance to Maori. A plan that gave limited recognition to such matters would severely handicap the iwi authority. Ideally, in such a situation, a district plan for Maori land would be developed either by iwi and approved by the council, or in tandem with the iwi. It may be that in districts with several iwi, a plan would have to be separately developed for each in order to recognise the tikanga and kawa for that tribe. Adequate training and resourcing of the iwi organisation would also be an issue. As noted earlier, there are no known examples of such transfers to date despite the nine years that have passed since its enactment. Proposed amendments to the RMA, if enacted, may simplify the transfer process.

4. Maori could also be resourced to produce iwi planning documents covering land and other resources within their rohe. Such documents, by encapsulating the Maori world view and Maori aspirations, can be a valuable information resource for local authorities. However the RMA only requires that local authorities take such documents into account, so they currently have no legal status.

5. Pilot projects could be set up whereby Maori are given the opportunity to test out a variety of approaches to resource management, incorporating a range of traditional and modern methods. Such projects could be monitored over a number of years and would not only add to the knowledge base of resource management techniques, but would also enable Maori to redevelop and pass on effective practices to subsequent generations.

6. Direction as to how these issues could be addressed by local authorities could be provided in a national policy statement covering sections 6(e), 7(a) and 8 of the RMA.

7. Other extra-legal approaches could be followed such as those forthcoming from some Treaty settlements: for example deeds of recognition, statutory acknowledgements and statutory advisory roles. Co-operative management agreements outside of the RMA framework could also be set up, such as for the protection of indigenous areas on Maori land. Resources could also be invested on a national or local level to building up the capacity and skills of Maori to adopt a greater future role in resource management.

However these solutions fail to deal with a number of inadequacies in the Resource Management Act. These include its limited recognition of the Treaty; its lack of express recognition of Maori traditional resource management knowledge and practices and current land use aspirations; its lack of socio-economic planning focus; its lack of explicit differentiation between Maori land and other land; and its lack of provisions to address the planning implications of Maori land tenure and the resulting inequities faced by Maori landowners. It may also be that the present structure of the Resource Management Act is inadequate to provide for any greater accommodation of the concepts of kaitiakitanga and rangatiratanga within district plans. A further issue not addressed in the RMA is that the relationship between Maori and local authorities is different to the relationship between the Crown and Maori tribes. The ability of local authorities to recognise rangatiratanga within

the context of the Resource Management Act is very limited. The full recognition of rangatiratanga, in the sense of 'full tribal authority and control over Maori lands', is primarily a matter to be worked out directly between the principal parties to the Treaty, not between local authorities and Maori.

These inadequacies would need to be addressed via significant changes to the RMA. Issues relating to the role of Te Ture Whenua Maori Act in Maori land control would also need to be addressed through legislative change.

Solutions involving legislative change

Amendments to the Resource Management Act to address these matters could include the following:

1. Replacement of section 8 RMA with the requirement that, in achieving the purpose of the Act, all persons exercising functions and power under it in relation to managing the use, development and protection of natural and physical resources, shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.

2. Giving increased recognition to the practices of kaitiakitanga through, for example, moving it to become a matter of national importance.

3. Strengthening of the role of iwi planning documents so that where they were developed in accordance with principles of sustainable management, they were equivalent to district plans in relation to Maori land.

4. Introduction of land management provisions for Maori land equivalent to those for Crown land managed for conservation purposes, whereby once a resource management plan has been developed by the relevant iwi group and approved by an appropriate authority (possibly the Minister for the Environment), the Maori land involved is no longer subject to the district plan and instead is controlled under the iwi plan.

5. A change to the purpose of the Resource Management Act so that it encompasses concepts of sustainable development, which is more aligned to the Maori wholistic world-view

6. Codification of a form of rangatiratanga within the Act, providing for collaborative management of Maori land between iwi and local authority, or between iwi and a Crown agency. Iwi would gain autonomy for resource management control subject to meeting mutually agreed national standards representing the interests of conservation and the wider public interest.

At the same time, changes to Te Ture Whenua Maori Act would be required to address other planning-related issues raised. If the Maori Land Court was to continue its role as a quasi-planning agency, which in some senses it is well qualified to do due to its deep knowledge of Maori land and culture, changes might include:

1. The incorporation of sustainable management or sustainable development principles into TTWMA to guide the Court and owners in planning and decisionmaking

2. A greater role for the Court or another agency under TTWMA in assisting iwi in developing iwi planning documents

3. Passing all planning responsibility for Maori land to the Court, together with the development of appropriate planning principles and practices within TTWMA

Another option would be to completely remove all planning-related functions from the Maori Land Court's jurisdiction, while at the same time passing these functions (for example for the approval of partitions, roadways and reserves) to iwi. This could be managed within a form of collaborative management with local authorities or the Crown, as described above.

Giving effect to the dual planning heritage

Constitutionally, the Crown has a strong obligation to give effect to the principles of the Treaty of Waitangi in respect of resource management planning. This obligation is at its strongest when dealing with a resource that has had continuous Maori ownership and use since prior to the signing of the Treaty.

The planning framework for Maori land is currently unsatisfactory for Maori. Historically, planning-related legislation has either ignored the existence of Maori land and traditional resource management practices, or focused on Maori land as a wasted resource which should be better utilised for the common good. The current RMA framework has only partially addressed the concerns Maori expressed during the resource management law reform. District plan provisions do not provide Maori the level of self-determination they seek for their own land. Furthermore, the Waitangi Tribunal continues to criticise the Resource Management Act's failures with regard to the Treaty principles.

Contemporary planning needs to recognise its basis in a dual heritage by reshaping its institutions and laws so as to accommodate the co-existence of an indigenous planning system. This could occur by way of collaborative management agreements whereby resource management planning responsibilities for Maori land are largely devolved to iwi within a framework delineating the Crown's kawanatanga requirements.

International examples show that governments are increasingly moving into collaborative agreements with indigenous groups for the management of indigenous lands and resources. These agreements, which generally involve the exercise of at least some traditional management methods, are consistent with contemporary international environment law and international human rights instruments. In almost all cases, groups do not have complete autonomy but practice it within limits set by government.

There are a number of advantages of adopting a new regime for Maori land planning. Land is at the heart of Maori society, and giving practical recognition to rangatiratanga on Maori

land would enhance mana and traditional relationships between Maori and their land and resources. A major priority for many Maori is the development of under-utilised Maori land to enhance their social, cultural and economic well-being. Increased participation of iwi members at all levels of planning decisionmaking will help towards removing barriers, increase involvement in their own land, and provide a greater degree of self-determination. Active participation in the management and protection of Maori land and its resources would also enhance national approaches to resource management by retaining and enhancing traditional Maori knowledge and management techniques. Experience gained through planning for Maori land and its resources could be extended to the management of other resources as appropriate.

The challenge for Maori in such a regime will be in redeveloping traditional forms of resource management and conservation while at the same time adopting, adapting and inventing new concepts, techniques and institutions. The challenge for the Crown will be to accept the real involvement of Maori in resource management planning and decisionmaking, and to enter into agreements that formalise this expression of rangatiratanga.

BIBLIOGRAPHY

Allan, S. 1984: *Relationships between Subdivision, Development and Town and Country Planning under the Local Government Act 1974 and the Town and Country Planning Act 1977.* Ministry of Works and Development.

Amber, M. 1992: Tribes Demonstrate Capability to Regulate, Reclaim and Protect the Environment. *First Nations Development Institute.* Business Alert 7(6) Nov/Dec

Anderson, R. 1983: *Planning for Maori Needs* Ministry of Works and Development, Auckland.

Arnstein s 1969: *Ladder of Citizen Participation* AIP Journal

Asher, G. and D. Naulls, 1987: *Maori Land.* Planning Paper No 9, New Zealand Planning Council, Wellington.

Austin, G.W. 1989: Planning in a Fragmented Constitution: Tai Tokerau District Maori Council and Environmental Defence Society v Mangonui County Council. *Planning Quarterly* 93 March pp20-23

Barns, M. 1988: *Resource Management Law Reform - A Treaty-based Model - the Principle of Active Protection.* Ministry for the Environment, Wellington

Barrett, M. 1997: Maori Health Purchasing - some current issues. *Social Policy Journal of New Zealand.* 9 Nov

Belich, J. 1996: *Making Peoples.* The Penguin Press, Auckland.

Bennion, T. 1997: *Rangahaua Whanui National Theme P - The Maori Land Court and Land Boards 1909 to 1952.* Waitangi Tribunal

Berger, T.R. 1992: *A Long and Terrible Shadow - white values, native rights in the Americas 1492-1992.* University of Washington Press, Seattle

Berkes, F 1981: The Role of Self-Regulation in Living Resources Management in the North. *Renewable Resources and the Economy of the North.* (MMR Freeman, ed.). Association of Canadian Universities for Northern Studies, Ottawa p166-178

Berkes, F; George, P and Preston, R 1991 *Co-management: The Evolution in Theory and Practice of the Joint Administration of Living Resources* Alternative Vol 18 No 2

Berry, R 1998: Huge Areas of Maori Land Wasted. *Sunday Star-Times* May 10 1998

Best, E 1924: *The Maori as he was.* AR Shearer, Government Printer

Beverly, P 1996: Consultation under s8 of the RMA - Underlying Issues. *Brookers Resource Management Bulletin* 1 BRMB 274

Te Puni Kokiri 1998: *Review of the Department of Conservation / Te Papa Atawhai - Service Delivery to Maori* Te Puni Kokiri

Te Puni Kokiri Newsletter 1998: Healthy hui turnouts reflect Maori interest in Te Ture Whenua review. November. Issue 48 p7

Te Puni Kokiri 1999: www.maoriland.govt.nz

Tomas, N 1994: Implementing Kaitiakitanga. *Environmental Law Reporter*. July 1994. p39-42

United Nations Conference on Environment and Development 1992: *The Outcomes of the Conference.* Ministry of External Relations and Trade; Ministry for the Environment, Wellington.

VK Consulting Environmental Engineers, 1997: *Access to Landlocked Maori Land: procedures for assessing costs and benefits of providing vehicle access.* Transit New Zealand.

Vari, P.R 1985: *Planning for Maori Land in the Bay of Plenty.* Thesis for M Phil in Regional Planning University of Auckland

Vogel S 1996: Self-determination in the environmental sphere for indigenous peoples in Canada and Aotearoa/New Zealand. Thesis, Auckland University

Waitangi Tribunal 1983: *Motonui-Waitara Report (Wai 6)* Department of Justice Wellington

Waitangi Tribunal 1987: *Orakei Report (Wai 9)* Brooker and Friend Wellington

Waitangi Tribunal 1988: *Muriwhenua Fisheries Report (Wai 22)* Department of Justice, Wellington

Waitangi Tribunal 1984: *Kaituna Report (Wai 4)* Department of Justice, Wellington

Waitangi Tribunal 1985: *Manukau Report (Wai 8)* Government Printer, Wellington

Waitangi Tribunal1 1988: *Taipa Sewerage Claim Report (Wai 17)* Department of Justice, Wellington

Waitangi Tribunal 1990: *Report of the Waitangi Tribunal on claims concerning the allocation of Radio Frequencies (Wai 26 and Wai 150)* Brooker and Friend, Wellington

Waitangi Tribunal 1991: *Ngai Tahu Report (Wai 27)* Brooker and Friend, Wellington.

Waitangi Tribunal 1992: *Ngai Tahu Sea Fisheries Report (Wai 27)* Brooker and Friend, Wellington

Waitangi Tribunal 1992: *Te Roroa Report (Wai 38).* Brooker and Friend, Wellington.

Waitangi Tribunal 1993a: *Ngawha Geothermal Report.* Brooker and Friend, Wellington.

Waitangi Tribunal 1993b: *Preliminary Report on the Te Arawa Representative Geothermal Claims(Wai 153).* Brooker and Friend, Wellington

Waitangi Tribunal 1994: *Maori Electoral Option Report (Wai 413)* Brooker and Friend, Wellington.

Waitangi Tribunal 1995: *Turangi Township Report (Wai 84).* Brooker and Friend, Wellington.

Waitangi Tribunal 1996: *Taranaki Report (Wai 143).* Brooker and Friend, Wellington.

Waitangi Tribunal 1997: *Muriwhenua Land Report (Wai 45).* GP Publications, Wellington.

Waitangi Tribunal 1999: *Whanganui River Report (Wai 167)* GP Publications, Wellington

Walker, R 1987: *Nga Tohetohe - Years of Anger* Penguin

Walker, R 1990: Towards a Tertiary Tomorrow. *Listener* 127 (2630) 6

Ward, A 1974: *A Show of Justice - Racial 'Amalgamation in Nineteenth Century New Zealand.* Auckland University Press / Oxford University Press.

Ward, A 1997: *National Overview of the Waitangi Tribunal Rangahaua Whanui Series.* Brooker and Friend, Wellington

Whitty, B 1994: Concerns over Land Issues in *New Zealand Rural Business* 4 22-23 Aut/Win

Williams, DV 1999: *Te Kooti Tango Whenua: The Maori Land Court 1864-1909.* Huia Publishers, Wellington

Williams, J 1993a: *Maori Claims to Energy Resources* Energy and Natural Resources Law Association Seminar on Maori Claims and Rights to Natural Resources 19 Feb 1993, Auckland.

Williams J 1993b: Dealing with the Maori Interest under the Resource Management Act. Conference Paper. Resource Management Law Association Oct 1993.

Williams, D.A.R (Ed) 1997: *Environmental and Resource Management Law in New Zealand.* Butterworths, Wellington.

Williams, DV 1990: Maori Issues in *NZ Recent Law Review* 2 June 1990 129-138

Winder, G 1983: *Maori Land in Rodney County - a discussion of planning issues.* Rodney County Council.

Wolfe-Keddie, J 1995: First Nations' Sovereignty and Land Claims in Mitchell, B (Ed) *Resource and Environmental Management in Canada: Addressing Conflicts and Uncertainties.* Oxford University Press, Toronto.

Woodley, S 1996: *Rangahaua Whanui National Theme S - The Native Townships Act 1875.* Waitangi Tribunal

World Commission on Environment and Development 1987 *Our Common Future* Oxford University Press

PLANNING DOCUMENTS

Bay of Islands County District Scheme 1992

Far North District Council Draft District Plan 1998

Gisborne Proposed Combined Regional Land and District Plan 1997

Hokianga County Operative District Scheme 1985

Kaikohe Borough Operative District Scheme 1981

Kaipara District Council Operative District Plan 1997

Kaitaia Borough Operative District Scheme 1981

Kawerau Proposed District Plan 1996

Mangonui County Operative District Scheme 1988

Opotiki Proposed District Plan 1998

Otorohanga District Council Proposed District Plan 1997

Rodney District Council: Proposed Plan Change No 55 (incorporating Variation No 1) 1995

Rotorua District Council Proposed District Plan 1996

South Waikato District Council Proposed District Plan 1994

Taupo County District Scheme 1085

Waikato District Council Proposed District Plan 1995

Waipa District Council Proposed District Plan 1994

Whakatane District Council Draft District Plan 1995

Whangarei County District Scheme 1987

Whangarei City District Scheme 1991

Whangarei District Council Proposed District Plan 1998

Whangaroa County District Scheme 1987