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From Anakoha to New York: The Genesis of the
Foreshore and Seabed Claim and the
Marginalisation of Ngati Kuia.

A thesis presented in partial fulfilment of the requirements for
the degree of Master of Arts in History at Massey University.

P. N. Meihana
2006

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Contents

<i>Map</i>	i
<i>Acknowledgements</i>	ii
<i>Contents</i>	iii
<i>Glossary</i>	iv
Introduction	1
Chapter One: Ngati Kuia me te Takutaimoana	13
Chapter Two: Colonial Encounters	28
Inset	
Chapter Three: In the Zone	47
Chapter Four: Still in the Zone	65
Chapter Five: The Tyranny of the Majority	82
Conclusion	94
Appendix 1	101
Appendix 2	102
Bibliography	104

Glossary of Maori terms

Mana	Power, authority
Manakitanga	Hospitality
Mataamua	First born
Noa	Profane, free of tapu
Potiki	Last born
Tapu	Sacred, restriction
Teina	Younger sibling of the same sex
Tuakana	Older sibling of the same sex
Utu	Reciprocity, revenge

Introduction

This study operates at three levels reflecting the title of the thesis. It deals with Ngati Kuia's connection to the Foreshore and Seabed Claim (Wai 1071) and to this extent it focuses mainly on the years 1997-1998. At this time Ngati Kuia became involved in a series of Environmental Court cases that related to marine farming in the Marlborough Sounds. *Anakoha*¹, heard in Blenheim from 28 April to 1 May, was the first of these hearings and began a process of litigation that ended in the New Zealand Court of Appeal. The Crown's response to the Court's decision was the Foreshore and Seabed Act 2004. The Crown proposals that preceded the Act invoked a damning report from the Waitangi Tribunal, the resignation of Tariana Turia from the Labour Party, the formation of the Maori Party and a hikoi protesting the proposed legislation. It also prompted Maori to seek urgent intervention from the United Nations who recently released their report.

Anakoha is a large bay near the entrance of Te Hoiere—Pelorus Sound—the traditional homeland of Ngati Kuia. Te Hoiere was the name given to the area by the ancestor Matuahautere in commemoration of his waka. According to tradition, Matuahautere was guided into the sound by Kaikaiawaro² who remained there for a number of generations. The relationship between Ngati Kuia and Kaikaiawaro was to reinforce their connection with the foreshore and seabed. Land at the head of the bay, commonly known as Okoha, was occupied during the harvesting of titi and hapuku. It was later set aside as a reserve under the Landless Natives Act 1906. Both my grandmother and grandfather have land interests in this reserve. In this thesis Anakoha also represents a worldview, it is therefore not only a geographical place but a state of mind and a state of being, it is for Ngati Kuia the 'genesis' of the foreshore and seabed claim.

¹ When written in italics *Anakoha*, *Tawhitinui*, and *Port Gore* refers to the Environment Court cases. When written in plain text it refers to the physical locality.

² In Ngati Kuia tradition Kaikaiawaro takes the form of a white dolphin. In European tradition this dolphin is referred to as Pelorus Jack.

On another level this thesis examines how Ngati Kuia has become marginalised in their attempt at having their property rights recognised at law. Litigation presented Ngati Kuia with an opportunity to address the problems faced as they attempted to enter the marine farming industry. It also provided an avenue to re-negotiate historical grievances. In his report United Nations Special Rapporteur Professor Rodolfo Stavenhagen noted that in New Zealand Maori customary rights have in fact been legally recognised 'through the courts, parliamentary statute or administrative decision'. However, he also stated that the same mechanisms had been used to dispossess Maori and extinguish their inherent rights. Furthermore the protest movements of the last few decades and the establishment of the Waitangi Tribunal can be traced to this process.³

My involvement in foreshore and seabed proceedings began in 1998 when I appeared as a witness in the Environment Court on behalf of Ngati Kuia. Myself, and others who presented evidence, provided the Court with an insight into the Ngati Kuia worldview. It should be acknowledged from the outset then that I am an 'insider'.⁴ I have had access to tribal whakapapa and tradition and am familiar with the dynamics, values, and concerns of this community. This has without doubt influenced both my analysis and the shape of this thesis. Its purpose is to write Ngati Kuia back into the narrative relating to the recent foreshore and seabed issue, and is then unashamedly Ngati Kuia-centric. Moreover it will become apparent in the chapters that follow that mana is at all times the central and motivating force in tribal affairs. The present work is no exception.

This thesis is also written within the context of a western academic institution and thus poses some problems for the 'insider'. Anna Green and Kathleen Troup write that although post-modernism has challenged empiricism as a research method, few historians 'dissent' from its use.⁵ Chris Connolly identifies research, interpretation, reliability, and objectivity as the 'common core of historical method'.⁶ All of this is meant to maintain the purity of the historian's craft which according to Angela Ballara 'typically seeks to

³ Roldolfo Stavenhagen, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People', 13 March 2006, p. 6, retrieved 5/4/2006 from <http://www.converge.org.nz/pma/fsinfo.htm>

⁴ Linda Tuhiwai Smith deals with Insider/Outsider Research in *Decolonizing Methodologies-Research and Indigenous Peoples*, Dunedin: University of Otago Press, 1999, p. 137.

⁵ Anna Green and Kathleen Troup, *The Houses of History-A Critical Reader in Twentieth-Century History and Theory*, Manchester: Manchester University Press, 1999, p. 1.

⁶ Chris Connolly, 'Historical Method, Postmodernism and Truth' in *History Now-Te Pae Tawhito o Te Wa*, 9:4, 2003, pp. 17-19.

explore the past without any practical purpose in view'.⁷ But as previously stated, this thesis is clearly written with purpose.

This philosophical debate has also surfaced in relation to the historiographical practice of the Waitangi Tribunal. W. H. Oliver, in his essay 'The Future Behind Us-The Waitangi Tribunal's Retrospective Utopia',⁸ questions the Tribunal's 'presentist approach' to history. He criticises the Tribunal for projecting utopian ideals on to the past. According to the Tribunal, writes Oliver, these ideals were embodied in the Treaty of Waitangi, and if honoured would have secured a positive future for all.⁹ Oliver contends, however, that this was a 'matter of feasibility', even if certain provisions had occurred to the government of the day, could it have in actual fact implemented them.¹⁰ The proposition of a retrospective utopia also raises questions for our discipline. The Tribunal's historiography allows it to arrive 'at emphatic and straightforward conclusions', but according to Oliver this comes at a cost. History of this genre, states Oliver, 'lacks a sense of perspective, which deals peremptorily with the distinctiveness of the past, and which ignores the impact of that context upon past actors, especially those acting for the Crown'.¹¹

This thesis then seeks to engage with these debates. If Maori history, or indeed Tribunal history, is written with purpose, how can it be reconciled with the need to remain free of 'presentism'? Rather than defend the purpose driven nature of Maori history, my intention is to examine the discipline of history itself; questioning whether or not the ideal of reading the past on its own terms is also driven by a present day agenda. To this extent my analysis concentrates on the topical notion of indigenous agency. It is my contention that in present historical debate the amount of power Maori actually possessed has been overstated and has in turn minimised the effect colonisation has had on tangata whenua.

It can be said then that as a result of both my Ngati Kuiatanga, and academic training, the space from which I write is enveloped by a number of persuasive influences.

⁷ Angela Ballara, 'The Innocence of History-The case of the 'Morioris' of Te Wai Pounamu a.k.a. the 'Waitaha Nation'', in *Histories Power and Loss-Uses of the past-A New Zealand Commentary*, ed. Andrew Sharp and Paul McHugh, Wellington: Bridget Williams Books, 2001, p. 127.

⁸ W. H. Oliver, 'The Future Behind Us-The Waitangi Tribunal's Retrospective Utopia', in *Histories Power and Loss-Uses of the past-A New Zealand Commentary*, ed. Andrew Sharp and Paul McHugh, Wellington: Bridget Williams Books, 2001.

⁹ Oliver, 'The Future Behind Us-The Waitangi Tribunal's Retrospective Utopia', p. 10.

¹⁰ Oliver, 'The Future Behind Us-The Waitangi Tribunal's Retrospective Utopia', pp. 18-19.

¹¹ Oliver, 'The Future Behind Us-The Waitangi Tribunal's Retrospective Utopia', p. 27.

There are, however, numerous other influences that should be mentioned. The generation of Ngati Kuia to which I belong is the first to be born outside of Te Hoiere. We have therefore come into contact with ‘forces’ unknown to our ancestors. Blenheim and Nelson are the two major urban centres where Ngati Kuia now live and in both localities represent a minority proportion of the population. Ngati Kuia as a consequence has been required to make ‘adjustments’ to fit into the wider community, but this is not to say that we have ceased to be Ngati Kuia. The wider community too has evolved in a way that reflects their majority status. The overwhelming feeling growing up in Blenheim was that of ‘unity’: that we, Maori and Pakeha are all the same.¹² Another, by insinuation, was that the Pakeha way of doing things was somehow better than that of Maori. These influences also inform my analysis.

One question that I believe all Maori researchers should consider at length is: who is research meant to benefit? At a hui held in Nelson in early 2005 copies of my earlier research¹³ were given to a number of kaumatua. While appreciative of the gesture I was asked: ‘when are you going to write something we can understand?’ Such problems are also shared by other Maori researchers. Brendan Hokowhitu, in his article ‘Tackling Maori Masculinity: A Colonial Genealogy of Savagery and Sport’, highlights the difficulties he faces when communicating ‘the theory and critical notions that underpin’ his work.¹⁴ In my own experience problems could have been alleviated by incorporating into my research design a reporting back process. By doing so, what are perceived as complex and difficult ideas can be explained appropriately. This is not to demean the Ngati Kuia community it merely reflects the fact that many of the ideas that are employed are often specific to the discipline of history and academia.

Another question that should be addressed in the writing of this thesis is how can the concerns and motivations of Ngati Kuia be addressed? Sir Tipene O’Regan writes that Maori history only makes sense when it is related to its own boundaries.¹⁵ Central to O’Regan’s observation is

¹² I first recognised that I was different to the ‘other’ kids in that I had more cousins than they did. Thus it was the concept of belonging to a large extended family that first shaped my identity as a non-Pakeha. My identity as a Ngati Kuia person did not develop until much later.

¹³ P.N. Meihana, ‘Representations of Ngati Kuia in Maori and Pakeha Narrative’, Research Exercise, Massey University, 2004.

¹⁴ Brendan Hokowhitu, ‘Tackling Maori Masculinity: A Colonial Genealogy of Savagery and Sport’ in *The Contemporary Pacific*, 16:2, University of Hawai’i Press, 2004, p. 261.

¹⁵ Tipene O’Regan cited in Danny Keenan, ‘Predicting the Past: Some Directions in Recent Maori Historiography’ in *Te Pouhere Korero-Maori History Maori People*, 1:1 March 1999, p. 31.

whakapapa,¹⁶ which according to Ngai Tahu historian Te Maire Tau provides the ‘skeletal backbone’ of Maori epistemology. He also comments that the ethics of mana and tapu emanate from whakapapa and affect the ‘Maori view of everything’.¹⁷

Chapter one therefore sets the scene. It examines Ngati Kuia’s connection to the foreshore and seabed and the origins of tikanga which govern the relationship between tangata whenua and the environment. The importance of tikanga cannot be overstated. As the Tribunal succinctly stated in its *Foreshore and Seabed Report*:

In the traditional Maori worldview, there is no matter that does not have tikanga attached to it. And the foreshore and seabed – te takutai moana, te papamoana – are quintessentially bound up with tikanga. Tikanga imbues consideration of every aspect of the elements themselves, and how humans interact with them.¹⁸

E. T. Durie writes that ‘tikanga’ derives from ‘tika’, or ‘that which is right or just’. Tikanga was not rule-like, it was according Durie, ‘pragmatic and open ended’. Maori did not, on the whole, adhere to ‘finite rules’. Rather reference was made to ‘principles’, ‘goals’, and ‘values’ that had often been instituted by particular ancestors. ‘Kawa’ on the other hand was more ‘rigid’ and was concerned primarily with ‘process and procedure’.¹⁹

For the purpose of this thesis I have adopted the definition of the foreshore and seabed as put forward by the Waitangi Tribunal:

It is the intertidal zone, the land between the high- and low-water mark that is daily wet by the sea when the tide comes in. It does not refer to the beach above the high-water mark. The seabed is the land that extends from the low-water, and out to sea.²⁰

The Tribunal notes, however, that the need to define these areas in such a way arises from the English common law and that no such distinction exists in Maori customary terms.²¹ This introduces a theme central to this thesis. I argue that

¹⁶ Keenan, ‘Predicting the Past: Some Directions in Recent Maori Historiography’, in *Te Pouhere Korero-Maori History Maori People*, 1:1 March 1999, p. 25.

¹⁷ Te Maire Tau, ‘Matauranga Maori as an Epistemology’, in *Te Pouhere Korero-Maori History Maori People*, 1:1 March 1999, p. 20.

¹⁸ *Report on the Crown’s Foreshore and Seabed Policy*, Wai 1071, Waitangi Tribunal Report 2004, p. 1, electronic version, retrieved 20/1/2005, from <http://www.waitangi-tribunal.govt.nz>

¹⁹ E. T. Durie, ‘Custom Law’, Unpublished Paper, Waitangi Tribunal, January, 1994, pp. 3-4.

²⁰ *Report on the Crown’s Foreshore and Seabed Policy*, p. xi.

²¹ *Report on the Crown’s Foreshore and Seabed Policy*, p. xi.

the incorporation of Maori concepts and ideas into a western legal system, while intended to protect rights, has also been responsible for their removal.

Chapter one also addresses the question of why and how a Ngati Kuia issue became a national Maori issue. Hapu and iwi are unique in the sense that they each have an intimate connection to a particular place. For Ngati Kuia their rohe is that area frequented by Kaikaiawaro and for this reason they claim a principal, but not an exclusive, interest here. The Kaikaiawaro traditions confirm Ngati Kuia's status as tangata whenua; a position that bestows upon them the rights and obligations of kaitiaki. It is for this reason Ngati Kuia continue to contest the claims of those who assert a greater interest. Although individual groups have associations with particular areas, what they share with all Maori is a common origin in Papatuanuku. This relationship provided a platform from which a pan-tribal response to the Crown's foreshore and seabed policy could be mounted. Indeed E. T. Durie writes, 'despite local variations, there was (and is) a degree of certainty in customary expectations'.²²

Whakapapa used in chapter one has been accessed from two principal sources: the Meihana and Hemi Manuscripts. The Meihana Manuscript is the older of the two and contains whakapapa relating to hapu resident in Te Tau Ihu in the pre-musket war period. Both are still held by Ngati Kuia whanau, and the authors of the Meihana Manuscript are my great and great great-grandfathers respectively. The Meihana Manuscript contains whakapapa dating from the mid-nineteenth century. It cites the informant and location at which it was recorded enabling whakapapa to be placed within a wider historical context. The Hemi Manuscript had a number of authors. During the late nineteenth and early twentieth centuries it was used by Pou Hemi Whiro to minute the meetings of the Te Hora Marae Komiti and later by Pou's son Eruera in his role as an agent of the Maori Land Court. Tuiti and Peter MacDonald also used the manuscript when compiling the names of Ngati Mamoe and Ngai Tahu kaumatua when they sat on the Ngai Tahu census committee. This section is commonly known as the 'Kohi Book'. Other information recorded in the manuscripts includes birth and death dates, receipts for payments of rent and a number of letters.

Chapter one, through an analysis of whakapapa and tradition, principally those relating to Kaikaiawaro, is too concerned with Ngati Kuia identity. It also begins to examine the

²² E. T. Durie, p. 2.

relationship between Ngati Kuia and other hapu: Ngati Wairangi, Ngati Kopia, Ngati Mamoe, Ngati Tumatakokiri, Ngati Apa, and Ngati Koata. What I begin to discuss in this chapter, and develop further in chapter two, is consistent with the observations made by Ballara in *Iwi-The Dynamics of Maori Tribal Organisation From c.1769 to c.1945*.²³ Of most relevance are Ballara's comments relating to the amalgamation of hapu groups in response to the changing circumstances brought about by colonisation.

Chapter two presents a précis of Ngati Kuia's encounter with Te Ao Pakeha but also affords the opportunity to deconstruct and rearticulate the dominant worldview in New Zealand. This is important because it establishes a base from which we can later interpret the Crown's response to the 2003 Court of Appeal decision. Central to this analysis is Michel Foucault's notion of discourse as it reveals the ideological link between the two. Ludmilla Jordanova writes that although discourse is difficult to define, two significant features can be identified. Firstly discourse refers to 'cultural products not to material conditions, so that texts become the principal sources'. And secondly, 'discourse implies that there is a more or less coherent worldview behind the texts, and that the ideas they express have palpable effects'.²⁴

The idea of discourse was later utilised by Edward Said in his work *Orientalism*. He writes that 'without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage—and even produce—the Orient politically, sociological, militarily, ideologically, scientifically, and imaginatively'.²⁵ One of Said's most discernible themes is how the Occident distinguishes itself from the Orient. He argues that the Occident has always seen the Orient as being 'like some aspect of the West', its 'cultural contestant', its 'contrasting image', 'idea', 'personality', and 'experience'.²⁶ Invariably the 'other' is constructed as inferior.

In *Culture and Imperialism* Said writes that what is 'striking' in European discourses on 'Africa, India parts of the Far East, Australia and the Caribbean' is the presence of 'rhetorical figures'. The idea of 'bringing civilisation to primitive or barbaric people' can too be found in Ngati

²³ Angela Ballara, *Iwi-The Dynamics of Maori Tribal Organisation From c. 1769 to c. 1945*, Wellington: Victoria University Press, 1998.

²⁴ Ludmilla Jordanova, *History in Practice*, London: Arnold, 2000, p. 81.

²⁵ Edward Said, *Orientalism*, London: Penguin Books, 1978, p. 3.

²⁶ Said, *Orientalism*, p. 2.

Kuia's colonial encounter. Indeed an examination of European narrative shows that Ngati Kuia have over time been represented as savages, conquered, slaves, Aryans or extinct. Although the terminology may have changed the purpose for their deployment has remained the same, that being to construct Ngati Kuia as irrational and devoid of civilisation. According to Said this helped facilitate colonial rule, and justified the violence perpetrated against the people of these places.²⁷ It will be argued that this process continues to operate in New Zealand, and helps to maintain the 'positional superiority' of the Crown. This notion, writes Said, 'puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand'.²⁸

Paramount to achieving and preserving the Crown's position is the 'gathering of intelligence'. In the context of this thesis, I use the term in a military sense, as a precursor to invasion and to reflect the subsequent damage inflicted on Ngati Kuia. According to Linda Smith, who also employs this notion, it was the Enlightenment that provided the 'impetus' to search for, extract, appropriate, and distribute knowledge. She goes on to write that the mechanisms used to carry this out became 'organized and systematic'.²⁹ While other disciplines perform this function, including our own, which is a testimony to the intertextuality of Orientalism, this thesis is primarily concerned with law. In New Zealand the courts and commissions of inquiry provide an 'organized and systematic' means by which intelligence can be gathered. The information is subsequently reconstituted within a framework that perpetuates the preconceived notion of native savageness and is then distributed as the 'truth'. In this way the Crown continues to confine Maori aspirations, restricting them to parameters of its own control,³⁰ and in turn maintaining its positional superiority.

In this thesis then I use the term 'Crown' in a broad and general way. While it is applied most readily to the elected government of the day I also include in this definition subordinate governmental institutions such as the Courts and the Waitangi Tribunal. As mentioned above I argue that these instruments of state have been crucial in maintaining

²⁷ Edward Said, *Culture and Imperialism*, London: Chatto and Windus, 1993. pp. xi-xii

²⁸ Said, *Orientalism*, p. 7.

²⁹ Smith, *Decolonizing Methodologies-Research and Indigenous Peoples*, p. 58.

³⁰ Moana Jackson, 'Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi', A brief discussion paper prepared for the 1995 Global Cultural Diversity Conference, Sydney, Australia, p. 1.

retrieved, 9/06/2006, from

http://www.immi.gov.au/multicultural/_inc/publications/confer/12/speech56a.htm

the positional superiority of the Crown. Other organisations have also acted to achieve this goal. Although nominally independent, the government was able to articulate its position on state owned television and state funded national radio prior to the passing of the Foreshore and Seabed Act to influence public opinion and thereby generate the dominant discourse. This will be explored further in the final chapter.

Said also asserts that Orientalism ‘does not exist in some archival vacuum’; it is a ‘cultural and a political fact’. He argues ‘that what is thought, said, or even done about the Orient follows (perhaps occurs within) certain distinct and intellectually knowable lines’.³¹ Said’s analysis can also accommodate Ngati Kuia’s colonial encounter. It can be shown that the Crown, in all its dealings with Ngati Kuia, has been driven by the need to maintain its positional superiority. This thesis argues that the Crown’s response to the Court of Appeal’s decision and the Foreshore and Seabed Act 2004 is but a recent example.

While acknowledging Said’s contribution, many of those working in the field of post-colonial studies have now moved beyond binary models of encounter: the imperial ‘We’ and the colonised ‘Them’ where power is held by the coloniser. Said himself writes in *Culture and Imperialism* that what he omitted from *Orientalism* was the native response to western dominance.³² Peter Childs and Patrick Williams comment that one of the most frequent criticisms directed at Orientalism is that it offers a theory that is ‘monolithic, totalising, or just insufficiently nuanced’. It fails to take into account the indigenous response to colonisation and masks the splits within western society.³³ Having read numerous reports, articles, essays, books and letters, as well as conversing with kaumatua and other tribal members, it has become glaringly obvious that Ngati Kuia has been extremely active in their resistance to colonisation. Nevertheless it is my contention that in all its engagements with the Crown, Ngati Kuia agency exists only as far as the Crown deems, or has deemed it appropriate.

To accommodate both realities I have borrowed from Mary Louise Pratt the term ‘contact zone’. In *Imperial Eyes-Travel Writing and Transculturation* she uses the term to denote the space where subjects, previously separated by geography and history, but whose ‘trajectories now intersect’. She writes that a:

³¹ Said, *Orientalism*, p. 13.

³² Said, *Culture and Imperialism*, p. xii.

³³ Peter Childs and Patrick Williams, *An Introduction to Post-Colonial Theory*, London: Prentice Hall, 1997, p. 115.

Contact perspective emphasises how subjects are constituted in and by their relations to each other...it treats the relations among colonizers and colonised...not in terms of separateness or apartheid, but in terms of copresence, interaction, interlocking understandings and practices, often within radically asymmetrical relations of power.³⁴

In the context of this thesis I use contact zone with particular reference to the various Courts and Commissions where Ngati Kuia has engaged with the Crown. A 'phenomenon of the contact zone', writes Pratt, is transculturation. She notes that ethnographers have used this term to describe the process whereby the marginalised 'select and invent' that which is transmitted to them by the dominant culture. The colonised, while not able to control what is emanated, can to some extent control what is absorbed. Useful here too is the term 'autoethnographic expression' or 'autoethnography'. Pratt writes that this occurs when 'colonized subjects undertake to represent themselves in ways that *engage with* the colonizer's own terms'.³⁵ In the context of this thesis then the law represents an example of autoethnographic expression. Thus, many of the sources cited are of a judicial nature.

Post colonial theory is another example of the colonised appropriating the idioms and forms of the coloniser. This thesis then can also be considered an example of autoethnographic expression. In New Zealand both Maori and non-Maori scholars have used post-colonial theory to help deconstruct the colonial encounters. Its development as a theoretical tool can be linked to intellectual movements in Western countries during the 1960s where the ideas of Frantz Fanon and others were 'employed and expanded' on by social movements such as feminists and civil rights groups.³⁶ Fanon's name is that most associated with anti and post-colonial theorising. Robert Young in *Colonial Desire* describes Fanon as the 'founding father of post-colonial theory'.³⁷ The urban migration that followed World War II enabled more Maori to enter educational institutions like Universities. According to Ranginui Walker this brought with it an increased knowledge of the techniques used to maintain 'the structural relationship of Pakeha dominance

³⁴ Mary Louise Pratt, *Imperial Eyes-Travel Writing and Transculturation*, London: Routledge, 1992, p.7.

³⁵ Pratt, *Imperial Eyes-Travel Writing and Transculturation*, pp. 6-7.

³⁶ Paul Spoonley, *Racism & Ethnicity*, second edition, Auckland: Oxford University Press, 1993, p. 37.

³⁷ Robert Young, cited in Childs and Williams, p. 49.

and Maori subjection'.³⁸ Paul Spoonley writes that the activism of the 1970s was initiated by Maori who had been born in major urban areas.³⁹ Nga Tamatoa, a group of young Maori associated with Auckland University became an 'important nurturing ground for the leadership of Maori activism in the 1970s'.⁴⁰ Members of this group included Linda Smith and Moana Jackson, both of whom I have cited in this study.

It is important to note that post-colonialism has recently come under criticism. It has been claimed by some indigenous researchers that it 'has become a strategy for reinscribing or reauthorizing the privileges of non-indigenous academics'.⁴¹ While I am hesitant about using the term 'strategy', as it implies a premeditated course of action by 'non-indigenous academics', I think it can be shown that their research often reflects the values and beliefs of the dominant culture. It is at this juncture where culture, the discipline of history, post colonial theorising, and colonisation meet. Some indigenous scholars have even challenged the term 'post-colonialism' itself. On hearing it for the first time Hawaiian academic Haunani Trask stated: 'Have they left?'⁴² In the preface to the second edition of *Ka Whawhai Tonu Matou-Struggle Without End*, Ranginui Walker responded to Trask's question:

With the Government's expropriation of Maori customary rights to the foreshore and seabed by legislative fiat, it would seem not, and so the struggle without end continues.⁴³

Chapter three continues to document the struggle. It traces how the concepts discussed in chapter one gained increased attention during the 1980s. An analysis of environmental claims brought before the Waitangi Tribunal at this time indicates that Ngati Kuia share with those claimant groups a common worldview, and thus have the potential to mount pan-tribal resistance. The concerns expressed by iwi were later incorporated into the Resource Management Act 1991(RMA). The importance of the RMA and the Environment Court is that it was via these legislative mechanisms that Ngati Kuia was first able to express their concerns regarding marine farming in the Marlborough Sounds. This chapter also examines the RMA within a

³⁸ Ranginui Walker, *Ka Whawhai Tonu Matou-Struggle Without an End*, revised edition, Auckland: Penguin Books, 2004, p. 209.

³⁹ Spoonley, *Racism & Ethnicity*, p. 41.

⁴⁰ Spoonley, *Racism & Ethnicity*, p. 42.

⁴¹ Smith, *Decolonizing Methodologies-Research and Indigenous Peoples*, p. 24.

⁴² Haunani Trask, cited in Walker, *Ka Whawhai Tonu Matou*, p. 8.

⁴³ Walker, *Ka Whawhai Tonu Matou*, p. 8.

context of international environmentalism highlighting again that Maori, in yet another way, are influenced by international trends.

Chapter four investigates three appeals brought before the Environment Court by Ngati Kuia, the lodging of a claim with the Maori Land Court in May 1997, and its passage through the New Zealand legal system ending in the Court of Appeal. At a local level the Environment Court cases were aimed at dealing with obstacles preventing Ngati Kuia from entering the marine farming industry. At a national level they formed part of a strategy that culminated in the eight iwi of the northern South Island seeking declaratory orders from the Maori Land Court that land below the mean high water mark was Maori Land. These iwi—Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Te Atiawa—are now known in foreshore and seabed literature as Te Tau Ihu iwi.

The foreshore and seabed issue has provoked much discussion throughout New Zealand. In his report Professor Stavenhagen wrote that it became a political issue during the 2005 election and that ‘it polarized public opinion and brought to the surface a number of underlying racial tensions in the country’, a claim that was rejected by the Government.⁴⁴ The final chapter will discuss Ngati Kuia’s and the Crown’s reactions to the New Zealand Court of Appeal’s decision. It will assess how the Crown was able to construct a public response that legitimised what some have termed ‘confiscatory legislation’. This chapter is by no means an in depth analysis of the Foreshore and Seabed Act, but it does focus on certain elements: the vesting of the foreshore and seabed in the Crown and the right of public access. It is my intention, by examining these aspects of the Act, to confirm Moana Jackson’s assertion that the Crown continues to operate within a paradigm ‘sourced in the history of colonisation’.⁴⁵

⁴⁴ Stavenhagen, ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People’, p. 14.

⁴⁵ Jackson, ‘Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi’, p. 2.

Chapter One

Ngati Kuia me te Takutaimoana

This chapter sets out to examine the connection between Ngati Kuia and the foreshore and seabed. It is divided into a number of parts. It examines the role of whakapapa and tradition in Maori society focusing particularly on Ngati Kuia's relationship with Kaikaiawaro. It discusses the creation tradition and the interconnectedness of the Ngati Kuia worldview. Lastly, it deals with the links between whakapapa, tradition, and rights to resources. The discussion draws on the works of Ranginui Walker, Mason and E. T. Durie, Wayne Ngata, Te Maire Tau and the Waitangi Tribunal's *Foreshore and Seabed Report*. That the ideas and concepts discussed by these scholars can be incorporated into a thesis concerned primarily with one hapu further suggests that Maori share a common worldview and helps to explain why an issue that began at the hapu level was able to generate enough interest that led to it becoming a regional, then a national and eventually an international issue.

Whakapapa and Tradition—Kaikaiawaro

The role of whakapapa is central to understanding Ngati Kuia perspectives of the foreshore and seabed. Cleve Barlow writes that to whakapapa is to 'lay one thing upon another'.⁴⁶ It acts as a kind of mnemonic whereupon a whole system of knowledge is constructed. Emanating from this are the 'ethics' referred to earlier by Tau, or what E.T. Durie terms 'conceptual regulators', and include mana (and manakitanga), tapu, noa, utu, tuakana, teina, mataamua and potiki. Their purpose is social cohesion and reflects a worldview that depended on 'cooperation and interaction between persons and peoples'.⁴⁷

⁴⁶ Cleve Barlow, *Tikanga Whakaaro-Key Concepts in Maori Culture*, Auckland: Oxford University Press, 1991, p. 173.

⁴⁷ E. T. Durie, 'Custom Law', p. 7.

Essential to the maintenance of these ethics, or conceptual regulators, is the recitation of myths, legends, history, stories and whakatauki (proverbs). E. T. Durie provides a detailed description of such linguistic devices;⁴⁸ however, I shall use the generic—‘tradition’—in reference to either one of these terms. Useful to this discussion also is Te Maire Tau’s *Nga Pikituroa o Ngai Tahu*.⁴⁹ It should be noted that Ngati Kuia share with Ngai Tahu a common Ngati Mamoe and Ngati Wairangi whakapapa and Kaikaiawaro traditions.⁵⁰ In respect of whakapapa he states that

In its simplest sense, whakapapa is a genealogy, in a wider sense whakapapa attempts to impose a relationship between an iwi and the natural world. Whakapapa is, then, a metaphysical framework constructed to place oneself within the world.⁵¹

Margaret Orbell also explains that the physical environment ‘shaped the very processes of thought; it led to the development of ideas explaining the origin and nature of the world’.⁵² Indeed the term tangata whenua—people of the land—can be readily understood when seen in this light. The following whakapapa and its associated traditions reflect and perform these very functions. Recorded by Meihana Kereopa in May 1862 it shows the link between Kaikaiawaro, Matuahautere and the eponymous ancestor Kuia. The Kaikaiawaro traditions account for a number of geographical features in Te Hoiere and on Kapiti Island, areas which Ngati Kuia and their relatives traditionally occupied. The physical manifestation of tradition in the contours of the land further enhances Ngati Kuia’s connection to their rohe.

Ruamano = **Kaikaiawaro**
 Matuahautere
 Matuakuha
 Tukauae
 Kuia⁵³

Kaikaiawaro still remains a living part of the Ngati Kuia consciousness. Young children are still told how Kaikaiawaro came to the aid of their ancestors Matuahautere, Koangaumu and Hinepoupou. Many of these traditions were recorded by James Cowan⁵⁴ in the early twentieth century

⁴⁸ E. T. Durie, ‘Custom Law’, p. 7.

⁴⁹ Tau, *Nga Pikituroa o Ngai Tahu-The Oral Traditions of Ngai Tahu*, Dunedin: University of Otago Press, 2003.

⁵⁰ In Ngai Tahu tradition Kaikaiawaro takes the form of a wood pigeon.

⁵¹ Tau, *Nga Pikituroa o Ngai Tahu-The Oral Traditions of Ngai Tahu*, p. 33.

⁵² Margaret Orbell, *The Natural World of the Maori*, Auckland: David Bateman Ltd, 1996, p. 13.

⁵³ Meihana Manuscript, p. 206.

⁵⁴ James Cowan, *Pelorus Jack: The White Dolphin of French Pass, New Zealand*, Christchurch: Whitcombe & Tombs, 1911.

after interviewing Kipa Hemi (the first); others have been kept within family groups. For example it is commonly known among the Hemi whanau that when Kipa Hemi (the second) departed for World War I Kaikaiawaro accompanied him. Kipa did not return and to date Kaikaiawaro has never been seen again.⁵⁵ Mary Walker remembers being told that when her father was fishing in Port Gore Kaikaiawaro began circling his boat. When he returned to shore he was informed that his Aunty had died.⁵⁶

A number of themes emerge when these traditions are examined in more detail. The retelling of these traditions not only ensures Kaikaiawaro's immortality, it also continues to reaffirm Ngati Kuia's place within the natural world. Kaikaiawaro's appearance in times of need and desperation is interesting also. The following whakapapa highlights the ancestors Matuahautere, Koangaumu and Kipa. Living generations apart it is unlikely that Matuahautere's Kaikaiawaro was the same Kaikaiawaro that left with Kipa, yet for Ngati Kuia they are one and the same.

Matuahautere

Matuakuha

Tukauae

Kuia

Wainui

Koangaumu

Maihi

Puhipuhi

Hemi

Te Pou

Kipa⁵⁷

This scenario need not bother Ngati Kuia because the past present and future are in continual association. Tau writes that 'the past was massaged and moulded into a form that maintained the mana of one's ancestors and community'.⁵⁸ Thus the Kaikaiawaro traditions act as a kind of portal that connects the living with the dead, reminding us that the dead persist as a constant and influential force. Although the Kaikaiawaro traditions are specific to Ngati Kuia in 'Custom Law', E.T. Durie also notes that:

The spirits of the ancestors as superintendents of earthly affairs was a present reality. At death people did not cease to exist but changed status from kaumatua to tupuna. The spirit of the ancestors encompassed the living and those still to be born. The land was shared with the dead, the living and the unborn. Even

⁵⁵ Shirley MacDonald, wananga, Te Hora Pa, 3/8/2003.

⁵⁶ Mary Walker, wananga, Te Hora Pa, 3/8/2003.

⁵⁷ Meihana Manuscript, p. 206.

⁵⁸ Tau, 'Matauranga Maori as an Epistemology', p. 11.

land that was given would eventually return to source to the tupuna as represented in the then generation. The principle was that of ancestral continuity.⁵⁹

Those living in the present then had imposed upon them responsibilities and obligations to both the dead and the unborn. The connections between these realms of being are part of a complex system of associations where people exist in relation to other entities. Thus in the *Report on the Crown's Foreshore and Seabed Policy* the Tribunal stated that Maori do not exist without the land.⁶⁰ Indeed the purpose of the Kaikaiawaro traditions is to reinforce the link between Ngati Kuia and Papatuanuku.

Ranginui and Papatuanuku

It can therefore be said that Ngati Kuia views the world holistically and as this thesis progresses it will become apparent that such worldviews are common to all Maori. This can, according to Mason Durie, be attributed to a common origin⁶¹ in Ranginui and Papatuanuku, the primordial parents. As the following Ngati Kuia karakia shows they too share these divine origins.

He karakia mo te Rangi
 Ko wai ko te tuhi
 I tuhia mai ai au
 Te Makau i ahau
 Ko te tuhi-o-te-rangi
 I tauwhiro ai
 Ki a Rua-potango
 Ki a Tutu-i-te-rangi
 Me i ko Kai-awa koe
 Ko te Tara-o-Matua
 Kia tutu i te rangi
 Te Hau-o-Titapu
 E toko koe i ahau⁶²

⁵⁹ E.T. Durie, 'Custom Law', p. 63

⁶⁰ *Report on the Crown's Foreshore and Seabed Policy*, p. 3.

⁶¹ Mason Durie, *Te Mana, Te Kawanatanga-The Politics of Maori Self Determination*, Auckland: Oxford University Press, 1998, p. 21.

⁶² Wayne Ngata, 'Nga Korero mo Ngati Kuia', A report commissioned by Crown Forestry Rental Trust, 2003, (Ngati Kuia Archives) p. 66.

Translation: An incantation for the sky parent
 Who recites this incantation
 Which affects me so
 It is Te tuhi-o-te-rangi
 That will keep alert
 Rua Potanga and

The importance of the creation tradition to discussions around the foreshore and seabed is that it is from this episode that the ‘ethics/conceptual regulators’, and tikanga which order the relationship between tangata whenua and Te takutai moana were first established. I have been unable to locate a coherent creation tradition specific to Ngati Kuia, however, tribal karakia and waiata mention many of the characters present in other tribal traditions. Mason Durie, Ranginui Walker and Wayne Ngata all give accounts of the separation of the sky father and earth mother and although differences are apparent they do not detract from the fundamental notion of interconnectedness.

Walker writes that the separation of Ranginui and Papatuanuku was preceded by heated discussion and debate among their children. It was Tawhirimatea who resisted any change to present conditions, however, the path to knowledge⁶³ was pursued, first by Tumatauenga who decided that he would separate his parents by cutting them apart. With this failing Tane Mahuta completed the wehenga by placing his shoulders against Papatuanuku and his feet against Ranginui and then proceeded to push them apart. This act brought into existence Te Aomarama—the world of light.⁶⁴

According to Walker, following the separation a war ensued between the children of Ranginui and Papatuanuku. Firstly it was Tawhirimatea, who having opposed the separation sought utu from his siblings. Only Tumatauenga stood in defiance while the other brothers hid from the wrath of Tawhirimatea. Consequently when the winds of revenge subsided it was Tumatauenga’s turn to exact utu from his brothers for their failure to stand with him against Tawhirimatea. Tumatauenga went about ‘debasing’ the children of his siblings ‘converting them to common use’. Walker writes that:

By his actions of using the children of his brothers as food and common objects, Tumatauenga negated their tapu, thereby making them noa. In this way the basic dichotomy in Maori life between the sacred and profane came into being. Tu’s assertion of mana over his brothers was the rationale for the superior position of human beings in the natural order.⁶⁵

Tutu i te rangi
And if you are kaiawa
It is the Tara of Matua
To be stood at the heaven
The vigour of Titapu
You are propped up by me.

⁶³ Walker interprets this as the origin of all knowledge.

⁶⁴ Walker, *Ka Whawhai Tonu Matou*, pp. 12-13.

⁶⁵ Walker, *Ka Whawhai Tonu Matou*, p. 13.

Mason Durie differs in his interpretation of events. He does not support the proposition that humans occupy a superior position in the natural order. He writes that:

Tumatauenga, often referred to as a god of war, though more accurately having responsibilities which extended over various human pursuits, is usually represented as the victor during the battle to separate the earth from the sky; and indeed he achieved a degree of power over Tawhirimatea, the god of the winds, surpassing the efforts of the siblings. But it did not guarantee him, or his successors, pre-eminence over others. Instead, people remain a part of nature rather than superior to it; they exist in a state of balance with other elements, without dominion over the natural environment.⁶⁶

Like Walker, Wayne Ngata states that:

The separation of Rangi and Papa was the cause of conflict between their children, the first example of sibling rivalry. The result eventually was that Tumatauenga, representative of we as people, dominated his brothers and controlled them with karakia.⁶⁷

Thus the extent to which humanity gained dominance over the natural world is contestable. The multiplicity of readings does not however create a contradiction; in fact all reflect Ngati Kuia's relationship with the natural environment. The use of karakia in Maori society is a case in point. In its Foreshore and Seabed Report the Waitangi Tribunal noted that karakia were used by tohunga and rangatira to invoke protection from 'the atua of the sea and to govern use of its bounty'. Moreover 'they are the focal point in the complex relationship between the atua of the natural world and the tangata whenua'.⁶⁸

Ngati Kuia is well known for their use of karakia. E.W. Pakauwera, a survivor of the nineteenth century attack on Pinohia Pa by Te Rauparaha and his allies, states that Ngati Kuia is 'he iwi karakia'. This is evidenced by the exploits of tupuna such as Koangaumu who escaped from the Ngati Tumatakokiri after he invoked the assistance of Kaikaiawaro. Karakia were also used in everyday life, the following fishing incantation further highlighting the importance of the sea to Ngati Kuia.

Auheke ai nga tai

⁶⁶ Mason Durie, *Te Mana, Te Kawanatanga*, p. 22.

⁶⁷ Ngata, 'Nga Korero mo Ngati Kuia', foot note 135, p. 66.

⁶⁸ *Report on the Crown's Foreshore and Seabed Policy*, p. 6.

Tauheke ra ki kikonui
 Kai takirikiri, e kai kopeka ai
 Kai tarere te ika ki te matau⁶⁹

The connection between tangata whenua and the natural environment should also be considered in light of the tuakana/teina relationship. As a result of his actions following the separation Tumatauenga effectively became the tuakana of his whanau. Consequently he (humanity) can expect to be nourished by the fish of Tangaroa, by the birds of Tane, and the fruits of Haumietiketike. This brings with it also an obligation to protect and support the teina of the whanau. This was acknowledged by the Waitangi Tribunal in its Foreshore and Seabed Report which stated that ‘the concept of kaitiakitanga best explains the mutual nurturing and protection of people and their natural world’.⁷⁰ It should also be recognised that the association between the tuakana and teina is not fixed rather it is fluid and subject to change. Thus while it can be said that humanity holds a position of dominance it is an uncertain one. Indeed the forces of nature constantly remind us that we are ultimately still part of a greater whole and are at times only minor players.

Maui and Kupe

The role of the teina in Maori society, and in particular their ability to challenge the status quo, is a dominant theme that emerges from the creation tradition. The Maui traditions also continue this theme. Although he had a troublesome birth and was the youngest of five brothers Maui rose to become ‘the epitome of the idealised character in Maori society’.⁷¹ Like other iwi throughout the country Ngati Kuia too maintains whakapapa and traditions that connect them to Maui. For instance while reciting the following karakia Maui fished up Te Ika a Maui from Arapaoa Island in the Totaranui.

Tina, tina taku aho
 Te Ihi o te rangi

⁶⁹ Ngata, ‘Nga Korero mo Ngati Kuia’, p. 83.

Translation: The tides descend
 Descend to kikonui
 Take this bait carefully
 But take it nonetheless

⁷⁰ *Report on the Crown’s Foreshore and Seabed Policy*, p. 8.

⁷¹ Ranginui Walker, ‘The Relevance of Maori Myth and Tradition’ in *Te Ao Hurihuri-Aspects of Maoritanga*, ed. Michael King, Reed Publishing, Auckland, 1992, p.170

Ko koe e mau mai na
Naku an otaku matau i ta⁷²

Kupe is another important ancestor from whom Ngati Kuia claims descent. This waiata composed by Tamairangi is a lament for her son Kekerengu. It recalls many of the place names associated with the arrival Kupe who pursued Te Wheke o Muturangi into Raukawakawamoana. Tradition states that having caught the octopus he then proceeded to kill it and place its eyes on the Brothers Islands.

Tena rawa pea koutou kei roto o Taitawaro e ngaro
Ko te waro hunanga o Tuhirangi
Nana i taki mai te waka o Kupe, o Ngake ki Aotearoa
Ka mate te wheke o Muturangi i Tapuae o Raukawa
Koia Whatu Kaipono me Whatutipare⁷³

As the above waiata demonstrates ancestors were also remembered through the process of taunahanahatanga. Douglas Sinclair writes that 'every block of land was named and carefully delineated by natural boundaries and topographical features'.⁷⁴ The Waitangi Tribunal stated in its Foreshore and Seabed report:

By naming places, and by reciting relationships (through whakapapa) with places and their resources, and by telling the korero relating to them, Maori affirm their connection to places, resources, and the people doing the telling and the listening. This is central to the way in which Maori relate to each other and their world, and how they transmit that relationship through the generations.⁷⁵

E.T. Durie also states that rights to resources were validated through whakapapa, moreover 'the earlier the ancestor the stronger the right'.⁷⁶ It is for this reason that whakapapa and tradition relating to Maui and Kupe are recited by Ngati Kuia at tribal gatherings. Many of the sites within the Ngati

⁷² Ngata, 'Nga Korero mo Ngati Kuia', p. 70.

Translation: Be firm, be strong my line
With strength derived from above
You who are firmly caught
By this hook of my own making.

⁷³ Ngata, 'Nga Korero mo Ngati Kuia', p. 75.

Translation: Maybe within Taitawaro you are lost
The darkened depths concealing Tuhirangi
He who tracked the keel of Kupe and Ngake to Aotearoa
When perished too the wheke of Muturangi there at the barrier of Raukawa
And hence Whatu Kaipono and Whatutipare (The Brothers)

⁷⁴ Douglas Sinclair, 'Land: Maori View and European Response', in *Te Ao Hurihuri-Aspects of Maoritanga*, Michael King ed. Reed Publishers, Auckland, 1992, p. 67.

⁷⁵ *Report on the Crown's Foreshore and Seabed Policy*, p. 9.

⁷⁶ E.T. Durie, 'Custom Law', pp. 64-65.

Kuia rohe associated with these illustrious ancestors are located on the coast, and such information formed a significant part of the evidence prepared for both the Environment Court and the Maori Land Court during the mid-1990s.

Mana and Manakitanga

The maintenance of whakapapa and traditions such as those discussed here cannot be divorced from tribal mana; the motivating force in Maori society. Thus in a thesis which attempts to reveal a particular worldview the concept of mana must necessarily be explored. While difficult to define it would be agreed by Maori that mana can be expressed in numerous ways, an example of which is the act of manakitanga or the extension of hospitality. One could expect however that such an act would be returned in the future. Balance and harmony, according to E.T. Durie, were maintained through the enactment of utu. Far from its public understanding utu was not just about revenge, rather:

Reciprocity disclosed the Maori world view that life's basic needs and survival depended on co-operation and interaction... reciprocity protocols were formulated for commerce, social intercourse, behavioural controls, and peace-making, all encapsulated in utu.⁷⁷

In its Foreshore and Seabed Report the Waitangi Tribunal wrote that:

One of the fundamental characteristics common to all tribes is the obligation of reciprocity, sometimes referred to as utu. The notion of exchange and balance, in which mana is maintained through a cycle of gift giving and in certain circumstances more forceful means, is a core value in Maori society.⁷⁸

In terms of manakitanga the importance of the foreshore and seabed to Ngati Kuia cannot be overstated. I have often heard kaumatua say, 'when the tide is out the cupboard is full'. And while Ngati Kuia's pantry was not limited to shellfish, as titi rupe and tuna were also harvested, the sea remained the primary food source. It is not surprising that Te Hoiere has today become the home of New Zealand's green lip mussel industry. At the head of the sound sits

⁷⁷ E.T. Durie, 'Custom Law', p. 7.

⁷⁸ *Report on the Crown's Foreshore and Seabed Policy*, p. 11.

Havelock, formerly Motueka Pa,⁷⁹ but is now sign-posted as the 'Green Lip Mussel Capital of the World'.

Ngati Kuia's long association with Te Tau Ihu has enabled them to build an inventory of knowledge relating to the environment and is fundamental to the act of manakitanga. A rather amusing story relayed to me by Ngati Kuia kaumatua Jim Walker aptly highlights this connection. During a visit to the Marlborough Sounds T.W. Ratana stopped at Black Ball just outside of Havelock. Here he spoke to the resident Ngati Kuia family. He is said to have commented that he had not yet tasted the kai moana that Te Hoiere was famous for. The prophet was jokingly told that he should perhaps ask God for some assistance in this matter. With nothing forthcoming Ratana was invited to sit and wait for thirty minutes at which time there would be plenty of food for him to eat. Sure enough and almost to the minute the out going tide uncovered a mussel bed at the bottom of the bank on which he was sitting.⁸⁰ Furthermore it was only due to the spring tide on this particular day that the mussels were exposed as they usually remained submerged. Humour aside, such an understanding of the tides reflected an intimate knowledge of the environment and importantly it allowed Ngati Kuia to manaki their manuhuri.

It can be said therefore that whakapapa frames the entire Ngati Kuia worldview. Through whakapapa and tradition, particularly that relating to Kaikaiawaro, they are placed firmly within the natural world. Their relationship with Papatuanuku is enhanced further through their connection to Te Tau Ihu's oldest people from whom they have inherited the rights and obligations of kaitiaki. Thus O'Regan is correct in his assertion that whakapapa is 'invariably driven by a purpose'.⁸¹

Asserting Rights

Rights and obligations stem from ancestors. They are therefore a matter of mana and are to be defended vigorously. For instance Ngati Kuia, following the invasion of the lower North Island by hapu from Tainui and Taranaki, amalgamated with other tangata whenua hapu for the purpose of attacking Kapiti Island, the headquarters of Te Rauparaha in 1822. Prior to the attack, debate ensued between the many hapu as to what strategy should be employed to evict the

⁷⁹ Motueka Pa was given to the Crown by Ngati Kuia in 1856 in return for schools and hospitals.

⁸⁰ Jim Walker, wananga, Te Hora Pa, 3/8/2003.

⁸¹ cited in Danny Keenan, 'Predicting the Past: Some Directions in Recent Maori Historiography', p. 25

invaders. However, no agreement could be reached and an unsuccessful operation resulted in the capture of Tutepourangi, a prominent Ngati Kuia rangatira. The release negotiated included a tuku of land to Ngati Koata. Before the transaction could be certified a delegation of Ngati Kuia and Ngati Koata rangatira were required to visit all those concerned. Proceedings concluded with a number of 'tuku marriages' that sealed the arrangement. It should also be noted that some right holders remained aloof from 'Treaty making'. The survivors of Hikapu, led by Wirihana Kaipara, continued to repel the incursions of the invaders through armed resistance.

The importance of whakapapa in the defence of rights can be seen in the quality of whanau whakapapa manuscripts. Whakapapa contained in the Meihana Manuscript are typically dated and the informant and location at which they were recorded cited. This enables whakapapa to be placed in a wider context. Those recorded on 10 May 1879 for instance trace descent from Ngati Wairangi, Ngati Kopia and Ngati Mamoe and coincide with the commencement of the Smith-Nairn Commission set up to inquire into the Kemp (1848), Otago (1844), Murihiku (1853), and Akaroa (1856) purchases.⁸² This along with a record of receipt of monies given to H.K. Taiaroa, the co-ordinator of the 'Ngai Tahu Claim',⁸³ indicates that Ngati Kuia tupuna believed that through their whakapapa connections to these hapu they had retained rights to lands inside the boundaries of the Kemp Purchase. This demonstrates also that whakapapa was neither static nor rigid, but was according E.T. Durie a 'highly developed politico-social tool, providing a flexible system of self and group identification and permitting of descent line manipulation to suit different situations'.⁸⁴

The Smith-Nairn Commission presented an opportunity for Ngati Kuia to reassert their rights inside the Kemp Purchase boundaries. Sittings were held in Auckland, Wellington, Otaki, Christchurch, Dunedin, Port Chalmers, Waikouiti, Akaroa, Riverton and Kaiapoi.⁸⁵ Noticeably, however, the Commission did not visit Te Tau Ihu raising questions as to the extent of a full and proper investigation. In January 1881 a report was issued condemning the purchase. Four years later the Crown rejected the idea of settling the claims

⁸² *Ngai Tahu Land Report*, 21 Parliamentary Select Committees, Royal Commissions and Commissions of Inquiry, p. 21.2.5, retrieved 5/1/2005 from <http://wai8155sl.verdi.2day.com.reports.sichat/wai0271/chap21/chapt2103.asp>

⁸³ Harry C. Evison, *The Long Dispute-Maori Land Rights and European Colonisation in Southern New Zealand*, Christchurch: Canterbury University Press, 1997, p. 307.

⁸⁴ E.T. Durie, 'Custom Law', p. 5.

⁸⁵ *Ngai Tahu Land Report*, p. 21.2.5

through a financial settlement but said it would consider further land grants. Although Ngati Kuia tupuna had provided whakapapa that connected them to lands within the disputed area, and had contributed significant sums of money to what was to become the 'Ngai Tahu' claim, they received none of the subsequent compensation. This was in part due to the Crown's desire to negotiate with large definable iwi groups rather than a multitude of 'disparate' hapu. Ballara notes that the Crown, in its dealings with 'Ngai Tahu', wanted to deal with one group. 'Ngati Mamoe, Poutini Ngai Tahu and some northern descent groups struggled to make their presence felt'.⁸⁶ Nevertheless Ngati Kuia continued to follow due process through the Maori Land Court but as will be discussed in the next chapter this too proved to be ineffective in securing rights.

Whakapapa then performs a number of functions. It provides a means of ordering knowledge, it places people within the natural world, and it is through whakapapa that rights to land and thus resources are validated. Whakapapa also determines relationships between groups. The following whakapapa and accompanying letter were recited to Meihana Kereopa by his cousin Hohepa Te Kiaka in July 1867.

Haeamaiterangi = Tukakia
 Tamatitoko = Tukaimanawa
 Hinekauwhata = Te Wawaro
 Tawhati = Te Whitio
 Taia = Tatau
 Manuhikuroa = Kainu

 Kereopa = Kerenapu

Hamuera = Huria

 Paipai = Turi (Ngati Koata) Meihana = Hana⁸⁷

I indeed put forth my word to you so the tribes of that island and this island, and the Europeans dwelling to the west and to the inland, may know that Haeamiterangi is the source and was a great king from the other island. His junior sibling was Tupehia, Tupehia had Hunuku, Hunuku had Papanui, Papanui had Mokorea. These are all ancestors of mine. Mokorea had Hunuku Tahunuku, and also had Hohepa Te Kiaka. I will leave that which is the source and a vine of life to that other island for Rangitoto. From there dwelt that tribe Ngai Koata upon my back so I could be a source for them.⁸⁸

⁸⁶ Ballara, *Iwi*, p. 315.

⁸⁷ Meihana Manuscript, p. 210.

⁸⁸ Translation cited in S.K.L. Campbell, 'A Living People- Ngati Kuia and the Crown, 1840-1856'. A Report Commissioned by the Crown Forestry Rental Trust, 2000, pp. 18-19.

The purpose of both letter and whakapapa is to highlight the relationship between the descendents of Haeamaiterangi and Ngati Koata. They demonstrate that in order for Ngati Koata to have all 'toes embedded in the soil',⁸⁹ or the foreshore and seabed, the fundamental requirement of intermarriage is needed. This is a well established precedent and has over time contributed to a complex and colourful whakapapa. Haeamaiterangi for instance is Ngati Tumatakokiri,⁹⁰ not Ngati Kuia. However, marriages between both groups extended and legitimated rights to resources. Furthermore, this is an example, as is the 'tuku of Tutepourangi', of hapu exercising mana and autonomy.

Recently other hapu, claiming iwi status, have used the Waitangi Tribunal process to try and assert their own rights in areas where Ngati Kuia believe they have, through ancestry and occupation, a primary interest. In her submission Kath Hemi of Ngati Apa ki te Rato stated that Ngati Kuia were merely a hapu of Rangitane and Ngati Apa and 'therefore has rights that cannot be greater than its originating iwi viz. Apa and Rangitane'.⁹¹ The following whakapapa does indeed demonstrate Ngati Kuia's strong association with Apa:

Apa
 Apanui
 Apatika
 Tarauenuku
 Rawaru
Tarakaipa
 Ronogotamea=Kuia⁹²

However, an analysis of whakapapa recorded in the Meihana Manuscript suggests that Ngati Apa came to Te Tau Ihu in a number of quite distinct migrations: Ngati Apa that migrated under Tarakaipa; Ngati Apa that migrated under Te Ahuru; and Ngati Apa that migrated under Kotuku. The last of these migrations is known as Te Kourawhitiwhiti. It is this group that became known as Ngati Apa ki te Rato and they arrived in Te Tau Ihu in 1824 following the battle of Waiorua. The descendents of Te Ahuru had by this time become effectively indigenised, as the whakapapa below shows. Such subtleties were not however recognised, rather Ngai Tarakaipa was constructed as a hapu of Ngati Apa ki te Rato in an attempt to extend its occupation of Te Tau Ihu. Furthermore there are as far as I am aware no whakapapa that reach beyond Te Ahuru suggesting again that although efforts were made to

⁸⁹ E.T. Durie, 'Custom Law', p. 65.

⁹⁰ I discuss Ngati Tumatakokiri in more detail in the following chapter.

⁹¹ Kath Hemi, 'Brief of Evidence' Wai 521, 2002, p. 30. (Ngati Kuia Archives)

⁹² Meihana Manuscript, p. 232.

trace descent from prominent migrating ancestors it was that which connected people to the land that is paramount. It is for this very reason that Ngati Kuia claim descent from ancestors such as Matuahautere, Wairangi and Tumatakokiri and why they continue to pursue rights that accrued to them over generations. Moreover, even if Ngati Kuia was a hapu of Rangitane and Ngati Apa, the hapu was, according to Lachy Paterson ‘the apex of real political and social unity within Maori society, mana did not tend to reside in larger, more transcendent groupings such as iwi’.⁹³

Te Ahuru (Ngati Apa)

Puangiangi

Kainu = Manuhikuroa (Ngati Tumatakokiri)

Kereopa = Kerenapu (Ngati Wairangi)

Paipai

Meihana = Hana (Ngati Kuia)

Haimona

Tahuariki⁹⁴

Matina

Te Pou

*Peter Meihana*⁹⁵

Tikanga

Lastly, some comment should be made about tikanga as essentially this is what this chapter has been all about. Tikanga is what governs the relationship between people and between people and the land. During the foreshore and seabed hearing a number of Maori academics submitted evidence that helped elucidate its meaning(s). It will be recalled that in its report the Waitangi Tribunal stated that ‘there is no matter that does not have tikanga attached’.⁹⁶ Professor Margaret Mutu of Ngati Kahu explained that tikanga Maori:

Is the correct way to carry out something in Maori cultural terms. Tikanga Maori is the Maori equivalent of English law...It derives from the very detailed knowledge gained from residing in a particular geographic area for many hundreds of years, developing relationships with other neighbouring communities as

⁹³ Lachy Paterson, *Colonial Discourses-Niuepa Maori 1855-1863*, Dunedin: Otago University Press, 2006, p. 138.

⁹⁴ Meihana Manuscript, p. 199.

⁹⁵ Names in Italics have been inserted to establish a generational time frame.

⁹⁶ *Report on the Crown's Foreshore and Seabed Policy*, p. 1.

well as those further a field, and learning from practical experience what works and what does not.⁹⁷

It is also worthwhile noting that because tikanga were formed over time they had by virtue of their origins in the past acquired mana. The non-adherence to tikanga was to takahi the mana of the atua and tupuna and therefore invoked a serious response. Furthermore as E.T. Durie writes ‘despite local variations, there was (and is) a degree of certainty in customary expectations’.⁹⁸ To this extent the pan-tribal response to the foreshore and seabed legislation was to be expected.

Whakapapa then cannot be ignored when attempting to understand the Ngati Kuia worldview. It serves a number of purposes but essentially it connects tangata whenua with Papatuanuku. It provides the structural framework around which myths, legends, history, stories and proverbs⁹⁹ can be placed, further reinforcing the bounds between people and land. The following chapter begins to look at how this worldview has been accommodated by New Zealand’s legal system. At the same time it provides an opportunity to explore some of those ideas discussed at the outset of this thesis.

⁹⁷ *Report on the Crown’s Foreshore and Seabed Policy*, p .2.

⁹⁸ E.T. Durie, ‘Custom Law’, p. 2.

⁹⁹ E.T. Durie comments that ‘the terms korero tupuna or korero o mua were sometimes used for myths and legends, korero o nga ra mua for the recent history and korero purakau and korero pakitara (or pakiwaitara) for stories, factual, fictional or based on fact. Pakiwaitara was also used for gossip’. p. 7.

Chapter Two

Colonial Encounters

The purpose of this chapter is twofold. It examines Ngati Kuia's encounters with early explorers, colonists, and government departments. Here it will be argued that over time a recognisable discourse emerged which constructed Ngati Kuia as 'barbarian', 'savage', 'conquered', 'extinct' and as 'slaves'. Consequently the Ngati Kuia worldview was moved to the peripheries of the new nation and replaced by the 'civilised', 'rational', and 'industrious' worldview of the settlers. Today that worldview continues to define the relationship between Ngati Kuia and the Crown. The importance of this discussion is that it helps to explain the Crown's response to the foreshore and seabed issue and sheds light on how and why the Crown was able to conjure up such an emotive public response to the Court of Appeal's decision in *Ngati Apa*.

To help deconstruct and further elucidate Ngati Kuia's colonial encounter I have utilised the works of Edward Said, and in particular *Orientalism*. Here I am concerned with his notion of intelligence gathering and the role it plays in maintaining the positional superiority of the dominant culture. This chapter then also affords the opportunity to engage with post-colonial theory. Cecelia Edwards writes that deconstruction is a useful theoretical tool by which 'texts are easily mined for evidence of their role in advancing ideas of European superiority and preparing the ground for formal annexation'.¹⁰⁰ This discussion also introduces a theme that I shall pursue throughout this thesis, that is, while post-colonialism is useful, perhaps even liberating, it has become a means by which the values of the dominant culture can be reinscribed on the process of post-colonial theorising. The result is, rather than reflecting the brutality of colonisation, the idea of indigenous agency has created an illusion that colonisation 'wasn't really that bad'. If this is the case colonisation has achieved the greatest deception: it has turned the truth into a lie.

¹⁰⁰ Cecelia Edwards, 'Constructing New Zealand's Landscape', M.A. Thesis, Massey University, 1999, p. 14.

It is imperative at the outset that I define what is meant by 'dominant culture'. Useful here is W.H. Oliver who writes that the 'English, Scottish, Irish and Welsh settlers...brought their needs, their beliefs, their habits and their institutions over the world's greatest oceans to a group of Pacific islands'.¹⁰¹ He describes them as 'mental furniture' and are comparable to the concepts and ideas discussed in chapter one. And whereas whakapapa provided the framework on which mana, tapu, tuakana, teina, utu, and manakitanga could be placed and understood, it was notions of linear progression that ordered the worldview of the settlers. Belich notes that observers from the late eighteenth century had been 'staggered' by both the growth in production and population in Britain. Such advancements were credited to 'God, Nature, free trade, racial character or rational but long-term historical laws'.¹⁰² However, their preparedness to leave Great Britain was a clear indication that the new immigrants 'were ready to change'.¹⁰³ Hence while searching for something new they also brought with them elements of the old world which Oliver poetically writes, either 'flourished', 'withered', or took on 'unexpected forms'.¹⁰⁴

Why then did some 'importations' flourish and others did not? This can be primarily attributed to the centrality of certain beliefs, values and norms in the cultural infrastructure of the settlers. To further this discussion we must delve into what Kerry Howe calls the western cultural memory.¹⁰⁵ It is here that the discourses that have shaped European thought are to be found. Pre-eminent is the long held Judeo-Christian tradition of 'paradise' that in the beginning housed the progenitors of humankind. Howe writes that this idea blended readily with the Greek concept of Arcadia, which was itself derived from Indian mythology. Its whereabouts was uncertain but it was considered to be somewhere in the East. By the sixteenth and seventeenth centuries hopes of physically locating it had begun to fade. However, the 'search for Eden' was continued as part of Europe's programme of global expansion.¹⁰⁶

The musings of philosophers too provided an impetus to search out new places. Robin Hodge writes that up until the

¹⁰¹ W.H. Oliver, *The Story of New Zealand*, London: Faber, 1960, pp. 268-269.

¹⁰² James Belich, *Making Peoples-A history of the New Zealanders-From Polynesian Settlement to the End of the Nineteenth Century*, Auckland: Penguin Books, 1996, p. 291.

¹⁰³ W.H. Oliver, *The Story of New Zealand*, p. 268.

¹⁰⁴ W.H. Oliver, *The Story of New Zealand*, p. 268.

¹⁰⁵ Kerry Howe, *Nature, Culture, and History-The "Knowing" of Oceania*, Honolulu: University of Hawai'i Press, 2000, p. 8.

¹⁰⁶ Howe, *Nature, Culture, and History-The "Knowing" of Oceania*, p. 8.

seventeenth century the west perceived of the natural world as a kind organism in which all living things were linked by a 'vital spirit'. These ideas can be traced to the Judaic scriptures and Greek philosophy. Plato's notion that the physical and spiritual worlds were connected by a 'creative spirit' and Aristotle's concept of a hierarchical scale of nature were later fused into the great chain of being.¹⁰⁷ As Europe 'discovered' more of the new world the hierarchical structuring found in the great chain of being was used to classify not only flora and fauna but also people.¹⁰⁸

From the seventeenth century nature began to be viewed as a machine. According to Hodge this change stems from 'three clusters of integrated ideas'. Firstly, true knowledge could be measured, thus making it rational. Secondly, measurability could be extended to living things enabling the separation of humans from other life forms, as proposed by Rene Descartes, and thirdly Francis Bacon's scientific method which proposed that general laws could be established through observation and experiment. The combination of these three clusters was to form what is known as classic science.¹⁰⁹ This was the worldview that the Crown operated under in the nineteenth and twentieth centuries and 'remains the dominant paradigm today'.¹¹⁰

The scientific developments of the sixteenth and seventeenth centuries were primarily concerned with astronomy and physics. Comparable changes in the biological and human sciences did not take place until the late eighteenth and early nineteenth centuries. According to Nancy Stepan the globe had to be explored, and knowledge of the various human types gathered and tested before a 'science of the human races could begin to emerge'.¹¹¹ Stepan also writes that up until the late eighteenth century British, and continental scientists, were predominantly monogenists. Influenced by Christian theology it was held that humankind, despite variations, belonged to a single species.¹¹² By the 1860s, however, polygenism 'formed a distinct if minority strand of British racial thought'. Polygenists argued that physical, moral, and mental differences separated the races

¹⁰⁷ Robin Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, co-authors Cathy Marr, Robin Hodge, Ben White, Waitangi Tribunal Publication 2001, p. 56, electronic version, retrieved 25/5/2006 from

<http://www.waitangitribunal.govt.nz/doclibrary/public/wai262/crownlawspolicies/Chapt04.pdf>

¹⁰⁸ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 56.

¹⁰⁹ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 54.

¹¹⁰ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 54.

¹¹¹ Nancy Stepan, *The Idea of Race in Science: Great Britain 1800-1960*, London: The Macmillan Press Ltd, 1982, p. xiii.

¹¹² Stepan, *The Idea of Race in Science: Great Britain 1800-1960*, London: The Macmillan Press Ltd, 1982, p. 1.

to the extent that they constituted 'separate biological species'.¹¹³ This shift, writes Stephan, was part of a wider change in emphasis where race was perceived not as 'the superficial and changeable products of climate and civilisation', as forwarded by some monogenists, but as 'stable and essential entities which caused or prevented the flowering of civilised behaviour'. By the middle of the nineteenth century it was believed that the white race was, in 'essential ways', superior to the non-white races.¹¹⁴

A defining feature of civilisation was the ability to harness the potential of land. Hodge writes that this idea was advanced by Emmerich de Vattel in 1760. He argued that from cultivation came growth, the production of a resource, and thus commerce. It was believed that those who did not improve the land through their own labour had no right to it. The belief that the individual must improve both himself and nature was later used by the British to justify the acquisition of new territories.¹¹⁵ Indeed William Hobson was instructed to obtain 'the Cession to the Crown of such Waste Lands as may be progressively required for the occupation of Settlers resorting to New Zealand'.¹¹⁶

The growth in the sciences was paralleled with an erosion in the influence of Christianity, ancient philosophy and beliefs in the supernatural, or at least, as Anne Salmond notes, among the educated classes.¹¹⁷ As a consequence the belief in heaven, or paradise, could no longer be sustained as it had once been. However, Howe writes that during the age of European expansion the notion of paradise became linked with a tropical island. The association between paradise and tropical islands had, according to Howe, 'imaginative precedents'. Perhaps due to their size islands offered 'visibility and control', while their proximity to the sea gave them 'physical and moral cleansing and redemptive characteristics'. Another variation, and perhaps of more relevance to this thesis was that of an island setting for a political utopia.¹¹⁸

Paul McHugh writes that by the middle of the nineteenth century Englishmen perceived of themselves 'as being in

¹¹³ Stephan, *The Idea of Race in Science: Great Britain 1800-1960*, pp. 2-3.

¹¹⁴ Stephan, *The Idea of Race in Science: Great Britain 1800-1960*, p. 4.

¹¹⁵ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 56.

¹¹⁶ Instructions from Lord Normanby to Captain William Hobson cited in W. David McIntyre and W. J. Gardner ed., *Speeches and Documents on New Zealand History*, Wellington: Oxford University Press, 1971, p. 13.

¹¹⁷ Anne Salmond, *Two Worlds-First Meetings Between Maori and Europeans 1642-1772*, Auckland: Penguin Books, 1991, p. 57.

¹¹⁸ Howe, *Nature, Culture, and History-The "Knowing" of Oceania*, p. 10.

something of a constitutional Promised Land'.¹¹⁹ It was at this time New Zealand was beginning its own political life. As the century rolled on the new polity began to view local institutions of governance as an extension of the English constitution. It was claimed, however, that there would be a difference. The New Zealand constitution would be 'better' than that of the English.¹²⁰ But that which was fundamental to the English constitution, 'the sovereignty of the Crown in Parliament and the rule of law',¹²¹ would also define New Zealand's constitution. With the passing of the Foreshore and Seabed Act 2004 Maori would again be reminded that in this 'paradise' the rule of law is ultimately subject to the sovereign will of parliament.

Before we examine Ngati Kuia's encounters with 'Europe' in more detail, the term itself requires some explanation. In the present context I use it to denote the commonalities between the nations of Europe. One could perhaps make the comparison that while Ngati Kuia is distinct, it shares certain beliefs and values with other Maori. In 1824 the German historian Leopold von Ranke wrote that Europe comprised those peoples that emerged following the fusion of the Latin and Teutonic nations, 'three in which the Latin element prevailed, viz. the French, the Spanish, and the Italian; and three in which the Teutonic element was conspicuous, viz. the German, the English and the Scandinavian'. And although they were nearly always at war these people were connected by 'kindred blood, kindred religion, institutions, manners, and modes of thought' and 'certain great enterprises are common to all'. Indeed the colonisation of the world's indigenous nations was a demonstration of European unity.¹²²

During the seventeenth century, writes Salmond, Europe was in 'the grip of a phase of expansion'. States competed against one another for the control of overseas territories. This was an expensive exercise and the costs could only be met by 'a mercantile state at the height of its powers'. At the time it was the Netherlands that best met these criteria.¹²³ It is against this background that Ngati Kuia's first encounter with Europe took place, when, in 1642 under

¹¹⁹ Paul McHugh, 'A History of Crown Sovereignty in New Zealand', in *Histories Power and Loss-Uses of the Past-A New Zealand Commentary*, ed. Andrew Sharp and Paul McHugh, Wellington: Bridget Williams Books, 2001, p. 189.

¹²⁰ McHugh, 'A History of Crown Sovereignty in New Zealand', p. 193.

¹²¹ McHugh, 'A History of Crown Sovereignty in New Zealand', p. 191.

¹²² Leopold von Ranke, *History of the Latin and Teutonic Nations 1494-1514*, translation by G.R. Dennis, London: G. Bell and Sons Ltd, 1915, pp. 1-3.

¹²³ Salmond, *Two Worlds*, pp. 63-64.

the service of the Dutch East India Company, Abel Tasman came to anchor near Te Taitapu.

Tasman's instructions contained the tentative route he was to take in search of the 'Southland',¹²⁴ the directions to which had been collated from previous European expeditions. The idea of such a place had long existed in the European mind. Andrew Sharp writes that Tasman's 1642-43 expedition had received a 'considerable stimulus' in 1475 and 1477 following the publication of Ptolemy's geographical work first written in 2 B.C. The 1477 edition depicted a fictitious land extending southward from south-east Asia and was inscribed Terra Australis Incognita.¹²⁵ He was warned to take care when landing as the inhabitants were 'very rough wild people...be well armed...since in all parts of the world, it has been found by experience, no barbarous people are to be trusted'.¹²⁶ Salmond explains that at the time there was speculation amongst the 'common folk' in Europe that 'antipodes' or 'opposite-footers' who had 'anti-human qualities' lived at the other end of the world.¹²⁷ Tasman was instructed that of those lands and peoples that may be 'discovered', the fruits, livestock, houses, the appearances of the inhabitants, their clothing, weapons, customs, manners, food, livelihood, religion, government and war shall be 'keenly' observed.¹²⁸ Tasman was not only informed of the 'inestimable riches' that were to be found but as with earlier voyages of discovery 'untold blind heathens' had come to the 'salutary light of the Christian religion'.¹²⁹

Tasman's meeting with Te Tau Ihu's 'heathens' is well known. As per his instructions Tasman's account describes the appearance of the people he met, their weapons, clothing, and canoes. Trouble arose however when a small row boat moving between the Heemskerck and the Zeechaen was rammed by the tangata whenua. In the ensuing conflict four Dutchmen were killed.¹³⁰ After this 'monstrous deed' Tasman departed leaving behind the name 'Murderers Bay' as a reminder of this inaugural encounter.¹³¹

Tasman's account does not record who it was that he met at Te Tai Tapu although narrative does exist that offers some

¹²⁴ cited in Andrew Sharp, *The Voyages of Abel Janzoon Tasman*, London: Clarendon P, 1968, pp. 30-39

¹²⁵ Sharp, *The Voyages of Abel Janzoon Tasman*, p. 24.

¹²⁶ cited in Sharp, *The Voyages of Abel Janzoon Tasman*, p. 36.

¹²⁷ Salmond, *Two Worlds-First Meetings Between Maori and Europeans 1642-1772*, p. 63.

¹²⁸ cited in Sharp, *The Voyages of Abel Janzoon Tasman*, p. 36.

¹²⁹ cited in Sharp, *The Voyages of Abel Janzoon Tasman*, p. 30.

¹³⁰ cited in Sharp, *The Voyages of Abel Janzoon Tasman*, pp. 122-123.

¹³¹ cited in Sharp, *The Voyages of Abel Janzoon Tasman*, p. 124.

suggestions. S. Percy Smith for instance states that he had been informed by the former Assistant Native Secretary James Mackay that he had on a visit to Croisilles met with members of Ngati Tumatakokiri. Mackay proceeded to ask if they were aware of, or heard of, white men in former days. Indeed they had and their ancestors had killed some of them.¹³² In 1937 J.D. Peart wrote in *Old Tasman* that the original people of Tasman Bay were Ngati Tumatakokiri, and although once numerous they have ‘ceased to exist’, the last ‘full blooded man’ having died in 1888.¹³³

Indeed much of the narrative surrounding Ngati Tumatakokiri describes them as ‘extinct’. At the 1883 Whakapuaka Maori Land Court hearing Alexander Mackay told the Court that the land in question was formerly owned by a tribe from Taupo who are now extinct.¹³⁴ The tribe he was referring to was Ngati Tumatakokiri. More recently Ballara has written, ‘the Ngati Tumatakokiri had been...shattered as a people in the events of 1831 and 1832’.¹³⁵

However another narrative exists. Ngati Kuia emphatically state that it was they who met Tasman. Moreover, they have never ceased to exist. The Meihana Manuscript indicates that at the time of Tasman’s visit, and up until the musket war period, Te Tai Tapu was occupied by a number of related hapu groups: Ngati Wairangi, Ngati Kopia, Ngati Haua, and Ngati Tumatakokiri. The latter became a blanket label to describe all of the aforementioned hapu. To consolidate their strength following the ‘events of 1831 and 1832’ they moved east to Whakatu and then to Te Hoiere, taking up residence with their relatives Ngati Kuia, Ngai Te Heiwi, Ngati Whakamana, and Ngai Tawake.

In 1883 the Maori Land Court sat for the first time in Te Tau Ihu. According to Ballara the Court’s decisions were one of the ‘greatest catalysts of change in tribal organisation in the 19th century’.¹³⁶ The Te Tai Tapu hearing provided an opportunity for the former residents to stake their claim. The Court ruled, however, that they had been defeated by Ngati Rarua and thus had no rights to the land.¹³⁷ The Court’s

¹³² S. Percy Smith, *Journal of the Polynesian Society*, volume 10, 1901, p. 104 and JPS, volume 18, 1909, pp. 4-5. cited in Hilary and John Mitchell, *Te Tau Ihu O Te Waka-A History of Maori of Nelson and Marlborough, Volume 1: Te Tangata me Te Whenua-The People and the Land*, Wellington: Huia Publishers, 2004, p. 147.

¹³³ J. D. Peart, *Old Tasman Bay*, Nelson: R. Lucas & Son Ltd, 1937, p. 16.

¹³⁴ Nelson Minute Book 1, p. 23.

¹³⁵ Angela Ballara, *Taua-Musket Wars, Land Wars or Tikanga-Warfare In Maori Society In The Early Nineteenth Century*, Auckland: Penguin Books, 2003, p. 391.

¹³⁶ Ballara, *Iwi*, p. 260.

¹³⁷ Nelson Minute Book 1, p. 67.

decision had a considerable influence on the make-up of Ngati Kuia. With no place to go, 'Ngati Tumatakokiri' permanently relocated to Te Hoiere taking up residence on reservations set up under the 1856 Ngati Kuia Deed of Sale.¹³⁸ As a consequence of the inevitable marriages between Ngati Kuia and hapu from the west a new identity emerged. 'Ngati Kuia' took on another, broader meaning. Ballara notes that 'in the 19th century changing settlement patterns promoted a new coalescence among kin groups with the consequent disappearance of small hapu'.¹³⁹ E. T. Durie similarly writes that 'numerous hapu names recorded in the 19th century have fallen into disuse but the disappearance of a name does not evidence group extermination, only a name change'.¹⁴⁰ Thus when asked if it was Ngati Kuia who met Tasman in 1642 kaumatua have replied in much the same way: 'Of course it was us! Who else would it have been? We have always been here!'¹⁴¹

Following Tasman Ngati Kuia did not see another European for over 130 years. During this time Europe was preoccupied with 'endemic wars and colonial struggles elsewhere'.¹⁴² Out of the ashes rose the English and the French.¹⁴³ Throughout the eighteenth century, even amidst the turmoil of war, science prevailed as a unifying force. In 1761 the Paris Academy and the Royal Society embarked on a project to observe the transit of Venus. Its purpose was to measure the distance between Earth and the sun. The results were inconclusive and another project to observe the transit was planned for 1769 at Tahiti. In the preparatory stages a former hydrographer with the English East Company, Alexander Dalrymple, urged the Royal Society to continue the search for Terra Australis Incognita.¹⁴⁴ Thus on completion of their task in Tahiti the expedition headed south and on 15 January 1770 sailed into Totaranui, anchoring at what is now called Ships Cove.¹⁴⁵

Cook was well briefed prior to his departure. On board the *Endeavour* was an 'extensive and eclectic' library containing maps, poetry, classic texts, and volumes to help identify plants, fish and other animals. Moreover descriptions of earlier European voyages, including a translation of

¹³⁸ The 1856 Deed will be discussed in more detail later in this chapter. It should be noted however that although now residing in the Ngati Kuia rohe these people continued to live together at the Orakauhamu reservation (commonly known as Ruapaka) in the Pelorus Valley.

¹³⁹ Ballara, *Iwi*, p. 250.

¹⁴⁰ E. T. Durie, 'Custom Law', p. 17.

¹⁴¹ This is a question that I have asked numerous times over a number of years.

¹⁴² Salmond, *Two Worlds*, p. 95.

¹⁴³ Salmond, *Two Worlds*, p. 94.

¹⁴⁴ Salmond, *Two Worlds*, p. 98

¹⁴⁵ Salmond, *Two Worlds*, p. 241.

Tasman's, were at hand.¹⁴⁶ The scientific nature of the expedition was reflected in the ship's personnel who included an astronomer, a botanical draughtsman, a landscape artist, and a botanist.¹⁴⁷ Indeed the enlightenment spirit ensured that like Tasman's voyage, the physical environment, bird and plant life and the habits of the Maori would be observed and documented. Cook wrote that the people of the Sounds:

Live disperse'd along the shore in search of their daily bread,
which is fish and firn roots, for they cultivate no part of the
lands...this people are poor when compared to many we have
seen, and their canoes are mean and without ornament.¹⁴⁸

Also of fascination to the Englishmen was the act of cannibalism, and as Salmond notes many of the journals kept by the crew record such incidents.¹⁴⁹ Joseph Banks, for instance, having found a family eating human meat stated that Maori were irrational and driven by a 'thirst for revenge'.¹⁵⁰

Cook returned to New Zealand on two further expeditions, each time calling into Ships Cove. The identity of those people he encountered is again uncertain. Hilary and John Mitchell note that although the names of individuals have been recorded in various journals and diaries no reference is made to their tribal affiliations.¹⁵¹ It is for certain, however, that some of those people present at the time of Cook's visits were Ngati Kuia or were at least one of the set of hapu that would eventually coalesce under the name Ngati Kuia.

In 1820 two Russian Navy ships commanded by F.F. Bellingshausen, not by chance, called at Queen Charlotte Sound. D.R. Simmons writes that the 'spirit of Cook and the scientific emphases of his voyages were guiding lights'.¹⁵² As was the case with Cook and Tasman the local inhabitants were observed and documented. Ivan Mikhaylovich Simonov, the expeditionary astronomer, wrote of the local people:

¹⁴⁶ Salmond, *Two Worlds*, p. 102.

¹⁴⁷ Salmond, *Two Worlds*, p. 105.

¹⁴⁸ cited in A.D. McIntosh, *Marlborough-A Provincial History*, Christchurch: Whitcombe & Tombs Ltd, 1940, p. 10.

¹⁴⁹ Salmond, *Two Worlds*, p. 244.

¹⁵⁰ cited in Anne Salmond, *The Trail of the Cannibal Dog-Captain Cook in the South Seas*, London: Penguin Books, 2003, p. 143

¹⁵¹ Hilary and John Mitchell, *Te Tau Ihu O Te Waka-A History of Maori of Nelson and Marlborough, Volume 1-The People and The Land*, Wellington: Huia Publishers, 2004, p. 187.

¹⁵² D.R. Simmons, in *Queen Charlotte Sound-New Zealand-The Traditional and European Records*, Glynn Barratt ed., Ottawa: Carleton University Press, 1987, p. 44-45.

They showed much animation and a fire full of martial spirit shone in their eyes... We, for our part, were well aware of their treacherous nature and so went ashore and visited their dwelling places only under armed escort.¹⁵³

Twenty years later on 17 August 1839 the *Tory*, the flagship of the New Zealand Company, anchored in Ships Cove.¹⁵⁴ By now it had become almost customary for any European expedition to call here. As with previous expeditions the Company was well versed in the 'observations' of its predecessors. On 18 August E. J. Wakefield wrote:

Rich historical recollections crowded on my mind as I tried to fix on the exact spot where Cook's forge and carpenter's shop had stood; and I was only roused from my reverie by the arrival of some more of the party, bent on the same object.¹⁵⁵

The objectives of the expedition were the purchase of lands for the Company, the acquisition of general information as to the country, and preparation for the formation of settlements. Colonel Wakefield, the Company's Principal Agent, was informed that he should stop at Entry Island as this was 'the seat of the tribe to which...both sides of Cook Strait belong'. He was also informed that useful information could be obtained from permanent residents such as whalers.¹⁵⁶ In this regard Dicky Barrett proved to be influential. E.J. Wakefield writes that from Barrett they learnt 'the country had been conquered about fourteen years before by the Kawhia tribe [the Ngatitōa]. They had almost exterminated the Muaupoko, Rangitane, and Ngatiapa, who were the original occupiers'.¹⁵⁷

Barrett's role in the events that were to later transpire cannot be overstated. He, like other whalers in the Cook Strait region, had married Ngati Toa or Te Atiawa women and lived there under the protection of these tribes. As recent arrivals one cannot expect Barrett's informants to be familiar with the numerous tangata whenua hapu, thus accounting for Ngati Kuia's non-identification. As Ballara rightly notes, blanket labels were often given when informants were discussing areas other than their own.¹⁵⁸

¹⁵³ cited in Barratt, 'Ivan Mikhaylovich as an informant for the 1820 visit to Queen Charlotte Sound', p.13

¹⁵⁴ E.J. Wakefield, *Adventure in New Zealand*, Auckland: Golden Press, 1975, p. 6.

¹⁵⁵ Wakefield, *Adventure in New Zealand*, p. 7.

¹⁵⁶ Alexander Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, Wellington, 1873, p. 50.

¹⁵⁷ Wakefield, *Adventure in New Zealand*, p. 14.

¹⁵⁸ Ballara, *Iwi*, p. 69.

Furthermore it is likely that Barrett would have been told about the fighting—and the many victories—from his patrons. Thus in 1839 when the New Zealand Company began entering into negotiations to purchase land in Te Tau Ihu they did so with the ‘conquering’ tribes. It is important to note here that the deeds of sale were drafted by Barrett, and were, according to G.A. Phillipson, made the ‘basis’ of later transactions.¹⁵⁹

With the arrival in New Zealand of William Hobson on 29 January 1840, however, the Company’s purchases were temporarily revoked until a formal inquiry could investigate their validity.¹⁶⁰ The British Colonial Office was well aware of the New Zealand Company’s activities. In May 1837 the Company, then known as the New Zealand Association, held its inaugural meeting. As part of its plan to colonise New Zealand it sought Parliamentary approval to begin negotiations with Maori and a Bill was drawn up to this effect. A battle ensued between the various ‘interest’ groups. Lord Glenelg, Secretary of State for Colonies and an evangelical humanitarian, believed that the granting of rights in New Zealand, prior to gaining Maori consent, would result in an injustice. The Association, however, had influential friends and the government granted it a Crown charter. The Association later refused the charter and in the middle of 1838 went into a ‘period of quiescence’. It was significant that ‘official policy now accepted colonisation in principle.’¹⁶¹ Opinions differed as to what form it should take, but there was a consensus that intervention was ‘both necessary and desirable’. The question was whose interests would take priority: Maori or British?¹⁶² Groups could be found at either end of the continuum, while others such as the Aborigines Protection Society attempted to reconcile the interests of both.¹⁶³

The government’s hand was soon forced. Throughout 1838 the British attitude towards New Zealand changed. Colonisation was now seen as inevitable.¹⁶⁴ The New Zealand Association, now known as the New Zealand Company, and other colonisation schemes were under way. In February 1839 Lord Normanby replaced Glenelg. While the new Secretary favoured colonisation, the issue of Maori

¹⁵⁹ G.A. Phillipson, ‘Northern South Island District Report (District 13)’, Waitangi Tribunal: Rangahaua Whanui Series, Working Paper: First Release, June 1995, p. 45.

¹⁶⁰ S. K. L. Campbell, ‘A Living People-Ngati Kuia and the Crown, 1840-1856’, A Report Commissioned by Crown Forestry Rental Trust, March 2000, p. 93.

¹⁶¹ Claudia Orange, *The Treaty of Waitangi*, Wellington: Bridget Williams Books, 1987, pp. 25-26.

¹⁶² Orange, *The Treaty of Waitangi*, pp. 26-27.

¹⁶³ Orange, *The Treaty of Waitangi*, p. 27.

¹⁶⁴ Orange, *The Treaty of Waitangi*, p. 27.

sovereignty remained a constant concern. Aware of the government's intentions the Company dispatched the *Tory* on 12 May to make its first land purchase. Orange writes that 'the success of the venture hung on the Company forcing the British government to accept its land claims as a fait accompli'.¹⁶⁵

In August 1839 Hobson left for New Zealand empowered with the authority to acquire sovereignty over any lands that Maori wished to cede.¹⁶⁶ The history of the Treaty of Waitangi has been traversed by numerous others and it is not my intention to do so here. It should be noted, however, that the Treaty was signed at three different locations in Te Tau Ihu: at Queen Charlotte Sound on 4-5 May; at Rangitoto Island on 11 May; and at Cloudy Bay on 17 June 1840.¹⁶⁷ Significantly Ngati Kuia did not sign the Treaty, perhaps because it was never brought to Te Hoiere. Moreover, in its engagements with the Crown Ngati Kuia tupuna made little mention of it. Nevertheless Ngati Kuia, during its Waitangi Tribunal hearing, argued that Ihaia Kaikoura had signed the Treaty at Cloudy Bay on their behalf. However Ihaia, strictly speaking, is part of the Rangitane grouping of hapu viz. Ngati Hapairangi and Ngati Huataki. Declaring a connection to a Treaty signatory should be seen merely as move to help legitimate a claim to rights through the only process available to Ngati Kuia.

With British sovereignty in New Zealand confirmed, pre-Treaty land transactions were to be investigated, and in December 1840 the Colonial Office appointed William Spain as Commissioner. Spain began by dispatching his interpreter Mr Meurant to Nelson where he spoke to the 'different tribes or families immediately interested'.¹⁶⁸ The Commission began hearing evidence on 20 August 1844. In his report Spain stated that when dealing with the 'aborigines...the rights of the actual occupants must be acknowledged and extinguished before any title can be fairly obtained'. Moreover, he stated that right holders not only included 'conquerors' but also 'the original unsubdued proprietors' and 'captives who have been permitted to re-occupy their land on sufferance'.¹⁶⁹ Yet he later wrote, 'the tribe Rangitane, the original occupants, is reduced to a mere remnant, living in the interior without any fixed dwelling-places'.¹⁷⁰

¹⁶⁵ Orange, *The Treaty of Waitangi*, p. 28.

¹⁶⁶ Orange, *The Treaty of Waitangi*, p. 29.

¹⁶⁷ Orange, *The Treaty of Waitangi*, p. 62.

¹⁶⁸ Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, p. 55.

¹⁶⁹ Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, p. 58.

¹⁷⁰ Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, p. 59.

The net result was that Ngati Rarua, Ngati Tama, and Te Atiawa signed deeds of release and received compensation,¹⁷¹ while the New Zealand Company was awarded a Crown grant of 151,000 acres.¹⁷² Ngati Kuia on the other hand received nothing. Phillipson comments that Spain's mission was not just a case of invalidating what were 'unfair or faulty contracts', rather an 'amicable adjustment' was the desired outcome. Such an approach, thought Spain, would benefit both Maori and settler.¹⁷³ Unfortunately for Ngati Kuia they did participate in the original New Zealand Company purchases, and the Crown's benevolence did not extend so far as to include them in any 'amicable adjustment'.

Between 1853 and 1856 the Crown signed fifteen deeds of sale with Te Tau Ihu Maori. The 'Waipounamu Purchase' was the last major attempt to extinguish Maori customary title in the northern South Island. Significantly this was the first time that Ngati Kuia had been acknowledged by the Crown as having rights. This change can be attributed to the Crown's policy of extinguishment but it was also a response to Ngati Kuia's protesting their exclusion from earlier land purchases. In 1851 Ngati Kuia interrupted the construction of a road linking the Wairau with Whakatu.¹⁷⁴ On 16 February 1856 Ngati Kuia signed the Ngati Kuia and Rangitane Deed of Sale in which it was purported signatories sold for £100 '...all our lands in this Island, with all the places at the Kaituna, and the Hoiere and all other places to which we have any right...'.¹⁷⁵ While the prospect of European trade¹⁷⁶ and the promise of schools and hospitals would have helped in gaining Ngati Kuia consent.¹⁷⁷ But as the last cab off the rank Ngati Kuia's acquiescence was essentially a fait accompli.

The alienation of Ngati Kuia lands during the nineteenth century increased the importance of other resources. In 1883 Ngati Kuia filed an application in the Maori Land Court to determine ownership of Nukuwaiata, Te Kakaho, and Te Paruparu.¹⁷⁸ These places were significant food gathering areas, particularly for titi, while the foreshore and seabed

¹⁷¹ Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, pp. 67-68

¹⁷² Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, p. 60.

¹⁷³ Phillipson, 'Northern South Island District Report (District 13)', p. 67.

¹⁷⁴ Campbell, 'A Living People-Ngati Kuia and the Crown, 1840-1856', p. 146.

¹⁷⁵ Mackay, *A Compendium of Official Documents, relative to Native Affairs in the South Island*, pp. 315-316.

¹⁷⁶ Campbell, 'A Living People-Ngati Kuia and the Crown, 1840-1856', p. 173.

¹⁷⁷ Cybele Locke, 'Ngati Kuia: The Poorest Tribe Under the Heavens-Ngati Kuia's Socio-Economic Circumstances 1856-1950', A report commissioned by Crown Forestry Rental Trust, October, 2001, p.7.

¹⁷⁸ *New Zealand Gazette*, 16 August 1883, pp. 1185-1186

surrounding Te Kakaho was an important fishing ground. However, the Court dismissed the claims stating that title to the islands had been extinguished by the 1856 Deed.¹⁷⁹ Nevertheless it does indicate that Ngati Kuia believed they had retained rights to the foreshore and seabed and other important food gathering areas. Ngati Kuia's opportunity to regain these mahinga kai diminished further when Motungarara (Titi Island) was reserved for the preservation of native flora and fauna in 1901. In 1904 Nukuwaiata was reserved for the preservation of scenery, as was Te Kakaho in 1934.¹⁸⁰

In 1913 a number of Ngati Kuia kaumatua contributed money to a fund used to hire John McGrath, a Wellington lawyer. McGrath was tasked with the job of investigating Ngati Kuia's titi harvesting rights.¹⁸¹ In 1919 an agreement was signed between Ngati Kuia and the Crown which granted 'the local Maoris, rights to take mutton-birds from certain Islands in the Cook Strait'¹⁸² (in particular Titi Island). Every year the island's trustees were required to write to the Commissioner of Crown Lands informing him of the day on which harvesting would commence. Following this the Crown would issue a permit authorising the taking of birds. But as time wore on permits were being issued less frequently. In September 1959 the Commissioner of Crown Lands informed Wiremu Waaka that following a recent inspection, the Internal Affairs Department had concerns about the declining bird population. The Commissioner thus told Ngati Kuia that in the 'meantime' no more permits would be issued.¹⁸³ Ngati Kuia did, however, respond to such assertions. In 1961 S. Mason and P. Walker wrote to the Commissioner of Crown Lands requesting permission to resume harvesting. They informed the Commissioner that they had inspected the island and that in their opinion—based on 'many years of association' with the island—there were 'ample mutton birds...worth taking'.¹⁸⁴ Today Ngati Kuia is still unable to harvest mutton birds from Titi Island.

Mutton birding was an important cultural practice that reinforced tribal identity and mana. The harvest took place

¹⁷⁹ Nelson Minute Book 1, p. 1.

¹⁸⁰ Letter from the Commissioner of Crown Lands to the Director General, 22 June 1959. (Ngati Kuia Archives)

¹⁸¹ Meihana Manuscript, p. 19.

¹⁸² Letter from the Commissioner of Crown Lands to the Under-Secretary for Lands, 18 September 1933. (Ngati Kuia Archives)

¹⁸³ Letter from the Commissioner of Crown Lands to Wiremu Waaka 2 September 1959. (Ngati Kuia Archives)

¹⁸⁴ Letter from S. Mason and P. Walker to the Commissioner of Crown Lands, 20 February 1961. (Ngati Kuia Archives)

in March usually over a weekend. Waihaere Mason¹⁸⁵ remembers that as a child Ngati Kuia families would meet at Havelock on the Friday night. The women and children would go to the local movie theatre while the men would go to the local hotel. When the movies had finished everybody would walk down to the wharf from where they would boat down to the island.¹⁸⁶ Sharon Smith,¹⁸⁷ who lived at Okoha until 1967, recalls that it was only the men and the boys that collected the birds. The women remained on the beach catching cod from the landing and cooking food in kerosene tins.¹⁸⁸ Once the harvest was completed people would return home. Those travelling to Havelock would stop at Pipi Beach in the inner Pelorus Sound, here titi and fish were divided up into family allotments.¹⁸⁹ Although the official records show that the harvesting of mutton birds took place over two days, Okoha residents followed their own 'calendar'.¹⁹⁰ It is remembered that one Empson Mason (Te Mutini Meihana) would take mutton birds when the need arose.

Titi Island presents itself as a site where worldviews and in particular conservation values meet. The creation of protected areas according to Hodge 'has evolved over the millennia in Western culture into a number of forms'.¹⁹¹ In the United States during the mid nineteenth century wilderness activities became popular and wilderness areas came to represent national identity and were entwined with ideas of public ownership.¹⁹² Also connected to the idea of wilderness is that of the nature sanctuary, itself an extension of the Judeo-Christian notion of refuge in a church or temple.¹⁹³ It is from this context that the New Zealand conservation estate grew. According to Fiona McLeod it is considered by many to be the heritage of all New Zealanders, it is a place of cultural and spiritual significance where people can retreat for 'recreational or contemplative purposes', and its preservation is best realised through public ownership via the vesting of such lands in the Crown.¹⁹⁴

In New Zealand the beach has also come to occupy a significant place in the psyche of Pakeha New Zealand. In an

¹⁸⁵ Waihaere Mason is a trustee of Te Runanga o Ngati Kuia.

¹⁸⁶ Waihaere Mason, wananga, 19/2/2006

¹⁸⁷ Sharon Smith is a trustee of Te Runanga o Ngati Kuia.

¹⁸⁸ Sharon Smith, wananga, 19/2/2006

¹⁸⁹ Waihaere Mason, wananga, 19/2/2006

¹⁹⁰ Sharon Smith, wananga, 19/2/2006

¹⁹¹ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p.259.

¹⁹² Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 260.

¹⁹³ Hodge, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna 1840-1912*, p. 261.

¹⁹⁴ Fiona McLeod, 'Conservation and Culture in New Zealand', Honours Thesis, University of Auckland, 1996, pp. 10-11.

essay entitled ‘More Than Sand: Theorising the Beach’, Steve Matthewman writes that while the beach is a littoral zone it is also a ‘liminal zone’ where new identities are formed. It is a place ‘literally awash with meaning’.¹⁹⁵ It is here, writes Stephen Turner, that ‘Pakeha truly find themselves’:

Since Captain Cook’s remarkable running-map of the country on his first voyage to the Pacific...going to the beach has become an important form of acculturation for Pakeha—not just an enjoyable activity, but one that acknowledges a common culture.¹⁹⁶

While the beach is distinct from the foreshore and seabed both notions became conflated in the debates following the Court of Appeal’s decision in *Ngati Apa*. In doing so, by appealing to the western cultural memory, the Crown was able to influence the dominant discourse, and thus the eventual outcome. I discuss this in more detail in the final chapter.

Evolving Knowledge of Ngati Kuia

Since the time of Tasman an inventory of knowledge relating to Ngati Kuia has been steadily collated. As intelligence gathering became more sophisticated the ‘Southlander’/ ‘barbarian’/ ‘savage’ became the ‘conquerors’/ ‘conquered’/ ‘Rangitane’. This provided a knowledge base for further colonisation. But such descriptions also reflected the worldview of the observer. European superiority was self-evident. Intelligence gathering operated to confirm what was already in fact known. Moreover, the act of observing placed the observer in a position of power. What was observed was mediated through rational and scientific methodologies that merely maintained the positional superiority of the coloniser. Colonial discourse then, because it is rooted in ‘fact’, is invariably laden with power. Through mechanisms such as the Spain Commission and the Maori Land Court, institutions that supposedly deal with facts, such power has manifested itself in the dispossession of Ngati Kuia.

A theme that emerges in the colonising story of New Zealand is one where ‘facts’ can be ignored if they are antithetical to

¹⁹⁵ Steve Matthewman, ‘More Than Sand: Theorising The Beach’, in *Cultural Studies In Aotearoa New Zealand-Identity, Space, And Place*, ed. Claudia Bell and Steve Matthewman, South Melbourne: Oxford University Press, 2004, p. 36.

¹⁹⁶ Stephen Turner, cited in ‘More Than Sand: Theorising The Beach’, in *Cultural Studies In Aotearoa New Zealand-Identity, Space, And Place*, p. 46.

the 'needs' of the dominant culture. The British Colonial Office, while aware of the arguments against colonisation proceeded henceforth, and although it tried to protect Maori the 'needs' of the settlers soon outweighed any humanitarian concerns. Alan Ward writes that colonisation in New Zealand 'was substantially an imperial subjugation of a native people, for the benefit of the conquering race', and as with other examples of European imperialism 'notions of white supremacy and racial prejudice... were very much in evidence'.¹⁹⁷ This writes Paterson, 'coupled with a nationalistic self-confidence, allowed many Britons to develop a belief in their own racial superiority'. During the mid-nineteenth century many settlers believed that Maori too could benefit from civilisation; they 'merely needed to be exposed' to it.¹⁹⁸ Colonisation then, for the most part, has operated under the illusion that what is good for the colony was also good for Maori. And while Ngati Kuia has actively engaged with 'civilisation', and in some instances may have even benefited, they have nevertheless been severely disadvantaged. In the pages that follow it will be argued that nothing much has changed, Ngati Kuia are still making concessions so that the 'needs' of the dominant culture can be met.

A number of criticisms may be levelled at this analysis. It could be argued that it conceives of colonisation as a process of binary interaction that essentialises both the coloniser and the colonised. Greg Loveridge states that these essentialisations are 'exacerbated by a fondness for techniques of deconstruction' which have at 'heart' the idea that by removing 'mediated layers of text' the 'true text' will be revealed. He further states that by doing so, that by announcing that something is 'Imperial' or 'Maori' renders both 'static', relegating them to 'acting out their culturally constituted roles'.¹⁹⁹ I would suggest, contrary to Loveridge's arguments, that an essential colonial discourse 'typified by certain features and structures'²⁰⁰ can be identified. In all its guises colonisation was premised on the belief that those doing the colonising had a divine right to rule. How this was done merely highlights Said's notion of positional superiority.

¹⁹⁷ Alan Ward, *A Show of Justice-Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1995, p. 308.

¹⁹⁸ Paterson, *Colonial Discourses-Niuepepa Maori 1855-1863*, p. 90.

¹⁹⁹ Greg Loveridge, 'The Gilfillan Killings-Narrative, Marginality and the Strangeness of the colonial Past', M.A. Thesis, Massey University, 2003, p. 6.

²⁰⁰ Loveridge, 'The Gilfillan Killings-Narrative, Marginality and the Strangeness of the Colonial Past', p. 6.

I mentioned in the introduction to this thesis that recent post-colonial scholarship now suggests colonial encounters take place within the contact zone. In the context of this chapter they include the Spain Commission, the Treaty of Waitangi, the Ngati Kuia Deed of Sale, the Maori Land Court, and Titi Island. According to Giselle Byrnes the contact zone is a place of ‘negotiation, exchange and agency as much as expressions of power’.²⁰¹ However, the contact zone, as I have employed the term here, is constructed by the Crown, a reality that became more obvious as its material power increased during the nineteenth century. As McAloon notes, ‘there was a considerable bureaucracy devoted to the acquisition of Maori land’.²⁰² Furthermore the Crown, via the law, defines the rules of negotiation. And while Ngati Kuia does have some agency it is ultimately confined to that deemed appropriate by the Crown. This will be discussed in the following chapter in relation to the Waitangi Tribunal and the Resource Management Act 1991.

The approach to colonisation proposed by Byrnes and Loveridge poses a problem for those studying colonisation. In her study of surveying in New Zealand Byrnes writes that they (the surveyors) ‘colonised the land through language, literally inscribing it with new meanings and new ways of seeing’.²⁰³ Her study provides a window on colonisation by focusing on the work of *individual* surveyors. She comments that land surveying was not just ‘an exclusively European (and hence a totally colonising) presence...they were agents of change who were themselves altered by their experiences’.²⁰⁴

Byrnes study, however, operates at the level of the individual. Herein lies the problem. By approaching colonisation in this way it without doubt becomes a complex process, as Loveridge rightly states, because any number of relationships are possible. Byrnes positions the *individual* surveyor at the centre of the colonial encounter producing a different set of readings than would occur if say the Crown, its subordinate institutions, Ngati Kuia, or Maori were positioned here. Although she is attempting to gain a greater understanding of colonisation she is in fact re-inscribing a worldview that promotes the *individual*. But as the previous chapter demonstrated, Ngati Kuia perceives the world from the vista of the group: the whanau, the hapu, and to a lesser

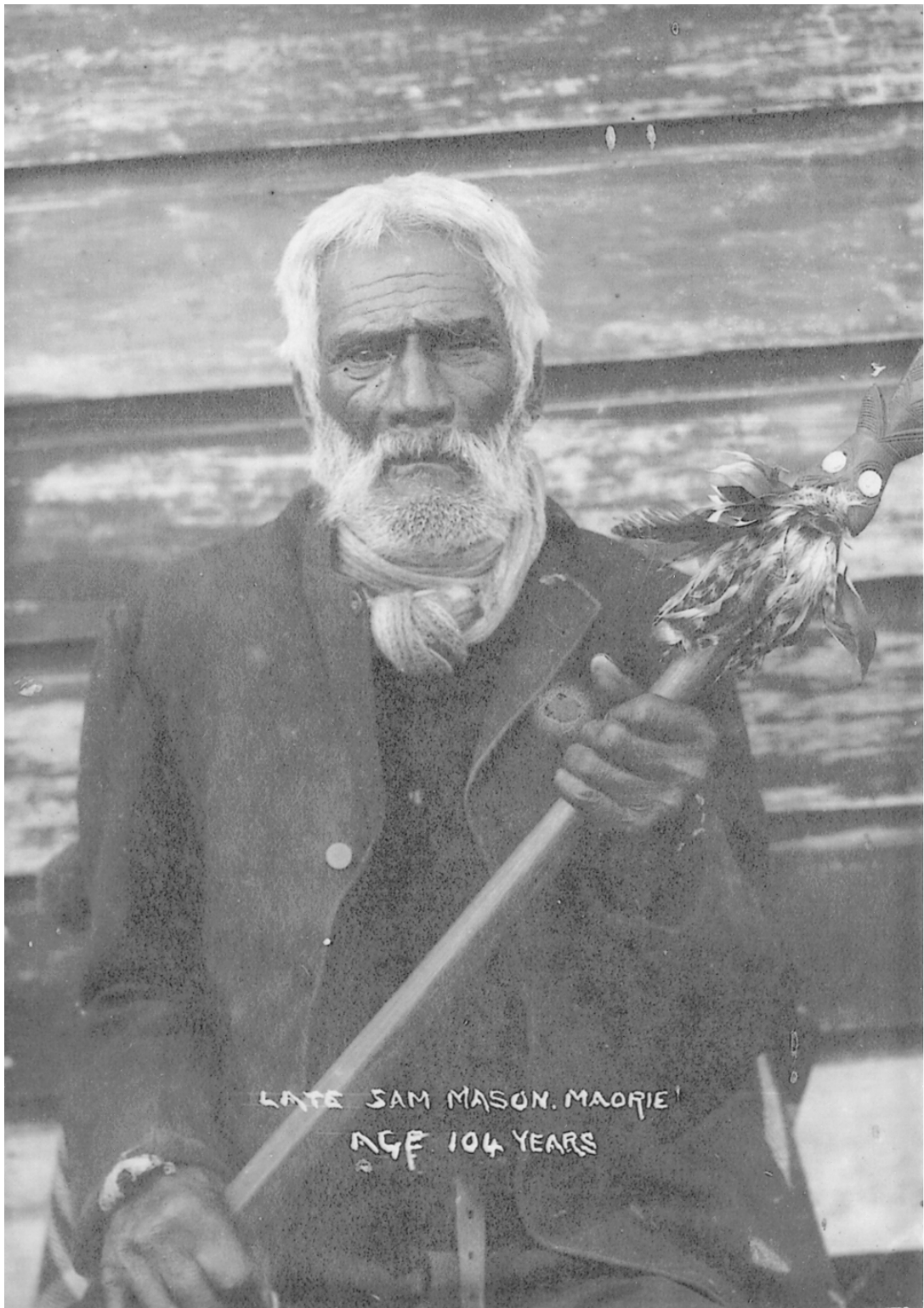
²⁰¹ Giselle Byrnes, *Boundary Markers-Land Surveying and the Colonisation of New Zealand*, Wellington: Bridget Williams Books, 2001, p. 8.

²⁰² Jim McAloon, ‘By Which Standards? History and the Waitangi Tribunal’ in *New Zealand Journal of History*, 40:2, 2006, p. 197.

²⁰³ Byrnes, *Boundary Markers-Land Surveying and the Colonisation of New Zealand*, p. 123.

²⁰⁴ Byrnes, *Boundary Markers-Land Surveying and the Colonisation of New Zealand*, pp. 124-125.

extent the iwi. The individual did not exist outside of these. If colonisation is to be studied the group should be the primary point of departure. This may lead to the essentialisation of the 'other', but as the following chapter will demonstrate, at one level Maori are essentially the same, not essentially barbarian or savage but in that they share a similar worldview.



Meihana Kereopa, author of the Meihana Manuscript.



(Left) Tahuariki Meihana, (son of Meihana Kereopa), continued to make entries in the Meihana Manuscript after the death of his father in 1914. (Right) Te Pou Hemi Whiro, author of the Hemi Manuscript.



(Left) Haromi Walker (nee Kiharoa). (Right) Kipa Hemi Whiro, described by James Cowan as 'the last tohunga and historian of Ngati-Kuia'.

Chapter Three

In the Zone

A significant step in the relationship between Maori and the Crown during the twentieth century was the creation of the Waitangi Tribunal in 1975. Janine Hayward and Nicola R. Wheen write that the Tribunal was the ‘government’s first comprehensive response to over 130 years of Maori protests’.²⁰⁵ As the previous chapters have demonstrated, it was not the only response. However there is little doubt that the Tribunal played an important role in promoting a Maori worldview and helped initiate further debate around the Treaty of Waitangi. Many of the Tribunal’s recommendations were incorporated into the Resource Management Act 1991 (RMA). This piece of legislation provided a mechanism through which Ngati Kuia was able to negotiate with the Marlborough District Council—the Act’s administrating body— about matters relating to marine farming during the mid-1990s. This led to a number of Environmental Court hearings and the eventual lodging of a claim with the Maori Land Court. The Environment Court hearings and the Maori Land Court application form the basis of the next chapter.

This chapter addresses the formation and function of the Waitangi Tribunal and assesses the RMA’s ‘Maori provisions’. It does this by firstly discussing the Maori protest movement of the 1970s and then examines three claims heard by the Tribunal during the 1980s. Although Ngati Kuia was not directly involved in the claims discussed here the eventual outcomes of these proceedings were to impact on Ngati Kuia in other ways. The legislative mechanisms put in place to ‘accommodate’ Maori, such as the RMA, also acted to re-induct Ngati Kuia back into the hegemonic structures of the state. It will also become apparent that those hapu and iwi who brought claims before the Tribunal share with Ngati Kuia a common worldview and that many of the concerns expressed during the hearings related to waterways and foreshore and seabed areas. It

²⁰⁵ Janine Hayward and Nicola R. Wheen, *The Waitangi Tribunal-Te Roopu Whakamana i te Tiriti o Waitangi*, Janine Hayward and Nicola R. Wheen ed., Wellington: Bridget Williams Books Ltd, 2004, p. xv.

should also be noted that claimants viewed the Tribunal as a last resort in their attempt to protect taonga.

This chapter also develops a theme discussed in chapter two. It considers the Tribunal and the RMA as contact zones where worldviews meet. It seeks to demonstrate that as products of a colonising paradigm they continue to do what colonisation has always done. Indeed its *modus operandi* is to maintain the positional superiority of the dominant culture. How it achieves this is subtle, and oblivious to most. Jackson argues that the ‘dominant cultural ethos’ in this country views colonisation as being ‘qualitatively’ different to other colonial encounters. It holds that Maori are ‘better off’ than others, or at least ‘better off’ than the Australian Aborigines.²⁰⁶ This assumption gives colonisation in our South Pacific utopia its durability, and lays bare a facet of colonisation unique to New Zealand. I would also argue that this assumption prevents any meaningful dialogue between Maori and Pakeha taking place. In the context of this chapter the ‘cultural ethos’ asserts that because the Treaty of Waitangi and Maori cultural values have been acknowledged in legislation Maori are somewhat privileged. But as Jackson rightly states, ‘authority and resources taken through deceit or at the point of a gun have the same consequences, the people concerned are no longer in control of their own destiny’.²⁰⁷

Protesting in the Zone

The creation of the Waitangi Tribunal can be seen in part as a legislative response to an increase in Maori protest. And while this can be viewed as a uniquely New Zealand experience—in that the injustices were perpetrated here—it paralleled a global reaction to colonisation. The decolonisation of many former European colonies following the Second World War was accompanied by the questioning of imperialism and colonialism by those who had experienced it. According to Anna Green and Kathleen Troup this ‘invariably entailed the revision or rejection of previous historical accounts which narrated European expansion as

²⁰⁶ Jackson, ‘Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi’, p. 3.

²⁰⁷ Jackson, ‘Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi’, p. 3.

largely unproblematic'.²⁰⁸ Groups such as native peoples and migrant ethnic groups began to assert their identity.²⁰⁹

Aroha Harris writes that while the modern era of Maori protest begun in the late 1960s, there had been a long established tradition of such activity.²¹⁰ Walker states that it 'is not an aberration of times...its genesis goes back to the Treaty of Waitangi in 1840'.²¹¹ Indeed Ngati Kuia had been challenging the state since the middle of the nineteenth century. Harris writes that although protest can be understood in terms of its historical lineage it 'may also be discerned in its own context and space and time'. It was part of the 'protest family' that also included gays and women. Opposition to the Vietnam War, the influence of the American civil rights movement and a youth rebellion against the conservative state-sponsored New Zealand Maori Council and Maori Women's Welfare League helped to shape Maori protest. More immediately however Maori protest was a response to government policy that 'continued the perennial push for assimilation'.²¹²

The protest movement of the 1970s stemmed from an increase in Maori urbanisation and education. Walker writes that the 'urban experience' resulted in an increased knowledge of the 'alienating culture'.²¹³ A new Maori leadership emerged that, according to Orange, was able to better articulate grievances and invoke a response from Pakeha.²¹⁴ From the early 1970s Nga Tamatoa became the 'public face' of the Maori protest movement. They launched a campaign to have Te Reo Maori taught in schools, made submissions to parliament and protested a Government initiated celebration of the Treaty of Waitangi in 1971.²¹⁵ Andrew Sharp writes that this took Pakeha New Zealand by surprise. It challenged the myth that the story of race relations in New Zealand was one of peace and harmony.²¹⁶

By way of a response to Maori protest the Labour government sought advice from the New Zealand Maori Council. In its submission the Council cited fourteen

²⁰⁸ Green and Troup, *The Houses of History-A Critical Reader in Twentieth-Century History and Theory*, p. 278.

²⁰⁹ Spoonley, *Racism and Ethnicity*, p. 37.

²¹⁰ Aroha Harris, *Hikoi-Forty Years of Maori Protest*, Wellington: Huia Publishers, 2004, p. 13.

²¹¹ Ranginui Walker, 'The Genesis of Maori Activism' in *Journal of the Polynesian Society*, volume 95, 1984, p. 280.

²¹² Harris, *Hikoi-Forty Years of Maori Protest*, p. 15.

²¹³ Walker, 'The Genesis of Maori Activism', p. 275.

²¹⁴ Orange, *The Treaty of Waitangi*, p. 245.

²¹⁵ Walker, *Ka Whawhai Tonu Matou*, p. 211.

²¹⁶ Andrew Sharp, *Justice and the Maori-Maori Claims in New Zealand Political Argument in the 1980s*, Auckland: Oxford University Press, 1990, pp. 6-7.

statutes that it argued breached Article Two of the Treaty of Waitangi. Walker states that the Council's submission 'both substantiated and complemented the protest action of Tamatoa'.²¹⁷ The government consequently passed the Treaty of Waitangi Act 1975 that brought into existence the Waitangi Tribunal. Michael Belgrave writes that although Maori had long cited the Treaty when it was perceived that the Crown had contravened its provisions, it was not until the passing of the Treaty of Waitangi Act 1975 that the Treaty could be used as a test by which Crown policy could be measured.²¹⁸ The preamble of the Act provides an outline of its primary function.

An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.²¹⁹

The first claims to be heard by the Tribunal were the Ngati Whatua Fisheries Regulations Claim and the Waiau Pa Power Station Claim. Neither resulted in any recommendations being made to government giving substance to suspicions that the Tribunal was just a 'token gesture'.²²⁰ However after the Tribunal released its Motunui-Waitara Report in 1983 Maori confidence in the Tribunal began to grow.

The Motunui-Waitara claim was presided over by E.T. Durie. His appointment as chairperson resulted in some changes in the way that the Tribunal operated, Belgrave argues that his determination to promote Maori perspectives produced 'inimitable' reports.²²¹ The original Motunui Claim was lodged with the Waitangi Tribunal by Aila Taylor on behalf of Te Atiawa on 4 June 1981.²²² Taylor argued that the untreated sewage and industrial waste from the planned Synfuels plant would pollute the traditional fisheries of Te Atiawa.²²³ The hearing was held at Manukorihi Marae in New Plymouth where Te Atiawa protocols were observed. In this way the Tribunal felt Maori could more easily 'express their feelings and make their concerns known'.²²⁴

²¹⁷ Walker, *Ka Whawhai Tonu Matou*, p. 212.

²¹⁸ Michael Belgrave, *Historical Frictions- Maori Claims & Reinvented Histories*, Auckland: Auckland University Press, 2005, p. 40.

²¹⁹ Cited in Janine Hayward and Nicola R. Wheen ed., *The Waitangi Tribunal-Te Roopu Whakamana i Te Tiriti o Waitangi*, Appendix 2, p. 210.

²²⁰ Walker, *Ka Whawhai Tonu Matou*, p. 245.

²²¹ Belgrave, *Historical Frictions- Maori Claims & Reinvented Histories*, pp. 6-7.

²²² *Motunui Waitara Report*, Waitangi Tribunal, Wai 6, 1983, p. 2.1. Electronic version, retrieved 5/7/2005 from <http://www.knowledge-basket.co.nz/oldwaitangi/text/wai006/0601.html>

²²³ *Motunui Waitara Report*, A1, Appendix 1

²²⁴ *Motunui Waitara Report*, p. 3.4.

The hearing gave Te Atiawa the opportunity to tell their history and of their connection to the reefs. They related to the Tribunal how the reefs were created and how they acquired their names. The Tribunal were also informed which hapu were associated with the different reefs and the customs attached to their regulation and control. The Tribunal acknowledged that the reefs played an important role in ‘recording and transmitting cultural values’. They were not only a source of food but a source of ‘tribal pride and prestige’ and that mana was maintained through the process of manakitanga.²²⁵

Consequently the Tribunal found that the proposed outfall would prejudicially affect Te Atiawa.²²⁶ In their opinion the Crown had an obligation under the Treaty of Waitangi to protect the Maori people to the fullest extent practicable. The Tribunal pointed out that the Treaty of Waitangi in both the Maori and English texts provided for this promise. It stated that protection not only meant the physical protection of the fishing grounds, it also meant the recognition of Maori in the use and control of resources according to their own custom. The Tribunal also found that the use of ‘exclusive’ in Article Two of the English text did not necessarily mean that the hapu most associated with a particular fishing ground had an exclusive use right,²²⁷ and nor did Te Atiawa claim one.²²⁸

The Tribunal thus recommended that the proposed outfall be stopped. It also made a number of other recommendations that included an amendment to the Maori Affairs Act 1953 that would allow the Maori Land Court, upon application, the authority to gazette Maori Fishing Ground Reservations. Further to this it recommended that an inter-departmental committee be set up to draft amending legislation to provide for the reservation and control of fishing grounds and recognition of them in regulatory and planning legislation.²²⁹

The Motunui-Waitara Report was the first to gain a positive response from the then National government who eventually abandoned the project. Interestingly, following the release of the Motunui-Waitara Report the government indicated that it would ignore the report but pressure from the public and

²²⁵ *Motunui Waitara Report*, pp. 4.1-4.5.

²²⁶ *Motunui Waitara Report*, p. 11.1

²²⁷ *Motunui Waitara Report*, p. 11.2

²²⁸ *Motunui Waitara Report*, p. 12.1

²²⁹ *Motunui Waitara Report*, p. 12.4

the media forced it to concede.²³⁰ Mason Durie comments it was at this time that the Tribunal ‘stood out as a powerful voice for the conservation movement’.²³¹ However, Nicola R. Wheen and Jacinta Ruru observe that support was only forthcoming when recommendations did not question public ownership.²³²

Motivated by similar concerns Ngati Pikiao lodged a claim with the Waitangi Tribunal on 30 January 1978. They asked that a proposed nutrient pipeline to the Kaituna River be halted²³³ and on 23 July 1984 the Tribunal began its investigation at Te Takinga Marae near Rotorua. Like Te Atiawa, the history of Ngati Pikiao is woven into the land and many esteemed kaumatua gave evidence to this effect.²³⁴ The river and the Maketu Estuary are an important food source and central to Ngati Pikiao’s tribal identity. Generations had been fed by fish, shellfish, eels, and koura gathered there.²³⁵

During the proceedings strong objections were made to the mixing of water contaminated with human waste and that used in the preparation of food.²³⁶ Alec Wilson of Ngati Whakauae, the then Acting Chairman of the Te Arawa Trust Board, told the Tribunal that ‘it was too late for us...the only fish in the lake is trout...this is our last stand...it was a gleam of hope for us when the Waitangi Tribunal was formed.’²³⁷ It was made clear by Ngati Pikiao that if the proposed discharge was to proceed then a tapu would have to be placed on the river.²³⁸

The Tribunal recommended the construction of the pipeline be abandoned and that research be undertaken to explore the possibility of discharging the effluent on land. Moreover, a broader recommendation was made that the Water and Soil Conservation Act 1967 and related legislation be amended so that Maori spiritual and cultural values be taken into account by Regional Water Boards and the Planning Tribunal

²³⁰ Paul Hamer, ‘A Quarter-century of the Waitangi Tribunal-Responding to the Challenge’ in *The Waitangi Tribunal-Te Roopu Whakamana i Te Tiriti o Waitangi*, ed. Janine Hayward and Nicola R. Wheen, Wellington: Bridget Williams Books, 2004, p. 5.

²³¹ Mason Durie, *Te Mana, Te Kawanatanga*, p. 27.

²³² Nicola R. Wheen and Jacinta Ruru, ‘The Environmental Reports’, in *The Waitangi Tribunal-Te Roopu Whakamana i Te Tiriti o Waitangi*, ed. Janine Hayward and Nicola R. Wheen, Wellington: Bridget Williams Books, 2004, p. 98.

²³³ *Kaituna River Report*, Waitangi Tribunal, Wai 4, p. 1.1. Electronic version, retrieved 5/7/2005 from <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=32147734-26C7-4D5E-812C-2DA77AC2A578&chapter=1>

²³⁴ *Kaituna River Report*, pp. 3.1-3.22

²³⁵ *Kaituna River Report*, p. 3.5

²³⁶ *Kaituna River Report*, p. 3.11

²³⁷ *Kaituna River Report*, p. 3.20

²³⁸ *Kaituna River Report*, p. 3.12

when considering applications concerning the granting of water rights.²³⁹ Following the release of the Kaituna River Report the Crown scrapped the proposed pipeline and agreed to support land based sewage dispersal.²⁴⁰

In July 1984 the Waitangi Tribunal heard a claim lodged by Nganeko Minhinnick on behalf of Te Puaha ki Manuka, a section of the Waikato-Tainui confederation.²⁴¹ At the time of the claim it was the 'most wide-ranging' that the Tribunal had heard. It related to the loss of lands surrounding the Manukau Harbour and the despoliation of the harbour itself. However, according to the Tribunal underlying the claim was 'an enormous sense of grievance, injustice and outrage that continues to haunt the Manukau Maori and bedevil the prospect of harmony in greater Auckland'.²⁴²

As with those claims already discussed the connection between the people and the harbour was established through whakapapa and tradition. It was, for instance, stated by Ngati Tamaoho that they were the descendents of Papaka of the Tainui waka. He had been dropped off in the middle of the harbour and made his way to a sand bar where he survived on kai moana. Over time he became half man and half crab and his descendents later left the water and intermarried with the local people. It was quite rightly claimed that 'the Manukau not only belongs to us but we to it. We are a people begotten from within the depths of its waters'.²⁴³

Like the Kaituna River and Maketu estuary, the Manukau Harbour is a renowned mahinga kai. Quoting the Harbour Plan the Tribunal noted that it supplied Waikato Marae from Mangere to Ngaruawahia, the head quarters of the Maori Queen. Seafood from the harbour was given to visiting dignitaries as an expression of hospitality while a contribution of seafood to the Queen was seen as an expression of ones loyalty. Seafood then and thus the harbour are intrinsically linked to tribal mana.²⁴⁴

In its findings the Tribunal concluded that the Treaty of Waitangi guaranteed to Maori the enjoyment, protection, use,

²³⁹ *Kaituna River Report*, pp. 10.1-10.2.3

²⁴⁰ Wheen and Ruru, 'The Environmental Reports', in *The Waitangi Tribunal-Te Roopu Whakamana i Te Tiriti o Waitangi*, p. 98.

²⁴¹ *The Manukau Report*, Report of the Waitangi Tribunal on the Manukau Claim, Wai 8, p. 1.

Electronic version, retrieved 5/7/2005 from <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=D6BBBFAC-EB90-4AEB-9113-8F8D2305BA3F&chapter=1>

²⁴² *The Manukau Report*, p. 01.

²⁴³ *The Manukau Report*, p. 3.2.

²⁴⁴ *The Manukau Report*, p. 6.3.

and ownership of their fisheries and lands. In the case of this claim it was found that the Manukau tribes had been ‘severely prejudiced’ by activities such as waste discharges, land development, reclamations, compulsory acquisitions and commercial fishing. The Crown’s failure to protect the Manukau people against these things was ‘contrary to the principles of the Treaty of Waitangi’.²⁴⁵ The Tribunal recommended that moves be made to improve the coherency in the laws and practices governing the management of rivers and coastal and foreshore areas taking into account both Maori and public sensibilities.²⁴⁶ In regard to Maori fishing rights the Tribunal also recommended that research be undertaken to explore how Maori fisheries ‘might be adequately provided for in legislation, policy and management planning’.²⁴⁷

The claims discussed here provide an insight into the worldview of Te Atiawa, Ngati Pikiāo, and the people of the Manukau Harbour. During the respective claims tangata whenua established a connection to the places affected through the recitation of whakapapa and tradition. The Tribunal acknowledged the importance of coastal areas, waterways, and mahinga kai to Maori. It found that in all the claims pollution would prevent iwi from carrying out its manakitanga obligations and that the ability to control and regulate the use of resources was also an expression of mana.

The Tribunal not only provided claimants with an avenue by which they could tell their story and express their concerns, it also presented an opportunity to bring the Treaty of Waitangi out of the archives. The reports discussed the Treaty in a wider historical context. The Tribunal consulted numerous experts in various disciplines and made reference to the status of treaties in other jurisdictions, stating in its Manukau Report, ‘the overseas experience must cause us to re-think our perception of the Treaty of Waitangi and its significance’.²⁴⁸ In each report the Tribunal defined its jurisdiction, identified the subject of the claim—the taonga—and in turn invoked the Treaty’s promise of protection guaranteed in Article Two. The Tribunal also identified how the claimants had been prejudicially affected by the Crown’s actions and recommended how the prejudice could be removed.

²⁴⁵ *The Manukau Report*, p. 9.2.1

²⁴⁶ *The Manukau Report*, p. 10.1

²⁴⁷ *The Manukau Report*, p. 10.6

²⁴⁸ *The Manukau Report*, p. 10.1

The claims also provided a foundation from which to explore those that followed. Having examined the historical background and text of the Treaty in the *Motunui-Waitara Report* and *Kaituna River Report* it turned its attention in the *Manukau Report* to the development of Treaty principles. Here the Tribunal stated that ‘the Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively protect them’.²⁴⁹ According to Janine Hayward, Treaty principles can evolve, building on those already established, or new principles can be developed to reflect a specific claim.²⁵⁰

The development of Treaty principles has also been controversial. Oliver, in his critique of the Tribunal’s historiography, argues that this practice, while establishing Crown culpability, fails to consider the ‘practicalities’ of establishing an administrative structure that would have ensured a utopian future. Furthermore, it does not acknowledge the ‘distinctiveness’ of the past.²⁵¹ Another criticism directed at the Tribunal’s historiography is that it creates ‘victims’ and ‘villains’.²⁵² Understanding the past in these terms, as discussed in the previous chapter, cannot account for indigenous agency which typified the colonial encounter.

By way of a retort McAloon’s comments in the previous chapter are credible. While there was a lack of any structure to protect Maori rights there was at the same time a ‘considerable bureaucracy’ that was ‘devoted’ to the alienation of Maori land.²⁵³ The existence of that bureaucracy in turn raises questions of agency. In Ngati Kuia’s case it was limited extremely limited. McAloon argues also that rather than ‘imposing present agendas on the past’ the Tribunal is in fact ‘emphasizing’ what was stated and then ‘marginalized’ at the time.²⁵⁴ Moreover, in light of the Foreshore and Seabed Act can the past really be considered ‘distinct’, or is it merely an example of colonisation in the present?

The Treaty of Waitangi gained further recognition in 1986. As part of what Belgrave calls the Fourth Labour Government’s ‘revolutionary transformation of the state’,²⁵⁵

²⁴⁹ *The Manukau Report*, p. 8.3

²⁵⁰ Janine Hayward, ‘Flowing from the Treaty’s Words’, in *The Waitangi Tribunal-Te Roopu Whakamana I te Tiriti o Waitangi*, Janine Hayward and Nicola R. Wheen ed., Wellington: Bridget Williams Books, 2004, p. 30.

²⁵¹ Oliver, ‘The Future Behind Us-The Waitangi Tribunal’s Retrospective Utopia’, p. 20.

²⁵² McAloon, ‘By Which Standards? History and The Waitangi Tribunal’, p. 195.

²⁵³ McAloon, ‘By Which Standards? History and The Waitangi Tribunal’, p. 197.

²⁵⁴ McAloon, ‘By Which Standards? History and The Waitangi Tribunal’, p. 195.

²⁵⁵ Belgrave, *Historical Frictions-Maori Claims & Reinvented Histories*, p. 81.

former state departments were to be corporatised and run as private sector businesses.²⁵⁶ According to Walker the newly formed SOEs ‘were to be possessed of an estate in the form of Crown lands’.²⁵⁷ The New Zealand Maori Council, concerned that lands yet to be investigated by the Waitangi Tribunal would become out of reach, sought a High Court injunction. As a result of the successful legal action the State Owned Enterprises Act was passed,²⁵⁸ section 9 stating that ‘nothing in this Act shall permit the crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi’.²⁵⁹

Ngati Kuia in the 1970s and 1980s

The 1970s and 1980s, the decades in which the Treaty of Waitangi was making a ‘comeback’, was a time of change for Ngati Kuia. By the end of the 1960s they had become effectively urbanised, reflecting a national trend. Most Ngati Kuia moved to Nelson or Blenheim, although some moved further afield. Urbanisation according to Walker ‘posed two developmental tasks’ for those involved: meeting the ‘economic demands of the urban industrial complex’ and ‘averting assimilation’. In the case of the latter ‘voluntary associations’ helped ensure that ‘cultural continuity’ was maintained through the perpetuation of ‘Maori identity, values and culture’.²⁶⁰

The Ngati Kuia experience again reflected wider national trends. In this new urban setting people quickly found ways to maintain tribal links. Many Ngati Kuia joined sports teams or church groups or organisations like the Maori Women’s Welfare League. Hinekawa Manihera (nee Hippolyte) remembers playing hockey with many of her cousins and aunties, and at one point three generations of her family played for the Wakatu hockey club. Hockey also brought Hinekawa into contact with relatives who lived outside of Nelson. She recalls playing against whanau from Blenheim, Picton and Tuahiwi in an annual fixture for the Tirikatane Shield.²⁶¹

²⁵⁶ Jane Kelsey, *The New Zealand Experiment-A World Model for Structural Adjustment?* Auckland: Auckland University Press and Bridget Williams Books, 1995, p. 3 .

²⁵⁷ Walker, *Ka Whawhai Tonu Matou*, p. 263.

²⁵⁸ Belgrave, *Historical Frictions-Maori Claims & Reinvented Histories*, p. 9.

²⁵⁹ Walker, *Ka Whawhai Tonu Matou*, p. 264.

²⁶⁰ Walker, *Ka Whawhai Tonu Matou*, pp. 198-199.

²⁶¹ Hinekawa Manihera, wananga, 17/12/2006

For many Ngati Kuia focus turned to the building of urban marae. Walker notes that there developed a need for facilities that could 'cater for tangi, related whanau, hapu, tribal and multitribal groups'. Furthermore it helped in the 'transplantation' of 'migrant' culture in the new urban environment.²⁶² Today, in the wharenui Kakati (Nelson) and Te Aroha o Te Waipounamu (Blenheim), stand a number of Ngati Kuia poupou alongside those of Te Tau Ihu's other iwi. Nevertheless the need to maintain their independence inspired many kaumatua, some of whom have now passed away, to build a marae of their 'own'. Thus land at Te Hora near Canvastown which had been set aside under the 1856 Deed was reserved by the Maori Land Court for 'marae purposes' in August 1987.²⁶³

Amidst the urban migration some families continued to live in Te Hoiere and those who did move continued to return home for tangihanga, weddings and birthdays. My grandparents, Martin and Haromi (nee Walker) Mason and their children were one of the few families who remained in Te Hoiere. The family home at Ruapaka is halfway between Blenheim and Nelson and was often used as the stopover point for travelling whanau. My uncle, Waihaere Mason, can remember that as a child innumerable visitors would call in on his parents.²⁶⁴ This custom was a well established one as Orakauhamu, the tribal whare runanga, once stood there. Because the Masons had remained in Te Hoiere to farm the land, obligations were bestowed upon them. It is well known amongst Ngati Kuia that my grandfather would provide sheep and eels for various tribal gatherings. Although he died in 1981 this practice has been maintained by his daughter Marion who still lives at her parents' house.

These decades were also characterised by a decline in Ngati Kuia's engagement with the Crown. It will be recalled that up until the 1960s Ngati Kuia had been actively lobbying for the retention of their titi harvesting rights. According to Ron Crosby the lack of Maori participation in the management of natural resources in Te Tau Ihu can be attributed to a lack of any formal iwi structures that could cope with legal processes and legislative provisions that took into account the Maori worldview.²⁶⁵ These issues were to some extent addressed with the introduction of the RMA and the formation of Te Runanganui o Te Tau Ihu o Te Waka a Maui in 1989.

²⁶² Walker, *Ka Whawhai Tonu Matou*, pp. 200-201.

²⁶³ Nelson Minute Book 18, p. 151.

²⁶⁴ Waihaere Mason, wananga, 21/2/2006.

²⁶⁵ Ron Crosby, 'Te Tau Ihu Maori Involvement in Resource Management Issues', in *Whenua Managing our Resources*, Merata Kawharu ed., Reed Books, Auckland, 2002, p. 359.

The primary aim of Te Runanganui was to represent the concerns of its constituents at a time when individual iwi had not yet begun to organise themselves into formal structures. The pan-tribal organisation represented the eight iwi of Te Tau Ihu: Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toarangatira, Rangitane and Te Atiawa. Te Runanganui was made up of a kaumatua council and a council of iwi delegates. From the latter a number of committees were established and tasked with various jobs including the lodging of a claim with the Waitangi Tribunal. As part of this process coastal areas were identified where it was no longer possible to harvest kai moana due to pollution, developments such as marinas and ports, and marine farming. Once the damage inflicted on these areas had been fully ascertained it was decided that Wai 102 would be used as a vehicle to address these concerns.²⁶⁶

Wai 102 was lodged with the Waitangi Tribunal in 1989. According to the statement of claim iwi did not wish to 'distinguish the specific claims' rather they acknowledged that collectively they had a claim over an area of land north of a line commencing at:

The mouth of the Waimakariri River and following the bed of the river to its headwaters then following the main divide south to Browning's Pass then following the northern tributary of the Hokitika River from its headwaters to the western coast line.²⁶⁷

The claim encompassed 'the use of all resources' within the stated boundaries including 'access to and enjoyment of all estates, forests and fisheries, fresh water and in the sea adjoining'.²⁶⁸ However, Te Runanganui was disbanded in 1997 and the claim was never heard as. Duncan Wilson, Ngati Kuia's delegate on Te Runanganui, says that tribal members were initially encouraged by the concept. They saw it as a means of addressing common issues and accessing government funding to help with iwi development, such as the building of marae. However there was a growing perception within Ngati Kuia that some iwi were benefiting more than others. Ngati Kuia thus decided to leave Te

²⁶⁶ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu: Perspective on Assertions and Denials of Rangatiratanga*, Wellington: Treaty of Waitangi Research Unit, Victoria University, 2006, p. 27.

²⁶⁷ Statement of Claim, Wai 102, 27 April 1989. (Waitangi Tribunal)

²⁶⁸ Statement of Claim, Wai 102, 27 April 1989. (Waitangi Tribunal)

Runanganui in 1990.²⁶⁹ Nevertheless, the issues identified in Wai 102 were pursued by Ngati Kuia in Wai 561.²⁷⁰

Te Runanganui was not the first time that Ngati Kuia had amalgamated with others, nor was it the last. In 1997 the eight tribes of the northern South Island again ‘amalgamated’, this time under the banner of ‘Te Tau Ihu iwi’. The purpose of this grouping was to further a Maori Land Court application which sought to determine the ownership of the foreshore and seabed of the Marlborough Sounds. At first Ngati Kuia was hesitant. It was at this time that iwi from the top of the South Island were preparing for their Waitangi Tribunal claims. Part of this process was the revisiting of their respective histories. Carried away with their newly discovered greatness, terms such as ‘conquered’ and ‘slavery’ soon entered the vocabulary of some iwi representatives. Although disturbed by this growing undercurrent Ngati Kuia heeded the call of legal counsel to put aside tribal differences, differences that were to later resurface in the individual claims of certain iwi.

Seven years after ‘Te Tau Ihu iwi’ was formed Ngati Kuia was again sitting at the negotiation table. On 15 September 2004 an agreement was signed between Ngati Kuia, Rangitane and Ngati Apa to form what the Crown has termed a ‘Large Natural Grouping’, with its purpose to secure ‘a comprehensive Treaty of Waitangi settlement’. On 8 November ‘Kurahaupo’ was accepted by the Minister in Charge of Treaty of Waitangi Negotiations as a legitimate negotiating entity. On 2 December the Kurahaupo ki Te Waipounamu Trust was formally established, and later that month the Crown Forestry Rental Trust approved an application by Kurahaupo to progress the claim.²⁷¹

Prior to the formation of ‘Kurahaupo’ Ngati Kuia categorically stated that they wished to negotiate their claim individually. The Crown, however, stipulated that they would only negotiate a settlement with a ‘large natural group’²⁷² and Ngati Kuia is proceeding as such, albeit under duress. Other hapu and iwi have taken a more active stance against the policy, lodging claims with the Waitangi Tribunal. Claimants have taken exception ‘to the Crown arbitrarily deciding what is an acceptable grouping’.²⁷³ It also raises the question of whether or not the Tribunal has bark but no bite. Annette Sykes, counsel for Ngati Makino,

²⁶⁹ Duncan Wilson, wananga, 17/12/2006

²⁷⁰ Amendment to Wai 561 Statement of Claim. (Waitangi Tribunal)

²⁷¹ *Building a Future*, Book 2, Kurahaupo ki Te Waipounamu Trust, Blenheim, p. 12.

²⁷² *Building a Future*, Book 1, Kurahaupo ki Te Waipounamu Trust, Blenheim, p. 2.

²⁷³ Chris Barton, *Dominion Post*, 18 November 2006, p. B4.

says that ‘the tribunal has made several recommendations in favour of groups like Ngati Makino and they’ve just been totally ignored. It’s a gross breach of natural justice and good faith’.²⁷⁴

Ngati Kuia, as we have seen, has traditionally amalgamated with others. The events surrounding ‘the tuku of Tutepourangi’, Te Runanganui and Te Tau Ihu iwi are all examples of Ngati Kuia’s willingness to coalesce for the purpose of achieving a common goal. Other examples are the Treaty Tribes Coalition and Te Ope Mana a Tai.²⁷⁵ Thus Ngati Kuia is not adverse to amalgamation. Nevertheless, when dissatisfied they have vacated such arrangements. The ‘Kurahaupo’, however, presents a problem. While the decision to form a large natural grouping rests with Ngati Kuia, to decline comes at a cost. The point to be made here is that it has always been the right of hapu to ‘decide’, a right that the Crown has now removed. In a recent report, *Waka Umanga-A Proposed Law for Maori Governance Entities*, E. T. Durie noted that small hapu have often expressed concern at the loss of autonomy as result of the formation of large iwi authorities. He acknowledges that ‘there is no customary inhibition on group aggregation, and no limit to the extent of aggregation amongst hapu’. Moreover, he states, ‘to maintain autonomy...aggregations cannot be forced’.²⁷⁶

Following their withdrawal from Te Runanganui, Ngati Kuia sought legal recognition under the provisions of Te Runanga a Iwi Act 1990. The Labour government introduced the Act at a time when it was seeking to devolve the delivery of services and resources to iwi. According to Donna Hall the Act was the first piece of legislation to recognise the status of tribes.²⁷⁷ This according to Mason Durie raised issues of mandate and legal identity for both the Government and Maori.²⁷⁸ E. T. Durie writes that the Act was criticised for being too prescriptive, ‘it focused on iwi, gave standard criteria to identify iwi, limited the type of structures that

²⁷⁴ Annette Sykes, cited in Chris Barton, *Dominion*, 18 November 2006, p. B4.

²⁷⁵ The Treaty Tribes Coalition will be discussed in the following chapter in relation to the allocation of fisheries assets. Te Ope Mana a Tai will be discussed in the final chapter in relation to the Crown’s Foreshore and Seabed Proposals.

²⁷⁶ E. T. Durie, *Waka Umanga-A Proposed Law for Maori Governance Entities*, Wellington: Law Commission, May 2006, p. 39, retrieved 20/12/2006 from http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_115_328_R92.pdf p. 40.

²⁷⁷ Donna Hall, ‘Maori Governance and Accountability’ in *The Waitangi Tribunal-Te Roopu Whakamana i Te Tiriti o Waitangi*, ed. Janine Hayward and Nicola R. Wheen, Bridget Williams Books, Wellington, 2004, p. 193.

²⁷⁸ Mason Durie, *Te Mana, Te Kawanatanga*, p. 224.

could be set up, and left important questions of principle to the Maori Land Court'.²⁷⁹

The Act was repealed by the National government when it came to power at the end of 1990²⁸⁰ and in July 1994 the Ngati Kuia Trust were registered under the Charitable Trust Act 1957. On 2 November 1996 Te Runanga o Ngati Kuia Charitable Trust was formed and from this point on became the representative voice of the Ngati Kuia people.²⁸¹ With both legislation in place and a legal entity by which Ngati Kuia could engage with the Marlborough District Council the scene was set for Ngati Kuia to take their seat at the 'negotiation table'. The Resource Management Act 1991 became the mechanism by which Ngati Kuia could now register their concerns in relation to environmental issues. As Crosby notes, and as I shall address in the following chapter, iwi in Te Tau Ihu soon turned their attention to resource management decisions and aquaculture developments in their tribal waters.²⁸²

Back in the Zone: The RMA

The RMA was a long time in the making, although it has been described as a 'radical break from the past'.²⁸³ It replaced more than twenty major statutes dealing with soil, water, geothermal resources, air and noise pollution and coastal reserves.²⁸⁴ But the RMA did not materialise on the day it received its royal assent. The influences that gave it shape have a long history. Locally the Waitangi Tribunal played an important role in the development of the Act's 'Maori provisions'. In one sense then the RMA can be seen as part of the 'struggle without end'. It should not be forgotten that the authority that legitimated the RMA also has a long history, sourced in the culture of colonisation itself. Thus it can be argued that the RMA was a continuation of, rather than a break from, the past.

²⁷⁹ E. T. Durie, *Waka Umanga-A Proposed Law for Maori Governance Entities*, Wellington: Law Commission, May 2006, p. 39, retrieved 20/12/2006 from http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_115_328_R92.pdf

²⁸⁰ Mason Durie, *Te Mana, Te Kawanatanga*, p. 225.

²⁸¹ Amendment to Wai 561 Statement of Claim. (Waitangi Tribunal)

²⁸² Crosby, 'Te Tau Ihu Maori Involvement in Resource Management Issues' in *Whenua Managing our Resources*, p. 360.

²⁸³ Bret Birdsong, 'Adjudicating Sustainability-New Zealand's Environmental Court and the Resource Management Act', with funding from the sponsors of the Ian Axford (New Zealand) Fellowship in Public Policy, October 1998, p. 1, retrieved 16/1/2006 from <http://www.fulbright.org.nz/voices/axford/docs/birdsongb.pdf>

²⁸⁴ Mason Durie, p. 28.

At an international level, Claire J. Newman states that from the 1970s to the 1990s global movements too impacted on New Zealand's environmental management systems.²⁸⁵ In 1972 the United Nations Conference on the Human Environment was held in Stockholm. It called for governments to improve and protect the environment for present and future generations,²⁸⁶ an aim reflected in Principle 2 of the Stockholm Declaration.

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.²⁸⁷

Further steps towards sustainability were taken during the 1980s. Newman describes this decade as an era that exemplified an awareness of environmental issues.²⁸⁸ The World Conservation Strategy was published in 1980 and emphasised that the future of humanity was inseparable from the conservation of nature and natural resources. The strategy also stated that 'conservation cannot be achieved without development to alleviate the poverty and misery of hundreds of millions of people'. Thus it was the World Conservation Strategy that 'first gave currency to the term "sustainable development"'.²⁸⁹ Then in 1987 the World Commission on Environment and Development (known as the Brundtland Commission) 'advocated the concept of sustainability as a linchpin of environmental policy'.²⁹⁰ In that same year the Montreal Protocol pushed for a reduction in the use of chlorofluorocarbons and in 1988 the Inter-governmental Panel on Climate Change addressed the issue of global warming. The 1980s also raised concerns about nuclear testing and the ozone hole.²⁹¹

Newman comments that the Brundtland Report and other international documents such as the Rio Declaration and

²⁸⁵ Claire J. Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', MA Thesis, University of Canterbury, 1999, p. 53.

²⁸⁶ Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', p. 53.

²⁸⁷ Declaration of the United Nations Conference on the Human Environment, Stockholm 1972, Principle 2 retrieved 16/1/2006 from

<http://www.are.admin.ch/imperia/md/content/are/nachhaltigreentwicklung/international>

²⁸⁸ Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', p. 53.

²⁸⁹ IUCN-The World Conservation Union, Caring for the Earth, retrieved 16/1/2006 from <http://www.ciesin.org/IC/CaringDS.html>

²⁹⁰ Birdsong, 'Adjudicating Sustainability-New Zealand's Environmental Court and the Resource Management Act', p. 5.

²⁹¹ Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', p. 53.

Agenda 21, both of which New Zealand is signatory to, are significant in that they acknowledge the importance of indigenous knowledge systems. They recognise that indigenous people have over time accumulated vast amounts of information pertaining to the natural environment and that they have a valuable contribution to make in the management of natural resources. Moreover governments should, in conjunction with affected indigenous communities, work towards the incorporation of such systems into legislation. But Newman notes, and this is a point I also wish to reiterate, while indigenous knowledge has gained ‘international acceptance’ the extent to which western societies are willing to embrace it is limited.²⁹²

The RMA is an exemplar of international environmentalism applied in a local setting. Although it is long, Mason Durie writes that it has four broad categories of provisions relating to Maori: cultural interests, the Treaty of Waitangi, iwi interests, and Maori language usage.²⁹³ Cultural interests are first recognised in section 6 of the RMA. It states that decision makers *shall recognise* ‘the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga’.²⁹⁴ Section 7 requires that *particular regard* be given to kaitiakitanga and section 8 stipulates that the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) shall be taken *into account*.²⁹⁵

While the RMA acknowledges a Maori worldview, sections 6, 7, and 8 are a consideration, to be taken into account ‘in achieving the purpose of the Act’.²⁹⁶ The reality of this scenario was evident in 1997-1998 when a number of Environmental Court hearings relating to marine farming in the Marlborough Sounds were initiated under the RMA. The hearings themselves will be discussed in more detail in the next chapter. It will become apparent that while the RMA seemingly gave Ngati Kuia a greater voice, a place where agency could be expressed, it was ultimately subject to the national interest.

In its broadest sense this chapter has been about the formation and function of the Waitangi Tribunal, the development of legislation to accommodate a Maori worldview, and the evolution of Ngati Kuia as a legal entity.

²⁹² Newman, ‘Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views’, pp. 28-29.

²⁹³ Mason Durie, *Te Mana, Te Kawanatanga*, p. 28

²⁹⁴ cited in Mason Durie, *Te Mana, Te Kawanatanga*, p. 28.

²⁹⁵ cited in Mason Durie, *Te Mana, Te Kawanatanga*, p. 28

²⁹⁶ see appendix 1

There is little doubt that the Tribunal has contributed significantly to the status of the Treaty of Waitangi. Not only has there been an increased public awareness of the Treaty since the Tribunal's inception but the Treaty has found its way into the statute books. It is here that we find the paradox of colonisation in New Zealand and an explanation as to how Ngati Kuia has become marginalised in its attempt at having its rights recognised via legislative mechanisms such as the Tribunal.

The claims discussed here also demonstrate that the claimants and Ngati Kuia share a similar worldview, one structured around whakapapa and the ethics of mana, tapu, utu and manakitanga. It is little wonder then that Te Atiawa, Ngati Pikiao and Manukau reacted as they did. Damage to mahinga kai effectively damages tribal mana. And while the success of the claims was a 'victory' for Maori, and indeed the wider community, it should not be forgotten that the Tribunal is a 'creation of legislature'. In 1989 M.P.K. Sorrenson wrote that the Tribunal has 'an uncertain future, one that is subject to the whims of politicians and ultimately the electorate'.²⁹⁷ This is indeed so, thus I would argue that the Tribunal's future is very safe. Its powers are recommendatory only. The Crown has, and will continue to ignore the Tribunal's recommendations when they are perceived to be antithetical to the 'national interest'.

Nevertheless, the Treaty settlements process is promoted by the Crown as an exemplar of settler/indigenous relations. But as Jackson explains, colonisation exists 'to impose a new authority' and its culture seeks to maintain this position. Today that culture has constructed a myth that asserts colonisation can be remedied 'with the settlement of a few land grievances'. The 'illusion' that the myth has created purports that 'the authority and institutions which dispossessed can also be the salvation from that dispossession'.²⁹⁸ Audre Lorde poignantly writes, 'the master's tools will never dismantle the master's house'.²⁹⁹ Moreover, if the myth achieves its aim then colonisation has succeeded. It has imprisoned 'indigenous sovereignty and dreams within parameters which it finds acceptable'.³⁰⁰

²⁹⁷ M.P.K. Sorrenson, 'Towards a Radical Reinterpretation of New Zealand: The role of the Waitangi Tribunal' in *Waitangi-Maori & Pakeha Perspectives of the Treaty of Waitangi*, ed. I.H. Kawharu, Auckland: Oxford University Press, 1989, p. 176.

²⁹⁸ Jackson, 'Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi', p. 2.

²⁹⁹ Audre Lorde, cited in Brendan Hokowhitu, 'Tackling Maori Masculinity: A Colonial Genealogy of Savagery and Sport', in *The Contemporary Pacific*, volume 16, number 2, 2004, p. 277.

³⁰⁰ Jackson, 'Sovereignty as culture, Maori, Politics, and the culture as sovereignty: Treaty of Waitangi', p. 2.

Chapter Four

Still In The Zone

This chapter is divided into two parts. The first deals with three Environmental Court hearings initiated by Ngati Kuia under the provisions of the Resource Management Act 1991. The Environment Court cases were intended to address specific issues affecting Ngati Kuia and other iwi in Te Tau Ihu as they attempted to enter the marine farming industry. The second part of this chapter deals with an application to the Maori Land Court by Te Tau Ihu iwi in 1997, and the litigation that followed. The application sought 'a declaration from the Maori Land Court that the foreshore and seabed of the Marlborough Sounds is Maori Customary Land'.³⁰¹ Together the Environment Court hearings and the Maori Land Court application were part of an overall strategy aimed at gaining greater recognition of Maori rights in the foreshore and seabed area.

This chapter then continues to document Ngati Kuia's struggle to have their rights recognised through due process. As was the case in the previous chapter I approach the RMA, the Environment Court, the Maori Land Court, the High Court, and Court of Appeal as contact zones where worldviews meet. This provides an opportunity to assess the law's ability to accommodate a Ngati Kuia worldview and protect Ngati Kuia rights. To this extent Paul McHugh's evidence presented during the Waitangi Tribunal's foreshore and seabed hearing is illuminating. In relation to the common law he writes that it (the common law) can only recognise those customary rights at the point where both systems intersect, that is, where the indigenous conforms to the norms embedded in the common law.³⁰² Also useful is Jane Kelsey who writes that colonisation as practiced by the English 'treated the philosophy of liberal rationalism and the economics of Western capitalism as omnipotent...Alternative worldviews were deemed

³⁰¹ Application for an Investigation of Maori Customary Land, Te Ture Whenua Maori Act 1993, Sections 12, 131, and 132, Submissions on behalf of applicants, 1997, p. 2.

³⁰² *Report on the Crown's Foreshore and Seabed Policy*, p. 50.

illegitimate, and often subversive'. The law, according to Kelsey, became the primary instrument through which the worldview of the dominant culture could be legitimated.³⁰³

While this chapter examines particular Court cases it is also important to establish how Ngati Kuia came to be before the Courts. To do this we must necessarily discuss the events that would eventually lead to the passing of the Fisheries Act 1989 and 1992 (the Sealords Deal), and the establishment of the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana). All were part of a series of Crown responses aimed at satisfying a growing demand for the greater recognition of Maori fishing rights. The net result was the creation of a property right in the form of fishing quota that would be allocated to Crown approved tribal entities. Ngati Kuia did not participate in the initial rounds of litigation, nor did they have any say in what the settlements would look like. But to receive those assets Ngati Kuia had no option but to acquiesce to the terms of the settlement.

Significantly rights in aquaculture were not dealt with in the 1989 and 1992 legislation, and thus we arrive at the present point. In *Ahu Moana-The Aquaculture and Marine Farming Report* (Wai 953) the Waitangi Tribunal explains that the term 'aquaculture' stems from the Latin 'aqua' or water and 'cultura' to grow. It stated that aquaculture refers to 'the entire range of activities involving the manipulation or intended manipulation of aquatic resources to supplement their natural supply'. Of aquaculture marine farming is a subset which occurs in inshore waters, also described as the 'coastal marine area'.³⁰⁴ The Marlborough Sounds are ideally suited to aquaculture. They have an abundance of food, high water quality, and a sheltered coast line.³⁰⁵ Ngati Kuia has taken advantage of these conditions for generations. For instance many of the mussel, cockle, and pipi beds in Croiselles Harbour were planted by Ngati Kuia. Often particular shellfish were seeded together to enhance growth.³⁰⁶

³⁰³ Jane Kelsey, 'Old Wine in New Bottles-Globalisation, Colonisation, Resource Management and Maori' in *Whenua-Managing Our Resources*, ed. Mereta Kawharu, Auckland: Reed Books, 2002. pp. 373-374.

³⁰⁴ *Ahu Moana-The Aquaculture and Marine Farming Report* (Wai 953) Waitangi Tribunal Report 2002, p. 2. retrieved 12/4/2006 from <http://www.waitangitribunal.govt.nz/scripts/reports/reports/953/24E4BBC0-2F38-4C51-A6B4-9CC224D95B96.pdf>

³⁰⁵ Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', p. 87.

³⁰⁶ Statement of Facts prepared for Maori Land Court application, p. 9. (Ngati Kuia Archives)

Aquaculture

New Zealand's commercial aquaculture industry began in the 1960s, at first serving the local market. However, by the 1980s and 1990s it had grown significantly so that in 1997 it was estimated to be worth \$100 million.³⁰⁷ In 2000 New Zealand's aquaculture industry returned \$287 million and in 2020 it is expected that the industry will reach \$1 billion in export earnings.³⁰⁸ During the early 1990s Ngati Kuia too began to realise the potential of marine farming as an income earner, a realisation made more explicit by the events of the nineteenth century which had left them virtually landless.

Although Ngati Kuia had been practicing aquaculture for generations they were a non-starter when the Marlborough industry began to flourish. According to William McCready, Ngati Kuia representative on the Resource & Regulatory Committee of the Marlborough District Council, this was due to a lack of investment capital. One way of entering the industry was through joint ventures with established players, a scenario brought about by the RMA's consultation process. This in turn gave Ngati Kuia leverage to negotiate marine farm space and produced some results for Ngati Kuia.³⁰⁹

The RMA gave Ngati Kuia confidence that they could participate in the aquaculture industry, and protect their customary rights. Prior to its introduction marine farming was primarily regulated by the Marine Farming Act 1971. It provided little protection for Maori rights and cultural values. The RMA's resource consent process enabled Ngati Kuia to object to the establishment of marine farms when they perceived their rights had been breached. Ngati Kuia also applied to establish marine farms in their own right. McCready says that while there were 'some successes there were more disappointments'. The disappointments, according to McCready, can be attributed to the racial bias of certain councillors at the time.³¹⁰ Hilary and John Mitchell note that in the first four years following the inception of the RMA not one of Te Tau Ihu's eight iwi succeeded as applicants or as objectors for resource consent.³¹¹ In this same period 116 applications for resource consent were granted by the

³⁰⁷ Newman, 'Management of a Coastal Environment-Marlborough Sounds: Insights into Two World Views', pp. 87-90.

³⁰⁸ *Ahu Moana-The Aquaculture and Marine Farming Report*, p. 10.

³⁰⁹ William McCready, wananga, 26/12/2006

³¹⁰ McCready, wananga, 26/12/2006

³¹¹ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 36.

Marlborough District Council.³¹² It soon became apparent that this was not a strictly Ngati Kuia or Te Tau Ihu experience, other iwi were also encountering difficulties with the administration of the Act. Consequently iwi concerns were forwarded to Te Ohu Kai Moana (Treaty of Waitangi Fisheries Commission) who charged its Customary Fisheries Committee to investigate further.³¹³

Te Ohu Kai Moana's pedigree begins in 1986 when the government made amendments to the Fisheries Act 1983 that made way for the introduction of the Quota Management System (QMS).³¹⁴ According to Mason Durie the QMS was 'promoted as a conservation and management tool...but, more significantly, the scheme had created a property interest in an exclusive right of commercial fishing'.³¹⁵ Under this system the Ministry of Agriculture and Fisheries divided the New Zealand coast line into zones and then issued Individual Transferable Quota for species under stress.³¹⁶ One result of the restructuring was that fisherman who had held licenses under the previous regime and whose income was mainly derived from other sources, or whose catch fell beneath a specified amount, had their licences removed.³¹⁷ In Northland this meant that half of the 600 fisherman were phased out.³¹⁸ At the time these actions did not directly affect Ngati Kuia, but it will soon become apparent that the litigation that was later brought against the Crown would directly impact on them.

In 1985 those northern tribes affected by the new legislation filed a claim with the Waitangi Tribunal under the collective identity of Muriwhenua.³¹⁹ Stephanie Milroy notes that the claim covered a raft of issues and so the fisheries claim was 'severed' from the others due to the urgency associated with the introduction of the QMS.³²⁰ In December 1986 the Tribunal were informed that the government was about to allocate fish quota.³²¹ At this early stage in proceedings the Tribunal had no evidence on which to base a report, and thus

³¹² Chris James, Information Systems Analyst, Marlborough District Council.

³¹³ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 39.

³¹⁴ R.P. Boast, 'Maori Fisheries 1986-1998: A Reflection', in *Indigenous People and the Law*, retrieved 25/10/2005 from www.kennett.co.nz/law/indigenous/2000/48.html

³¹⁵ Mason Durie, *Te Mana, Te Kawanatanga*, p. 152.

³¹⁶ Walker, *Ka Whawhai Tonu Matou*, p. 274.

³¹⁷ Mason Durie, *Te Mana, Te Kawanatanga*, p. 152.

³¹⁸ Walker, *Ka Whawhai Tonu Matou*, p. 274.

³¹⁹ Walker, *Ka Whawhai Tonu Matou*, p. 274.

³²⁰ Stephanie Milroy, 'The Fisheries Reports' in *The Waitangi Tribunal-Te Roopu Whakamana i te Tiriti o Waitangi*, ed. Janine Hayward and Nicola R. Wheen, Wellington: Bridget Williams Books Ltd, 2004, p. 84.

³²¹ Milroy, 'The Fisheries Reports', p. 84.

sent a memorandum to the Director-General of Fisheries requesting that allocation be postponed.³²² In response the Tribunal was advised that there could be no delay in the implementation of the QMS.³²³

In September 1987 Maori again sprung into action. The New Zealand Maori Council and Te Runanga o Muriwhenua petitioned the High Court to impose an injunction to stop the Ministry of Fisheries from issuing further quota.³²⁴ Soon after this the Waitangi Tribunal was asked to make an interim ruling to back the injunction. The Court found that the QMS did indeed contravene those rights guaranteed to the Muriwhenua under Section 88(2) of the Fisheries Act 1983 which stated that 'nothing in this Act shall affect any Maori fishing right'.³²⁵ Although Muriwhenua had won an injunction it did not apply to the entire New Zealand coastline, rather it was limited to Northland waters.³²⁶ Therefore in October further legal action was taken by other groups including, the Ngati Tahu Trust Board, Raukawa Marae Trustees, Taranaki Maori Trust Board, Taitokerau District Maori Council, and the Tainui Maori Trust Board. The QMS was brought to a halt when the minister was again ordered not to issue quota.³²⁷

The High Court made it clear that both the Crown and Maori needed to seek resolutions. The negotiations that followed resulted in the Maori Fisheries Act 1989. The Act fell far short of what negotiators were instructed to settle for,³²⁸ but was recognised by all parties as an interim settlement.³²⁹ Milroy notes that the interim agreement 'foreshadowed some of the major aspects of the final settlement'. Rather than being abandoned the QMS would be changed to accommodate Maori interests. This included the transfer of ten percent of quota to a Maori Fisheries Commission.³³⁰ The Commission's purpose and principal functions are set out in section 5 of the Maori Fisheries Act 1989, and include developing the potential of Maori to enter the business of fishing³³¹

³²² Milroy, 'The Fisheries Reports', p. 84.

³²³ Mason Durie, *Te Mana, Te Kawanatanga*, p. 152.

³²⁴ Milroy, 'The Fisheries Reports', p. 85.

³²⁵ Walker, *Ka Whawhai Tonu Matou*, p. 275.

³²⁶ Walker, *Ka Whawhai Tonu Matou*, p. 275.

³²⁷ Mason Durie, *Te Mana, Te Kawanatanga*, p. 154.

³²⁸ Mason Durie, *Te Mana, Te Kawanatanga*, p. 154.

³²⁹ Boast, *Maori Fisheries 1986-1998: A Reflection*, in *Indigenous People and the Law*, p. 4.

³³⁰ *The Fisheries Settlement Report*, Wai 307, Wellington: Waitangi Tribunal Report, 1992, part 2, retrieved 7/9/2006 from <http://www.waitangi-tribunal.govt.nz/reports/view.asp?ReportID=9E79854F-EB77-46D2-BFB3-6BCB594D37ED>

³³¹ 'Report of the Treaty of Waitangi Fisheries Commission Te Ohu Kai Moana-Annual Report for the year ended 30 September 2002', p. 5. retrieved 7/9/2006 from <http://teohu.maori.nz/archive/reports/Treaty%20of%20Waitangi%20Annual%20report>

In September 1992 Maori fisheries negotiators signed a second fisheries settlement (also known as the Sealords Deal). As part of the deal the Crown would provide Maori with \$150 million that would enable them to purchase half of Sealords Products Ltd. In addition to the 10 percent of quota received in 1989 Maori would also receive 20 percent of any new species introduced into the QMS. Furthermore the Maori Fisheries Commission was to be restructured to gain wider tribal representation and would be responsible for the allocation of assets to iwi.³³²

At the time of Sealords Lisle Walker was chairperson of the Ngati Kuia Trust. He recalls that although a hui was convened at Te Hora to discuss the government's proposals there was little detail available. While he expressed some concern at the time there was a general feeling, particularly among kaumatua, that Ngati Kuia should sign to ensure they at least received something.³³³ According to Annette Sykes, on the day of the signing tribal representatives were flown to Wellington, most without legal counsel, and asked to read and sign a lengthy document that they had only just cited. She notes that others, and in particular fisheries negotiators, Tipene O'Regan, Matiu Rata, Graham Latimer, and Robert Mahuta, were well aware of the Deed's contents.³³⁴ Ranginui Walker writes that the negotiators then went about 'belatedly seeking a mandate for what was in effect a *fait accompli*'.³³⁵ Thus the echo of previous Ngati Kuia/Crown engagements rang true when Jim Walker signed the deed of settlement on 'behalf' of Ngati Kuia. On 31 March 2006 Ngati Kuia received the first allocation of fisheries settlement assets. The package included \$47,000 cash and shares in Aotearoa Fisheries Ltd, valued at \$223,000 and shares in the quota allocated to Maori fisheries valued at \$447,000.³³⁶

Some of those iwi who did not sign Sealords sought redress through the United Nations, an indication of the difficulties that lay ahead for Te Ohu Kai Moana³³⁷ (Previously the Maori Fisheries Commission). A task charged to Te Ohu Kai Moana, and one perhaps its most contentious, was how assets would be distributed to iwi. Two sides emerged in the debate, one that favoured allocation based on coastline—*mana whenua mana moana*, the other based on population—*mana totoru o te tangata*. Ngati Kuia, with a relatively small

³³² *The Fisheries Settlement Report*, part 1.

³³³ Lisle Walker, wananga, 16/12/2006

³³⁴ Annette Sykes, 'The Fiscal Envelope: The Generation Cap', interview (video), Moko Productions.

³³⁵ Walker, *Ka Whawhai Tonu Matou*, pp. 295-296.

³³⁶ Te Runanga o Ngati Kuia 2006 AGM Booklet. (Ngati Kuia Archives)

³³⁷ Walker, *Ka Whawhai Tonu Matou*, p. 297.

population, joined Ngai Tamanuhiri, Ngati Tama, Ngai Tahu, Hauraki, Ngati Kahungunu, Ngati Rarua, Te Ati Awa, Ngati Kuia, Ngati Apa, Ngati Toa and Moriori, forming the Treaty Tribes Coalition in 1994. The purpose of this group was to lobby on behalf of its constituents for the adoption of the mana whenua, mana moana allocation model.

According to Wayne Hemi, Ngati Kuia's delegate, the Treaty Tribes Coalition initially provided a convenient vehicle to represent the concerns of the tribe. Ngati Kuia joined the Coalition with the bottom line that allocation be based solely on coastline. To help reconcile the differences between the two camps Te Ohu Kai Moana convened Taumata Paepae, a working group made up iwi and commissioners. It soon became apparent that iwi within the Coalition with larger populations were becoming less inclined to maintain a common stance. Hemi recalls attending the Taumata Paepae hui knowing full well that certain Coalition members had already 'hui-ed' with the 'opposition'. Frustrated, Ngati Kuia withdrew from the Treaty Tribes Coalition.³³⁸

Although aquaculture was not included in the 1992 settlement when one considers the purposes and functions of the Commission it is not surprising that it would later become involved in aquaculture issues. During the mid-1990s Te Ohu Kai Moana received a number of complaints from iwi throughout the country relating to aquaculture and the administration of the RMA. A hui was subsequently convened by Te Ohu Kai Moana at Pipitea Marae, Wellington. Issues discussed at the hui included: proposals by Regional Councils to impose rates on resource consent holders; Government proposals to develop a tendering regime for water space, both of which imply ownership; the extension of previously issued permits into longer-term resource consents; and the perceived discriminatory way in which the Marlborough District Council was dealing with iwi objections and applications for resource consents.³³⁹ Following tentative legal advice, and the extent of the problems faced by iwi in the northern South Island, Te Tau Ihu was chosen as a test case from which a strategic plan could be devised and employed later by other iwi.³⁴⁰

³³⁸ Wayne Hemi, wananga, 17/12/2006

³³⁹ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 40.

³⁴⁰ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 39.

To address the issues raised at Pipitea Te Ohu Kai Moana and Tunncliffe Walters and Williams³⁴¹ developed what Ruth Berry calls a 'multi-pronged offensive to gain greater recognition and understanding of Maori economic development rights in the coastal marine area'.³⁴² The first stage of the strategy was to select a number of resource consent decisions that if appealed to the Environment Court were likely to succeed. Hilary and John Mitchell comment that the purpose of the Environment Court hearings was twofold. They were intended to address the perceived 'discriminatory' administration of the RMA, and to identify how those decisions had breached the Act's Maori provisions.³⁴³ It was at this stage that Ngati Kuia entered (or as history shows re-entered) legal proceedings. The second stage of the strategy was to apply to the Maori Land Court seeking a declaration as to the status of the foreshore and seabed in the Marlborough Sounds. The purpose of the application was to address issues around proposed rating and tendering regimes.³⁴⁴ Te Ohu Kai Moana was to finance the operation. According to Fisheries Commissioner Shane Jones, the decision to do so was to 'see whether there was any life and vitality left in Maori customary rights which could provide a platform to shoehorn Maori into the business of aquaculture'.³⁴⁵

The Environment Court

In May 1995 the Marlborough District Council considered an application by Aqua King Ltd seeking resource consent to establish a marine farm in Anakoha Bay. The Council declined the application stating that there were already a significant number of marine farms in the area. If consent were granted it 'would detrimentally tilt the balance in favour of marine farming against other activities'.³⁴⁶ Te Runanga o Ngati Kuia also opposed the application due to the significance of the area to the tribe, and because of

³⁴¹ Tunncliffe Walters and Williams were the legal advisors to Te Ohu Kai Moana. They also represented Ngati Kuia in the Environment Court and Te Tau Ihu iwi in the Maori Land Court, the High Court and the Court of Appeal.

³⁴² Ruth Berry, 'Maori Harness Power of the Courts', 31/03/2005, retrieved 22/9/2005 from http://www.nzherald.co.nz/feature/story.cfm?c_id=1500896&ObjectID=10117887

³⁴³ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 41.

³⁴⁴ Hilary and John Mitchell, *Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga*, p. 44.

³⁴⁵ Ruth Berry, 'Maori Harness Power of the Courts'.

³⁴⁶ Letter to interested parties re: Application for Resource Consent pursuant to section 88 of the Resource Management Act 1991-Coastal Permit. File U920260. (Marlborough District Council Archives)

navigational concerns.³⁴⁷ Consequently Aqua King Ltd appealed the Council's decision to the Environment Court who heard the appeal at Blenheim from 28 April to 1 May 1997.

The importance of Anakoha to Ngati Kuia was highlighted in the evidence presented by iwi witnesses. The Court was told that Anakoha means 'bay with many signs', and relates to the blooming of the rata trees at which time Ngati Kuia would begin to fish for hapuku.³⁴⁸ According to Jim Walker, who was raised in Te Hoiere, both Anakoha and Titirangi were places of significance for Ngati Kuia because they were sites often frequented by Kaikaiawaro. Anakoha was also an important food gathering area. Ships travelling through Cook's Strait often called there to replenish their supplies. Furthermore the Court was informed that site of the proposed marine farm was an important mahinga kai where crayfish continue to be taken from.³⁴⁹

In the synopsis of submissions counsel for Ngati Kuia reiterated the concerns expressed by iwi witnesses. The Court was reminded that Ngati Kuia had been in occupation of the area well into the twentieth century, and had exercised traditional authority over the entire area. As an important fishery of the Ngati Kuia people there was trepidation that if consent was granted it would interfere with traditional fishing practices, and thus compromise their kaitiakitanga and mana. With a view to the future counsel also stated that if the application was to proceed it would effectively grant an exclusive right of occupation of the seabed and coastal marine area, and therefore 'prejudice Ngati Kuia's claim to customary title to the seabed'.³⁵⁰

It was also put forward by iwi counsel 'that to grant consent would be inconsistent with the provisions of the Act' (RMA), referring specifically to sections 5, 6(e), 7(a), 7(c), 7(f). Section 5 (2) refers to the duty of 'avoiding, remedying, or mitigating any adverse effects of activities on the environment'. It was argued that 'cultural conditions' are included in the definition of 'environment', citing *Aqua King Limited & Fleetwing Farms Limited v Marlborough District Council*. Here it was held that iwi concerns about coastal waters and its uses come 'well within the definition

³⁴⁷ Letter from Te Runanga o Ngati Kuia, to W.J. Oliver, Manager, Resource Management Regulatory Department. 8 July 1993. File U920260 (Marlborough District Council Archives)

³⁴⁸ Environment Court Decision, W71/97, p. 2. File U920260 (Marlborough District Council Archives)

³⁴⁹ Jim Walker, 'Statement of Evidence before the Environment Court', pp. 1-3. file U920260 (Marlborough District Council Archives)

³⁵⁰ Mr J.V. Williams and Ms R.M. Rauna, 'Synopsis of Submissions', File U920260 (Marlborough District Council Archives)

of the effect the proposal may have on the environment'. It was therefore submitted 'that to consent to this application will fail to avoid, remedy or mitigate the adverse effects of this activity on the environment'.³⁵¹ After considering the evidence and legislation the Court upheld the Council's original decision and disallowed the appeal.

In March 1996 the Marlborough District Council considered an application from the Marlborough Mussel Company who wished to establish marine farms in south-east, and north-east Tawhitinui Bay.³⁵² Consent was granted but was appealed to the Environment Court by the Director General of Conservation, Ngati Toa and Ngati Kuia. The Director General cited the adverse effects that the development would have on the environment. Ngati Kuia and Ngati Toa opposed the Council's decision because of their ancestral connection to the area³⁵³ and because the issuing of water space was a breach of their property rights guaranteed under Article Two of the Treaty of Waitangi.³⁵⁴

The Environment Court heard the appeal at Blenheim from 26 to 28 May 1997. Ngati Kuia submitted that the area known as Te Hoiere extends from Maukatapu to Raukawakawa Moana; a single entity of which Tawhitinui is a part.³⁵⁵ Tawhitinui, like Anakoha, was an important food gathering area that was also visited by Kaikaiawaro. Ngati Kuia also considered the allocation of coastal water space as a breach of their property rights guaranteed under the Treaty of Waitangi.³⁵⁶ The Court ruled that if consent were granted it would adversely affect both the natural character of the coastal environment³⁵⁷ and undermine the relationship between that environment and iwi.³⁵⁸ It therefore overturned the Council's original decision.

Tawhitinui, as the case became known, was my introduction to tribal affairs. Ngati Kuia kaumatua Jim Walker, and tribal officials Kahurangi Hippolite and William McCready, also presented evidence on behalf of the tribe. My participation came about primarily through the encouragement of kaumatua, and in particular Jim Walker. It was his philosophy that all Ngati Kuia were obliged to make some contribution to the tribe, regardless of age. Although the

³⁵¹ Williams, 'Synopsis of Submissions', pp. 3-4.

³⁵² For the purposes of this thesis I will refer to both applications collectively as Tawhitinui.

³⁵³ Environment Court Decision, No. W89/97, pp. 4-5. File U941497. (Marlborough District Council Archives)

³⁵⁴ Environment Court Decision, No. W89/97, p. 13.

³⁵⁵ Environment Court Decision, No. W89/97, p. 18.

³⁵⁶ Environment Court Decision, No. W89/97, pp. 4-5.

³⁵⁷ Environment Court Decision, No. W89/97, p. 21.

³⁵⁸ Environment Court Decision, No. W89/97, pp. 18-19.

Environment Court hearings were a serious matter there was an almost festival atmosphere as relatives from both sides of the Whangamoā³⁵⁹ gathered in Blenheim to support the kaupapa. At this stage nobody was aware of the significance of the hearings, including myself. For most it was a chance, other than tangi, for people to meet.

In May 1996 the Marlborough District Council considered an application to establish marine farms at Waimatete Bay and Kaitangata Bay in Port Gore.³⁶⁰ On this occasion the applicant was the Kaikaiawaro Fishing Co. Ltd, a fully owned subsidiary of Te Runanga o Ngati Kuia. The company was created in 1991 in an anticipation of receiving the quota allocated as a result of the 1989 fisheries settlement. Its guiding principles are: economic viability, environmental and sustainable awareness, cultural and social awareness and accountability.³⁶¹ In their applications Ngati Kuia stated that marine farming would provide an opportunity for economic advancement.³⁶² Nevertheless, after ‘balancing’ section 6(e) of the RMA, which provides for the relationship of Maori with their culture and ancestral lands, water etc, against section 6(a), which refers to the preservation of the natural character of the coastline, the Council found that the latter was of overriding importance. It therefore declined the applications.³⁶³

In response Ngati Kuia made an application to the Environment Court which heard the appeal at Blenheim on 15 December 1999. Appearing in support of the Council’s decision was the Director-General of Conservation and a spokesperson for Queen Charlotte Wilderness Park (a tourism business on land adjoining Waimatete Bay). During the hearing Ngati Kuia, as they had done in earlier hearings, established their connection with the area of the proposed marine farms through the recitation of whakapapa and tradition.³⁶⁴ As in previous hearings counsel also raised issues relating to the RMA. Counsel questioned whether it was appropriate for the Council to consider section 6(a) as overriding the importance of section 6(e).³⁶⁵ It was the view of Ngati Kuia that neither the Marlborough District Council

³⁵⁹ The Whangamoā is the range that separates Marlborough from Nelson.

³⁶⁰ For the purposes of this thesis I will refer to both applications collectively as Port Gore.

³⁶¹ ‘Kaikaiawaro Fishing Company Ltd Statement of Intent 2006’, p. 2. (Ngati Kuia Archives)

³⁶² Application for Resource Consent, Kaikaiawaro Fishing Company, 23 January 1996. File U950990. (Marlborough District Council Archives)

³⁶³ Report prepared by J. Kennedy, Resource Management Section, Kaikaiawaro Fishing Company Appeal for Kaitangata Bay U950990 and Waimatete Bay U950989, 14 October 1999. (Marlborough District Council Archives)

³⁶⁴ Environment Court Decision, No. W84/99, p. 19. File U950990 (Marlborough District Council Archives)

³⁶⁵ J. Kennedy report re: Kaikaiawaro Fishing Company Appeal.

nor the Director-General of Conservation took into account sections 5(2), 6 (e), 7 (a), or 8 when they assessed the applications. It was thus argued that there was a reluctance to recognise Ngati Kuia's rangatiratanga. Ngati Kuia also stated that 'the Department (of conservation) will (only) support the proposals which accord with the Department's aspirations in a particular area'.³⁶⁶

In its decision the Court acknowledged that Ngati Kuia had a special relationship with the area in question, and that granting consent would indeed provide for sections 6(e), 7(a) and section 8 of the RMA. Furthermore the Court found that in respect of the economic, social and cultural wellbeing of Ngati Kuia the proposal fell within section 5(2) of the Act. However the Court considered that section 5(2) must also be viewed in light of sections 5(2) (a) (b) (c).³⁶⁷ Section 5(2) (a) relates to the sustainability of natural and physical resources so as 'to meet the reasonably foreseeable needs of future generations'. It was found that this could be achieved if Waimatete and Kaitangata Bays were maintained in their 'unmodified form'.³⁶⁸ The Court also raised concerns in relation to section 5(2) (b), which seeks to safeguard 'the life-supporting capacity of air, water, soil, and ecosystems'. Here the Court was not convinced that the proposal would achieve this aim.³⁶⁹ It was found then that in accordance with section 5(2) (c) the proposal had the potential to adversely affect the 'natural character, outstanding landscape and ecosystems'.³⁷⁰ Thus the Court upheld the Council's original decision stating, 'overall, we find the proposals do not meet the requirements of s.5(2)(a), (b), (c) of the Act and must therefore be declined'.³⁷¹

It can be argued that Ngati Kuia, via the RMA and the Environment Court, was able to negotiate space in which they could re-inscribe a Ngati Kuia worldview. In all three cases Ngati Kuia witnesses produced evidence that established and reinforced their relationship with the areas in question. The Court duly found that the protection of this relationship was provided for under the Act. And although it upheld the Marlborough District Councils decision to decline Ngati Kuia's application, *Port Gore* established that the RMA could accommodate Ngati Kuia development rights in aquaculture. Crosby describes this 'positive' and 'defensive' interpretation of the RMA as a 'significant

³⁶⁶ Environment Court Decision, No. W84/99, p. 29.

³⁶⁷ Environment Court Decision, No. W84/99, p. 36.

³⁶⁸ Environment Court Decision, No. W84/99, p. 35.

³⁶⁹ Environment Court Decision, No. W84/99, p. 35.

³⁷⁰ Environment Court Decision, No. W84/99, p. 35.

³⁷¹ Environment Court Decision, No. W84/99, p. 36.

development' for iwi.³⁷² Nevertheless it should not be forgotten that Ngati Kuia was declined consent.

The RMA can be cited as an attempt to acknowledge a Maori worldview in environmental management. However, *Port Gore* highlights fundamental and perhaps irreconcilable differences between the worldview of Ngati Kuia and that of the dominant culture. As discussed in chapter two the idea of setting aside areas to be maintained in an 'unmodified form' is embedded in the western cultural memory. The notion of imposing restrictions over particular localities is not completely alien to Ngati Kuia, who often place rahui over areas that require a period of retirement. Such actions are however temporary. Humanities interaction with the environment, rather than their separation from it, is what remains paramount.

Ngati Kuia and the Courts

The Environment Court cases provided an opportunity for Ngati Kuia to gather together customary evidence in support of the 1997 Maori Land Court application. As with the Environment Court the evidence gathered for the appeal highlighted the connection between Te Tau iwi and the foreshore and seabed. The statement of facts begins with the exploits of the ancestor Kupe and in particular his arrival and encounter with Muturangi's octopus. It was stated that 'land is held by those who have mana over it'. The naming of places and the recording of whakapapa and waiata that relate to the heroic deeds of ancestors were all expressions of mana.³⁷³ Moreover since the time of Kupe Te Tau Ihu iwi have exercised mana over the foreshore and seabed through the utilisation and protection of particular resources in accordance with tikanga.³⁷⁴

On the basis that Maori held land in accordance with tikanga prior to 1840, and that title had never been voluntarily extinguished since then, Te Tau Ihu iwi requested an order under ss.131 and 18(h) of Te Ture Whenua Maori Act 1993 that the foreshore and seabed of the Marlborough Sounds is Maori customary land. If however it was determined that the land was Crown land, Te Tau Ihu iwi asserted that they never consented to the abrogation of title, and therefore requested that the Court make an order in their favour under s.18(i)

³⁷² Ron Crosby, 'Te Tau Ihu Maori Involvement in Resource Management Issues' in *Whenua-Managing Our Resources*, ed. Mereta Kawharu, Auckland: Reed Books, 2002, p. 367.

³⁷³ 'Statement of Facts re: Maori Land Court Application', pp. 1-2. (Ngati Kuia Archives)

³⁷⁴ 'Statement of Facts re: Maori Land Court Application', pp. 8-9. (Ngati Kuia Archives)

that the land was held by the Crown in a fiduciary capacity. In the case of the latter Te Tau Ihu iwi request that the interests in such land be ascertained following an investigation ordered under s.132.³⁷⁵

Preliminary objections to the application were raised by the Attorney General (on behalf of the Crown). The Crown stated that the case could not proceed as a matter of law, citing the 1963 Appeal Court decision of *Ninety Mile Beach*, the Territorial Sea, Contiguous Zone, and Exclusive Zone Act 1977 and the Foreshore and Seabed Endowment Act 1991. It argued that as a result of the 1963 case, and the aforementioned legislation, Maori customary rights in the foreshore and seabed had been extinguished and therefore outside the jurisdiction of the Maori Land Court. However this view was not supported by Judge Hingston. In December 1997 he gave an interim decision that rejected the Crown's argument. In 1998 the decision was appealed by the Crown to the Maori Appellate Court where it was decided that a case should be put to the High Court to consider eight questions³⁷⁶ of law.³⁷⁷

In the High Court Justice Ellis found that the seabed did in fact belong to the Crown at common law, and had been declared so by statute. In regard to the foreshore it was accepted that the Maori Land Court could investigate whether or not such land was Maori customary land. However, following the ruling in *Ninety Mile Beach* Judge Ellis found that once Maori customary title to land above the high water mark had been extinguished so too had title to the adjacent foreshore.³⁷⁸ Consequently Te Tau Ihu iwi appealed the decision to the Court of Appeal who convened in July 2002.

The Court of Appeal focused primarily on the jurisdiction of the Maori Land Court—that being the first question at law put before the High Court. It found that the Maori Land Court did have jurisdiction to investigate and determine the status of the foreshore and seabed.³⁷⁹ In arriving at its decision the Court was required to consider the application of the common law and aboriginal (native) title in New Zealand,³⁸⁰ that is, the set of legal rules that apply 'when British sovereignty over a new colony is achieved'. Its purpose is to 'pre-serve the pre-existing rights that

³⁷⁵ Application for an Investigation of Maori Customary Land, p. 3.

³⁷⁶ see Decision in the Court of Appeal of New Zealand, part 6.

³⁷⁷ *Report on the Crown's Foreshore and Seabed Policy*, p. 41

³⁷⁸ Decision in the Court of Appeal of New Zealand, part 7.

³⁷⁹ Decision in the Court of Appeal of New Zealand, part 91.

³⁸⁰ *Report on the Crown's Foreshore and Seabed Policy*, p. 42

indigenous people have in their lands, according to their own customs'.³⁸¹

The doctrine of native title first became part of western legal thought in the sixteenth and seventeenth centuries. Following the Spanish colonisation of Mexico and Peru it was accepted by the Spanish Crown that it had an obligation to protect the property rights of indigenous peoples. It was this obligation that was to later develop into what is now known as the doctrine of native title. Grant Powell, who acted on behalf of Ngati Kuia and Te Tau Ihu iwi through the various stages of foreshore and seabed litigation, writes that 'by the date of the Treaty of Waitangi there was a clear acceptance of this obligation in the British Colonial office'.³⁸² This is evidenced and acknowledged in Normanby's instructions to Hobson.

In its investigation the Court necessarily returned to the *Ninety Mile Beach* decision, and the 1877 Supreme Court decision in *Wi Parata v Bishop of Wellington*. Here Chief Justice Prendergast ruled that the common law could not be applied in New Zealand because Maori did not possess social organisation sufficient enough to be recognised by English law.³⁸³ At the time *Wi Parata* was a legal anomaly. Courts in New Zealand,³⁸⁴ and in other (ex)-colonies,³⁸⁵ had earlier acknowledged common law rights. Nevertheless *Wi Parata* 'continued to influence thinking in New Zealand'. In subsequent litigation the Crown maintained that upon the acquisition of sovereignty it had acquired ownership of all land in New Zealand. This was the stance taken by the Solicitor-General in *Ninety Mile Beach*.³⁸⁶

In a landmark decision that brought New Zealand into line with other jurisdictions the Court of Appeal, in *Attorney-General v Ngati Apa*, overturned its own ruling in *Ninety Mile Beach*. It found that 'the transfer of sovereignty did not affect customary property'.³⁸⁷ Rights at common law remained until lawfully extinguished,³⁸⁸ either through consent or statute.³⁸⁹ While the matter of consent was outside the Court's investigation all five judges found that statute had not extinguished Maori customary rights in the foreshore

³⁸¹ *Report on the Crown's Foreshore and Seabed Policy*, p. 43

³⁸² Grant Powell, 'A Few Thoughts on Foreshore and Seabed', 12 November 2003, retrieved 10/11/2005 from <http://www.converge.co.nz/pma/fs121103.doc>

³⁸³ Decision in the Court of Appeal of New Zealand, part 23.

³⁸⁴ Decision in the Court of Appeal of New Zealand, part 16

³⁸⁵ Decision in the Court of Appeal of New Zealand, part 18

³⁸⁶ Decision in the Court of Appeal of New Zealand, part 25.

³⁸⁷ Decision in the Court of Appeal of New Zealand, part 13.

³⁸⁸ Decision in the Court of Appeal of New Zealand, part 34.

³⁸⁹ Decision in the Court of Appeal of New Zealand, part 85.

and seabed.³⁹⁰ Thus Justice Elias stated, ‘the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land Court’.³⁹¹

Although this was a positive outcome for Te Tau Ihu iwi the parties were reminded by the Court that ‘the significance of the determinations...should not be exaggerated’. The appeal did not establish that land below the high water is Maori customary land. The ‘assertion that there is some such land faces a number of hurdles in fact and law’.³⁹² Indeed it merely recognised the Maori Land Court’s ‘new’ jurisdiction. In addition, it had long been the prerogative of the High Court to apply the common law doctrine of native title. However, this role was made redundant due to the effectiveness of Maori land legislation in converting customary rights into fee simple ownership. *Ngati Apa* ‘revived’ this function.³⁹³

It can be argued that the common law and native title, while confirming rights can also act to restrict them—a line of reasoning I have pursued throughout this thesis. The Court of Appeal found that Maori customary title was not extinguished upon the arrival of English common law. Rather, it became part of the common law of New Zealand.³⁹⁴ However, to ‘recognise’ the legal systems of indigenous peoples is to incorporate them into a non-indigenous paradigm, divorced from that which they originated. More fundamentally this marginalises the worldview of the ‘recognised’ because recognition takes place in the space of unequal power relations inherent in colonial societies.

In previous chapters I have employed the notions of intelligence gathering and positional superiority to help illuminate Ngati Kuia’s colonial encounter. It has been shown that explorers, land agents, settlers, anthropologists and commissions of enquiry have all contributed to a corpus of knowledge pertaining to Ngati Kuia. Moreover, intelligence gathering has played a central role in their dispossession, and in maintaining the positional superiority of the Crown. The present chapter has too highlighted the Environment Court, High Court and Court of Appeal as effective intelligence gathering mechanisms. Although the Court of Appeal’s decision can be viewed as a ‘victory’ for Ngati Kuia, New Zealand’s constitutional arrangements would ensure that the Crown’s positional superiority

³⁹⁰ *Report on the Crown’s Foreshore and Seabed Policy*, p. 43.

³⁹¹ Decision in the Court of Appeal of New Zealand, part 13.

³⁹² Decision in the Court of Appeal of New Zealand, part 8.

³⁹³ *Report on the Crown’s Foreshore and Seabed Policy*, p. 44.

³⁹⁴ Decision in the Court of Appeal of New Zealand part 183.

remained unchallenged. The following chapter then examines the Crown's response to the Court of Appeal's decision, and continues to document Ngati Kuia's struggle to retain their rights.

Chapter Five

The Tyranny of the Majority

It is bad to be oppressed by the minority, but it is worse to be oppressed by the majority. For there is a reserve of latent power in the masses which, if it is called into play, the minority can seldom resist. (John Emerich Dalberg-Acton)³⁹⁵

In June 2003 the New Zealand Court of Appeal handed down its decision in *Ngati Apa v The Attorney-General*. The Court advised that the ruling should not be ‘exaggerated’ as the decision did not establish that the foreshore and seabed was Maori land. Significantly however the Court overturned the influential 1963 decision in *Ninety Mile Beach* making way for Te Tau Ihu iwi to take their claim to the Maori Land Court. This chapter examines the Crown’s and Ngati Kuia’s response to *Ngati Apa*. What will become clear is that both parties employed recognisable strategies to achieve a desired end. The Crown, as argued throughout this thesis, sought to maintain its positional superiority, Ngati Kuia its mana.

The Crown’s initial reaction to the Court of Appeal’s decision was a measured one. On 22 June 2003 Prime Minister Helen Clark and Attorney-General Margaret Wilson stated that it was a ‘narrow’ and ‘technical’ decision ‘relating to the jurisdiction within which claims to the foreshore and seabed may be considered’. The Crown also stated that while citizens are free to explore their legal rights, ‘issues of ownership and use affect all New Zealanders’ and thus ‘the government will be giving consideration to how these issues are best resolved’.³⁹⁶

The Appeal Court decision and the government’s response engendered confidence in Maori that a positive resolution could be negotiated. Raymond Smith, who was active in foreshore and seabed proceedings at the time, was still

³⁹⁵ John Emerich Dalberg-Acton, ‘Athens: The Tyranny of the Majority’ in *Critical Issues in History-Ancient Times to 1648*, Thomas W. Africa ed., Boston: D. C. Heath and Company, 1967, p. 35.

³⁹⁶ ‘Ministers Comment on Court of Appeal Decision’, retrieved 12/9/2006 from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=17134>

circumspect. While the decision allowed Maori to lodge applications with the Land Court, stringent criteria, such as evidence to show the continued use of the foreshore and seabed, still had to be met before a status order could be issued. Smith believes that even if Ngati Kuia had been deemed by the Maori Land Court to meet the criteria, it would only affect a few bays in the Marlborough Sounds.³⁹⁷

The government soon began to re-position itself. On 26 June Finance Minister Dr Michael Cullen, who by this time had emerged as the government's trouble shooter, presented plans to resolve issues relating to the foreshore and seabed. Rights of public access and use would be upheld while Maori customary rights would also be protected. Cullen stated he and senior government ministers would meet with the Maori caucus, who had an 'electoral mandate to represent Maori', to discuss how these interests could be reconciled. Cullen went on to say that the government was looking for a 'win-win' result, and that resolving the situation would require legislation. What this would look like was uncertain but a framework that took account of all interests and that did not create exclusive titles over what had been regarded as 'public domain' was being developed.³⁹⁸

The government's change in stance produced an almost instant Maori backlash. According to Harry A Kersey the government's intension to legislate breached a long-standing policy of consultation.³⁹⁹ Maori were quick to respond, and did so in quite a predictable fashion. Applications were filed with the Waitangi Tribunal but were declined because the government's announcement 'could not be viewed as representing a policy or proposed policy'.⁴⁰⁰ Furthermore, on 12 July a national hui was convened at Paeroa by Ngati Maru. It is worthwhile noting that the people of Hauraki had previously petitioned the Maori Land Court to determine ownership of the Thames foreshore. In 1870 Chief Judge Fenton stated in the *Whakaharatau* decision: 'I can find no reason or law which renders it incompetent for a Maori to have ownership of land covered by the sea at highwater'.⁴⁰¹ The Crown responded by suspending the jurisdiction of the Court in the foreshore of the Auckland area.⁴⁰²

³⁹⁷ Raymond Smith, wananga, 6/1/2007.

³⁹⁸ 'Govt Approach to Foreshore and Seabed Issues', retrieved 12/9/2006 from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=17176>

³⁹⁹ Harry A Kersey, Jr. *Policy Change and Maori Political Resurgence: An American View of the 2005 Election in Aotearoa-New Zealand*, Wellington: Treaty of Waitangi Research Unit, Victoria University, 2006, p. 3.

⁴⁰⁰ *Foreshore and Seabed Report*, p. 147.

⁴⁰¹ Cited in David V. Williams, *Te Kooti Tango Whenua-The Native Land Court 1864-1909*, Wellington: Huia Publishers, 1999, p. 43

⁴⁰² Williams, *Te Kooti Tango Whenua-The Native Land Court 1864-1909*, p. 44.

The outcome of the Hauraki hui was the ‘Paeroa’ or ‘Hauraki’ Declaration. It declared that: the foreshore and seabed belonged to the hapu and held under their tino rangatiratanga; it affirmed the tupuna rights to the foreshore and seabed as whenua rangatira; it directed all Maori MPs to oppose any legislation which proposes to extinguish or redefine customary title or rights; the hui supported all hapu and iwi who wished to confirm their rights in Court; the Government must disclose its proposals to whanau, hapu and iwi immediately, whose decision to accept or reject will be final; the final decision on the foreshore and seabed rests exclusively with whanau and hapu; the hui accepted the invitation of Te Tau Ihu to host the next hui⁴⁰³ to be held at Omaka, Blenheim, on 29 and 30 August.

To help facilitate a response to the government’s plans Te Tau Ihu iwi, with assistance from Te Ohu Kaimoana, formed Te Ope Mana a Tai.⁴⁰⁴ The group’s membership initially consisted of the original litigants in *Ngati Apa*: Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa. In the weeks that followed *Ngati Apa* other iwi also joined. Raymond Smith, Ngati Kuia’s representative on Te Ope Mana a Tai, says that Ngati Kuia joined in the belief that it would be able to achieve the goal of acquiring more water space for marine farms. According to Smith, Te Ope Mana a Tai soon took on a life of its own, moving outside of its brief. Financial contributions were also sought from members to help fund the group’s activities. This was a large burden for a small tribe.⁴⁰⁵ It was in response to these demands that Ngati Kuia withdrew as a member of Te Ope Mana a Tai in September 2003. However, Ngati Kuia stated that if, or when, the Crown was willing to negotiate they would do so directly.⁴⁰⁶

Prior to the Omaka hui both Te Ope Mana a Tai and the government released discussion documents. In its *Discussion Framework on Customary Rights to the Foreshore and Seabed*⁴⁰⁷ Te Ope Mana a Tai contextualises the debate within a wider discussion around the Treaty of Waitangi. It provides a background to the Court of Appeal decision, current legislative provisions for protecting customary rights, and international approaches to customary rights. Te

⁴⁰³ Paeroa Declaration, retrieved 14/9/2006 from <http://www.converge.org.nz/pma/paeroa.htm>

⁴⁰⁴ Walker, *Ka Whawhai Tonu Matou*, p. 384.

⁴⁰⁵ Raymond Smith, wananga, 6/1/2007.

⁴⁰⁶ Letter from Te Runanga o Ngati Kuia to the working group of Te Ope Mana a Tai, 20/9/2003. (Ngati Kuia Archives)

⁴⁰⁷ Te Ope Mana a Tai, ‘Discussion Framework on Customary Rights to the Foreshore and Seabed’, August 2003, retrieved 11/09/2006 from <http://wcl.wcc.govt.nz/maori/rauemi/teopemana.doc>

Ope Mana a Tai stated that the rights of iwi include, but are limited to: self-governance (ownership, control, regulation, management, and allocation); development (cultural and economic benefit); exclusivity (in accordance with tikanga); and access. Moreover, the document stated that these rights were an expression of mana, recognised in English common law, and guaranteed by the Treaty of Waitangi. On 18 August the government, in *Protecting Public Access and Customary Rights: Government Proposals for Consultation*, confirmed its intentions as expressed in earlier media statements. This was quickly followed by a new application for urgency with the Waitangi Tribunal. On 27 August Judge Carrie Wainwright was appointed to determine the application. After four judicial conferences the hearing was scheduled to be held over six days between January 20 and January 23 and January 28 and 29 2004.⁴⁰⁸

The Omaka hui drew a large audience of Maori and Pakeha. Iwi from Hauraki, Taranaki, Rongomaiwahine, Ngai Tamanuhiri, Ngati Raukawa, Muaupoko, Waikato, Whanganui, Ngati Kahungunu, Ngati Tuwharetoa and Mataatua were in attendance.⁴⁰⁹ Like Hauraki the hui passed a number of resolutions. It supported the direction and principles proposed by Te Ope Mana a Tai; engaging with the Crown and the sharing of information; the role of Te Ope Mana a Tai as a ‘mechanism for moving forward in an inclusive and cooperative manner’; the continuation of further discussion around strategies and options, such as increasing Te Ope Mana a Tai’s membership. The hui also rejected the Crown’s current proposals and affirmed both the Hauraki Declaration and the Te Tii Mangonui ki Te Tai Tokerau Declaration.⁴¹⁰

The Omaka hui brought together a good representation of iwi from around the country. Many became members of Te Ope Mana a Tai. Despite this the Prime Minister downplayed its significance. According to Helen Clark the hui was not representative of Maori, ‘it is not what is being reflected in the mainstream, or being reflected in polling among Maori at the moment’.⁴¹¹ In response John Mitchell of Ngati Tama stated: ‘it’s an old tactic...when you don’t like the message you try to destroy the messenger’.⁴¹² There were also renewed calls for a Maori political party. According to Buddy Mikaere, spokesperson for the Treaty Tribes Coalition:

⁴⁰⁸ *Foreshore and Seabed Report*, pp. 147-151

⁴⁰⁹ *Marlborough Express*, 2 September 2003, p. 3.

⁴¹⁰ Resolutions from Omaka Hui, retrieved 15/9/2006 from <http://www.converge.org.nz/pma/in300803.htm>

⁴¹¹ *Marlborough Express*, 2 September 2003, p. 3.

⁴¹² *Marlborough Express*, 2 September 2003, p. 3.

There is no political party out there that is prepared to stand up for our rights so we need to build one that will represent and serve our interests...if we rise to that challenge, we will take the Maori electorates off the current Government and it will fall as a result.⁴¹³

In October Te Ope Mana a Tai released its second document, *Submission on the Crown's Proposals to Protect Public Access and Customary Rights*.⁴¹⁴ It reiterated the need to centralise the Treaty of Waitangi in foreshore and seabed discussions. It stressed that this was the appropriate starting point 'for developing creative and durable ways of reconciling everyone's rights and interests. It urged the government to work together with iwi and hapu; emphatically stating that changes to the existing system should not be made without their agreement.

On 17 December the government released *Foreshore and Seabed: A Framework*. It stated that in formulating the *Framework* they were guided by the principles of: access, regulation, protection and certainty, and feedback received as part of the public consultation process. This included a series of hui held throughout the country⁴¹⁵ including one at Omaka on 9 September. The *Framework* proposed a new system for recognising rights in the foreshore and seabed. Importantly the policy would 'give whanau, hapu and iwi enhanced opportunities for greater involvement in management processes', and identify and protect customary rights that are 'not adequately recognised and protected at present'.⁴¹⁶ 'Practical initiatives' to help develop the relationship between whanau, hapu, iwi and policy makers in both local and central government would also be developed. To effect these changes Te Ture Whenua Maori Land Act would need to be amended as it 'was not intended to be the legal framework that applied to land in the foreshore and seabed'.⁴¹⁷

The Tribunal heard Wai 1071 in January. Contrary to the Crown's assertion its report stated that the proposed foreshore and seabed policy would not enhance Maori customary rights. Rather, it would 'confer both fewer and

⁴¹³ *Marlborough Express*, 1 September 2003, p. 1.

⁴¹⁴ Te Ope Mana a Tai, *Submission on the Crown's proposals to protect public access and customary rights*, retrieved 11/09/2006 from

<http://www.ngatittoa.iwi.nz/Final%20submission%20MAT%20Submission%20Oct%2003.htm>

⁴¹⁵ *Foreshore and Seabed: A Framework*, p. 1. retrieved 11/09/2006 from

<http://www.behive.govt.nz/foreshore/foreshore-seabed-framework.pdf>

⁴¹⁶ *Foreshore and Seabed: A Framework*, p. 5.

⁴¹⁷ *Foreshore and Seabed: A Framework*, p. 1.

lesser rights'.⁴¹⁸ The Tribunal deemed the policy 'expropriatory' because it denied Maori access to the Courts, which was effectively an 'expropriation of the rights themselves'.⁴¹⁹ Furthermore, because Maori do not consent to this, and because it is only the rights of Maori that are to be 'abolished', the Crown is failing to treat Maori and non-Maori equally.⁴²⁰ Consequently the Tribunal found that the Crown had breached Article Two and Article Three of the Treaty of Waitangi. The most telling of the Tribunal's observations, however, was that which spoke of its own role in proceedings. With the power to make recommendations only the government is ultimately 'free to do what it wishes'. The Tribunal proceeds with 'the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness'.⁴²¹

Ngati Kuia's participation in the Tribunal hearing can be described as 'distanced'. None of the traditional witnesses who appeared before the Tribunal were Ngati Kuia. In fact nobody from Te Tau Ihu, or indeed, the South Island presented evidence. Grant Powell, legal counsel for Te Ope Mana a Tai, gave an oral submission on behalf of his clients,⁴²² while Matiu Rei, chairperson of Te Ope Mana a Tai is recorded as submitting a number of supporting documents.⁴²³ Ngati Kuia's non-participation can be seen as an almost inevitable consequence of a process in which a Ngati Kuia issue became a Maori issue.

Also worthwhile discussing here are those Maori who did present evidence before the Tribunal. Two days were set aside for traditional witnesses, and included Dr Manuka Henare, Professor Margaret Mutu, and Sir Hugh Kawharu, amongst others of the Maori intelligentsia. Indeed there can be no dispute as to the calibre of witnesses. This highlights the fact that dialogue took place in terms cognisable to the Crown; an example of what Pratt has termed autoethnography or autoethnographic expression. According to Pratt this 'involves partial collaboration with and appropriation of the idioms of the conqueror'.⁴²⁴ While autoethnography enables Maori to communicate their concerns through legislative mechanisms such as the Tribunal, it invariably allows for the

⁴¹⁸ *Foreshore and Seabed Report*, pp. 127-128

⁴¹⁹ *Foreshore and Seabed Report*, p. 121.

⁴²⁰ *Foreshore and Seabed Report*, p. 129

⁴²¹ *Foreshore and Seabed Report*, pp. xii-xiii

⁴²² A list of those people who presented evidence can be found at: *Foreshore and Seabed Report*, p.151.

⁴²³ *Foreshore and Seabed Report*, p. 175.

⁴²⁴ Pratt, *Imperial Eyes, Travel Writing and Transculturation*, p. 7.

assimilation of a Maori worldview into a European paradigm. This process, as has been shown, can distort concepts that make sense only when examined in relation to that which has produced it. Moreover once the irrational has been rationalised it becomes definable, and thus dismissible.

The Crown for instance argued that land was distinct from the foreshore and seabed. While ‘all dry land was claimed by various tribes’, Maori did not own the sea in a ‘territorial sense’. According to the Crown the sea was, in ‘classical Maori thought’, hostile; it was a common highway with no tribal boundaries and therefore associated with nobody’s mana. Moreover ‘claims of ownership of the sea are a twentieth-century development in Maori thinking’. To substantiate its position the Crown cited a report prepared by L. F. Head for Wai 167, and a number of statements by Professor Hirini Moko Mead and Judge H. K. Hingston.⁴²⁵

The government’s response to the Tribunal’s report was predictable. According to the government it was ‘disappointing’. The Deputy Prime Minister said that some matters raised in the report would be considered, but he rejected a number of the Tribunal’s findings. ‘Implicit’ in the report was the rejection of the principle of parliamentary sovereignty. There is an assertion that the government is itself breaking the law. The Tribunal had apparently forgotten that ‘the power of Parliament to change the law is central to the exercise of sovereignty and therefore the contemporary exercise of Article One of the Treaty’. Furthermore the Tribunal claims that the proposed policy does not ‘recognise customary rights as property rights’. To this the government replied: ‘this is simply not so...the government does recognise customary rights as property rights’. When all is taken into account, stated Cullen, ‘much of the logic of the Tribunal’s report simply falls to the ground’.⁴²⁶

Ngati Kuia made further protestations to the proposed policy through the select committee process. In his submission to the Fisheries and Other Sea-Related Legislation Select Committee on the Foreshore and Seabed Bill, Raymond Smith stated that the policy was developed with little meaningful consultation with iwi. More specifically it extinguishes property rights, denies access to justice, and offers nothing meaningful to hapu and iwi. Furthermore, the Crown has participated in ‘scaremongering’ and has ‘manufactured and

⁴²⁵ *Foreshore and Seabed Report*, p. 20-22.

⁴²⁶ ‘Waitangi Tribunal Disappointing’ retrieved 5/1/2007 from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091>

exploited' the issue of public access for political ends.⁴²⁷ It is to these assertions that I now wish to turn my attention.

While the government was trying to manage the foreshore and seabed 'controversy' the National Party took the opportunity to resuscitate itself in the opinion polls. According to Kersey this included the exploitation of ethnic tensions, the defining moment of which was Don Brash's Orewa speech in January 2004.⁴²⁸ In what could have passed as the foreword to Stuart C. Scott's *The Travesty of the Treaty*⁴²⁹ Brash regurgitated the myths that so many New Zealanders hold steadfast to, and continue to fuel colonisation in the present. We should be under no illusion, states Brash, pre-European Maori society was 'hard, brutal and short', implicitly saying Maori were savages. Reference is also made to the usual rhetorical figures: race relations in New Zealand are excellent, Maori get it better than others, and there aren't any real Maoris left.⁴³⁰

However, it was Brash's attack on Labour's Maori policy, and in particular its foreshore and seabed proposals, that paid dividends for National. According to Brash the 'convoluted notion' of public domain would more than recognise Maori customary rights. It would extend to Maori the power of veto over any activity in the foreshore and seabed. Furthermore Maori customary title would allow for the exercise of development rights that 'over time would inevitably erode public access'.⁴³¹ Support for National soared following Orewa. According to Ken Hingston this epitomised 'where we as a country are—or are not'.⁴³² Furthermore the message for Labour in the lead up to the 2005 election was clear: to maintain their hold on power they needed to placate the wishes of the Pakeha majority.

Labour's handling of the situation was conditioned by this priority. In an address to the Waipukurau Rotary Club on 15 March 2004 Cullen stated that 'by launching an attack on what he terms preferential treatment for Maori, Dr Brash has inflamed irrational fears...and...unleashed a wave of hostility

⁴²⁷ Raymond Smith, 'Submission to the Fisheries and Other Sea-Related Legislation Select Committee on the Foreshore and Seabed Bill', 5/7/2004. (Ngati Kuia Archives)

⁴²⁸ Kersey, *Policy Change and Maori Political Resurgence: An American View of the 2005 Election in Aotearoa-New Zealand*, p. 9.

⁴²⁹ Stuart C. Scott, *The Travesty of the Waitangi-Towards Anarchy*, Dunedin: The Campbell Press, 1995.

⁴³⁰ 'Orewa Speech-Nationhood', retrieved 1/2/2005 from <http://www.national.org.nz/Article.aspx?ArticleID=1614>

⁴³¹ 'Orewa Speech-Nationhood'.

⁴³² Ken Hingston, 'Foreshore and Seabed' in *State of the Maori Nation-Twenty First Century Issues in Aotearoa*, ed. Malcolm Mulholland, Auckland: Reed Publishing, 2006, p. 111.

and suspicion towards all Maori'.⁴³³ This was but one of a number of examples when Labour accused National of stirring up racial tension. But Labour did not stop here:

It is ironic that the major opposition parties are attacking the government for leaning too much towards Maori, while some Maori and the Tribunal are saying the exact opposite. Perhaps that might suggest to a fair and independent observer that the government has it about right.⁴³⁴

'Some Maori' then were also constructed as irrational. In doing so Labour promoted itself as the party of the middle ground. Thus, while the government did not 'manufacture' the issue of public access it can be said with some confidence that it 'exploited' the issue for political ends.

The most public display of dissatisfaction with the Foreshore and Seabed Bill was undoubtedly a march on parliament that coincided with the Bill's first reading on 5 May 2004. Well aware of the Crown's intentions the idea of a hikoi was mooted by Ngati Kahungunu in the September 2003.⁴³⁵ Starting in Te Tai Tokerau the hikoi made its way down the North Island, collecting supporters on the way. On 4 May a small number of Ngati Kuia gathered with other iwi from Te Tau Ihu at Waikawa Marae in Picton to make preparations for the following day's journey across Raukawa-kawamoana.

Raymond Smith recalls the huge number of people who had gathered in Wellington on 5 May. The logistics of organising such an event stood out for him. Although riding on the back of Kaikaiawaro 'kotahitanga was the kaupapa of the day'. Nevertheless, the hikoi highlighted how invisible Ngati Kuia had become in the journey from Anakoha to the footsteps of parliament. For this reason, and impressed with the varying array of tribal flags, Smith promoted the need for a flag amongst Ngati Kuia. Smith also noticed the significant amount of Pakeha people marching on the hikoi, but says 'there should have been more'. Witnessing the coming together of all Maori was an extremely positive experience. For Smith, however, the most disappointing aspect of the day was Prime Minister Helen Clark's refusal to meet with hikoi participants, something he will never forget.⁴³⁶ Jim Walker, who also attended the hikoi, expressed similar sentiments. Prior to his death in February 2006 I spoke to him at his home in Blenheim. He was disgusted in how Helen Clark and

⁴³³ 'Waipukurau Rotary Club' retrieved 5/1/2007 from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19164>

⁴³⁴ 'Waipukurau Rotary Club'.

⁴³⁵ Walker, *Ka Whawhai Tonu Matou*, p. 403.

⁴³⁶ Raymond Smith, wananga, 6/1/2007.

Labour had treated his people. Like his father he had always voted for Labour, but, he said he would never vote for them again. In the 2005 general elections he had given both votes to the Maori Party.⁴³⁷

The Foreshore and Seabed Act was passed on 24 November 2004. At one point however its future was uncertain. Te Tai Hauauro MP and Associate Minister of Maori Affairs, Tariana Turia, announced she would vote against it. And other Maori MPs, under pressure from their constituents, were starting to reconsider how they would vote on the legislation. To ensure that the Bill would become law Labour, who had proposed the concept of 'public domain', dropped United Future, its regular coalition partner. Labour now looked to New Zealand First for support. At the latter's insistence, however, 'public domain' was removed and replaced with Crown ownership.⁴³⁸

Labour's political positioning(s) were truly something to behold. From the time the Court of Appeal handed down its decision the words 'foreshore' and 'seabed' had become catalysts for discussion and sometimes anger. One reason for this is that in much of the debate the term itself had been conflated with the 'beach', an iconic Pakeha symbol. Prior to the passing of the Act Cullen stated: 'New Zealanders will discover when they go to the beach this summer that the effect of the Foreshore and Seabed Bill, passed today, is to preserve the status quo'. The vesting of the foreshore and seabed in the Crown was, according to the government, to provide certainty.⁴³⁹ It was also to counter growing concerns amongst the Pakeha public that if Maori had control of the beaches they would be denied their own 'divine right' to visit this 'wahi tapu'. Stopping short of explicitly stating it the Crown implied that Maori were greedy, selfish and without compassion.

In April 2006 the United Nation's Committee on the Elimination of Racial Discrimination (CERD) released the report of its Special Rapporteur on his mission to New Zealand. Having exhausted the avenues available to them domestically, Ngati Kuia took their protest offshore. The Treaty Tribes Coalition, in conjunction with Ngai Tahu and the Taranaki Maori Trust Board, petitioned CERD. The Committee, based in New York, heard the petition on 14 May 2004. It despatched Special Rapporteur Rodolfo

⁴³⁷ Jim Walker, wananga, November 2005.

⁴³⁸ Kersey, 'Policy Change and Maori Political Resurgence: An American View of the 2005 Election in Aotearoa-New Zealand', p. 6.

⁴³⁹ 'Certainty Restored', retrieved 7/1/2007

from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=21539>

Stavenhagen, who visited New Zealand from 16 to 26 November 2005. The report focuses specifically on the Foreshore and Seabed Act and its human rights implications, but also covers issues such as: political representation, land rights, claims, settlements, justice, language, culture and education. The report found that parts of the Act were discriminatory, and can be seen 'as a step backward for Maori'.⁴⁴⁰ The Special Rapporteur recommendations included: the constitutional entrenchment of Treaty of Waitangi; the constitutional entrenchment of the MMP electoral system; granting the Waitangi Tribunal 'legally binding powers'; and the repeal of the Foreshore and Seabed Act 2004.⁴⁴¹

The government described the United Nations report as 'disappointing, unbalanced and narrow'. Cullen stated that this was not surprising as he had only spent eight days in the country. According to Cullen the Special Rapporteur was not aware of the progress successive governments had made in dealing with Maori grievances. He further asserted that New Zealand is one of the few countries that have implemented sophisticated mechanisms to deal with such grievances. Furthermore the Rapporteur's recommendations were, according to Cullen, 'an attempt to tell us how to manage our political system'. To this he replied: 'this may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves'.⁴⁴²

When examining the foreshore and seabed issue it is important to consider also the government's treatment of dissenting points of view. Apart from its initial positioning following *Ngati Apa*, the government took every opportunity to marginalise those who criticised its foreshore and seabed policies as they evolved. It described the Court of Appeal decision as 'judicial activism', the Omaka hui as not representing all Maori, and the UN's report as 'unbalanced'. This played an important role in maintaining the government's positional superiority. In *Culture and Imperialism* Said writes that narrative is a method used by colonised people 'to assert their own identity'. While the main battle in imperialism is over land; who won it, settled it and worked it, the process that 'now plans its future', is 'reflected', 'contested', and 'decided' in narrative.⁴⁴³ Said argues:

⁴⁴⁰ 'Report of the Special Rapporteur', pp. 12-15.

⁴⁴¹ Report of the Special Rapporteur', pp. 20-21.

⁴⁴² 'Response to UN Rapportuer Report', retrieved 8/1/2007 from <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25366>

⁴⁴³ Said, *Culture and Imperialism*, p. xiii.

The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.⁴⁴⁴

Questions of agency are also raised in relation to this scenario. New Zealand's constitutional arrangements ensure that the Crown ultimately controls the legal processes—the contact zone. But as this chapter has demonstrated the Crown, through its recourse to logic and rationality, and to the western cultural memory, was also able to set the agenda in public debate. Ngati Kuia, with little room to move, attempted to generate traction in its negotiations with the Crown by joining with others to form Te Ope Mana a Tai. Dissatisfied and unable to contribute financially they left the group. One could suggest that agency in the contact zone comes at a price.

⁴⁴⁴ Said, *Culture and Imperialism*, p. xiii.

Conclusion

The purpose of this thesis has been to write Ngati Kuia back into the narrative surrounding the foreshore and seabed. In turn this has provided a window on a Ngati Kuia worldview. I have also been concerned with how that worldview has become marginalised and consequently how rights to the foreshore and seabed have been extinguished. To help deconstruct, and make sense of Ngati Kuia's colonial encounter, I have employed post-colonial theory, and in particular Said's notions of positional superiority and intelligence gathering. It can be said that the Crown, in all its engagements with Ngati Kuia, has operated on the basis of what Jackson terms a 'right to rule'. This assumption gives colonisation in New Zealand its consistency, and supports Said's assertion 'that what is thought, said, or even done about the Orient follows (perhaps occurs within) certain distinct and intellectually knowable lines'.⁴⁴⁵

In chapter one I discussed the function and purpose of whakapapa and tradition in Maori society. It was shown that ultimately their purpose is to link Ngati Kuia to the physical environment. Furthermore, it is from this relationship that ethics such as mana, manakitanga, utu and rights to resources, emanate. These concepts define and structure the Ngati Kuia worldview. How Ngati Kuia sought to protect and promote this worldview was explored in subsequent chapters. One way in which Ngati Kuia attempted to do this was by amalgamating with others to achieve a common goal. However, amalgamation was not just a response to colonisation; it has always been an important dynamic in the formation and re-formation of Ngati Kuia. But as later chapters demonstrated, amalgamation often contributed to Ngati Kuia's marginalisation.

Chapter two examined Ngati Kuia's encounters with early explorers, colonists, and government departments. It was argued that there exists an identifiable discourse which has invariably constructed Ngati Kuia as inferior: as 'barbarians', 'savages', 'slaves', 'conquered', and 'extinct'. Intelligence gathering played an important role in perpetuating the European belief in Maori savagery. Following formal colonisation intelligence gathering became

⁴⁴⁵ Said, *Orientalism*, p. 13.

more sophisticated. The Maori Land Court ostensibly provided Ngati Kuia with an opportunity to have their rights recognised. However, the Court's findings continued to reflect a discourse predicated on the inferiority of non-European peoples. In savage societies 'might was right'. For Ngati Kuia this was to have palpable effects. Thus while purportedly protecting Ngati Kuia rights the law was used as an effective tool to remove them.

Chapter two also explored the idea of paradise and its connection to colonisation. I argued that this notion was reconstituted during the Enlightenment and later found new expression in various ideologies. One manifestation was that of a political utopia and indeed the early settler polity saw itself as such. The conservation values of the dominant culture can too be traced to the idea of paradise. The imposition of these values during the late nineteenth and early twentieth centuries resulted in the further alienation of important resources. Moreover, it can be argued that the recent foreshore and seabed issue can in part be seen as a continuation of the search for 'Eden'.

Chapter three examined the Maori protest movement of the 1970s. Primarily a phenomenon of the large urban centres, and as such Ngati Kuia did not participate, the protest movement provided a catalyst for change that would later impact on Ngati Kuia. A legislative response to Maori protest was the creation of the Waitangi Tribunal in 1975. Significantly the claims discussed in this thesis related to waterways and foreshore and seabed areas, and highlighted the commonality in the worldviews of the claimants. The Tribunal's findings were to influence the shape and content of the Resource Management Act 1991 which included a number of Maori 'provisions'. It was via the RMA that Ngati Kuia was able to register their concerns relating to marine farming during the mid-1990s.

The evolution of Ngati Kuia as a legal entity was also traversed in this chapter. In order to access the benefits of Tribunal recommendations and to utilise the provisions of the RMA Ngati Kuia were required to formalise themselves legally. Initially they amalgamated with Te Tau Ihu's other iwi forming Te Runanganui o Te Tau Ihu. However, dissatisfied they soon left. More recently Ngati Kuia has amalgamated with Rangitane and Ngati Apa under the banner of 'Kurahaupo'; its purpose, to advance the Treaty of Waitangi claims of the three iwi. As I have argued Ngati Kuia is not adverse to amalgamation, however, unlike previous pan-tribal arrangements Kurahaupo was not founded on the free will and consent of the Ngati Kuia people. As a

result of duress the Kurahaupo is artificial. Moreover, the Crown's policy of dealing only with large natural groupings has removed the fundamental right of those concerned to decide who it is they will coalesce with.

During the mid-1990s Ngati Kuia employed the provisions of the RMA in an attempt to gain entry into the marine farming industry and to protect customary rights. The Environment Court provided an avenue to address concerns expressed by Ngati Kuia regarding the administration of the Act. However, as chapter four demonstrated success was limited. Consequently, an application was lodged with the Maori Land Court by 'Te Tau Ihu iwi'—an amalgamation of Te Tau Ihu's eight iwi—who sought a declaration that the foreshore and seabed of the Marlborough Sounds was Maori customary land. The Court found that this was indeed the case. The Crown in turn appealed the decision to the Maori Appellate Court, and so begun a process of litigation that ended in the New Zealand Court of Appeal.

The Court of Appeal did not find the foreshore and seabed to be Maori land. Rather, it confirmed the Maori Land Court's jurisdiction to investigate title to these areas. And although the Court warned that the decision should not be 'exaggerated' the Crown's response was arguably just that. The government stated that the foreshore and seabed had long been considered 'public domain' and announced that it was working towards a framework that would take into account the interests of all.

By this time the foreshore and seabed had become more than just a Ngati Kuia issue. To help formulate a response to the government's proposals the iwi of Te Tau Ihu formed Te Ope Mana a Tai, and following two national hui other iwi also joined. In January 2004 the Waitangi Tribunal heard Wai 1071. In its report the Tribunal emphatically rejected the Crown's assertion that the proposed policy would enhance Maori customary rights. Ngati Kuia continued to follow due process via the Fisheries and Other Sea-Related Legislation Select Committee on the Foreshore and Seabed Bill. The culmination of Maori protest, however, was without doubt the hikoi.

The issue of the foreshore and seabed mobilised Maori around a common cause. Nevertheless, protest did not prevent the passing of the Foreshore and Seabed Act, confirming what I have argued throughout this thesis: power ultimately resides with the Crown. This raises questions of agency, a theme I have also engaged with throughout this thesis. Recently post colonial theory has moved beyond

binary models of encounter as they cannot accommodate indigenous agency. Rather, it is now suggested that colonial encounters take place within a contact zone: ‘a place of negotiation and exchange’.⁴⁴⁶

There is little doubt that Ngati Kuia has been able to negotiate space within the contact zone whereby they have been able to re-inscribe a Ngati Kuia worldview. The RMA is a case in point. However, the cultural integrity of that worldview, as it is represented in the Act is questionable: does kaitiakitanga equate to stewardship? Furthermore, Ngati Kuia’s entry into the contact zone has often been part of a coercive process where by stolen resources are returned, but only after they have been codified and reduced to the status of a commodity. This raises to significant questions for Ngati Kuia: does this reflect a whakapapa relationship with the resource, or more to the point, does money equate to mana? Moreover, it should not be forgotten that the Crown ultimately determines who will be the beneficial owners of the assets.

Ngati Kuia agency then should not be overstated. It has been demonstrated during this thesis that it exists only as far as the dominant culture will allow. It has, however, become a buzz word in recent scholarship. I would argue the relentless theorising around indigenous agency has begun to blur the brutal reality of colonisation. In fact I think it can be argued that the notion of agency has given intellectual robustness to the dominant cultural ethos that colonisation in New Zealand was relatively good.

Theoretical debates about how the past should be used are also relevant to discussions about agency. At the start of this thesis I stated that it is written with purpose, as is Tribunal history, and thus outside the bounds of ‘orthodoxy’. Byrnes, in a recent essay, writes that most historians now ‘acknowledge presentist tendencies in their historical narratives’.⁴⁴⁷ While seemingly taking a moderate stance between ‘uncontrolled relativism’ and ‘scientific empiricism’,⁴⁴⁸ Byrnes essay essentially re-states what ‘real’ history is, or rather, what Tribunal history is not: ‘true or accurate’.⁴⁴⁹ If narrative is a way in which the colonised can ‘assert their own identity’, as Said argues,⁴⁵⁰ does not the

⁴⁴⁶ Byrnes, *Boundary Markers-Land Surveying and the Colonisation of New Zealand*, p. 8.

⁴⁴⁷ Giselle Byrnes, ‘By Which Standards? History and the Waitangi Tribunal: A Reply’ in *New Zealand Journal of History*, 40:2, 2006, p. 216.

⁴⁴⁸ Byrnes, ‘By Which Standards? History and the Waitangi Tribunal: A Reply’, p. 217.

⁴⁴⁹ Byrnes, ‘By Which Standards? History and the Waitangi Tribunal: A Reply’, p. 225.

⁴⁵⁰ Said, *Cultural and Imperialism*, p. xxi.

recourse to 'orthodoxy' marginalise such narrative and consequently silence the voice of the colonised?

Another development in post colonialism has been the move towards the study of more localised encounters. According to Nicholas Thomas there is an increasing awareness 'that only localized theories and historically specific accounts can provide much insight into the varied articulations of colonizing and counter-colonial representations and practices'.⁴⁵¹ While correct, the proliferation of such studies has presented an opportunity for some to rank the experiences of indigenous peoples on some perceived hierarchical scale of oppression. In 2001 for instance Hugh Laracy, Associate Professor of History at Auckland University, addressed Tariana Turia's use of the word 'holocaust' to describe the Maori experience of colonisation. Laracy replied: 'considering small mercies, it might not be impertinent to suggest that they (Maori) were better off in finding such opportunities under British rule'.⁴⁵² To suggest that Maori were better off under British rule is to continue to operate within a paradigm of colonisation. To assume that some body's loss is greater or lesser than that of another is also to assume that the writer/researcher knows the subject better than they know themselves—an assumption that has always defined the orientalist.⁴⁵³

While taking into account its fiscal constraints and electoral implications, the Crown's Treaty settlement policy can also be seen to reflect these very assumptions. The Office of Treaty Settlements, when determining the redress quantum that claimants will receive, refers to a check list that includes: the proportion of the land lost since 1840; the current population of the claimant community; and the means of land loss. Land lost through raupatu, as occurred in Waikato and Taranaki, is given highest priority by the government. Given a lower priority is land lost as a result of early Crown purchase policies.⁴⁵⁴ It is the latter category to which Ngati Kuia has been placed.

The point I am trying to make here is that there exists a connection between culture, the discipline of history, post colonial theorising, and colonisation itself. Useful here is

⁴⁵¹ Nicholas Thomas, *Colonialism's Culture-Anthropology, Travel and Government*, Cambridge: Polity Press, 1994, p. ix.

⁴⁵² Hugh Laracy, 'Was Colonisation Really That Bad', in *History Now-Te Pae Tawhito o Te Wa*, 7:1, February 2001, p. 12.

⁴⁵³ In *Orientalism*, Said cites Arthur Balfour's speech to the House of Commons on 13 June 1910: 'We know the civilisation of Egypt better than we know the civilisation of any other country. We know it further back; we know it more intimately; we know more about it'. p. 32

⁴⁵⁴ David Williams, 'Honouring the Treaty of Waitangi' in *Murdoch University Electronic Journal of Law*, retrieved 10/1/2007 from <http://www.austlii.edu.au/au/journals/MurUEJL/2002/31.html>

Antonio Gramsci's notion of cultural hegemony. In *Orientalism* Said writes that Gramsci makes an 'analytical distinction between civil and political society'. Political society is made up of institutions such as the army, the police, and state bureaucracy. Civil society consists of 'voluntary (or at least rational and non-coercive) affiliations' such as schools, families and unions. The role of political society in the polity is 'direct domination'. Civil society, however, operates through what Gramsci calls 'consent', and it is here that we find culture.⁴⁵⁵ In non-totalitarian societies 'certain cultural forms predominate over others'. It is this 'cultural leadership' that Gramsci terms cultural hegemony.⁴⁵⁶

In a recent essay Ken Hingston, presiding judge in the 1997 Maori Land Court case, stated that certain attitudes towards Maori have 'permeated through New Zealand society and become part of the Pakeha psyche'. The bottom line according to Hingston is that many New Zealanders are just opposed to any benefits that may accrue to Maori.⁴⁵⁷ In 1982 Donna Awatere expressed similar sentiments when she wrote 'white hatred seems a harsh explanation for the attitudes of whites and for the way that the Maori has been and is treated. But the evidence suggests that no other explanation will do'.⁴⁵⁸ Quite obviously not all New Zealanders are of this opinion. Carol Archie's *Maori Sovereignty-The Pakeha Perspective*⁴⁵⁹ provides examples of alternative thinking. Nevertheless, I believe the government's and indeed the opposition's response to *Ngati Apa* confirms Hingston's and Awatere's observations.

Finally, and I believe appropriately, I would like to address an issue that I raised at the beginning of this thesis: who is this research meant to benefit? From previous experience it is the use of theory, or perhaps the language of theory, that has presented barriers to understanding. According to Smith, post colonial theory highlights the ability of indigenous writers to:

Appropriate the language of the colonizer as the language of the colonized and to write so that it captures the ways in which the colonized actually use the language, their dialects and inflections, and in the way they make sense of their lives.⁴⁶⁰

⁴⁵⁵ Said, *Orientalism*, p. 6.

⁴⁵⁶ Said, *Orientalism*, p. 7.

⁴⁵⁷ Hingston, 'Foreshore and Seabed' in *State of the Maori Nation-Twenty First Century Issues in Aotearoa*, p. 112.

⁴⁵⁸ Donna Awatere, *Maori Sovereignty*, Wellington: Broadsheet, 1984, p. 15.

⁴⁵⁹ Carol Archie, *Maori Sovereignty-The Pakeha Perspective*, Auckland: Hodder Moa Beckett, 1995.

⁴⁶⁰ Smith, *Decolonizing Methodologies-Research and Indigenous Peoples*, p. 36.

This is important, writes Smith, because it ‘speaks to an audience of people who have also been colonized’.⁴⁶¹ One would have to assume the audience she speaks of are the indigenous intelligentsia. This is the very point I wish to make: is research meant solely for those in academia? Again I would agree with Smith. Research that is theoretically informed has advantages in that it helps communities to make ‘assumptions and predictions’ which then allows time to ‘strategize’ and decide on the appropriate course of action.⁴⁶² What is required is community participation. This not only includes the imparting of information by tribal members to the researcher, it is essential also that the researcher undertakes to articulate concepts and ideas appropriately. It should also be noted, without precluding these observations, that Maori research has always been theoretically informed: by matauranga Maori. Research that is sourced in whakapapa and tradition ensures that the concerns and motivations of the community involved remain paramount. It was therefore necessary to examine those relating to Ngati Kuia at the outset of this thesis, for contained within are the cultural imperatives that help define and structure the worldview of these people.

⁴⁶¹ Smith, *Decolonizing Methodologies-Research and Indigenous Peoples*, p. 36.

⁴⁶² This again implies that the colonised have power. I would argue that ‘real’ power only begins when the colonised become aware that such power is still ultimately limited.

Appendix One

Part II Purpose and Principles

5. Purpose --- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means 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.

6. Matters of national importance--- In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7. Other matters---In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) Kaitiakitanga:
- (b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values:
- (d) Intrinsic values of ecosystems:
- (e) Recognition and protection of heritage values of sites, buildings, places, or areas:
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources:
- (h) The protection of the habitat of trout and salmon:

8. Treaty of Waitangi--- In achieving the purpose of this Act, all persons exercising 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).

Source: Resource Management Act, 1991.

Appendix Two

[6] Eight questions were posed for the High Court:

1. What is the extent of the Maori Land Court's jurisdiction under Te Ture Whenua Maori Act 1993 to determine the status of foreshore or seabed and the waters related thereto?
2. Does the law of New Zealand recognise any Maori customary title to all or any part of the foreshore?
3. (If the answer to question 2 is Yes.) Irrespective of any fact in any particular case, when there has been an extinguishment of Maori customary title to land having the sea as a boundary without express mention of the foreshore in the instrument evidencing extinguishment, as a matter of law, can any Maori customary title to the foreshore remain?
4. Would the law of New Zealand prior to the enactment of the Territorial Sea and Fishing Zone Act 1965 have recognised any Maori customary title to all or any part of the seabed and the waters related thereto/
5. (If the answer to question 4 is Yes.)
 - (i) Did s7 of the Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977 ("Territorial Sea Act"), or its predecessor, (s7 of the Territorial Sea and Fishing Zone Act 1965), extinguish any Maori customary title to the seabed?
 - (ii) Can the exercise of any jurisdiction held by the Maori Land Court to determine the status of the foreshore and/or seabed and/or waters thereto amount to a "grant of any estate or interest therein" in terms of s7 of either of the Territorial Sea Acts?
6. Do s7 of the Territorial Sea Act and s129(3) of Te Ture Whenua Maori Act 1993 prevent the Maori Land Court from making a declaration under s131 of Te Ture Whenua Maori Act that the seabed is Maori customary land?
7. Does the following area specific legislation which vested areas of the foreshore and/or seabed in the Marlborough Sounds in the Harbour Boards, local authorities and other persons, extinguish any Maori customary title to the foreshore and seabed in those areas:
 - The Public Reserves Management Act 1867 (Marlborough)

- The Picton Recreation Reserve Act 1896 vested an area of Picton Harbour in the Picton Borough Council
- The Havelock Harbour Board Act 1905
- Section 30 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1907
- The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1910
- The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915
- The Marlborough Harbour Amendment Act 1960
- The Reserves and Other Lands Disposal Act 1973
- The Marlborough Harbour Amendment Act 1977

8. Does s9A of the Foreshore and Seabed Endowment Revesting Act 1991 extinguish any Maori customary title to the foreshore and seabed?

Source: Decision in the New Zealand Court of Appeal Between Ngati Apa and The Attorney-General section 6.

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