

CHAPTER 4

MĀORI INTERESTS AND RIGHTS: FOUR SITES AT THE FRONTIER

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Māori are the indigenous peoples of Aotearoa (New Zealand). Aotearoa has been the home for Māori for many generations, with some Māori tribes indicating that they have always been in Aotearoa. It was only when non-Māori, such as Abel Tasman and James Cook, sighted and landed in Aotearoa, in 1642 and 1769, respectively, that it began to become a frontier where Māori and non-Māori needed to negotiate settlement and co-existence.

Whatever sphere it relates to, public policy is a product of the values and cultures which are embedded in the communities, people and agencies that design, implement, monitor and evaluate it. Public policy is not neutral. Our primary interest in this chapter is in the evolution of public policy as it relates to Māori rights, and the relationship between Māori and the Crown. The Crown, which can encompass multiple meanings, is commonly used in New Zealand to refer to the New Zealand state (sometimes extended to include the British Monarchy) and often to the executive branch of government.

Where such policy has been successful, and sometimes innovative, it has largely been a result of pressure from Māori. Where public policy has not worked tends to be in places where the Crown continues to institutionalise colonial practices. Most of this chapter is devoted to examples of both where and when policies have been successful from a Māori perspective, and where they have failed.

The questions, therefore of ‘what has worked’ and ‘what hasn’t worked and why’ come back to the fact that the Crown itself, and indeed the dominant thinking of many New Zealand public policy scholars, continue to perpetuate colonial practices and attitudes. The consequence of such a circumstance is that Māori scholars

are left to explain to policy makers and other scholars New Zealand's history and the way that current public policy is not culturally neutral (Mikaere, 2005).

As an example of how public policy in New Zealand is culturally 'loaded', consider how law and policy was originally constituted through the English Laws Act 1858. This Act 'made all English laws applicable to New Zealand' (Durie, 2005a, p. 2). As Mason Durie argues, 'it was taken for granted that if the laws worked in England, they should work in New Zealand' (Durie, 2005a, p. 2). Durie highlights early non-Māori assumptions about the applicability of English laws and policy to New Zealand in the 1800s, but the core of this legal and governance system remains and continues to claim a neutral positioning. Notwithstanding that policies and laws also continue to evolve and be adapted, of course.

When analysing and evaluating public policy, it is essential to recall its origins and acknowledge its cultural specificity. Legislation and policy are imbued with the values and assumptions of particular cultures and national contexts. Evaluating whether 'innovations' in policy have been 'successful' depends therefore on which part of the 'frontier' you are standing on: whether you are on the frontier because you are Indigenous and at home, or whether you are non-Indigenous.

This chapter explores four areas of public policy that have been notably important and, in some ways, innovative. These four 'sites' are addressed under the following headings: Tangata Whenua (public policy relating to the recognition of the rights of Māori as people of the land); Rangatiratanga (constitutional dimensions of public policy); Kaitiakitanga (innovative public policy approaches to the relationship between communities and the natural environment); and Iwi Taketake (public policy in the context of the rights of Indigenous peoples and the international human rights framework).

The development of public policy relating to Indigenous peoples in settler states is dependent upon how the state conceptualises the Indigenous population and their rights. The four sites examined in this chapter show how Māori rights have been conceptualised by the Crown in different ways across time, resulting in varied responses in different areas of public policy. We use the term 'the Crown' to refer to the partner to the Te Tiriti o Waitangi (Treaty of Waitangi discussed below; Shore & Kawharu, 2014). We will use each of these sites (Castree, 2004) to illustrate in particular cases Māori policy and legal traditions and innovation, as well as Crown policy and practices, and frontiers that the Crown continues to find too startling to cross.

The Treaty of Waitangi was signed between Māori and the British in 1840, and is the cornerstone of New Zealand's democracy and constitutional arrangements. There are different understandings of the Treaty, its status and implications within New Zealand. The most controversial points which Māori and non-Māori have tended to disagree about relate to the version of the Treaty that should take precedence – the Māori language version that Māori mainly signed or the English version which fewer than five Māori signed – and the extent to which the kawana-tanga (governance) provided for the British Crown limited, or was limited by, the tino rangatiratanga (self-determination, chiefly authority) reaffirmed to Māori. Which views are dominant at any given point in history has an impact on the kind of public policy that is developed and implemented.

SITE ONE: TANGATA WHENUA

Māori are ‘tangata whenua’, literally ‘people of the land’ in Aotearoa (New Zealand). At the core of the concept of being tangata whenua, is the understanding of mana whenua, that is, that particular hapū (sub-tribes) and iwi (tribes) have authority over specific areas of the land. The Māori land tenure system is built around the mana (authority) each hapū and iwi hold over land, and was in place when non-Māori arrived. Each area of the country was governed collectively by hapū or iwi, and use-rights relating to specific resources were allocated to external groups (Erueti, 1999).

Crown policies towards Māori land and land tenure have focussed on Māori as land owners rather than Treaty partners. Based on British historical and cultural traditions about land, the British determined that their own system, based on individual land title, was superior to that of Māori and implemented it across the country. The New Zealand Native Land Court, or the ‘Land Taking Court’ as it was known by many Māori, was established in 1865 and converted Māori customary land title into an individual land title system (Williams, 2007). The British did not conceive of Māori as equal Treaty partners (despite having signed Te Tiriti o Waitangi which created a partnership) whose laws, including land law, should be negotiated with in partnership. The British instead sought to rapidly change the dominant mode of land tenure, and make sales and allocations to British settlers thereby reconfiguring who ‘the people of the land’ were.

The Crown also acquired land through the New Zealand land wars when they declared some iwi to be in ‘rebellion’, and punished them with land confiscation legislation such as the New Zealand Settlements Act 1863 and the New Zealand Suppression of Rebellion Act 1863. Both of these Acts had a dual purpose, to acquire Māori lands, including by confiscation, which could then be allocated to non-Māori settlers, and to try to destroy Māori political and legal institutions, which aimed to retain Māori ownership and control of Māori lands (Keane, 2010). These Acts were devastating for Māori, but effective for the Crown who confiscated large areas of land, including in Waikato and Taranaki.

Māori rejected the Native Land Court and its work of altering Māori land tenure, but by the 1880s most of the country had been processed and removed from Māori ownership (Durie, 2005b). Crown policy then shifted to changing Māori land utilisation. Once again the Crown determined that their system of managing and utilising land was superior to Māori systems. The Crown insisted that under Māori governance land was ‘idle’ or ‘wastelands’ (Payne, 2014). They instituted policies to ‘develop’ Māori land primarily through agriculture (Keenan, 2013). Land development schemes were introduced and had a degree of success in some regions (Harris, 1996). Inequities were unfortunately embedded in land development policies, and in places where non-Māori were given land removed by the Native Land Court from Māori ‘in the national interest’ as late as the 1960s (Payne, 2014).

Legislation through the 1950s and 1960s made slight shifts towards trying to protect Māori land ownership but although some mechanisms were established, like the Māori Trustee, their effectiveness at protecting Māori land development

and ownership were limited ([Office of the Controller & Auditor-General, 2004](#)). Huge tracts of land were lost between the 1860s and 1920s, and continued to slowly be alienated until the 1950s and 1960s. Te Ture Whenua Māori/The Māori Land Act 1993 marked a sea change in public policy towards Māori land. Te Ture Whenua Māori Act brought a halt to the conversion of Māori land into general fee simple title and sale, which had been possible under other land Acts until that point. The Act aimed to support the retention of Māori ownership of Māori land, and set out policy frameworks for the occupation, use, and development of Māori Land.

Between 2015 and 2017, Te Puni Kōkiri/Ministry of Māori Development reviewed Te Ture Whenua Māori and Māori land policy. A Bill to repeal the Act and significantly alter its purpose was introduced in 2017. The Bill sought to resolve a number of the issues associated with managing and developing communally owned land – what some saw as too large a role of the Māori Land Court in management – and to enable more flexibility in the activities of land Trusts. The Bill was discharged when a new government was elected in the 2017 general election, and the 1993 Act stands.

The key feature of the Crown's policy and interactions with Māori around land has been to deal with Māori as land owners or rights holders but not as Treaty partners. Ultimately, through individualisation of title and other mechanisms, this approach served to undermine Māori forms of land tenure and, as a consequence, also eroded Māori political and economic structures. The key innovation in this site was to firmly halt the further alienation of Māori land and legislate its retention in Māori ownership. The limitation of this retention policy has been the difficulty Māori have subsequently experienced with being able to govern their lands in agile ways.

SITE TWO: RANGATIRATANGA

The issues surrounding the people of the land connect closely with the political and constitutional status of tangata whenua, since the Treaty of Waitangi there has been very little consensus between Māori and the Crown regarding the extent of Māori political and constitutional rights.

The Waitangi Tribunal was created in 1975 to hear and report on claims based on the principles of the Treaty of Waitangi and, for that purpose, to determine the Treaty's meaning and effect. The Waitangi Tribunal is a standing commission of inquiry. The Tribunal's members include Māori and non-Māori, reflecting the Treaty partnership, and the members are appointed for their particular skills and expertise relevant to matters likely to come before the Tribunal. Claims may be made by any Māori person on behalf of themselves or a wider group/community. All claims are against the Crown and must allege that some Crown action or omission that was in breach of the principles of the Treaty has had a prejudicial effect on Māori.¹

The Waitangi Tribunal makes recommendations to the Crown. These recommendations are predominantly non-binding; however, the Tribunal does have limited jurisdiction to make binding recommendations in relation to former

State-owned Enterprise land and Crown Forest Licensed land. These binding powers have never been fully exercised. Since its establishment, the Waitangi Tribunal has reported on claims addressing a wide range of subject matter, including historical claims relating to alienation of lands and natural resources, and contemporary policy matters relating to te reo Māori (the Māori language), electoral issues, fisheries management, intellectual property and many other issues (see [Hayward & Wheen, 2004](#)). The Treaty of Waitangi Act 1975, which established the Waitangi Tribunal, directs the Tribunal to consider both the English and Māori texts of the Treaty in determining the practical application of Treaty principles.

In 2014, in their report *Part One of the Northland Inquiry, Te Paparahi o Te Raki*, the Waitangi Tribunal found that Māori had not ceded sovereignty in Te Tiriti o Waitangi 1840. This statement reflected what many Māori thought was already clear, and had been using as justification for advancing the extent and inclusion of Māori constitutional rights since 1840 ([Jackson, 2016](#)).

The Tribunal's announcement was followed closely by the Prime Minister of the day John Key, responding that the finding 'did not affect the Government's authority to rule of New Zealand' and that New Zealand had been 'settled peacefully' (Key quoted in 2014). This example shows the mismatch between a reality that Māori are comfortable with and the Crown's unwillingness to consider co-existing sovereignties. This has been reflected in Crown policy which has shifted from one of assimilation of Māori, to a minimal acknowledgement of Māori rights, to an uneasy recognition that Māori tino rangatiratanga limits Crown kawanatanga in some areas.

The 1867 Māori Representation Act introduced four seats for Māori representation, marking a significant innovation in New Zealand's democracy. There were several rationales for the original introduction of Māori representation, including to provide representation for a tax paying population, to encourage Māori to abandon separate political institutions and assimilation ([Wilson, 2010](#)).

Over the years the Māori seats became permanent although not entrenched as the general seats are, and this remains a point of contention ([Bargh, 2015](#)). The Royal Commission on the Electoral System in 1986 found that:

Although they were not set up for this purpose, the Māori seats have nevertheless come to be regarded by Māori as an important concession to, and the principal expression of, their constitutional position under the Treaty of Waitangi. To many Māori, the seats are also a base for a continuing search for more appropriate constitutional and political forms through which Māori rights (mana Māori in particular) might be given effect. ([Royal Commission on the Electoral System, 1986](#))

At various points of New Zealand history, the Crown has acknowledged different levels of Māori political rights. Te Urewera Native District Act 1896 which was in existence until 1922, enabled Tūhoe self-government ([Binney, 2009](#)).

Māori political entities have had limited abilities to enforce Māori law, therefore over the years Crown recognition has repeatedly been sought. From the 1860s until 1900, the Kingitanga (King Movement) and the Māori parliaments sought recognition of their rights to govern Māori people and to control the governance

of land and its alienation (Keane, 2010). The Kingitanga continues to promote unity for Māori and is based in the territory of, and works closely with, Waikato Tainui. The Māori parliaments came to an end in 1901 as the Crown introduced the Māori Councils Act and persuaded Māori to channel their political attention there and into the settler parliament.

The settler parliament had established four Māori seats in the House of Representatives in 1867, and whilst several of the first Māori parliamentarians also attended the Māori parliaments, attention soon focussed on trying to receive recognition of Māori rights within the House of Representatives. Early Māori parliamentarians attempted to introduce a Native Rights Bill which would have acknowledged Māori jurisdiction over Māori people and resources but European members refused to debate it (Cox, 1993).

With the change of electoral system to Mixed Member Proportional in 1993, the number of Māori seats were able to increase, largely dependent on the number of Māori on the Māori Electoral Roll. In 1867, there were 4 Māori seats out of 76, there are now 7 Māori seats in the 120-seat Parliament. Every five years, Māori are able to decide which electoral roll they wish to be on, and just over half of all Māori enrolled to vote elect to be on the Māori roll (Electoral Commission, 2018). Although the seats are regarded by many Māori as a positive innovation to enable a minimum level of Māori representation as per the Treaty guarantees, there are still some groups and political parties which seek their abolition.

Although in some ways Māori representation at a national level has set something of a precedent, this has not been accepted through all levels of government. Amendments to the Local Electoral Act 2001 mean that Local Councils have the opportunity to replicate the system of Māori representation at a national level, and introduce Māori wards and constituencies at a local government level. Since those amendments however, only two other Councils have introduced Māori constituencies (Waikato Regional and Wairoa District) taking the total to 3 out of a total of 78 Councils (with the Bay of Plenty Regional Council having introduced constituencies under a separate Act) (Bargh, 2016).

The creation of the Principles of the Treaty of Waitangi in the mid-1990s led to a significant shift in the way public policy recognised Māori constitutional rights. The creation of the principles, and the inclusion of reference to them in numerous pieces of legislation, provided an avenue for Māori to advocate for policies which supported their rights and provided an avenue to the courts to have the principles defined. The courts and the Waitangi Tribunal have increasingly outlined the obligations for Māori and the Crown arising from the principles. Whilst there are often different views, the principles of (1) good faith, (2) Crown's duty to actively protect Māori rights, and (3) partnership, are the key ones.

Definitions of the principles of the Treaty have been central to the Treaty Settlements process, which has been the main policy framework for Māori and Crown relations since the 1990s. The Treaty Settlements process involves the Office of Treaty Settlements, negotiating directly with Māori iwi about historical breaches of the Treaty. The process follows a standard formula set out by the Office of Treaty Settlements. Māori iwi that wish to enter direct negotiations must demonstrate that they are mandated by their members to negotiate. Iwi then enter

into negotiations with the Office of Treaty Settlements to agree on an historical account of what occurred and any breaches of the Treaty of Waitangi. Once agreement is reached on those matters, then a Deed of Settlement is drafted setting out redress and future obligations on both parties. The Deed is initialised and eventually passed as an Act of Parliament (Wheen & Hayward, 2012).

The Treaty Settlement process attracts criticism from many sides, and the Waitangi Tribunal has highlighted flaws in the way the Office of Treaty Settlements determines which groups to negotiate with and the manner in which negotiations take place (Jones, 2018a; Waitangi Tribunal, 2018).

The Crown established an agency called 'Te Arawhiti: Māori-Crown relations' in 2018, to 'help make the Crown a better Treaty partner' (Retrieved from Te Arawhiti website: <http://www.tearawhiti.govt.nz>), and ensure that adequate and coherent attention is given to the Crown's post-settlement commitments and obligations. It is too early in the existence of the agency to assess whether it is an enduring innovation for Māori rights and interests, but for an optimist it presents an opportunity for change (Jones, 2018b).

With the Crown's greater sense of the need for engaging with Māori that has emerged in a post-settlement environment, most branches of government have policies which require engagement with Māori. On the other side, a number of Māori organisations engage directly with the Crown. Since the 1980s, the New Zealand Māori Council was one of the most prominent entities to actively try to hold the Crown to account for Crown Treaty obligations, mainly through the courts. When the Māori Party entered Parliament, and then joined a coalition arrangement to become part of the government in 2008, it promoted the Iwi Chairs' Forum as a single entity for the Crown to consult with on a number of resource management and constitutional issues.

SITE THREE: KAITIAKITANGA

The third site addressed in this chapter is the site of public policy as it relates to the natural environment. This site provides rich examples of engagement between Māori and the Crown. It illustrates the distinctive approach of negotiation and, often imperfect, recognition of Māori rights at the public policy frontier.

Māori and the Natural Environment

The natural environment has a central role in the Māori world. The natural environment is understood not merely as a set of resources, but part of a complex network of kin relationships, which directly connects people to all other aspects of the natural world. At the heart of the relationship between people and the environment is the Māori cosmology, within which Papa-tū-ā-nuku is understood as the Earth Mother, the deity that sustains all life. In the context of resource management law reform, the Māori theologian and philosopher, Māori Marsden, described how this understanding of the natural world ought to drive law and policy in relation to environmental planning and management. He suggested that

anyone involved in environmental management should act according to the following principles (Marsden, 1992):

- a. Humankind's contribution is to enhance and maintain the life support systems of Papa-tū-ā-nuku.
- b. People should treat Papa-tū-ā-nuku with love and respect in recognition of her life-supporting function, her role in the creation of the natural world, and her place in our own whakapapa.
- c. We do not own Papa-tū-ā-nuku, but are recipients, and therefore stewards, of the natural environment.

The concept of kaitiakitanga has, in recent years, been used to reflect the Māori ethic of guardianship that encapsulates these basic principles. Kaitiakitanga stems from the obligations of kinship, to care for and nurture one's relations. It encompasses the rights necessary to discharge those obligations. Kaitiakitanga is distinct from Western concepts of property and ownership, and includes a spiritual dimension that animates the rights and obligations that are inherent within the relationships between people, communities, and the natural world.

Māori Environmental Guardianship in New Zealand Law and Policy

Māori interests are recognised in the environmental law and policy of Aotearoa (New Zealand) in a number of ways. A central piece of legislation that regulates environmental policy and planning is the Resource Management Act 1991. This legislation requires people exercising functions under the Act to 'recognise and provide' for a number of matters of national importance, including 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (s6(e)). The principles of the Treaty of Waitangi must also be 'taken into account' (s8). And 'kaitiakitanga' is the first item on a list of matters to which people exercising powers under the Act must 'have particular regard' (s7).

There is provision for the recognition of Māori interests in other parts of the Act as well. For example, s33 of the Act allows for local authorities to delegate some decision-making powers to iwi authorities (tribes); however, no such delegations have occurred in more than 25 years of the Act's existence. And, despite the specific references to the Treaty of Waitangi, Māori relationships to the natural environment, and the guardianship ethic of kaitiakitanga, Māori interests have struggled to have a strong and effective voice in environmental management (Williams, 2013). As the Waitangi Tribunal noted in *Ko Aotearoa Tēnei* (2011, p. 284): 'Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise...'

In 2017, amendments were made to the Resource Management Act, designed to, amongst other things, to more effectively provide for Māori interests (Resource Legislation Amendment Act, 2017). In particular, these amendments introduced the possibility of creating instruments for enhanced Māori participation in environmental management processes, which are known as Mana Whakahono a

Rohe (ss58L-58U). Section 58M of the Resource Management Act sets out the purpose of Manawhakahono a Rohe as follows:

- a. To provide a mechanism for iwi authorities and local authorities to discuss, agree and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act.
- b. To assist local authorities to comply with their statutory duties under this Act, including through the implementation of Sections 6(e), 7(a), and 8.

Sections 6(e), 7(a), and 8 are the sections that provide for Māori interests as referred to above.

Under this part of the Act, an iwi authority may initiate discussions relating to the establishment of a Mana Whakahono a Rohe, by inviting a local authority to enter into an agreement (s58O). The local authority is then required to respond and engage in negotiations with the iwi in relation to adopting a relationship agreement. The guiding principles of Mana Whakahono a Rohe require the local authority and the iwi to use their best endeavours to, amongst other things, ‘enhance opportunities for collaboration’, ‘work together in good faith and a spirit of co-operation’ and ‘achieve the purpose of the Mana Whakahono a Rohe in an enduring manner’ (s58N).

Innovative Public Policy Responses and the Settlement of Historical Claims

The settlement of historical claims arising from Crown breaches of the Treaty of Waitangi has led to the development of innovative mechanisms for public policy relating to the natural environment. The recognition of legal personality of landscape features such as the Whanganui River and the forest that formerly comprised Te Urewera National Park, has gained international attention, but other settlements have been similarly innovative in relation to environmental management.

Settlements of historical claims underpin co-governance arrangements for the Te Arawa Lakes, the Waikato, Rangitaiki and Manawatu Rivers, and the establishment of joint planning committees in regions such as Hawke’s Bay, and in relation to iconic environmental features such as the volcanic cones in Auckland and Te Oneroa-a-Tohe (Ninety-Mile Beach).

Co-management of Lakes and Rivers

Co-management arrangements relating to lakes and rivers that developed out of the negotiation of the settlement of historical claims form an important part of the public policy framework.

The Te Arawa Lakes settlement represented an early example of such co-management arrangements. Key aspects of this settlement were implemented by the Te Arawa Lakes Claims Settlement Act 2006. This Act transferred the title of 13 lakebeds to Te Arawa (s23). The Act also established the Rotorua Lakes Strategy Group, with members appointed by the Rotorua District Council, the

Bay of Plenty Regional Council and the Trustees of the Te Arawa Lakes Trust (s48). The purpose of the Group is to (s49):

contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes.

A further major development arising for claims settlement negotiations between Māori and the Crown, was the agreement for the settlement of historical claims in relation the Waikato River. This agreement is given effect by the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. The Act established the Waikato River Authority which has an equal number of members appointed by the Crown and Māori entities representing iwi with interests in the Waikato River (s22). The Authority is to (s22):

- a. set the primary direction, through the vision and strategy, to achieve the restoration and protection of the health and well-being of the Waikato River for future generations;
- b. promote an integrated, holistic and co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River; and
- c. fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-up Trust.

More recently, joint-governance bodies have been established in relation to waterways, such as the Rangitaiki and Manawatu Rivers, which reflect the approach pioneered in the Te Arawa Lakes and Waikato River settlements and applied to other kinds of collective redress, as discussed below under the 'Joint Planning Committees' heading. The co-management arrangements in relation to lakes and rivers have also established a political and policy context that allowed for the application of the concept of legal personality to iconic landscape features.

Legal Personality

The recognition of legal personality of landscape features, though still rare, has been a significant development in the settlement of historical claims and public policy relating to environmental management.

The first implementation of the recognition of legal personality of a landscape was provided by the Te Urewera Act 2014. This Act declared that Te Urewera (the forest land that had formerly comprised Te Urewera National Park), 'is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person' (s11). In the background to the Act (s3), Te Urewera is described in the following terms:

- a. Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure and remote beauty.
- b. Te Urewera is a place of spiritual value, with its own mana and mauri.
- c. Te Urewera has an identity in and of itself, inspiring people to commit to its care.

The Act established the Te Urewera Board to act on behalf of, and to provide governance for, Te Urewera (ss16-20). The Board now has nine members – three members appointed by the Crown and six appointed by Māori (specifically, by the trustees of Tūhoe's governance body, Te Uru Taumatua) (s27). The shift in approach to environmental management of Te Urewera that has been initiated by this settlement is illustrated by the management plan (Te Kawa o Te Urewera) promulgated by the Te Urewera Board (2018). This plan is framed by the following statement (p. 8): 'Deliberately, we are resetting our human relationship and behaviour towards nature. Our disconnection from Te Urewera has changed our humanness. We wish for its return.'

Following the recognition of the legal personality of Te Urewera, legislation has also been enacted that recognises the legal personality of the Whanganui River system, now known as Te Awa Tupua (Te Awa Tupua (Whanganui River Claims Settlement) Act 2017). As with Te Urewera, the recognition of the legal personality of Te Awa Tupua is part of a suite of measures intended to better reflect Māori understandings of relationships with aspects of the natural environment. The Te Awa Tupua Act identifies a set of key values ('Tupua Te Kawa') including (s13):

- a. Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River, and the health and well-being of the iwi, hapū, and other communities of the River.
- b. Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and meta-physical elements.
- c. The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.
- d. Te Awa Tupua is a singular entity comprised many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.

Decision-makers under a range of other environmental legislation are required to either recognise and provide for, or have particular regard to, these key values and the legal personality of Te Awa Tupua (s15).

In December 2017, the Crown signed a Record of Understanding with iwi of Taranaki agreeing to work towards the recognition of the legal personality of 'Ngā Maunga' (the mountains that currently sit within Egmont National Park. That document records that the redress arrangements are intended to recognise Ngā Maunga, 'is a living, indivisible whole incorporating the peaks, to be referred to by their Tupuna [ancestral] names, including Taranaki, Pouakai and Kaitake' (cl 3.4.1) and 'encompasses all of the physical and metaphysical elements of Ngā Maunga from the peaks through to all of the surrounding environs' (cl 3.4.2). The Record of Understanding also notes that the recognition of legal personality will sit alongside the recognition of key values that will guide decision-makers in relation to the management of the national park within which Ngā Maunga are situated.

Joint Planning Committees

The settlement of historical claims has also led to other joint-governance arrangements involving multiple Māori communities and local government. These mechanisms illustrate a distinctive approach to environmental planning, specifically as it relates to Māori rights and interests.

A collective settlement relating to the significant volcanic cones throughout Auckland is one example of a co-governance model that has emerged through the Treaty claims and settlement process. This settlement was given effect by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, and involved 13 iwi and hapū who had historical claims in Tāmaki Makaurau (Auckland). That Act established the Tūpuna Maunga o Tāmaki Makaurau Authority which is composed of six members appointed by the Auckland Council, six members appointed by representative Māori entities and, initially, included one non-voting member appointed by the Minister for Arts, Culture and Heritage (s107). The Authority oversees the administration of 14 volcanic cones that are sites of cultural and historical significance to the members of the iwi collective. To carry out its purpose, the Tūpuna Maunga o Tāmaki Makaurau Authority exercises the powers that local authorities would usually hold under the Reserves Act 1977 (s112), whilst the Auckland Council provides administrative support (s114).

A similar joint-governance body formed part of the collective redress of Northern iwi who have interests in Te Oneroa-a-Tohe (Ninety-Mile Beach). Claims settlement legislation established the Te Oneroa-a-Tohe Board as a statutory body (s77, Te Rarawa Claims Settlement Act 2015).² The Board has eight members: one member to be appointed by each of Te Rarawa, Ngāti Kuri, Te Aupouri, and Ngāi Takoto (being the relevant iwi who participated in a collective agreement for this redress)³; and two members to be appointed by each of the Northland Regional Council and the Far North District Council (s79). The purpose of the Board is (s78):

to provide governance and direction to all those who have a role in, or responsibility for, the Te Oneroa-a-Tohe management area, in order to protect and enhance environmental, economic, social, cultural, and spiritual well-being within that area for the benefit of present and future generations.

The Board performs a range of functions to achieve its purpose. Amongst other things, it is responsible for preparing and approving a beach management plan for Te Oneroa-a-Tohe, monitoring the implementation and effectiveness of that plan, and appointing commissioners to panels to hear resource consent applications that relate to Te Oneroa-a-Tohe (s81).

An example of a joint-governance body that has a more general mandate in relation to environmental planning processes is the Hawke's Bay Regional Planning Committee (RPC). This committee was originally developed as part of the settlement negotiations with two Hawke's Bay groups, Ngāti Pāhauwera and Maungaharuru-Tangitū. The RPC was formally established by the Hawke's Bay Regional Planning Committee Act 2015. The RPC is a statutory body made up of members appointed by the Hawke's Bay Regional Council and tāngata whenua groups, and its purpose is to oversee the development and review of regional documents under the Resource Management Act 1991 (s9). Although, originally,

part of the settlements negotiated with two specific groups, the Act provides for representation from nine tāngata whenua groupings throughout Hawke's Bay (s11). There have, nevertheless, been some significant concerns raised by tāngata whenua representatives about the operation of the RPC (Sharpe, 2018).

This suggests that public policy responses that aim to negotiate the frontier in relation to kaitiakitanga and environmental management must also address relationships alongside formal legal instruments, and often need to unpick colonial power dynamics and entrenched behaviours. These are the very issues that are currently playing out in both political and legal fora in the context of freshwater management. Though still developing, the resolution of those issues will no doubt provide further useful lessons for public policy in relation to the natural environment.

SITE FOUR: IWI TAKETAKE

The final site that is addressed in this chapter is the site framed by the international recognition of the rights of Indigenous Peoples, and the public policy frontier that sits between Māori as iwi and rights holders, and the New Zealand state as duty bearer. This frontier is located within a framework of international human rights bodies and instruments, and of particular relevance is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Waitangi Tribunal, in its report on the Māori Community Development Act reform – *Whaia Te Mana Motuhake* – examined the way in which UNDRIP reinforces the principles of the Treaty of Waitangi. Subsequent Waitangi Tribunal inquiries have also considered the way in which public policy development ought to be informed by rights set out in UNDRIP, especially those rights relating to consultation and participation in decision-making.

Indigenous Peoples' Rights in the International Human Rights Framework

Since its adoption by the United Nations General Assembly in 2007, UNDRIP has been recognised as the leading statement of the rights of Indigenous Peoples. UNDRIP developed over a period of many years, with the Working Group on Indigenous Populations being established in 1982 (UN Economic and Social Council E/RES/1982/34), which produced a draft declaration in 1993, and the final text then adopted in 2007. New Zealand was one of four states that initially voted against the adoption of UNDRIP; however, in 2010, the New Zealand government announced its support for UNDRIP (Sharple, 2010).⁴ There are a number of mechanisms within the United Nations system which promote the recognition and implementation of the rights of Indigenous Peoples.

The Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, and the United Nations Permanent Forum on Indigenous Issues are all specifically focussed on the rights of Indigenous Peoples. The United Nations Human Rights Council and treaty monitoring bodies such as the Committee on the Elimination of Racial Discrimination, to which New Zealand has reporting obligations, also take an interest in Māori rights as a part of their broader mandate.

In fact, the rights that are articulated in UNDRIP are intended to reflect the particular implications for Indigenous Peoples of rights which have previously been recognised as human rights more generally. In line with this approach, UNDRIP is framed by the core human rights of equality, freedom from discrimination, and self-determination. The 46 articles of UNDRIP describe how those rights apply to the distinctive circumstances of Indigenous Peoples. The rights expressed in UNDRIP are closely connected to the rights guaranteed to Māori under the Treaty of Waitangi. The New Zealand Human Rights Commission (n.d.) has described the two instruments as being ‘strongly aligned and mutually consistent’ and, therefore, ‘[t]he Declaration assists with the interpretation and application of the Treaty principles’ (‘The Rights of Indigenous Peoples’). UNDRIP is, therefore, an important part of the framework of Māori rights that ought to be considered in the development of public policy in Aotearoa (New Zealand). The relevance of UNDRIP to public policy has been addressed by the Waitangi Tribunal in several inquiries.

UNDRIP and Reform of the Māori Community Development Act

The most thorough examination of UNDRIP undertaken by the Waitangi Tribunal can be found in *Whaia Te Mana Motuhake/In Pursuit of Mana Motuhake – Report on the Māori Community Development Act* (2015). This report was the result of an inquiry into the process that had been adopted for the reform of the Māori Community Development Act 1962. That Act is significant in the context of Māori rights of self-determination because it established the New Zealand Māori Council as an advisor to government, and also provides the regulatory framework for Māori Wardens, a volunteer service that provides support and security often at community events. When the New Zealand government undertook a review of the Māori Community Development Act, representatives of the New Zealand Māori Council argued that this undermined the self-government institutions that were protected by the Act, and brought a claim alleging that the Crown was, therefore, acting in breach of the principles of the Treaty of Waitangi.

The Waitangi Tribunal found that any policy development or law reform in this area should be based on the recognition of Māori self-government. Specifically, any reform of the Māori Community Development Act should be led by the New Zealand Māori Council itself and negotiated with the Crown. The Tribunal reached these findings after a thorough consideration of the principles of the Treaty of Waitangi, as informed by UNDRIP.

The Tribunal explains how articles of UNDRIP are relevant to understanding the application of Treaty principles. For example, the Tribunal identifies Articles 19, 38, 39 and 46 of UNDRIP as assisting with the application of the Treaty principles of *kāwanatanga*. *Kāwanatanga* refers to the role of the Crown to govern the State of New Zealand, whilst also requiring it to act towards Māori with utmost good faith.

The articles of UNDRIP identified by the Tribunal as relevant to understanding the application of the principle of *kāwanatanga* are as follows:

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from states and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 46

- a. Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.
- b. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
- c. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The Tribunal notes that these Articles also speak to the right of States to govern, but that the State also has a role to play in ensuring that Indigenous Peoples participate in collaboratively developing legislation or administrative measures and providing support for this to occur. Furthermore, in exercising its governing role, the State has an obligation to protect the rights of all citizens, including Indigenous Peoples. These Articles also make it clear that the rights recognised in UNDRIP are to be interpreted and implemented in accordance 'with principles of justice, democracy, respect for human rights, equality, non-discrimination,

good governance, and good faith' (p. 40). This, the Tribunal finds, is consistent with the Treaty principle of *kāwanatanga* and in fact reinforces and assists with our understanding of that principle.

The Tribunal undertakes a similar analysis of the recognised Treaty of Waitangi principles of *rangatiratanga*, partnership, active protection, equity and equal treatment, and the right to development in the context of specific articles of UNDRIP. This contributes to the Tribunal's assessment of the Crown's compliance with Treaty principles in the development and implementation of policy.

UNDRIP and the Development of Public Policy in Aotearoa (New Zealand)

Whaia Te Mana Motuhake is not the only report in which the Waitangi Tribunal has addressed UNDRIP, though it is addressed in most detail in that report. UNDRIP has been raised in recent inquiries dealing with contemporary public policy processes, specifically where Māori participation has been at issue. The inquiry into the reform of Te Ture Whenua Māori Act/The Māori Land Act 1993 is one such example.

In 2012, the New Zealand government initiated a process to review and reform Te Ture Whenua Māori Act 1993, the comprehensive statute that regulates the administration of Māori land. Claims were lodged with the Waitangi Tribunal challenging the process that the Crown had adopted for this review and an urgent inquiry into the matter was held. The Tribunal reported on this inquiry in *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (2016).

In this report, the Tribunal notes the arguments raised by the parties in relation to UNDRIP and the standard of consultation required for compliance with Treaty principles. The claimants argued that this was a case where the Treaty/Māori interest was so central to the subject matter of the legislation in question that the standard of free, prior and informed consent that underpins many of the articles of UNDRIP should be the standard applied (p. 74).

The Crown, on the other hand, argued that the UNDRIP requirement of consent to legislation is 'aspirational' and that so long as the Crown is properly informed of the Māori interest, the Crown should not be prevented from making final decisions on policy (p. 73). The Tribunal does not make any explicit finding about the UNDRIP standard in this report, but the Tribunal's statements on the consultation process are clearly informed by reference to UNDRIP. Ultimately, the Tribunal found that aspects of the reform process were not Treaty compliant. However, the Tribunal acknowledged that the reform process was not entirely Crown led, even though information and representation were lacking in fundamental parts of the process.

Standards of consultation and engagement with Māori over policy reforms have been raised in other recent claims to the Waitangi Tribunal. At the same time, UNDRIP is starting to become a more frequently cited reference point when Māori rights are before the courts (Charters, 2017). The New Zealand government's engagement with UNDRIP continues to be relatively uneven, but

understanding Māori rights and interests in the context of the broader articulation of the rights of Indigenous Peoples is becoming a crucial aspect in the development of public policy in Aotearoa (New Zealand).

CONCLUSIONS

Māori rights and interests form an important element of the development of public policy in Aotearoa (New Zealand). Successive governments have struggled with addressing Māori rights within the public policy context. This can be seen across the key sites of engagement and interaction considered in this chapter. This interaction at the frontier is often challenging for both Māori and the Crown, and the effectiveness of public policy has been mixed, whether aimed at recognising or extinguishing distinctive Māori rights.

As we have demonstrated throughout the chapter, over time, the Crown's policy objectives, acknowledgement of Māori rights, and approaches to engaging with Māori have all shifted significantly. Nevertheless, the relationship between Māori and the Crown, and how that ought to be recognised in public policy, continues to be negotiated across multiple sites of interaction and remains dynamic.

NOTES

1. For information on this process, see <https://www.waitangitribunal.govt.nz>. The text focusses on broader concerns, but the process itself is innovative as well.
2. Note that the provisions relating to the Te Oneroa-a-Tohe Board were originally introduced to Parliament in a combined Te Hiku Settlement Bill, but eventually ended up being repeated in separate settlement acts for each iwi involved. For simplicity, we will refer to the provisions as they appear in the Te Rarawa Claims Settlement Act 2015.
3. Ngāti Kahu, another iwi with rights and interests in this area, opted not to participate in the collective process, though still retains the opportunity to join the Te Oneroa-a-Tohe Board.
4. Note that the other three countries who opposed the adoption of UNDRIP were Canada, Australia and the USA. Each of those countries has also subsequently modified its position in relation to UNDRIP.

FURTHER READING

- Bargh, M. (2007). *Resistance: An indigenous response to neoliberalism*. Wellington: Huia Publishers.
- Erueti, A. (Ed.). (2017). *International indigenous rights in Aotearoa New Zealand*. Wellington: Victoria University Press.
- Hayward, J., & Wheen, N. (Eds.). (2004). *The Waitangi Tribunal – Te Roopu Whakamana i te Tiriti o Waitangi*. Wellington: Bridget Williams Books.
- Hickford, M., & Jones, C. (Eds.). (2018). *Indigenous peoples and the state: International perspectives on the Treaty of Waitangi*. Oxford: Routledge.
- Jones, C. (2016). *New treaty new tradition*. Wellington: Victoria University Press.
- Mulholland, M., & Tāwhai, V. (Eds.). (2010). *Weeping waters: The Treaty of Waitangi and Constitutional Change*. Wellington: Huia Publishers.
- Wheen, N., & Hayward, J. (Eds.). (2012). *Treaty of Waitangi Settlements*. Wellington: Bridget Williams Books.

REFERENCES

- Bargh, M. (2015). The Māori seats. In J. Hayward (Ed.), *New Zealand government and politics*. Auckland: Oxford University Press.
- Bargh, M. (2016). Māori wards and advisory boards. In J. Drage & C. Cheyne (Eds.), *Local government in New Zealand*. Wellington: Dunmore Press.
- Binney, J. (2009). *Encircled lands*. Wellington: Bridget Williams Books.
- Castree, N. (2004). Differential geographies: Place, indigenous rights and 'local resources'. *Political Geography*, 23, 133–167.
- Charters, C. (2017). Use it or lose it: The value of using the declaration on the rights of indigenous peoples in Māori legal and political claims. In A. Erueti (Ed.), *International indigenous rights in Aotearoa New Zealand* (pp. 137–151). Wellington: Victoria University Press.
- Cox, L. (1993). *Kotahitanga: Search for Māori Unity*. Auckland: Oxford University Press.
- Durie, M. (2005a). Race and ethnicity in public policy: Does it work? *Social Policy Journal of New Zealand*, 24, 1–11.
- Durie, M. (2005b). *Ngā Tai Mataatū: Tides of Māori Endurance*. Auckland: Oxford University Press.
- Electoral Commission. (2018). Māori electoral option results. Retrieved from <https://www.elections.org.nz/events/maori-electoral-option-2018/results-statistics>
- Erueti, A. (1999). Māori customary law and land tenure: An analysis. In R. Boast et al. (Eds.), *Maori land law*. Wellington: Butterworths.
- Harris, A. (1996). *Māori land development schemes 1945–1974*. Unpublished Master's thesis, Massey University. Retrieved from https://mro.massey.ac.nz/bitstream/handle/10179/6486/01_front.pdf?sequence=1&isAllowed=y
- Jackson, M. (2016). Facing the truth about the wars. *E-Tangata*. Retrieved from <https://e-tangata.co.nz/history/moana-jackson-facing-the-truth-about-the-wars/>. Accessed on September 17, 2016.
- Jones, C. (2018a). Crown treaty settlement process 'Not Fair or Reasonable'. *RadioNZ*. Retrieved from <https://www.radionz.co.nz/news/national/355429/crown-s-treaty-settlement-negotiations-not-fair-or-reasonable>. Accessed on April 18, 2018.
- Jones, C. (2018b). Te Arawhiti – A game changer? *Newsroom*. Retrieved from <https://www.newsroom.co.nz/2018/09/23/246760/te-arawhiti-a-game-changer>. Accessed on September 24, 2018.
- Keane, B. (2010). Kotahitanga. In M. Bargh (Ed.), *Māori and parliament*. Wellington: Huia Publishers.
- Keenan, D. (2013). *Ahuwhenua: Celebrating 80 years of Māori farming*. Wellington: Huia Publishers.
- Marsden, M. (1992). *Kaitiakitanga: A definitive introduction to the holistic world of the Māori*. Wellington: Ministry for the Environment.
- Mikaere, A. (2005). The Treaty of Waitangi and Recognition of Tikanga Māori. In M. Belgrave, M. Kawharu, & D. Williams (Eds.), *Waitangi revisited: Perspectives on the Treaty of Waitangi*. Auckland: Oxford University Press.
- New Zealand Human Rights Commission. (n.d.). The rights of indigenous peoples: What you need to know. Retrieved from https://www.hrc.co.nz/files/5814/5618/4456/NZHR_Booklet_12_WEB.pdf
- Office of the Controller and Auditor-General. (2004). *Maori Land Administration: Client service performance of the Maori Land Court Unit and the Maori Trustee. Report of the Controller and Auditor-General*. Wellington: The Audit Office.
- Payne, D. (2014). *Mai Rangiriri ki Pōkaewhenua: The Confiscation of Pōkaewhenua in the national interest 1861–1869*. Unpublished Ph.D. thesis, Victoria University of Wellington.
- Royal Commission on the Electoral System. (1986). Report of the Royal Commission on the Electoral System. Retrieved from <https://www.elections.org.nz/voting-system/mmp-voting-system/report-royal-commission-electoral-system-1986>
- Sharpe, M. (2018). Treaty claimant groups call on Crown to replace Hawke's Bay Regional Council with commissioners. Retrieved from <https://www.stuff.co.nz/environment/105751963/treaty-claimant-groups-call-on-crown-to-replace-hawkes-bay-regional-council-with-commissioners>
- Sharples, P. (2010). Supporting UN Declaration restores NZ's mana. Retrieved from <https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nzs-mana>
- Shore, C., & Kawharu, M. (2014). The crown in New Zealand. *Sites*, 11(1). doi:10.11157/sites-vol11iss1id267
- Te Urewera Board. (2018). 'Te Kawa o Te Urewera'.

- Waitangi Tribunal. (2011). *Ko Aotearoa Tēnei: A report into claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Wellington: Legislation Direct.
- Waitangi Tribunal. (2018). *Report on the Whakatohea Mandate Inquiry*. Wellington: Waitangi Tribunal.
- Williams, D. (2007). *Te Kooti Tango Whenua: The Native Land Court 1864–1909*. Wellington: Huia.
- Williams, J. (2013). *Lex Aotearoa: An heroic attempt to map the Māori Dimension in Modern New Zealand Law*. *Waikato Law Review*, 21, 1–34.
- Wilson, J. (2010). The Māori seats. In M. Bargh (Ed.), *Māori and Parliament*. Wellington: Huia Publishers.

LEGISLATION [DATABASE]

- Hawke's Bay Regional Planning Committee Act 2015.
- Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.
- Resource Management Act 1991.
- Te Arawa Lakes Claims Settlement Act 2006.
- Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
- Te Rarawa Claims Settlement Act 2015.
- Te Ture Whenua Māori Act 1993.
- Te Urewera Act 2014.
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.