

Māori Participation, Rights and Interests

By Deputy Chief Judge Caren Fox
And Chris Bretton

Introduction

We intend to explore today the opportunities for Māori involvement in natural resource and environmental management, and where known the utilisation of these opportunities that has occurred in practice.

As a Judge of the Maori Land Court, I have jurisdiction to make decisions such as authorising hapū partitions of Māori land or the establishment of Māori reservations without subdivision consents, contrary to the standard requirements of the Resource Management Act (RMA).¹ This can lead to potential overlapping jurisdictional issues with the Environment Court, the more recent example being *Grace v Minister for Land Information* (2014).²

As a presiding officer in the Waitangi Tribunal, I have made decisions critical of the RMA under the principles of the Treaty of Waitangi due to its impacts on Māori rights and interests.³

Yet as an Alternate Judge in the Environment Court and as Deputy Chair for one of the Environmental Protection Authority's Boards of Inquiry on the Wiri Prison proposal, I have had to interpret and apply the RMA to Māori interests in the exact same manner so heavily criticised by the Waitangi Tribunal.⁴ So if this presentation seems slightly schizophrenic, you will understand why. I take responsibility for that, not my co-author Mr Chris Bretton who cannot be here.⁵ He is definitely not schizophrenic.

¹ Te Ture Whenua Māori Act 1993, ss 301(1) & 338.

² [2014] NZEnvC 82.

³ Waitangi Tribunal *He Maunga Rongo – Report on the Central North Island Claims* (Wai 1200, 2008) vol 4 at ch 19.

⁴ See for example *Marr & Ors v Bay of Plenty Regional Council* [2010] NZEnvC 347, [2011] NZRMA 89; *Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri* (Environmental Protection Authority, September 2011) vol 1 at ch 15.

⁵ Chris Bretton LLB, Research Counsel, Māori Land Court and Waitangi Tribunal.

Waitangi Tribunal

We begin by noting that the Waitangi Tribunal has been very critical of the resource management framework in New Zealand prior to and post the RMA 1991. That is because the Tribunal has found that this framework has prevented Māori, particularly iwi and hapū from controlling the management of their own taonga or natural resources contrary to the principles of the Treaty of Waitangi. It is noteworthy that as early as 1993, the Ngāwha Tribunal recommended an amendment to the RMA due to Part II not according Māori treaty rights appropriate standing after it found that:⁶

Our consideration of the provisions of the Resource Management [Act] and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Māori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure that decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed...

We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.

In 2011, the Wai 262 Tribunal was still critical of the manner in which the RMA was implemented and it focused on what reforms could be adopted to provide for Māori interests noting that:⁷

The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case.

Accordingly, the Tribunal recommended that the RMA regime be reformed, so that “those who have power under the Act are compelled to engage with kaitiaki in order to deliver

⁶ Waitangi Tribunal *Ngāwha Geothermal Resource Report 1993* (Wai 304, 1993) at 154.

⁷ Waitangi Tribunal *Ko Aotearoa Tēnei – A Report into the Claims Concerning NZ Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 285-286.

control, partnership, and influence where each of these is justified.”⁸ In meeting this general recommendation the Tribunal specifically identified the following areas for improvement:⁹

- Enhanced opportunities for the development and use of iwi management plans;
- Improved mechanisms for delivering control to Māori;
- A commitment to capacity-building for Māori; and
- Greater use of the national policy statements and tools.

The Current Local Government and Resource Management Regime & Reforms

As you know the National Government embarked upon the task of reforming the RMA, the Local Government Act 2002 and various other environmental management statutes prior to the 2011 Elections.

The first round of the reforms has resulted in the Resource Management Amendment Act 2013, the Crown Minerals Amendment Act 2013, the Housing Accords & Special Housing Areas Act 2013, the Local Government Act 2002 Amendment Act 2014, and the Heritage New Zealand Pouhere Taonga Act 2014 which replaced the Historic Places Trust Act 1993.

Local Government

In terms of the Local Government Act 2002, there were existing provisions dealing with Māori participation and interests in local government. These included s 4 which refers to the Treaty of Waitangi and provides that in order to:

... recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.

That section and the following sections remain in the 2002 Act:

- a) Section 81 with Schedule 10 Clause 8 (requiring local authorities to engage with Māori and establish processes for Māori to contribute to decision making, they must also foster the development of Māori capacity to contribute and provide information needed for participation);
- b) Section 82(2) (which deals with consultation principles);

⁸ Ibid.

⁹ Ibid.

- c) Sections 109-110 with Schedule 11 (which deal with rates remission policies for Māori land).

Many local authorities have attempted to engage Māori through the use of consultation processes with Māori and/or by establishing Māori standing or advisory committees.¹⁰ The Bay of Plenty Regional Council has taken the issue further and has Māori representation on the Council. There are many other examples of initiatives taken by local authorities in this regard.

The Local Government Act 2002 Amendment Act 2014 has inserted two relevant provisions relating to planning that further enhance the opportunity for Māori participation. The first is s 76AA requiring that local authorities must have a “significance and engagement policy”. The second is Clause 11 of Schedule 10 which requires that all long term plans must contain a summary of that policy. Thus the engagement conducted under ss 81 and 82 will be publically available for scrutiny. In addition, as far as reorganisation schemes are concerned a new Clause 20(1) has been inserted requiring consultation with Te Puni Kōkiri and with iwi/Māori identified by them.

RMA 1991

The new s 32 of the RMA introduced by the Resource Management Amendment Act 2013 may mean that Councils will consult more and be better informed of Māori interests when weighing the merits of any relevant proposals. That is because that section requires local authorities to undertake full evaluations including the extent to which the objectives of a proposal are the most appropriate way to achieve the purpose of the RMA. Furthermore, there must be *inter-alia* sufficient detail of any cultural effects corresponding to the scale of any proposal.¹¹ In addition, the new Schedule 4 of the RMA at clause 7 requires that when assessing the cultural effects of a proposal for resource consent, that assessment must also consider cultural effects. We discuss the amendments to the Crown Minerals Act 1991 that further enhance Māori participation below.

Freshwater

In 2007, the Central North Island Waitangi Tribunal panel found that the RMA regime for the management of fresh water was not a regime consistent with the principles of the Treaty of Waitangi because it failed to address the full nature and extent of Māori rights and interests in freshwater. It also found that its procedures failed to assure Māori of anything more than the

¹⁰ Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, Legislation Direct, 2011) at 181 citing several examples of such initiatives.

¹¹ Resource Management Amendment Act 2013, s 70.

right to be consulted, and failed to provide for greater participation of Māori in management.¹²

The Tribunal was critical of the fact that Māori rights and interests are weighed in a process requiring a balancing of those issues against the other matters listed in ss 6 and 7 and the primary purpose of the 1991 Act declared in s 5.¹³ The Tribunal considered that an amendment to s 8, or the insertion of some new provision in the Act, was the only mechanism that could assure Māori that their rangatiratanga or autonomy and self-government would be appropriately considered in RMA processes.¹⁴

Since the Waitangi Report was released, although not because of it, freshwater has been a significant aspect of the resource management policy reform programme led by the National Government. That has been primarily because of the need to recognise that a first in, first served resource consent process was not equitably addressing all interests in freshwater.¹⁵

From a Māori perspective, the background to these reforms began when the Freshwater Iwi Leaders Group formed in 2007. The Group comprises the leaders of Tūwharetoa, Ngāi Tahu, Te Arawa, Waikato-Tainui and Whanganui. The Freshwater Iwi Leaders Group saw an opportunity to participate in the reforms when the National Government decided to review the issue of freshwater in 2008-2009. After some discussion with the Government, they signed protocols with relevant Ministers to facilitate their engagement in the ongoing development of freshwater policy.¹⁶

The Freshwater Iwi Leaders Group became a member of the Land and Water Forum. Thus the Group were involved in the 2010 report *A Fresh Start for Freshwater* which significantly contributed to the Freshwater reforms including the National Policy Statement for Freshwater Management 2011.¹⁷ The 2011 Statement, however, did not provide adequate direction for setting limits and standards for water quality as recommended by the Forum. It also did not address allocation issues.¹⁸ The Land and Water Forum produced two further reports. The

¹² Waitangi Tribunal *He Maunga Rongo – Report on the Central North Island Claims* (Wai 1200, 2008) at 1457-1458.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ B Spence “Future allocation of freshwater management under the Resource Management Act 1991” (2014) 10 BRMB at 115-118.

¹⁶ Waitangi Tribunal *Stage 1 Report of the Waitangi Tribunal on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 24-25.

¹⁷ Land and Water Forum *Report of the Land and Water Forum: A Fresh Start for Fresh Water* (September 2010) and see B Spence “Future allocation of freshwater management under the Resource Management Act 1991” (2014) 10 BRMB at 115-118.

¹⁸ B Spence “Future allocation of freshwater management under the Resource Management Act 1991” (2014) 10 BRMB at 115-118.

first released in April 2012 dealt with water quality issues including freshwater management planning and the second published in October 2012 grappled with implementation and allocation.¹⁹

In March 2013 the National Government released a package of proposals entitled *Freshwater reform 2013 and beyond*.²⁰ The proposals have been described as “the most comprehensive reform of New Zealand’s freshwater management system for a generation.”²¹ The proposals differed in some places to those recommended by the Land and Water Forum, and in terms of Māori involvement, the Government considered that Māori participation early in the planning process would result in better outcomes for freshwater.²² The Government, through the Ministry for the Environment released in November 2013 a new document that foreshadowed the changes that would take place to the 2011 National Policy Statement. That document was entitled *Proposed amendments to the National Policy Statement for Freshwater Management 2011*.²³ The changes included identifying more clearly Māori values in freshwater.

While developing its final position, the Government took into account concerns from the Iwi Leadership Group and the Māori Party that there should be a reference to the Treaty of Waitangi.²⁴ They were also able to influence the work done to incorporate Māori values and interests into the new Statement enacted in 2014.²⁵ Deputy Prime Minister Bill English, acknowledged their involvement in his evidence to the Supreme Court in the ‘Water Rights’ case, noting that engagement by Māori on freshwater reform occurred through the Freshwater Iwi Leaders Group, the Land and Water Forum and the Iwi Advisers Group.²⁶

¹⁹ Land and Water Forum *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quality Freshwater Policy and Plan Making Through Collaboration* (April 2012); Land and Water Forum *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (October 2012).

²⁰ Ministry for the Environment *Freshwater reform 2013 and beyond* (March 2013).

²¹ B Spence “Future allocation of freshwater management under the Resource Management Act 1991” (2014) 10 BRMB at 115-118.

²² Ministry for the Environment *Freshwater reform 2013 and beyond* (March 2013) at 65.

²³ Ministry for the Environment *Proposed amendments to the National Policy Statement for Freshwater Management 2011: A discussion document*. (November 2013).

²⁴ Nick Smith and David Carter “A Fresh Start for Fresh Water: Questions and Answers” (Press release, undated).

²⁵ Waitangi Tribunal *Stage 1 Report of the Waitangi Tribunal on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 24-25.

²⁶ *New Zealand v Māori Council v Attorney-General* [2013] NZSC 6 at [144] and note that the Iwi Advisers Group advises the Iwi Leaders Group.

The National Policy Statement for Freshwater Management 2014 sets out the National Government's objectives and policies for freshwater management under the RMA.²⁷ The Statement came into effect on 1 August 2014 pursuant to s 52(2) of the RMA. The Statement goes some way towards addressing some of the criticism of the Waitangi Tribunal as noted by the Central North Island Tribunal. Whether it goes far enough is another issue.

However, it has moved the debate in a progressive way and we note that the Preamble recognises the Treaty of Waitangi as the 'underlying foundation of the Crown-hapū relationship with regard to freshwater resources.' The Policy Statement 'seeks to address tāngata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water' as 'key to meeting obligations under the Treaty of Waitangi. The Preamble also states that freshwater objectives for a range of tāngata values are intended to recognise "Te Mana o te Wai". An interesting notion and one that may have some serious tikanga issues raised should the mana of a particular waterway be impacted in a negative manner. Iwi and hapū relationships with the natural environment, including fresh water are recognised as are their kaitiaki responsibilities.

Te Mana o te Wai is also recognised in the opening section on the National Significance of Freshwater, as are tāngata whenua values. While there may be issues over the meaning ascribed to the word "values" and how those may be defined by regional councils, Objective D1 attempts to provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of freshwater, including associated ecosystems. The Statement requires all local authorities to take reasonable steps to involve iwi and hapū in the management of freshwater and freshwater ecosystems in the region, to work with them to identify values and interests and to reflect those in management and decision making.

The experience of the Iwi Leadership Forum on the Freshwater issue may be a precursor for the future development of National Environmental Statements issued under sections 43 and 44 of the RMA. In this regard the Government has stated that the "requirements to consult with Māori when developing National Environment Standards would be aligned with the existing requirements for developing National Policy Statements. This means that before preparing proposed Standards, the Minister for the Environment would seek and consider comments from the relevant iwi authorities."²⁸

Heritage New Zealand Pouhere Taonga Act 2014

We note that the new Heritage New Zealand Pouhere Taonga Act 2014 has a Treaty of Waitangi (Te Tiriti o Waitangi) clause, where previously there was no such provision.

²⁷ "National Policy Statement for Freshwater Management 2014" (4 July 2014) 71 New Zealand Gazette 1992-2017.

²⁸ Ministry for the Environment *Improving our resource management system: a discussion document* (February 2013) at 67

Section 7 notes that in order to recognise and respect the Crown's responsibility to give effect to the Treaty of Waitangi (Te Tiriti o Waitangi) the Act provides:

- (a) in section 10, for the appointment, in consultation with the Minister of Māori Affairs, of at least 3 members of the Board of Heritage New Zealand Pouhere Taonga who are qualified for appointment having regard to their knowledge of te ao Māori and tikanga Māori; and
- (b) in sections 13 and 14, that Heritage New Zealand Pouhere Taonga—
 - (i) has functions that relate to wāhi tūpuna, wāhi tapu, and wāhi tapu areas; and
 - (ii) has the powers to carry out those functions, including the power to be a heritage protection authority under Part 8 of the Resource Management Act 1991; and
- (c) in section 22, that Heritage New Zealand Pouhere Taonga has the power to delegate functions and powers to the Māori Heritage Council continued by section 26; and
- (d) in sections 27 and 28, for the functions and powers of that Council to ensure the appropriate protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, historic places, and historic areas of interest to Māori; and
- (e) in section 39, for the power of Heritage New Zealand Pouhere Taonga to enter into heritage covenants over wāhi tūpuna, wāhi tapu, and wāhi tapu areas; and
- (f) in sections 46, 49, 51, 56, 57, 62, 64, and 67, for the measures that are appropriate to support processes and decisions relating to sites that are of interest to Māori or to places on Māori land; and
- (g) in sections 66, 68, 69, 70, 72, and 78, for a power for the Council to enter, or to determine applications to enter, wāhi tūpuna, wāhi tapu, and wāhi tapu areas on the New Zealand Heritage List/Rārangī Kōrero, and to review or remove such entries; and
- (h) in section 74, a power for the Council to make recommendations to relevant local authorities in respect of wāhi tapu areas entered on the New Zealand Heritage List/Rārangī Kōrero under Part 4 and a duty on local authorities to have particular regard to such recommendations; and
- (i) in sections 75 and 82, requirements that the Council (and in section 82, the Minister of Māori Affairs) be consulted in certain circumstances relating to the New Zealand Heritage List/Rārangī Kōrero and the Landmarks list respectively.

We note that s 188 of the RMA has not been amended and it appears to be still available as an option for Māori to apply to become a heritage authority. The use of the Treaty of Waitangi section is an interesting development and it potentially opens up further opportunities for the protection of important cultural sites.

Litigation

There are opportunities, albeit expensive opportunities, to progress Māori issues through litigation. Recent trends in the Environment Court jurisprudence demonstrate an increasing sophistication in dealing with balancing Māori interests. The Court tends to override them only where the need to recognise and provide for other matters of national importance outweigh those considerations, where the purpose of the RMA under s 5 may be defeated or where there are no reasonable alternatives available as a means of mitigating any adverse effects. There are many decisions from all the judges of the Environment Court that may be cited and in the footnotes below are just a few examples of the trend.²⁹

In addition, 2 judges of the Māori Land Court now hold warrants to act as Alternate Judges, myself and Judge Clark. A simple application can be made to have one of us sit with an Environment Court judge to hear proceedings and we have done so on a range of issues.³⁰

Comment

It seems clear that even though the next stage of the RMA reforms has not yet commenced in earnest, opportunities remain for Māori to influence planning and resource consent proposals over and above other members of the public. There are also opportunities for working with local authorities on capacity building and information sharing. We note that there is provision for what we consider to be a reasonable rating relief policy framework for Māori land. That policy framework has been utilised by various Councils including the Gisborne District Council. The Freshwater reforms have been productive and are a good example of what can be achieved where there is collaboration. Heritage values have arguably been enhanced and Part II is generally providing some relief for Māori where they have had to litigate despite competing interests that must be weighed alongside of the overall purpose of the RMA.

²⁹ *Mokau ki Runga Regional Management Committee v Waitomo District Council* [2010] NZEnvC 437; *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211; *Grace v Minister of Land Information* (2014) [2014] NZEnvC 82 *Te Tumu Land Owners Group v Tauranga City Council – BC 201460454 2014* (2014) [2014] NZEnvC 38.

³⁰ Resource Management Act 1991 ss 249, 250, 252 and see the following cases *Te Rakato Marae Trustees & Ors v Hawkes Bay Regional Council* [2011] NZEnvC 231 (Judge Thompson & Judge Clark); *Mahanga E Tu Inc v Hawkes Bay Regional Council & Ors* [2014] NZ EnvC 83 (Judge Thompson & Judge Clark); *Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council & Ors* [2009] NZEnvC 92 (Judge Smith & Judge Fox); *Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council & Ors* [2010] NZEnvC (Judge Harland & Judge Fox); *Te Runanga o Ngäi Te Rangi Trust & Ors v Bay of Plenty Regional Council* [2011] NZEnvC 402 (Judge Smith & Judge Fox); *Te Puna Matauranga o Whanganui & Universal College of Learning v Whanganui District Council* [2013] NZEnvC 110 (Judge Thompson & Judge Fox); *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269 (Judge Dwyer & Judge Fox).

What all this indicates is that successive Governments have recognised the importance of Māori interests in resource and environmental management including the need for appropriate consultation commensurate with any proposal.

Reforms 2013 and Beyond

Following the enactment of the RMA Amendment Act 2013, the National Government focused on the next phase of the reforms. In February 2013, the Ministry for the Environment released a discussion document,³¹ titled *Improving our Resource Management System*. In it the Ministry set out where the National Government considered improvements should be focussed. It identified six areas and these included to provide for more effective and meaningful Māori participation. Following the consultation round on that document, in September 2013 the Government released *Resource management summary of reform proposals* (August 2013).³² Of note is the reform proposal addressing Māori participation which we have set out in full below:³³

Māori Participation

The reforms include a number of provisions to achieve greater clarity on the role of iwi/hapu in local government resource management planning. The reforms will specify requirements for councils to involve iwi/hapu in planning, setting out a clear role iwi/hapu early in the process.

While final decisions will always remain with councils, changes across all planning pathways will require councils to seek and have particular regard to the advice of iwi/hapu on a draft plan and report on how this advice was considered. New requirements for section 32 evaluations will ensure transparency for how this advice is considered. The changes also provide for hearing/review panels on plan processes to include members with understanding of tikanga and the perspectives of local iwi/hapu. ...

Councils will be required to invite iwi/hapu to enter into an arrangement that details how iwi/hapu and councils will work together through the planning process. Council-iwi/hapu arrangements would add greater detail, potentially supplementing the statutory requirements, and be tailored to meet particular circumstances. There is no requirement for iwi/hapu to enter an arrangement with councils. However, there will be a requirement for councils to take into consideration all advice from iwi/hapu on draft plans and policy statements. The Crown will have the ability to step in to ensure an arrangement is

³¹ Ministry for the Environment *Improving our resource management system: a discussion document* (February 2013).

³² Ministry for the Environment *Resource management summary of reform proposals* (August 2013).

³³ Ministry for the Environment *Resource management summary of reform proposals* (August 2013) at 8.

followed and to facilitate arrangements where relationships between parties have broken down.

Existing arrangements under Treaty settlements will be maintained, and could work alongside or be supplemented by any other arrangements set up between iwi/hapu and councils.

These proposals require Councils to invite iwi/hapū to enter into arrangements detailing how they will work together. In this manner the Government appears to have grappled with the issue of iwi/hapū participation as recommended in a number of Waitangi Tribunal reports including the Wai 262 report. Thus, and depending on what happens to these proposals during the legislative process, the reforms could provide further opportunities for Māori to be involved in decision making. At the least, the Government expectation is that the reforms will “provide greater certainty over the role of iwi/hapū in the planning system, and incentivise early engagement between iwi/hapū and councils.” The further expectation is that this will avoid disagreements and any unnecessary litigation.³⁴

Proposals Concerning Sections 6 and 7 of the RMA

The proposals for Part II, on the other hand, may result in a different direction for how Māori rights and interests have been accommodated to date. The main proposal in this regard is to merge ss 6 and 7 into one list of matters of national importance.³⁵ The new list does not include all current ss 6 and 7 matters. However, the wording of the current s 6(e) remains and the concept of kaitiakitanga is elevated to a matter of national importance. However, the proposal is that in making a “broad judgment under section 5 in order to achieve the purpose of the Act” those performing functions and exercising powers under the RMA must recognise and provide for those matters of national importance listed. Not surprisingly, this proposal has been welcomed by some and criticised by others.³⁶

Primarily the criticism has been because of the elevation of competing values currently in s 7, or additional to them, to matters of national importance. From a Māori perspective the combined elevation of economic, utilisation and development values could potentially dilute the importance of Māori considerations in the RMA as each matter of national importance is weighed against the other. Thus, the new proposals may militate against the opportunities created concerning iwi participation in planning or in terms of resource consent applications.

The proposals for Part II may change, however, given the decision in the *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* (2014) and its finding that Part II

³⁴ Ibid.

³⁵ Ministry for the Environment *Resource management summary of reform proposals* (August 2013) at 11-12.

³⁶ For example: Geoffrey Palmer *Protecting New Zealand's environment: An analysis of the government's proposed freshwater management and Resource Management Act 1991 reforms* (September 2013) Fish and Game New Zealand <www.fishandgame.org.nz> at 49 cf. John Hassan “RMA Part 2 Reforms” (2013) 10 BRMB 11-14.

cannot trump the New Zealand Coastal Policy Statement.³⁷ In light of that decision, it seems to me that there is an opportunity for Māori to improve their position, rather than have their interests weighed among many, by simply ensuring their interests are appropriately recognised in National Policy Statements and National Environmental Standards. The success of such an approach would depend, however, on whether the current proposals for Part II remains the same, or whether will be altered to reverse the effects of the Supreme Court's decision.

Proposals Concerning s 33 & Joint Agreements

With regard to the transfer of powers, the National Government initially proposed to amend the criteria in the RMA to improve the use of existing tools for participation. The proposal was that:³⁸

the criteria for joint management agreements and transfers of resource management responsibilities under the RMA would be amended to make them easier to be used for enabling iwi participation. This would facilitate greater uptake of these under-used tools.

We are not sure what has happened to this proposal and whether it will appear in the next stage of the reforms. In practise there have been no examples of a full transfer or delegation of powers under s 33 of the RMA by any consenting authority that we have been able to identify. In terms of Joint Management Agreements, many of you will remember the 2005 amendments to the RMA where s 36B was introduced. That provision provided for the development of agreements that may be made between a range of parties including iwi authorities and groups that represent hapū.

Section 36B Agreements have been rarely negotiated with Māori, probably for the reasons so clearly articulated by Natalie Coates in her article for the 2009 South Pacific Law Journal entitled *Joint-Management Agreements In New Zealand: Simply Empty Promises?*³⁹ She identified the potential barriers to RMA agreements as:

- a) the requirement in the RMA that such agreements must be efficient. Joint management agreements may only be economically efficient if iwi contribute to costs, a potentially significant barrier;
- b) the potential for parties to cancel the agreement at any stage under s 36E. The problem here is that if there are conflicts, local authorities would always have

³⁷ [2014] NZSC 38; [2014] NZRM 195.

³⁸ Ministry for the Environment *Improving our resource management system: a discussion document* (February 2013) at 67.

³⁹ (2009) 13(1) JSPL at 32.

the advantage given that if the agreement is cancelled the powers and functions would revert to them;

- c) fear of political consequences, whereby officials who support joint management, when a majority in the community do not, risk not being re-elected; and
- d) perceived conflicts of interest where iwi have a direct interest in matters over which they have decision-making powers.⁴⁰

She recorded only one agreement and that was the Taupo District Council And Tūwharetoa Māori Trust Board Joint Management Agreement.⁴¹ There is no doubt in our view that this Agreement is an example of local authorities trying to work with Māori to manage their lands. However, Ms Coates described the Agreement as follows:⁴²

... there is limited actual power sharing. The agreement only applies in regards to resource consents and plan changes that affect multiply owned Māori land. This limitation reduces the barrier identified earlier, that other people may have a vested interest in the resource and are therefore likely to claim bias on behalf of the iwi. It does however mean that the agreement is quite limited in its application. Another limitation of the scope of this agreement is that it is optional for those to which the agreement applies, to be heard by the joint committee (the council and the Tūwharetoa iwi authority). In essence it confines the decision making scope of the joint committee to those instances where an applicant thinks that it will be beneficial for their application to have the iwi authority as part of the administrative process. As well as negating concerns about bias or conflicts of interest, this restriction that ensures that Council members also do not have to worry about getting voted out of their positions for “forcing” a potentially unpopular administrative procedure on an unwilling population.

Freshwater Reforms

Linked to the RMA reforms are the impacts of the National Government’s freshwater management reforms of 2013-2014.⁴³ Here the Government’s emphasis on arrangements between Councils and iwi so as to provide advice on plans and decisions is also reflected in the freshwater reforms, including the National Policy Statement for Freshwater Management 2014 and its directives to Councils. The reasons for this approach can be discerned from the following section of the Ministry for the Environment’s *Freshwater reform - 2013 and beyond* :

⁴⁰(2009) 13(1) JSPL at 33.

⁴¹ There may be other agreements now but we have not had time to research these for this paper.

⁴² (2009) 13(1) JSPL pp 38-39.

⁴³ Ministry for the Environment *Freshwater reform 2013 and beyond* (March 2013).

Reform 2: Effective provisions for iwi/Māori involvement in freshwater planning

A more effective role for iwi/Māori in national and local freshwater planning and decision making is a crucial aspect of recognising them as Treaty partners.

There are benefits for all in clarifying and enhancing iwi/Māori role in decision-making processes. This will provide greater certainty for iwi/Māori and others with an interest in using fresh water.

A more effective role in freshwater planning for iwi/Māori will be provided for through:

- a statutory requirement ensuring iwi have a place alongside other key parties and interests in alternative collaborative planning processes, described in quality decision-making reform 1.
- a role for iwi in providing advice and formal recommendations to a council ahead of its decisions on submissions, with a statutory requirement for the advice and recommendations to be explicitly considered before decisions are made. These requirements would apply to all decisions on submissions on freshwater plans, whether they are developed under the new collaborative process or the existing process in Schedule 1 of the RMA.

This new role will not displace or override any existing arrangements that have been created under Treaty settlements. Iwi and councils will also have the freedom to reach a different arrangement for the advisory and recommendation role, if this would better meet local needs, as currently occurs in some regions.

Comment

As we understand it, there is no Bill available reflecting all these second stage RMA reform proposals, so we do not know what the detail of the legislation will be. Due to the election result last Saturday, we can be certain, however, that the reforms will continue.

Whether the Iwi Leadership Group or iwi/Māori will continue to be consulted on stage 2 of the RMA reforms, freshwater and National Policy Statements and National Environmental Standards remains to be seen but it is likely given the productive relationships that have been developed to date.

Environmental Reporting Bill

The Environmental Reporting Bill was introduced at the end of 2013. It follows the Ministry for the Environment release of *Measuring up: Environmental reporting – a discussion document* released in August 2011. The Bill addressed the need for “independent”

environmental reporting to be produced as the National Government considered that it was important to “give the public certainty about the scope and quality of the information” they receive.⁴⁴

That Bill proposes that domain reports be produced in relation to topics prescribed by regulations made under clause 18. It requires the Secretary for the Environment and the Government Statistician to publish domain reports on 1 of 5 environmental domains (air, atmosphere and climate, freshwater, land, and marine) every six months and publish a synthesis report (providing an analysis of cross-trends and interactions) once every 3 years. It is mandatory that domain reports include impacts that the state of the environment may be having on *inter alia* culture and recreation.⁴⁵ There may be an opportunity here for Māori issues to be examined where the state of the environment is impacting in a negative way on Māori cultural values. Obviously that will require not only statistical data but also consultation with affected Māori. The Bill is currently still before the Parliamentary Select Committee on Local Government and the Environment.

EEZCH (EE) Act 2012

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) received the Royal Assent on September 2012. There are several sections of the 2012 Act that contain a reference to Māori interests and the principles of the Treaty of Waitangi are referred to at s 12. Other sections enable Māori participation including ss 18, 32, 33, 39 and 45.

The recent decision of the *EPA Board of Inquiry into the Trans-Tasman Resources Ltd Marine consent (2014)* demonstrates the opportunities that exist for Māori under the legislation. In declining the application for consent from Trans-Tasman the Board applied provisions that recognise Māori interests in the EEZ marine environment. A full and detailed analysis of this decision as far as Māori issues are concerned has been authored by Benjamin Ralston and Jacinta Ruru and can be found in the September 2014 issue of *Law Talk*.⁴⁶ This decision has now been appealed by Trans-Tasman Resources Ltd to the High Court, so we await with interest the outcome of those proceedings.

Crown Minerals Act 1991

The Waitangi Tribunal has been critical of the approach taken to the management of petroleum in New Zealand in two reports completed in 2003⁴⁷ and 2011.⁴⁸ The Petroleum

⁴⁴ Environmental Reporting Bill 2013 (189-1), Explanatory Note.

⁴⁵ Environmental Reporting Bill 2013 (189-1), cl 10.

⁴⁶ Benjamin Ralston and Jacinta Ruru “Landmark EPA Decision” [2014] NZLJ at 284-285.

⁴⁷ Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003) at ch 7 Summary.

Panel for the Waitangi Tribunal recommended strengthening s 4 along the same lines as the Conservation Act 1987 and the State-Owned Enterprises Act 1986.⁴⁹ It noted that the EEZ of New Zealand lacked a management regime at that time. It recommended legislative change to include:

- The compulsory notification of any applications concerning petroleum-related activities that may concern Māori land;
- The compulsory arbitration provisions provide exemptions in respect of Māori land;
- Enhanced protections for sites of importance where land is no longer Māori-owned;
- Establishing a statutory advisory committee to provide the Minister of Energy and Māori Affairs with advice on Māori perspectives on petroleum issues and related matters. This was primarily addressed to issues of active protection, poor consultation practice and greater Māori participation in management.
- Providing for regional representation to allow opportunities for joint hearings of permit applications and/or establishment of regional iwi advisory boards or greater local government participation;
- Use of national policy statements and national environment standards to provide guidance to local authorities;
- Establish a Commissioner for the Treaty of Waitangi to audit compliance with the Treaty by Central and Local Government on all issues not just petroleum.

The Crown Minerals Amendment Act 2013, along with the EEZ Act, has provided further opportunity for Māori interests to be accommodated in relation to Crown minerals. The Amendment does to a limited degree also address some of the recommendations of the Petroleum Panel of the Waitangi Tribunal.⁵⁰ Under the legislation, there is a new tier system for permitting. Tier 1 projects are the highest risk projects and will generally be subjected to strict monitoring under the Act. In contrast, Tier 2 operations are not subjected to the same strict regime. Aside from s 4 which requires all those exercising powers and functions under the Act to have regard to the Treaty of Waitangi, s 33C requires that Tier 1 and Tier 2 permit holders report annually to the Minister on the permit holder's engagement with iwi and hapū

⁴⁸ Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at ch 8.

⁴⁹ Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, Legislation Direct, 2011) at 170.

⁵⁰ The following regulations have been amended pursuant to the Crown Minerals Act 1991: the Crown Minerals (Petroleum) Regulations 2007 amended by the Crown Minerals (Petroleum) Amendment Regulations 2013; the Crown Minerals (Minerals and Coal) Regulations 2007 amended by the Crown Minerals (Minerals Other than Petroleum) Amendment Regulations 2013. New regulations enacted are the Crown Minerals (Royalties for Petroleum) Regulations 2013 and the Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013. Consequential amendments were also made to the Conservation Act 1987, the Continental Shelf Act 1964, the Reserves Act 1977 and the Wildlife Act 1953.

in whose area some or all, of the permit is situated. The additional notice requirements where Māori land is concerned have not been touched and remain in place.⁵¹

In addition, a new s 14 provides that minerals programmes must set out or describe how the Minister and the chief executive will have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) (as required by s 4) for the purposes of mineral programmes. This is a new provision and was not part of the previous ss 13-22 regime.

The Petroleum Programme 2013 and the Minerals Programme 2013 were issued pursuant to clause 3 of Schedule 1. The programmes refer to the Treaty of Waitangi and set out the detail for consultation with iwi and hapū. These also list how defined areas of land of particular importance to iwi and hapū may be excluded from the operation of the programmes or are not to be included in any permit. The new annual reporting requirement for permit holders on their engagement with iwi and hapū are also detailed. Specifically Part 2 of both programmes is set out below:

2.1 Treaty of Waitangi (Te Tiriti o Waitangi)

- (1) Section 4 of the Act requires all persons exercising functions and powers under the Act to have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) (“the Treaty”).
- (2) In order to meet the Crown’s responsibility to have regard to the principles of the Treaty, this Programme does the following things:
 - (a) it provides that certain land that has been identified as being of particular importance to the mana of iwi or hapū must not be included in a permit (see clause 3.1).
 - (b) it specifies the matters on which iwi and hapū must be consulted (see clauses 2.2 and 2.4 to 2.6)
 - (c) it sets out the principles and procedures for consulting with iwi and hapū (see clauses 2.3 to 2.7, and 2.11 and 2.12)
 - (d) it specifies the matters of which iwi and hapū must be notified (see clauses 2.4(2), 2.5(1), 2.5(4), 2.5(5), 2.6(1), 2.6(3), 2.6(4) and 2.9)
 - (e) it requires Tier 1 permit holders to report annually to NZP&M on their engagement with iwi and hapū whose rohe includes some or all of the permit area or who otherwise may be directly affected by the permit (see clause 2.13).

⁵¹ Crown Minerals Act 1991, s 51. That section also references the Waikato Raupatu Claims Settlement Act 1995 and the Ngāti Awa Settlement Act 2005 and ensures that Ngāti Awa and Waikato-Tainui receive the same notice as owners of Māori land. See also the Crown Minerals Act 1991, s 80.

Treaty of Waitangi (Fisheries Claims) Settlement Act 1993 (TWFCFA) & the Marine and Coastal (Takutai Moana) Act 2011 (MCA)

The TWFCFA

In accordance with s 10 of the TWFCFA and the Fisheries (Kaimoana Customary Fishing) Regulations 1998 tāngata whenua may apply to the Minister of Fisheries to establish a mātaítai reserve on a traditional fishing ground for the purpose of recognising and providing for customary management practices and food gathering. A mātaítai reserve will restrict commercial fishing in the area. Tāngata Tiaki/Kaitiaki administer the mātaítai reserves. They may recommend bylaws to be approved by the Minister of Fisheries. Bylaws apply only to those species managed under the Fisheries Act 1996. There are approximately 10 of these reserves around the country.

In *Te Runanga o Ngāi Te Rangi Trust & Ors v Bay of Plenty Regional Council*,⁵² the Environment Court accepted that the effects of dredging the Tauranga Harbour on a Mātaítai Reserve should form part of the overall Part II analysis under the RMA.

The MCA

The MCA repeals the Foreshore and Seabed Act 2004. It therefore makes a number of amendments to the RMA. One of the major effects of the MCA in terms of Māori involvement in resource management is the creation of ‘protected customary rights’. Protected customary rights must have been exercised since 1840 and continue to be exercised in the same or similar manner, or in a way that evolves over time. They may be recognised either by an agreement by the customary rights group and the Crown, or by an order of the High Court.

This term replaces ‘recognised customary activities’ in the RMA, and includes a change to the test that local authorities use when considering resource consents in these areas. The MCA amends the RMA to include definitions for new concepts such as ‘protected customary rights group’.

The MCA effectively creates a veto power for certain types of resource consents for customary rights groups in protected areas. Under s 55(2) of the MCA, consent authorities must not grant resource consents that may have adverse effects on the exercise of the right without the holder’s written approval. Section 87A(2A) of the RMA was correspondingly amended in relation to consents for controlled activities.

The MCA also creates ‘customary marine title’ for groups that have held an area in accordance with tikanga since 1840 without substantial interruption. Customary marine title holders are granted a RMA permission right, which includes the ability to give or decline

⁵² [2011] NZEnvC 402.

permission for certain activities in the specified area. There is right of appeal to any such decision by the title group.

Comment

Obviously, there are opportunities under both these statutes to have iwi/hapū interests recognised and provided for or to be actively involved to a limited extent in the management of their marine environment. In other words, the combined effect of this legislation, the NZ Coastal Policy Statement, the EEZ Act and the RMA has significant potential to accommodate various aspects of the Māori interest in the marine environment.

Treaty Settlements

Statutory Acknowledgements

Ongoing and significant amendments made to the RMA are occurring due to the various settlement Acts granting to iwi/hapū certain statutory acknowledgements. Schedule 11 of the RMA lists the Settlement Acts that contain these acknowledgments. It is continually updated as new Settlement Acts are enacted.

Statutory acknowledgments are formal acknowledgments of the mana of iwi/hapu over a specific area, known as a 'statutory area'. These areas generally only relate to Crown-owned land and can include coastal marine areas. Under s 95E(2)(c) of the RMA, consent authorities must have regard to the statutory acknowledgments when deciding whether a person is an affected person for the purposes of s 95B and thus whether they should be given limited notification of consent applications, to the extent required, if at all under the RMA.

Joint Management Agreements

There are very few joint management agreements made under the RMA provisions, however there are numerous examples of co-management regimes arising from the Treaty of Waitangi settlement process. Natalie Coates identified the main benefits of joint management agreements made as a result of Treaty settlements and we summarise those below:⁵³

- a) Joint management agreements from the settlement process are generally incorporated into settlement Acts. Potentially reluctant councils are therefore actually required to enter into the agreements and work with iwi. Questions about efficiency or political consequences are taken out of the hands of councils.
- b) They generally relate to land that has been vested back into iwi, or is a reserve or Crown land. This can reduce perceived conflicts of interest, as there are less likely to be other proprietary interests.

⁵³ Natalie Coates "Joint-management agreements in New Zealand: Simply empty promises?" (2009) 13(1) JSPL at 32.

- c) Further, they don't generally require the iwi to act impartially in accordance with the RMA, as a local authority would, when considering applications. They are not forced to give equal weight to other matters of national importance as they do to Māori concerns. Rather, iwi representatives are typically on a committee, and are there to provide or advocate a Māori perspective.

Māori have, it seems, preferred to pursue the opportunity to influence RMA outcomes through the Treaty settlement process. Beginning with the Ngāi Tahu Claims Settlement Act 1998 you can discern a pattern towards more and more sophisticated demands for joint management regimes. Thus the more recent regimes are significantly different from this earlier Ngāi Tahu settlement. There is no recognition of Te Waihora (Lake Ellesmere), for example, as a legal entity in the way that some natural features are recognised in later settlements.

There is, however, a joint management agreement between Ngāi Tahu and Canterbury Regional Council. It is not a joint management agreement under the RMA, rather it is required under their settlement Act. Furthermore the bylaws made pursuant to the legislation may only be made by the Minister of Conservation on the recommendation of Te Runanga o Ngāi Tahu. That is to be contrasted to more recent settlements where iwi have become actively engaged in making bylaws.

The trend in more recent settlements has been towards more direct decision-making powers in joint management arrangements. The Waikato River settlement, for example, represents a change to the way that joint management arrangements were once conceptualised. It stems from the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and Ngā Wai o Maniapoto (Waipa River) Act 2012.

The Waikato River Authority is a statutory body established under this legislation, and consists of 10 members, with equal Crown and iwi representation. The authority exercises a number of powers including the ability to request call-ins under the RMA, and the ability to appoint iwi commissioners to consent hearings that relate to the river. The Authority's powers do not include actual decision-making powers in relation to resource consent applications.

The legislation may alter RMA plans and policy statements where inconsistencies exist. For example, ss 11-15 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and ss 12-16 of the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 provide for Te Ture Whaimana. This is the vision and strategy statement for the river and it is found in Schedule 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Te Ture Whaimana prevails over ss 59-77 of the RMA, which deal with regional policy statements and plans. The legislation incorporates the vision and strategy into the Waikato Regional Policy Statement. The vision and strategy also prevails over any inconsistent

provision in any National Policy Statements or the New Zealand Coastal Policy Statement. If the vision and strategy statement is stricter than National Environmental Standards or Water Conservation Orders, it will prevail.

Through the development of the vision and strategy, Waikato River iwi can therefore directly influence RMA plans and policy statements. The Waikato River settlement Acts also explicitly require local councils and the Waikato Raupatu River Trust to enter into joint management arrangements. Section 43 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, for example, requires joint management agreements between the trust and local authorities to include a means for the two to work together to carry out duties and functions, and exercise powers under the RMA. This includes: monitoring and enforcement; preparing, reviewing, and changing an RMA planning document, and exercising duties, functions and powers relating to resource consents.

The joint management agreement between the Raukawa Settlement Trust and the Waikato Regional Council, established under the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, sets out a resource consent process for applications which affect the Upper Waikato River as defined in s 49 of that Act.⁵⁴ Having been sent the required details of consent applications, the Raukawa Settlement Trust confirms its position on the application including whether it has no issue with it, supports it (conditionally or not), opposes it unless certain conditions are met or opposes it fully. The consenting officer must then formally acknowledge receipt of the advice and provide advice on the process forward. This demonstrates a clear pathway for the trust to inform and advise the Council, and the Council is required to formally communicate to the trust its decision and the reasons for it. The agreement also provides that the Council will engage with the trust on applications for direct referral to the Environment Court, and take account of its views.

Environmental Personalities

There appears to be a trend towards granting legal status to rivers and other parts of the natural environment. This is a relatively new development and the legal issues that may be raised regarding adverse environmental effects on these bodies are yet to be fully explored.

Under Te Urewera Act 2014 for example, Te Urewera was declared to be a legal entity given all the rights and duties of a legal person, those powers and duties to be exercised on its behalf by Te Urewera Trust Board. This is a significantly different approach to the early settlement Acts. The board itself consists of eight members, four Crown appointees and four appointed by the Tuhoe Trust Board, Tuhoe Te Uru Taumatua. The make-up of the board changes to 6 Tuhoe appointees and 3 Crown appointees three years after settlement. The board's principal responsibilities include the production of a management plan, authorising certain activities in the region, and passing bylaws (subject to approval by the Minister of Conservation).

⁵⁴ Waikato Regional Council and Raukawa Settlement Trust Joint Management Agreement (2012) at 21.

Under s 43 of Te Urewera Act 2014, work done for the purpose of managing Te Urewera under the Act that is consistent with the management plan, and does not significantly impact the environment outside its boundary, does not require resource consent. The section also exempts leases granted by the Tuhoe Trust Board from the subdivision requirements in the RMA.

The Whanganui River settlement 2014 is the latest settlement and it draws on the idea similar to the Urewera settlement. Under Whanganui River settlement legislation, the river will become a legal entity in its own right. Te Pou Tupua will represent this entity, comprising two kaitiaki, one representing the Crown and one representing the Whanganui River iwi. There is no draft Bill available as yet, however it seems likely that its provisions will be similar to the model in the Urewera settlement.

Comment

At play in the Treaty settlement process is the pattern of involvement for Māori that the Wai 262 Tribunal recommended. That process offers greater opportunities to achieve RMA outcomes that accord Māori an appropriate level of priority in resource management as discussed by the Wai 262 Waitangi Tribunal.

Conclusion

Some significant steps have been taken by successive Governments to increase the practical involvement of Māori in resource management leading to increased opportunities for participation and appropriate consultation. Certainly the Iwi Leadership Forum has not been slow to seize the opportunity to influence the RMA reforms when asked to collaborate. However, there is no certainty that the reforms will continue to deliver. It remains to be seen what will happen to Part II of the RMA for example and it is still uncertain what will happen to s 33 and s 36B of the RMA.

That conclusion should not, however, detract from the obvious massive effort to engage Māori in resource and environmental management and we consider that significant incremental progress has been made to address many of the Waitangi Tribunal findings and recommendations. Treaty settlement legislation, however, remains the primary route or opportunity to influence the RMA regime as far as governance and remedial planning is concerned. It has resulted in more than mere technical amendments to the RMA for some regions. Whether sufficient progress has been made is a question best left to another day.

What can be said is that there is a discernible pattern in the resource management legislation integrating in a limited manner how the principles of the Treaty of Waitangi should be recognised and how Māori should engage in decision making. It could be argued that because the issue of governance and the transfer of powers has not been realised under the RMA, Māori have no choice but to seek a solution through the Treaty settlement process. When that

happens, there may be only limited integration as can be seen by the Waikato River settlement legislation.

We were asked to consider whether the Treaty Settlement process is the best way forward for Māori? Well for most Māori, it has been. Whether this is the best way forward for an integrated resource management regime is another question.