THE REPORT ON THE MANAGEMENT OF THE PETROLEUM RESOURCE

The Report on the Management of the Petroleum Resource

WAI 796

WAITANGI TRIBUNAL REPORT 2011

The cover illustration is of the Ocean Bounty drilling platform, drilling an exploratory well 12 kilometres off the coast of Motunui in north Taranaki for the Shell consortium's Pohokura gas field project, March 2005.

The frontispiece is of Shell Todd Oil Services' Maui B platform, 35 kilometres off the coast of west Taranaki in the Tasman Sea, February 2006. Condensate is pumped from the platform to the shore processing station at Oaonui.

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Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Dr Pita Sharples
Minister of Māori Affairs

and

The Honourable Gerry Brownlee
Minister of Energy
Parliament Buildings
WELLINGTON

29 March 2011

E nga Minita o te Karauna, tena hoki korua

Tuatahi, ka huri ake nga mihi ki a rātou ma kua riro ki te pō, rātou ma kāore i kite i te mutunga o ēnei kerēme, haere okioki ki to tātou Kaihanga. E kore koutou e warewarea, arā koutou kei te pae o maumahara.

Tuarua, nga mihi aroha ki nga whānau o te hunga rua tekau ma iwa, nga tāngata kua mate i roto i te koopu o Papatūānuku a tena marama kua pahemo nei. Kei te tangi tonu te motu.

Tuatoru, tēnei te manu ka rere, e tuku atu nei i tēnei purongo a Te Roopu Whakamana i te Tiriti o Waitangi ki te motu. He maha nga raruraru mo te penehīni kua kitea matou i te Kawana e mahi ana. Ko tētahi, he iti rawa te wāhi ki te iwi Māori. Kei te kaha ke ra nga iwi me nga hapū ki te tiaki i o ratou wāhi tapu me o rātou taonga. Me tinihia te Kawana i o rātou mahi hei kawe i te penehīni mēna kei te hiahia rātou ki te whakamana i nga ture o te Tiriti.

We have the honour of presenting to you our report on the management of the petroleum resource. As you will recall, the Waitangi Tribunal issued its first report on petroleum

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claims in 2003. In order to meet the urgent needs of the parties in that inquiry, the report focused on issues of ownership and did not address the management of the resource in modern times. After new developments in how the resource is managed, and in response to various requests, the Tribunal agreed to hold an urgent inquiry into management issues in 2010.

The claims were brought by Ngāruahine of Taranaki and Ngāti Kahungūnu of Hawke's Bay and Wairarapa. In essence, these tribes claim that the regime for the management of petroleum, as governed by the Crown Minerals Act 1991 and the Resource Management Act 1991 (the RMA), is in breach of Treaty of Waitangi principles. In their view, three fundamental problems underlie the regime:

- the substance of the law is biased against Māori interests and culture in favour of conflicting interests;
- the processes established to apply the law fail to ensure that there is effective participation by Māori to safeguard their interests, and they actually deter, and sometimes deny, Māori involvement; and
- Māori communities do not have the capacity to overcome the obstacles to their effective participation in the system because there are no reliable and sufficient sources of assistance available to them.

In our inquiry, the Crown accepted that Māori capacity to participate in RMA processes is an issue but argued that 'incremental steps' are being taken, and techniques being explored, to improve matters. Of especial importance, we were told, is the empowerment of Māori through Treaty settlements, and the well-resourced governance entities that they create. Otherwise, the Crown denied the claims entirely.

We heard the parties in April and May of 2010 at Aotearoa Marae in Okaiawa and in Wellington. We heard additional evidence and submissions from tribal groups with watching briefs, including the Otaraua hapū and Nga Hapū o Poutama, and also from the Taranaki Regional Council and the South Taranaki District Council. This helped inform the Tribunal of the roles and experiences of the three parties crucial to making petroleum management processes work: central, local, and tribal government. We heard some evidence of scattered successes, including the sound consultation principles contained in the 2005 *Minerals Programme for Petroleum*, and some praiseworthy efforts by local government to establish iwi liaison officers or Māori advisory committees. But the high points were few and far between. After hearing the evidence, we were soon convinced that one part of this three-cornered regime – tribal government – is not having its full and appropriate input to the decisions that are being made. This weakens and impoverishes the whole regime and its goal of managing petroleum in conformity with matters of national

importance, which include Māori kaitiakitanga (guardianship) of ancestral lands, waters, and other taonga.

Our findings and recommendations are summarised in chapter 8. In sum, we find that there are systemic flaws in the operation of the current regime for managing the petroleum resource. They arise from the combined effect of the following features:

- the limited capacity of 'iwi authorities' (tribal government) to take the role envisaged for them in the regime, and the Crown's failure to provide adequate or appropriate assistance, despite acknowledging the problem;
- the Crown's failure, despite its Treaty responsibility, to protect Māori interests, to provide local authorities with clear policy guidance, and to require them to adopt processes that ensure appropriate Māori involvement in key decisions; and
- the low level of engagement with te ao Māori and Māori perspectives that is exhibited by central and local government decision-makers.

The result, we consider, is that decision-makers tend to minimise Māori interests, and elevate other interests, in their decisions about the petroleum resource. Consequently, neither the regime nor its outcomes are consistent with Treaty principles. The prejudice is that Māori cannot protect their lands, waters, and other taonga, nor exercise their kaitiakitanga, in the manner or to the degree to which they are entitled under the Treaty, and that the law envisages. We heard evidence of the damage or destruction of wāhi tapu, a serious matter at any time but particularly serious in Taranaki, where so much has already been lost. Māori feel powerless where they should be partners.

In our view, this prejudice can be removed by a range of steps, some of which have no or only minor fiscal implications and do not require a law change. Often, the failing arises not in the legislation but in how it is being carried out. Regional iwi advisory committees, for example, could be established to have input to petroleum decision-making, with their membership drawn from similar committees operating at the district level, and be adequately resourced. Such bodies already operate in Southland, and it is not difficult to envisage, with the necessary political will on all sides, how a structure for effective Māori participation might be established in regions affected by the petroleum management regime. Local factors, of course, will influence how this recommendation should be carried out, so we offer it as a guide, with the details to be worked out by the parties involved. At the same time as resourcing regional and district committees, we agree with the Te Tau Ihu Tribunal that the Government should consider a central fund to assist tribal bodies themselves to better meet their RMA responsibilities.

We also consider that 'user pays', a principle now predominant in our society, ought to apply to applicants seeking consents to use the petroleum resource: they could contribute

more to assisting Māori participation in the decisions necessary to resolve whether (or how) they can use the resource. Also, Māori participation could be improved by some streamlining of RMA processes, including joint consent hearings.

These various reforms could enable Māori tribal government to be more effectively involved in decision-making processes, at potentially modest cost to the Government and at some cost to 'users'.

At the national level, we consider that the Crown can improve its fulfilment of its Treaty obligations of active protection of Māori lands, waterways, and resources by developing national policy statements and national environmental standards. These could provide much needed guidance to local authorities on enhancing and protecting taonga and wāhi tapu.

Beyond these steps, which could be taken immediately, we recommend that the Crown Minerals Act 1991 be amended to require decision-makers to act consistently with Treaty principles and to establish a ministerial advisory committee so that Māori can have input to policy-making at the highest level. Such a committee could advise Ministers, for example, on:

- the pace and extent of petroleum resource exploitation and extraction;
- the issue of a Treaty interest in petroleum (the Tribunal's 2003 recommendation, which we agree with the claimants should be given effect);
- the matter of royalties, especially concerning petroleum production in the exclusive economic zone and continental shelf area; and
- Māori submissions for the exclusion of land from the *Minerals Programme for Petroleum*, block offers, and mining permits.

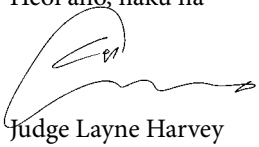
This kind of advisory committee should enable Māori interests, values, and perspectives to be incorporated more effectively in central government decision-making. It is not without precedent; one is envisaged, for example, in the Environmental Protection Authority Bill 2010. While not entirely comparable, the example provides a useful framework that could be adopted for the creation of an advisory committee at ministerial level.

Also, we think that the Crown Minerals Act should be amended to provide greater protection to Māori land, enabling Māori landowners to refuse access where that is their wish. We do not accept that the small, surviving Māori land base should have less protection in respect of petroleum than it is accorded in respect of other Crown minerals. To ensure that decisions are made by the fullest possible collective of owners, permit holders should be required to seek access permission from a meeting of assembled owners, as provided for under the Te Ture Whenua Māori Act 1993.

In terms of the RMA, we recommend, as the Tribunal has done many times before us, that it be amended to require decision-makers to act consistently with the Treaty. We also recommend that a commissioner be established, perhaps with the title of Treaty of Waitangi commissioner, to monitor local authorities' performance in respect of Treaty obligations delegated to them by the Crown. In order to ensure the fullest possible protection of Māori interests, legal aid for appeals to the Environment Court (the final resort for objectors) should be more readily available to hapū and tribal authorities.

If these recommendations are implemented, we believe that the petroleum management regime can be made Treaty-consistent and that the high level of protection that legislators intended to give Māori interests when originally passing these Acts can be given better effect. We will all benefit from a truly fair balancing of interests and the protection of cultural and environmental heritage for future generations.

Heoi ano, nāku nā



Judge Layne Harvey
Presiding Officer

ABBREVIATIONS

ACC	Accident Compensation Corporation
app	appendix
BERL	Business and Economic Research Limited
ch	chapter
cl	clause
CMA	Crown Minerals Act 1991
comp	compiler
DCJ	District Court judge (when used after a surname)
doc	document
DOC	Department of Conservation
ed	edition, editor, edited by
EEZ	exclusive economic zone
ELRNZ	*Environmental Law Reports of New Zealand*
EPA	Environmental Protection Authority
esp	especially
fn	footnote
GDP	gross domestic product
J	Justice (when used after a surname)
ltd	limited
MA	Department of Maori Affairs file
MED	Ministry of Economic Development
MPP	*Minerals Programme for Petroleum*
NGC	Natural Gas Corporation Holdings Limited
no	number
NPDC	New Plymouth District Council
NZLR	*New Zealand Law Reports*
NZOG	New Zealand Oil and Gas Limited
NZRMA	*New Zealand Resource Management Appeals*
OPEC	Organisation of Petroleum Exporting Countries
OTBO	onshore Taranaki blocks offer
P	president of the Court of Appeal (when used after a surname)
p, pp	page, pages
para	paragraph
PC	Privy Council
PCE	Parliamentary Commissioner for the Environment
PEP	petroleum exploration permit
pt	part
reg	regulation
RMA	Resource Management Act 1991
ROI	record of inquiry
RPS	regional policy statement
s, ss	section, sections (of an Act of Parliament)
sch	schedule
sess	session
STDC	South Taranaki District Council
TOE	tonnes of oil equivalent
TRC	Taranaki Regional Council
v	and
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 796 record of inquiry, a select copy of which is reproduced in appendix III and a full copy of which is available on request from the Waitangi Tribunal.

EDITORIAL NOTES

Although most Māori words and terms used in this report are defined as they appear, not all are. However, a glossary is provided on pages 203 to 206.

Where documents on the record of inquiry are unpaginated, page references are calculated from the first page (regardless of whether it is a covering page or not) and are indicated in the citation by square brackets around the page number.

CHAPTER 1

THE CONTEXT FOR THIS INQUIRY

1.1 Introduction

1.1.1 What this inquiry is about

This inquiry focuses on the system of laws, policies, and practices that regulates the discovery and exploitation of the petroleum resource in New Zealand and off its shores, and the effects of those activities on Māori interests in land, in the environment, and in their culture and traditions. It examines the law on how to allocate rights to exploit the resource and how to manage the environmental and other effects of petroleum exploration and mining. This inquiry is not about the ownership of the petroleum resource, although that is a matter about which many claimants to the Waitangi Tribunal have made claims. Those concerns were the subject of an earlier Tribunal report, the *Petroleum Report* of 2003, and it provides an important part of the context for the present inquiry.[1] In appendix II, we explain the process by which the present inquiry has evolved since the 2003 report was issued. Here, we provide a summary of that report.

1.1.2 The Waitangi Tribunal's *Petroleum Report*

The earlier inquiry into petroleum focused on the legal ownership of, and Māori rights to, the resource. The four-day urgent hearing, held in Wellington from 16 to 19 October 2000, arose from the Crown's intention to sell its interests in the Kupe licence. The Crown's position was that it owned the petroleum resource, Māori had no property or other interest in it, and there was no basis to include petroleum assets in Treaty settlements. The prospect of the Kupe licence sale put those policies under the spotlight. The inquiry was convened quickly, and when the Tribunal reported, it considered that it had had insufficient time and information to report more broadly. Issues about the petroleum management regime were therefore deferred. That is the genesis of the present inquiry.

In the earlier inquiry, the claimants and the Crown agreed that, before 1937 – which is when the petroleum resource was nationalised by legislation – land ownership carried with it legal rights to the petroleum stored within that land.[2] Since landowners were owners of the petroleum in their land, it followed that, if they willingly gave up ownership of their land (as in a sale), then they also gave up ownership of the petroleum in the land. The claimants argued, however, that in the nineteenth century and up to 1937 they lost most of their land against their wishes through Crown conduct that was in breach of the principles of the Treaty of Waitangi. Then, in the Petroleum Act 1937, the Crown

nationalised the petroleum resource without paying compensation to landowners and without making provision for the ongoing payment of royalties to them. This, the claimants said, was a further breach of the Treaty. They argued that these major deficiencies in the manner by which the Crown came to own the petroleum resource meant that they had enduring rights in petroleum that were being ignored by the Crown.

The Tribunal concluded that there were indeed many circumstances in which Māori land was acquired by means involving breaches of Treaty principle by the Crown. The situation in Taranaki, for example, where most of the land was confiscated, is well known. The Tribunal reached the view that, where legal rights to an important and valuable resource are lost or extinguished as a direct result of a Treaty breach, an interest of another kind is generated. The Tribunal called this a 'Treaty interest'.[3] It then asked: What happened to that interest (and any other Māori interest) upon the nationalisation of the petroleum resource, without compensation to prior owners, in 1937? Was that expropriation consistent with Treaty principle?

The Crown argued that, in 1937, the nationalisation of petroleum was in the national interest. The Tribunal accepted that argument, observing that:

> the policy reasons for preferring a centrally rationalised system of petroleum regulation were sound, reasonable, and properly within the Government's sphere. It was clearly important that the regime in place should be attractive to international investors. Equally, oil was crucial to New Zealand's economy, to its defence, and to its place within the wider British Empire at the time.[4]

The Tribunal did not accept, however, that the Crown was justified in withholding royalties from the true owners of the resource. In Parliament before the 1937 Act was passed, Sir Apirana Ngata had 'bitterly opposed the complete expropriation of all rights and benefits from Maori owners, particularly access to royalties'.[5] The Crown argued that there was no Treaty breach because Māori and non-Māori landowners were treated equally in respect of royalties. In the Tribunal's view, however, Māori had lost so much by 1937 that denying them the royalties hit them 'much harder' than anyone else: 'Even if in theory the Petroleum Act was non-discriminatory, the circumstances of its practical application made it otherwise.'[6] This aspect of the 1937 expropriation was unjustifiable in Treaty terms.

Thus, for Māori who lost petroleum-bearing land in breach of the Treaty or were deprived of royalties from any petroleum in their remaining lands in 1937 (or who suffered both), a Treaty interest arose, carrying with it 'a right to a remedy, and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right'.[7] Importantly, it was found that this Treaty interest created an entitlement to a remedy for the loss of rights in the petroleum resource additional to the redress for historical land loss grievances.

The Tribunal considered that Ngā Hapū o Ngāruahine of Taranaki and the Ngāti Kahungunu claimants of Hawke's Bay and Wairarapa had a subsisting Treaty interest in the petroleum resource and were accordingly entitled to redress beyond that to which their historical land loss grievances entitled them.

The Tribunal also examined the reasoning underlying the Crown's view that petroleum assets ought to be excluded from Treaty settlements. It concluded that this exclusion was in breach of the principles of the Treaty and that the Crown's remaining petroleum assets ought to be on the table in any settlement negotiations with affected claimants. The Tribunal said that its conclusion in this regard had general application but applied with particular force in the case of Taranaki.

The Tribunal concluded by recommending that the Crown:

- negotiate with affected Māori groups for the settlement of petroleum grievances; and
- withhold from sale the Kupe petroleum mining licence until a rational policy had been developed to safeguard Māori interests or until the petroleum claims were settled.

1.2 New Zealand's Petroleum Industry: Facts and Figures

1.2.1 Introduction

To provide context to the issues in this inquiry, the following section summarises:

- the characteristics of the petroleum resource in New Zealand;
- the industry that the resource supports and its contribution to New Zealand's economy and well-being; and
- the reasons for nationalising the petroleum resource in 1937.[8]

(1) *'Petroleum' defined*

First, we must establish the meaning of 'petroleum' for the purposes of this inquiry. This is provided by section 2 of the Crown Minerals Act 1991 (the CMA), which defines petroleum broadly to include gaseous, liquid, and solid forms of naturally occurring hydrocarbons (except coal), and naturally occurring mixtures of such hydrocarbons and certain other chemicals (see sidebar).

(2) *The ownership and allocation of rights to exploit petroleum*

The CMA declares that petroleum in its natural state belongs to the Crown, regardless of who owns the land in which it may be found (section 10). This has been the case since 1937, when the Petroleum Act of that year nationalised the resource. The CMA governs the allocation of rights to explore for and to mine petroleum in its natural state in New Zealand, including its territorial sea, and in the exclusive economic zone/continental shelf area. Section 8 of the Act provides that no one may prospect or explore for or mine Crown-owned minerals, including petroleum, unless they have obtained a permit from the Minister of Energy and comply with the conditions set out in the Act.[9] The Ministry of Economic Development (the MED) administers the Act through its Crown Minerals Group. In chapter 4, we outline the Act's provisions relating to the petroleum resource.

Crown Minerals Act Definition of 'Petroleum'

'Petroleum' means—

(a) Any naturally occurring hydrocarbon (other than coal) whether in a gaseous, liquid, or solid state; or

(b) Any naturally occurring mixture of hydrocarbons (other than coal) whether in a gaseous, liquid, or solid state; or

(c) Any naturally occurring mixture of one or more hydrocarbons (other than coal) whether in a gaseous, liquid, or solid state, and one or more of the following, namely hydrogen sulphide, nitrogen, helium, or carbon dioxide—

and . . . includes any petroleum as so defined which has been mined or otherwise recovered from its natural condition, or which has been so mined or otherwise recovered but which has been returned to a natural reservoir for storage purposes in the same or an adjacent area.

1.2.2 A brief history of petroleum discoveries

The Tribunal's 2003 *Petroleum Report* described Māori knowledge (mātauranga Māori) of petroleum, whereby people and nature and, in particular, tupua and minerals were seen as being connected.[10] It referred to a local legend, recorded by the German naturalist Ernst Dieffenbach (who visited the Taranaki area in 1839), that an atua (god) had drowned and was still 'undergoing decomposition' at a spot where there were strong emissions of sulphuric hydrogen gas.[11] The report also described how the inflammable gas vent on the northern East Coast was named in relation to Te Ahi-o-te-Atua ('the fire of the gods'),[12] and it referred to evidence about local relationships with the Wairarapa gas seepages, which were named Te Ahi o Taiwhetuki and were regarded as tapu.[13] The report noted that, although Māori knew of the existence and the combustible nature of petroleum, they had neither

the technological knowledge nor the immediate cultural imperative to extract and exploit the resource.

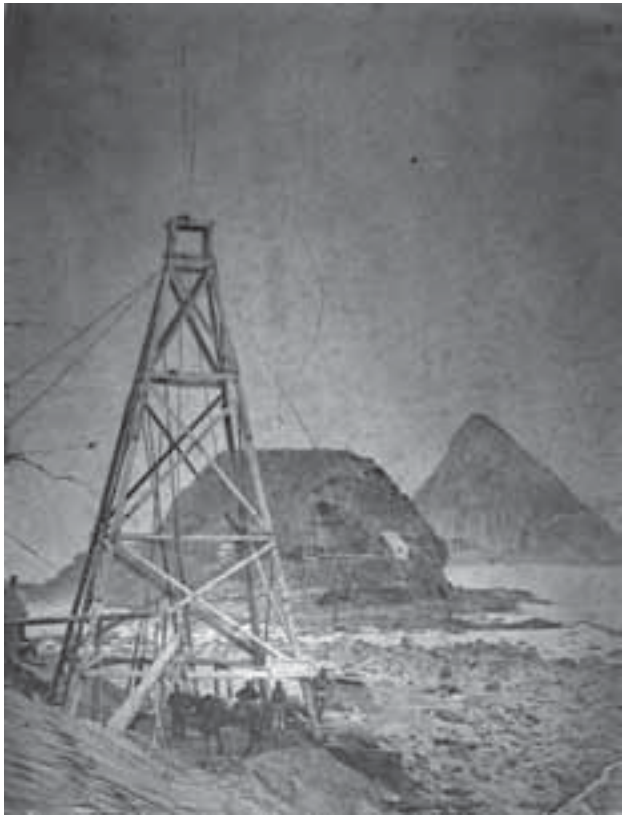
New Zealand's first petroleum exploration well, named 'Alpha', was dug near the Moturoa seeps in Taranaki in 1865, following the verification of oil samples taken from the area by a local politician, Edward Metcalf Smith. Oil and gas were found a few months later.[14] After a period of intermittent oil extraction, hampered by equipment problems and a lack of technology, interest in Taranaki's oil prospects was revived in the 1880s following a geological survey conducted by the newly formed Mines Department. Henry Gordon, inspecting engineer of the department, refuted the earlier-held view that oil would be found only in a narrow strip at Moturoa, stating that there was 'sufficient evidence to suggest that a belt or basin of oil bearing country exists' and that all that had to be done was to discover its source.[15]

Prospectors also began focusing attention on the East Coast in the 1880s, following the sinking of the first two wells at Waitangi Hill, near Gisborne, in 1874 and 1875. In 1884, a well was sunk in the Waingaromia Valley floor near the road to Waitangi, and it remains the most productive oil well drilled in the East Coast Basin.[16] During the 1880s, seven wells were drilled at Rotokautuku, near Ruatoria, and they began producing oil in 1887.

By 1900, 11 wells had been drilled in the Taranaki region. The first commercial strike followed six years later when the Taranaki Petroleum Company's 'Birthday' well at Moturoa blew out such great quantities of oil that the surrounding residents evacuated their homes.[17] The well went into commercial production and a small speculative boom followed. The increased activity extended to the East Coast, where wells were drilled at Waihīrere and Mangaone (near Gisborne) and at Waipātiki (south of Dannevirke) between 1909 and 1912. Before 1913, when the first refinery was built at Moturoa, the heavier crude oil produced in Taranaki was used as a fuel in steamers and locomotives,[18] while the lower density thin oil produced on the East Coast was good for kerosene lighting.

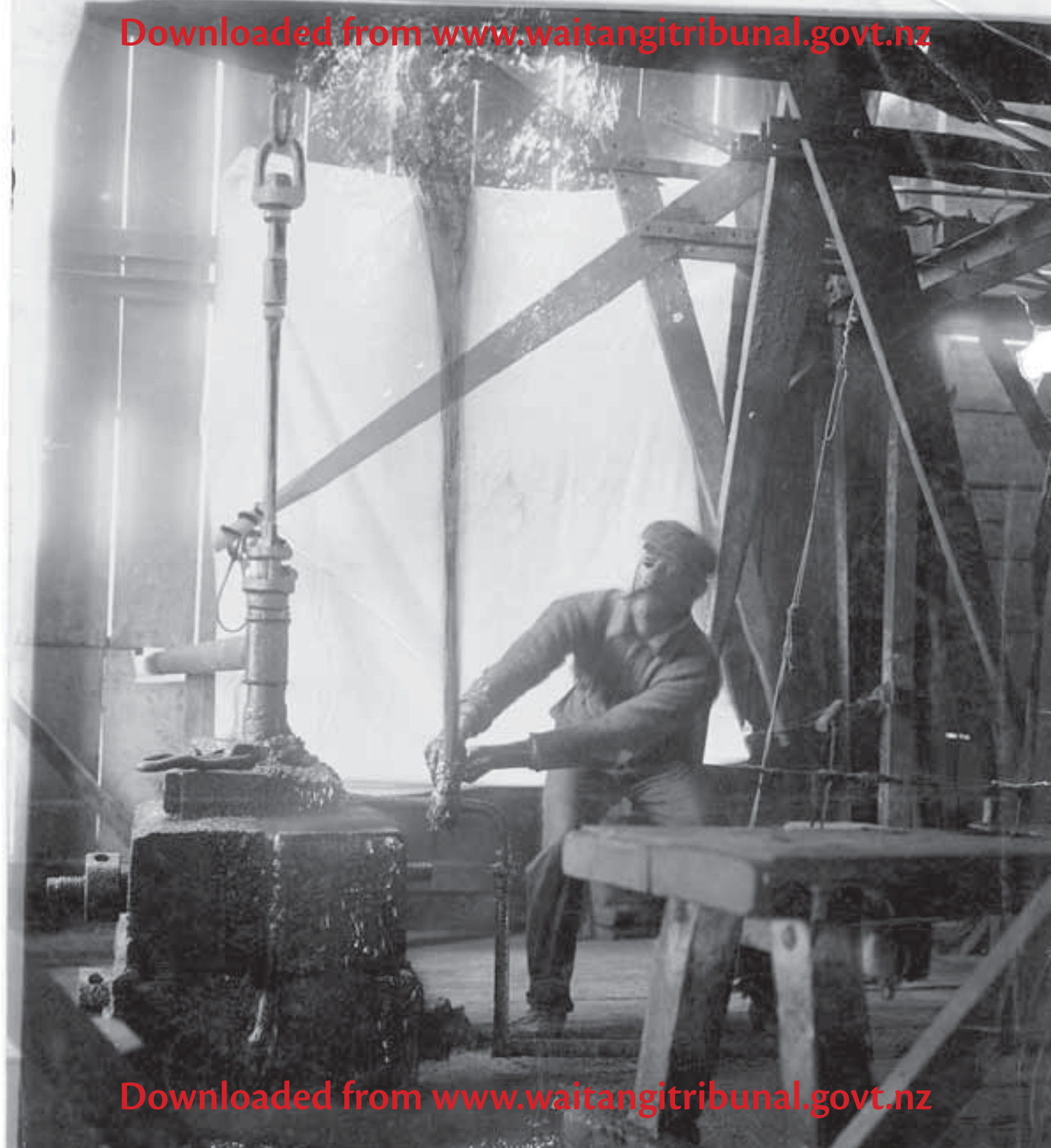
Further geological surveys and prospecting took place following the First World War, and by 1955 another 24 wells had been drilled in the country. In 1959, the large Kapuni gas-condensate field was discovered onshore, and commercial production started just over a decade later, in 1970.[19]

Offshore exploration began after the enactment of the Continental Shelf Act 1964, which established the legal basis for the Crown's control of resources in the seabed adjacent to, but outside, the territorial limit. By 1969, an area nearly four times the size of New Zealand's landmass had been leased to companies for offshore petroleum



The Alpha well, Sugarloaf Point, New Plymouth, 1886. The islands of Mikotahi and Moturoa can be seen in the background.

▶ **Well manager Barney O'Dowda demonstrates the flow of oil in the Birthday well, 27 August 1906. The well was so named because it was apparently 'spudded', or started, on O'Dowda's birthday.**



The Moturoa Petroleum number 1 well, 1930s

exploration.[20] The Maui field was discovered in 1969, and production started in 1979.[21] In 1975, the East Coast's first offshore well, the 'Hawke Bay 1', was created.[22]

Onshore and offshore exploration slowed in the mid-1970s owing to such factors as the OPEC oil crisis, changes to the licensing system, the introduction of a special levy, and the establishment in 1977 of the Crown-owned Petroleum Corporation of New Zealand (Exploration) Limited ('Petrocorp'), which had exploration licences covering all the best prospecting areas.[23] Petrocorp made a number of important onshore discoveries, including the first major commercial oilfield in New Zealand at McKee 2 in the Kapuni Group sands, the Tariki and Ahuroa gas-condensate fields, the Waihapa–Ngaere field, the Kapuni sands gas condensates, and the small fields at Stratford and Kaimiro.[24]

Petrocorp's success prompted private companies to shift exploration to more shallow offshore targets: oil was struck at 'Moki 1' in 1983 and at 'Kora 1' in 1988, and hydrocarbons were discovered at 'Kupe South 1' in 1986.[25]

The 1990s saw further discoveries onshore (including the Ngatoro and Rimu oil fields and the Mangahewa gas-condensate field) and offshore (including the Pohokura gas-condensate field). In 1998, gas was discovered north-east of Wairoa on the East Coast.[26]

Exploration has also taken place in other parts of New Zealand: the Northland, West Coast, Canterbury, and West Southland Basins continue to be the focus of low-level exploration activities.[27] It is likely that activity will increase in the Northland Basin, where large offshore blocks to the north-west of Northland were recently made available for permit offers.[28]

Interest in the Taranaki and East Coast Basins remains high: all New Zealand's producing oil and gas fields are located in the Taranaki Basin,[29] while the East Coast region has more oil and gas seeps than elsewhere in New Zealand. Companies continue to work to address the challenges of accessing these rich resources in a profitable way.

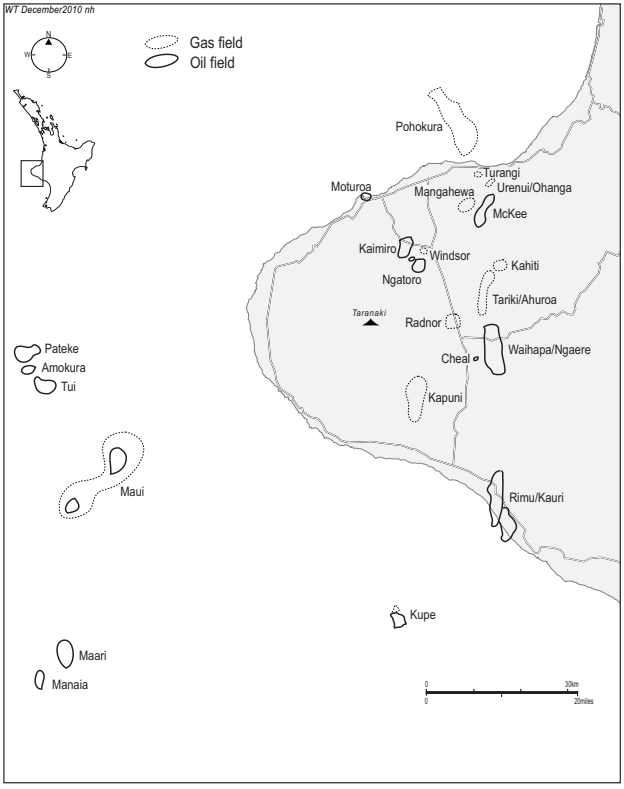
1.2.3 Production: offshore and onshore

Most of the petroleum produced in New Zealand to date has come from the offshore area. MED figures show that:

- in 2009, 91 per cent of the oil and 73 per cent of the natural gas came from the offshore fields of Maui, Pohokura, Maari, Kupe, and Tui; and
- from 1970 to 2009, these five offshore fields yielded 59 per cent of the oil and 72 per cent of the gas produced in New Zealand.[30]

Of the five fields, all but Pohokura are entirely outside the 12 nautical mile territorial limit. By removing Pohokura's shares of production (3.8 per cent of oil and 4 per cent of gas), it can be seen that, over the past 40 years, 55 per cent of oil production and 68 per cent of gas production in New Zealand has come from fields beyond the territorial waters.

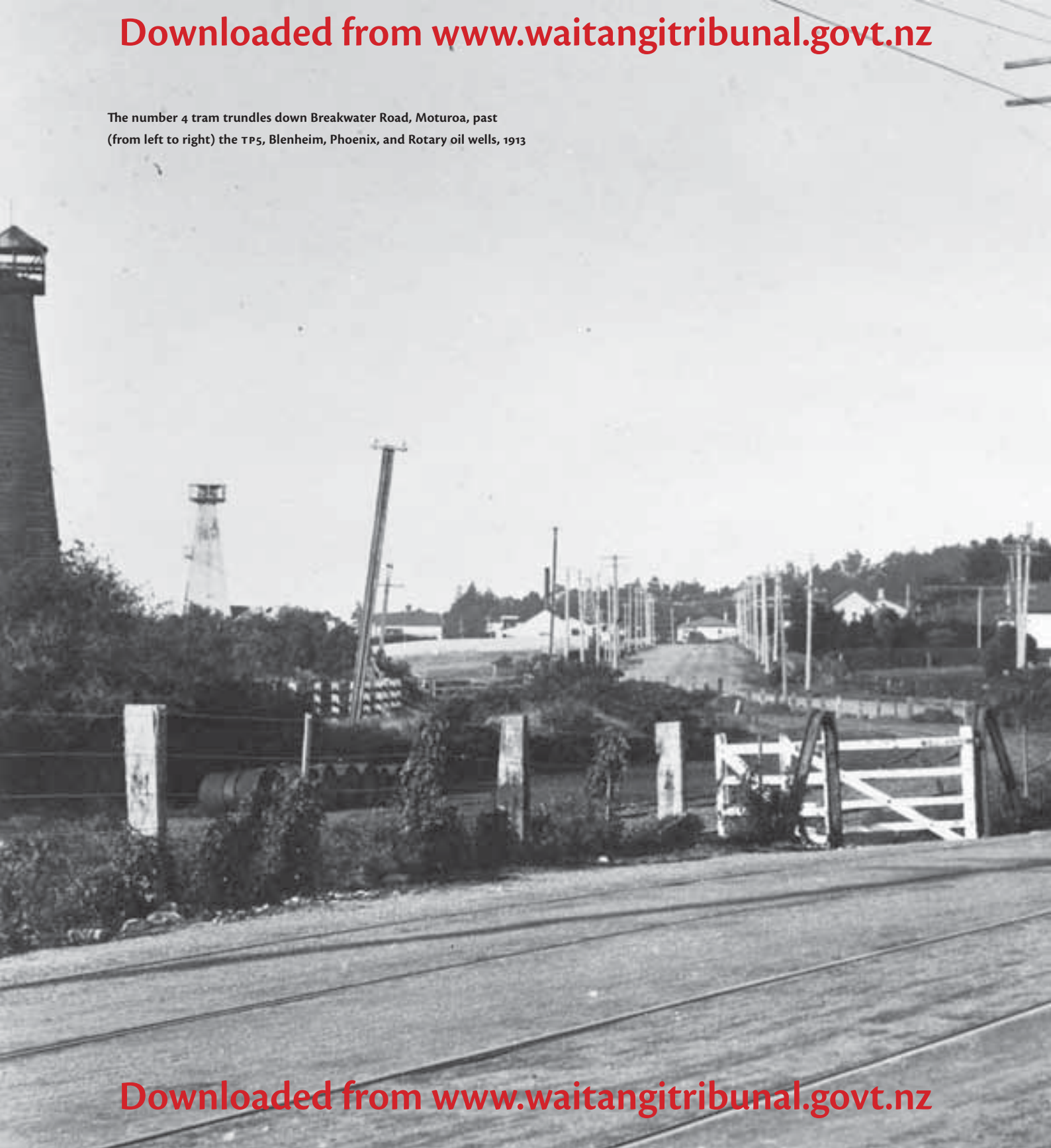
Over the 1999 to 2009 period, the number of wells drilled onshore outnumbered those drilled offshore by 238 to 70, reflecting the greater ease and lower cost and risk of onshore operations.[31] From 2006 to 2008, there was an increase in offshore drilling, which Crown witness Rob Robson, a senior MED official, attributed to the drilling of development wells (of discoveries that had already been made) around the Maui, Pohokura, and Kupe fields.[32] The Tui and Maari fields were also brought into production in these years. At the same time, the number of active permits declined while the area of active permits increased, indicating an increasing average size of permit area.[33]

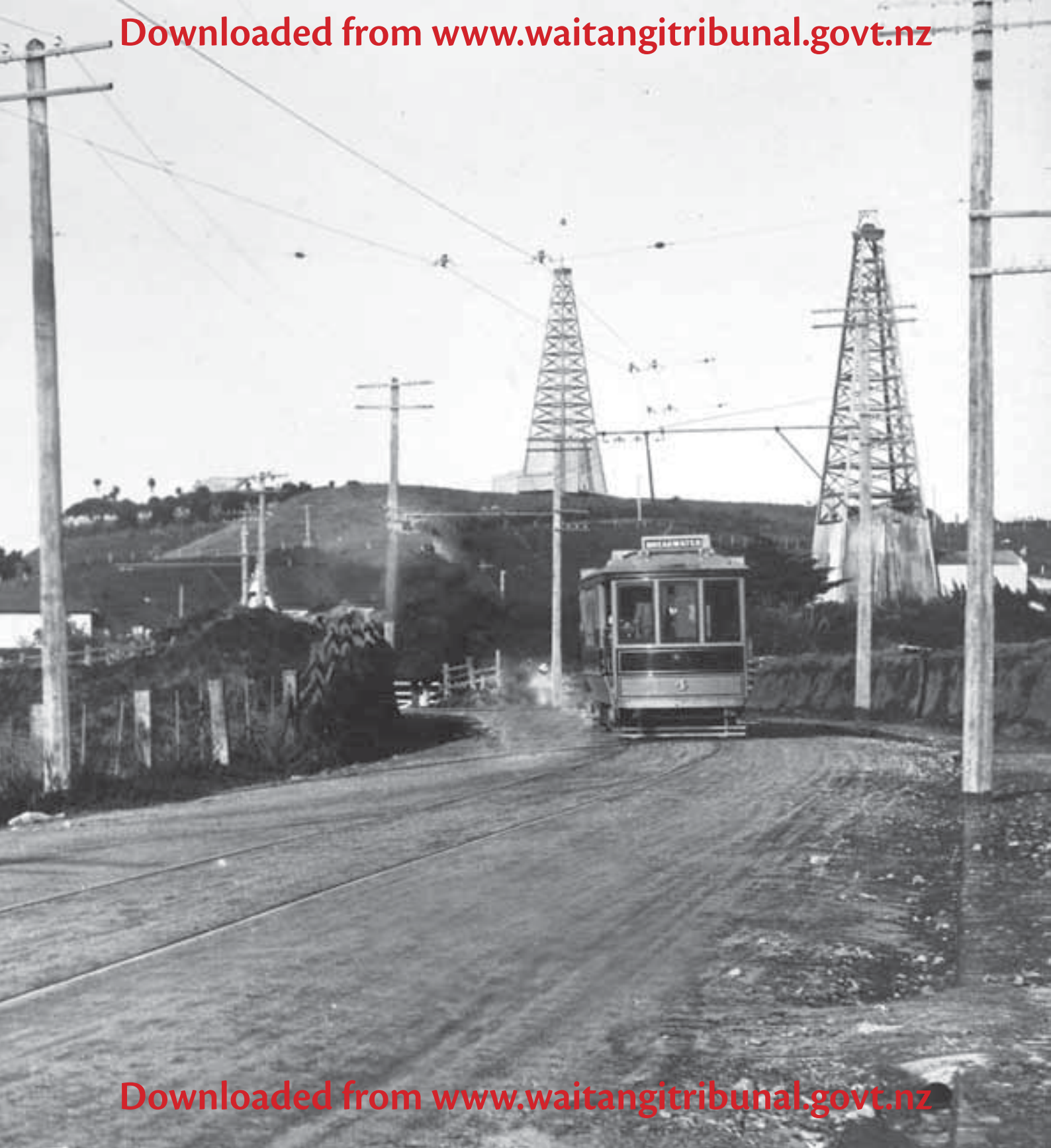


Map 1: Onshore and offshore oil and gas production reserves in the Taranaki region as at 1 January 2009

In 2009, offshore drilling dropped back towards the historic annual average for this activity, and the Crown Minerals Group's website indicates that, in the year to June 2010, only 10 of the 67 current wells were located offshore.[34]

The number 4 tram trundles down Breakwater Road, Moturoa, past (from left to right) the TP5, Blenheim, Phoenix, and Rotary oil wells, 1913





1.2.4 Minerals and petroleum and economic growth

The MED discussion paper *Reviewing the Crown Minerals Act* states that the 'primary reason for exploiting minerals and petroleum is to increase jobs, revenue, and taxation income on behalf of all New Zealanders'.[35] This accords with the evidence that economist Dr John Yeabsley gave to the Tribunal in 2000 that 'all economies seek to capture the greatest advantage they can from their endowments of resources and people . . . [by] creating the right institutional environment to encourage appropriate investment'.[36]

In the latter part of the twentieth century, that advantage has been measured principally in terms of growth in gross domestic product (GDP) (see below), and in other related economic indicators, such as incomes and employment. Although national GDP and trade statistics are compiled on a regular basis, the GDP contribution of individual sectors or regions is not. Drawing on references in the evidence presented to the Tribunal in this inquiry and other current sources, the economic value of the oil and gas industry can be summarised as follows.

In 2008–09, oil production in New Zealand was 21 million barrels, valued at $2.8 billion.[37] Statistics New Zealand trade data show that, for the year ending January 2009, oil accounted for 5.9 per cent of New Zealand's total exports by value and had displaced forest products as the third largest commodity export after dairy and meat.[38] This export ranking fluctuates from year to year with changes in production level and international commodity prices.

Crown Minerals' annual report also states that oil from Taranaki contributed $741 million to the GDP.[39] This same

Gross Domestic Product

The gross domestic product (GDP) is a measure of the monetary value of the goods and services produced within an economy and is calculated in three separate ways: as the value added or the difference between the total value of outputs in the economy and the total value of the resource inputs used to create them; as the incomes earned or returns to the main factors of production, namely labour, fixed capital, and proprietor's interest; and as the sum of expenditures on consumption and investment in the economy.

But there is widespread recognition that the GDP is not a complete measure of a national or local community's economic well-being. It does not measure all effects on the economy's 'balance sheet' of assets and it measures only monetary transactions, so effects that are not reflected in current market exchanges may be excluded altogether. A country could cut down its forests and deplete its fisheries to record an increase in its current GDP but be worse off in the long term because of the uncounted depletion of its natural resource stocks or because environmental damage and associated harm to people are not counted in the GDP calculation. Likewise, although natural disasters can appear 'good' for the economy as measured by the GDP because of the repair and reconstruction work, this ignores the human cost and the diversion of resources to repair and restore old, damaged assets instead of being used to create new goods and assets.

Although various measures or indexes have been proposed as alternatives to the GDP, none has yet been widely accepted as a practical alternative and preferable guide to economic and social progress. The GDP remains pre-eminent, and effects on communities and the wider environment that are outside the scope of the GDP are considered through other mechanisms, such as the Resource Management Act 1991. But, in a situation where some effects such as oil production are easily measured and valued and other effects such as impacts on Māori communities are not, the imbalance in measurement raises the possibility of distorted choices between promoting GDP and protecting the environment.

figure is given in an earlier report by consultants Business and Economic Research Limited (BERL), which estimated the economic impacts of the oil and gas industries for the year ending March 2006 as follows:

- Oil and gas industries generated $741 million of GDP in Taranaki (17 per cent of the region's total GDP) and employed 817 full-time equivalent staff.
- Nationwide, oil and gas industries generated $827 million of the GDP (around 0.5 per cent of the total national GDP) and employed 904 full-time equivalent staff.[40]

However, oil and gas industries also have a flow-on impact, as spending by direct recipients of income from oil stimulates other sectors of the economy. The total impact (direct plus flow-on) is calculated by a multiplier on the direct impact. The results from the BERL report are summarised in table 2.

The table shows that Taranaki accounts for about 90 per cent of the direct economic activity and employment in the oil and gas industries in New Zealand but a smaller share of the flow-on and total effects, which are spread more widely through the country. The multiplier effect is smaller at the regional level than the national level because some of the value 'leaks' away as the smaller regional economy imports more goods and services from outside the region.

The BERL report characterises the oil and gas sector as capital intensive, requiring highly skilled employees with labour productivity significantly higher than the national average. The flow-on impact is more widespread, with jobs created in construction, transportation, and building supplies industries, as well as for the operation and maintenance of production plant and distribution facilities. The relatively large multipliers for employment, compared to the GDP, show that the flow-on effects account for a larger increment of jobs than the GDP and that, on average, those jobs will be of low value. An implication of this is that, while oil and gas production may create and support jobs in the locality, unless communities on whose land the activity takes place are directly involved in the

The Taranaki Basin

The Taranaki Basin:

- Covers approximately 330,000 square kilometres.
- Contains 21 of the 22 mining permits that are currently active in New Zealand (the other permit, number 50100, is on the West Coast, near Greymouth).
- Has been the location for over 400 exploration and production wells that have been drilled, onshore and offshore, since the 1950s.
- Contains the Maui field, which has been 'the mainstay of NZ's petroleum production since 1979 but is now in decline'.
- Was the location of the largest ever crude oil spill in New Zealand, which took place at Ōkato in October 2007 and affected nearly 15 kilometres of coastline. The operators of the offshore 'Umuroa' production station, Australian Worldwide Exploration and Prosafe, were fined a total of $105,000 over the incident in 2009.

The East Coast Basin

The East Coast Basin:

- Is located along the East Coast of the North Island and extends to the northern tip of the east coast of the South Island.
- Covers, onshore and offshore, approximately 120,000 square kilometres.
- Has been the location for over three offshore wells and more than 40 onshore since the 1950s.
- Has the 'potential for large petroleum accumulations' according to the MED's Crown Minerals Group in 2010 and already has over 300 known oil and gas seeps.

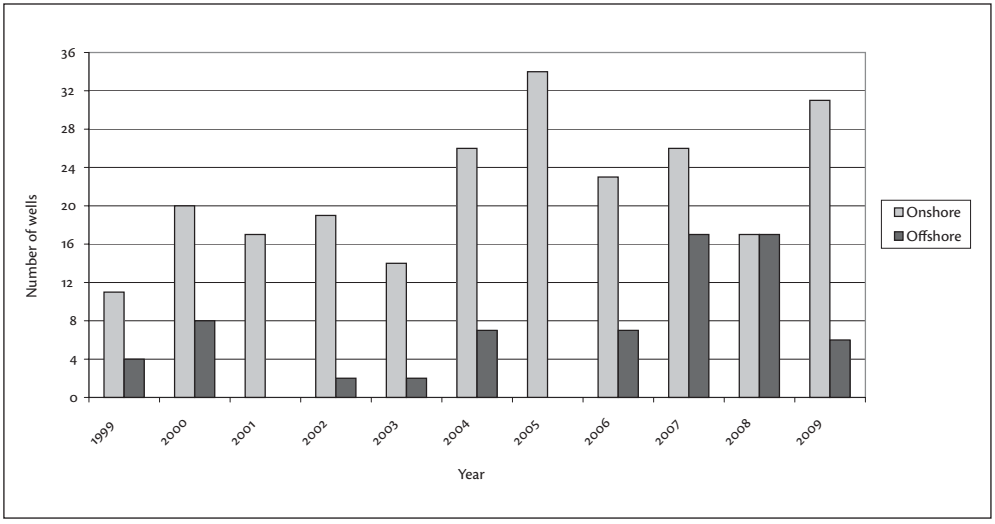


Table 1: Petroleum wells drilled, 1999–2009, including sidetracks. A 'sidetrack' is where a directional hole is drilled in order to 'bypass an obstruction in the well . . . or damage to the well, such as collapsed casing that cannot be repaired'. Sidetracks are also used to 'deepen a well or to relocate the bottom of the well in a more productive zone, which is horizontally removed from the original well'.

Year to March 2006	Taranaki ($1,000,000)	New Zealand wide ($1,000,000)	Taranaki share (%)
Direct effects			
GDP	741	827	89.6
Full-time equivalent staff	817	904	90.4
Total (direct + flow-on) impacts across the economy			
GDP	1,003	1,615	62.1
Full-time equivalent staff	2,991	8,647	34.6
Multipliers			
GDP	1.35	1.95	
Employment	3.66	9.57	

Table 2: Economic impacts of the oil and gas sector

developments, they may experience little trickle-down benefit in jobs and incomes.

Since 2006, to which the BERL GDP estimates refer, there has been a marked increase in the production of oil and, to a lesser extent, gas.[41] Although there is no updated estimate of oil and gas sector GDP, it would have increased accordingly. There has been a corresponding increase in the value of revenues collected by the Crown from this activity: in 2005 the revenue comprised $51 million from royalties on oil and $61 million from the energy resource levy on gas, and by 2008 the revenue from royalties had increased to over $250 million (a 500 per cent increase for oil). However, the revenue from the levy had decreased to about $30 million (a 50 per cent decrease for gas).[42]

Petroleum royalties in the 2008–09 financial year were up again on the 2008 figures to about $511.6 million (98.5 per cent of the $519.2 million total royalties from Crown-owned minerals), with a further $31.4 million of energy resource levy collected from gas produced from old licences.[43] Royalty revenues amounted to about 0.9 per cent of the $54.7 billion that the Government collected in taxes and levies.[44]

For the mining industry as a whole, income taxes on corporate profits and employee wages are much more significant revenue earners than royalties, but non-petroleum mineral royalties tend to be set at lower rates.[45] There are no publicly available statistics on the income tax paid by individuals and companies in the oil and gas sector.

Oil and gas also contribute to the provision of a secure energy supply for economic activity and growth throughout New Zealand households and businesses. If New Zealand did not have its own oil and gas production, it would need to obtain alternative sources of energy supply (such as imports) at higher cost than it already does (otherwise imports would be the preferred choice now).

1.2.5 Characteristics of the petroleum resource

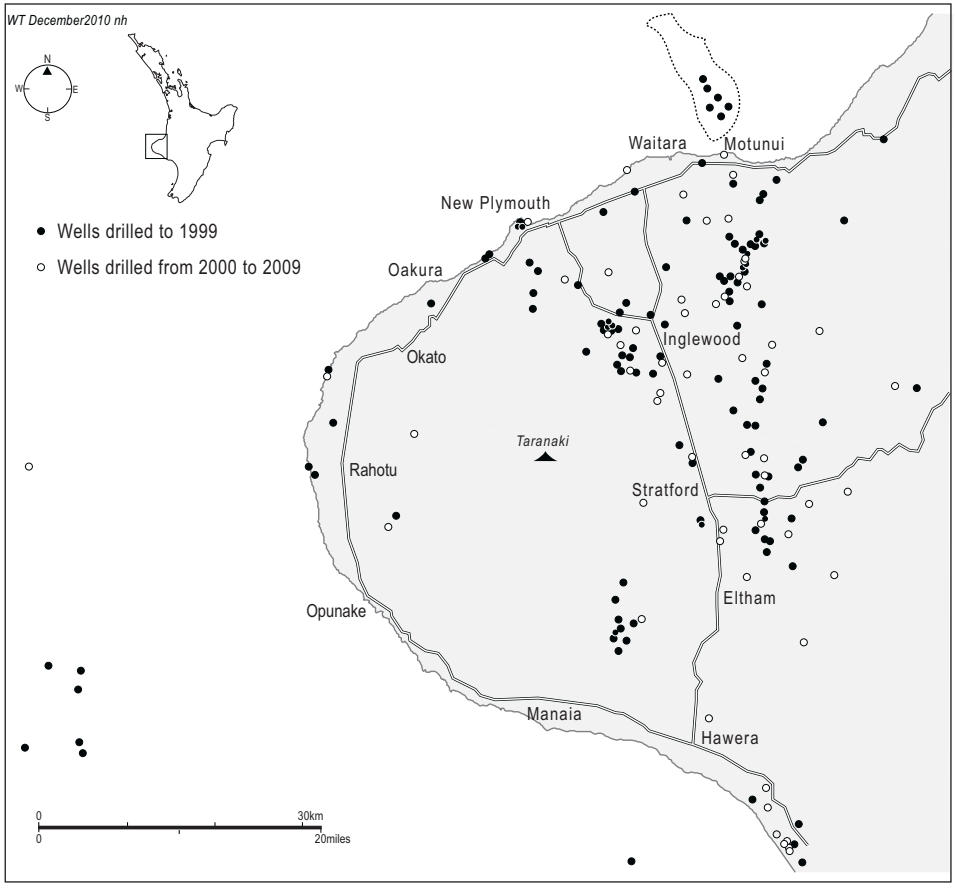
The Tribunal was told in 2000 that New Zealand's production and reserves of petroleum and gas are extremely small on a world scale but that the country remains relatively under-explored.[46] This is borne out by current statistics, as summarised in table 3, which compares known reserves of oil and gas in New Zealand against those worldwide in tonnes of oil equivalent (TOE). On the basis of these figures, New Zealand has 0.01 per cent and 0.02 per cent respectively of the world's oil and gas reserves.[47]

Worldwide reserves	
Proven oil reserves at end 2009	181.7 billion TOE
Proven gas reserves at end 2009	168.7 billion TOE
Ratio of oil to gas worldwide	1.1 : 1
New Zealand reserves	
Proven oil reserves at January 2010	0.016 billion TOE
Proven gas reserves at January 2010	0.031 billion TOE
Ratio of oil to gas New Zealand	0.5 : 1

Table 3: New Zealand and worldwide known oil and gas reserves

The absence of infrastructure and the small domestic market for gas adds to the difficulty of utilising the petroleum resource. Compared to what is common practice in other countries, New Zealand's production is high when measured against its known reserves, and thus the rate of depletion of those reserves is high.[48]

All of New Zealand's producing oil and gas fields are in the Taranaki region, with pipelines carrying gas to the main urban centres in the North Island. Natural gas is used entirely within New Zealand, as it has not been economically feasible to export it at current international prices, except for small volumes of liquefied petroleum gas, most of which is distributed as bottled gas. As gas wells and pipelines are confined to the North Island, the gas market is restricted, supply exceeds demand, and gas prices have been low by international standards for industrial customers.[49] Being an abundant and relatively cheap resource, new uses for it have been found in gas-fired electricity generation (nearly 55 per cent of consumption in 2008 and 44 per cent in 2009) and the production of



Map 2: Petroleum wells in Taranaki, 2009. This map does not distinguish between current and capped wells because this information was not available in the source.

methanol (15 per cent in 2008), ammonia and urea (4 per cent in 2008), and synthetic petrol (now discontinued). (In 2009, the combined figure for 'non energy use' of gas was nearly 16 per cent.) In 2008, about 20 per cent of gas was used as an energy source by industrial customers (27 per cent in 2009), 2.8 per cent by residential customers (4.2 per cent), and 2.2 per cent by commercial customers (3.7 per cent).[50]

New Zealand is almost totally reliant on oil products for its transport fuels and, according to the *Energy Data File*, obtains about half its total delivered energy consumption from oil.[51] Although the local production of crude oil and condensates has about half the energy of New Zealand's oil consumption, most of that oil is exported because it is not best suited for local refining needs.[52] As a result, most of New Zealand's consumption comes from imports of refined products or blends of particular types of crude oils, which are transformed at the Marsden Point refinery into products such as petrol, diesel, aviation fuel, or bitumen of the right specification for use in New Zealand's vehicles and machinery.[53] On average, the New Zealand refinery runs on approximately 40 to 50 per cent crude from the

Map 3: Petroleum wells on the East Coast, 2009. This map does not distinguish between current and capped wells because this information was not available in the source.

Middle East, 40 to 50 per cent crude from Australia and East Asia, and the balance from local production. The production of oil, unlike that of natural gas, is not 'strategic' in the sense of improving New Zealand's self-sufficiency in an essential product, but it does help the balance of trade and offsets some of the cost of imports.

1.2.6 Drivers for expansion of petroleum activity

Witnesses in the Tribunal's earlier petroleum inquiry were in broad agreement that the riskiness of the petroleum business as well as characteristics peculiar to New Zealand created certain hurdles to the development of the resource that management policy could help to overcome. New Zealand is not considered highly prospective or attractive for petroleum exploration and development. Its small domestic market, remoteness from other markets, rugged topography, and harsh marine environment increase the cost of oil and gas operations. Petroleum exploration and the development of petroleum resources are inherently uncertain, so companies adopt a portfolio approach, spreading the risk of their operations across a wide variety of locations and potential fields.[54] In this

setting, companies are most likely to view New Zealand as one part of an international portfolio of exploration operations.

International companies have both the technical expertise and the breadth of operations to spread risk widely. To attract such international investment to these shores, New Zealand needs to provide an attractive regime for access to the resource that will overcome the apparent disadvantages.[55]

The current expansion in petroleum exploration activity has been fuelled by high oil prices and the strong demand in international markets, which factors improve the prospects of the industry recovering its costs. These changes are both recent and appear likely to be sustained over a number of years, owing to recent geopolitical trends that have seen economic growth shifting to China, India, and other large developing countries, where the ownership of cars and other oil-fuelled equipment is likely to increase as incomes rise. Another factor is the anticipated depletion of the Maui gas field, which has raised expectations of an increasing price of gas on the domestic market.

> *'Four years ago, there was just one oil multinational exploring offshore New Zealand. Now, there are four . . .*
>
> . . . . .
>
> *'The last four years have seen exploration block offers released for the East Coast Basin, parts of the offshore and onshore Taranaki Basin, Great South Basin, Reinga Basin, Northland Basin and the Raukumara Basin. Looking ahead, it's probable that more acreage blocks will be released over new basins, as our understanding of further offshore regions increases.'*
>
> Crown Minerals Group, *Annual Report, 2009–2010* (Wellington: Ministry of Economic Development, 2010), p 10

Oil exploration and development has high up-front costs and a low rate of successful strikes, so companies have an incentive to utilise resources quickly once found, in order to recover their costs.[56] As oil and gas are non-renewable resources, companies that increase production will also increase their exploration to maintain their ratio of reserves to current production.

That ratio is currently low in New Zealand by international standards. As at January 2010, the remaining reserves of oil, containing 653 petajoules of energy, would last 5.5 years at the current annual production of 118.62 petajoules, while the 1,311 petajoules of gas reserves would last 7.3 years at their current annual production of 180 petajoules.[57] By comparison, the *BP Statistical Review of World Energy June 2010* shows the global reserve to production ratio of oil to be 45.7 years, while in the regions with the lowest ratios, North America and Asia–Pacific, it is about 15 years. The reserve to production ratio for natural gas is 62.8 years worldwide and 11.3 years for the region with the lowest ratio, North America.[58] New Zealand's low ratio and the desire not to have production capacity stranded with no resource to utilise gives the companies an incentive to step up their exploration activity in order to maintain the ratio and to gain a better understanding of resource availability and the potential for sustained utilisation.

1.2.7 Why is New Zealand's petroleum regime as it is?

New Zealand's management regime for petroleum is based on:

- Crown ownership of the resource within New Zealand's territory;
- the Crown's exclusive authority to allocate rights to explore for and to mine petroleum in New Zealand's territory and in the expansive exclusive economic zone/continental shelf area beyond; and
- the Crown's receipt and retention of the royalties from production.

These features originated in the nationalisation of the petroleum resource by the Petroleum Act 1937.

The move to nationalise petroleum was aimed at two main objectives.[59] One was enhancing New Zealand's economic performance, the success of which is apparent in

Map 4: Petroleum permits in New Zealand, 2010. This map is a graphical rendition of the New Zealand petroleum permit map.

the significant economic activity and employment created in Taranaki over the past 30 years and in the net foreign earnings from internationally competitive commodity exports. The other was avoiding possible physical shortages of petroleum supplies given the strategic importance of oil in 1937.

In the 2003 *Petroleum Report*, the Tribunal reviewed the arguments put forward by the Crown in support of nationalisation. These were largely concerned with warding off physical shortages and included:

- securing and controlling oil for New Zealand's sea defence;

- increasing the self-sufficiency of the British Empire in fuel;
- needing a centrally rationalised system because of the strategic and economic importance of oil to New Zealand's domestic interests; and
- creating a regime that was simple, accessible, and attractive to international oil companies with sufficient capital to exploit the resource in order to compensate for the high cost and risks of exploration and development.[60]

Clearly, with respect to the first point, New Zealand faces less immediate threat than was the case in 1937. And the imperial imperative of the second point no longer applies. As for the need for a centrally rationalised system of petroleum regulation, the Tribunal accepted the policy reasons for preferring such a system, given that:

- the way that oil flows underground causes genuine difficulties in allocating it to particular landowners;
- genuine doubts were held about the law on the ownership of oil resources; and
- the Government has a responsibility to act in the interests of the community as a whole.[61]

Evidence was given at the earlier Tribunal hearing that, because petroleum is a fluid natural resource found in 'pooled' fields that cross beneath surface property boundaries, there is still an economic advantage in having just one owner of the mineral rights, as this reduces both the likelihood of inefficient and wasteful duplication of effort and the incentive to race to extract the resource before others can. The Tribunal heard that, in countries with multiple ownership regimes, that complexity adds cost, but not value, to the mineral estate.[62] Examples were given from the United States, where, with oil ownership vested in landowners, costly litigation had been necessary to prevent an owner from extracting oil or gas from under the land of neighbours. There have also been inefficiencies in the exploitation of petroleum resources, as a result of overspending on drilling in the race to be first to extract the resource, and uncoordinated operations by competitive wells resulting in lower total recovery than otherwise would be possible.[63] While rules and practices have eventually been worked out through long legal processes in different states, the United States system remains a regime with high transaction costs.[64]

By contrast, the 2003 Tribunal was told, nationalisation in New Zealand provided certainty, had lower transaction costs, and avoided the costly process of developing New Zealand legal precedents through the courts.[65] It was necessary to attract international resources for extraction activities to New Zealand.[66] But it was suggested that, where private landowners have an interest in the mineral, there is less conflict with oil companies because of the mutual benefit between company and landowner in exploiting the resource.[67]

The fourth argument for nationalisation – that the risks necessitated a simple regime attractive to overseas companies – appears more questionable today given the Crown's evidence in the present inquiry that New Zealand companies do well with onshore operations.[68] However, these firms do still need to attract the interest of larger players for on-selling or developing their discoveries. As well, since some of the largest fields like Maui and Pohokura have been found from offshore drilling, and as interest moves to the exploration of deeper waters and the continental shelf, the costs and the risks increase and there remains a need for international expertise and funding. Mr Robson stated that New Zealand had less leverage with international oil companies than was formerly the case, as few New Zealand companies have the capital required for deepwater drilling or the technological capability to go it alone.[69]

In sum, the petroleum resource in New Zealand and off its shores is valuable for the significant economic benefit that it brings, both regionally (for Taranaki) and nationally. Petroleum is extremely valuable worldwide: all nations rely heavily on this non-renewable, finite resource, although New Zealand's share of it is small. Exploiting our supplies is thus a matter that all New Zealand governments have found to be in the national interest. Nonetheless, many factors have changed since its nationalisation in

1937. While natural gas is strategically important because of its contribution to local users and the national electricity supply, other forms of petroleum are largely exported and now have an entirely economic significance. There are, it seems, still good business reasons why the allocation of rights to this resource should be managed centrally by the Government. As well, the possibility of discovering new sources of petroleum has increased with the dramatic rise in deepwater exploration and the potential to exploit previously unusable manifestations of the resource (such as the petroleum contained in the continental shelf or in the form of coal seam gas).

The petroleum resource, therefore, has the potential to become economically valuable to more regions than just Taranaki, but it could also pose new threats to the environment (both physical and cultural) in those regions. Currently, the national imperative to exploit petroleum is reinforced by the method used to calculate its value – the economic factors measured in the GDP. But other values, including the spiritual and cultural value of ancestral sites and landscapes to Māori tribes and to the nation, are not measured in the GDP. Taranaki and East Coast iwi have brought claims to this Tribunal about the management of the petroleum resource, especially in terms of its effects on their kaitiakitanga (guardianship) of their natural world and their sites of great value. It is to Māori values and perspectives that we now turn.

Text notes

1. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003)
2. This agreement about the legal position made it unnecessary for the Tribunal to make a finding on the question whether petroleum is a taonga of Māori. It expressed a tentative view, however, that it found claimant arguments to that effect to be unpersuasive (ibid, p 42).
3. Ibid, p 56
4. Ibid, p 62
5. Sir Apirana Ngata, 6 December 1937, *New Zealand Parliamentary Debates*, 1937, vol 249, p 1040; Waitangi Tribunal, *The Petroleum Report*, p 61
6. Waitangi Tribunal, *The Petroleum Report*, p 64
7. Ibid, p 65
8. This section draws on evidence presented to the Tribunal in the earlier petroleum inquiry by Crown witnesses Evelyn Cole (doc A29), Dr John Yeabsley (doc A31), and Professor Gary Hawke (doc A32), and by Waitangi Tribunal-commissioned witness Geoffrey Logan (doc A37).
9. Note that, from the introduction of the Crown Minerals Act 1991, petroleum licences were replaced by permits. In this report, when discussing both, we use the generic term 'permit'.
10. This section relies on information in chapter 2 of the Waitangi Tribunal's *Petroleum Report*, especially pages 10 to 15.
11. James D Henry, *Oil Fields of New Zealand: With Some Critical Notes on the Colonial Situation of To-day* (London: J D Henry, 1911), p 9 (Waitangi Tribunal, *The Petroleum Report*, p 10)
12. Document A5(a), p 89 (Waitangi Tribunal, *The Petroleum Report*, p 10)
13. Documents A2, A23, A25 (Waitangi Tribunal, *The Petroleum Report*, p 10)
14. Document A5(b), pp 26–27
15. Ibid, p 29
16. Document A5(c), p 21
17. Document A5(b), p 30
18. Document A5(a), p 90
19. Ibid, p 89
20. Ibid, p 94
21. Ibid, p 89
22. Document A29, p 13
23. Document A5(a), p 96
24. Document A29, p 10; doc A5(a), p 101
25. Crown Minerals Group, *Taranaki Basin Exploration History* (Wellington: Ministry of Economic Development, undated), p 3; doc A29, p 11
26. Document A29, pp 13, 14, 26
27. Ibid, p 15
28. Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010)
29. Crown Minerals Group, 'Taranaki Basin', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms/petroleum/petroleum-basins/taranaki-basin (accessed 3 December 2010)
30. Crown Minerals Group, 'Petroleum – Facts and Figures', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms (accessed 3 December 2010)
31. Ibid
32. Paper 2.154, p 357
33. Document E1, app A
34. Crown Minerals Group, 'Petroleum – Facts and Figures', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms (accessed 3 December 2010)

35. Paper 2.189, app C, p 11
36. Document A31, p 7
37. Crown Minerals Group, *Annual Report, 2008–2009* (Wellington: Ministry of Economic Development, 2009), p 2. The Crown Minerals Group's report for the 2009–10 financial year is now available. It records that 19.6 million barrels of oil were produced and $1.7 billion of high-quality oil was exported: see Crown Minerals Group, *Annual Report 2009–2010* (Wellington: Ministry of Economic Development, 2010), pp 3, 14.
38. Statistics New Zealand, *Overseas Merchandise Trade: January 2010 – Tables* (Wellington: Statistics New Zealand, 2010), table 5
39. Crown Minerals Group, *Annual Report, 2008–2009*, p 2
40. Jason Leung-Wai and David Norman, *Economic Impact of the Oil and Gas Sector on the Taranaki Region and New Zealand* (report to the Petroleum Exploration and Production Association of New Zealand, Wellington: Business and Economic Research Ltd, 2007), p 1
41. Document E4, p 13
42. Ibid, p 25; Leung-Wai and Norman, *Economic Impact*, p 34
43. Crown Minerals Group, *Annual Report, 2008–2009*, pp 32–33. Figures are now available for the 2009–10 financial year and show the Government collected $399.2 million from petroleum royalties and a further $32.7 million from the energy resource levy on gas: see Crown Minerals Group, *Annual Report, 2009–2010*, p 33.
44. Treasury, *Financial Statements of the Government of New Zealand for the Year Ended 30 June 2009* (Wellington: Treasury, 2009), p 8
45. Brent Layton, Johannah Branson, Claire Gall, Chris Schilling, and and James Zuccollo, *Diamond in the Rough: The Current and Potential Economic Contribution of New Zealand's Mineral Resources Sector* (report to Straterra, Wellington: New Zealand Institute of Economic Research Incorporated, 2010), p 14
46. Document A37, pp 4, 13
47. New Zealand figures are P90 estimates (that is, those with a 90 per cent probability of being realised), converted from petajoules to tonnes of oil equivalent at the rate of one petajoule to 23,885 tonnes, consistent with the BP review. For unit conversion data, see Ministry of Economic Development, *New Zealand Energy Data File 2010* (Wellington: Ministry of Economic Development, 2010), p 169.
48. Document A37, pp 13–14
49. Ministry of Economic Development, *New Zealand Energy Data File 2010*, p 153, fig J.1b
50. Ministry of Economic Development, *New Zealand Energy Data File 2009* (Wellington: Ministry of Economic Development, 2009), p 79, fig E1c; Ministry of Economic Development, *New Zealand Energy Data File 2010*, p 77, fig E1d
51. The Ministry of Economic Development's *Energy Data File* shows that, in the 2009 calendar year, total consumer energy in New Zealand was 492.7 petajoules, of which 233.18 petajoules (47.3 per cent) were from oil and 52.62 petajoules (10.7 per cent) were from natural gas. By comparison, the indigenous production of oil was 113.24 petajoules and of natural gas 147 petajoules: only 35.8 per cent of gas was consumed directly as energy, with 47.6 per cent used in gas-fired electricity generation and 14.8 per cent in gas-based products such as ammonia and urea: see Ministry of Economic Development, *New Zealand Energy Data File 2010*, pp 28–29.
52. Ministry of Economic Development, *New Zealand Energy Data File 2009*, p 42
53. Ministry of Economic Development, *New Zealand Energy Data File 2010*, p 47
54. Document A37, pp 30–31; doc A29, p 59
55. Document A31, pp 8, 9–10
56. Document A37, p 30
57. Ministry of Economic Development, *New Zealand Energy Data File 2010*, pp 58, 82, 131–132. Note that the figure of 653 petajoules for oil and 1,311 petajoules for gas are P90 estimates. The less conservative ('median') P50 estimate is 982.7 petajoules: see Pete Hodgson, Minister of Energy, 'Gas Exploration Incentives', paper to Cabinet Business Committee, 24 November 2005, annex 1.
58. BP, *BP Statistical Review of World Energy June 2010* (London: BP, 2010), pp 6, 22
59. Document A31, p 5
60. Waitangi Tribunal, *The Petroleum Report*, p 61
61. Ibid, pp 61–62
62. Document A37, p 35; doc A31, p 11
63. Document A31, pp 11–14
64. Ibid, p 13
65. Ibid, p 15
66. Document A32, p 21
67. Document A37, p 36
68. Paper 2.154, p 365
69. Ibid

Sidebar notes

Page 10: Joseph E Stiglitz, Amartya Sen, and Jean-Paul Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (Paris: Commission on the Measurement of Economic Performance and Social Progress, 2009), pp 11, 12, 14–15, 92–93
Page 11 (top): Crown Minerals Group, *New Zealand Petroleum Basins* (Wellington: Ministry of Economic Development, 2010), pp 12, 14; Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010); doc E22, p 161; Taranaki Regional Council, *Taranaki Regional*

Council Marine Oil Spill Tier 2 Response – AWE/Prosafe FPSO Spill – Okato Beaches – October 2007 (Stratford: Taranaki Regional Council, 2009), p [38]
Page 11 (bottom): Document A29, p 4; Crown Minerals Group, *New Zealand Petroleum Basins*, pp 40, 44

Map notes

Map 1: Document C5(A7)
Map 2: Paper 2.107, apps 1, 3
Map 3: Ibid, apps 2, 4
Map 4: Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010)

Table notes

Table 1: Crown Minerals Group, 'Petroleum – Facts and Figures', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms (accessed 3 December 2010). The definition of 'sidetrack' was taken from Occupational Safety and Health Administration, 'Oil and Gas Well Drilling and Servicing eTool: Servicing – Workover', United States Department of Labor, http://63.234.227.130/SLTC/etools/oiland-gas/servicing/workover.html (accessed 13 December 2010).
Table 2: Jason Leung-Wai and David Norman, *Economic Impact of the Oil and Gas Sector on the Taranaki Region and New Zealand* (report to the Petroleum Exploration and Production Association of New Zealand, Wellington: Business and Economic Research Ltd, 2007), pp 15–23
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CHAPTER 2

A MĀORI WORLD VIEW: THE CONNECTION AND IDENTIFICATION WITH THE ENVIRONMENT

2.1 Introduction

Central to this inquiry is the claimants' view that Māori values and perspectives, particularly in an environmental guardianship context, are often disregarded or treated as having peripheral, if any, relevance by decision- and policy-makers. Māori beliefs and customary practices, the claimants told us, were seen as either contrived and superstitious or insufficiently credible to justify consideration beyond box-ticking 'consultation'. In response, the Crown said that this perception was incorrect. Māori views were regularly sought as part of a 'culture of consultation' and were always taken into account when decisions were being made on matters that affected Māori and Crown minerals policy development. The claimants further contended that their experiences with the Resource Management Act 1991 and local authorities were problematic and fraught with difficulties.

Whakapapa acts as the link between the land and the tipuna (ancestors) who were its custodians. They exercised their functions as kaitiaki (guardians) through the observance of tikanga (Māori customary practices). It is this connection that links the past with the present and provides a rationale and a basis for the lengths that Māori will go to in their efforts to protect wāhi tapu (sacred sites), regardless of whether they 'own' the land in a legal sense. Associated with wāhi tapu is the kaitiaki concept, which provides an additional set of considerations. These systems of knowledge and belief continue to pervade te ao Māori to the present day. Māori views on the tribal custodianship of natural resources are therefore integral to an understanding of the claimants' perspectives on how the current petroleum regime affects them and their efforts to exercise rangatiratanga as kaitiaki over their respective tribal domains.

In this chapter, we briefly traverse core aspects of Māori cosmology as a prelude to a discussion on fundamental concepts of kaitiakitanga, mauri, and mana, and how they influence present-day iwi and hapū interaction with local authorities, central government, private corporations, and the wider community through the Resource Management Act 1991 and the Crown Minerals Act 1991. We also consider related concepts, including taniwha, kaitiaki, tipua, and wāhi tapu. The purpose of this chapter, therefore, is to provide some insight into traditional Māori beliefs, perspectives, and connections with customary practices, and the relationship between lore and legal process.

'Kotahi tonu te atua o te Māori – ko Ranginui e tū nei, ko Papatūānuku e takoto nei. Ahakoa e rua rāua, kotahi anō rāua. Ki te kore a Papatūānuku, kāhore hoki a Ranginui, ki te kore a Ranginui, kāhore hoki a Papatūānuku. Ki te whakahua i a Ranginui, kai roto hoki a Papatūānuku i te mahara. He pērā anō te kōrero mō Papatūānuku. Koia i kīia ai kotahi anō rāua. Ko ngā mea katoa kai waenganui i a rāua, kotahi anō, i heke katoa iho i a rāua; ngā whetū, te rā, te marama, ngā kapua, te ua, te hukarere, te hau, ngā mea katoa e kite nei tāua, e rongo nei tāua. Tae noa ki ngā mea o te ao, katoa, ngā manu, ngā kararehe, ngā ngārara, rākau, te moana, te whenua, ngā awa, katoa i haere katoa mai i a Ranginui rāua ko Papatūānuku.'

'There is only one god of the Māori – Ranginui who stands above, and Papatūānuku lying here. If there is no Papatūānuku, Ranginui cannot be, if there is no Ranginui, Papatūānuku cannot be. If you mention Ranginui, you are conscious of Papatūānuku, and the same applies to Papatūānuku. That is why they are one. Everything between them is one, they all come from them; the stars, the sun, the moon, the clouds, the rain, the snow, the wind, everything that we see and feel. Even to the things of the world, everything, the birds, the animals, the insects, the trees, the sea, the land, the rivers, everything – all comes from Ranginui and Papatūānuku.'

Wiremu Pākehā to Pou Temara, Wainui Marae, Whakatane,1978

2.2 In the Beginning – The Primeval Parents

The account cited above by the late Wiremu Pākehā, a renowned tohunga of Ngāti Awa, describes Māori cosmology at its most fundamental. Drawing together the strands of numerous traditions, we commence this brief history with a retelling of the birth of the gods Ranginui (Rangi) and Papatūānuku (Papa), who through a series of acts of procreation made everything.[1] All are related and are part of the whakapapa of Rangi and Papa. Their moenga tuatahi, or first act of procreation, produced their whānau atua, their pantheon of god children. Tradition records that there were 70 altogether, with seven gaining prominence. Tāne became the god of forests, birds, and knowledge, Tūmatatauenga was responsible for the art of war, Tāwhirimātea was given oversight of the weather and winds, while Rongo was the god responsible for cultivation and peaceful pursuits. Their siblings Tangaroa, Haumiatiketike, and Ruamoko became respectively the custodians of the oceans, fernroots, and earthquakes. It is said that, from Rangi and Papa's moenga tuarua, or second act of procreation, came Rangiroa, Rangipōuri, Rangipōtango, Rangiwhatuma, Rangiwharo, and Rangiwhākere. Rangiwhākere went on to have Te Tahunuiorangi, who became the father of the elements. Rangi and Papa had 13 more acts of procreation, which then produced everything that is seen and felt. In Māori terms, this is the whakapapa of the universe.

Tradition then recounts how this first brood was firmly entombed in the embrace of their parents. In this gloomy world, they could hear sounds and noises from beyond. Their desire to investigate became so strong that the only way to statisfy their curiosity was to somehow leave their world. But how? Tūmatauenga suggested that their parents be killed, but his siblings refused to endorse such patricidal brutality. Tāne suggested separation, which was acceptable to the majority, yet Tāwhirimātea remained aloof, electing instead to accept the status quo. This decision was to cause an everlasting conflict among the pantheon. However, this was also the beginning of discourse, debate, and independent thought. The separation of Rangi and Papa became the task of Tāne, the originator of the proposal, and it was fulfilled by his use of the four pillars to keep the primeval parents apart. Grief-stricken, Rangi and Papa attempted to reunite but were thwarted by Tāne,

who kept them separated. Their despair was intense, and Rangi showered Papa with tears of rain, and in return she sent the mists skyward. In desperation, Tāne turned Papa over so that she was unable to see her husband, but as time elapsed Tāne noticed the diminishing beat of Papa's heart: she was dying. According to Māori history, at a place in Te Ao Tukupū, the universe, called Mataaho, Tāne restored his parents' views of each other. This place has since been known as Te Hurihanga-nui-i-Mataaho, or the Great Turning Over at Mataaho. As she again faced her husband, 'Ka aro te hā o Papa ki a Rangi, ka aro te hā o Rangi ki a Papa, ka whānau ko te aroha' (The breath of Papa drifted up towards Rangi and his breath descended down towards Papa and it is from that act that aroha was born).[2] This is a philosophy of universal application connecting various concepts, including love, affection, consideration, goodwill, and charity, which are important aspects of whakapapa relationships that bind the iwi to themselves, to their beliefs and customs, and to their land.

2.2.1 The significance of Tāne

Tāne eventually became sympathetic to his parents' plight and arranged his teina, or younger siblings, the stars and planets, the clouds, and the different celestial hues, to adorn Rangi. He then turned his attention to his mother, clothing her with his progeny, the forests. Tāne became known as Tānenui-ā-Rangi for this event. He was a prolific designer and originator, who created and then procreated with his creations. Māori tradition records that Tāne was in union with Pūwhakahara and had Kotukutuku (fuchsia) and Tawa. He then did the same with Tauwharekiokio and had Tāwhara, Kiekie, Kōuka (cabbage tree), Tōi, Mamaku, and Kaponga; then again with Apunga to produce Mauku and Māikaika (wild onions); and then he formed another union with Tūtorowhenua and had Aruhe (fernroot) and plants of that species.[3] Through these acts, he became known as Tāne Mahuta, lord of the forests and birds. The bounty of the forest became known as Te Puanui a Tāne and was there for Māori to harvest at the appropriate time, usually at Te Mātahi o te Tau, when Tāne's relation Matariki signalled the new year.[4] There were strict and elaborate rituals for the taking of the bounty of Tāne, which involved reciting karakia (prayers) to ensure a good harvest and to protect the ongoing mauri (life force) of the plants, birds, and animals that were being taken. In addition to these acts, Tāne undertook a successful quest to acquire the baskets of knowledge from Io the Fatherless. As a consequence, he became known as Tāne-te-wānanga, or Tāne the Learned.

Having completed these divine tasks, Tāne turned his mind to the procreation of humanity. From the sands at the shores of Kurawaka, he formed the shape of a human female. He then exhaled his godly hā (breath) into her nostrils, and she sneezed and came to life. This became the sneeze of life, or tihe mauri ora, which has since been immortalised in whaikōrero – the art of oratory. Invariably, 'tihe mauri ora' are the first words a speaker utters before moving into the body of his oration. This creation of Tāne was called Hineahuone. Tāne procreated with Hineahuone and had a daughter called Hinetītama. He then entered into union with Hinetītama, and their issue became the line to the living. In this way, they became the first parents of humanity. Yet, this was achieved only by Tāne committing incest with his daughter.

2.2.2 The coming of death to humanity

Tāne's incest was appalling to Hinetītama, who had been blissfully unaware of it until, during a moment of informality, she asked her husband who her father was. Tāne evaded the question several times but, because of Hinetītama's mounting persistence, told her to ask the walls of their house. This was a further evasion, since obviously she would receive no answer from them. After long contemplation, Hinetītama concluded that Tāne was also her father, and this discovery was to have an everlasting effect on the world.[5] According to traditional sources, Hinetītama was so dismayed by this revelation of her parentage that she met with her husband and their family,

recounting her mortification and revealing to them her future plans. She bade them farewell and headed for the portal to the underworld of Rarohenga. Tāne pleaded with her to reconsider but to no avail. At the Tatau o te Pō (the Entrance to the Night), she turned to gaze at her husband and their children for the final time and then said, 'Tāne, return to our family, I have severed connection with the world of light and now desire to dwell in the world of night.'[6] She went on to say, 'Aitia mai i te ao, māku e manaaki i te pō' (Procreate in the world and I will care for them in the night). This was an allusion that immortality was not guaranteed and that death was a possibility that might afflict mankind. Only death would alleviate the shame felt by Hinetītama, but if death were to prevail, she would be there to receive and look after humankind in the realm of night. Having made her final farewells, she descended to Rarohenga. There, she transformed into Hinenuitepō, the keeper of the mauri of death. The recounting of these events in this primordial world confirmed that death was then still only a possibility, not a certainty. It would take a struggle over the mauri of death between Hinenuitepō and her mokopuna, Māui, the demigod, to make death inevitable.

It is also said that there was a conspiracy of the gods, who ordained that Māui should die. They knew that eventually he would be tempted by his human traits to surpass them and ultimately supplant their authority, and that he would take risks in doing so. They then sought some formal justification to secure his demise, finding it in the weakness of human recall. When Māui's father, Mākeatutara, performed the sacred tohi rite over his son, he made a faux pas in the recitation of his karakia. This error was inexcusable, and so the gods secured the further justification they were seeking, with Hinenuitepō to be the means of his demise. True to form, Māui sought immortality for himself and humankind and to achieve this, he had to enter Hinenuitepō by her vagina, retrieve her heart – which was the physical mauri of death – and emerge from her mouth. But as he entered her, the curious sight of his legs thrashing about excited laughter in a fantail, awakening Hinenuitepō. Realising what was happening, she crushed and killed Māui. Thus, he was the first person to die, and by his death Māui consigned all humankind to that fate.[7] The tradition also emerged from this event that, when the fantail sings indoors, it is an ill omen, usually heralding death. To ward off that prospect, Māori talk to this messenger, scold it, and tell it to seek death elsewhere.

2.2.3 Māori traditional beliefs and the environment

This account provides some lessons about the environment. First, there is the issue of the separation of the primeval parents by their children. This is viewed as the first hara, or sin, even though this act brought life and enlightenment to the world. It resulted in change and a will to shape and develop the environment. In turning over Papatūānuku to face away from her husband, Tāne was exacerbating an already stressful situation, but realising this he sought to restore balance by returning Papa to her original position. This act reveals that awhitū (remorse) became embedded in the consciousness of Tāne. That particular episode also led to the creation of the philosophy of aroha. This definition of aroha is not limited to the literal translation 'love' but can include distress or longing, pain, and yearning. It also relates to the notions of restoration and balance – where an imbalance requires correction, through aroha, this can be achieved through restoration. We note with some trepidation that, according to the recollections of traditional historians, Tāne committed incest by sleeping with his daughter. This was the second hara. However, while incest is forbidden in Māori culture, it is grudgingly acknowledged that this union was necessary to create humanity. So, without the intervention of the gods, human affairs would have remained dormant and the natural world devoid of men and women.

Another lesson is the relationship of all things in the environment through whakapapa. Everything comes from the union of Rangi and Papa. The story of Tāne fashioning the first human from the earth is part of the whakapapa to the land and underscores the depth of the affinity that Māori have with it. As the late John Rangihau, a

well-known expert of tikanga Māori, explained with characteristic eloquence:

> As I stand on the marae, and experience the sensation of the environment around me, the land, the snow tipped mountains, the smoky hills, the forest, I recall my storied past, the myths and legends handed down from generation to generation until I am confronted by that past. It is then that I renew my affinity with the land, it is then that I say 'Whenua, I am you and you are me. You nurtured me for nine months of my being, and that which nurtured me I called my whenua, my placenta. My whenua was deposited with much pomp and ceremony into the nooks and crannies of whenua, land, thereby renewing my vows that I come from you and in time I will return to you, whenua. That which I called my pito, my umbilical cord, was deposited into the trees set aside for such practice, signifying that, where my pito was severed, there I shall return to be reunited with it for the sweet slumber from which there is no awakening.'[8]

Equally relevant to this inquiry was the evidence of Ronald Hudson, who recounted the age-old proverb: 'The warrior will fight for two things, for his women and for his land – without that he is nothing. Without that there is no survival for the tribe.'[9] The relevant whakatauki is 'He whenua, he wahine e mate ai te tangata' (It is for land and women that men die). The survival of the tribe is premised on two fundamentals – procreation and land for sustenance – since, should either be absent, the future of the iwi would be at risk. This was precisely the sentiment expressed by the renowned Taranaki chief Wiremu Kingi Te Rangitake of Te Atiawa when he opposed the taking of land without the consent of the tribes. He compared the risks of loss of land to Europeans and the effects of such loss for the iwi with the wanderings of seabirds, drifting without a place to stand:

> Ko enei whenua e kore e hoatu e matou ki a korua ringaringa ko te Kawana kei rite matou ki nga manu o te moana, noho ki runga i te kowhatu, ka pari te tai ka ngaromia taua kowhatu e te moana, ka rere nga manu no te mea kahore he nohoanga mo ratou.
>
> These lands will not be given by us into the Governor's and your hands, lest we resemble the seabirds which perch upon a rock. When the tide flows the rock is covered by the sea, and the birds take flight for they have no resting place.[10]

2.3 The Nature of Whakapapa

We understand that these traditional accounts of the procreation of Tāne confirm the relationship of the trees and the forests to one another and to the natural world in general. A chronological table begins to emerge which sets the trees, the stars, and everything else before the Māori. It is only after all these divine feats that humans are even considered. This is comparable to the basic tenets of Christianity and Judaism, where it is only after the Earth was created that God created man, then woman from man. The parallels are obvious, as are the differences. Moreover, in a whakapapa sense, the trees, birds, animals, and stars are all tuakana, or older relations to Māori. Attached to each level, and indeed with each name in the whakapapa, is a historical account which makes the whakapapa relevant and meaningful. This is aptly described by Professor Ranginui Walker as 'the systematic layering of knowledge in an evolutionary sequence that culminates in living people'.[11] Another important point in these accounts is that whakapapa connects Māori to their tīpuna and to their gods.[12] This connection is crucial, as it adds gravity to the philosophy of whakapapa and to its integrity.

Inherent in that connection is the issue of tapu, defined in the context of this discussion as sacred. Tradition records that it is the prerogative and will of the gods that nothing can be tapu if this whakapapa connection does not exist or is severed. In this sense, tapu includes a strict code of restrictions and costs for human flaw, and where failings invoke the disapproval and wrath of the gods, the perpetrator may sometimes pay the ultimate price, as

revealed by Te Uira Manihera.[13] To lessen the likelihood of such human frailties, whakapapa was restricted to the learned pū whakapapa (whakapapa expert). Crucial to the culture was precision, which required the ability to develop the memory to the highest level. In this respect, the precise recitation of whakapapa was akin to the precision of karakia, because both involved and invoked the gods. In short, we understand that such practices were to be treated with the utmost care and reverence lest, by even the slightest unintended error, the consequences become serious. In any case, the fundamental point is that whakapapa makes these relationships clear and brings order and understanding to the Māori world.

Through whakapapa that reaches back to the immortals, Māori are an integral part of the environment and nature defined by their whakapapa. Because of this connection, there is an obligation for Māori to be stewards and custodians of taonga through the exercise of kaitiakitanga. As such, they become part of a whole cultural family of kaitiaki (see below). Kaitiaki are responsible for the mauri of the taonga. And the responsibility of effective kaitiakitanga is the assurance that the taonga will not be compromised by the actions of people.[14]

2.4 Mauri

2.4.1 Definitions

As we have noted, kaitiaki are responsible for the ongoing mauri of taonga. The renowned anthropologist and author Hirini Mead says of mauri:

> Mauri is the spark of life, the active component that indicates the person is alive . . .
> . . . The mauri symbolises a marvellous active sign of life and one can talk about the mauri as something separate from the body. The mauri becomes an attribute of the self, something to nurture, to protect, to think about. The self and mauri are one. If there is something wrong with the mauri, the person is not well. When the person is physically and socially well, the mauri is in a state of balance described as mauri tau (the mauri is at peace) . . .[15]

Mead observes that a mauri at peace brings balance, and if the mauri is unwell then so too is the person. Mauri needs to be nurtured and looked after. He rightly bemoans the definition of 'life principle' or 'thymos of man' given by Herbert Williams, stating that the Greek word 'thymos' is unhelpful for clarity.[16] However, it can be argued that Mead does not provide a conclusive definition of this elusive yet seminal concept. The late John Rangihau considered mauri in the same way as Mead, describing it as 'life force, aura, mystique, ethos', and 'lifestyle'. These definitions, it could be said, take one's understanding little further than of an almost mundane and orthodox state without the intensity and force that we suspect emanates from mauri.

In tohunga Tamati Kruger's definition of mauri, the prospects are more promising:

> Mauri is like a purposefulness, a design, a will to fulfill. Our mauri emerges from the many facets of our being: from our spiritual reality and philosophical underpinnings; from our intelligence; from our emotions; and from our physical desires. It is a driving force that generates willfulness and zeal, and at times, obsession.[17]

Here, Mr Kruger articulates the proposition that mauri need not be mundane but is indeed the spark that can be developed at a higher level, depending on the type of person and their intelligence, emotional disposition, determination, station, and focus. It is a vitality that can define the individuality of a person. It can also be described as an 'x factor', the point of difference which is vibrant and alive, eliciting excitement and expectation as part of its central distinctiveness. Equally importantly, mauri is also found in living things other than humans. According to tradition, trees, birds, fish, animals, and rivers all have mauri. It is generally understood that the mauri of these life

forms is similar to the mauri of humans: it, too, derives originally from the gods and can wax and wane. A tree can be loaded with fruit one year and less so in another. In its natural state, a river can be clear and then be slippery with the plant life of a dry year. An entire forest may look unchanged, and even anaemic, one year and then healthy and vibrant the next. These are, in Māori terms, fluctuations in mauri. That said, we understand that Māori tradition acknowledges that there is also a point below which the mauri cannot be permitted to fall if the balance so important to te ao Māori is to be maintained.

2.4.2 The mauri of inanimate objects

Inanimate objects, like carved or unadorned Māori houses, rocks, carvings, and weapons have imbued mauri, the care of which usually falls under the prerogative of the tohunga. These traditional experts are the medium between the spirit world and the living and have the authority to embed mauri into these objects by elaborate age-old rituals and karakia. In the case of an elaborately carved taiaha, which has been fashioned by the hand of a tohunga whakairo, without mauri it is only an elaborately carved piece of wood. A branch of the same dimensions and weight can inflict the same physical pain as the carved taiaha. However, we understand that when it is imbued with mauri by a tohunga, it comes alive, it develops a voice, and it has moods and becomes akin to the legendary 'Excalibur', and thus the protector of its owner. This creates a belief and confidence in the custodian of that taonga, which makes the crucial difference. Because of this, it is said that the owner's continued health relies on his or her ability to protect the mauri of this weapon; to ensure that his taiaha is never exposed to places or people which can affect the health of its mauri. Similarly, a completed Māori house is given mauri by the ritual called 'tā i te kawa'. This entails disestablishing the mauri of the carvers and builders and their tools from the house and instating mauri with a foundation of aroha and manaakitanga, of warmth and unity. The concept of unity is attributed to Tāne because he is also known as Tāne Whakapiripiri, or Tāne the Unifier. The ongoing health of the mauri of a house depends on the ability of the tangata whenua to enact and maintain the tenets of those values; otherwise, the mauri can ultimately be withdrawn by the gods.

2.4.3 Other forms of mauri

Concepts like whaikōrero (formal speech making), reo, and karanga also have mauri. This kind of mauri is derived from the primal gods; that is, the pantheon of god children referred to at the start of this chapter. They used reo to debate the fate of their parents in the style of whaikōrero. When the divine parents were separated, it was with karanga that Tāwhirimātea farewelled them. He then continued berating his siblings in this same manner. Tāwhirimātea was to later wage the eternal war of the gods, which continues today.

In a literal sense, mauri can be compared to a battery that ensures an engine starts. In that respect, it is the spark of life described by Mead, the heartbeat, the life force. The engine is not entirely dependent on a battery, but a vehicle with one is a far better proposition than one without. And a battery, like a heart, needs to be maintained, and this equates with Mead's discussion on the maintenance of mauri. Infusing a 'life force' into a life form that is already alive is another aspect of mauri. A person has life but is dependent on mauri. Then there is another form of mauri that determines future behaviour and conduct, as Mr Kruger seems to be suggesting. We consider that this is the kind of mauri or life force which gives quality and longevity and therefore mana to the mundane life of the subject. The same principle applies to inanimate objects: that without life can be given a life by a tohunga. The comparison which justifies the means is a taiaha without a mauri and one with. The taiaha is only a carved piece of wood, but if a mauri is installed, it becomes a taonga. Its importance remains critical from that point forward. The owner then becomes the kaitiaki of the mauri of that taonga.

In summary, therefore, we consider that mauri can be

briefly defined as a divine spark and presence which gives all things animate or inanimate quality, vitality, meaning, value, poise, longevity, and mana.

2.5 Mana

We understand it is said that mana is the result of being good stewards of mauri. A kaitiaki, be it an individual or a group, which has maintained the mauri of a taonga and has enhanced that mauri, attains mana. The attainment of mana influences how individuals are viewed by others. It can bring kudos or outrage and even envy, or all three at the same time. Relationships are formed or lost (as the case may be) on the achievement and retention of mana – or, more pointedly, in the process of achieving mana. Mr Kruger views it this way:

> As we achieve the objectives that our Mauri drives us towards, then mana is achieved. Recognition develops and the outer manifestation of the achievements, or indeed the lack of success then influences perceptions of others as certain ideals within their minds are stimulated. Reputations are gained and lost in this manner and expectations of further conduct and probabilities of success and failure emerge.[18]

In achieving mana, the more important and therefore tapu component of the process – the accomplishment of mauri – can be forgotten. Mr Kruger cautions against the false premise that mana generates mana:

> Humanity is such that we often see the manifestations of endeavour while looking past the drivers that are embedded within the behaviours. It is easy to therefore reach the false conclusion that mana generates mana. If we arrive at this false premise, then in our failure to acknowledge the mauri, we invisibilise what to us is the tapu part of the endeavour, the harbinger of the mana, which is essentially that which we seek to conceptualise.[19]

In summary, mana is the result of mauri and is achieved when mauri is safe and enhanced. The focus of endeavour should always be on mauri. Mana is the reward of that achievement, but people should be aware of its pitfalls.

2.6 Kaitiakitanga

An analysis of McCully Matiu's statement (see opposite) reveals that spiritual kaitiaki are manifest in different forms. Some have physical representations like reptiles (especially lizards and associated species) or as dog forms, fish, or denizens of the ocean. These are termed taniwha. Then there are the kaitiaki in the form of rocks, trees, or features like unusual pools of water. These are called tipua kaitiaki. There are also the carved kaitiaki, either realised in stone (which was the usual practice) or in wood. These could be objects of significant size or very small, easily hidden stones. All these are termed mauri, whatu, or pou whenua. Stone kaitiaki were common around the Te Arawa or Rotorua district, being utilised to look after the gardens and ensure a good harvest. Carved pou whenua were the physical representation of the mauri of a district, hapū, or iwi. These forms of kaitiaki were responsible for the mauri of the natural elements, defined by Matiu and others as taonga. Matiu simply describes taonga as items which are greatly treasured and respected. Takirirangi Smith emphasises that a taonga is 'any inherited resource that provides a benefit, or has the potential to provide benefit, for the welfare of the people'.[20] He goes on to say that taonga are 'owned' not by any one person or group but by previous generations from whom the taonga belong, for the benefit of future generations. Particular individuals or groups are charged with stewardship on that basis. In short, kaitiaki are the minders of the mauri of taonga.

2.7 Taniwha Kaitiaki

Māori tradition confirms that taniwha kaitiaki are particularly significant – though not confined – to Tainui, who have a fitting tribal saying emphasising the number of kaitiaki in the Waikato River: 'Waikato taniwha rau, he

'Kaitiakitanga is the role played by kaitiaki. Traditionally, kaitiaki are the many spiritual assistants of the gods, including the spirits of deceased ancestors, who were the spiritual minders of the elements of the natural world. All the elements of the natural world, the sky father and mother earth and their offspring, the seas, sky, forests and birds, food crops, winds, rain and storms, volcanic activity, as well as man and wars, are descended from a common ancestor, the supreme god Io. These elements, which are the world's natural resources, are often referred to as taonga, that is, items which are greatly treasured and respected. In Māori cultural terms, all the natural, physical elements of the world are related to one another, and each is controlled and directed by the numerous spiritual assistants of the gods.

'These spiritual assistants often manifest themselves in physical forms such as fish, animals, trees or reptiles . . . Each kaitiaki is imbued with mana. Man being descended from the gods is likewise imbued with mana although that mana can be removed if it is violated or abused. There are many forms and aspects of mana, of which one is the power to sustain life.

'Māoridom is very careful to preserve the many forms of mana it holds, and in particular is very careful to ensure that the mana of kaitiaki is preserved. In this respect Māori become one and the same as kaitiaki (who are, after all, their relations), becoming the minders for their relations, that is, the other physical elements of the world.

'As minders, kaitiaki must ensure that the mauri or life force of their taonga is healthy and strong . . . A taonga whose life force becomes severely depleted, as is the case, for example, with the Manukau Harbour, presents a major task for the kaitiaki. In order to uphold their mana, the tāngata whenua as kaitiaki must do all in their power to restore the mauri of the taonga to its original strength.

'In specific terms, each whānau or hapū is kaitiaki for the area over which they hold mana whenua, that is, their ancestral lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will mana be removed, but harm will come to the members of the whānau and hapū.

'Thus a whānau or a hapū who still hold mana in a particular area take their kaitiaki responsibilities very seriously. The penalties for not doing so can be particularly harsh. Apart from depriving the whānau or hapū of the life-sustaining capacities of the land and sea, failure to carry out kaitiakitanga roles adequately also frequently involves the untimely death of members of the whānau or hapū . . .'

McCully Matiu and Margaret Mutu, *Te Whānau Moana: Ngā Kaupapa me ngā Tikanga – Customs and Protocols* (Auckland: Reed Books, 2003), pp 167–168

piko he taniwha' (Waikato of many taniwha, at every bend a taniwha). This saying is also a reference to the number of rangatira along the river, but the existence of taniwha there has been emphatically backed by Meto Hopa of Ngāti Hikairo and by the late Dr Tui Adams of Ngāti Maniapoto, both authorities on Tainui traditions. Dr Adams always invoked the taniwha kaitiaki of the river when someone disappeared there as a result of drowning; he was always confident that the taniwha would give up the body. In the Mātaatua or Bay of Plenty area, there are some well-known taniwha kaitiaki. One is called Te Tahi and was a real person and tipuna of Ngāti Awa before transforming into a taniwha upon his death. Te Tahi is the guardian taniwha of the sea and the rivers in the Mātaatua region. When a person has difficulties in the rivers of Mātaatua, or in the sea, one appeals to Te Tahi for deliverance from drowning. According to Tuhoe traditions, another taniwha kaitiaki is Waerore, who dwells around, and is kaitiaki of the mauri of, that part of the Whakatāne River which flows through Rūātoki. Like Te Tahi, she was a real tipuna who has many living descendants. She is regularly seen in different forms but her defining feature is that she had a

ringa mutu (missing digit). In Taranaki, according to the evidence of the late Thomas Ngatai, Ngāti Haua Piko have a kaitiaki in the form of a blue shark called Aho-Aho.[21]

In summary, taniwha kaitiaki can take many forms, are usually descended from gods, and can have living descendants. They remain an essential feature of Māori beliefs and practices, and their role as guardians is no less important today than it was in traditional pre-European times.

2.8 Tipua

Despite being defined by Williams as 'goblin[s], demon[s], object[s] of terror' or 'taniwha', tipua and taniwha are recorded by tradition as having a positive side which endears them to people.[22] These tipua kaitiaki are often present today in the form of rocks or trees. For example, at Hanamahihi on the Whakatāne River, one finds Takuahitēkā, who ensures good weather if certain rituals are observed as you pass. Local tribes confirm that a failure to acknowledge the rocks usually results in bad weather. Further up and in the middle of the river is Te Kurī a Tarawhata, who is similar to Takuahitēkā. These are places for enacting the ritual of uruuru whenua, or safe passage through a strange land for waewae tapu (first-time visitors). The general public have access to Hatupatu's rock, south of Tokoroa on State Highway 1, but local custom dictates that Māori should stop there to leave a sprig and to ask for the mercies of safe travel. Hatupatu is the mauri of that particular stretch of the country. According to Te Arawa legend, he defeated the powerful bird woman Kurangaituku by hiding in the stone now known as Hatupatu's rock and then leading her to a boiling mud pool to her destruction. While Hatupatu was a man, his deeds were those of a demi-god, and so the place where he sheltered has become one of the tipua of that region.

At Ohāuaterangi on the Whakatāne River is Te Iho o Kātaka, a hīnau tree. Besides being the mauri for the surrounding area protecting the food resources, it is said that this tipua is also imbued with the power to make barren women conceive – the Ripaki whānau from Waiōhau near Lake Matahina in the Bay of Plenty are a result of that tree. Someone once took an axe and disfigured Te Iho o Kātaka in ignorance, and not far away his horse fell down a cliff. He survived – but only just. As is generally understood, Māori lore recognises that human interference with tipua may result in harm if the appropriate recognition is not given and the necessary rituals observed.

2.9 Maunga, Awa, and Moana

Landmarks not mentioned by Matiu, including mountains, rivers, and lakes, can also be recognised as kaitiaki. They hold the mauri of a district and a whole tribe. All iwi have landmarks which are their symbols of identification and mana. It is inconceivable to mention the region of Taranaki without immediately thinking of the maunga tipuna, while acknowledging that the restoration of that name in local non-Māori consciousness has been a slow process. Hikurangi and Waiapu are synonymous with Ngāti Porou and Apirana Ngata, just as Taupiri and Waikato are inextricably linked with Tainui and Kīngi Pōtatau. The House of Te Heuheu is synonymous with Tongariro and Lake Taupo-nui-a-tia, while their relations the Whanganui iwi say of their identifying river, 'Ko au ko te awa, ko te awa ko au' (I am the river, the river is me). Mountain landmarks accumulate mana and tapu by the tikanga of burying tūpapaku (the remains of the dead) on them or in their nooks, crannies, and caves. Taupiri is an example of this kind of ongoing tikanga. The members of the Waikato and Tainui tribes always stop at the foot of Taupiri to karakia before undertaking a journey. Increasingly, we understand, other iwi are also observing this practice at that site because Taupiri, and therefore the reigning monarch, is regarded as the mauri o te motu. This is encapsulated in the Tau o Mātaatua with the lines: 'Titiro tonu atu au ki Taupiri, ko Kīngi Pōtatau, ko te mauri o te motu, he tipua, he taniwha' (I look in the direction of Taupiri, to King Pōtatau, the mauri of the land, a tipua and a taniwha).

Conversely, the placement of communication masts on Pūtauaki, the maunga tipuna of Ngāti Awa in the eastern Bay of Plenty, has caused irritation and anger because it contravenes the kaitiaki code of practice and belief. For the Crown, a local authority, or a private company to own a maunga can be regarded by many Māori as equally unsavoury since the newcomers cannot provide a whakapapa link to the mountain. It is most unusual for iwi to willingly alienate their ancestral mountains out of their control, since they are often regarded as being among the most sacred and tapu of all tribal kaitiaki. The Tūhoe iwi can whakapapa to the mountain Maungapōhatu, to Te Urewera National Park, and to Lake Waikaremoana. However, the kaitiakitanga or custodianship over these landmarks is not in Tūhoe hands, as is also the case of the Taranaki iwi and their maunga tipuna, which is controlled by the Crown following confiscation. Even so, that does not, we understand, render these places any less important and sacred to the identity of the tribes concerned. The loss of legal ownership simply adds another layer of difficulty to the exercising of the role of kaitiaki.

2.10 Te Tangata, Hapū, Iwi

Māori custom and tradition also makes provision for living kaitiaki. These are individuals or hapū who are responsible for the maintenance of the mauri of a resource, a piece of land, or a landmark. For example, the late Hikawera Te Kurapa and Paetawa Miki were the kaitiaki of Ruatāhuna and Maungapōhatu respectively. Their responsibilities included keeping a balance between the living, the spirit world, and the land, thereby ensuring the stability of the mauri of all three. They acknowledged the mauri of the land, the forest and its wāhi tapu, the rivers, and the atmosphere. Hikawera was careful to point out these wāhi tapu and to caution the uninitiated not to venture there unprepared and without appropriate guidance. With their passing in the 1980s, it is said that the result was inevitable imbalance. The forest had lost its kaitiaki and the results were clearly seen. The renowned Ruatāhuna elder the late Wharekiri Biddle observed some decades ago, 'Kei te mate haere te ngahere' (The forest is dying).[23] Now, according to recent media reports, Tūhoe are seeking the restoration of the kaitiakitanga of Te Urewera in an effort to restore that balance so that the ongoing stability of the mauri is assured.

> *'But despite all this Nga Ruahinerangi is still strong. Our spirituality and our faith gives us strength. For my hapu of Ngati Haua Piko and all other hapu of Nga Ruahinerangi Iwi, spiritually comes from Mareikura (translated means a female guardian angel), and Whatikura (translated means a male talisman). Our entire being and surrounds are waahi tapu, urupa, pa-pakanga, papakainga, awa, waipuna, roto, kaoa kaimoana, moana ruku kai, moana hiinga ika, maunga, puke, papa-wanaga [sic], mauri, rakau, tauranga waka, wai-tohi, tuahu, whare tutahanga, wai-paru, paru kokowai, mahinga kai, whakaparu, pu-harakeke, pu-pingao, pu-kiekie, pu-rakau, pu-oneone, takutai moana, rua-pito, urunga pito, rua-taniwha, ana taniwha, rua-pou-whenua, kohatu, ngahere, uru-rakau, wai-hohourongo, iringa-korero, marae.'*
>
> Thomas Ngatai (doc A18, p 3)

2.11 Wāhi Tapu

In his evidence to the Tribunal in 2000, claimant witness Thomas Ngatai gave a detailed list of places which he considered wāhi tapu. Many of them fell under the restriction category of tapu, and these included ruku kai, which is an activity, puke, rākau, tauranga waka, whare tū tahanga, wai paru, paru kōkōwai, mahinga kai, whakaparu, pū harakeke, pū pīngao, pū kiekie, pū rākau, pū oneone, takutai moana, and kōhatu.[24] The rest fell under the intrinsic tapu; that is, they came with an inherent sacredness. However, all were wāhi tapu. Hence, wāhi tapu is any place that is described as being of historical and cultural significance. The operative concepts are wāhi (place) and

tapu (sacred), and under these concepts, urupā or burial grounds come to mind immediately. These urupā may come in the form of traditional cemeteries, where a piece of ground has been set aside, fenced off, or surrounded by a deep ditch, thus denoting it as a wāhi tapu. Some wāhi tapu are extremely tapu, such as the famous Opihi, across the Whakatāne River from the township. Many famous rangatira are buried at Opihi, and the intensity of the site is marked by the saying 'Opihi whanaunga kore' (Opihi of no relatives, or Opihi without peer).[25]

Some interments, which traditionally occurred above ground, are described by Mead as first-stage burials, and these include the tree burial sites in Waimamaku, south of Hokianga in the Far North, and the similar traditions of Ngāti Tamatuhirae of Waimana in the Mātaatua area.[26] The bodies of the dead were placed in the forks of trees to accelerate decomposition.[27] We note these lines from a Tūhoe waiata:

I tuhia ai ki te tuhi māreikura,
Koia a Ngāi Tama-tuhi-rae.
I whakairia e ki runga ki te rākau
Koia te kauhau a tō tipuna a Māui, e Hine . . .

Marked with the sign of te māreikura,
Hence Ngāi Tama-tuhi-rae.
Suspended from the trees,
As prescribed by your ancestor Māui, o daughter . . .

Other sites of first-stage burials were swamps, where bodies were pressed into the mud to hasten decomposition,[28] and coastal sand dunes for people who lived by the sea, as in the case of Palliser Bay in Wairarapa. These places were extremely tapu. Where the tapu of such sites has been innocently transgressed, the appropriate rituals need to be observed to render both the tangata whenua and the visitors free from any unseen future difficulties.

The last stage of the burial process in traditional times was the gathering of the bones in the now defunct process called hahunga and the redepositing of them in final burial sites, such as in caves, on ledges, under huge rocks, and in cavities in the ground and in the hollow of trees. Some of these sites are well known, but the majority are not. The well-known ones are the mountain wāhi tapu. Mountains have their own intrinsic tapu as the symbolic landmarks of iwi. Chiefs are associated with them, and their tapu is intensified when coupled with the tapu of the dead. Mr Ngatai said that kuia would look to the Taranaki mountain and pray to it.[29] This is reminiscent of Taupiri, where people stop and pray at the foot of the mountain before travelling onward. Some iwi make journeys to their wāhi tapu to weep over the bones of the dead or to deposit placentas. Like mountains, these places of final rest are considered wāhi tapu for more reasons than one. In a karakia, we see the association of the gods, tapu, mana, and mauri with mountains, which provides some insight into the significance of wāhi tapu:

Whakarongo rā e Tāne ki te ahurewa, ki te pūkenga, ki te wānanga ki te taura, ki te tauira. I tipu iho ngā pū ngā weu, ngā rito, ngā take i te orooro, i te orooro.

Tēnei rā te whakahua ake i ngā maunga tapu, ko Tipuaoterangi, ko Tawhito-o-terangi, i takea mai, ko te mana ko te tapu o te mauri o ngā atua.

Listen O Tāne to the keeper of the altar, to the skilled, to the learned, to the student of the first level, to the student of the second level. The taproot, the fibres, the leaf and the main roots all emanate from the beginning.

Here we mention the sacred mountains of Tipua-o-te-rangi and Tawhito-o-te-rangi, from where the mana, tapu and mauri all come . . .

The next category of wāhi tapu are tuāhu, the sites of religious ceremonies. These are places that have been selected by divine intervention where tohunga practise their religious rituals and invoke and converse with the gods or kaitiaki. These sites are usually close to water sources, like streams, springs, and rivers because water is integral in these rituals. As such, they were known as wai

whakaika (waters of dedication). These places are identified by Mr Ngatai as wai tohi (waters of baptism) and wai hohou rongo (waters to implement peace). Mead wrestles with the tapu of water in these religious sites and contends that – logically – water is not tapu because water flows.[30] Yet, it can also be argued that the water is tapu. For example, we understand that there are locations along streams where water cannot be taken for drinking because it is tapu together with the location. A pigsty was once built to straddle a stream a few metres upwards of a wai whakaika. The water had to flow through the sty and then on down to the wai whakaika. All the pigs died, and the would-be pig farmer was afflicted by a porcine disease. Sites along a stream may be designated for different daily purposes, like drinking and washing, and for ritualistic practice. The important point is to understand the distinction and the implications of the difference.

Whare wānanga and sites for passing on knowledge are also considered wāhi tapu because mātauranga is considered tapu.[31] Mātauranga, it is said, is the property of Io – Io the supreme god and the beginning of all things. The mission undertaken by Tāne to acquire the baskets of knowledge from Io was fraught with strife, danger, and challenges, especially from his younger sibling Whiro, who wanted the honour of kneeling before the supreme god to request the baskets. This background thus underscores in our view the sacred nature of wānanga sites.

The next example of wāhi tapu is any place of previous occupation, especially places that were occupied by ancient Māori. These are often pā sites, clearly defined with the outlines of their terraces and maioro (defensive ditches) still evident today. The association of these pā sites with tīpuna makes them tapu. Even when they are publicly accessible, as with some sites in Taranaki, these places are still tapu to Māori. Many of them are in the bush or by the sea, where food is plentiful, but that fact alone – their proximity to food – does not render them anything other than sacred. The ability to defend such pā was another serious consideration. In going through the vast expanse of Te Urewera, it is evident that there are many pā sites overgrown and hidden by the forest. Yet, on closer examination the choices of the ancients as to the location of their sites were inspired, since those sites were hidden, easily defended, and close to water supplies and escape routes. We emphasise that an affinity to a sacred or otherwise important location need not be the exclusive preserve of indigenous peoples. It is the history and the association with the ancestors which make these places wāhi tapu.

Places which have been named after parts of the anatomy of a chief or a tohunga are also wāhi tapu. An example is a part of the Taiarahia Range in Rūātoki that a prominent chief called his backbone. Thereafter, that part of the range was closed to normal passage. Some wāhi tapu are symbols of the establishment of tatau pounamu (peace pacts). One such symbol was the 'arranged marriage' between the hills Kuha-tarewa and Turi-o-Kohu, which represented Ngāti Kahungunu and Tūhoe. The marriage gave the tatau pounamu permanency.[32] Another site is Ōhui at Matahina, which is the geographical symbol of peace between Ngāti Awa and Tūhoe.[33] This peace pact is given added significance by the association of the names of two chiefs with Ōhui: Hātua representing Ngāti Awa and Kōura representing Tūhoe.[34]

Then, as foreshadowed, there are other natural features like lakes and rivers. Waikaremoana is described as beautiful by non-Māori but looks intimidatingly tapu to Māori and sends messages of foreboding to non-resident Māori passing through. The wildness of the environment, the bush, the huge misshapen rocks, the steep cliffs, and brooding Panekire – which could only have been the work of the resident taniwha, Haumapuhia – are all reflected in the clear green waters of Waikaremoana. It echoes the history of occupation, of wars fought and words spoken, and of a long and continuing relationship. This association has revealed its moods, and the local saying is a fitting description – 'Waikaremoana whanaunga kore' (Waikaremoana of no relatives). Lakes and rivers are termed 'te wai tuku kiri o ngā tīpuna' (the waters where ancestors immersed their skins). In the case of Waikaremoana, Tūhoe prefer to

call it 'te Wai Kaukau o ngā Tīpuna' (the bathing waters of the ancestors), or 'Wai Kaukau' for short. This gives lakes and rivers added depth of meaning and tapu. Then there are the abodes of taniwha and tipua, already mentioned previously in this chapter.

In summary, wāhi tapu are places of historical and cultural significance. They are an essential part of the physical and cultural landscape of the tribes within which the principles of kaitiakitanga are observed in the exercise of rangatiratanga to protect the land and resources for the present and future generations. As the Tauranga Tribunal emphasised, ultimately all of these concepts merge into a single outcome and purpose – the tikanga that defines human conduct in the exercise of custodianship over the natural world and environment:

> The ancestral landscape defines the relationship between tangata whenua and the natural environment; it is, quite literally, the embodiment of their cultural heritage. The state of their ancestral landscapes is therefore 'inextricably linked to Maori spiritual, emotional, physical and social well-being and is expressed through the ethic and practise of kaitiakitanga'.

All key resources have their kaitiaki, their guardians. Acting as kaitiaki – exercising kaitiakitanga – ensured that the landscape's resources were safeguarded. This responsibility was the corollary of the authority and control exercised by rangatira, or chiefs, over the environment and its resources in the name of their people. Besides kaitiakitanga, other key cultural values such as whanaungatanga (family links) and manaakitanga (hospitality) also shaped the exercise of rangatiratanga or authority. Cumulatively, these concepts have established the tikanga, or principles, that define appropriate behaviour within the environment, and determine how the environment's resources should be used and managed.[35]

Text notes

1. This is also the view of the well-known Te Arawa historian Te Rangikaheke, who stated to Sir George Grey, 'Kotahi anō te tupuna o te tangata Māori ko Ranginui e tū nei, ko Papatūānuku e takoto nei' (There is only one ancestor of the Māori people, Ranginui who stands above, and Papatūānuku who lies below): Sir George Grey, *Nga Mahi a Nga Tupuna*, ed Herbert W Williams, 3rd ed (Wellington: Maori Purposes Fund Board, 1953), p 1.
2. Chris Winitana, seminar at Te Panekiretanga o te Reo Māori, Eastern Institute of Technology, Hastings, 2007
3. Pou Temara, *Maungapōhatu* (Wellington: Huia Publishers, 2008), pp 8–9
4. The Pleiades, or the Seven Sisters.
5. Ranginui Walker, *Ka Whawhai tonu Matou: Struggle without End* (Auckland: Penguin, 1990), pp 14–15
6. Ibid, p 15
7. Ibid, pp 16–17, 18–19
8. John Rangihau, address to Department of Social Welfare staff, Porirua, 1982
9. Document A16, p 2
10. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), p 171
11. Ranginui Walker, address to Waitangi Tribunal Māori members' forum, Wellington, 20 October 2010
12. Waitangi Tribunal, *Te Urewera: Pre-publication, Part 1* (Wellington: Waitangi Tribunal, 2009), p 98
13. Michael King, *Te Ao Hurihuri: Aspects of Maoritanga* (Wellington: Hicks Smith and Sons, 1975), p 7
14. Jim Williams, 'Papa-tūā-nuku: Attitudes to Land', in *Ki te Whaiao: An Introduction to Māori Culture and Society*, ed Tānia M Ka'ai, John C Moorfield, Michael P J Reilly, and Sharon Mosley (Auckland: Pearson Education New Zealand Ltd, 2004), pp 50–60
15. Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia Publishers, 2003), p 53
16. Ibid; Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: Legislation Direct, 2001), p 197
17. Tamati Kruger, brief of evidence, 6 September 2004 (Wai 894 R01, doc G12(a)), pp 5–6
18. Ibid, p 6
19. Ibid
20. Document A23, p 4
21. Document A18, p 5. The spelling of Aho-Aho is sourced to Mr Ngatai.
22. Williams, *Dictionary of the Maori Language*, p 458
23. Rangi Mātaamua and Pou Temara, 'Ka Mate Kāinga Tahi, Ka Ora Kāinga Rua: Tūhoe and the Environment – The Impact of the Tūhoe Diaspora on the Tūhoe Environment', in *Māori and the Environment:*

Kaitiaki, ed Rachael Selby, Pātaka Moore, and Malcolm Mulholland (Wellington: Huia Publishers, 2010), p 103
24. Document A18, p 3
25. Mead, *Tikanga Māori*, p 67
26. Ibid
27. Elsdon Best, *Tuhoe: The Children of the Mist – A Sketch of the Origin, History, Myths and Beliefs of the Tuhoe Tribe of the Maori of New Zealand; With Some Account of Other Early Tribes of the Bay of Plenty District*, 2nd ed, 2 vols (Wellington: AH and AW Reed, 1972), vol 1, p 86
28. Ibid, p 273
29. Document A18, p 4
30. Mead, *Tikanga Māori*, p 66
31. Ibid, p 68
32. Best, *Tuhoe*, vol 1, p 551
33. Ibid, p 389
34. Waitangi Tribunal, *The Ngāti Awa Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 57; see also Waitangi Tribunal, *Te Urewera*, pp 108–109
35. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 495–496

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CHAPTER 3

THE INQUIRY AND ITS PARTICIPANTS

3.1 The Claimants

The two main claimant groups in the management of the petroleum resource inquiry were also the main claimants in the Waitangi Tribunal's petroleum inquiry in 2000. They are from Ngāruahine and Ngāti Kahungunu.

3.1.1 Ngā Hapū o Ngāruahine (Wai 796)

The claim by Thomas Tohepakanga Ngatai and Tihi (Daisy) Noble, made on behalf of Ngā Hapū katoa o Ngāruahine, relates to the petroleum resource, including natural gas and condensate, within the rohe of Ngā Hapū o Ngāruahine. The boundary of those traditional lands, as mapped in the 1996 report of the Taranaki Tribunal, runs from the mouth of the Taungatara Stream north-east to the tip of Mount Taranaki, eastwards to Tariki, southward via the Whakaahurangi track to Araukuku and down the Waihi Stream to its mouth, and from there north-west along the coast to the mouth of the Taungatara Stream (see map 8).[1] For the purposes of the Wai 796 claim, the claimants describe the rohe of Ngā Hapū o Ngāruahine as also including 'the seabed and continental shelf adjacent to that [land] area without seaward boundary'.[2]

As has been noted in chapter 1, all of New Zealand's producing oil and gas fields are in the Taranaki region.[3] The claimants' rohe is in south Taranaki, and they have lived with widespread petroleum-related activity over an extended period.

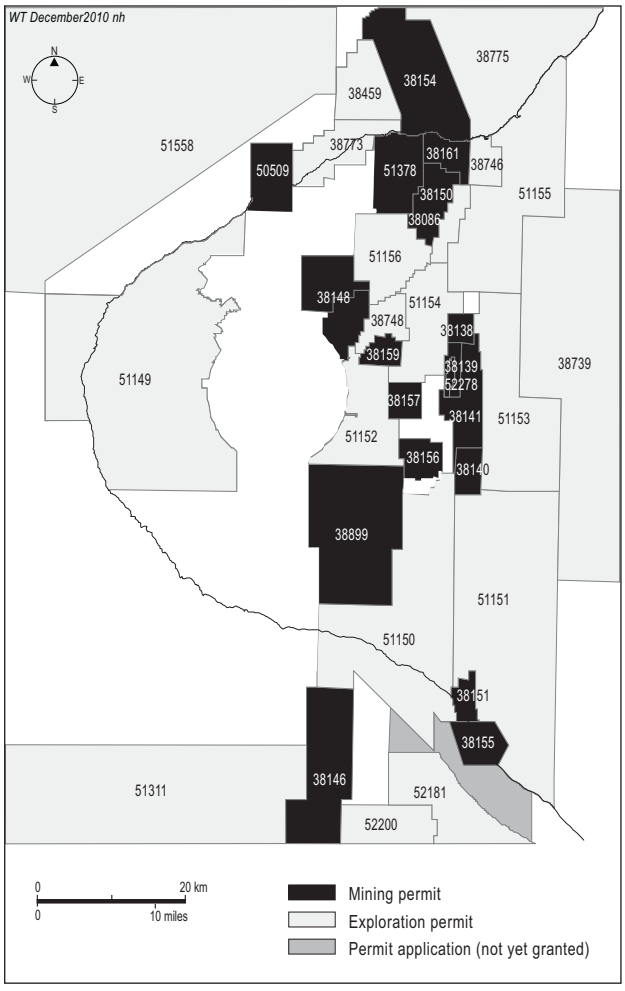
There are five 'active' petroleum mining permits that fall within, or that overlap, Ngāruahine's rohe on land and offshore out to 12 nautical miles.[4] They include the large-scale 'Kupe' and 'Kapuni' operations, the latter dating back to 1970. Details of these mining permits are as follows:

- Shell Todd Oil Services Limited (the operator), the Petroleum Mining Company Limited, and the Todd Petroleum Mining Company Limited hold mining licence 38839, the Kapuni operation, which covers 219 square kilometres of onshore area south-east of Mount Taranaki. It was granted on 1 January 1970 and expires on 13 December 2011.
- Cheal Petroleum Limited holds mining permit 38156, the 'Cheal and Cardiff' operation, which covers 30.3 square kilometres of onshore area immediately south of Stratford. It was granted on 26 July 2006 and expires on 25 July 2016.

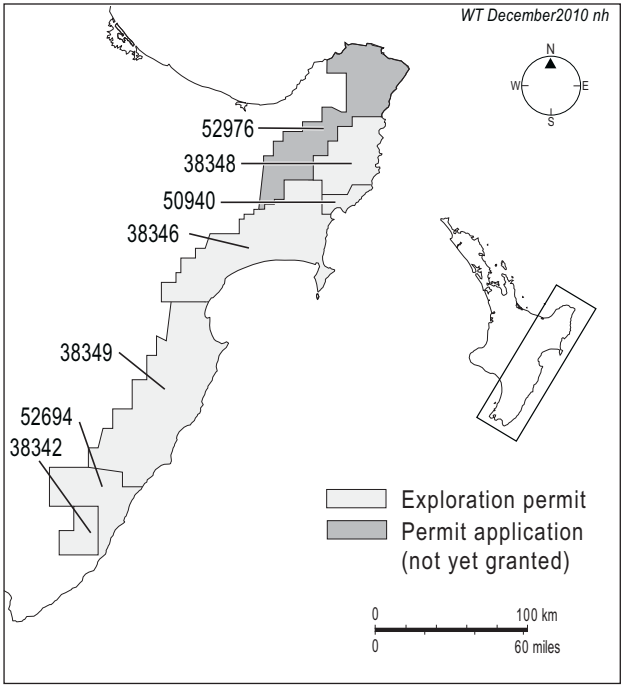
- The operator, Bridge Petroleum Limited, and various companies in the Greymouth group hold mining permit 38157, the 'Radnor' operation, which covers 22.5 square kilometres to the north of Stratford.[5] It was granted on 19 May 2005 and expires on 18 May 2015.
- The Greymouth Petroleum Acquisition Company Limited holds mining permit 38159, the 'Surrey' operation, which covers 19.4 square kilometres of onshore area surrounding Tariki. It was granted on 5 April 2007 and expires on 4 April 2017.
- Origin Energy Resources (Kupe) and several other companies hold mining licence 38146, the 'Kupe' operation, which covers 256.5 square kilometres of offshore area extending out from Ohawe on the coast.[6] It was granted on 1 February 1992 and expires on 13 November 2021.[7]

There are approximately five petroleum exploration permits (PEPs) that fall within, or that overlap, Ngāruahine's rohe. Details of these permits are as follows:

- Green Gate Limited holds PEP 51150, which covers 374.2 square kilometres of onshore area around, and offshore area adjacent to, Hawera. This PEP covers the largest portion of the onshore rohe and was granted on 23 September 2008 as a result of the Taranaki onshore blocks offer. It expires on 22 September 2013.
- Greymouth Petroleum Taranaki Limited and Greymouth Petroleum 2008 Limited hold PEP 51152, which covers 106.3 square kilometres of onshore area north-west of Stratford. It was granted on 23 September 2008 and expires on 22 September 2013.
- Greymouth Petroleum Taranaki Limited and Greymouth Petroleum 2008 Limited hold PEP 51154, which covers 96.1 square kilometres of onshore area to the east and south of Tariki, overlapping with Ngāruahine's rohe. It was granted on 23 September 2008 and expires on 22 September 2013.
- Kea Oil and Gas Limited holds PEP 52200, which covers 184.1 square kilometres of offshore area that falls mostly within the 12 nautical mile limit and lies south-east from the Waihi Stream. It was granted on 22 October 2010 and expires on 21 October 2015.
- NZOG Development Limited holds PEP 51311, which covers 2,985 square kilometres of offshore area to the south-west from Waihi Stream, a small part of which falls within the 12 nautical mile limit.[8] It was granted on 27 January 2009 and expires on 26 January 2014.



Map 5: Petroleum permits in Taranaki, 2010



Map 6: Petroleum permits on the East Coast, 2010

At the Tribunal hearing, three witnesses gave evidence for Ngāruahine. Each is the key contact person for her hapū in its dealings with the Crown about the petroleum resource: Tihi (Daisy) Noble (Kanihi hapū), Maria Robinson (Ngāti Manuhiakai hapū), and Mere Brooks (Okahu Inuawai hapū).

These witnesses' briefs of evidence were accompanied by several thousand pages of supporting documents. Many relate to the witnesses' own extensive experiences with local and central government bodies in connection with the petroleum resource. Most of the documents are publications of New Zealand Government agencies and local authorities, and articles and papers about overseas jurisdictions' approaches to petroleum management issues.

Another brief of evidence filed by Ngāruahine was by Michael Dreaver, who, in 2003, was contracted by the MED to report on Māori participation in the *Minerals Programme for Petroleum* (MPP). That report was appended to his brief of evidence.

Lawyers Tom Bennion and Niki Sharp represented the Ngāruahine claimants at the hearing.

We note that the submissions filed on behalf of the Ngāruahine claimants before the April 2010 hearing, including the substantial document filed in April 2009,[9] were prepared by their lawyer of many years' standing, Deborah Edmunds. Ms Edmunds was not available to attend the hearing.

3.1.2 Ngāti Kahungunu (Wai 852)

The claim by William Blake of Wairoa, Toro Waaka of Napier, Marei Apatu of Hastings, and Murray Hemi of Masterton, made on behalf of Ngāti Kahungunu, relates to petroleum resources within the Ngāti Kahungunu rohe. The rohe is described as:

> the area on the east coast of the North Island in New Zealand stretching from Mahia Peninsula in the north to Cape Palliser and Lakes Ōnoke and Wairarapa in the south and inland to the shores of Lake Waikaremoana and to the Kaiweka, Kaimanawa, Ruahine, Tararua and Rimataka Ranges to the west, including all riverbed, lakebed, foreshore and seabed areas within or adjacent to those areas.[10]

Information from the MED shows that the East Coast petroleum basin within the Ngāti Kahungunu rohe remains largely under-explored but is considered to have good exploration potential. Counsel for the Ngāti Kahungunu claimants advised the Tribunal that the numerous onshore and offshore PEPs granted in the claimants' rohe in the decade to May 2010 had been consolidated into three large PEPs 'covering all but the southernmost and inland reaches' of the rohe. Those three PEPs are as follows:

- Westech Energy New Zealand holds PEP 38346, which covers 5,582 square kilometres of onshore area

from south Wairoa to just north of Napier. This permit was granted on 3 July 2006 and expires on 2 July 2011.

- Orient Petroleum (NZ) Limited holds PEP 38349, which covers 6,860.5 square kilometres of onshore area from just north of Napier to northern Wairarapa. This permit was granted on 8 November 2006 and expires on 7 November 2011.
- Discovery Geo Corporation holds PEP 38342, which covers 902.8 square kilometres centred around Masterton. This permit was granted on 28 June 2004 and expires on 27 June 2014.[11]

Since May 2010, a further PEP – PEP 52694 – has been granted to East Coast Energy Ventures Limited, covering 2,230 square kilometres north of Masterton. This permit was granted on 24 November 2010 and expires on 23 November 2015.[12]

At the Tribunal hearing, Toro Waaka gave evidence for the Ngāti Kahungunu claimants. Other witnesses' briefs of evidence, filed for the stage 1 petroleum inquiry, were also relied on. Lawyers Grant Powell and Roimata Smail represented the Ngāti Kahungunu claimants.

3.1.3 Claimants with watching briefs

Many other claims that have been made to the Tribunal raise issues about the Crown's management of the petroleum resource. Before the April 2010 hearing, a number of claimant groups and individuals were granted leave to maintain a watching brief in this inquiry.[13] That status limited their role to observers with the ability to apply for leave to make oral or written submissions, or to question witnesses, on particular points. Two claimant groups with watching briefs – Otaraua Hapū (Wai 2262) and Ngā Hapū o Poutama (Wai 1747) – were granted leave to present evidence, question witnesses, and make submissions during the hearing.

Otaraua is a hapū of Te Atiawa in Taranaki. Its rohe is described as 'extending from the Onaero River to the Mangaoraka River inland to Taramouku Stream, including the Rimutauteka from Mangaone Stream to Ngahuinga (where the Waitara and Manganui Rivers meet)'.[14] (See map 10.) Donna Eriwata (Otaraua Hapū's manager) and David Doorbar (Otaraua Hapū's chairman) gave evidence for the Wai 2262 claimants. They were represented by lawyer Liana Poutu.

Ngā Hapū o Poutama are connected to both Ngāti Tama and Maniapoto. Their landward rohe is described as beginning at the Waikaramuramu Stream and running 'north to Onetai, inland east to the Herangi Ranges to Te Matai, south across to Umukaimata then to Ohura, Tangarakau to Tahora Paroa, and west to the sea at Waikaramuramu'.[15] Haumoana White gave evidence for Ngā Hapū o Poutama, who were represented by lawyers Annette Sykes and Miharo Armstrong.

One other claimant with a watching brief, Herewini Kaa (Wai 39), was granted leave to make written submissions on the newly adopted United Nations Declaration on the Rights of Indigenous Peoples.

At the hearing, Ata Tuahui and Rata Pue sought and were granted leave to present submissions and evidence on behalf of Muru me te Raupatu mo ngā Hapū o Ngāruahine. That group is described as comprising the representatives of four of the six groupings of Ngāruahinerangi, the original Wai 796 claimant.[16]

3.1.4 The Crown

The Crown called one witness in the inquiry – Rob Robson, manager (petroleum and minerals policy) for the Crown Minerals Group of the MED, whose brief of evidence was accompanied by numerous relevant documents. The Crown also relied on written evidence filed for the earlier petroleum inquiry, the audio record of Crown witness Evelyn Cole's evidence and questioning at that inquiry, and further documents filed, at the Tribunal's request, in this inquiry.

Lawyers Virginia Hardy, Helen Carrad, Sarah Inder, and Ben France-Hudson represented the Crown at the hearing. Ms Carrad presented the Crown's closing submissions.

3.1.5 Local government participation

In February 2010, the Tribunal invited the local councils in the Taranaki and Wairoa regions – particularly the Taranaki Regional Council (the TRC), the South Taranaki District Council (the STDC), and the Wairoa District Council – to participate in the inquiry as interested parties.[17]

The TRC and the STDC very helpfully agreed to present evidence about their roles in the petroleum resource management regime. Two witnesses gave evidence: Alan (Fred) McLay, director (resource management) for the TRC, and Blair Sutherland, planning manager for the STDC. Both councils also supplied various policy and other documents to the Tribunal. The two councils were represented at the hearing by lawyer Matt Conway.

The Wairoa District Council chose to be involved in the inquiry by way of watching brief. To assist the Tribunal, the council filed several chapters from its district plan, as well as information about petroleum-related activities in the Wairoa district.

3.1.6 Tribunal-commissioned witness

The Waitangi Tribunal commissioned planning expert Sylvia Allan to present evidence on the role of local councils in the petroleum regulatory regime, with particular focus on the councils' engagement with Māori.

3.2 The Hearing

The four-day hearing of evidence was held at Aotearoa Marae in Okaiawa, south Taranaki, from 16 to 19 April 2010. Closing submissions were presented on 6 May 2010 at the Wellington District Court.

3.3 Subsequent Submissions and Evidence

After the hearing, several further submissions were filed by claimant and Crown counsel, mainly concerning the Crown's review of the Crown Minerals Act 1991 (the CMA), the process for which could have led to a Bill being introduced before the Tribunal reported on the current claims.[18] Submissions and supporting documents were also filed by Vector Energy. These related to statements made in Ngā Hapū o Poutama's evidence and submissions.[19] In late October 2010, the Tribunal advised that it intended to make its report available by mid-December, and it asked the Crown to consider the report before completing its review of the CMA.[20] On 16 December, Crown counsel advised the Tribunal that the timeframe for the review had been extended and that, if the Tribunal's report were released before the end of 2010, there would be time for the Government to consider it before making policy decisions.[21] A pre-publication version of the current report was issued by the Tribunal on 22 December 2010. The present, published version was released in early April 2011.

3.4 The Issues

This inquiry focuses on New Zealand's legal regime for the management of the petroleum resource and, in particular, its effects on Māori interests in the resource and in the environment that might be affected by petroleum exploration and mining activities.[22] The claimants' case is that the regime is characterised by three systemic problems:

- The substance of the law is biased against Māori interests in the natural world and in their culture, in favour of conflicting interests.
- The processes established to apply the law fail to ensure that there is effective participation by Māori to safeguard their interests, and those processes actually deter, and sometimes deny, Māori involvement.
- Māori communities do not have the capacity to overcome the obstacles to their effective participation in the system because there are no reliable and sufficient sources of assistance available to them.

The combined effect of these problems, the claimants submitted, is that the interests of Māori in the natural world and in their culture are being denied and damaged,

in breach of the principles of the Treaty of Waitangi. In response, the Crown argued that the substance of the CMA and the the Resource Management Act 1991 and the processes by which those laws are applied are consistent with the Treaty. In particular, the law provides Māori with an appropriate role in decision-making about the management of the petroleum resource and any possible adverse effects on the environment and Māori culture. That role, we were told, allows Māori to put their interests to decision-makers through fair, good-faith consultation and to have those interests given their due weight in any decisions that are made under the petroleum management regime.

The Tribunal's jurisdiction is to assess the Crown's conduct, by its policies, legislation, and officials' actions, for its consistency with the principles of the Treaty of Waitangi.[23] In the next chapter, we provide an outline of the law that is relevant to this inquiry.

Text notes

1. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), fig 4
2. Claim 1.1(a), p 1
3. Crown Minerals Group, 'Taranaki Basin', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms/petroleum/petroleum-basins/taranaki-basin (accessed 3 December 2010)
4. Ngā Hapū o Ngāruahine describe their rohe as including the continental shelf, but we have limited our discussion to permits on land and within the territorial sea, because the information available does not allow us to make reliable assessments beyond that. We note, however, that, in the exclusive economic zone approximately adjacent to Ngā Hapū o Ngāruahine's rohe, there are numerous petroleum exploration permits and at least one petroleum mining permit in operation: see Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010); 'Maritime Boundary Definitions', Land Information New Zealand, http://www.linz.govt.nz/hydro/nautical-info/maritime-boundaries/definitions/index.aspx (accessed 30 November 2010). As noted in chapter 1, we use the term 'permit' when referring to both permits and licences.
5. The owners of permit 38157 are: Greymouth Petroleum Acquisition Company Limited (33.33 per cent), Greymouth Gas Turangi Limited (6.25 per cent), Greymouth Gas Kaimiro Limited (7.53 per cent), Greymouth Gas Parahaki Limited (6.25 per cent), and Greymouth Petroleum Turangi Limited (4.97 per cent). Bridge Petroleum Limited owns 41.67 per cent.
6. The owners of permit 38146 are GP No 5 Limited (4 per cent), Mitsui E&P Australia Proprietary Limited (4 per cent), Kupe Mining (No 1) Limited (17.81 per cent), Kupe Holdings Limited (16 per cent), Nephrite Enterprises Limited (1 per cent), Origin Energy Resources (Kupe) Limited (32.19 per cent), GP No 2 Limited (11 per cent), National Petroleum Limited (12.75 per cent), and Petroleum Equities Limited (1.25 per cent): see Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010).
7. Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010)
8. Ibid
9. Document D4
10. Claim 1.2(a), p 2
11. Document E31, pp 3–4; docs E31(c)(A1)–(A3)
12. Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 4 December 2010)
13. Those with watching briefs who took no other role in the inquiry are Ngāti Kahungunu ki Wairoa (Wai 621), Te Rūnganui o Te Pakakohi Trust Incorporated (Wai 99), Te Rūnanga o Ngāti Ruanui and Ngāti Koata (Wai 566), Te Rūnanga o Ngāti Porou (Wai 272), and various claimant groups from the East Coast and Te Rohe Pōtae Tribunal inquiry districts (Wai 74, Wai 849, Wai 901, Wai 1082, Wai 1089, Wai 1269, Wai 1300, Wai 1337, Wai 1409, Wai 1498, Wai 1974, Wai 1975, Wai 1976, and Wai 1866). See appendix I for a full list of parties to the Wai 796 inquiry and their legal representatives.
14. Document D2, p 2
15. Document E15, p 1
16. Document E33, p 1
17. Paper 2.115, para 7
18. Papers 2.185, 2.188–2.190, 2.192–2.194, 2.196, 2.198–2.200
19. Documents E38, E38(a)–(m), E45
20. Paper 2.201
21. Paper 2.202
22. The Tribunal's *Petroleum Report* (Wellington: Legislation Direct, 2003) indicated that a further report would also examine the process by which the Crown devised the regulatory framework for petroleum.

However, in submissions made in 2009, the main claimants, Ngā Hapū o Ngāruahine (Wai 796) and Ngāti Kahungunu (Wai 852), and the Crown advised that they no longer intended to explore that process.

23. Treaty of Waitangi Act 1975, s 6(1)

Map notes

Map 5: Crown Minerals Group, 'Permits – Current Permits (Map View)', Ministry of Economic Devlopment, http://www.crownminerals.govt.nz/cms/petroleum/permits-content/permits-landing-page-content/permits-current-permits-map-view (accessed 30 November 2010)

Map 6: Ibid

Downloaded from www.waitangitribunal.govt.nz

CHAPTER 4

THE RELEVANT LAW

4.1 Introduction

The two key statutes that control the use of the petroleum resource are the Crown Minerals Act 1991 and the Resource Management Act 1991. Other relevant legislation includes the Historic Places Act 1993, the Maritime Transport Act 1994, and the Local Government Act 2002.

The claimants' case and the Crown's response (which are examined in the following chapters) cannot be understood without an appreciation of the relevant law. This chapter sets out the main features of the law. Its purpose is twofold: to provide readers with a ready insight to the complex regulatory regime for the petroleum resource and to serve as a reference document for later chapters' discussion of elements of the regime.

4.2 The Crown Minerals Act 1991

4.2.1 Treaty clause – section 4

The Crown Minerals Act 1991 (the CMA) provides for the management of Crown-owned minerals (petroleum, gold, silver, and uranium) by the Minister of Energy. Section 4 provides that all persons exercising functions and powers under the Act 'shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

4.2.2 Administration of the Act

The Ministry of Economic Development administers the CMA. The Ministry's Crown Minerals Group processes the permits issued under the Act and assists the Minister to carry out his or her functions concerning the Crown mineral estate. These include preparing and reviewing the *Minerals Programme for Petroleum*, granting petroleum permits, and monitoring the effect and implementation of the minerals programme and permit regime (section 5).

The nature of the Minister's decisions on the matters covered by the CMA means that none is subject to appeal to a court. The only course available to a dissatisfied person affected by a decision would be to commence judicial review proceedings in the High Court. The grounds for the successful review of decisions such as those of the Minister's under the CMA, which are made in the exercise of a discretion, are very narrow.[1]

4.2.3 Petroleum defined

The CMA declares petroleum in its natural state to belong to the Crown (section 10). Petroleum is defined to include the gaseous, liquid, and solid forms of naturally occurring hydrocarbons (except coal) and naturally occurring mixtures of such hydrocarbons and certain other chemicals (section 2).

4.2.4 Limits of Crown ownership and further rights

The New Zealand Parliament cannot make law for areas outside New Zealand except to the extent allowed by international law. When the Petroleum Act 1937 nationalised petroleum, the territorial limits of New Zealand extended to three nautical miles from shore. The petroleum within the landmass of New Zealand and within that three nautical mile offshore limit was declared to be Crown property by the Act. Nowadays and since 1977, New Zealand's territorial waters extend to 12 nautical miles from the shore, and the CMA applies in that area just as it does on dry land.[2] Thus, section 10 of the CMA applies to make petroleum in its natural state in New Zealand, including in its 12 nautical mile territorial sea, the property of the Crown.

Under international law, New Zealand has exclusive rights over the petroleum resource in a vast area of the seabed beyond the territorial sea, which, generally speaking, extends either to 200 nautical miles offshore (the exclusive economic zone or EEZ) or even further where the continental shelf carries on beyond that (see map 7). In that huge area, of approximately 5.5 million square kilometres, the Crown does not own the petroleum resource but allocates exploration and mining rights to it and obtains a royalty from its production.

There are a number of international law instruments that underpin New Zealand's authority with regard to petroleum offshore. The first two both came into force in 1964: the United Nations Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf. Both were replaced by the United Nations Convention on the Law of the Sea, which New Zealand signed in December 1982 and ratified in July 1996. By that time, the third incarnation of the convention had come into force, in 1994. It is article 3 of the convention that is the source of the 12 nautical mile territorial sea. Article 55 provides for the EEZ, stating that it is 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part', and article 57 provides the 200 nautical mile boundary for the EEZ. The boundaries for the continental shelf and methods for delineating them are provided in article 76, but a basic explanation is found in paragraph 3, which states that:

> The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

As a result of New Zealand's geography, the offshore area over which New Zealand exercises authority to allocate rights to petroleum is the fourth largest in the world. As was noted in chapter 1, the greater part of New Zealand's oil and gas production in the past 40 years has come from offshore mining in the area beyond the 12 nautical mile territorial limit.

4.2.5 The *Minerals Programme for Petroleum*

The framework of the law that regulates petroleum exploration and mining – onshore and offshore – is set out in the CMA. It is fleshed out by the *Minerals Programme for Petroleum* (the MPP), for which the Minister of Energy is responsible (section 13). The MPP contains the detail of, and the reasons for, the policies and procedures that implement the CMA's provisions for petroleum (section 15). The MPP must be reviewed and replaced at least every 10 years (section 20).

The MPP was first issued on 1 January 1995 and was reviewed during 2003 and 2004. The current MPP, which took effect on 1 January 2005, is a publication of some 120 pages. Much of it is dedicated to detailing the mechanics

Map 7: New Zealand's exclusive economic zone and continental shelf

of the permit system that governs petroleum prospecting, exploration, and mining, and to explaining the royalty regime that applies to discoveries of petroleum.

4.2.6 Permit system

The CMA provides that the Minister of Energy must allocate a permit before anyone can prospect or explore for or mine petroleum (section 8(1)). Permits can be granted on 'such conditions as the Minister thinks fit' (section 25(1)), including those relating to fees and royalties (section 34). A breach of conditions can lead to a permit's revocation (section 39). Exploration permits are allocated by means of a block offer, which is a competitive tendering process in which a large area of land (a block) is offered for exploration activities.[3]

Prospecting, Exploration, and Mining

Prospecting relates to low-impact activities such as geophysical and geochemical surveys and sampling by hand. A permit for prospecting usually covers a broad area because the petroleum company will use the permit to assess where more concentrated activities should occur. A prospecting permit will be for a maximum period of two years but may be extended for a further two years. It does not give the permit holder the right to an exploration permit.

Exploration involves a more intensive investigation of an area to assess the presence or size of oil or gas deposits and the feasibility of extraction. It usually involves detailed geophysical surveying and drilling of the land. An exploration permit will be for a maximum period of five years but may be extended for a further five years. It carries with it the right to a subsequent mining permit, if petroleum is found.

Mining involves the extraction of oil and gas. Mining permits cover a very concentrated area and may last for up to 40 years. A mining permit will usually arise as a result of a successful exploration permit.

4.2.7 Land access for permit holders

The CMA specifies the rights that permit holders have to access land covered by their permits and the rights of landowners and occupiers to prevent that access in certain circumstances (sections 47 to 80). Generally, a permit holder can enter land to conduct 'minimum impact activities' once 10 working days' notice has been given to the landowner and occupier (section 49). Where land is Māori land, additional requirements apply: the permit holder must notify the local iwi authority and make reasonable efforts to consult the owners (section 51(1)). But where land is Māori land and is regarded as a wāhi tapu by the tangata whenua, a permit holder cannot enter to conduct minimum impact activities unless the owners have given consent (section 51(2)).

When a permit holder wants to enter land to conduct more than minimum impact activities, then either the consent of each landowner and occupier must first be obtained (with any conditions that they negotiate) or an arbitrated access arrangement must be made (section 53). Such an arrangement will grant the permit holder access to the land on what the arbitrator determines to be reasonable conditions, including the payment of compensation (section 70). In other words, the arbitrator cannot prohibit the permit holder from obtaining access to the land. The only circumstances in which a landowner or occupier will be able to prevent an arbitrated access arrangement from being made are those that fall within section 55(2), where the land concerned is used for certain purposes or is of a certain description, namely:

(a) Any land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 to the Conservation Act 1987:

Definition of 'Minimum Impact Activity'

'Minimum impact activity' is defined in section 2 of the CMA to include such things as geological, geochemical, and geophysical surveying; aerial and land surveying; and the taking of samples by hand. It excludes such things as the cutting, destroying, removing, or injuring of any vegetation on other than a minimum scale; the use of explosives; damage to improvements, stock, or chattels on any land; and any breach of the provisions of any Act, including provisions relating to protected native plants, water, noise, and historic sites.

(b) Land subject to an open space covenant in terms of the Queen Elizabeth the Second National Trust Act 1977:
(c) Land subject to a covenant in terms of the Conservation Act 1987 or the Reserves Act 1977:
(d) Land for the time being under crop:
(e) Land used as or situated within 30 metres of a yard, stockyard, garden, orchard, vineyard, plant nursery, farm plantation, shelterbelt, airstrip, or indigenous forest:
(f) Land which is the site of or situated within 30 metres of any building, cemetery, burial ground, waterworks, race, or dam:
(g) Land having an area of 4.05 hectares or less.

The CMA's provisions for access to land for the purpose of petroleum prospecting, exploration, and mining are more favourable to the permit holder than those for other Crown-owned minerals. For other minerals, when a landowner or occupier does not consent to a permit holder having access, a compulsory arbitrated access arrangement cannot be made (section 55(1)) unless the Governor-General declares, by Order in Council, that such an arrangement is to be made (section 66).

In the earlier petroleum inquiry, Crown witness Evelyn Cole gave the reason for the compulsory arbitrated access provision in relation to petroleum. She said that Parliament had decided:

> because of the national strategic importance of petroleum to New Zealand, that there would be a presumption in favour of permit holders being able to access the resource. The clear intent of the legislation is that access will be amicably determined between the permit holder and the land owner and occupier. However, if this does not occur, the permit holder can seek an arbitrator to achieve a fair access arrangement.[4]

A petroleum permit holder who wishes to enter Crown land must reach an access arrangement with the appropriate Minister of the Crown, who will have regard to specified factors (section 61). Certain categories of public conservation land (including national parks and marine, nature, and scientific reserves) cannot be the subject of an access arrangement, except for specified limited purposes (section 61(1A) and schedule 4). Finally, access to any Crown land for activities connected with petroleum can be prohibited by the Governor-General by an Order in Council made on the recommendation of the Minister of Energy and the Minister in whom the land is vested (section 62).

4.2.8 Land excluded from permitting regime or particular permits: section 15(3)

Among the key provisions of the CMA for present purposes is section 15(3), which provides:

> On the request of an iwi, a minerals programme may provide that defined areas of land of particular importance to its mana are excluded from the operation of the minerals programme or shall not be included in any permit.

It was by virtue of section 15(3) that the 1995 MPP excluded from the petroleum permitting regime the lands above sea level of Mount Taranaki and the Poukai, Pukeiti,

and Kaitake Ranges within Egmont National Park. As a result of consultation with Ngāi Tahu in the review of the MPP, the Tītī and Beneficial Islands (above sea level) are now also excluded from petroleum prospecting, exploration, and mining.[5] The total area excluded from the 2005 MPP is 33,765 square hectares.[6]

The 2005 MPP explains the basis upon which the Minister is to make the decision to grant or refuse a request to exclude particular land from the entire permitting regime (as above) or from a particular permit:

> In evaluating such requests, matters that the Minister must take into consideration include, but are not limited to, the following:
>
> - What it is about the area that makes it important to the mana of iwi and hapu;
> - Whether the area is a known wahi tapu site;
> - The uniqueness of the area; for example, whether it is one of a number of mahinga kai (food gathering) areas or the only waka tauranga (the landing places of the ancestral canoes);
> - Whether the importance of the area to iwi and hapu has already been demonstrated, for example by Treaty claims and settlements and objections under other legislation;
> - Any Treaty claims which may be relevant and whether granting a permit over the land would impede the prospect of redress of grievances under the Treaty;
> - Any iwi management plans in place in which the area is specifically mentioned as being important and should be excluded from certain activities;
> - The area's landowner status. If the area is one of the special classes of land in section 55, landowner veto rights may protect the area;
> - Whether the area is already protected under other legislation, for example the Resource Management Act 1991, Conservation Act 1987, Historic Places Act 1993; and
> - The size of area and value of the potential resource affected if the area is excluded.[7]

A provision that might be relevant to a submission to the Minister requesting the exclusion of land from the petroleum permitting regime is section 17(7), which enables information provided about the land to be kept confidential in certain circumstances:

> Notwithstanding the provisions of the Official Information Act 1982, where a request is made by any person for disclosure of information contained in a submission, the Department or Minister to whom the request was made may refuse to make the information available where the Department or Minister is satisfied that such refusal is necessary to avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu and, in the circumstances of the particular case, the importance of avoiding such offence or disclosure outweighs the public interest in making that information available.

The provision thus gives the Minister a discretion to keep confidential any information supplied in support of an iwi's application under section 15(3), provided that there is no countervailing public interest in its disclosure.

4.2.9 Schedule 4 lands

Access to the Crown land listed in schedule 4 to the CMA is excluded for all but minimum-impact and other specified low-impact mining activities. The land covered by schedule 4 amounts to 34,500 square kilometres, or 15 per cent of New Zealand's land area, plus 12,670 square kilometres of offshore marine reserves. It includes all land administered under the National Parks Act 1980, wilderness areas under the Reserves Act 1977 or the Conservation Act 1987, marine reserves under the Marine Reserves Act 1977, and wetlands of international importance.[8]

4.2.10 The MPP's interpretation of Treaty clause

The MPP's explanation of how section 4 of the CMA is interpreted and applied has two focal points:

- the mechanisms available for excluding areas of particular importance to iwi from the operation of the MPP or from particular permits; and
- the Minister's and officials' commitment to consultation with iwi and hapū in the process of making key permitting decisions.

The relevant Treaty principles are described in this way:

> **3.2** The requirement to have regard to the principles of the Treaty gives rise to important obligations that apply to the Crown. The Minister and the Secretary must act in accordance with these principles when exercising powers under the Act. This requirement will be carried out with reference to the following principles:
>
> - The Crown will act reasonably and in utmost good faith to its Treaty partner;
> - The Crown must make informed decisions;
> - The Crown must have regard to whether a decision will impede the prospect of redress of grievances under the Treaty (this will be more relevant where there is an application for a permit in respect of land or resources that is the subject of a claim before the Government or the Waitangi Tribunal); and
> - The Crown has responsibilities in relation to active protection and, as prospecting, exploration or mining may impact upon lands, waters or other properties protected by Article 2 of the Treaty, various mechanisms are available for excluding areas of particular importance to iwi from the operation of the Minerals Programme.[9]

(1) *Exclusion of land*

The 'various mechanisms' identified in the MPP extend beyond the CMA's provisions in section 15(3) – concerning land of particular importance to the mana of iwi – and section 51(2) – concerning wāhi tapu being immune from minimum impact activities. They also include other Acts' provisions which can provide protection from mining activities for reasons connected to Māori interests. The MPP states:

> The [Crown Minerals] Act is complemented by the Resource Management Act 1991, which promotes the sustainable management of natural and physical resources. The Resource Management Act 1991 requires all decision makers to take into account the principles of the Treaty of Waitangi, to have particular regard of kaitiakitanga, and to recognise and provide for the relationship of Maori with their ancestral lands and wahi tapu as matters of national importance. Where iwi and hapu are concerned that petroleum prospecting, exploration or mining may have an impact on surface land areas or features of significance, the Resource Management Act 1991 provisions could be used to protect taonga and wahi tapu areas. There are also provisions in the Conservation Act 1987 and the Historic Places Act 1993 which may be appropriate to use.[10]

(2) *Consultation – when and how conducted*

The MPP sets out three occasions when consultation with iwi and hapū will occur:

> **3.4** In relation to the management of the petroleum resource under the Act, consultation is a process in which the Minister and Secretary are committed to meaningful discussion with iwi and hapu and are receptive to those Maori views and give those views full consideration. This process is seen as operating on three levels. These are:
>
> (a) The preparation of the Minerals Programme for Petroleum. . . .;
>
> (b) Planning in respect of Petroleum Exploration Permit Block Offers, which are the predominant form of petroleum permit allocation . . .; and
>
> (c) Decisions in relation to applications for petroleum permits (where the relevant issues have not already been

addressed), and applications for amendments to petroleum permits to extend the land or minerals.[11]

The MPP also sets out four principles that guide consultation with iwi and hapū:

> **3.5** It is important to note that each decision will be made having regard to the considerations in relation to the principles of the Treaty that are raised as a result of the consultation, taking into account the circumstances of each case. The consultation principles that will be followed in each case, however, are:
>
> (a) That there is early consultation with iwi and hapu at the onset of the decision making process aimed at informing the Secretary and the Minister of the Treaty implications of particular issues;
>
> (b) That sufficient information is provided to the consulted party, so that they can make informed decisions and submissions;
>
> (c) That sufficient time is given for both the participation of the consulted party and the consideration of the advice; and
>
> (d) That the Secretary and the Minister genuinely consider the advice, and approach the consultation with open minds and a willingness to change.[12]

4.3 The Resource Management Act 1991

4.3.1 Purpose, principles, and presumptions

The Resource Management Act 1991 (the RMA) 'replaced some 54 pre-existing statutes and endeavoured to provide a consistent framework for the management of natural and physical resources'.[13] Comprising nearly 800 pages of provisions, the Act applies to the land (which includes the subsurface), the air, and the water within New Zealand's territory, including the territorial sea.

The overarching purpose of the RMA is 'to promote the sustainable management of natural and physical resources' (section 5(1)). Those resources are defined in section 2 of the Act to include land, water, air, soil, minerals, energy, all forms of plants and animals, and all structures. 'Sustainable management', as defined, exempts petroleum (and other minerals) from being managed so as to sustain their potential to meet the needs of future generations (section 5(2)(a)).

The Act's purpose has primacy over the numerous matters, listed in sections 6 to 8, that must be considered by all people exercising powers and functions under the Act. The different form of words used to describe how the matters in each section are to be considered reveals that those specified in section 6 must be given the greatest weight, followed by those in section 7, and then those in section 8. Thus, those working under the Act must 'recognise and provide for' seven 'matters of national importance' specified in section 6, 'have particular regard to' 11 'other matters' specified in section 7, and 'take into account' the principles of the Treaty of Waitangi (section 8).

Among the matters of national importance specified in section 6 are:

- 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (section 6(e));
- 'the protection of historic heritage from inappropriate subdivision, use, and development' (section 6(f)); and
- 'the protection of recognised customary activities' (section 6(g)).

One of the 'other matters', specified in section 7(a), is 'kaitiakitanga', which is defined in section 2: '"kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'.

Section 17 provides that 'every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf

Sections 5, 6, 7, and 8 of the Resource Management Act 1991

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

(2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

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

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

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of recognised customary activities.

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

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) *Repealed.*

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

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

of the person'. That duty is not specifically enforceable, which indicates that the purpose of section 17 is to convey a fundamental theme of the legislation. Other basic themes, or presumptions, in the RMA about how resources should be managed include:

- that uses of land can take place unless they contravene a district or regional rule or a national environmental standard, in which case approval by means of a rule in a plan or a consent is needed (section 9);
- that all subdivisions, uses of the coastal marine area and of the beds of rivers and lakes, takings and uses of water, and discharges of contaminants into land, water, or air cannot take place unless a rule in a plan, a national environmental standard, or a consent allows the activity (sections 11 to 15).

The evidence of planning expert Sylvia Allan was that these presumptions tend to 'lead to a permissive approach to land use activities, particularly in rural areas'.[14] Ms Allan also noted that 'the minerals industry has been active in making submissions relating to rural areas, or rural zones, in plans to ensure that prospecting and sometimes exploration are permitted or controlled activities'.[15]

4.3.2 Decision-making devolved to local authorities

Local authorities comprise regional authorities and territorial authorities. The latter are made up of city and district councils. To a very large extent, the RMA relies on local authorities to carry out, by means of plans, the complex sets of functions, powers, and duties that the Act creates. Sections 30 and 31 of the Act set out extensive lists of the functions of regional councils and territorial authorities. The presumptions mentioned above are reflected in the respective functions of local authorities, with city and district councils being primarily responsible for land use planning and management (other than in the coastal marine areas) and regional councils being responsible for all other resources.[16]

An indication of the scope of regional councils' responsibilities may be obtained from the following, which are the first four of 13 functions listed in section 30(1) of the RMA:

> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
> (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
> (c) the control of the use of land for the purpose of—
> (i) soil conservation:
> (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:
> (iii) the maintenance of the quantity of water in water bodies and coastal water:
> (iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:
> (iv) the avoidance or mitigation of natural hazards:
> (v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:
> (ca) the investigation of land for the purposes of identifying and monitoring contaminated land:

The next paragraph of section 30(1) specifies regional council functions with respect to the coastal marine area, which extends to the outer limits of the territorial sea, or 12 nautical miles from shore. Those functions include 'the control (in conjunction with the Minister of Conservation) of land and associated natural and physical resources' (section 30(1)(d)(i)).

To perform its functions, a regional council must prepare and regularly review a regional policy statement. The general content of that statement, and the process for making it, are specified in sections 60, 61, and 62 of the RMA. There must be a regional coastal plan for each region, and a regional council may also prepare, review, and administer regional plans to address the range of resource issues

for which it is responsible, namely those relating to water, air, and any land uses of regional significance (sections 63 to 68).

The relationship between regional and territorial council functions can be seen by comparing the provisions of section 30(1) (above) with section 31(1), which sets out the functions of territorial authorities as follows:

> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
> (i) the avoidance or mitigation of natural hazards; and
> (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:
> (iii) the maintenance of indigenous biological diversity:
> (c) *Repealed.*
> (d) The control of the emission of noise and the mitigation of the effects of noise:
> (e) The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:
> (f) Any other functions specified in this Act.

District and city councils must prepare, regularly review, and administer a district plan dealing with the effects of land uses and the range of associated effects for which they are responsible (sections 72 to 76).

The combined effect of those provisions is that the activities and effects of petroleum prospecting, exploration and mining in New Zealand's territory will be regulated by various regional and district council plans. Regional plans for water, soil, and air will apply to onshore activities, as will district plans controlling land uses and their specified associated effects. Regional coastal plans, applying to the coastal marine area out to the 12 nautical mile limit, will govern petroleum exploration and mining activities in the territorial waters.

4.3.3 Transfer and sharing of local authority functions

A local authority can transfer any one or more of its functions, powers, or duties to a public authority, which includes any 'iwi authority' and any joint (regional and district) committee (section 33). Since 2005, it has been possible for a local authority to initiate a joint management agreement with one or more public authorities, iwi authorities, and groups representing hapū (sections 36B to 36E). Such an agreement can provide for the joint undertaking of any of the local authority's functions, powers, or duties relating to a natural or physical resource.

4.3.4 Processes for making policies and plans

The process of preparing and changing regional policy statements and regional and district plans is set out in schedule 1 to the RMA. The following steps are involved:

- the council carries out its own background studies and reviews relating to the issues of the district or region;
- before, simultaneously, or following its own studies, the council consults with the required agencies and the wider public;
- following consultation, a proposed plan is notified for submissions;
- submissions are received and summarised, and there is a further notification for further submissions in support of or opposition to submissions already lodged;
- submissions are heard by the council;
- any amendments to the plan's provisions are made and submitters are advised of the decisions; and

- submitters can lodge appeals to the Environment Court.[17]

While any policy development or planning that is done under the Act must keep 'at the forefront' section 5 of the RMA (its purpose), as well as the various matters listed in sections 6 and 7 and the principles of the Treaty of Waitangi (section 8), an additional analysis must be undertaken to satisfy section 32.[18] It requires a local authority to examine the extent to which each objective it has identified is 'the most appropriate way to achieve the purpose' of the Act and also whether, in light of their efficiency and effectiveness, the policies, rules, or other methods the local authority is proposing 'are the most appropriate for achieving the objectives' (section 32(3)). This analysis, the Tribunal was informed, puts 'an onus of proof' on the local authority with regard to any intervention beyond 'normal' zoning provisions. Particularly in rural areas, we were told, landowners are highly resistant to protective mechanisms being applied to private land, including the geographic identification of areas within which specific controls on activities are applied. This tends to narrow protection mechanisms so that they apply to localised 'items' rather than to wider areas which may contain a number of important wāhi tapu.[19]

With regard to opportunities for input by Māori, it is a specific requirement of the Act that a local authority, when preparing a regional policy statement, regional plan, or district plan, must 'take into account' any iwi management plan, which is defined as 'any relevant planning document recognised by an iwi authority, and lodged with the council' (sections 61(2A), 66(2A), and 74(2A)). A regional policy statement must also state the resource management issues of significance to iwi authorities in the region (section 62(1)(b)(i)). And schedule 1 to the Act requires consultation with iwi authorities: clause 2 states that a regional coastal plan must be prepared in consultation with iwi authorities of the region; clause 3 provides that a local authority, when preparing a proposed plan, must consult through iwi authorities with the tangata whenua of the area who may be affected. An 'iwi authority' is defined as 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so' (section 2).

Since 2005, local authorities must keep the contact details of each iwi authority in a region or district and any groups that represent hapū for the purposes of the RMA (section 35A(1)), and the Crown (through Te Puni Kōkiri) must provide information to local authorities about iwi authorities and hapū groups in the area (section 35A(2)). Also added in 2005 was clause 3B of schedule 1 to the RMA, which specifies what will count as consultation by a local authority with an iwi authority or hapū group whose details are recorded in accordance with section 35A. A local authority 'is to be treated as having consulted with' those bodies if it:

> (a) considers ways in which it may foster the development of their capacity to respond to an invitation to consult; and
> (b) establishes and maintains processes to provide opportunities for those iwi authorities to consult it; and
> (c) consults with those iwi authorities; and
> (d) enables those iwi authorities to identify resource management issues of concern to them; and
> (e) indicates how those issues have been or are to be addressed.

Also relevant is clause 5 of schedule 1, which requires a local authority to provide a copy of its proposed plan without charge to the tangata whenua of the area, again through iwi authorities.

4.3.5 When consents are required

All plans within a region must give effect to the regional policy statement. The rules in plans have the status of regulations and are enforceable (sections 68 and 76). Rules determine which activities can be done as of right and which require consents.[20]

The RMA divides activities with effects on natural and physical resources into six classes: permitted, controlled, restricted discretionary, discretionary, non-complying, and prohibited (section 77A(2)).[21] Local council plans

Resource Consents Issued by the the Taranaki Regional Council

From information provided to the Tribunal or available on the website of the the Taranaki Regional Council, we have compiled the following facts about resource consents issued for petroleum industry activities by the council. Our purpose in including this information is to give some sense of the industry's effects in RMA terms and the implications of that for local authorities.

- In the period 2002 to 2007, the regional council issued 1,289 resource consents for oil and gas exploration activities and 48 resource consents for production stations.
- By June 2008, hydrocarbon exploration activities had been issued 277 consents to discharge to land or surface water, and petrochemical processing had been issued 55. These represented 12.5 per cent of the consents of these types issued to all industry groups, second only to dairy farming, for which the majority of consents (1,868) were issued.
- In 2009, the petrochemical industry accounted for 11 of the 43 consents in place for discharges to the coastal marine area. This was the highest number for any use, followed by 'stormwater' (seven consents), 'other industry' (six), and 'municipal' (including sewage) and energy (five each).
- In its 2009 *State of the Environment Report*, the regional council attributed the increased number of consents for air discharges in Taranaki to increased levels of hydrocarbon (predominantly petroleum) exploration and production. The number of air discharge consents for emissions from hydrocarbon exploration had almost doubled from 76 in 2004 to 145 in 2009.
- The 145 consents for air discharges for hydrocarbon exploration in 2009 outnumbered those for all other industry types. The next largest emitting groups were 'other' and poultry farms, for each of which approximately 40 air discharge consents were issued.
- From 2003 to 2008, the amount of surface water allocated for hydrocarbon exploration increased from 4,074 to 9,229 cubic metres per day, while the amount allocated for petrochemical processing decreased from 65,538 to 62,239 cubic metres per day. Combined, hydrocarbon and petrochemical processing in 2008 accounted for 15 per cent of the total surface water allocated (compared with 16 per cent in 2003).
- Between 2003 and 2008, the amount of groundwater allocated for hydrocarbon exploration increased from 550 to 7,750 cubic metres per day, while for petrochemical processing it increased slightly from 5,384 to 5,734 cubic metres per day. Combined, petrochemical processing and hydrocarbon exploration accounted for 31 per cent of the total groundwater allocated in 2008 (compared with 27 per cent in 2003).
- In 2006 and 2007, the regional council carried out 135 inspections of exploration wells, 80 inspections of producing wellsites, and 72 inspections of production stations. In all cases, activities were found to be in compliance with resource consent conditions.

classify activities as belonging to one of those classes and make rules for each class (section 77A(1)). Section 87A sets out which classes of activity need a resource consent – the umbrella term for a land use consent, subdivision consent, coastal permit, water permit, or discharge permit – and the powers of the consent authority (usually the relevant local authority) in each case. The main features of the system are as follows:

- An activity classed as a 'permitted activity' is one that is expected to have no, or minimal, actual or potential adverse effects on the environment. A permitted activity does not require a resource consent as long as

it complies with the standards, terms, or conditions (if any) specified in a regional or district plan or proposed plan. If the activity does not comply with those standards, terms, or conditions, it will fall under one of the other classes of activity in the plan.

- A 'controlled activity' requires resource consent and:

> such consent must be granted, unless the consent authority . . . has insufficient information to determine whether or not the activity is a controlled activity. The local authority must specify in the plan or proposed plan the matters over which it has reserved control, and any conditions to be imposed on the resource consent are restricted to those matters.[22]

Again, the activity must comply with the standards, terms, or conditions specified in the plan or proposed plan or it will fall into another class of activity.

- A 'restricted discretionary activity' requires resource consent. 'The consent authority may grant consent with or without conditions or it may decline consent.'[23] The local authority must specify the matters on which it has reserved its discretion, and 'the power to decline consent and to impose conditions is restricted to those matters'.[24] Again, the activity must comply with the standards, terms, or conditions in the plan or proposed plan.
- A 'discretionary activity' requires resource consent, 'which may be granted with or without conditions, or may be declined'.[25] The activity must also comply with the standards, terms, or conditions in the plan or proposed plan.
- A 'non-complying activity' requires resource consent, which may be granted with or without conditions or may be declined. In granting consent, the consent authority must be satisfied either that adverse effects of the activity on the environment will be no more than minor or that 'the application is for an activity that will not be contrary to the objectives and policies of the relevant plan'.[26]
- A 'prohibited activity' must not be granted resource consent and no application for consent can be made for such an activity.

4.3.6 The consent process: notification and approvals

There is no requirement for an applicant for resource consent to consult with anyone in preparing an application. Nor is there any requirement for a consent authority to consult in determining the application. The authority will, however, need to determine whether an application for consent for an activity needs to be notified, either publicly or on a limited basis, to give people generally, or specific people, the opportunity to make formal submissions.

Before the RMA was amended in 2009, there was case law which gave rise to the presumption that:

> applications should be either fully publicly notified, or notified to a limited range of affected persons, unless the potential effects of the activity were assessed by the Council to be *de minimis*.[27]

Since the 2009 amendment, the RMA requires public notification in only three situations: if the effects of the activity are likely to be 'more than minor'; if the applicant requests it; or if a rule or a national environmental standard requires it (section 95A). In other situations, it is generally in the local authority's discretion whether to publicly notify an application. If it does not publicly notify, it must decide if there are any affected persons or affected order holders[28] in relation to the activity and, if there are, it must give them limited notification of the application (section 95B). An 'affected' person is one on whom the activity's adverse effects are minor or more than minor, but not less than minor (section 95E). In making its determination about who is 'affected' by an activity, the consent authority must disregard certain specified effects that the activity might have, including effects on persons who own or occupy the land in, on, or over which the activity will occur or any adjacent land (section 95D(a)). The consent authority must also disregard any effects on a person

who has given written approval to the application (section 95D(e)).

It has been suggested that the new RMA provisions will mean that applications for controlled activities will not be notified, applications for non-complying activities (unless of very modest impact) will generally be publicly notified, and applications for activities in between those two classes – restricted discretionary and fully discretionary activities – will be very carefully evaluated.[29] Any person notified can make a submission on the application and, if they do, they have the right to take part in any prehearing meetings or other processes, to request a hearing of the application, and to be represented at the hearing (sections 96 to 100). Submitters also have rights to appeal a decision to the Environment Court (section 120). The cost of lodging an appeal was increased in 2009 from $55 to $500.[30]

4.3.7 Multiple consents

The RMA provides for the integrated management of situations in which several consents are required to be obtained from one or more consent authorities (sections 102 and 103). Under section 102, joint hearings by different consent authorities are provided for, with a streamlined process for notifications, but each council must make a separate decision.

4.3.8 Central government responsibilities

The RMA confers a number of very important functions on the Minister for the Environment, including:

- recommending the issue of national policy statements and national environmental standards;
- intervening in, or making directions for, matters that are proposals of national significance;
- recommending the approval of applicants as requiring authorities or heritage protection authorities; and
- monitoring the effect and implementation of the RMA, including the relationship between the powers and functions of central and local government (section 24).

The nature of these functions is outlined below.

(1) *National policy statements*

The purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA (section 45(1)). A national policy statement will thus help local authorities decide how to balance competing national benefits and local costs. Among the 10 considerations the Minister may have regard to in determining whether it is desirable to prepare a statement is the presence of:

- anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to, New Zealand (section 45(2)(f)); and
- anything which is significant in terms of section 8 (Treaty of Waitangi) (section 45(2)(h)).

Apart from the national coastal policy statement, which is compulsory, the only other national policy statement issued to date is in respect of electricity transmission. There are four in various stages of development concerning renewable electricity generation, freshwater management, flood risk management, and urban development.[31] The process for developing a national policy statement generally involves four stages: scoping, drafting, consultation, and implementation.[32] Since 2005, before preparing a proposed statement, the Minister must 'seek and consider comments from the relevant iwi authorities' and from any other persons and organisations that the Minister considers appropriate (section 46). Any Minister can gain approval to scope a topic for a statement, but the Minister for the Environment will provide an overview and advisory role. Local authorities must take national policy statements into account when drafting their plans, and current plans must be amended to give effect to statements (section 55). Councils must also have regard to any statements in relation to individual resource consent applications (section 104).

(2) *National environmental standards*

National environmental standards are regulations prescribing technical standards, methods, or requirements

for environmental matters (sections 43 and 44). They must be enforced by all local authorities and so ensure a consistent approach and minimum standards throughout New Zealand.[33] Among other things, a national environmental standard can:

- prohibit an activity or expressly allow an activity that may otherwise be prohibited under the RMA (section 43A(1));
- state whether an activity is permitted or not and whether a particular activity is controlled, restricted discretionary, discretionary, or non-complying (section 43A(5), (6)); and
- specify activities for which a consent authority must give, or is precluded from giving, public notification of an application for a resource consent (section 43A(7)).

There are currently national environmental standards in effect for air quality, sources of human drinking water, telecommunications facilities, and electricity transmission. Standards in development relate to contaminants in soil, ecological flows and water levels, future sea-level rises, on-site wastewater systems, and plantation forestry.[34]

(3) *Direction for proposals of national significance*

Part 6AA of the RMA empowers the Minister for the Environment to direct any proposals (including plan changes or consent applications) that are of national significance to be decided by a board of inquiry or the Environment Court rather than by the normal procedure set out by the Act (section 142). In deciding whether to call in a proposal, the Minister must have regard to the views of the applicant and the local authority, to the capacity of the local authority to process the matter, and, if applicable, to any recommendations of the Environmental Protection Authority (sections 142(4) and 147(4)).

Proposals of national significance that have been called in relate to: undercover dairying in the Mackenzie Basin; the Turitea, Waikato, and Te Waka wind farm proposals; the Te Mihi geothermal power station; and Transpower's North Island grid upgrade project.[35]

(4) *Requiring authorities*

A network utility operator may obtain approval from the Minister for the Environment to be a requiring authority (section 167). A network utility operator includes someone who undertakes the distribution of gas or petroleum by pipeline (section 166). To obtain the status of a requiring authority, the Minister must be satisfied that approval is appropriate for the purposes of the project requested and that the applicant 'is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a requiring authority under this Act and will give proper regard to the interests of those affected and to the interests of the environment' (section 167(4)). The applicant must provide detailed information on the nature of the activity or project and explain why requiring authority status is needed. Many network utility operators have been approved as requiring authorities.[36] Ministers of the Crown and local authorities are automatically requiring authorities (section 166).

Having the status of a requiring authority allows a network utility operator to designate large areas of land for use as network utilities. Once a site is designated, the requiring authority is able to: proceed with the specific work on the site as if it were permitted by the district plan; control activities that occur on the site; prevent the landowner from doing anything that would compromise future work; apply to the Minister of Lands to compulsorily purchase or lease all or part of the land under the Public Works Act 1981; and enter private land to undertake investigations. While the designation gives the requiring authority 'permission' for activities under the district plan, it must still address all relevant matters under the regional plan, which may involve obtaining resource consents.[37]

(5) *Heritage protection authorities*

Any body corporate can apply to the Minister for the Environment for approval as a heritage protection authority for the purposes of protecting the special heritage qualities of a place or structure (section 188(1)). To give approval, the Minister must be satisfied that it is

appropriate for the protection of the place and that the applicant is likely to satisfactorily carry out the responsibilities, including financial responsibilities, of a heritage protection authority (section 188(5)). Once approved, the authority is able to give notice to the territorial authority of its requirement for a heritage order to protect a place of 'special interest' or of 'special significance to the tangata whenua for spiritual, cultural, or historical reasons' (section 189(1)(a)). A heritage order is a provision in a district plan which makes it compulsory for a person to obtain the written consent of the heritage protection authority before doing anything that would compromise the effect of the order (section 193). All Ministers of the Crown, all local authorities, and the Historic Places Trust are automatically heritage protection authorities (section 187).

Since the RMA was enacted, there have been five bodies approved as heritage protection authorities under section 188, although one has had its status revoked.[38] None of the bodies has obtained approval in respect of a place of special significance to tangata whenua.

(6) *Monitoring the implementation of the RMA*

The Minister for the Environment is responsible for monitoring the implementation of the RMA, including the relationship between the functions, powers, and duties of central and local government. To this end, the Minister can investigate any local authority's acts or omissions, make recommendations to a local authority about its performance, and, if necessary, appoint others to take over the exercise of part or all of a local authority's role (sections 24A and 25) The Minister can also direct a local authority to prepare or change a plan to address a resource management issue or to review all or part of its plans (sections 25A and 25B).

The Minister of Conservation has a more limited range of functions. These relate to New Zealand's coastal area and include:

- preparing and recommending New Zealand coastal policy statements;
- approving regional coastal plans;
- directing regional councils to review all or part of their regional coastal plans; and
- monitoring the effect and implementation of coastal policy statements and coastal permits for restricted coastal activities (sections 28 and 25B(2)).

4.4 Regulation beyond the Territorial Sea

The RMA does not apply beyond the 12 nautical mile limit of New Zealand's territorial sea. There is no comprehensive legal regime that seeks to prevent adverse environmental effects in that area. Some protection is provided, however, by the Maritime Transport Act 1994 and rules made under that Act, which focus on shipping and meeting international obligations in relation to shipping. In relation to oil rigs, the rules require the owners or operators to have plans in place to deal with oil spills and other discharges. The Maritime New Zealand webpage states:

> Part 130B [of the rules] requires owners of oil transfer sites (defined to include any site where oil is transferred to or from a ship, or offshore installation in any part of the sea inside the outer boundary of the exclusive economic zone of New Zealand) to have an oil spill contingency plan to assist personnel to deal with an unexpected discharge of oil.[39]

And:

> Part 200 provides rules for offshore installations to prevent pollution of the marine environment . . . It requires operators to develop a discharge management plan – a form of environmental management plan – which must be approved for all offshore installations and promotes the application of 'best practicable option' to prevent or minimise adverse effects on the environment arising from discharges.[40]

4.5 The Historic Places Act 1993

The purpose of the Historic Places Act 1993 is to 'promote the identification, protection, preservation, and

conservation of the historical and cultural heritage of New Zealand' (section 4(1)). In achieving its purpose, all persons exercising functions under the Act must recognise, among other things, 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga' (section 4(2)(c)).

The Act provides the Minister of Culture and Heritage and the Historic Places Trust with a range of means of identifying and protecting a historic place, area, wāhi tapu, or wāhi tapu area. ('Wahi tapu' is defined to mean 'a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense', and 'wahi tapu area' means 'an area of land that contains 1 or more wahi tapu' (section 2).)

'Archaeological sites', whether identified or not, are given blanket protection by the Act and cannot be modified or destroyed without authorisation from the Historic Places Trust (sections 10 to 14). The definition of such sites (section 2) means that they must contain physical evidence of human activity before 1900. An application to modify, damage, or destroy a site must be accompanied by an assessment of the values of the site, including any Māori values, and whether consultation with tangata whenua has taken place (section 11). Where the trust authorises the destruction of a site, conditions can be attached (section 14), which can include 'monitoring and compliance with any cultural protocols required by iwi' and what must be done if koiwi (human remains) are found.[41]

The Historic Places Act requires the trust to establish a register of historic places and wāhi tapu sites (section 22). This gives notice to local authorities of the sites, so they can take them into account when preparing their plans and when applications for resource consents are made that relate to the sites (see, for example, sections 32D to 34).

4.6 The Local Government Act 2002

The purpose of the Local Government Act 2002 is 'to provide for democratic and effective local government that recognises the diversity of New Zealand communities' (section 3). To that end, the Act provides for local authorities to play 'a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach' (section 3(d)). The Act is administered by the Department of Internal Affairs.

Section 4 of the Act is a response to the fact that the Crown cannot avoid its Treaty responsibilities by delegating its powers and functions to local authorities. It provides:

> **4. Treaty of Waitangi**—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.

Among the principles in part 2 of the Act are that a local authority should:

- 'conduct its business in an open, transparent, and democratically accountable manner';
- 'make itself aware of, and have regard to, the views of all of its communities';
- when making a decision, take account of the 'diversity of the community, and the community's interests, within its district or region';
- 'provide opportunities for Māori to contribute to its decision-making processes':
- 'collaborate and co-operate with other local authorities and bodies as it considers appropriate to promote or achieve its priorities and desired outcomes, and make efficient use of resources' (section 14(1)(a) to (e)).

Part 6 of the Act requires local authorities to follow certain practices when making decisions. Section 77 provides that, in its decision-making process, a local authority must identify all reasonably practicable options for

achieving the objectives of a decision, and if any of the options involves a 'significant decision in relation to land or a body of water', it must 'take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga' (section 77(1)(c)). These words echo those used in section 6(e) of the RMA, except that in the RMA the same matter is one of national importance, which decision-makers must 'recognise and provide for'.

The Local Government Act also requires local authorities to be proactive in encouraging Māori participation in local authority decision-making. Under section 81(1), a local authority must:

> (a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and
> (b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and
> (c) provide relevant information to Māori for the purposes of paragraphs (a) and (b).

Section 82 specifies the principles of consultation that local authorities must follow, including in their consultation with Māori. The principles emphasise the need for local authorities to provide user-friendly information to affected or interested persons about the subject matter, purpose, scope, and eventual outcome of the consultation. They also highlight the need for consultees to have time to formulate their views and appropriate opportunities to present them, and for local authorities to be open-minded in their consideration of consultees' views.

The final provisions of note here relate to the accountability of local authorities for performing their functions in the manner required or recommended by the Local Government Act. There are several provisions in the Act that require local authorities to prepare different kinds of policy statements and plans, as follows.

- *Triennial agreements:* section 15 requires all local authorities in a region, by 1 March after each triennial general election of members, to enter an agreement containing protocols for communication and coordination among them during the period until the next triennial general election.
- *Local governance statements:* section 40 requires a local authority to prepare and make publicly available, after the triennial election, a local governance statement that includes information on 15 listed matters, including the functions, responsibilities, and activities of the local authority; the bylaws; the electoral system; the representation arrangements; the governance structures; and the policies for liaising with, and memoranda or agreements with, Māori (section 40(1)(a) to (n)).
- *Long-term council community plan:* section 93 requires a local authority to have, at all times, a long-term community plan covering a period of 10 years and prepared using the 'special consultative procedure' prescribed by section 83. Copies of this plan must be sent to the Secretary for Local Government, the Auditor-General, and the Parliamentary Library. (section 93(10)).

  The purpose of the long-term plan is six-fold, as set out in section 93(6)(a) to (f), and includes 'to describe the activities of the local authority', 'to describe the community outcomes of the local authority's district or region', and to 'provide a basis for accountability of the local authority to the community'.

  The plan must include the information required by part 1 of schedule 10 to the Local Government Act. Schedule 10 was completely replaced late in November 2010, as part of a broader set of changes to the Act. Now entitled 'Long-term plans, annual plans, and annual reports', the schedule provides in clause 1 that 'to the extent determined appropriate by the local authority', the plan will describe the community outcomes for the local authority's district or region. ('Community outcomes' are now defined in section 5(1) as 'the outcomes that a local authority

aims to achieve in order to promote the social, economic, environmental, and cultural well-being of its district or region, in the present and for the future'.) Before November 2010, clause 1 of schedule 10 identified further information that could be provided in a long-term plan about community outcomes, including: how the local authority would work with other local organisations, Māori, central government, and others to further the outcomes; what measures would be used to assess progress towards achieving those outcomes; and how monitoring would occur. Those other matters, with their focus on collaborative approaches to community outcomes and the measurement of progress towards them, are no longer mentioned anywhere in schedule 10. That omission is consistent with other changes made by the November 2010 amendment Act, the effect of which appears to be to reduce local authorities' obligations to measure and report on the achievement of community outcomes.[42]

Clause 8 of schedule 10, entitled 'Development of Māori capacity to contribute to decision-making processes', requires a long-term community plan to:

> set out any steps that the local authority intends to take . . . to foster the development of Māori capacity to contribute to the decision-making processes of the local authority over the period covered by that plan.

- *Annual plan:* section 95 requires a local authority to prepare and adopt an annual plan for each financial year which is to 'contain appropriate references to the long-term council community plan'. By clause 35 of schedule 10 to the Act, the annual report must also include 'a report on the activities that the local authority has undertaken in the year to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority'.

The reporting on those various plans and statements, and the auditing of local authorities' performance is also provided for in the Act.

Section 94 provides for what might be called a 'process audit' (as opposed to a 'policy content audit') of the long-term council community plan by the local authority's auditor.

Section 98 requires that an annual report be adopted, one purpose of which is to 'compare the actual activities and the actual performance of the local authority in the year with the intended activities and the intended level of performance as set out in respect of the year in the long-term [council community plan] and the annual plan'. Copies of local authorities' annual reports must be sent to the Secretary for Local Government, the Auditor-General, and the Parliamentary Library. Section 99 requires the annual report to contain an auditor's report on financial matters and on 'the local authority's compliance with the requirements of Schedule 10 that are applicable to the annual report'.

Finally, we note the powers of the Local Government Commission, a three-member commission of inquiry, one of whom must have a knowledge of tikanga Māori (sections 33 and 34). Its functions include providing information about local government and promoting good practice relating to a local authority or local government generally (section 30). Although focused mainly on representation issues, the commission was required by section 32 to review the operation of the Local Government Act 2002 and Local Electoral Act 2001 and present a report as soon as practicable after the triennial general election in 2007. The focal points of the review were:

> (a) the impact of conferring on local authorities full capacity, rights, powers, and privileges; and
> (b) the cost-effectiveness of consultation and planning procedures; and
> (c) the impact of increasing participation in local government and improving representation on local authorities.

The commission's summary report, issued in July 2008, contains six sets of key findings. Of particular relevance to the present Tribunal inquiry are the fifth and sixth sets of findings. The fifth notes that:

> there are some critical areas where further good practice guidance and training is urgently required. These include the community outcomes process, long-term planning, understanding and application of 'significance' in relation to decision-making and consultation, and effective consultation processes.[43]

Under the sixth heading, 'There are specific items requiring focus', the commission recommends 'an audit of the effectiveness of local authority engagement with Māori'. It also recommends the monitoring of:

> central government agencies' involvement in the community outcomes process, participation levels in local authority decision-making processes, and the effectiveness of local authority consultation practices as part of the ten-year evaluation of local government legislation.[44]

The evaluation referred to is being conducted by the Local Government and Community Branch of the Department of Internal Affairs and is due to be completed in mid-2013.

This account of the main features of the relevant law will, we trust, be useful as readers proceed through the remaining chapters of this report. Those chapters assume a basic knowledge of the law, and where there are gaps in readers' understanding, they should refer back to the information in this chapter.

We turn now to outline the issues raised by the claimants about the regime for managing the petroleum resource.

Text notes

1. Document E28, p 11
2. Section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 declared the boundary of the territorial sea to be 12 nautical miles.
3. Document C5(D1), ch 5
4. Document A29, p 77
5. Document C5(D5), p 31; doc D5, p 15; doc D6, p 10
6. Document D5, p 15
7. Document C5(D1), p 24
8. Document D5, p 11
9. Document C5(D1), p 22
10. Ibid, p 25
11. Ibid, pp 22–23
12. Ibid, p 23
13. Document E14, p 3
14. Ibid, p 5
15. Ibid, p 16
16. Ibid, pp 4–5
17. Ibid, pp 13–14
18. Ibid, p 14
19. Ibid, pp 18–19
20. Ibid, p 12
21. Ibid, pp 20–21
22. Document D5, p 27
23. Ibid
24. Ibid, p 28
25. Ibid
26. Ibid
27. Document E14, p 22
28. The 'order holder' referred to is the holder of a customary rights order under the Foreshore and Seabed Act 2004.
29. Document E14, p 22
30. Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009, reg 4. Also in 2009, the Resource Management Act 1991 was amended to restore the Environment Court's power to make an order for security for costs on certain grounds, which include the appellant possibly not being able to pay the costs of the respondent in an appeal: see document E31(b), p 57; Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 129.
31. 'National Policy Statements', Ministry for the Environment, http://www.mfe.govt.nz/rma/central/nps (accessed 3 December 2010)
32. Ibid
33. 'National Environmental Standards', Ministry for the Environment, http://www.mfe.govt.nz/laws/standards (accessed 23 November 2010)
34. Ibid
35. 'Processing of Applications of National Significance', Ministry for the Environment, http://www.mfe.govt.nz/rma/central/call-ins.html (accessed 3 December 2010)
36. 'Designations and Requiring Authorities', Ministry for the Environment, http://www.mfe.govt.nz/rma/central/designations (accessed 3 December 2010)

37. 'Designations and Requiring Authorities', Ministry for the Environment, http://www.mfe.govt.nz/rma/central/designations (accessed 3 December 2010)
38. 'Heritage Orders and Heritage Protection Authorities', Ministry for the Environment, http://www.mfe.govt.nz/rma/central/heritage (accessed 3 December 2010)
39. 'Commercial and Recreational Maritime Rules, Part 130B: Oil Transfer Site Marine Spill Contingency Plans', Maritime New Zealand, http://www.maritimenz.govt.nz/Rules/List-of-all-rules/Part130B-marine-protection-rule.asp (accessed 3 December 2010)
40. 'Marine Protection Rules Part 200: Offshore Installations – Discharges', Maritime New Zealand, http://www.maritimenz.govt.nz/Rules/List-of-all-rules/Part200-marine-protection-rule.asp (accessed 23 November 2010)
41. Document D5, p 49
42. Local Government Act 2002 Amendment Act 2010, esp ss 8, 13, 14
43. Local Government Commission, *Review of the Local Government Act 2002 and Local Electoral Act 2001: Summary Report* (Wellington: Local Government Commission, 2008), p 7
44. Ibid

Sidebar notes

Page 50: Crown Minerals Act 1991, ss 32, 35–38; doc C5(D1), p 32; doc D4, para 11.4
Page 59: Document E22, pp 99, 115, 123, 159, 198, 200, 264, 265. We note that, while the text states that 43 discharge consents have been granted, the graph accounts for only 40. Because it is not stated that the graph covers all discharge consents, we have used the figure identified in the text.

Production stations are where petroleum oil, gas, or condensate are processed or are separated and prepared for transport to another production station facility. For descriptions of the activities at individual production stations in Taranaki, refer to the various reports at 'Oil and Gas Compliance Monitoring Reports', Taranaki Regional Council, http://www.trc.govt.nz/oil-and-gas-compliance-monitoring-reports (accessed 3 December 2010).

Map notes

Map 7: 'Map of the Continental Shelf Boundary', Land Information New Zealand, http://www.linz.govt.nz/hydro/projects-programmes/continental-shelf/undersea-image/index.aspxb (accessed 10 November 2010)

CHAPTER 5

THE CLAIMS

5.1 Introduction

In this chapter, we outline the claimants' case that the legal regime for managing the exploitation of the petroleum resource does not comply with the principles of the Treaty of Waitangi. A quick insight into the claimants' negative experiences with the regime can be obtained from Mere Brooks' closing statement to the Tribunal:

> There are so many problems with the whole process – the nature of petroleum exploration and the way that the RMA deals with this; the huge imbalances in resources between participants; the technicality of information we have to deal with; the lack of understanding of Maori concerns by councils, the Crown, and petroleum companies; the lack of time, expertise and resources at our disposal to participate effectively; the strange distinctions as to who is worthy of consultation in resource management processes; the ability for petroleum companies to undertake a lot of work without our input; the fact that we have to deal with several different bodies and companies; all contribute to Maori being totally powerless in this process. The Crown has set up this management regime, and the Crown should fulfil their Treaty obligation to enable us to have a real say in petroleum management.[1]

Our understanding of the totality of the claimants' evidence and submissions is that the sorts of issues listed by Ms Brooks stem from three fundamental and inter-related problems with the system for managing the petroleum resource. As the claimants see it, the underlying problems are these:

- The substance of the law is biased against Māori interests in the natural world and in their culture, in favour of conflicting interests.
- The processes established to apply the law fail to ensure that there is effective participation by Māori to safeguard their interests; instead, they actually deter, and sometimes deny, Māori involvement.
- Māori communities do not have the capacity to overcome the obstacles to their effective participation in the system because there are no reliable and sufficient sources of assistance available to them.

The result, the claimants say, is that the interests of Māori in the natural world and in their culture are being denied and damaged, in breach of the principles of the Treaty of Waitangi and to the detriment of all New Zealanders.

To illustrate some of the issues raised, in chapter 6 we present five examples of claimant experiences with the petroleum resource management regime. The situations were described in the claimants' written evidence and, to differing degrees, were the subject of witnesses' oral evidence at the hearing in this inquiry. At relevant points in this chapter, we cross-reference those examples. We refer to them as the Ngarewa, Pohokura, Ngā Hapū o Poutama, onshore Taranaki blocks offer, and Tikorangi examples.

We turn now to outline the claimants' evidence and submissions about the three fundamental problems identified above and their effects.

5.2 The Law is Biased against Māori Interests and Favours Conflicting Interests

The core of the claimants' concerns under the first head is that their values, knowledge, and interests – the very essence of their being tangata whenua – are not sufficiently understood or respected by the law. The claimants say that, even when the law appears to promise protection for their unique interests, it generally requires only that they be given cursory consideration, after which they can be ignored. This means that the interests of the petroleum industry prevail and the claimants' taonga – their iconic landmarks, burial grounds, wāhi tapu, pā sites, and other places of ancestral significance – are often left at risk of desecration or are actually destroyed.

5.2.1 Crown failure to recognise Māori Treaty interest

Much of the claimants' case is based on the content of the Crown Minerals Act 1991 (the CMA) and the Resource Management Act 1991 (the RMA). However, the backdrop for their analysis is the Crown's failure to adopt the recommendations of the Waitangi Tribunal in its 2003 *Petroleum Report*. In that report, as we explained earlier, the Tribunal concluded that certain tangata whenua groups have an interest in the petroleum resource that deserves separate redress in their Treaty settlements with the Crown. The groups with a Treaty interest are either or both:

- those who have lost land containing petroleum as a result of Crown conduct in breach of the Treaty; and
- those who were unjustly deprived of royalties for any petroleum still in their legal ownership at the time of its nationalisation in 1937 without compensation.

As the claimants see it, groups with a Treaty interest in the petroleum resource have a particularly strong right to be involved in key decisions about its management. They consider, however, that the Crown has done very little since 2003 to improve their position under the CMA and RMA. On their analysis, the 2003–04 review of the *Minerals Programme for Petroleum* (the MPP) did not

> *'We've never successfully opposed a consent application. The Crown has poured thousands, probably millions, of dollars to incentivise and attract petroleum companies to invest and come to New Zealand. It has given us nothing to help us protect our interests, our land, our resources. In terms of "having regard to the Treaty of Waitangi", all that has meant is sending us a letter from time to time. That is all.'*
>
> Mere Brooks (doc C3, p 9)

> *'The present regime does not reflect what I consider partnership should be. I believe Ngaruahine should have much greater involvement in the Crown's management of petroleum. We are not against development, we are against exclusion.'*
>
> Daisy Noble (doc C1, p 16)

> *'This is related to the issue of what happens offshore. We are deemed not to have an interest in off-shore exploration that is outside [the] 12 mile zone. Hapu are not consulted for offshore. There are spills offshore, it hits the coast.'*
>
> Mere Brooks (doc C3, p 7)

take account of the submissions made by Māori groups.[2] Nor did the review take up any of the more substantive recommendations made in the report by Michael Dreaver, who was commissioned by the MED, on Māori participation in the petroleum regime.[3] The claimants also consider that a number of the amendments introduced by the Resource Management (Simplifying and Streamlining) Amendment Act 2009, and the nearly 10-fold increase in the Environment Court's filing fee (to $500), further limit the opportunities for Māori involvement in planning processes, consent hearings, and appeals.[4] Among the 2009 amendments criticised by the Ngāti Kahungunu claimants are those which: remove the ability of submitters to challenge a whole policy statement or plan; allow applications for resource consents to be referred directly to the Environment Court without the need for a council hearing; prohibit a trade competitor from assisting an appellant, regardless of the merits of the appeal; reduce the circumstances in which consent authorities must notify applications; restore the Environment Court's power to make an order for security for costs; and remove the right to appeal to the Court of Appeal on questions concerning proposals of national significance.[5]

5.2.2 The Treaty clauses and sections 6 and 7 of the RMA

The claimants submitted that the 'Treaty clauses' in section 4 of the CMA and section 8 of the RMA (see sections 4.1.1 and 4.1.2) are too weakly worded to ensure that people exercising powers under those statutes comply with the principles of the Treaty of Waitangi. The Ngāruahine claimants' criticisms were summed up in their counsel's submission that the effect of the clauses is to impose on people who are exercising powers under the Acts 'what are essentially procedural obligations' and, more particularly, obligations to consult Māori.[6] Other legislation imposes a standard that requires Treaty compliance, and claimants consider that the CMA and the RMA should be amended so that all who exercise functions under them must act consistently with Treaty principles.[7]

The claimants also submitted that the 'Māori protection provisions' in sections 6 and 7 of the RMA (see section 4.1.2) are far from sufficiently protective of Māori values, knowledge, and interests. Those sections require decision-makers to consider, along with many other matters, 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' and also 'kaitiakitanga', but the Act does not specify any circumstances in which priority should or must be given to those matters. Instead, decision-makers must consider all the matters identified in the sections and determine, in particular situations, which course will best achieve the Act's purpose as set out in section 5. Counsel for the Ngāti Kahungunu claimants submitted that the sections 'have little effect on preserving or developing the kaitiaki's relationship with the environment, or protecting the transmission of the kaitiaki's relationship from generation to generation'. The principal reason for this, counsel said, is that 'the values identified are specifically qualified so as to be balanced against other competing criteria, including environmental effects and the well-being of other communities'.[8]

Counsel for Ngāruahine made the additional submission that the Crown's policy of promoting the exploitation of petroleum (a mineral, which, under section 5(2)(a) of the RMA, does not have to be sustained to meet the needs of future generations) 'predetermines' that exploitation is in the 'national interest'. That has the effect, he considered, on decisions made under the RMA about petroleum activities, of skewing, in favour of exploitation, the way decision-makers weigh up the matters in sections 6 and 7.[9]

5.2.3 The CMA

The CMA contains few specific references to Māori groups or interests. The claimants' criticisms of the Act for its bias against Māori interests focus on:

- the provisions for access by permit holders to Māori land; and
- the Minister's discretionary power, under section 15(3) of the Act, to exclude from mining land of particular importance to the mana of iwi.

The Act provides that the owners of Māori freehold land which is regarded as a wāhi tapu must give their consent before any minimum impact activities can be conducted on that land (section 51(2)). But, for more intrusive activities on Māori freehold land, compulsory arbitrated access arrangements can be imposed on the owners. Counsel for the Ngāti Kahungunu claimants submitted that the 'irony with these graduated requirements' for access is that 'the more significant the activity the less protection [is] provided under the CMA'.[10]

The other way in which the CMA provides protection for land of special significance to Māori – whether or not it is still in Māori ownership – is by the Minister of Energy exercising a discretion, granted by section 15(3), to exclude 'defined areas of land of particular importance' to the mana of an iwi from the MPP or a specific permit. The claimants consider that the way in which the Minister exercises this discretion is biased against the exclusion of such land.[11] Just two areas of land have been excluded from the MPP, and in both cases it was only the land above sea level, and other applications to exclude areas of undoubted importance have been rejected. One application that was rejected was made by Whanganui iwi and hapū in respect of the Tongariro National Park. Having seen reports and letters by officials about unsuccessful applications, the claimants asserted that the test applied by the Minister was 'impossibly high'.[12] Counsel for the Ngāti Kahungunu claimants summed up the 'key issues' with the Crown minerals regime in these words:

> Maori as landowners are in most cases unable to prevent even land that they own from being subject to petroleum exploration, regardless of its cultural importance, with even less protection available in respect of wahi tapu on land owned by third parties or the Crown. At the same time Maori continue to be entirely excluded from participation in the decision making processes under the Crown minerals regime . . .[13]

5.2.4 The RMA

Four features of the RMA's scheme were the subject of particular criticism for minimising the value of Māori interests:

- the seemingly lenient classification of petroleum prospecting and exploration activities as permitted or controlled;
- the effects of that classification on the notice, or lack of it, given to tangata whenua about proposed petroleum-related activities;
- the narrow meaning of an 'affected' person, who is entitled to limited notification of an application for consent; and
- the limited ability of the RMA to ensure wāhi tapu and other significant sites are protected from petroleum prospecting, exploration, and mining activities because of: local authorities' varied efforts to prioritise the protection of such sites; the cost of the listing process; and the fear of some tangata whenua that information held in local authorities' records may be misused.

> *'The economic value of oil and gas in our rohe has allowed for a more lenient view of permitted activities within Taranaki and within the district plans for our rohe.'*
>
> Donna Eriwata (doc D1, p 14)

(1) *Lenient classification of activities*

The claimants considered that the Crown's policy of promoting petroleum exploration influences, or is mirrored by, local authorities' attitude to exploration. In Taranaki, where exploration and production have long been occurring, and in the Ngāti Kahungunu rohe, where heightened activity is imminent, the claimants said that local authorities' classification of a range of prospecting and

exploration activities as permitted or controlled was too lenient. Counsel for the Ngāti Kahungunu claimants submitted that the operative plan for the Wairoa district made it very clear where the priorities lay in respect of petroleum exploration. In the principal reasons given for the approach taken in the plan, it is stated that utilities, mineral exploration, and energy developments are 'essential to servicing the Wairoa District and wider region' and so must be allowed to occur 'without undue restriction, provided any adverse effects can be avoided, remedied or mitigated'. To this end, the plan's rules:

> have been developed to generally enable utilities, and minerals exploration and energy developments, to operate without the need for consent, but to require consent where the adverse effects may be more than minor.[14]

Counsel submitted that the Wairoa district rules appeared to be more permissive than those in the Taranaki regional and district plans that had been referred to by other claimants.[15] While the petroleum industry is yet to be developed in the Wairoa district, counsel voiced his clients' fears that their lands would be next to be explored and that the rules were inappropriately favourable to the industry. Among the permitted activities identified in the Wairoa plan are:

> Pipes for distribution (but not transmission) of natural or manufactured gas at a gauge pressure not exceeding 2000 kilopascals and necessary incidental equipment, including household connections and compressor stations.
>
> Petroleum exploration survey, meaning the activity to define a potential petroleum resource, and includes geological and geophysical prospecting, including seismic survey.
>
> Temporary structures associated with exploratory drilling activities, including worker accommodation.[16]

Among the controlled activities are:

> *'The council often makes a distinction between being 'affected' and just 'interested'. Ngaruahine are the original people of the area, if there is a proposal involving our area, we will always be affected, just as every Taranaki group is affected by issues affecting the mountain.'*
>
> Mere Brooks (doc C3(a), p 2)

> Pipeline operations, meaning the construction and installation of underground pipes for bulk distribution or transmission of natural or manufactured gas, petroleum, or geothermal energy, and ancillary works [that are not Permitted Activities] . . .
>
> . . . . .
>
> Production testing of hydrocarbon resources of up to 120 days duration, within the Rural Zone.[17]

The Ngāruahine claimants highlighted the fact that the south Taranaki district plan classifies all petroleum prospecting activities as permitted and nearly all exploration activities, and production testing, as controlled. Counsel observed that the plan treats petroleum activities in rural areas differently from other industrial activities, for no other industry in a rural area has its own specific rules. This showed, he submitted, that the district has 'by default, an "oil plan" of sorts', but its underlying policy had not been subjected to the scrutiny that is given to an overt policy in a district plan.[18] Blair Sutherland, the planning manager for the South Taranaki District Council (the STDC), agreed that no other industrial activity in a rural area was given the 'special status' of having its own specific rules.[19] He later gave his view that the reason the south Taranaki district plan mentions petroleum activities separately was because they are quite different from other activities in rural areas, which is where they occur, and because there

was 'quite a large amount of petroleum activity' in the district compared with other activities, and its effects were, in some instances, quite different from those of other activities.[20]

(2) *No guaranteed notification*

The kind of classification given by local authorities has implications for whether tangata whenua groups will be notified of activities that are proposed to occur on lands within their rohe.

Activities that are classified as permitted do not need a resource consent, meaning that all that must happen before the activities can commence is the giving of notice to the landowner under the CMA. If tangata whenua do not own the land, they will not receive that notice. If they do own the land, notice will be given but the way in which it is done can cause offence.

Mere Brooks gave an example of notice being given to her hapū of a permit holder's intention to enter their land. In October 2008, she was telephoned by an oil company representative, who asked to walk over the lands the company wished to seismic test. The company had apparently already written to another person in the hapū, who was not responsible for environmental issues, and Ms Brooks, who was, was unaware of the proposed testing before the telephone call. The oil company representative wanted Ms Brooks to give her consent to the testing as soon as possible, but she was not prepared to do that without knowing where the company wanted to go on the land. The following day, the company delivered a letter to her saying that it wanted to start testing the very next day. Ms Brooks commented 'What kind of consultation is that? This company is the same one that our hapu had dealings with 10 years ago. Nothing has changed.'[21]

For activities that are controlled, resource consent must be given, and it is at the consent authority's discretion whether it will notify the application for consent and, if it does, whether it will be done publicly or on a limited basis. When public notification is given, anyone may make a submission and be part of the process thereafter. But when limited notification is given, it is given only to 'affected persons', and only they can participate fully in the subsequent process.[22]

(3) *'Affected' or merely 'interested' parties*

The claimants have difficulties with the RMA's distinction between being an affected party (with greater rights to take part in resource consent processes) and being an interested party, finding it unresponsive to Māori kaitiaki responsibilities.[23] The 2009 amendments to the RMA, which require the adverse effects of an activity on an 'affected' person to be minor or more than minor, are likely to make it more difficult for a person or a group of persons to establish that they are 'affected'. Planning expert Sylvia Allan, who was commissioned by the Tribunal as a witness, advised that an iwi or hapū organisation would not normally be considered to be an affected party, 'unless it was very clear that there would be an effect on an area or resource of importance to them'.[24]

The fact that those who are recognised by a local authority to be 'affected persons' can give their written consent to a proposed activity can mean, if the consent of all such people is obtained early on, that there is no need for the consent application to be notified on a limited basis. For example, the Ngarewa Wahi Tapu Committee found that a non-notified consent had been issued for the discharge of drilling solids onto land that was of significance to them (see chapter 6).

(4) *The RMA's limited protection of wāhi tapu and other significant sites*

The RMA's presumption that land use is permissible unless it contravenes a district or regional rule or a national standard, in which case consent is needed, presents a risk to wāhi tapu and other sites of significance to tangata whenua that are not noted in a district plan. The claimants submitted that the Act's 'default position' in favour of land use is at odds with the Historic Places Act's protection of

archaeological sites and the RMA's identification, in section 6(e), of 'the relationship of Maori with their ancestral lands, water, sites, waahi tapu, and other taonga' as a matter of national importance. Ms Allan agreed that the position was 'a little odd', because, she said, there are usually good reasons for having some sort of conditions attached to most land uses and 'I think we are only really waking up to that now'. As an example, Ms Allan noted that dairy farming is almost universally a permitted activity but regional councils are having to control such things as fertiliser distribution as a discharge issue rather than a land use issue.[25]

> *'We have [lost] over 100 sites within our rohe since the . . . late 70s and we have lost so much. We have tupuna who are buried there and that is not information for the council, and yet our resources do not enable us to monitor these places or do anything. The land owner now, in the eyes of the government, has more say than we do as tangata whenua.'*
>
> David Doorbar (paper 2.154, p 68)

(a) *Variable efforts by local authorities:* Ms Allan's evidence provided important contextual information for the claimants' frustrations with the deficiencies in the law's protection of sites and areas of significance to Māori. She highlighted weaknesses in the Taranaki local authorities' efforts to provide available protection and summarised the results of studies that confirmed how widespread has been the destructive impact in the region of human activity, and the elements, on wāhi tapu and other significant sites.

At the regional level, Fred McLay from the Taranaki Regional Council (the TRC) gave evidence that the council was supportive of collecting and applying information about such sites, but Ms Allan noted that that the regional policy statement and regional plans provided neither specific recognition nor specific protection of them.[26] Commenting on the RPS's 'stand-alone section' about the resource management issues of significance to iwi, Ms Allan said that its identification of issues was 'relevant and comprehensive' but not 'fully integrated with the remainder of the RPS document'. She continued:

> They . . . give little guidance as to any protective mechanisms, or of any specific values to be protected, and thus there is little assistance to other plans which must give effect to the RPS. I also note that none of the [seven] anticipated environmental results relating to this section were reported upon in the TRC's otherwise very comprehensive 2009 State of the Environment Report.[27]

By contrast, Ms Allan noted that the minerals section in the RPS indicated that there was 'a simple, strong and positive policy framework for minerals development in the region'. This was no surprise, she added, for the region that produces all of the oil and gas in New Zealand and that, between 2002 and 2007, issued 1,269 consents in relation to exploration activities and 48 consents in relation to production stations. However, she continued, 'the RPS seems to provide a level of prioritisation and protection for such activities, and, as noted earlier, there is an ambiguous relationship between these provisions and the stated matters of significance to iwi'.[28]

Ms Allan expressed her view that, if the RPS were tested through the statutory processes available, its provisions for places of significance to Māori would probably not measure up:

> the provisions in the RPS would probably be found not to provide any specific protection for places or areas of Māori significance (other than those that have statutory acknowledgements), particularly if tested in the context of policy for petroleum development.[29]

At the district level, Ms Allan observed that the three Taranaki district plans were diverse in their provisions but

that the protection they provided for areas of significance to Māori was 'relatively rudimentary'.[30] She summarised their relevant provisions in this way:

- South Taranaki district acknowledges that the council has not addressed wahi tapu, wahi tapu areas and archaeological sites, but intends to through the formation of a consultative/partnership approach inclusive of appropriately negotiated protocols with a view to amending the district plan.
- Stratford district has an extensive list of heritage items including some urupa, and an extensive list of archaeological items. Rules require consents for any activities in the whole of the land title within which these sites are found. This is probably the most comprehensive provision of the three local authorities.
- New Plymouth district identifies a number of points on plan maps as the centres of wahi tapu as significant sites. Rules change the status of activities in the immediate vicinity of these locations. There are acknowledged problems with the location of some of these sites, and not all important sites or areas are mapped.[31]

Referring to a New Zealand Archaeological Association review of archaeological sites that identified 'almost 2000' such sites in Taranaki, Ms Allan said that it could be expected that many wāhi tapu and areas of significance to tangata whenua would be located in the vicinity of those sites. She also referred to the findings from a monitoring of archaeological sites in the region, district by district, in 2007, which included that:

- South Taranaki district contains more than half of all archaeological sites in the region; the majority on private land. Many pa sites have been damaged by bulldozing for farm tracks, or have been quarried for gravel or levelled for productive land use. Cultivation and infilling has affected storage and borrow pits. Coastal erosion is affecting coastal pā sites, and ridge sites are vulnerable to change from slips and slumps in extreme weather conditions. Flooding has also affected river valley sites.
- Stratford district's archaeological sites are mostly in rural areas on grazing and forestry land. The condition of sites was noted as variable, with many suffering stock damage and erosion.
- New Plymouth district's archaeological sites are mostly on grazing land and, while some remain unchanged, a significant number have been damaged by bulldozing for farm tracks, or repeated smoothing as a result of cultivation. In extreme cases, sites had been destroyed by bulldozing as part of farming activities or by earthworks for building platforms, roads, or quarries. Many sites are on the coast and are subject to coastal erosion or expanding residential subdivisions.[32]

Ms Allan gave her view of what would be needed to improve the Taranaki local authorities' protection of wāhi tapu and other sites of significance. It would require:

> specific budget allocation from the councils and the active co-operation and assistance of iwi in identifying and allowing precinct or overlay mapping of areas of importance. Such identification would be expected to be accompanied by more restrictive land use (and possibly also regional) rules, and would no doubt have to 'run the gauntlet' of full RMA processes due to the likely concerns of private land owners.[33]

(b) *Cost of listing sites:* Although the RMA's ability to protect wāhi tapu depends on local authorities knowing about them, the claimants identified several obstacles to their passing on that information. A substantial obstacle to the listing of wāhi tapu in a district plan is the cost of the process. The Tikorangi example in the next chapter illustrates this point. Donna Eriwata, for Otaraua hapū, provided this explanation:

> Registering a wahi tapu and having it recorded in the wahi tapu schedule to the NPDC District plan involves a full

process to amend the District Plan. This process involves going through a full community notification, submission and hearing process, involving several sub-committees and several reports. If challenged during this process, we then have to prove that these sites are actual sites. To add a wahi tapu to this schedule we have to notify the NPDC [New Plymouth District Council] to amend the District Plan. This is a time consuming process and has to be undertaken every time a wahi tapu is added.[34]

Claimant counsel questioned Ms Allan about the costs of seeking a change to 'add a number of heritage places or sites to a register in a small district'. She replied that, 'just to get you in the door', a plan change request would need to be prepared, accompanied by an assessment of effects on the environment and an analysis in terms of section 32 of the RMA. She estimated the cost of that to be $30,000 to $50,000. Then, if the council adopted the plan change it would take over the continuing costs, but if it decided to 'stand back a bit', which Ms Allan said was common, and 'let the plan change proceed on its own merits', the full costs of the process, through to the council's decision, would fall on the person requesting the plan change. Those costs could be 'very substantial', Ms Allan said, giving an example of a recent plan change request, which had involved an Environment Court decision, where the costs were 'about $320,000'.[35]

In addition, tangata whenua may not have ready access to sufficiently precise information to enable the registration of all the wāhi tapu in a district. In Taranaki, in particular, the legacy of extensive raupatu nearly 150 years ago is likely to include some loss of knowledge about sites of importance. The problem is compounded by the paucity of Native Land Court and other written records of Māori occupation and land use, another consequence of raupatu. Gathering that information from tribal members and any other surviving sources can be a very large task, requiring resources beyond the capacity of hapū or iwi. (Again, the Tikorangi example is relevant here.) And, despite the ability of local authorities to hold 'silent files' of sensitive information, some tangata whenua are extremely reluctant to pass information about wāhi tapu to such bodies. Among their reasons is that there is no watertight guarantee that the information will not be disclosed, which puts the wāhi tapu at risk: the power of local authorities not to disclose sensitive information is discretionary, as is the Minister of Energy's power under the CMA.[36] Thus, Māori lose control of the information they provide to authorities in their bids to protect taonga.[37]

> *'If anyone wishes to come into our area then they should be coming to our door and not looking at a document or looking at a map. That's one of the reasons why we don't identify [wāhi tapu] . . . we would prefer kanohi ki te kanohi, not for records to be held with the regional or district council, for a developer to be able to go in and say 'Oh I know where that is. I'm fine'.*
>
> Daisy Noble (paper 2.154, p 32)

(c) *Fear of misuse of information on local authority's records:* Another fear is that local authorities may treat written records of wāhi tapu as if they are comprehensive and so fail to talk with tangata whenua about other possible sites, thereby putting at risk all unrecorded wāhi tapu and other significant places. David Doorbar, for the Otaraua hapū, made it clear that, while part of the protection that is needed will require the mapping of certain wāhi tapu and having information kept on local authorities' silent files, those mechanisms cannot replace the need for constructive relationships between local authorities and tangata whenua, in which there is ongoing dialogue about issues of concern to both parties. For the claimant groups that appeared before the Tribunal, that kind of relationship was an aspiration, not a reality. Mr Doorbar gave evidence that a local authority officer had suggested that the

Otaraua hapū should pass over all the information it had about its wāhi tapu in order to avoid the perception that it was 'making stuff up' as particular situations arose.[38]

The claimants were also critical of some decision-makers' interpretations of 'wahi tapu' and of situations in which petroleum companies brought in outside experts to give evidence in hearings about the existence, or boundaries, of wāhi tapu. An example of the difficulties that can be involved for tangata whenua when seeking to protect sites of particular significance is provided by the experience of the Otaraua hapū with the Tikorangi site (see chapter 6).

> *'The Council changed its policy so as to only protect a wāhi tapu for a 50 metre radius from the centre of a site. It is inconceivable that the council can place a 50 metre ring around our wāhi tapu and decide that is where the site ends and finishes.'*
>
> David Doorbar (doc D2, p 4)

5.2.5 The law beyond New Zealand's territorial waters

The claimants were highly critical of the fact that the RMA does not apply beyond New Zealand's territorial waters, which is where the majority of petroleum exploration and mining permits are granted. They submitted that tangata whenua interests in the resources of the coastal and maritime areas of their rohe were devalued by the Crown's limited control of the environmental risks posed by oil companies which operate, with the Crown's permission and to its financial benefit, more than 12 nautical miles from shore.

The claimants also submitted that Māori claims to the ownership of the petroleum resource in the seabed beyond New Zealand's territorial waters were denied by the Crown's assumption of the right to permit petroleum exploration and mining in that area. Claimant counsel supported this submission by referring to section 25(1A) of the CMA, which provides that the Minister 'may not grant an exploration permit or a mining permit . . . in respect of minerals that are privately owned'. Its effect, it was submitted, was that, if any of the petroleum beyond the territorial seas were owned by Māori, the Minister would have no authority to grant permits to explore for or mine it.[39] The notion that Māori may own resources some distance offshore was not fanciful, it was submitted: Māori customary rights in respect of fisheries were recognised much further offshore.[40]

> *'We felt excluded from the discussions. Knowing that we have a responsibility to that land, to the mauri of the land, the exclusion really hurts. We felt like we weren't looking after our responsibility, our inherited responsibility, like we are selling the land short.'*
>
> Maria Robinson (doc C2, p 10)

5.3 The Failure of the Law to Ensure Effective Participation by Māori

The essence of the claimants' complaints under the second head is that the CMA and RMA processes largely treat Māori groups as outsiders, but even when they provide for Māori to be more involved, including as decision-makers, that is unlikely to happen because current decision-makers are reluctant to foster Māori participation. A closely related theme is that the success or failure of Māori involvement in the petroleum management regime is dependent on the variable knowledge and goodwill of a multitude of central and local government bodies and on the passion and strength of particular Māori groups. Between them, all five of the examples presented in the next chapter illustrate these points. Inevitably, the claimants' concerns pose questions about the role of central government in ensuring nationwide consistency for Māori in high-quality petroleum resource management processes.

> *'Our interests have been relegated to being merely 'letter recipients'. That is all consultation has meant for us. We have no determinative role in decision-making; we are not even privy to the decision-making process. We are like a third party. In practice, having a Treaty interest has been no more effectual for us than if we were just a general stakeholder.'*
>
> Daisy Noble (doc C1, p 16)

5.3.1 The CMA

The claimants' criticisms of the CMA's processes centre on four features:

- the failure to consult tangata whenua on the policy issues that set the context for the Act's implementation;
- the narrow scope of the Crown's consultation and the limited opportunities for it to occur;
- the lack of Māori expertise in the process by which the Minister exercises the discretion to exclude land of particular importance to the mana of iwi; and
- the absence of any requirement for petroleum permit holders to engage with tangata whenua and be accountable for the quality of that engagement.

(1) *Failure to consult on high-level policy issues*

The claimants told the Tribunal that, although the Crown is aware of their serious concerns about the petroleum ownership and regulatory regime, they have not been consulted about such high-level policy issues as the rate at which petroleum exploration should occur and the conditions that should be imposed on exploration. Counsel for the Ngāruahine claimants said that Taranaki iwi were reduced to making submissions to the Crown about only the effects of the 'market driven approach to exploitation and the concentration of the activity' in Taranaki, not about the approach itself.[41] Another matter of concern to the claimants was that 'petroleum', as defined, includes coal seam gas and also methane hydrates. These are potentially large resources, which, it is expected, will be increasingly feasible to recover in the foreseeable future because of improving technologies and market conditions.[42]

The claimants believed that issues concerning coal seam gas had been the subject of lengthy correspondence and discussion between Crown officers and oil industry participants at about the same time as Crown Minerals Group officials were consulting Māori about the MPP. They were certain, however, that the matter had not been mentioned in their consultation meetings.[43] The matter was significant to the Ngāruahine claimants because 'all the coal gas in the coal fields in Taranaki is now deemed to be petroleum',[44] which means that coal fields, including any under Māori land, would now be subject to the laws regulating petroleum exploration and mining. One effect of that would be that the Crown could, on the basis of the existence of a coal field, refuse an application to exclude from mining land of particular importance to iwi. Further, it was submitted that, where coal under Māori land is concerned, 'a further nationalisation has occurred or been confirmed which may not have been appreciated when the CMA was passed in 1991'.[45]

(2) *Limited scope of, and opportunities for, Māori input*

The CMA does not expressly require the Minister or anyone else exercising functions under the Act to consult with Māori on any matter. The MPP does, however, prescribe three situations in which consultation with Māori must be conducted: in the MPP review process; in the planning of block offers; and in decisions relating to applications for petroleum permits.[46]

Beyond those situations, Māori are not assured of any involvement in decision-making under the Act. The result, say the claimants, is that the Crown Minerals Group's consultation with them is of very narrow scope, being focused on the possibility – which has proved to be very slim – of excluding land from the MPP or from a block offer or proposed permit. (The onshore Taranaki blocks offer example is relevant in this regard.) For that reason, some claimants regard the consultation process as being insufficiently

relevant to their interests to warrant their time and effort. That attitude is reflected in the poor attendance at consultation hui held in connection with the review of the MPP. The Tribunal's attention was drawn to a hui in Taranaki that was attended by only three tangata whenua.[47]

Among the calls for greater involvement of Māori in decision-making under the CMA were those by the Ngāruahine claimants for the MED to contract local Māori to assist in determining the allocation of permits in their rohe.[48] As the claimants observed, they have had many dealings – good and bad – with petroleum companies, and those experiences could inform the decision-making process.[49]

> *'The process is always the same. It feels very much like a 'tick the box' exercise for MED. It is fair to say that we have become increasingly cynical that any good will come of it in terms of protecting our land and natural resources as nothing has changed as a result of our submissions.'*
>
> Daisy Noble (doc C1, p 11)

The claimants frequently referred to the complex technical nature of the information they are sent by the Crown Minerals Group in the course of its consultation processes. They said that their requests for assistance to make the information understandable, and to have the effects of the proposed activities plainly spelt out, have fallen on deaf ears. The gulf between the Crown minerals system and the RMA does not assist in this regard: Crown Minerals officers do not know, at the time a permit is granted, what exactly will be the effects of the permit holder's activity. Therefore, they tell the claimants that the effects of activities (within New Zealand's territory) will be dealt with by the RMA system. To the claimants, it seems irresponsible, and procedurally cumbersome, for the possible effects of a permit holder's activities to be dealt with separately from the process by which the permit is granted.[50]

The Ngāruahine claimants highlighted what they submitted were deficiencies in the process by which the 1995 MPP was reviewed and replaced.[51] In particular, they were critical of the review's apparent lack of regard for the recommendations made by MED-commissioned consultant Michael Dreaver in a February 2004 report. The claimants filed Mr Dreaver's report, 'Maori Participation in the Minerals Programme for Petroleum', and a brief of evidence in which he endorsed the recommendations he had made there.[52] Noting that few of his recommendations seem to have been accepted and implemented, Mr Dreaver said that at the time he wrote the report there appeared to be a 'degree of disjunct' between the Crown Minerals Group and policy teams within the MED. 'Overall', he said, 'I considered that despite fine statements at the start of the MPP about Treaty principles, there was little evidence of these things being given practical effect.'[53]

The process that Mr Dreaver followed in the four weeks he had to complete the report did not involve formal consultation with Māori. He talked to 'a few people in the petroleum industry' and to counsel for Ngāruahine, but largely the report was based on documents, including submissions and evidence, presented at the Tribunal's petroleum inquiry in 2000 and the resulting report.[54] It is unsurprising, therefore, that there are substantial similarities between the issues and recommendations in Mr Dreaver's report and the claimants' case in the present inquiry. For that reason, we do not provide a detailed summary of the report but merely outline some of its content.

A section of the 2004 report entitled 'Maori Interests Associated with Petroleum Development' sets out Mr Dreaver's own, 'practical' explanation of the nature of the Māori interest in the Crown's management of petroleum. That interest, he wrote, is concerned with 'the impact of petroleum prospecting and development on places and resources of significance to Maori'.[55] As a result, the sorts of decisions which Māori would have an interest in having effective input to would be those on:

- the activities that take place on their own land or on land that they consider significant;

- the exclusion of significant sites from petroleum activities;
- the carrying out of certain activities that might, for instance, disturb human remains or cultural artefacts;
- the prevention or mitigation of environmental degradation (in the broadest sense); and
- the prevention or mitigation of practices that they consider to be culturally insensitive or offensive – such as the discharging of human waste into the sea.[56]

Mr Dreaver's report noted that the extent to which these interests could be 'wholly accommodated' within the MPP was limited because the RMA regulated environmental impacts. However, he noted that the MED could take steps to assist in raising iwi and hapū awareness of the distinction between the two regimes and that it could work with the Ministry for the Environment in this regard.[57]

Mr Dreaver summarised what he found to be the issues affecting Māori participation in decisions on petroleum management as follows:

> (a) the extent, nature and format of information provided to Maori when they are consulted and the time provided for a response;
> (b) gaps in the skills, human and financial resources and organisational and governance capacity of Maori groups;
> (c) competing priorities for some Maori;
> (d) information gaps in the Crown and industry about which groups to consult, what their concerns are and how to resolve these issues;
> (e) general problems with the relationship between the Ministry and Maori; and
> (f) a lack of co-ordination and consistency within government over matters such as participation in natural resource decision-making.[58]

The resulting low participation of Māori, Mr Dreaver found, had a range of negative impacts, including:

- an inability for Māori to identify issues of genuine concern to them;
- confusion within the Government over who speaks for Māori on particular issues;
- division within Māori groups;
- an inability for the Government and industry to engage constructively with Māori; and
- the imposition of costs on the industry and, ultimately, on the Government and the economy.[59]

The 16 recommendations that Mr Dreaver made were in four categories:

> (a) improving the information available to Maori on the operation of the MPP and related matters;
> (b) increasing the capacity of Maori to provide constructive input;
> (c) building better relationships with hapu and iwi; and
> (d) improving the information available to industry about hapu and iwi.[60]

Mr Dreaver's report also noted a number of legislative changes that could be made to encourage or facilitate greater input and participation by Māori in decision-making. The suggested changes would increase both the number of opportunities for Māori involvement and the weight to be given to their input. For example, it was suggested that Māori land not be liable to compulsorily arbitrated access agreements and that, when decisions on block offers are made, the Minister have 'particular regard to' the views and interests of Māori.[61]

The final issue raised by the claimants in connection with the CMA concerns the standard protocol that has been included in some Treaty settlements, which sets out how the MED is to consult with the governance entity of the iwi on specified matters. Toro Waaka for the Ngāti Kahungunu claimants criticised the protocol, saying there was no advantage in accepting it because it was just a 'restatement of the provisions of the Crown Minerals Act 1991', by which the only role for Māori was as 'infrequent consultees'. He noted, in particular, that the protocol provided no means for the iwi to have input to MED policy, planning, or decision-making in connection with a PEP

once it had been granted. This continued the present situation in which the opportunities for iwi to seek to have a wāhi tapu exempted from petroleum-related activities were very limited.[62]

(3) *Process for exercise of Minister's section 15(3) discretion*

The claimants also drew attention to the fact that there is no requirement that the Minister of Energy obtain advice from relevant experts when deciding whether to grant or decline an application under section 15(3) of the CMA to exempt a defined area of land from mining because of its particular importance to the mana of an iwi. The evidence of the Crown was that no such advice is obtained. Rather, the decision is made on the advice of Crown Minerals Group officials, who consider the nine factors listed in the MPP (set out in section 4.1.1(8)) and any others which may be relevant. All but the last of the nine listed factors relate to characteristics of the area itself and its status under the law. For example, the first two factors are 'what it is about the area that makes it important to the mana of iwi and hapu' and 'whether the area is a known wahi tapu site'. The ninth factor is 'the size of the area and value of the potential resource affected if the area is excluded'.[63] The discussion of the onshore Taranaki blocks offer in the next chapter provides an example of the 'balancing' that is done by officials and the Minister in order to reach a decision that considers all the factors. The claimants described as 'disturbing' the Crown's evidence as to how the 'balancing' was done between the importance of the area to iwi and its value as a potential petroleum resource. Counsel summarised the issue:

> Mr Robson claimed that MED did not undertake any assessment of the strength of association and mana, but merely balanced that against other factors. It is hard to see how one can assess a balance of matters while being uninformed about one side of the scales.[64]

Another feature of the section 15(3) process that drew claimant criticism was the lack of clarity in official communications about the intention of the land exclusion provision and whether the MED was unduly narrowing the meaning of 'defined areas of land' of particular importance to the mana of an iwi by focusing instead on wāhi tapu. Counsel pointed to a comment in an MED report of October 2004 about the submission to exclude Tongariro National Park. There, the MED's chief executive advised the Associate Minister of Energy that the land sought to be excluded covered a 'very expansive area', including 'a large portion of the Whanganui basin, which has significant petroleum potential'. Nonetheless, the report stated:

> we are cognisant that there may be defined areas of particular importance to the mana of iwi within the requested area, which could qualify for the protection afforded by section 15(3), such as wahi tapu or mahinga kai. We consider that the exclusion of areas of this nature would be more appropriately addressed on a case-by-case basis, rather than by exclusion from the Minerals Programme itself.[65]

Other documents, including a letter signed by Mr Robson, also stated that the intention of section 15(3) was to protect very specific areas such as wāhi tapu or 'waka tauranga', rather than broad areas of land.[66] Yet, as Mr Robson noted in evidence to the Tribunal, the area of Mount Taranaki, which has been excluded under section 15(3), is extensive, and it covers about 10 per cent of the entire petroleum field on land in Taranaki.[67] Later in his evidence, Mr Robson spoke about his understanding of wāhi tapu, saying that they need not necessarily be small and confined sites, especially in the more contemporary view, but in a traditional sense the sites regarded as wāhi tapu were mostly smaller.[68]

Counsel submitted that the situation was highly unsatisfactory:

> It seems that where iwi seek to exclude areas on the basis of mana, the response of the Treaty partner is to apply the personal understanding of MED staff, along with notions about what the current law might define as wahi tapu.[69]

(4) *No requirement for engagement*

A frequent complaint is that the Minister does not make it a condition of any permit that the permit holder engage with the tangata whenua and demonstrate that it has forged a relationship satisfactory to all concerned. The claimants noted that applicants for permits must provide a work plan, which the Minister must approve. It was submitted that, depending on the circumstances of the tangata whenua, the Minister could make it a requirement of an acceptable work plan that an analysis be done, in a manner acceptable to the tangata whenua, of the impact of the proposed activities on cultural values. Further conditions could then be imposed relating to the conduct of the activities, including, for example, that the tangata whenua be formally involved in monitoring the activities.[70]

> *'I think the Crown should require companies to have a relationship with tangata whenua, as part of the conditions for their permit. It makes it very hard for us when these companies come to talk to us, as there is no obligation on them to do so. We've been told by some of these companies when we ask for certain things that they don't even have to be there.*
>
> *'I want to say that we are not against development, but we are against being left out of decisions affecting our takiwa. We want a real say in the process.'*
>
> Daisy Noble (doc C1, p 17)

The claimants submitted that, in the absence of a requirement for a petroleum company to engage with the tangata whenua and find ways to accommodate their interests, there may be no incentive for it to learn about Māori values and to endeavour to work consistently with them. And, ironically, the current situation is unhelpful even to a company that is predisposed to working with the tangata whenua, for neither the Crown nor local authorities actively facilitate the building of such a relationship. Even though, as the onshore Taranaki blocks offer example in the next chapter shows, The Crown Minerals Group has passed on to a successful permit applicant information about the tangata whenua and their concerns, and has recommended that they meet and talk, that does not help the permit holder decide how best to manage the situation, especially if they do not have strong New Zealand connections.[71]

5.3.2 The RMA

The problems that the claimants identified with the RMA's processes are these:

- The Act depends on 'iwi authorities' having a vital role in the RMA, and yet iwi authorities are not necessarily the most appropriate representatives of tangata whenua interests in resource management matters.
- because of the difficulties that tangata whenua experience in getting involved at key, early stages in the RMA's policy and planning processes, they must rely on local authorities to understand and represent their interests. However, there are multiple local authorities, with different rules and uncoordinated processes, and they have not made it a priority to improve their knowledge of, and means of engaging with, Māori.
- The opportunities provided in the Act for Māori to take or share responsibility for environmental matters have not been pursued by local authorities, nor by central government.

(1) *Misplaced reliance on engagement of 'iwi authorities'*

The RMA contains numerous references to an 'iwi authority' being the appropriate body to represent Māori interests in particular aspects of the resource management system. Section 2 of the RMA defines 'iwi authority' to mean 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so'.[72]

The claimants highlighted a set of interrelated problems that arise from the RMA's reliance on iwi authorities as the bodies with which permit holders or local authorities must or should deal. The first is that there is no solid basis for

iwi authorities being singled out as being the most relevant Māori bodies to be involved with environmental issues. Iwi authorities around New Zealand vary in strength. Their limited capacity to engage with resource management issues is indicated by the limited number of 'iwi management plans' that have been created or approved.[73] Counsel for Ngāruahine said that, in the 19 years of the RMA's operation, only two such plans had been made in the Taranaki region – and then only recently.[74] That fact is indicative of a major flaw in the Act's processes, the claimants submitted. The RMA's requirement that local authorities, in their planning, have regard to any iwi management plan was intended to be an important means by which the interests of tangata whenua would be considered, early on, in the authorities' vital planning processes. Thus, in the absence of comprehensive iwi management plans, other reliable means are needed to secure Māori involvement at the 'front end' of those processes. But, the claimants submitted (and for reasons that will be outlined under the next major head of the claimants' case), there are no other reliable means in existence. Mr McLay's evidence supported this when he spoke of the limited Māori response to the Taranaki regional policy statement:

> We put it out there. Again, some of the feedback we got was 'Fred, our tables are already full with policies, plans, other government agency documents, applications for resource consent. We have a full table.'[75]

Mr McLay was asked by counsel for the Otaraua hapū about the assistance provided by the TRC to tangata whenua groups that wished to find out about the council's plans, be involved in opportunities to discuss them, and have their questions answered. Mr McLay explained that plans would be sent out to tangata whenua groups for consultation, with an invitation to come and talk to council staff. When counsel asked him if the opportunities afforded to Māori are 'no different really to those afforded to any other community groups', Mr McLay replied 'Yes, that is true.'[76]

The result, the claimants submitted, is that Māori groups must either resign themselves to having no involvement in local authority processes or try to get involved, in a piecemeal fashion, at the 'back end' of the system whenever their circumstances make that possible. Claimant evidence told of their repeated, largely unsuccessful, efforts to have an effect at the back end of the resource management process. Donna Eriwata from Otaraua said:

> It seems that as long as we are participating in the resource consent process by constantly submitting our objections, the consenting authorities take this kind of participation to mean that their responsibilities to us as tangata whenua are being met . . . We have over 100 exploration and/or production sites within our rohe and all of them have been granted resource consents despite our objections to many of them.[77]

Another sense in which the iwi authority for an area may not be the most appropriate body to be involved was highlighted by the Ngāruahine claimants, who submitted that the CMA's requirement for a permit holder to notify the 'iwi authority' of its intended entry upon Māori land was inappropriate: 'Ngaruahine and other hapu within Taranaki act autonomously within their own rohe and legislation which places the power of consenting to access to land with the Iwi Authority undermines this position.'[78]

If that is so for the CMA, it must equally be true for RMA matters, but Mr Sutherland's evidence was that the practice of the STDC is to work through iwi:

> In practical terms it can be quite difficult determining which Maori groups to direct applicants [for consent] to consult with or which groups to serve with notice of a notified application. The Council's approach has been to direct applicants to the Iwi for the area in the first instance. In some instances Iwi consult directly with the applicants and

> in other instances Iwi refer the applicants on to particular hapu groups. This approach is formalised in the best practice measures for resource management matters.[79]

Mr Sutherland's reference to best practice measures is to information on a website owned and funded by the Ministry for the Environment entitled 'Quality Planning: The RMA Planning Resource'. The information is the product of a partnership between several relevant professional bodies and the Ministry.[80]

There are other risks involved in Crown or local authority bodies dealing with 'iwi authorities', instead of, or as well as, hapū bodies. In the present context of Treaty settlements being negotiated by the Crown with mandated Māori groups, the claimants submitted that there is a risk that local authorities will deal only with groups which have established their mandate for settlement purposes, even if other groups' interests overlap those of the mandated groups. Mr McLay confirmed that this could occur.[81]

A further problem, highlighted by counsel for Ngā Hapū o Poutama, is that the representatives of a mandated group who are best-known to local authorities – and who, counsel noted, tend to be male – are not necessarily the people with hands-on experience of the environmental issues faced by hapū. Thus, if local authorities confine their dealings with the tangata whenua to the representatives of mandated groups, the risk is that they will not discover the depth and breadth of the problems being experienced on the ground.[82] On this point, Mr McLay agreed with counsel for Ngā Hapū o Poutama's suggestion that it would be a good idea for the council to bring together, and talk with, 'tohunga, the specialist knowledge keepers of resource management issues for their marae and hapu'.[83]

The reason for the CMA's and RMA's reliance on 'iwi authorities' as the most appropriate bodies to represent Māori interests was suggested by two witnesses familiar with pre- and post 1990 environmental laws: Ms Allan, the Tribunal-commissioned witness, and Mr McLay. Each observed that the Government's intention in the RMA was for Māori to have a significant role in resource management. Mr McLay observed that the RMA 'was presented as co-management. It was presented as co-management with only resourcing for one side. . . . It's a fundamental issue. It still remains an issue.'[84] Ms Allan referred to an expectation at the time the RMA was introduced that the Runanga Iwi Act 1990 would result in the establishment of representative iwi agencies that 'in a way would mirror local government agencies and provide for formal interaction on resource management matters'.[85]

In closing submissions, counsel for Ngā Hapū o Poutama pursued this point, observing that the RMA was in development late in 1989 when the Runanga Iwi Bill was before Parliament. Enacted at the end of August 1990, the Runanga Iwi Act sought to give legal recognition to incorporated iwi rūnanga (councils), which would be the authoritative voice of iwi in their dealings with the Crown and would take over the Department of Māori Affairs' role of delivering Government programmes. But the Act was short-lived, being repealed in mid-May 1991, soon after the change of government.[86] The RMA was enacted in July 1991. In the claimants' view, the 1990 Act's repeal prevented the soon-to-be-enacted RMA from relying on the emergence of incorporated iwi rūnanga to contribute to resource management decision-making.[87] The RMA proceeded, however, on the premise – no longer supported by facilitating legislation – that there would be strong iwi input to local authority plans and decisions.

(2) *Multiple local authorities but minimal coordination of policies, rules, and processes*

In the absence of strong input from iwi at the policy setting and planning stages of local authorities' processes, hapū representatives must navigate those processes as best they can. The difficulties of doing so were spelt out by claimants with a fervour born of frustration. The number of local authorities with which any Māori group must

deal is a major problem. Even if a claimant group's rohe is within just one local authority region, that group will need to keep up with the activities of several district councils and the regional council. Many groups will, however, need to deal with more than one regional council as well.

The degree of separation between local authorities' work is another major problem. Mr Sutherland told us that the councils in the region do not coordinate their approach to deciding or discussing matters of national significance or other fundamental principles of the RMA, or Treaty principles: 'We are required to notify neighbouring authorities when we change our plans, but to my knowledge we haven't sat down together and talked about a coordinated approach to these things, no.'[88]

Mr Sutherland also confirmed that there had been no coordination of the local authorities in the region towards a common position on the oil industry, although he did not rule out the possibility in the future.[89] The district councils' 'silo' style of operation – in the one region of the country where the petroleum industry is a major force – meant that there could be different classifications of the same activity (for example, as permitted, controlled, and discretionary) in each district. In addition, there was not the degree of coordination between district and regional processes that the RMA seems to encourage – or even require. Mr Sutherland advised that there had not been a joint Taranaki region and south Taranaki district hearing of consent applications since 1999.[90] He also said that there was no process by which a Māori group could submit that resource consents should be dealt with together.[91]

The fact that multiple consent processes could occur in relation to a proposed activity posed logistical problems for claimant groups but had distinct advantages for the applicants' prospects of success. Ms Allan and Mr McLay both referred to the expectation in the RMA, and in court decisions, that multiple consent applications for a single activity would be 'bundled', or dealt with together.[92] Combining applications makes it easier for interested parties to participate in the consent process, allowing them to focus their resources on fewer hearings.[93] Ms Allan observed that, despite the RMA's expectation, local authorities and applicants did not necessarily regard the integrated management of multiple consent applications as desirable.[94] Mr McLay supported this, saying that, while the TRC supported joint hearings, the STDC did not seem to want them.[95] Mr Sutherland confirmed that applications were usually dealt with separately by the district council and that the council's decision to deal with applications together or separately was made, he said, 'in consultation with the applicants'.[96]

Ms Allan explained that there were clear benefits for applicants in having resource consent applications processed separately. One reason flows from section 104(2) of the RMA, which provides that a consent authority 'may disregard an adverse effect of an activity on the environment if . . . the plan permits an activity with that effect'. Where parts of the proposed activity are permitted, this provision can mean that the consent authority considers only the effects 'above and beyond' the effects of the permitted activities.[97] Further, Ms Allan said, by submitting applications in succession, applicants could use the consent obtained for one part of an activity to 'minimise the perception of effects' of other parts.[98] She also noted that the case law principle of 'bundling' discouraged applicants from having multiple applications considered together. By this principle, the 'highest' activity status of any part of the application is conferred on all parts of it, which is a situation that applicants are keen to avoid.[99]

Ms Allan went on to explain that local authorities' processes for reviewing their plans were very complicated. This evidence provided insight to the difficulties facing claimant groups that wished to keep abreast of the rules for particular activities. In response to questions, Ms Allan agreed with claimant counsel that within a region there was a series of plans (for example, for land, air, and water), that different parts of each plan would be reviewed at different times, and that changes in one part (such as the rural chapter) might well affect other parts (the heritage chapter, for example). Ms Allan then explained how 'proposed plans' became operative:

> if you start with a plan that has been right through the process and it's operative, that has full effect. Time comes up and the council decides to review its plan or part of its plan. That becomes a proposed plan or a proposed plan change and the contents of that proposed plan or proposed plan change run in parallel with the operative plan, gradually gaining weight as the proposed plan moves through the process.[100]

Ms Allan's concluding comment is noteworthy:

> So I mean it is hard for someone like myself to keep track of where every plan is and what stage of the process it is, and it is difficult for the Environment Court at times as well.[101]

The Tikorangi example in the next chapter illustrates this point. There, a plan change of which claimants were unaware reduced the protected area of a wāhi tapu to an area with a 50-metre radius.

(3) *Local authorities' varied efforts to include Māori in decision-making*

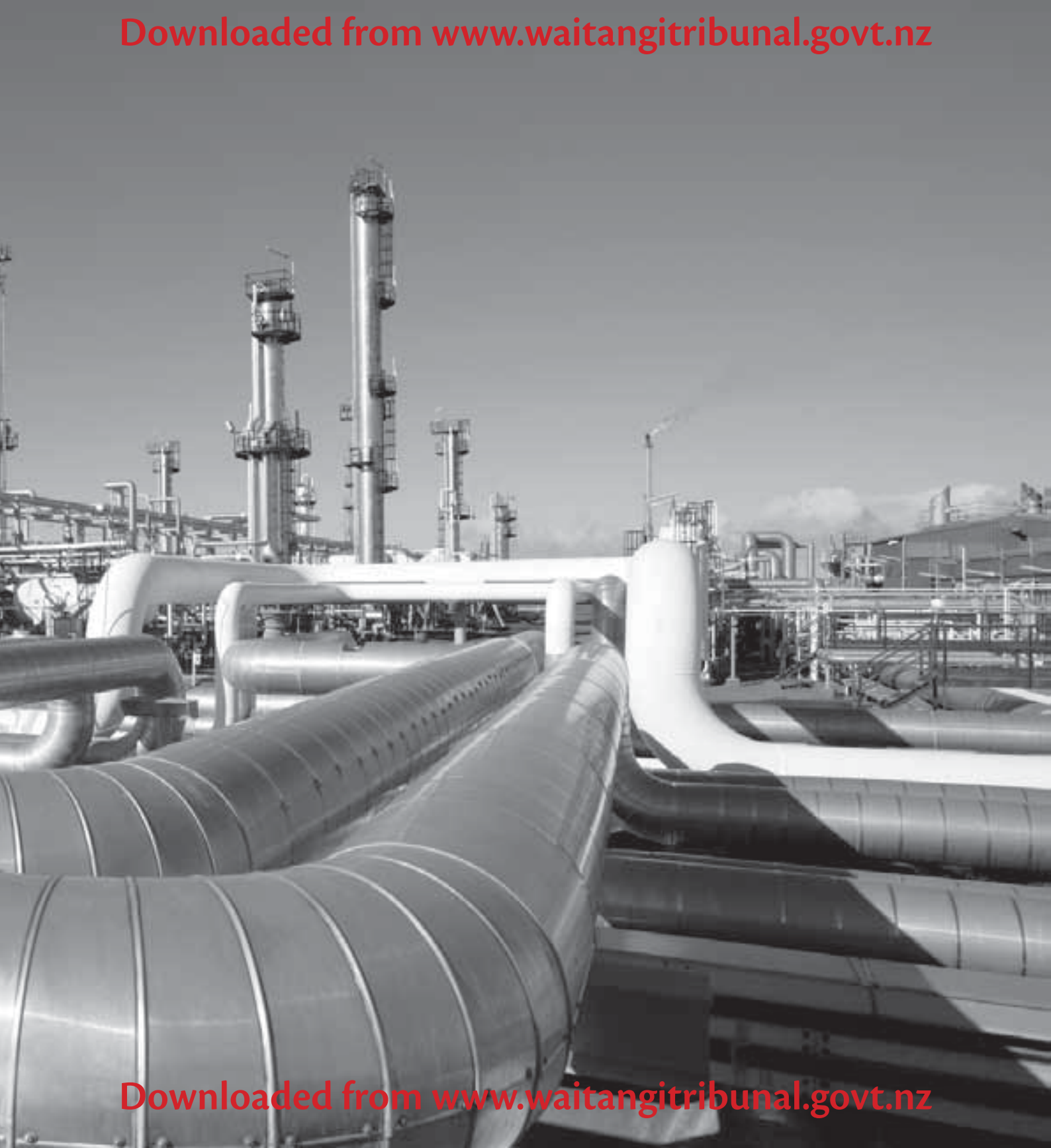
The limited capacity of iwi authorities to be involved in local authority policy and rule setting, together with the limitations on tangata whenua being involved in complex resource consent processes, mean that they are far more dependent than they want to be on local authorities' ability to protect Māori interests.[102] The claimants do not have a high level of trust in local authorities' capacity to understand and respond appropriately to their needs and aspirations. That is because the efforts made towards incorporating Māori knowledge in local authority decision-making processes are varied and, in the claimants' view, substandard. The fact that the RMA does not require more consistent and better quality initiatives by local authorities is seen to be a failing of that Act. The Local Government Act 2002, which requires local authorities to adopt good practices in their consultation with Māori and to encourage Māori participation in local authority decision-making, is likewise seen to be insufficiently prescriptive.[103] In closing submissions, counsel for the Ngāruahine claimants summed up their view: 'The problem is that the default position under the current legislation is that councils can stumble along for years without expert Maori staff or even contact committees and that is lawful.'[104]

The claimants noted that their local authorities do not have significant Māori representation at council level. We were told that the TRC has two members with local whakapapa connections, but we are not aware of Māori representation on any of the district councils in the region. Mere Brooks said that not only is it 'really hard to get Maori elected onto local bodies' but, 'if they are, they don't deal with us because we are told they would have a "conflict of interest"'.[105] In her view, 'It is funny how they never say that a Pakeha councillor has a conflict of interest when there are Pakeha submitters.'[106]

As for other elements of local authority processes, Mr McLay and Mr Sutherland both spoke about the strategies employed by the TRC and the STDC to enable Māori participation in the local authorities' business. We outline their evidence in some detail here because we believe that it gives a good picture of the two authorities' engagement with tangata whenua.

The TRC established a Māori liaison committee known as Te Pūtahitanga o Taranaki, or Te Pūtahi, in 1992, which contributed to the early post-RMA policies and plans of the council. It was a standing committee and its members were drawn from all eight iwi in the region. The purpose of Te Pūtahi was to provide a forum for discussion and a source of advice to the council in relation to Treaty obligations and issues of concern to Māori, particularly those to do with resource management. Its role was to formulate 'appropriate broad level policies for the Council' (for example, providing input into the annual plan and regional policy statements) but not to make recommendations on matters relating to specific iwi or site-specific resource consents.[107] Like other council committees, Te Pūtahi could make recommendations on matters referred to it by the full council or by the Policy and Planning Committee.[108] An iwi liaison officer was employed by the regional council during the period in which Te Pūtahi was

Shell Todd Oil Services' Oaonui refinery in west Taranaki, where gas and condensate are processed from the offshore Maui field
Inset: A gas flare at the refinery, May 2004



active, and that person would refer issues raised by the council to Te Pūtahi. There has now not been an iwi liaison officer for about 10 years. Instead, the managers of the planning and resource consent sections (and councillors) were provided with 'appropriate cultural training' to take on the extra liaison responsibilities.[109]

Mr McLay said that Te Pūtahi made a very significant contribution to the development of council policy and, in particular, to resource management policy. It also had input at the national level on the draft MPP, including on the policy on petroleum and mining activities beyond the 12-mile limit.[110] Another example of its work was its development, with the council, of a declaration of understanding and a code of conduct in relation to the principles of the Treaty. These were incorporated into the regional policy statement.[111] In addition, by means of commenting on working papers, Te Pūtahi had early input into the development of the council's four operative regional plans.[112] It was not Te Putahi's role, however, to become involved in iwi-specific matters, such as the drafting of iwi management plans.[113]

The reasons Mr McLay gave for Te Pūtahi's failure to meet in more than a decade were that iwi had other priorities (namely settlement negotiations); there was a lack of agreement about who should represent the iwi; and there was a perception that the committee had a limited role and functions.[114]

Since Te Pūtahi stopped meeting in 1999, the regional council has engaged directly with iwi and hapū on resource management matters. Mr McLay gave the example of the council, in the early stages of reviewing its regional coastal plan, having several hui with local iwi and hapū, some of them on marae. He said that the council also facilitated ongoing dialogue in a number of ways, such as:

- meeting with Māori to discuss any matter of mutual interest or importance at agreed times and venues;
- providing opportunities for Māori within the council's standing orders to appear before and to address any meeting of a council standing committee or the full council;
- seeking opportunities, when appropriate, to be represented before meetings of Māori governance entities;
- contracting Māori for specific advice, information, or other services, including the establishment of a wāhi tapu database with three hapū; and
- reaching memoranda of understanding with post-settlement iwi governance entities.[115]

There were also ad hoc consultation measures. For example, the council has met once with the regional iwi leaders forum, which is an informal forum of representatives from the eight iwi authorities.[116]

The 2010 *Regional Policy Statement* sets out a range of 'proposed methods' of working with 'iwi'. These include transfering functions, delegating powers, drawing up memoranda of understanding, establishing joint management agreements, building up capacity, and managing and monitoring resources in a way that recognises Māori cultural and spiritual values. Ms Allen suggested that many of these appear not to have been implemented 'to any great extent' yet.[117]

Mr Sutherland told us about the STDC's Iwi Liaison Committee, a standing committee of council which was formed in 1991 and comprises three council representatives (the mayor, the deputy mayor, and one other councillor) and two elected members from each of the four recognised iwi in south Taranaki.[118] The committee meets every six weeks, and its role is to facilitate discussion between the council and iwi on matters that relate to Māori: it provides a forum for concerns and issues to be raised with the council. The committee's standing is the same as the other council committees, but unlike some it does not have a decision-making role.[119] The Tribunal asked to see the minutes of the committee's last six meetings, and these and more were filed by the district council. They suggested that the committee addresses a range of issues, from the site-specific through to cultural events and the disbursement of grants from the Tangata Whenua Liaison Fund.[120] (The fund's purpose is to 'support local groups, such as marae committees and/or hapu, projects and initiatives that develop positive relationships between Tangata

Whenua, Council and the people of South Taranaki'.[121]) Mr Sutherland was not aware of anyone raising any petroleum-related issues with the committee. He gave, as an example of its work, the guidance it provided in the naming of new roads and streets.[122]

The documents filed by the council show that, in 2007, the Iwi Liaison Committee asked that the council review the committee's appointment, representation, role, and operation. The review team consulted the 'Council, iwi representatives, community representatives and other stakeholders' and reported that 'The majority of the respondents were happy with the current structure of the Committee', viewing it as 'functional' and 'meet[ing] the current needs of both the Council and the iwi'.[123] It is not clear what proportion of the respondents were Māori.

The review team noted the committee's aims as being:

- To advise the council on how it can improve the delivery of its services and functions to Māori people in the district. This includes giving advice about staff training programmes to develop a greater awareness of Māoritanga and tikanga Māori.
- To promote and develop procedures to ensure that good consultation takes place between the council and tangata whenua on resource management issues.
- To decide priorities for the Tangata Whenua Liaison Fund budget on an annual basis and to make recommendations to the council accordingly. Funding priorities will be based on criteria developed and agreed by the committee.[124]

A number of the review team's 17 recommendations related to administrative and process matters, but four are notable in that they seem to reflect the desire of tangata whenua to bring a greater strategic perspective to their dealings with the council. These recommendations were:

- That an annual strategic planning meeting of the committee be held, 'which could lead to the development of iwi plans between the Council and Iwi' (recommendation 13).
- That iwi and the council consider entering into 'formal agreements' to allow for 'direct negotiation and consultation on issues that directly affect them', reflecting a Māori preference for making 'direct contact with the relevant Council staff member on operational matters' (recommendation 14).
- That an iwi forum be created that would sit outside the standing committee structure and have more of a strategic oversight role. Reference was made to the New Plymouth District Council's Iwi Forum, which, although part of that council's committee structure, was described as 'open to all kaitiaki in the district', thereby allowing iwi and hapū to discuss matters of common interest (recommendation 15).
- That the council and the committee 'investigate ways that it can work with iwi and hapu to develop management plans' (recommendation 17).[125]

When questioned about specific areas that the committee might be working on and how it was utilised, Mr Sutherland's responses showed that:

- The committee had not been asked to help the council deal with the difficulty of knowing which Māori groups had mana whenua and were affected by particular resource consent applications.
- The committee had not been asked to invite iwi or hapū to indicate their broad geographical areas of interest so that applicants for resource consents would know who to talk to.
- The committee was not involved in the classification of any activities (as permitted or controlled or any other classification).
- The committee did not have a role in advising the council or its staff about the principles of the Treaty.
- Iwi authorities had recently been directly consulted in relation to plan changes and other matters because the committee meeting was some weeks away, although the matters were not so urgent that they could not have waited until the next meeting;
- In his role as the council's new planning manager, Mr Sutherland had not needed to attend a committee meeting, although he thought that it would be useful to do so.[126]

In addition to the Iwi Liaison Committee, the STDC has other means of engaging with Māori. Mr Sutherland referred to the council talking with iwi about any change to the district plan at both the pre-consultation stage and in the formal consultation stage.[127] A notable addition to the council's staff occurred in 2010, when an iwi liaison officer was appointed to improve communication between the council and Māori by 'actively encouraging Maori participation and by providing advice and guidance to the District Council and staff on matters which are significant to Maori'.[128]

Other planned initiatives include the introduction of an annual mayoral forum, which would 'bring Councillors, senior staff, local business leaders and local Iwi leaders together to discuss issues of mutual concern and interest'.[129] Also envisaged in the council's future plans were:

- Mana Whenua involvement in significant events, such as citizenship ceremonies and openings.
- Iwi Liaison Committee involvement in training for District Council staff and elected representatives, for example in Te Reo and Tikanga.
- Educational workshops for Iwi Liaison Committee primarily covering resource management issues.
- Iwi Liaison involvement on relevant District Council working parties.
- The establishment of a Kaumātua Committee to contribute to the decision-making processes pertaining to the care and protection of taonga held within the District Council's collection, or through its partnership with South Taranaki District Museum Trust.
- The development of a Memorandum of Understanding between mana whenua and the District Council, which may include a review of District Council protocols, processes and procedures and consultation guidelines.[130]

At the time of the Tribunal's hearing, the only initiatives in place in south Taranaki were the Iwi Liaison Committee and the brand new iwi liaison officer.

Both Mr McLay and Mr Sutherland talked of difficulties that their councils had experienced finding out who were the tangata whenua for particular areas. That information is needed not only for the local authority's formal notification purposes but also to refer applicants for resource consents to the right people, when they seek to obtain the consent of 'affected' persons' to the proposed activities. A particular difficulty is determining, at hapū level, the areas with which groups are associated. Mr McLay advised that the regional council's website is regularly maintained with Māori input to provide marae, iwi, and hapū information. Mr Sutherland referred to Te Kāhui Mangai (the database of iwi and hapū groups and contacts compiled by Te Puni Kōkiri) as being a helpful resource, but he noted that it is not comprehensive at hapū level.[131] The district council's approach has been to refer applicants to iwi authorities in the area in the first instance, although this has met with varying degrees of success where two or more hapū are involved and they have different responses to the application.[132] From the hapū's standpoint, Maria Robinson of Ngāti Manuhiakai described how petroleum companies which have been referred to them can give technical presentations about their proposed activities, and then:

> they always want a 'yes' or a 'no' from us . . . They tell us what they plan to do, but they never tell us what the effect will be on the whenua. We have to prompt them to do that. They always tell us that the effects will be 'minimal'.[133]

We have presented the foregoing information in some detail because the claimants believe that, under the current petroleum resource management regime, the ability of Māori groups to influence local authority policy and decisions varies according to the level and kinds of processes that the authority has elected to put in place to engage with Māori. In other words, the quality of tangata whenua participation in local authority processes depends on whether and, if so, how many of the following sorts of things are in place: Māori representation on the local authority; Māori representation on the authority's key committees; a Māori advisory body; Māori liaison

staff; funding for the mapping of cultural sites; and other resources dedicated to securing Māori participation in important issues or projects. The principle is a general one, applying also to central government agencies. The essential problem that claimant evidence sought to highlight is that the quality and quantity of the resources that are dedicated to involving Māori in the decision-making processes of the petroleum regime are very variable as a result of being determined by the many individual decision-makers. Central or local government bodies that do not prioritise Māori involvement in their decision-making processes, and so devote minimal resources to that end, are thus likely to be the least equipped to respond to claimants' needs and wishes – which perpetuates mistrust and misunderstanding.

The claimants' objection to being sent complex, technical information which they do not understand was levelled not only against the MED but also against petroleum companies, which provide the information in order to seek claimant approval to their proposed activities. The claimants have generally found petroleum companies to be disinclined to provide a full and clear explanation of the activities and their effects. As well, those companies have generally been unwilling to pay the costs of the claimants hiring a suitably qualified consultant to analyse the activities' effects.[134]

A particular difficulty for the Ngāruahine claimants is the comparative lack of information that has been recorded about their lands, which is a legacy of the extent of the confiscation in Taranaki and the resulting lack of Native Land Court hearings and records. The claimants identified different ways by which the situation could be improved – from commissioning rohe-wide, intensive studies of traditional land uses and sites of significance to more generalised studies of the cultural significance of an area in which a permit is proposed – but they had not been able to obtain funding for that work. Some hapū have reached agreement with the STDC to map wāhi tapu, but that requires a degree of knowledge, and a willingness to share it in that way, that is not universal.

The attitude of the MED to funding local or regional cultural impact assessments (outlined in chapter 7) was said by counsel to be 'more astonishing' when the Minister of Energy's discretion to exclude land from mining under section 15(3) of the CMA is 'the one provision in the CMA which provides Maori a limited role in the petroleum regime'.[135] In brief, the MED's attitude is that such assessments are not needed when block offers are advertised because: mostly, the offers are for offshore areas; cultural effects are more appropriately taken into account in the resource consent process; and the MED's processes are flexible enough that a cultural impact assessment could be ordered to be done if that were considered necessary.

(4) *Local authorities do not transfer or share power*

The provision for a local authority to transfer power to an iwi authority under section 33 of the RMA has not been used in 19 years of the Act's life. Ms Allan was not aware that an iwi had actively sought any such power and believed that resourcing would be an issue for an iwi taking on full responsibility under that section.[136] Section 36B of the Act, added in 2005, allows a local authority to initiate a joint management agreement with an iwi authority or a group representing hapū, subject to conditions (as in section 33) relating, among other things, to efficiency and the availability of technical capability. It has had very limited use to date.[137] In Ngāti Kahungunu's submission, joint management 'could materially assist kaitiaki in the maintenance of their relationship with the environment'. They contend, however, that there is 'no incentive for local authorities to delegate powers to iwi, and no ability for iwi to encourage such delegation'.[138]

5.4 Māori Lack Capacity to Overcome Obstacles to Effective Participation

The claimants' case under the third head has already been glimpsed in the course of the discussion to this point. It has been noted that in the absence of 'iwi authorities' or other well-resourced Māori groups taking an active part in the

policy setting and plan making and review stages of local authority operations, tangata whenua are in a weak position. In effect, they feel that they should become involved in the resource consent processes for particular petroleum prospecting, exploration, and mining activities every time the proposed activities might pose a risk to their taonga. They cannot always participate at this stage, however, for the reasons outlined earlier. For example, the activity may be permitted and there will be no consent process or they may not be considered to be 'affected' parties. The examples in the next chapter illustrate this point and show how time-consuming – and protracted – the processes can be. Indeed, they show that for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast of petroleum companies' activities so that taonga may be protected is relentless.

'It is no great secret that we cannot really afford to go to Court. The Environment Court costs money and we do not have it.'

Mere Brooks (paper 2.154, p 38)

'We do not believe it is necessarily the responsibility of these [oil] companies to help us to participate. In our view it is the Crown's responsibility. It is only because we have got nothing from the Crown that we have had to try and get the petroleum companies to help. We're not convinced the companies help us because it's right in principle. At a practical level they've finally realised it makes their life easier.'

Maria Robinson (doc c2, p 5)

'They have offered us the opportunity to mark on a map places that we would not like people to drill within particular licences and that was the first time that had been offered to us and we had a time frame of about two weeks to put that together. And we wrote back to them and said that we do not have the resources or the time or the personnel and in lieu of that we have declared our whole rohe as wahi tapu, not to abuse the name but, again, we thought about that carefully because as of yet our claims have not settled and you know the blood of our tupuna is still on that ground and it has not been addressed.'

David Doorbar (paper 2.154, p 67)

The claimants are very conscious of their lack of technical knowledge about the petroleum industry and their need for advice and plain-language explanations of proposed activities and their effects. Some of the examples that the claimants gave of technical matters they did not understand, or of possible effects they were worried about, did not seem to be difficult matters to clarify – but clarification depended on there being good lines of communication between them and either the MED or a particular petroleum company.

'I am concerned that the drilling will affect the mauri of certain aspects of the land. For example where they propose to site the drilling rig is right next to our eeling spots. I am concerned that the eels will be chased away. This is an important place for eels in northern Ngati Kahungunu. Eels leave the district for hui all over the rohe, and people come here and expect to have them on the table as the local delicacy. There are also many skinks down on the beach and the katipo spider lives in the sand dunes. The proposed drilling site would be right in the middle of this highly sensitive environment.

'I have seen other rigs in the area and they are all lit up at night. We have ducks, swans and white herons, as well as migrating birds coming to our lands. I don't know what the effect of that will be on our bird life, and their breeding cycles. It will light up the whole area which was formerly dark and peaceful.

. . . . .

'We have not yet been told the details of the proposed drilling site. We are advised that while Westech must consult with us, they do not need our consent. Any law that does not even allow us the opportunity to protect our sensitive wetlands and fails to give us undisturbed possession as guaranteed by the Treaty must be wrong. We are the tangata whenua, the people on the ground who are the kaitiaki of our lands and the indigenous flora and fauna there. We are being asked to give up too much.'

Sue Wolff (doc A27, pp 3–4)

In some cases, unhelpful attitudes may have become entrenched as a result of past unsatisfactory attempts to engage. Some claimants were frustrated that the MED had not provided them with clear information about petroleum prospecting, exploration, and mining processes. They explained that sometimes their opposition to proposals about which they were given notice was based on their lack of understanding about what was involved. Ms Noble, her hapū's liaison person on these issues, said:

> The information provided by MED is technical and difficult to understand.
> . . . For example, if someone wants to do a seismic survey, we do not know what that means or what the impact on the whenua might be. We do not have the technical training to make that assessment or the funds to pay someone to advise us. Because of that, we cannot support something that we do not understand.
>
> . . . . .
>
> The Crown's own policy states that MED can publish information brochures on petroleum prospecting, exploration and mining processes and distribute these to iwi and hapu. This suggests that MED is aware that this type of assistance would be useful. However, has MED done this? Not that I'm aware of. I certainly have not received any such brochures.[139]

The claimants' incomplete knowledge of the history of their lands, and their fear that what little is left of their taonga will be desecrated unless they are particularly vigilant, magnify their frustration at being unable to access funding to conduct cultural values or cultural impact assessments appropriate to their needs. There was a clear sense that local authorities believe that 'one size fits all' when it comes to the process of recording wāhi tapu and other significant sites, even though some claimant groups' needs had not yet been recognised:

> we have never had the advantage of having a detailed site of significance research completed for our iwi. We did not have a detailed [Waitangi Tribunal] historical Inquiry into Nga Ruahine rohe; we were not funded by the Crown Forestry Rental Trust to get this work done; we have to rely on volunteers to try to contact kaumatua and kuia to find these things out on an ad hoc basis. Nor have we had a Treaty settlement which would allow us to get this inventory done, as have Ngai Tahu and other iwi.[140]

The cost of being involved in local authority processes has also been touched on. A particular concern was that, when legal advice is relied on by applicants in consent hearings, and in court hearings, unrepresented tangata whenua objectors are at a disadvantage. The claimants spoke of the heavy demands upon, and limited availability of, funding from the Ministry for the Environment's Environmental Legal Assistance Fund, which is available only for parties to court or board of inquiry proceedings under the RMA provided certain conditions are satisfied. Groups, including hapū and iwi, can apply to that fund for a maximum of $40,000 for legal assistance and expert witness costs.[141] A feature of the availability of legal aid for RMA hearings is that the applicant must be an individual, not a group.

The claimants frequently spoke of the time involved in responding to CMA and RMA demands for information or in seeking to be otherwise involved in their processes. All the claimants we heard from were volunteers

for their hapū. The sheer size of the files that they had assembled about particular projects to which they had objected provided some indication of the extent of the work required of them, which was done in their own time. Again, all of the examples in chapter 6 provide an insight into the magnitude of the effort that is expended by tangata whenua in seeking to exercise their kaitiaki responsibilities.

5.5 The Harmful Effects of the Regime

The point of much of the claimants' evidence was to demonstrate that dislocation from their traditional lands has not weakened their responsibilities as kaitiaki. To the contrary, the losses suffered have increased the pressure to protect what has been retained of their taonga, and yet the claimants struggle even to have an influence on decisions that determine their fate:

> The Tikanga of Poutama requires that taonga remain on Poutama whenua and decisions on where they shall be placed or kept will be made by Poutama.
>
> Currently the heritage protocol provides that the Ministry for Culture and Heritage have a major role in determining custodianship of Poutama taonga and there is an expectation that the custodian of the taonga be the museum.[142]

The heightened responsibility to preserve what remains of their taonga is the reason why claimants want more control over the exemption of Māori freehold land from petroleum exploration and mining. That land represents a small proportion (some 6 per cent) of New Zealand's land. As successive Waitangi Tribunal reports have now demonstrated, the reasons for this are very much connected with breaches of the principles of the Treaty by the Crown. And that is why the claimants believe it is unfair that the petroleum management regime does not provide for any weight to be given to the history of Crown–Māori relations, including the continuing adverse effects on Māori groups of the loss of their land through raupatu and other indefensible Crown conduct.

The claimant experiences presented in the next chapter provide examples of situations in which wāhi tapu have been destroyed or damaged by activities undertaken by the petroleum industry. They also exemplify the lengths to which the tangata whenua must go in order to mount a successful challenge to petroleum-related activities that directly threaten the integrity of their taonga and that, without the claimants' objections, could have been approved. This feature of the experiences highlights the damage done to relationships – between tangata whenua and local authorities and between tangata whenua and petroleum companies – by the circumstances in which they interact, or fail to interact. There is a strong sense that, in order to protect their interests, claimant groups must work against the system – rather than within it, with support from others, to achieve common goals.

> *'None of the regulatory authorities in our rohe have shown that they have our interests at heart and they can barely look after the few places that are already registered. This engenders no confidence in the existing processes. There are pa sites that have been bulldozed and have oil installations built on them. NPDC [New Plymouth District Council] and HPT [Historic Places Trust] have been to visit these sites and advised that they couldn't do anything about protecting them. Why would we put our places on their books, we are the holders of the korero and we are the ones that the NPDC should contact when working within our rohe.'*
>
> David Doorbar (doc D2(b), p 3)

> *'It just feels like all we do is write letters of protest and nothing ever changes. Until Maori are brought into the decision making process, then the odds are always stacked against us. It is hard to get councils and big companies who often have little*

or no understanding of tikanga Maori to come to see things from our point of view. You just end up feeling like you are wasting your breath.'

Mere Brooks (doc C3, p 11)

'When the block offers are advertised, we would make a submission saying similar things to what we would say in opposition to the resource consent application. No wonder we feel like we are repeating ourselves, because we are.'

Mere Brooks (doc C3, p 5)

The naming of petroleum sites can present issues for claimants. One problem is that some companies presume, without consulting tangata whenua, that they can give their site the Māori name for the area. An example is found in the Ngarewa situation discussed in chapter 6. Another problem can arise if petroleum companies give their sites names that are not associated with the area and its history:

> the name of the place is Tikorangi but they called it Kowhai A. They are renaming our sites as well. They are rubbing us out. They remove our taonga from the ground, our connection to the place, then they rename it, then they steal all the resources in there and we argue about it amongst ourselves on how we are going to sort it out.[143]

As those words indicate, another effect of the current regime can be to create or magnify differences among hapū and iwi, as they each respond as and when they can to particular proposals of which they are notified or otherwise become aware. It seems that the imperfect understanding of central and local government of which groups have interests in particular lands, coupled with the relatively ad hoc nature of different groups' involvement in RMA processes and the burden that is placed on the small number in each group who give their time and energy to become actively involved, is a recipe for tension.

An effect to which the claimants frequently drew attention was their loss of opportunity to develop constructive relationships with petroleum companies in which both parties' interests could be better explored and accommodated. The more usual situation, we were told, was one that was characterised by mistrust and misunderstanding on both sides:

> We suggested [to the MED] that as a condition of [a petroleum company's] permit being granted that they contact the tangata whenua in the first instance and highlight that it is in their interests to start developing the relationships. That would be a 'win-win' situation as far as I am concerned – both parties are better off.
>
> The way I look at it is, we live here, they're here for the long haul, we can't get them to go, so we might as well try and build a relationship . . .
>
> In reality, the companies don't get to us until they've already been to the Council to lodge their resource consent application. . . . They could save so much time if they spoke to us before they lodge their resource consent application.[144]

A number of examples were given of constructive engagement between hapū groups and a petroleum company, including a company paying for a survey and providing funding for riparian planting to combat erosion.[145] But instances of a company paying for the tangata whenua to be advised about the company's proposal were rare. It seems more usual for any funding or other services to be directed at improving marae facilities. Some claimants expressed disappointment at being unable to secure education, training, and employment benefits for their people from the companies operating in their rohe. This compounded their sense of being left out of the decisions that had brought the company into their area and had determined what it could do there. The desire to be involved

in what is happening with the petroleum industry in their rohe was a constant theme of the claimants' evidence. As was said several times, the claimants do not oppose development; they oppose being excluded from matters in which they have vital interests:

> The Crown woos these companies to come to New Zealand and drill for oil. Not only does it do nothing to help us deal with the negative impacts, it doesn't help us to try and benefit.[146]

Text notes

1. Document C3, pp 11–12
2. Document D4, paras 20.1–20.35, 22.1–22.5
3. Ibid, paras 16.1–17.2, esp 16.14; doc D4(e)
4. Document E31(b)
5. Ibid, paras 3.1–3.17
6. Document E28(g), pp 8, 15
7. Paper 2.55, p 4; doc E36, pp 2–3
8. Paper 2.55, p 12b
9. Document E28(g), p 16
10. Document D7, p 4
11. The experience of the Kanihi hapū in connection with the onshore Taranaki blocks offer, presented in chapter 6, is relevant.
12. The Ngāruahine claimants also referred to the Minister's use of section 15(3) in connection with the exclusion of land from the mining of Crown-owned minerals other than petroleum. The situations are not directly comparable, however, because landowners have a far greater right to deny access to their land for such mining activities: see the Crown Minerals Act, ss 54(2), 55(1), 66.
13. Document E16, pp 2–3
14. Document D7, p 9
15. Ibid, p 11
16. Ibid, p 10. We note that, despite definitions of seismic surveying including 'shot holing which uses explosives' (see, for example, section 1.07 of the *Operative District Plan for the South Taranaki District Council* (Hawera: South Taranaki District Council, 2004)), Mr McLay from the TRC stated that seismic surveying no longer involves explosives but relies on sound waves and vibrations: paper 2.154, p 233.
17. Document D7, p 10
18. Document E28(g), p 21
19. Ibid; paper 2.154, pp 188–189
20. Paper 2.154, p 214
21. Document C3, p 4
22. There is provision in section 274(1)(d) of the Resource Management Act 1991 for a person to be involved at the Environment Court level of the process if they have an 'interest in the proceedings that is greater than the interest of the general public'.
23. Document D4, para 34.12
24. Document E14, p 22
25. Paper 2.154, p 130
26. Document E14, p 28
27. Ibid, pp 25–26
28. Ibid, p 26
29. Ibid
30. Ibid, p 30
31. Ibid, p 29. Under the New Plymouth District Council's current district plan, registered wāhi tapu and archaeological sites can be protected from various activities but only within a certain radius from their centre point. For example, excavation within a 50-metre radius becomes a discretionary activity if the site is listed in schedule A to appendix 26 of the plan or a controlled activity if the site is listed in schedule B: see New Plymouth District Council, *New Plymouth District Plan*, 3 vols (New Plymouth: New Plymouth District Council, 2005), pp 202–203.
32. Document E14, p 29
33. Ibid, p 30
34. Document D1, p 12
35. Paper 2.154, p 127
36. Crown Minerals Act, s 17(7); see also the Resource Management Act 1991, s 42
37. Paper 2.154, p 65
38. Ibid, pp 65–66
39. Document E34, p 4
40. Document E31, pp 21–22
41. Document E28(g), p 8
42. 'Coal Seam Gas (CSG)', Solid Energy New Zealand Ltd, http://www.coalnz.com/index.cfm/1,255,0,0,html (accessed 25 November 2010); doc E4, p 35; doc E7, pp 11–12
43. Paper 2.154, pp 334–336
44. Ibid, p 334
45. Document E28(g), p 13
46. Document C5(D1), pp 22–23
47. Paper 2.154, pp 351–352
48. Document D6, p 7
49. Document C1, p 17
50. Document D4, paras 20.20–20.23
51. Ibid, paras 13–22.5
52. Document C4; doc C4, attachment
53. Document C4, p 7
54. Ibid, p 2
55. Document C4, attachment, p 14
56. Ibid, p 15
57. Ibid
58. Document C4, pp 3–4; doc C4, attachment, p 4
59. Document C4, p 4

60. Ibid, pp 4–5; doc C4, attachment, p 5
61. Document C4, attachment, pp 36–41
62. Document E8, pp 2–3
63. Document C5(D1), p 24
64. Document E28(g), p 11
65. Chief executive, Ministry of Economic Development, 'Report of the Chief Executive of the Ministry of Economic Development to the Associate Minister of Energy on Submissions Received on the Draft Replacement Minerals Programme for Petroleum' (Wellington: Ministry of Economic Development, October 2004), p 32 (doc C5, pt C, p 628)
66. Paper 2.154, pp 330, 337; doc C6(a)(RR13), app 3
67. Paper 2.154, pp 314, 316, 330
68. Ibid, pp 369–370
69. Document E28(g), p 11
70. Document D6, p 7
71. Document C1, p 17
72. Section 51(1) of the Crown Minerals Act 1991 also requires notice to be given to the relevant 'iwi authority' by a permit holder who wishes to enter Māori land to conduct minimum-impact activities.
73. We note that a 2004 study commissioned by the Ministry for the Environment found that, of the 77 iwi organisations identified nationwide, 38 (49 per cent) had a management plan of some kind: KCSM Consultancy Solutions, 'Review of the Effectiveness of Iwi Management Plans: An Iwi Perspective' (report to the Ministry for the Environment, Opotiki: KCSM Consultancy Solutions, 2004), pp 3–6.
74. Document E28(g), p 19
75. Paper 2.154, p 232
76. Ibid, p 246
77. Document D1(d), p 3
78. Document D6, p 8
79. Document E12(a), p 4
80. The bodies are the New Zealand Planning Institute, the Resource Management Law Association of New Zealand, Local Government New Zealand, and the New Zealand Institute of Surveyors.
81. Paper 2.154, p 256
82. Document E29, pp 6–8
83. Paper 2.154, p 266
84. Ibid, p 276
85. Document E14, p 7
86. Document E35, pp 6–7
87. Ibid, pp 7–8
88. Paper 2.154, p 205
89. Ibid, p 195
90. Ibid, p 196
91. Ibid, p 192
92. Document E14, p 23; paper 2.154, p 236. Sections 91, 102, and 103 of the Resource Management Act 1991 provide for joint consent processes.
93. Paper 2.154, p 196
94. Document E14, pp 23–24
95. Mr McLay noted that the regional council supports joint hearings, where applications are heard and considered jointly but decisions are issued separately: paper 2.154, p 236.
96. Ibid, p 192
97. Ibid, p 140
98. Document E14, pp 23–24
99. Ibid, p 24
100. Paper 2.154, p 133
101. Ibid
102. Document E28, p 20
103. Document D7, p 13
104. Document E28, p 22
105. Document C3, p 5
106. Ibid, p 10
107. Document E13, paras 2.12–2.15
108. Paper 2.154, p 244
109. Ibid, p 245
110. Document E13, paras 2.16–2.17
111. Ngāruahine's disagreement with one element of that declaration is noted: namely, the use of the word 'acknowledgement' in paragraphs 4 and 5: doc E13, para 2.25; doc E13(b).
112. Document E13, para 2.65
113. Ibid, para 2.15
114. Ibid, para 2.18
115. Ibid, paras 3.7–3.9
116. Paper 2.154, p 273
117. Document E14, p 27; Taranaki Regional Council, *Regional Policy Statement* (Stratford: Taranaki Regional Council, 2010), pp 125–140
118. Document E12, para 2.3; paper 2.154, p 198
119. Paper 2.154, pp 197–198
120. Document E12(d)
121. 'Tangata Whenua Liaison Fund', South Taranaki District Council, http://www.southtaranaki.com/Council/Funding-Grants/Tangata-Whenua-Liaison-Fund (accessed 23 November 2010)
122. Paper 2.154, pp 197–198
123. Document E12(g), pp 2–3
124. Ibid, p 10
125. Ibid, pp 4–5, 32–37
126. Paper 2.154, pp 198, 199, 204–205, 209, 211
127. Ibid, p 208
128. Document E12, para 2.4
129. Ibid, para 2.5
130. Ibid
131. Document E12, para 7.4
132. Ibid, paras 7.2, 7.4, 7.5; paper 2.154, p 199
133. Document C2, p 3
134. Ibid, pp 3–4
135. Document E28, p 11
136. Document E14, pp 6–7; paper 2.154, pp 112–113

137. Paper 2.154, p 112. A joint management agreement was entered into by the Tūwharetoa Māori Trust Board and the Taupo District Council in 2009: see Natalie Coates, 'Joint-Management Agreements in New Zealand: Simply Empty Promises?', *Journal of South Pacific Law*, vol 13, no 1 (2009), pp 36–38. A joint management agreement is currently being negotiated between the Waikato-Tainui Raupatu River Trust and Environment Waikato.
138. Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007 (Wai 262 ROI, doc S1), p 57 (paper 2.55, app 1, paras 8, 9)
139. Document C1, p 13
140. Ibid, p 11
141. Among the conditions that applicants for funding must satisfy are that 'the focus of the case is the protection or enhancement of environmental qualities' and that 'the case affects the wider community or general public': see 'Environmental Legal Assistance Fund (ELA Fund) Information Guide for Applicants', Ministry for the Environment, http://www.mfe.govt.nz/withyou/funding/ela-information-guide.html (accessed 1 December 2010).
142. Document E15, p 21
143. Paper 2.154, p 62
144. Document C2, p 8
145. Ibid, pp 5–6
146. Ibid, p 6

CHAPTER 6

EXAMPLES OF CLAIMANT EXPERIENCES

6.1 Introduction

This chapter consists of accounts of five different situations in which the claimants have become involved with the legal regime for managing the petroleum resource. We present these accounts to illustrate the kinds of problems experienced by tangata whenua as they seek to have input to the regime for the purpose of protecting sites of significance to them. Our aim is to give an idea of how the regime operates 'on the ground' for iwi and hapū that engage with it.

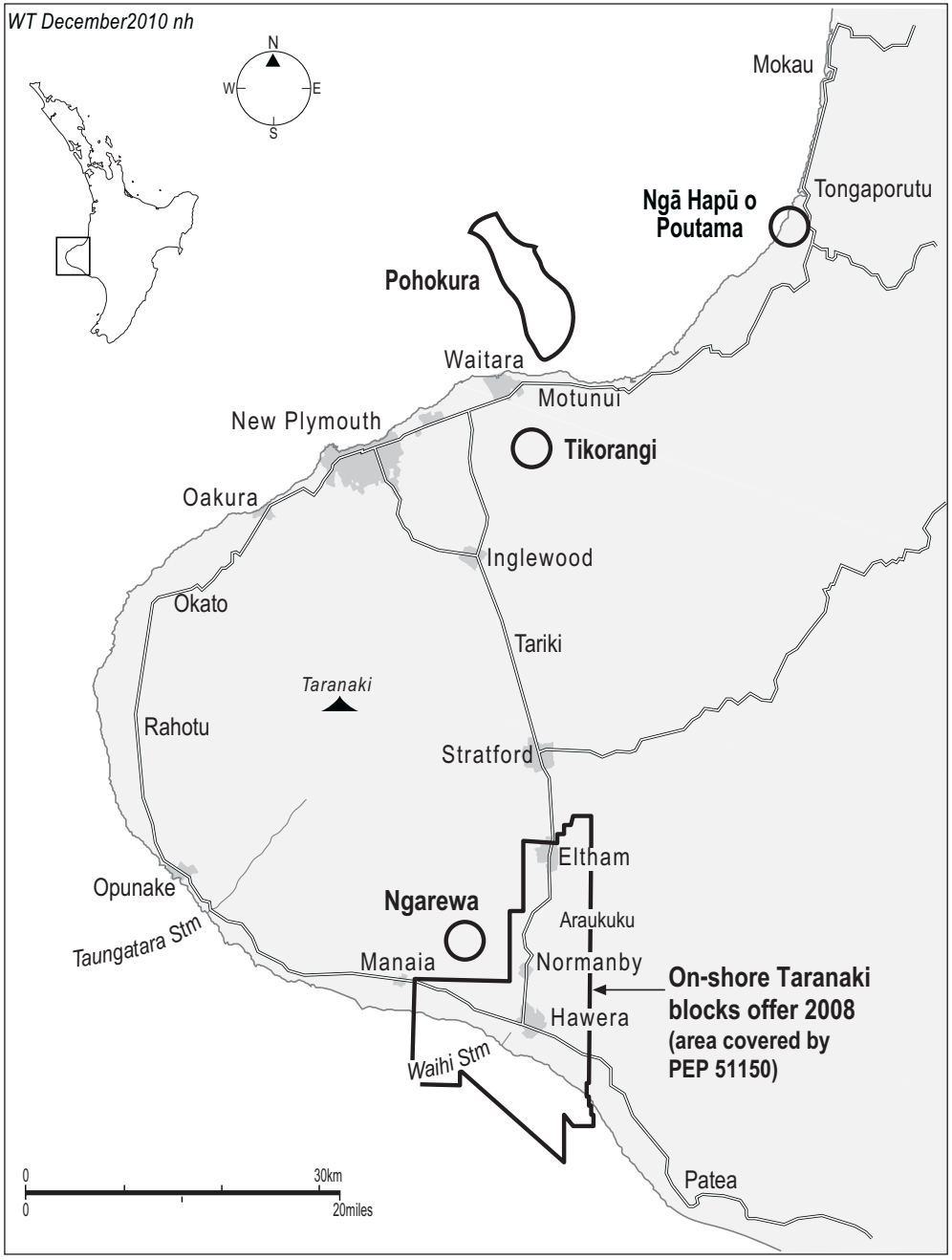
One theme to emerge is the sheer volume of work involved – a particular problem for tangata whenua representatives, who are generally operating on a voluntary and unpaid basis. Also evident is that the tangata whenua feel excluded from decision-making and find it difficult to navigate the various central and local government processes in such a way as to achieve positive outcomes for their communities.

As will be clear from the title of this chapter, we do not purport to convey here the views of the petroleum companies, the local authorities, or the Crown. However, we note that, for the petroleum companies at least, the regime must also be problematic, involving often lengthy resource consent processes in which they can encounter tangata whenua whose views they may find difficult to understand and accommodate.

The five examples are arranged in roughly chronological order. They relate to:

- The Ngarewa wellsite in south Taranaki and the Ngarewa Wāhi Tapu Komiti's experience of the associated resource consents process.
- The Pohokura oil and gas field off the northern Taranaki coast and the experience of the Otaraua hapū in relation to both onshore and offshore petroleum-related activities there.
- Ngā Hapū o Poutama's experience in relation to work carried out at Te Rua Taniwha and Mangapukatea, near Tongaporutu in northern Taranaki.
- The onshore Taranaki blocks offer in 2008 and the efforts of the Kanihi–Umutahi and Okahu–Inuawai hapū in southern Taranaki to participate in the process and have their concerns heard.
- The Tikorangi Hill pā site near Waitara and the steps taken by the Otaraua hapū to try to ensure its protection.

Map 8: Location of examples discussed



6.2 Ngarewa

The following example of claimant experience illustrates the complexity of the processes under the Resource Management Act 1991 (the RMA) that tangata whenua need to engage in when trying to exercise kaitiakitanga over areas of significance to them. It involves an oil and gas company's applications for land use and other resource consents affecting land in the rohe of Ngāruahine and Ngāti Ruanui. Unusually, the applications were heard by a joint committee of both local authorities involved, which meant that the tangata whenua did not have to attend separate hearings. The Tribunal was told there has not been another joint hearing in the last 10 years, apparently because the South Taranaki District Council (the STDC) is not keen on them.[1] A particular problem for the claimants was trying to explain to decision-makers the nature and significance of their wāhi tapu. After two years' involvement in the process, the parties arrived at a mediated agreement, but the related consents appear to have lapsed and the wellsite has not been used.

Ngarewa is situated in south Taranaki (see map 8). To protect the wāhi tapu there, three hapū of the area set up the Ngarewa Wāhi Tapu Komiti, which has the support of both Ngāruahine and Ngāti Ruanui, as well as of the combined Kaumatua Council of South Taranaki.[2] Referring to the nature of the wāhi tapu, the komiti said: 'Our people were born and raised here. Our whenua [placenta] are buried here. Many fought battles and were killed and maimed here. . . . And many are buried here – in known and unknown graves.'[3]

The claimants noted that Ngarewa is right in the middle of the area affected by the land wars of the nineteenth century and that their tupuna were 'sent to caves and prisons' for trying to protect it. They also noted that there are punawai (sacred springs) not far from their urupā, Rangiikeike, and that the last remaining stand of native bush in the area is nearby.[4]

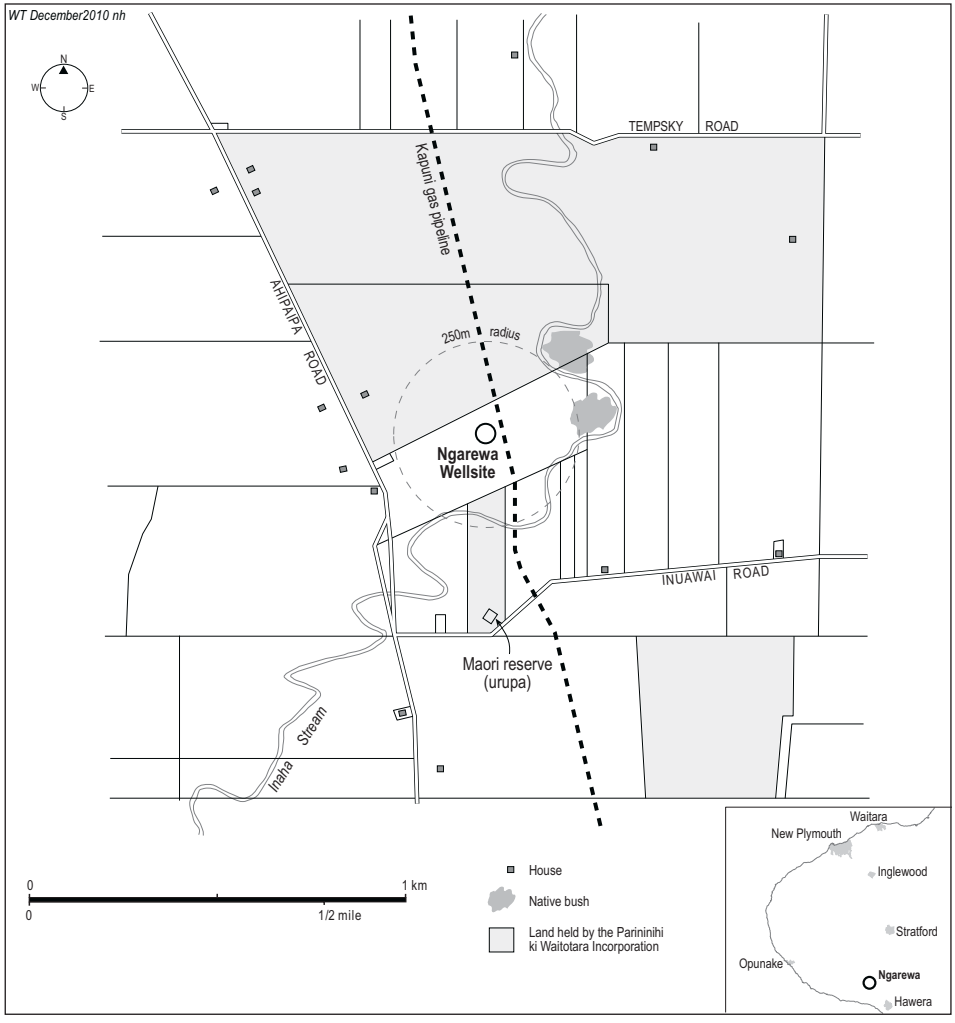
In mid-1998, Shell Todd Oil Services Limited lodged a land use application with the STDC for permission to drill three exploration wells and carry out production testing in the vicinity of Ngarewa. The company stated that an evaluation of seismic and other data had confirmed that there was a 'geologic structure worthy of exploration' below the proposed site. The precise location for the drilling apparently took into account unspecified 'geologic requirements', as well as factors such as the topography, drainage, access, and distance from houses. For those reasons, the ideal drilling spot was 'very specific and localised' – no alternative site would serve the purpose unless it was within a 250-metre radius of the spot chosen. The surrounding land was recorded as being either in private ownership or administered for Māori owners by the Parininihi ki Waitotara Incorporation.[5]

Around the same time as it lodged the land use application with the STDC, the company also applied to the Taranaki Regional Council (the TRC) for a number of discharge permits covering a range of activities:

- the discharge of treated stormwater to land;
- the discharge of drill cuttings to land;
- the discharge of flared hydrocarbons to the atmosphere;
- the disposal of drilling fluids; and
- the disposal of water drawn off from the drilling process.[6]

All these applications were lodged in the context of Shell Todd Oil's ongoing development of the Kapuni field, but one of them appears to have concerned activities near Patea and was thus not directly related to the Ngarewa site.[7] Mere Brooks, the convenor of the Ngarewa Wāhi Tapu Komiti, said that she and the komiti heard of the company's plans only 'through the grapevine'.[8]

The STDC's proposed district plan had by this time been notified and was well on its way to becoming operative, so it was given 'considerable weight' in the decision-making about the consents. The plan classified any land use involving 'a heritage item or archaeological site' (including wāhi tapu) as a 'discretionary activity' for which consent could be refused or, alternatively, granted with or without conditions.[9] Under the TRC's rules, discharges to land were also categorised as discretionary activities. However, the



Map 9: Claimant experiences – Ngarewa

discharging of flared hydrocarbons into the air was classified as a 'controlled activity' under Taranaki's regional air quality plan, so consent could not be refused (although conditions could be imposed).[10]

Attached to Shell Todd Oil's application forms were a number of written consents from 'affected persons'. These were collected by the company between April and July and approved the non-notification of the applications.[11] Of concern to the claimants is that certain of the activities relating to Ngarewa were thus given the green light by a consent issued on a non-notified basis. That consent is number TRK985379, granted on 18 September 1998, which gave permission to discharge and bury up to 1,500 cubic metres of drilling solids per well, 'including deposits

Mere Brooks

to land from flaring in the vicinity of the Inaha Stream'.[12] Ms Brooks noted that there were no special conditions attached to the consent and that it allowed a considerably greater volume of discharge than was requested in the applications.[13] That same month, the wāhi tapu komiti filed a petition with over 130 signatures against the granting of the consent and, more generally, against drilling on their 'sacred whenua'.[14]

The non-notified consent did not cover all the activities listed in the applications and, in due course, the remaining applications were publicly notified. Notice of the land use application occurred some time after 20 July 1998 and indicated that activity would be limited to exploration and testing (that is, permanent production was not included).[15] The other applications were publicly notified in October, with a cut-off date for submissions of 9 November.[16]

Following the closure of submissions, it was agreed that a pre-hearing meeting about the various consents would be held on a marae and that the wāhi tapu komiti would arrange the details. The meeting was duly held at Kanihi Marae on 27 February 1999 and was attended by officers of the two councils, two representatives of Shell Todd Oil, and 31 submitters. No outcomes were reached, however, and a second pre-hearing meeting was proposed. That meeting did not take place 'because of the likelihood that [again] no resolution of issues would occur', and in May 1999 all the outstanding applications were considered by a joint hearing committee of the regional council and the district council.[17]

6.2.1 Wāhi tapu status

A particular issue for the Ngarewa Wāhi Tapu Komiti was what it saw as a lack of understanding about the wāhi tapu status of the area. As Ms Brooks put it: 'It has proved difficult to get any awareness or understanding of wahi tapu from council officials and petroleum industry representatives.'[18]

At the pre-hearing meeting in 1999, the komiti was asked to provide documentation showing that Ngarewa is a wāhi tapu and an archaeological site.[19] This it did, tendering the information with some caution and noting that:

> It is neither exhaustive nor comprehensive. Sensitivity of much of our information precludes full disclosure and is restricted. In addition, we are mindful of the lack of sensitivity displayed and blatant misuse in relation to this 'taonga'.[20]

The komiti also stressed that the name 'Ngarewa' itself had special spiritual significance and that both the name and the area should be treated with respect.

However, Shell Todd Oil then tried to 'identify archaeological features on the land' using ground-penetrating radar. Opus, the company contracted to carry out the work, found 'no evidence of bodies at the site'. The komiti viewed the survey – undertaken despite protest from it – as an 'attempt . . . to negate Ngarewa as a Wahi Tapu'. The komiti found it 'demeaning and insulting'.[21] Shell Todd Oil did tender an apology at the joint hearing for 'the

implication of insensitivity to the Maori people',[22] but the komiti still felt that Shell Todd Oil and Opus had failed to respect the name and wāhi tapu status of the place, and it decided to try to veto the use of the name 'Ngarewa' in the future.[23]

Even after accepting that Ngarewa is a wāhi tapu, however, the hearing committee said that it was obliged to weigh the 'cultural concern' about the area's wāhi tapu status against the importance of gas exploration, any perceived physical environmental effects of the activity, and the sustainable management of the resource.[24]

6.2.2 Consultation with tangata whenua

The Ngarewa Wāhi Tapu Komiti contended that it has had little opportunity to participate in consent processes and to influence outcomes and that it has been disadvantaged in terms of time and resources:

> When we get submissions from these people who want to develop . . . we have been given two weeks to read it, and that means taking it for yourself, understanding it, taking it back to hapu for mandate and getting them to understand it and getting a decision back, all within a certain small amount of time. This is continuous and ongoing.[25]

Making this point to the joint hearing committee in 1999, Ms Brooks added that on some occasions important documents had reached the komiti very late or not at all.[26]

The hearing committee rejected the idea that the timeframes had been inadequate, noting that they had been extended from three months to six months in order to 'provide for additional consultation with Maori'.[27] Furthermore, the committee considered that Shell Todd Oil had spent a 'considerable amount of time . . . attempting to resolve the issues that had been presented to it by tangata whenua', both prior to the consents being notified in October 1998 and again in the period up to the time of the joint hearing.[28] The committee concluded that the consultation had been 'appropriate to the scale of the activities' and had 'met the requirements of the RMA', and that Shell Todd Oil had fulfilled its obligations by 'consulting with the three marae'.[29] The marae in question were Aotearoa and Te Aroha (both associated with Ngāruahine) and Kanihi (Te Atiawa), and the consultation appears to have included a meeting at each and then a follow-up letter.[30]

A major issue for the Ngarewa Wāhi Tapu Komiti was that Shell Todd Oil had tried to obtain the discharge-to-land permits on a 'non-notified' basis.[31] A requirement of non-notified resource consents is that, before a permit is issued, the 'written approval of every person who may be adversely affected by the granting of consent must be obtained'.[32] The komiti was not on the company's list of 'affected persons'.[33] In the komiti's view, the parties it represents were thus 'deemed non-existent'.[34] The Parininihi ki Waitotara Incorporation, however, was on the list but it did not sign a consent form,[35] and since full agreement had not been obtained, it is not clear why a non-notified consent was granted for some of the activities. On this point, the hearing committee's report said that it was not within its jurisdiction to 'rule on whether the application for the disposal of drilling muds should have been notified or non-notified' and that the decision had been 'delegated to the officers of the [Regional] Council'.[36] It is not clear from the evidence whether the claimants sought to take this matter further with the council.

6.2.3 Involvement of tangata whenua in local body decision-making

Another concern put forward by the Ngarewa Wāhi Tapu Komiti was that there was little provision for tangata whenua representation in decision-making processes at the local body level.[37]

The TRC has a Māori advisory body, Te Pūtahitanga o Taranaki (Te Pūtahi), but 'by its own mandate and constitution', that body 'does not become involved in individual consent decisions'.[38] Furthermore, although a part of the council's formal committee structure, Te Pūtahi has not met since mid-1999 and, at the time of our hearing, was in abeyance.[39]

Submitters at the joint hearing requested that the TRC

have a 'fully resourced, full time Maori unit', and they also criticised what they saw as a lack of 'Maori/mana whenua representation' on the joint hearing committee itself.[40] The committee responded by saying that these were matters of policy to be considered by the TRC, and it noted that one of its members was of Ngāti Rāhiri descent.[41] It also pointed to tangata whenua input to the decision to discharge stormwater onto land, rather than into the Inaha Stream, and said that this constituted involvement in the decision-making process.[42] On this point, Ms Brooks disputed the council's implication that disposal onto land was acceptable to the tangata whenua and said that 'no partnership had been demonstrated'.[43]

6.2.4 Provision for kaitiakitanga

During the joint hearing, Ms Brooks questioned whether kaitiakitanga had been provided for in granting the consents.[44] The Ngarewa Wāhi Tapu Komiti was particularly concerned about protecting the natural underground spring and the Inaha Stream. The latter, said one witness, was a source of watercress, eel, freshwater koura, and kakahi (freshwater mussels) for the local people.[45] (An assessment of environmental effects, attached to the consent applications, had different preoccupations, noting that the stream was 'not a significant trout fishery'.[46]) Also of concern was the effect of the proposed activities on groundwater under the wellsite, which formed part of the water supply to houses in the vicinity.[47]

The joint hearing committee considered that 'issues of cultural sensitivity associated with the discharge of stormwater', together with 'effects on local springs and the Inaha Stream', were 'the most important issues' raised in relation to the two applications lodged with the TRC.[48] In determining these particular matters, the committee said that it had given primacy to the council's resource consents procedures document and that it was persuaded that Treaty principles and kaitiakitanga had been dealt with appropriately. By way of example, it pointed to the notification process, the pre-hearing facilitation, the participation in the hearing, the environmental assessment procedures, the consultative efforts made by Shell Todd Oil and the TRC, and the monitoring conditions imposed by the committee itself.[49] Shell Todd Oil's agreement to discharge the stormwater onto land rather than into the Inaha Stream had, the committee felt, mitigated any potential harm from the discharge. Shell Todd Oil had thus met the requirements of section 5(2) of the RMA (about sustainable management) as well as the policy objectives under issue 3.3.7 of the Taranaki regional policy statement, which was aimed at avoiding water quality degradation.[50]

But the wāhi tapu komiti was worried about the standard of monitoring to be undertaken by the district and regional councils during any works at Ngarewa, and it pointed to problems that had occurred at Kawakawa, where the Tokaora Quarry is sited.[51] In the TRC's defence, inspectorate manager Brian Calkin said that, over five years' monitoring, the quarry had achieved 'reasonable compliance to the treated stormwater consents held for the site'; and Fred McLay, the council's director of resource management, said that the TRC 'prides itself on the monitoring that it undertakes'.[52] Despite this, Roger Dewhurst, a consultant geologist and geohydrologist engaged by the wāhi tapu komiti, called for an 'independent monitoring programme . . . to detect any contamination of groundwater or surface water', as well as 'boreholes for groundwater monitoring purposes'.[53] In response, Shell Todd Oil said that it had already agreed to the drilling of monitoring boreholes.[54]

6.2.5 The joint hearing committee's decision

On 2 June 1999, the joint hearing committee made its report and recommendations concerning both the land use application and the discharge consents.[55]

On the land use application, it recommended that 'consent be granted to Shell Todd Oil Services to sink up to 3 exploratory wells and carry out production testing' at the identified site.[56] In its view, the environmental effects of the proposed wells were insufficient to warrant declining the application.[57] Nevertheless, it pointed out that any actual exploitation at the site would require an additional

resource consent, and it also imposed conditions on the initial exploratory and production testing phase.[58] While accepting that Ngarewa was a wāhi tapu, it said: 'The Hearing Committee is not satisfied that the waahi tapu prevents the use of the land, but the area needs to be treated with respect. This can be achieved by the imposition of conditions.'[59]

Of 14 conditions attached to the granting of the consent, three related to archaeological matters, including the stipulation that an archaeological investigation be carried out 'of all parts of the site likely to be disturbed'. If any artefact or 'archaeologically significant evidence' was found, Shell Todd Oil was to be responsible for ensuring that it was preserved or protected. Another three conditions related to allowing the wāhi tapu komiti a role in monitoring the activities permitted under the consent.[60] Importantly, from the point of view of the tangata whenua's ability to carry out a direct kaitiaki role, the hearing committee stipulated that, 'by agreement of the consent holder, the reasonable cost of a representative of Ngarewa Wahi Tapu Komiti shall be met for the purpose of jointly monitoring the exercise of the consent with Council officers'.[61]

The committee also insisted that the consent holder and TRC staff meet with 'interested submitters' eight weeks after the drilling had finished to 'discuss monitoring data and any other matter relating to the exercise of this resource consent, in order to facilitate ongoing consultation'.[62]

In writing to notify one of the submitters, Maraea Horsfall, about the outcome of the hearing, STDC director Ian McDonald mentioned that, because of the sensitivity of the information provided, the council had made an order 'restricting the publication or use of any information relating to the application or any submissions'. He further reassured her that 'Various submissions were not to be recorded'.[63]

The hearing committee also approved the outstanding applications for discharge permits, but again it imposed special conditions. In terms of the discharge-to-land permits, the committee required Shell Todd Oil to increase the capacity of the soakage pit to cope with the sort of unusually heavy rainfall event that might occur only once in 10 years.[64] It also noted the need for boreholes to monitor groundwater, with specifications about their location and construction.[65] Other special conditions related to the need for a blowout preventer, bio-monitoring of the Inaha Stream, and a contingency plan in case of 'spillage, or accidental discharge of materials and/or waters not licensed by this consent'.[66] The committee considered that such conditions would 'ensure that any environmental effects are very minor and [would] be restricted to the immediate property only'.[67] As for the discharge-to-air permit, special conditions there related largely to flaring, and included a requirement to give advance notice of such activity to nearby residents.[68]

Both types of discharge consent also required the tangata whenua to have a role in monitoring activities, with the conditions couched in the same terms as for the land use consent (see above).[69] In addition, the committee noted submitters' objections to the name 'Ngarewa' being used for the wellsite 'and the acknowledgement from STOS [Shell Todd Oil Services] that an alternative name could be used'. It went on to say: 'Consents arising from the Committee's decision will not use the name Ngarewa.'[70] Despite the hearing committee's view that the integrity of the wāhi tapu could be maintained by imposing various conditions, the wāhi tapu komiti believed that the approval of the resource consent to drill at Ngarewa flew in the face of acknowledging its status as a wāhi tapu.[71] To focus purely on the presence or otherwise of archaeological remains was to miss the point. As was stated during the Tribunal's hearing at Aotearoa Marae:

> They say they listen, but ultimately the outcome is always the same in that they said they have heard it, but they are still going to give that consent anyway. There is no change. So we keep hitting our head against this wall, this legal wall.[72]

By way of a postscript, we note that in April 2000, the Ngarewa Wāhi Tapu Komiti lodged an appeal against the

wellsite consents with the Environment Court. The parties then requested an adjournment in proceedings to allow mediation to take place, and according to Mr McLay, the matter was resolved by 'allowing a wellsite to be established on the other side of Ahipaipa Road'. He added, however: 'The wellsite was prepared but never used and the consents have lapsed.'[73]

6.3 Pohokura

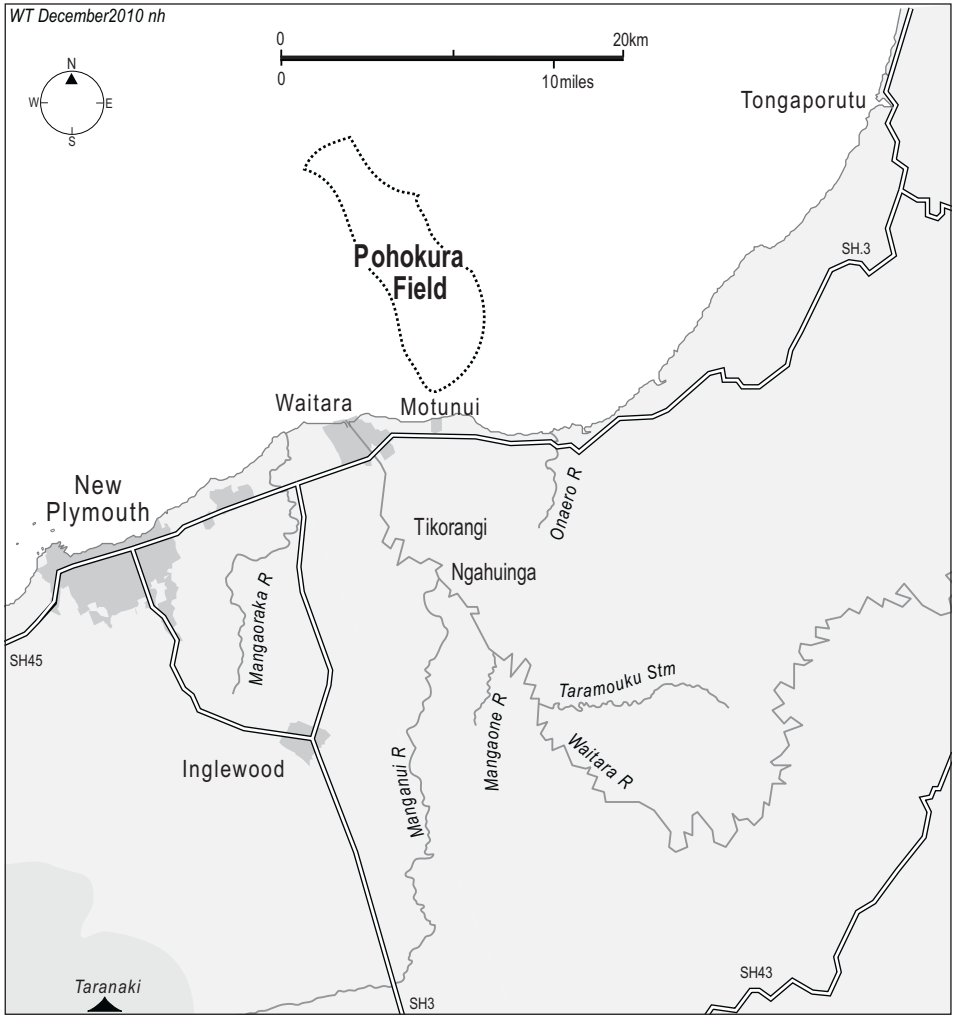
6.3.1 History

The events recounted below again illustrate the complexity of the resource management processes with which tangata whenua must engage to have their views heard. Also notable is the length of time that the proceedings can take: in this case around six years, and monitoring work is still ongoing. The example covers the experience of the Otaraua hapū in its dealings with Fletcher Challenge (and later Shell Todd Oil), district and regional councils, the Environment Court, and the Ministry for the Environment over the development of the Pohokura oil and gas field. Otaraua were particularly distressed about the way in which artefacts found on their wāhi tapu during earthworks were disposed of, and they have ongoing concerns about the health of fishing grounds in the pipeline and offshore construction area.

The Pohokura field is located in the Taranaki Basin and stretches from a drilling platform eight kilometres off the northern Taranaki coast to an onshore production station at Motunui. The field holds a significant proportion of New Zealand's oil and gas reserves.[74] It is also an area of significance to the Otaraua hapū, which, it told us, has a mana whenua interest in the region.[75] David Doorbar, on behalf of Otaraua, described the boundaries of their rōhe as 'defined by our Wāhi tapu extending from the Onaero River to the Mangaoraka River inland to Taramouku Stream, including the Rimutauteka from Mangaone Stream to Ngahuinga (where the Waitara and Manganui Rivers meet)' (see map 10).[76] Otaraua also say that there are customary fishing reefs and spawning grounds in the vicinity of the offshore platform.[77] The hapū has had to deal with gas and oil companies operating in the region for the past 20 years.[78]

In 1998, Fletcher Challenge Energy Taranaki Limited submitted resource consent applications to develop the Pohokura field. Its plans included both onshore and offshore drilling and a production station. Otaraua objected for a number of reasons. First, the onshore area was of historical significance. It had been an important centre of occupation for the hapū, and they were concerned that the activities would damage historical sites. Secondly, they were anxious that the proposed stream diversion would affect the tuna (eel) and watercress resource. Thirdly, they worried about offshore impacts on the fishing reef.[79] When a land use consent was granted by the New Plymouth District Council (NPDC) and discharge permits were granted by the TRC, Otaraua and Ngāti Rāhiri Hapū Trustees lodged appeals with the Environment Court. Otaraua challenged the permits on the ground that the proposal to develop a wellsite 'in the immediate vicinity of waahi tapu and areas of concern to tangata whenua' was culturally insensitive and resulted from a lack of consultation with the tangata whenua.[80] Ngāti Rāhiri Hapū Trustees challenged the land use consent. Te Ohu Motunui, representing Ngāti Tamarongo and Ngāti Hinemokai, was also admitted as a party to the appeal, which was heard by the Environment Court in September 1998.[81]

Before the hearing was completed, however, Otaraua and Ngāti Rāhiri reached an agreement with Fletcher Challenge (see below), so the court continued to hear Te Ohu Motunui's case alone. The case raised a number of issues, including whether the NPDC had applied policies appropriate to the coastal environment. The court found that 'the site selected for the proposal recognises and provides for the preservation of the natural character of the coastal environment and is not [an] inappropriate development in it'. The court also found against Te Ohu Motunui in respect of allegations about insufficient notification, consultation, and provision of information. It



Map 10: Claimant experiences – Pohokura

likewise rejected assertions about adverse effects on Ngāti Tamarongo's and Ngāti Hinemokai's social and economic wellbeing, cultural values, and health and safety – in particular commenting that there was 'no evidence' to support 'a claim that the proposed wellsite was in a marae named Hangarurua.'[82]

Meanwhile, Otaraua and Ngāti Rāhiri had agreed on terms by which their consent would be given to the works at Pohokura. These included shifting the proposed onshore wellsite about 100 metres to the south. The reason for this was not explicitly stated in the court's decision but presumably related to avoiding 'areas of particular value to Maori' (see below). The terms also included pumping out the stormwater and removing it for disposal elsewhere,

David Doorbar

as well as shifting the stormwater discharge; varying the horizontal section of the well path to avoid an urupā; and imposing protocols within the land use consent to deal with the potential discovery of human remains or taonga while the wellsite was being constructed.[83]

The outcome was that the court upheld the granting of the consents, noting that Fletcher Challenge had carefully selected the site so as to 'avoid known areas of particular value to Māori'; had observed Māori cultural protocols; and had agreed to tanker stormwater away from the site. It therefore held that Fletcher Challenge had recognised and provided for the relationship that Māori have with the environment (as required by section 6(e) of the RMA).[84] Indeed, in the court's opinion, the agreement reflected a:

> fair and reasonable balance of the differing interests of the community as a whole, of the applicant, of the general community of interests represented by the elected public authorities discharging their statutory and democratic responsibilities, of the owner of the subject land and of the hapu, Ngati Rahiri and Otaraua, having traditional and cultural relationships with the area and locality where the proposed activities are to be carried out.[85]

The court also considered that granting the consents on the agreed terms would satisfy the purpose of section 5 of the RMA, for it would both 'promote the sustainable management of natural and physical resources' and 'appropriately avoid, remedy and mitigate any adverse effects on the environment'.[86] The court's decision ended by 'commend[ing] the parties for having been willing to listen to each other' and for finding a way by which 'the issues raised . . . could be properly and responsibly resolved'.[87]

6.3.2 The 2000 spill

In 2000, offshore exploration drilling resulted in 'discharges of uncombusted hydrocarbons to the coastal marine area'. Fletcher Challenge pleaded guilty to offences under the RMA in respect of three separate spills, including one where oil drifted onshore and contaminated the beach, and was fined a total of $15,000. Protocols were subsequently put in place to manage further such spills, should they occur. However, Donna Eriwata, speaking for Otaraua, described the protocols as being designed to manage spills, not prevent them.[88]

The incident in 2000 also led to the TRC, Fletcher Challenge, and the Ministry for the Environment working together with local hapū to develop a set of kaimoana assessment guidelines. Mr McLay, giving evidence for the TRC, said that the project 'involved capacity building for the hapu and council, and the guideline was promoted nationally by MFE [the Ministry for the Environment]'.[89] This would appear to be the same exercise referred to by Ms Eriwata, when she said that a member of Otaraua hapū had participated in a kaimoana survey that 'showed what species were in and around our reefs before Pohokura was established'. Ms Eriwata said that the hapū had received

A drilling rig leased to Shell Todd Oil Services drilling for gas in the early stages of the Pohokura oil and gas field development at Motunui, north Taranaki, July 2007

resourcing for the survey and that it had become the basis for an educational package being used by schools, hapū, and iwi all over New Zealand. However, she commented that there had been no funding for a follow-up survey to monitor what had happened since the establishment of the Pohokura platform.[90]

6.3.3 Further applications

Responsibility for the Pohokura operation then transferred to Shell Todd Oil Services, and in 2002 it applied to the TRC for production facility consents covering 'a number of activities'. According to Mr McLay, the council and Shell Todd Oil took action to identify tangata whenua concerns prior to lodging the application. Their efforts, he said, included: pre-application consultation; the council's initiation of a cultural impact assessment, to be carried out by the National Institute of Water and Atmospheric Research and to involve 'two iwi and many hapu'; the applicant's establishment of a tangata whenua working group, which, together with the services of an experienced

petroleum engineer, would seek to address iwi capacity and resourcing issues; and an agreement to involve Māori in compliance monitoring.[91] It is not clear from the evidence whether Otaraua were among the hapū involved. However, in the TRC's view, efforts had been made to 'recognise and provide for Maori values in decision making'.[92]

But the construction phase of the project was not without its problems for Otaraua. Some people had to leave their homes during the building of the Motunui production station because of noise levels. One kaumātua, who was terminally ill, was given the option of having a new home built for him or having his existing home relocated further away from the site. He chose the latter, but sadly passed away at a rental property he had moved to while waiting for the relocation to happen.[93]

Also of concern were the earthworks carried out. Ms Eriwata recalls that, during the consent application phase, Otaraua objected on the grounds of likely damage to historical sites. She says that their objections were ignored and that the NPDC and the TRC granted resource consents and the Historic Places Trust 'granted destruction orders for the land'. When work began, 'Numerous artefacts, rua pits, hangi pits and whare were all found'. The work was then stopped while archaeologists were brought in to map and record the finds, but afterwards, according to Ms Eriwata, the works continued – destroying the archaeological remains – and the artefacts were deposited with the Taranaki Museum. For Otaraua, she says, this was 'heart breaking'.[94]

The construction of the offshore facilities and the pipeline connecting them with the shore has also given rise to problems.[95] There are, for instance, conflicting views on the placement of the pipeline. The TRC believed that the use of subsurface horizontal drilling meant that the pipeline avoided crossing a fishing reef.[96] Otaraua, on the other hand, held that the pipeline was trenched directly through the customary fishing reef, as well as through the spawning grounds of several fish species. The hapū was also concerned that any temperature increase in the vicinity of the pipe would affect the ecology of the area.[97] By April 2009, only one of three intended platforms had been erected, but the result for Otaraua had still been a ban on certain types of fishing within 500 metres of the platform.[98]

Ms Eriwata summed up the hapū's feelings by saying:

> It seems that as long as we are participating in the resource consent process by constantly submitting our objections, the consenting authorities take this kind of participation to mean that their responsibilities to us as tangata whenua are being met.[99]

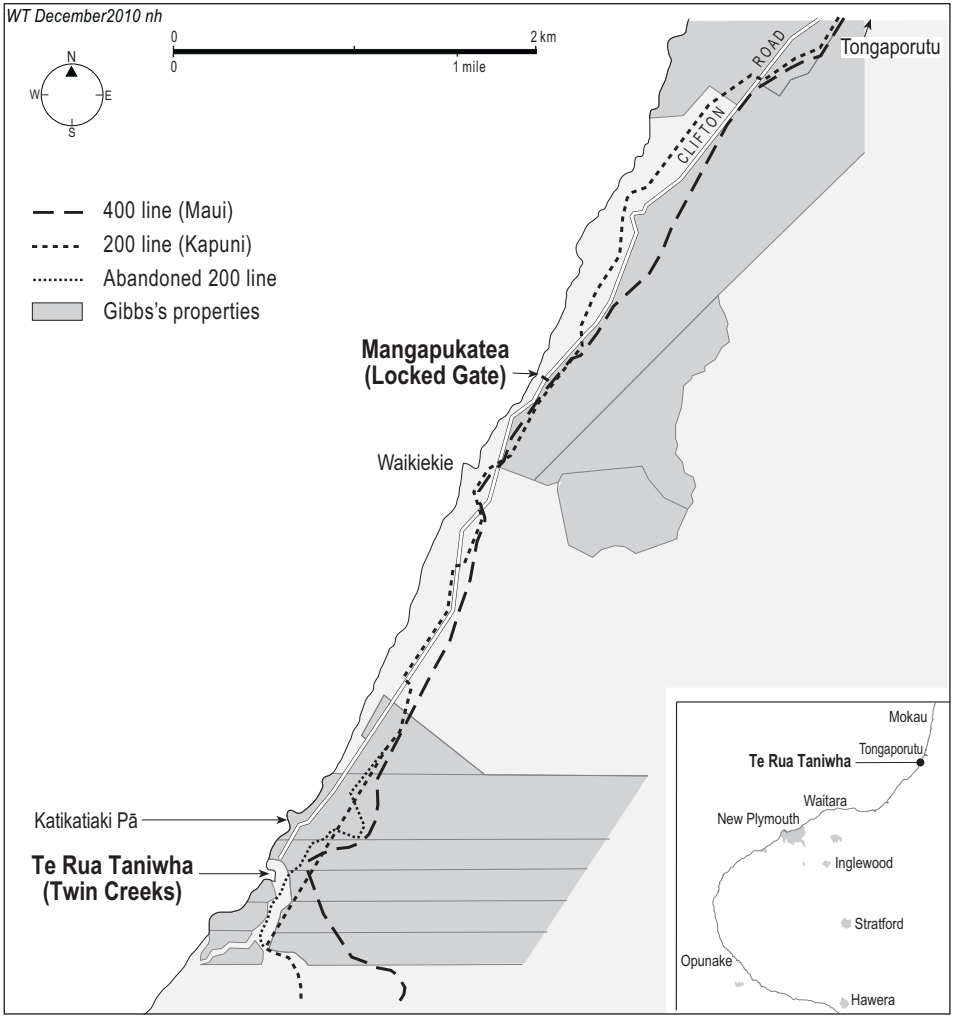
6.4 The Experience of Ngā Hapū o Poutama

This account is of the experience of Ngā Hapū o Poutama during the course of pipeline realignment projects at Te Rua Taniwha and Mangapukatea over a period of some six years. It highlights the tension between the interests of hapū and individuals trying to carry out their kaitiaki role and the interests of companies like Vector Gas, which have a duty to protect the safety of gas pipelines critical to New Zealand's economy. From the claimants' viewpoint, it is something of a 'David and Goliath' situation: they see themselves as needing to be constantly vigilant in their dealings with commercial and local body organisations that wield considerable power and often command significant financial resources.

Ngā Hapū o Poutama told us that they hold mana whenua in the area south of Tongaporutu that includes the stretch of coastline between Mangapukatea (also known as Locked Gate) and Te Rua Taniwha (Twin Creeks). (See map 11.) They therefore have a duty of kaitiakitanga, which includes caring for the area and protecting its mauri. They note that Rua Taniwha is a wāhi tapu, having been a waka launching site as well as the site of a major battle in the early 1800s, and that it has a 'Taniwha element that has a significant presence and influence'. The Gibbs family have lived on the land for many years. According to hapū representative Haumoana White, current owners Russell Gibbs and his wife, Parani (who is from Tuhoe), have been accepted into Ngā Hapū o Poutama.[100]

Running along the stretch of coastline in question, and traversing the Gibbs's property, are two gas pipelines: the Maui pipeline, built in 1968 and owned by Maui Developments Limited, and the Kapuni pipeline, originally developed in the mid-1970s by Natural Gas Corporation Holdings Limited (NGC). NGC was gradually taken over by Vector Limited, and when Vector completed its acquisition of all shares in September 2005, NGC became Vector Gas. Both pipelines take gas north towards Auckland and are maintained and physically operated by Vector. Between them, they carry about 70 per cent of New Zealand's gas supply, which in turn contributes significantly to the generation of electricity for the country.[101]

NGC had been a 'requiring authority' since 1994, and as



Map 11: Claimant experiences – Poutama

Haumoana White

its successor, Vector Gas also acquired that status. Since 19 March 2009, Maui Developments has also been approved as a requiring authority.[102] This means that both can enter designated private land without permission to conduct the required activities there (see section 4.3.8(4)).[103]

Sometime around early 2003, according to the claimants, Vector installed concrete mattressing beneath a culvert at Te Rua Taniwha, near the point where the Waikorora Stream flows into the sea. The work appears to have related to land drainage and erosion problems and was carried out not far from the pipeline.[104] No resource consent was obtained, but the TRC did not become aware of the project until 2005. At that point, it seems, the council wrote to the company to request an explanation. However, other matters (which we will come to shortly) were by then in train, so the TRC did not immediately proceed with a prosecution and, after six months, the opportunity to prosecute was lost.[105] These circumstances were of particular concern to Ngā Hapū o Poutama, for the area where the mattressing was installed is a place where ancestral bones lie and is, therefore, a wāhi tapu.[106]

In 2005, NGC commissioned a study of coastal erosion along a length of shoreline that included the Gibbs's property. The Kapuni pipeline was identified as being at risk both at Te Rua Taniwha and at Mangapukatea. The Maui pipeline was likewise threatened, but only at Mangapukatea.[107]

In May 2005, there was a discussion between Poutama, Mr and Mrs Gibbs, and NGC about drainage work needed on the shore at Te Rua Taniwha, near the Waikorora Stream mouth, to slow erosion that was threatening the pipeline. It is not clear from the evidence whether this discussion took place before, during, or after the erosion study. Either way, Mr and Mrs Gibbs and Haumoana White say that they refused to consent to a plan proposed by NGC that involved excavation, stressing again that the area was a wāhi tapu. Despite this, on 26 May, they found 'NGC employees and contractors' down on the shore with a digger.[108]

Later that year, NGC prepared a resource consent application to carry out 'mitigating works' to combat the erosion and protect the pipeline. The company indicated that the long-term solution would be to relocate about one kilometre of the pipeline to a new underground trench 20 metres further inland. This would involve horizontal drilling between two points, using a solution of clay as a lubricant. However, given the urgent nature of the threat to the pipeline, NGC sought as a temporary measure to shift a shorter section, of about 130 metres, to a point 15 metres inland and to run it largely above ground. As a second alternative, it proposed to build some sort of

◀▲ Te Rua Taniwha, 2003. The works in the foreground did not have resource consent.

structure or lining along the shore on the seaward side of the pipeline.[109]

In the event, the idea of a temporary solution seems to have been abandoned, because the consent application was withdrawn.[110] However, it appears to have been the lodging of this application that alerted the TRC to the earlier non-consented work. Mr McLay told us:

> There were intentions to try and license that through a subsequent consent process. They [Vector Gas Ltd] withdrew that application. The ball is clearly now in their court. . . . Now, the council doesn't have the enforcement powers but it does have powers to make sure that Vector follows through, because I don't think it's in Vector's best interest, for example, to have a fall out with the TRC or the public over having an illegal structure.
>
> One of the key points here though is that would removing the structure have a greater adverse effect than leaving it? For example, that may be something (given the very highly valued wahi tapu there) that may be better, given the rates of coastal erosion that occur there, for that structure to stay in place. The coast erodes at a rate of about half a metre to a metre a year there, so it may be (and I mean this with respect) – it may be that it does serve some purpose and [it] may be worse to remove it.[111]

As evidence of tangata whenua consultation or involvement, the consent application stated that NGC was 'working closely with the landowners, Russell and Parani Gibbs', and that discussions had also been held with Greg White, as spokesperson for Ngāti Tama. It indicated that Ngāti Tama's formal approval to the project would be sought, although it went on to note that 'Greg acknowledged NGC's relationship with Rodney [Haumoana] White as the representative of the Poutama Hapu, whose area is affected by the proposed works'. The application stated that NGC would 'continue to involve Poutama Hapu in the project during the site works'.[112]

It appears that by early 2006 there was a degree of consensus between the various parties over the need to realign a section of the Kapuni pipeline at Te Rua Taniwha. Furthermore, Ngā Hapū o Poutama had carried out an investigation to confirm an initial wāhi tapu assessment by Haumoana White and, as a result, 'suitable entry and exit points [presumably for the horizontal drilling] were chosen and agreed'. Hapū representatives also met with Vector staff to 'explain concepts of Tapu and Waahi Tapu', and a Poutama tohunga carried out a blessing of the Rua Taniwha site and the agreed entry point.[113]

In April 2006, Mark Webb, then manager of service operations with Vector and also divisional manager of operations (gas), became involved in negotiations, and a formal agreement between Vector and the landowners was signed in June.[114]

However, it seems that Vector then unilaterally shifted the entry point for the drilling by about 100 metres.[115] The reason for this is not entirely clear, but under cross-examination Mr McLay mentioned 'a weakness in the ground' that had not been foreseen.[116] Despite protests from the tangata whenua, the contractors began work at the new site, only to find taonga from an old pā site under the first layer of topsoil. Haumoana White recalls having to remove 'about a truckload' of taonga from the site while the earthworks continued.[117]

Ngā Hapū o Poutama see a direct link between this transgression of tapu and the death the very next day of a Vector contractor delivering metal to the site. They also link it to the subsequent death of one of Mrs Gibbs's twin babies. In Haumoana White's words: 'we as Māori can only connect those things. I cannot say to the Crown that – or prove that – that was connected, but to us it was connected.'[118]

The TRC followed up this incident by sending its representative to inspect the site. Following standard practice, the council then sent a letter of inquiry to the company requesting an explanation. Vector's response – namely 'that they had done just about everything within their power to avoid this incident' but that it had been caused

Tongaporutu

by an unanticipated problem – resulted in a decision not to proceed with any enforcement action because, in the council's view, this was a justifiable defence under the RMA.[119]

By December 2006, the Kapuni pipeline at Te Rua Taniwha had been successfully realigned, although some of the tidying-up work, agreed on by Vector under the June agreement, remained outstanding.[120] For example, to carry out the horizontal drilling there had to be a supply of water, which Vector had decided to pump from the sea. This involved the installation of a temporary suction line running out into the water about 170 metres below the culvert near the Waikorora Stream mouth and weighted down by concrete anchor blocks.[121] In an email to Mark Webb and others dated 12 September 2007, Mr and Mrs Gibbs reminded Vector: 'Clumpweight still at Te Rua Taniwha'.[122] An earlier letter to Vector from the TRC indicated that two attempts had in fact been made to remove the weight but that both had been unsuccessful and Vector had therefore asked the council for permission to leave it in place.[123] The council had agreed, providing that Maritime New Zealand had no objection. Some weeks after the Gibbs's email, Maritime New Zealand confirmed to Vector that, since the weight did not represent a hazard to navigation, it had no objection to its staying there.[124] Nevertheless, Ngā Hapū o Poutama and Mr and Mrs Gibbs say that they agreed to the use of the sea anchor only on condition that it be removed afterwards.[125]

The Gibbs's email also listed a number of other issues that they felt had not been resolved to their satisfaction.[126] For example, the project was also to have included the removal of 'the abandoned asbestos wrap sections' of the old pipeline, but this, too, appears not to have happened. In his evidence, Mr Webb said that Vector had agreed to remove the redundant sections if they were exposed or were at risk of becoming exposed. He also said that Vector and the landowners had agreed that an expert should be engaged to assess 'the cultural effects of the removal or retention of the redundant sections', and that he was waiting for the landowners to confirm the scope of that assessment.[127] In a later High Court court case between Vector and Mr and Mrs Gibbs (see below), the company acknowledged that there was work still outstanding at Te Rua Taniwha, but the judge's decision did not specify its nature.[128]

In July 2007, Vector – in its own right and on behalf of Maui Developments – then proposed realignment works on both the Kapuni and the Maui pipelines at Mangapukatea.[129] But first Vector needed to conduct area surveys and inspections that would include walking over and inspecting the Gibbs's land at Mangapukatea, as well as possibly taking borehole samples.[130] Given that Ngā Hapū o Poutama and the Gibbs felt that there were matters unresolved from the Rua Taniwha realignment project, they denied Vector permission to access the site.[131]

With no apparent progress being made in negotiations, in December 2008 Vector applied to the New Plymouth District Court under the Public Works Act 1981 for an order permitting entry to the Gibbs's property.[132] At the hearing in February 2009, Mr and Mrs Gibbs raised a number of issues in relation to Vector's application. The court found, however, that the case turned on the sole issue of whether Vector had taken all reasonable steps to negotiate entry.[133] On this basis, it awarded an order to enter the land to Vector.[134] This decision was unsuccessfully appealed by Mr and Mrs Gibbs to the High Court in April 2009.

Of the legal process, Haumoana White noted:

> It is clear from these decisions that the Court was not concerned with (or had no jurisdiction to deal with) the issues we had raised. This has left us in no man's land where we have been subjected to further works while still being prejudiced by those that have already taken place.
>
> I also note it cost us significant amounts of money to oppose the application. Vector is a substantial company and has significant resources whereas we have had to pay these costs out of our personal resources. This makes it very difficult for us to be able to maintain our obligations under kaitiakitanga and rangatiratanga.[135]

Vector accordingly entered the property and conducted surveys, including a 'walk over of the proposed pipeline realignment route and inspection of the cliffs to assess coastal erosion'.[136] No drilling was conducted despite Vector's having obtained permission to do so.[137] For Ngā Hapū o Poutama and Mr and Mrs Gibbs, these circumstances only intensified their frustration: 'They never drilled a single hole. The imposition of their entry, all the costs and effort of the process were for nothing, because the drill they brought on could not drill the holes. So we went through the whole process for nothing.'[138]

6.5 The Onshore Taranaki Blocks Offer 2008

The following example relates, among other things, to Māori involvement in decision-making under the Crown Minerals Act 1991 and shows the limited scope of consultation required under that Act. It also describes aspects of the decision-making process followed by officials from the MED's Crown Minerals Group when considering whether particular areas of land should be excluded from mining. In this instance, claimants from the Kanihi–Umutahi, Okahu–Inuawai, and other hapū engaged in a two-year process relating to a public offer of petroleum exploration permits that affected land in their rohe. During that time, communication from the MED was limited, and the claimants felt themselves to be irrelevant to the process, despite their attempts to engage.

In late 2006, Taranaki hapū and iwi became aware that certain areas of land in the region were to become subject to a bidding process for petroleum exploration permits. On 14 November that year, Rob Robson, a senior manager in the Crown Minerals Group, sent out identical letters to 28 iwi and hapū contacts, outlining what was involved and asking for feedback. He explained what the permits were for, how any exploration activity might impact on the blocks of land selected, and what scope there was for iwi and hapū to influence what was to happen. He wrote: 'As part of the consultation process, hapu and iwi may request an amendment to the proposed blocks offer.' A map was attached to the letter, showing which areas of land were affected.[139]

The recipients were told that they needed to submit any feedback by 14 December but that arrangements for face-to-face consultation could be made where appropriate. The letter assured them that 'The form of the consultation process is flexible' and that, if necessary, they could request additional time for making comments. They could, in addition, request that defined areas of land (or seabed) of particular importance to the mana of the hapū and iwi not be included in any permit. An attachment to Mr Robson's letter explained that, where such a request was made, it had to be accompanied by supporting information, including why the area was important to the iwi or hapū concerned. The exclusion request would then be considered by the Minister, and iwi and hapū would be informed of his decision. 'If the request has been declined', said the attachment, 'an explanation will be provided.'[140]

On behalf of the Kanihi hapū, Tihi (Daisy) Noble wrote to Mr Robson on 25 November expressing concern and requesting a meeting.[141] On 18 December, Mr Robson and another senior Crown Minerals Group official, Barry Winfield, met with Ms Noble and members of the Kanihi hapū at Mawhitiwhiti-Kanihi Marae to discuss the situation.[142] Also present was Mere Brooks, who attended on behalf of the Okahu–Inuawai hapū.[143] In response to a question from Ms Noble about the process for excluding wāhi tapu land, Mr Robson explained that such decisions were made by the Minister 'on recommendation from officials that had considered submissions from iwi/hapū'. The decision became public information, he said, and Crown Minerals 'notified iwi of the outcome of their submissions'. Mr Robson further explained that, at the permit application stage, Crown Minerals 'did not generally know the location of proposed drilling' because the applicant would first need to undertake ground work to establish the best site. Ms Noble commented that it was a pity iwi were not accorded the same 'broadness of area' but were instead expected to pinpoint, upfront, the precise location of any wāhi tapu.[144]

In Mr Robson's view, as expressed at the meeting, iwi and hapū were 'not necessarily affected by that early stage of allocation of Crown minerals'. Rather, he thought, effects were more likely to be felt once exploration activities began to be carried out, at which point any problems could be dealt with under RMA processes.[145]

That same night, Ms Brooks emailed Mr Robson expressing her hapū's continuing concerns. She listed 10 points, the gist of which was summed up at point 2, where she alleged that the hapū was only ever included 'as an afterthought – after decisions have been made'. A number of her other points cited examples in support of this contention – point 7 being that 'again blocks in our area are up for sale and we have been notified after the fact'. Ms Brooks's final point was a request that the hapū be allowed to see, and to check the accuracy of, any draft report of that day's meeting before it was submitted to the Minister.[146]

Tihi (Daisy) Noble

Ms Noble, for her part, made a more formal written submission on behalf of Kanihi–Umutahi and other hapū. She noted that she and her hapū had raised concerns at the meeting about a range of issues, including: 'the continued sale of petroleum blocks' (both offshore and onshore) within the Taranaki region; other prospecting and development activities, such as those relating to the mining of iron sand; and the potential for environmental and other damage as a result of exploiting these various resources. She then specifically asked:

1. [That the] coastal area between the Waihi Stream and Te Ngaere Stream be excluded from the proposed blocks offers;
2. That the hapu be included at the very beginning of the process, ie; at the point when the Ministry begins to plan and prepare a 'proposed blocks offer';
3. That the hapu be included to receive the same relevant information as the Minister as to who has lodged 'expressions of interests' in the proposed blocks offers;
4. That the Minister inform the hapu as to who has won the 'rights' to the block offers within their takiwa, as well as the information as to how the Minister reached that decision;
5. That the Ministry inform the hapu as to what decisions are reached regarding the excluded area identified by the hapu.[147]

In support of the request to exclude the area between the Waihi and Te Ngaere Streams, Ms Noble listed several reasons why it was of significance, including that it contained: a registered archaeological site with moa remains; three tauranga waka (canoe landing) sites registered under the Māori reserves legislation and of significance to four different hapū (including Kanihi–Umutahi); and the site of one of the earliest missionary churches in the region. She pointed out that the hapū had requested a customary rights order for that part of the coastline and

was awaiting a hearing date from the Māori Land Court. As well, together with other Ngāruahine hapū, they had approached the Ministry of Justice about the possibility of a territorial rights order.

Mr Robson acknowledged his receipt of Ms Noble's submission on 21 December, ending with the assurance: 'I will advise you of the outcome of your submission and who, if any, were the successful persons/company for those blocks relevant to the rohe of Kanihi Hapu.'[148] We note that it is not clear from that wording whether he envisaged two separate steps – namely, that first there would be consideration of the points raised by Ms Noble and a response to them and then, further down the track, there would be notification of the outcome of the bidding process.

Earlier that same day, Mr Robson had written to Ms Brooks saying that he was not in a position to discuss a number of the concerns she had raised. In his view, they were either 'RMA/local authority concerns', to be taken up with the Ministry for the Environment, or 'wider issues', which needed to be addressed with the Office of Treaty Settlements and the Ministry of Justice. He did, however, take issue with Ms Brooks's seventh point (about being notified after the fact), stating that her iwi had been notified on 14 November 2006 of the Crown's intention to hold a blocks offer and that it had been open to them to provide comment:

> That written notification is about the Crown's intention to hold a blocks offer and seeks comment from relevant iwi and hapu. *The proposed blocks offer has not been finalised, neither has it been opened to receive work programme tenders from petroleum explorers, nor will it be until all early steps are completed*. It is therefore not the case that Okahu/Inuawai Hapu were notified after the fact, and *I welcome any further comment that the hapu may wish to make*. [Emphasis added.][149]

This letter suggests that there was still time to influence which areas would be included in the blocks offer and possibly, to a limited degree, other aspects of the process. It is clear, however, that Mr Robson's view of iwi and hapū consultation and involvement was different from that of Ms Brooks and Ms Noble and their respective hapū, who were seeking a much fuller sharing of information and a larger role in the shaping of any blocks offer and the process to be used.

In response to Okahu–Inuawai's request to see a draft of any report on the meeting, Mr Robson noted that the Government's current policy for consultation with iwi and hapū, 'as set out in chapter 3 of the 2005 Minerals Programme for Petroleum', did not provide for the 'supply to hapu of draft reports written for the Minister'. He did, however, assure them that any report concerning iwi consultation over the current onshore Taranaki blocks offer would 'carry the points of concern listed in [their] e-mail' and would also convey the Okahu–Inuawai hapū's message that, until they had 'meaningful negotiations with the Crown, Crown agencies and other people/businesses in an initial, equal and inclusive manner', they would continue to object to those block offers.[150]

From the evidence available, six months then elapsed before Mr Robson sent any further communication to either Ms Brooks or Ms Noble: certainly an identical email sent to each of them on 5 June 2007 made no reference to any intervening correspondence. Instead, it advised that the bidding on the onshore Taranaki blocks was to be opened in September, with a cut-off date of late February 2008. That meant that 'it will be some months into 2008 when I will come back to you with the results of the blocks offer and the outcome of the points that you made in your submission.'[151]

The email made no response to Ms Noble's submissions about her hapū's wish to be 'in on the ground floor' of the shaping of the bidding process. It also failed to give any feedback on whether the Minister had had anything to say about the concerns and objections raised by Ms Brooks on behalf of the Okahu–Inuawai hapū.

Around mid-September 2008, a briefing paper on the onshore Taranaki blocks offer was sent to the Associate Minister of Energy. Attached was a report from the 'OTBO Evaluation Committee'. It summarised the blocks

involved and the bidders, and recommended who should get what. Under the heading 'Iwi Consultation', the committee expressed the view that there was no need to make the exclusion requested in Ms Noble's submission because legislation already provided 'substantive protection for the cultural sites of importance in the coastal areas that Kanihi hapu has referred to'. Under 'Recommended Action', it advised the Minister to '*Note* that iwi consultation was undertaken and issues appropriately managed' (emphasis in original).[152]

A few days later, Taranaki hapū and iwi were finally advised of the outcome of the bidding process, which was also posted on the Crown Minerals Group's website. In the case of Ms Noble and the Kanihi–Umutahi hapū, Mr Robson wrote to let them know the outcome of the bidding process and, in particular, to draw their attention to PEP 51150 (see maps 5 and 8), which included the takiwā of the Kanihi hapū. He also advised them of 'the Minister's full consideration' of the matters they had raised in their submission but continued, 'Having had regard to all matters, and while recognising that the nominated coastal area is important to Kanihi hapu, on balance it was decided not to exclude the area from the Blocks Offer.'[153]

In his letter, Mr Robson said that the following factors were taken into account:

- 'the Resource Management Act 1991 the Historic Places Act 1993, and the Maori Reserves Act' already provided 'substantive protection for the cultural sites in the coastal area of importance to Kanihi hapu';
- the area was under-explored; and
- the area sought to be excluded was substantial in size and its exclusion from permitting would 'substantively restrict the Crown's ability to manage its petroleum assets in the wider area'.[154]

Mr Robson also said that the hapū's concerns had been conveyed to the companies that had been granted the permits, along with the suggestion that 'it would be helpful to establish a relationship with Kanihi hapu'.[155] As the Crown notes, the Ministry also notified the TRC, the STDC, and the Department of Conservation (Wanganui conservancy) of the hapū's concerns, 'given the involvement of those agencies in legislation regarding the environmental effects of petroleum exploration'.[156]

In the case of the Okahu–Inuawai hapū, Mr Robson wrote to Ms Brooks and again drew particular attention to PEP 51150, 'which is the permit that includes the takiwa of Okahu/Inuawai hapu'. He went on to say that 'the Minister gave consideration to the matters set out in your submission' (namely, her email of 18 December 2006), but he then repeated his view that most of the issues were not relevant to the onshore Taranaki blocks bidding process: 'your issues were mainly matters that the Minister has no powers to consider in terms [of] allocating the current petroleum blocks'.[157] As to the lack of any ministerial response to the matters which *were* considered directly relevant – namely, the hapū's objections to the bidding process for the blocks – it seems that Mr Robson felt he had disposed of those by his letter of 21 December 2006 (in which he denied Ms Brooks's assertion that the hapū had been included in discussions only after decisions had been made). Plainly, Ms Brooks and Mr Robson have different ideas about what counts as the first steps in a blocks offer process and who should be involved in them. Ms Noble's views, too, are clearly at odds with those of the MED on the matter of consultation:

> The process is always the same. It feels like a 'tick the box' exercise for MED. It is fair to say that we have become increasingly cynical that any good will come of it in terms of protecting our land and natural resources as nothing has changed as a result of our submissions.[158]

6.6 Tikorangi

This account outlines the experience of the Otaraua hapū, which, over a period of about 10 years, has been required to deal with five different oil and gas companies, as well as the Department of Conservation, the Historic Places Trust, and various other Crown agencies and local authorities in its efforts to protect its wāhi tapu on Tikorangi

Hill. Otaraua see partnership and the building of relationships as the key to successful outcomes in their rohe but have frequently found the resource management process challenging, especially when rules for particular activities change and they have not been kept abreast of developments. They acknowledge that issues arise, too, for local authorities wishing to record wāhi tapu in their district plans but have identified various obstacles to passing on relevant information to that end. At the heart of the hapū's concern is the problem of when and how parties talk to each other, what 'consultation' means, and the value placed by others on the hapū's own history and understanding of the sites in question.

The Tikorangi Pā site is located on Tikorangi Hill, in the Waitara district of northern Taranaki (see map 8). It was a place of safety for the Otaraua hapū before it was destroyed by Government forces in 1860. Immediately adjacent to it was a kainga (settlement). Gatherings were held there when important decisions were to be made: in particular, it was where the northern Taranaki people came together in the early 1800s to discuss the possibility of the great southern migration later known as Tama Te Uaua. The hill also has environmental and spiritual significance, being the source of some 15 freshwater springs and the Waiau River. Furthermore, Otaraua treasure it as one of the few places from which they can see their territory in its entirety, along with all their pou rāhui.[159]

For all these reasons, the entire hill area is important to the hapū, and each generation in turn is taught from an early age to treat it with respect. Although the land is part of the area confiscated after the land wars, Otaraua still consider that they have a responsibility to protect it.[160]

6.6.1 Resource consent process impacts on Otaraua

In trying to carry out their kaitiakitanga responsibilities, Otaraua have had to engage in a number of resource management processes which operate simultaneously. To identify what action is needed, the hapū has had to 'unbundle' each application to see what activities are involved (for example, land use, discharge to air, discharge of stormwater) and thus work out which district or regional plan rules apply to which activity.[161] They have, they said, had to educate themselves about all the processes involved with the oil and gas companies, local bodies, and Crown agencies, 'without support from anyone.'[162]

Keeping up to date with regional and district plans has been crucial, not only in understanding how the regional and district resource management systems operate alongside one another but also in effecting any change to those systems. Otaraua have tried to participate in reviews relating to land use, wāhi tapu, and rural and urban resource management, as well as engaging with the councils at iwi liaison hui.[163] 'Often we are spread so thinly,' said Ms Eriwata, 'that it is just impossible for us to participate in every application or consent process that affects us.'[164]

In 1998, the NPDC publicly notified its first district plan, which included provision for protecting registered archaeological sites and wāhi tapu.[165] Some time after that, the plan was updated, reducing the protected area around such sites. In the case of sites listed in schedule 26.1A, protection from activities such as excavation was now to apply only within a 50-metre radius from the central point. Inside that area, the activity's classification changed from 'permitted' to 'restricted discretionary', triggering the need for written approvals from affected parties.[166]

Otaraua were unaware of the change and thought that the whole of Tikorangi Hill, which has a registered blockhouse on the western end of its ridge, remained protected.[167] But Tikorangi Pā would seem to lie outside the 50-metre radius around the blockhouse site,[168] and because it was not registered in its own right on the schedule to either the district or the regional plan, the plan change meant that there was no need for notification about activities that might affect the site. Thus, when work began on laying gas pipelines in the vicinity of Tikorangi in November 2008, it was only by their own active monitoring of the project that Otaraua found out, some three or four months later, that the intention was to take an eight-inch (20-centimetre) gas pipe through the hill.[169]

When Otaraua then sought advice from the Historic

Places Trust, the trust replied that, under the provisions of the Historic Places Act 1993, only registered archaeological sites have legal protection. For an area to qualify as an archaeological site, it has to have 'physical remains, and features associated with human activity'. The registration of wāhi tapu where the values are 'cultural rather than archaeological' is optional, and registration does not confer protection. However, the registration of such a site can give 'greater clarity and awareness of . . . cultural values', which may act as a deterrent to the disturbance of the site.[170] The implication was that Otaraua's best chances of protecting Tikorangi were by proving the existence of archaeological remains.

Otaraua also contacted the NPDC about the intended underboring of the hill. The council wanted details of the exact location of the pā in relation to the hill, and it engaged an archaeologist to review all available relevant reports about the area.[171] The archaeologist's conclusion was that there was no 'visible surface evidence' to suggest the existence of a pā on Tikorangi and that terraces on the hill, initially interpreted as a sign of early Māori settlement, were instead related to possible agricultural activity. Further, 'the likelihood of uncovering any subsurface archaeological deposits [was] negligible', and any such unrecorded material would in any case be unaffected by Petrochem's underboring. The archaeologist was aware of Otaraua oral tradition to the contrary and recommended that those traditions be 'investigated separately by the appropriate experts'.[172]

6.6.2 Different perceptions of wāhi tapu

Otaraua have often found it difficult to get others to understand the cultural framework within which the concept of wāhi tapu exists. For them, the significance of wāhi tapu transcends any physical remains that may exist. To lose a wāhi tapu is to lose 'that last remaining connection to that part of our history, our tupuna and our whenua'.[173] They are therefore frustrated by the continual emphasis on archaeological remains and precise site definition,

Donna Eriwata

and resent a tendency to call in 'Pakeha experts . . . to say where exactly [a particular] feature finishes'. It is, said one of their witnesses, an attempt to 'determine our wahi tapu by someone else's expertise'.[174] At one point, faced with a two-week timeframe in which to assemble information, Otaraua decided to try to get a 'blanket wāhi tapu' designation placed over an entire area. This was not intended as an abuse of the term 'wāhi tapu', they said. Rather, they were worried that, in their haste to comply with process requirements, some wāhi tapu would be missed off the list: it was an action born of 'frustration in dealing with that process and not being able to protect the little places'.[175]

With concerns such as these in mind, and feeling that they had exhausted all legal options available to them in relation to Tikorangi, Otaraua 'met and made the decision to occupy the . . . site in a bid to provide protection that [they] could not get from anywhere else'. They took up occupation on 22 March 2009 but emphasised that, in

doing this, they did not want to be seen as 'stopping progress' – they were 'simply seek[ing] a way for [their]wahi tapu and taonga to be respected and protected in their own right'.[176]

6.6.3 Different perceptions of 'consultation'

Quite apart from its relationship with the local authorities, the Otaraua hapū has had to deal with five different oil and gas companies over the years, as well as the Department of Conservation, the Historic Places Trust, and various other Crown agencies.[177]

David Doorbar, on behalf of Otaraua, voiced the opinion that, because the oil and gas companies are 'not required to build a relationship with tangata whenua', they fail to understand their concerns and how to address them.[178] As an example, he pointed to the naming of the wellsite at Tikorangi as 'Kowhai A': 'The lack of respect for who we are in our old places is apparent just through that process, even if it is [done] unwittingly by them.'[179] Mr Doorbar explained that the names traditionally given to places within Otaraua boundaries were seen as part of the hapū's identity. Furthermore, he said, if the name 'Tikorangi' disappeared from use as a result of a unilateral decision to rename the site, it would be 'a loss for the next generation.'[180]

In Mr Doorbar's view, 'consultation' often seemed to be 'more about ticking a box'.[181] In such situations, the hapū felt that it was just 'dealing with people trying to get through their business, their legal business' to achieve a particular short-term objective such as a licence but that, for most purposes, the tangata whenua were on 'a lower tier of consultation'.[182]

Sometimes there was no consultation at all, and all too often no legal requirement for notification. This meant that tangata whenua were put in the position of lodging numerous objections against resource consent applications for exploration and production sites within their boundaries. None of Otaraua's witnesses saw this as satisfactory. 'Consultation', Mr Doorbar said, 'needs to be at a meaningful level'. He went on, 'we believe that we are [in] direct partnership [with] the Crown and that is the consultation that should be taking place, not playing with people who have already got the green light'.[183]

Ms Eriwata agreed, but she saw the Crown's partnership duties as being shared by the local authorities:

> As tangata whenua we need to be speaking with our Treaty partners over these matters. The council should be directly consulting with us so that they are in a position to determine what mitigation may be required to protect our wahi tapu.[184]

To this end, Otaraua had supported, and had representation on, the NPDC's Wāhi Tapu Reference Group, which was set up to 'review, amend, correct and establish a more workable recording system to be used within the resource consent process'. The group had, however, had mixed success, and Ms Eriwata noted that Otaraua were 'continuing to lose wahi tapu at a very high rate'.[185] Hapū members also feared that, once the location of wāhi tapu was revealed, tangata whenua would lose their rangatiratanga over those places, because oil and gas companies would make decisions about them without reference to the people concerned. The attitude of the companies, said Mr Doorbar, would be: 'We don't really need to talk to you fellows, the council's got all your information.'[186]

6.6.4 Registration of wāhi tapu

Otaraua say that they are the 'rightful kaitiaki' of their wāhi tapu and of knowledge pertaining to those wāhi tapu.[187] As such, protecting wāhi tapu is their inherited responsibility. However, the NPDC's policy is that wāhi tapu must be registered in order to trigger any provisional requirement which recognises kaitiakitanga.

Registering a wāhi tapu is not an easy matter, since it involves amending the district plan. To do this, the council has to run a community notification, submission, and hearing process, involving several subcommittees and

several reports. 'If challenged during this process', Ms Eriwata said, 'we then have to prove that these sites are actual sites.'[188]

That is indeed what happened when a hearings commission, acting under the authority of the NPDC, sat to hear submissions about registering the Tikorangi site as a wāhi tapu. The commission was made up of four council members, and its aim was to investigate:

- whether the pā existed;
- if it did, whether it was an archaeological site;
- if it was, where it was located and how big an area it covered; and
- whether it was a wāhi tapu.[189]

Mr Doorbar noted the difficulties faced by Otaraua in engaging in such processes. For example, some funding is available to participating hapū members by way of sitting fees, but most of the work is done on an unpaid, voluntary basis.[190] Then there is the adversarial nature of the proceedings, which Mr Doorbar saw as unhelpful:

> every time we go to a hearing we're always up against lawyers. The companies have lawyers, the district council has lawyers, the regional council has lawyers and none of them are our friends . . . I cannot speak legal language . . . it does us no favours and it doesn't protect our taonga.[191]

6.6.5 The hearing commission's decision

The hearing commission made its inquiry on 8 and 9 December 2009 in New Plymouth, with a view to deciding whether the district plan should be amended by adding Tikorangi Pā. The TRC, Petrochem, the Historic Places Trust, and Otaraua all made submissions, although the Historic Places Trust did not have a representative present at the hearing itself.[192] Otaraua provided evidence that the whole of Tikorangi Hill was, for them, a spiritually and environmentally significant landmark. Petrochem's lawyer, however, argued that 'waahi tapu must be objectively established, not merely asserted'.[193] The company stressed the need for certainty about the location and extent of any wāhi tapu so that it could assess their impact on its operations. Speaking on the company's behalf, management executive Lara Walker explained:

> discoveries at the Kowhai A [Tikorangi] well site are significant and therefore Petrochem Limited is concerned about any new designation which could adversely affect their ability to operate and utilise the well site and/or the surrounding area of the leased land.[194]

It was important, Ms Walker said, to define the boundaries of the Tikorangi Pā site so that Petrochem could identify 'what consents might be required for any future activities on the site'.[195]

An archaeologist called by Petrochem then gave his estimation of where the pā site lay in relation to Tikorangi Hill. He said that, in his view, it was 'not a major pa'.[196] Petrochem also sought the expert opinion of a cultural consultant, who gave his views on the general nature of wāhi tapu in traditional Māori society. He thought that the available evidence supported the existence of an established kainga at Tikorangi, but he believed that the pā had been built later and had not lasted long.[197]

In its decision, the commission accepted that:

- Tikorangi Pā did exist;
- it met the criteria for being recognised as an archaeological site;
- its location and probable extent could be defined;
- it was a 'wāhi tapu' and a 'wāhi tapu site', within the meanings of those terms as used in the district plan (see below); and
- by listing it in the district plan, the council would be 'appropriately discharging its obligations under the RMA.'[198]

The *New Plymouth District Plan* defines 'waahi tapu' as 'places or things that are sacred or spiritually endowed and includes but is not limited to pa, ara (tracks), urupa, battle sites and tauranga waka (canoe landings)'.[199] The commission considered that this supported a broader interpretation of the term than had been offered by Petrochem's cultural consultant. Nevertheless, it drew attention to a

review of wāhi tapu and archaeological sites being undertaken by the NPDC, and it anticipated that 'one of the outcomes associated with this work will be a greater precision around the defining of waahi tapu'.[200]

6.6.6 Implications of the decision

In its decision, the hearing commission expressed satisfaction at having identified the 'spatial extent' of the pā site, saying that it would provide 'a high degree of certainty to users of the District Plan as to when resource consent may be required'. This greater certainty would 'in turn result in reduced costs for the Council in District Plan administration, and also for resource users . . . and also for the Hapu'. In the view of the commission, there was 'no alternative but to have Tikorangi Pa recorded in the District Plan so that the site is afforded protection by the effect of the related rules'.[201]

The claimants remained nervous about having their wāhi tapu information held on record, but Mr McLay from the TRC commented to the Tribunal: 'if you are going to manage a resource, you need to know about it'.[202] He also mentioned the use of 'silent files', saying that the council 'will not be brandishing these around'.[203] Mr Doorbar acknowledged that having silent files was 'a move in the right direction' but said that the hapū still had concerns:

> they are thinking about us and they are trying to provide for us in that respect, but as far as we understand, all information that goes to the District Council is in the public domain . . . it sort of negates our concerns that that's our intellectual property right, that's our korero, that's our rohe and if they come and see us, we could tell them.[204]

Text notes

1. Paper 2.154, pp 196, 236
2. Document A21(2.1), p 1; doc E13(h), p 9
3. Document A21(2.1), p 19
4. Ibid, p 17; doc A20, p 2
5. Document E13(h), pp 1–2, 4, 7; doc A21(2.2), p 22
6. Document A21(2.1), p 3
7. Ibid, pp 3–4, 22e–22i; doc A21(2.2), pp 4–5; doc E13(h), p 2; doc E13(i)
8. Document A20, p 3
9. Document E13(i), p 2
10. Document E13(h), p 32. The first regional air quality plan was issued in 1997.
11. Document A21(2.2), pp 25d–25p
12. Document A21(2.1), pp 22f–22g
13. Ibid, p 7; doc A20, p 4; doc A21(2.2), pp 3, 3a–3c
14. Document A21(2.1), pp 1, 6; doc E13(h), p 5
15. Document E13(i), p 1
16. Document E13(h), pp 6, 8
17. Ibid; doc E13(i)
18. Document A20, pp 4–5
19. Document A21(2.1), pp 22aa–22ii
20. Ibid, p 1
21. Document E13(h), pp 8, 20; doc A21(2.1), p 21
22. Document E13(h), p 19
23. Ibid, p 12
24. Ibid, p 34
25. Paper 2.154, p 37
26. Document A21(2.1), pp 4, 11; doc E13(h), p 10
27. Document E13(h), p 27. The Resource Management Amendment Act 2003 repealed section 37(5A) but inserted a similar provision in section 37(1) of the principal Act.
28. Document E13(h), p 27
29. Ibid, p 29
30. Document A21(2.2), p 25c
31. Document E13(h), p 4
32. Document A21(2.2), pp 25d–25p
33. Ibid, pp 25a–25b; doc E13(h), p 4
34. Document A21(2.1), p 3; doc E13(h), p 9
35. Document A21(2.2), pp 25–25p
36. Document E13(h), p 10
37. Document A21(2.1), pp 4–5; doc A21(2.2), p 22
38. Document E13(a), p 4; doc E13(h), p 33
39. Document E13, para 2.18
40. Document E13(h), pp 16, 33
41. Ibid, pp 22, 33
42. Ibid, p 31
43. Ibid, pp 12–13
44. Ibid
45. Ibid, p 11; doc A21(2.1), p 22dd
46. Document A21(2.2), pp 18, 21
47. Document E13(h), p 11
48. Ibid, p 20
49. Ibid, pp 25–26, 31
50. Ibid, pp 20–21, 22, 25
51. Document A21(2.1), pp 10, 22e-22i; doc E13(h), p 10
52. Document E13(h), p 19; paper 2.154, p 268

53. Document E13(h), p 6
54. Ibid, p 8
55. Document E13(h); doc E13(i)
56. Document E13(i), p 2
57. Ibid
58. Ibid, p 3
59. Ibid, p 2
60. Ibid, pp 3–4
61. Ibid, p 4
62. Ibid
63. Ibid
64. Document E13(h), pp 8–9, 35
65. Ibid, p 36
66. Ibid
67. Ibid, pp 21, 35–37
68. Ibid, pp 37–39
69. Ibid, p 37
70. Ibid, p 33
71. Document A20, p 5
72. Paper 2.154, p 37
73. Document E13, para 4.13; doc E13(d), p 3
74. Crown Minerals Group, 'Pohokura To Have Only One Offshore Platform and Three Onshore Wells', Ministry of Economic Development, http://www.crownminerals.govt.nz/cms/news/2004/news_item.2007.05-07.7908040317 (accessed 12 November 2010); 'Pohokura', Shell Todd Oil Services Ltd, http://www.stos.co.nz/pohokura.asp (accessed 11 November 2010)
75. Document D2, p 2
76. Ibid
77. Document D1, p 6
78. Ibid, pp 2–3; doc E28(a)
79. Document D1, pp 4–6
80. *Otaraua Hapu v Taranaki Regional Council* unreported, 9 September 1998, Environment Court, Auckland, A110/98, p 1; doc E13(d), p2
81. Document E28(a), p 2
82. Ibid, pp 4–12
83. Ibid, pp 2–3, 13–14
84. Ibid, p 9
85. Ibid, pp 12–13
86. Ibid, p 13
87. Ibid
88. Document D1, p 6; doc E13, para 6.4; paper 2.154, p 58; *Taranaki Regional Council v Fletcher Challenge Energy Taranaki Ltd* unreported, 10 October 2000, Sheppard DCJ, District Court, New Plymouth, CRN0043010043
89. Document E13, para 6.3
90. Document D1, p 6
91. Document E13, para 4.8
92. Ibid, para 8.3
93. Document D1, p 7
94. Ibid, pp 4–5
95. Ibid, pp 5–6
96. Document E13, para 4.8
97. Document D1, p 6; paper 2.154, p 58
98. Document D1, p 6; paper 2.154, p 58
99. Document D1, p 5
100. Document E15, pp 1–3, 12, 15
101. Document E38, pp 2–4
102. The Resource Management (Approval of Maui Development Limited as Requiring Authority) Notice 2009, 11 March 2009, *New Zealand Gazette*, 2009, no 35, pp 939–940
103. Document E38, p 2; doc E29, p 9
104. Document E15, p 12. Photographs dated 26 April 2003 and 28 September 2003 can be found in document E15(o).
105. Paper 2.154, pp 267–268
106. Ibid, pp 87, 95
107. Document E38, p 5
108. Document E15, p 13; paper 2.154, p 84; doc E15(i)
109. Document E15(k), pp 3, 13
110. Paper 2.154, p 275
111. Ibid
112. Document E15(k), p 14
113. Document E15, p 14
114. Document E38, pp 2, 5, 6
115. Paper 2.154, p 84
116. Ibid, p 261
117. Ibid, p 95; doc E15(j)
118. Document E15, p 15; paper 2.154, pp 84–85
119. Paper 2.154, p 261
120. Document E38, p 6; doc E45, pp 3–4; doc E15, p 17
121. Document E15(k), pp 9, 9a
122. Document E38(e)
123. Document E38(m), p 1
124. Ibid, p 2
125. Paper 2.177, p 5
126. Document E38(e). Two years later, Judge A C Roberts recorded that 'an issue of replaced or substituted pipes from earlier realignment work at Twin Creeks had [still] not been resolved': *Vector Gas Ltd v Gibbs* unreported, 27 February 2009, District Court, New Plymouth, CIV-2008-043-000545, para 10.
127. Document E38, p 9
128. Document E15(m), para 31
129. Document E38, p 7
130. Document E38(i)
131. Document E29, p 13
132. The application to the District Court was made in December 2008: see document E15(m), p 3.
133. Document E15(l), para 8
134. Ibid, para 20
135. Document E15, p 19

136. Document E38, p 10
137. Paper 2.154, p 93; doc E15, pp 19–20
138. Paper 2.154, p 93
139. Document C6(a)(RR25), pp 1, 3
140. Ibid, attachment 1, p [2]; doc C1(DN11), attachment 1, p [2]; *Minerals Programme for Petroleum* (Wellington: Ministry of Economic Development, 2005), p 23
141. Document C1(DN13); doc C6, p 25. At this stage, Ms Noble referred only to 'Kanihi' and not (as later) to 'Kanihi–Umutahi'. Te Puni Kōkiri's directory of iwi and Māori organisations, Te Kahui Mangai, lists Kanihi and Umutahi as two hapū sharing the same marae: see 'Ngāruahine: Hapū and Marae', Te Puni Kōkiri, http://www.tkm.govt.nz/iwi/ngaruahine (accessed 8 December 2010).
142. Document C1(DN15), p 1; doc C6(a)(RR26)
143. Document C1(DN16), p 2
144. Document C6(a)(RR26), p [2]
145. Ibid, p [3]
146. Document C1(DN16), p 3
147. Document C1(DN14), pp [3]–[4]
148. Document C1(DN15), p 1
149. Document C1(DN16), p 2
150. Ibid
151. Document C1(DN15), p 1
152. Document C6(a)(RR27), p [4]
153. Document C6(a)(RR28), p [2]
154. Ibid
155. Ibid
156. Document D5, p 19, para 60.8
157. Document C1(DN16), p [4])
158. Document C1, p 11
159. Document D2, p 3; doc D1(e), paras 15.1–16.26
160. Document D1(e), para 16.9; doc E32, pp 8–9
161. Document D1, p 14
162. Ibid, p 3
163. Ibid, p 14
164. Ibid, p 3
165. Document D1(e), para 23.5
166. Document D2, p 4; doc D1(a), p 1. Schedule A is intended to cover all archaeological sites and 'waahi tapu that are wholly or partly physically evident in the landscape'. Eventually, there will also be a schedule B, for sites that were 'physically destroyed prior to . . . 1998 but which are still regarded as being in existence in accordance with Tikanga Maori'. As a temporary measure, however, all wāhi tapu are listed in schedule A as it has not yet been possible for the council to consult hapū about which sites should be listed on which schedule: New Plymouth District Council, *New Plymouth District Plan*, 3 vols (New Plymouth: New Plymouth District Council, 2005), vol 2, app 26.
167. Document D2, p 4
168. We have not been presented with evidence that clearly shows the relative positions of the blockhouse and pā site.
169. Document D1, pp 8, 10–11; doc E32, p 6
170. Document D1(c)
171. Document D1(a), p 1
172. Ibid, pp 4–5
173. Document D2, p 2
174. Paper 2.154, p 61
175. Ibid, pp 67–68
176. Document D1, pp 13–14
177. Ibid, pp 2–3
178. Document D2, p 6
179. Paper 2.154, p 69
180. Ibid, pp 69–70
181. Document D2, p 5
182. Paper 2.154, p 67
183. Ibid
184. Document D1, pp 9–10
185. Ibid, p 12
186. Paper 2.154, p 60
187. Document D2, p 3; doc E32, pp 2–3
188. Document D1, p 12
189. Document D1(e), paras 18.1.1–18.1.4
190. Ibid, para 16.11; paper 2.154, p 64
191. Paper 2.154, p 64
192. Document D1(e), paras 6.1, 6.2, 7.1.1–7.1.2
193. Ibid, para 11.8
194. Ibid, para 12.3
195. Ibid, para 12.5
196. Ibid, para 14.6
197. Ibid, para 15.8
198. Ibid, paras 20–24
199. New Plymouth District Council, *New Plymouth District Plan*, vol 1, p 422
200. Document D1(e), paras 23.5, 23.11
201. Ibid, paras 24.3, 25.3, 25.4. We note that, as a result of the hearing commission's decision, plan change 19 was passed, adding Tikorangi to the list of sites in appendix 26.1, and it became operative as of 16 June 2010: 'Plan Change 19 Addition of Tikorangi Pa to Schedule 26.1: Waahi Tapu and Archaeological Sites', New Plymouth District Council, http://www.newplymouthnz.com/CouncilDocuments/PlansAndStrategies/DistrictPlan/PlanChangesandPrivatePlanChanges/PlanChange19.htm (accessed 7 December 2010).
202. Paper 2.154, p 225
203. Ibid, p 249
204. Ibid, p 65

Map notes
Map 9: Document E38
Map 11: Document A21, p 245

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CHAPTER 7

THE CROWN'S RESPONSE

7.1 Introduction

In this chapter, we set out the Crown's response to the claims of Ngāruahine and Ngāti Kahungunu. In the Waitangi Tribunal process, the Crown's role is not to act as a 'defendant' but rather to assist the Tribunal to inquire into the truth of matters. In this inquiry, the Crown did not make any concessions that its acts or omissions were in breach of the principles of the Treaty of Waitangi. In essence, its position was that its laws and processes for managing petroleum were consistent with the Treaty. In setting out the Crown's response, we rely on its written submissions made before and during our hearing, the oral submissions of Crown counsel, and the evidence of the Crown's sole witness, MED official Rob Robson. We set out the Crown's arguments in terms of the interests that it is required to protect, the Treaty compliance of the Crown Minerals Act 1991 and the Resource Management Act 1991, the protection accorded the environment outside New Zealand's territorial waters, and the significance to our inquiry of the United Nations Declaration of the Rights of Indigenous Peoples.

7.2 'Active Protection': Which Māori Interests is the Crown Protecting?

The Crown accepts that it has a duty of active protection.[1] The question arises: What Māori interests does the Crown see itself as protecting in the management of the petroleum resource?

The Crown noted that the Tribunal, in its *Petroleum Report*, was not persuaded that petroleum was or is a taonga. Although the Tribunal did not make a conclusive finding, the Crown's position is that petroleum is not a taonga, so no Māori interest arises under this head.[2] Secondly, the Crown 'carefully considered but did not accept' the Tribunal's finding that Māori who have lost land in breach of the Treaty have retained a special Treaty interest in valuable resources in such land, including petroleum, which could be used to settle claims.[3] In the Crown's view, petroleum is not an appropriate asset to use in Treaty settlements and no interest arises to which it must give effect or protection.[4] Thirdly, the Crown noted the Tribunal's acceptance of its argument that petroleum was justly nationalised in 1937. Although circumstances have inevitably changed, the Crown is still the legal owner of petroleum and is still best placed to carry out the national, centralised allocation

function so important to overseas investment and to the effective, rational development of the resource.[5] Thus, it rejected any suggestion that the claimants have an ownership interest in petroleum (including beyond the territorial limit) and any prospect of Māori involvement in the Crown minerals programme as decision-makers. Only the Crown, we were told, can properly balance all the interests involved so as to arrive at fair decisions that are truly of benefit to the nation.[6] Possible reforms suggested by the claimants, including the creation of a council to advise the Minister of Energy, were rejected by Crown counsel.[7]

As an ancillary point, Crown counsel suggested that Māori do not always agree as to whether economic development and mining should be prioritised over the cultural and other interests in protecting land or sea. Although the thrust of claimant concerns in our inquiry has been to 'emphasise protection', this may well change as iwi settle their claims and become economic players with a greater interest in development. The Crown should be balancing these shifting interests; Māori – because they may have different views – are not the correct party to do so.[8]

So, the Crown does not see itself as protecting a Māori interest in petroleum per se or a partnership in the exercise of Māori authority over the allocation of the petroleum resource. What, then, does it see itself as protecting?

> *'The Crown has responsibilities in relation to active protection and, as prospecting, exploration or mining may impact upon lands, waters or other properties protected by Article 2 of the Treaty, various mechanisms are available for excluding areas of particular importance to iwi from the operations of the Minerals Programme.'*
>
> *Minerals Programme for Petroleum* (Wellington: Ministry of Economic Development, 2005), p 22

Under the CMA, the Crown has identified one subject for the exercise of its duty of active protection: land that is of 'importance to the mana of iwi'.[9] Mr Robson said in evidence that the MED does not take into account environmental impacts, which are the province of local authorities operating the resource management regime.[10] The thrust of protection under the CMA is to allow the exclusion from prospecting, exploration, and mining of land which is so important to iwi that it outweighs the national interest in petroleum development.[11]

The second area of protection comes under the Resource Management Act 1991 (the RMA). In brief, the Crown sees itself as protecting things which the Act identifies, in sections 5 to 8, as matters of particular importance to Māori. Counsel drew attention to the definition of 'sustainable management', which recognises that natural and physical resources are to be managed to enable people and communities to provide for their 'social, economic and *cultural* wellbeing' (emphasis in original),[12] and said that the Act provides for the recognition of Māori interests in a number of ways. Of the section 6 'matters of national importance', three were highlighted: 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'; 'the protection of historic heritage from inappropriate subdivision, use, and development'; and 'the protection of recognised customary activities' (section 6(e) to (g)). The provision in section 7(a) for decision-makers to have particular regard to kaitiakitanga was likewise highlighted. It was submitted that the combined effect of sections 5 to 8 of the RMA is 'to give significant protection to Maori interests' and that, in practice, 'many of the matters of national importance listed in section 6 are likely to be compatible [with] and complementary to section 6(e) and (f)'.[13] The Crown then outlined local authority processes under the RMA of policy setting, planning, and rule-making, giving examples of statements about Māori and matters of particular interest to them to support its submission that Māori are fully involved in the decision-making processes about those matters under the RMA.[14]

These, then, are the interests which the Crown views as requiring its active protection. In counsel's submission,

its views match well with claimant concerns, which – as expressed at our hearing – related almost entirely to protecting sites of significance from harm.[15]

7.2.1 'New' interests: Māori interests outside the territorial waters of New Zealand

In its submissions, the Crown noted that the Tribunal's earlier inquiry did not address issues relating to the foreshore and seabed. In addition, the Tribunal did not consider the issue (which arose after nationalisation in 1937) of Māori customary interests outside the territorial zone, where the Crown does not claim ownership of petroleum but nonetheless receives royalties from its exploitation. According to Crown counsel, the claimants have made a broad assertion of customary rights in the continental shelf and its petroleum resources without defining the interest or providing any evidence in support of it. Neither the Crown, nor – in its view – the Tribunal has been given anything sufficient with which to engage. Māori have not demonstrated an interest in need of protection, other than an interest in the well-being of fisheries and the coastal environment. Hence, the Minister rejected Te Aupouri's objection to the Reinga Basin block offer, which had been based on an assertion of ownership of petroleum.[16]

7.2.2 'New' interests: coal seam gas

Another new interest that arose well after 1937 is the inclusion of coal seam gas in the definition of Crown-owned petroleum in the *Minerals Programme for Petroleum* (the MPP) of 2005. It has only recently become commercially viable to explore and exploit coal seam gas. In their closing submissions, Crown counsel pointed out that this addition was in the draft MPP, which was the subject of consultation with Māori in 2004, before being finalised in 2005.[17] The implication is that Māori did not object to it at the time. According to minutes appended to Mr Robson's evidence, 'CSG' was discussed at the Ngāi Tahu hui on 7 May 2004. Mr Robson believed that it was also discussed at the second New Plymouth consultation hui, on 21 July 2004, although it was not recorded in the minutes of that hui. Replying to a question from counsel for Ngāruahine, Mr Robson commented that the minutes 'don't necessarily record every last detail'.[18] In response to a request from the Tribunal for additional information, counsel advised that the policy for coal seam gas was devised in 2003, after consultation with the petroleum industry.[19] From the documentation supplied by the Crown, Māori do not appear to have been consulted.[20] In his evidence for the Crown, Mr Robson noted that the expansion of the natural gas supply was considered a matter of importance for the nation at the time, because of forecasts that there would be insufficient gas for electricity beyond 2015.[21]

7.3 The Crown Minerals Act 1991

According to the Crown, the first line of protection for Māori interests is the Crown Minerals Act 1991 (the CMA). This Act is the legislative means for allocating the rights to Crown-owned petroleum. We have already described its provisions in chapter 4. In essence, if Māori want land of great importance to them excluded from petroleum exploration and mining activities, then that is one of the interests that the Minister of Energy, who is the primary decision-maker, must 'balance' when issuing permits. The Crown accepts that the petroleum regime does offer fewer protections for landowners than is the case for other Crown-owned minerals but submits that this reflects 'the strategic importance of petroleum in the economy'.[22]

7.3.1 Opportunities for Māori to have their interests protected under the CMA

Some land that is of value to Māori, such as the land in national parks (and other land listed in schedule 4 to the CMA), is automatically exempt under the CMA from activities that have more than a minimum or otherwise limited impact.[23] Other land in the conservation estate cannot be the subject of a compulsorily arbitrated access arrangement, and for the Minister to consent to any petroleum-related activity, 'strict criteria' would need to be met.[24] In addition, Māori have the right to request that other land

of importance to them be excluded from the operations of the petroleum industry. The first opportunity for Māori to have their interests protected in this way is when the MPP is revised every 10 years, at which time Māori can have their land exempted from the coverage of the programme altogether. (Individual amendments to the MPP can also be made at any time, although it would seem likely that the exercise of that power would be reserved for substantial changes.[25]) The second opportunity arises when the Crown puts out block offers for consultation; Māori may seek to exclude particular pieces of land before a block is awarded to companies. The third opportunity arises when the Crown consults Māori about actual permits, including mining permits. Māori may seek to have land excluded from the operation of a permit or to have a permit amended.[26]

These modes of protecting land of importance 'to the mana of iwi' are available to all iwi and hapū, regardless of the legal ownership of the land concerned. In addition, Māori landowners may refuse permit holders access to their land for low-impact activities, so long as the land concerned is 'regarded as wahi tapu'.[27] This, the Crown observed, is a right not shared by general landowners.[28] For higher impact activities, permit holders can obtain access only by negotiation, and landowners have the right to impose conditions. In the Crown's view, this is an important protection for Māori. If the parties cannot agree, there is a provision for compulsory arbitration, but this has never had to be used.[29] Also, the Crown expects that some Māori land is 'likely' protected from compulsory, arbitrated access by the exclusion of land under crop or land within 30 metres of a burial ground.[30]

All decision-makers under the Act, including the Minister, the chief executive of the MED, and any arbitrators, must have regard to the principles of the Treaty of Waitangi in the processes that they conduct and the decisions that they make (section 4).[31] In the Crown's view, these protections make the Act (and the system that operates under the Act) Treaty compliant.

7.3.2 What processes are followed to carry out the CMA's Treaty requirements?

In the Crown's submission, the processes used to carry out the CMA are Treaty compliant.

Consultation is the key means by which the Minister becomes sufficiently informed about Māori interests so as to make decisions.[32] It follows, therefore, that the processes used for consultation are critical to our inquiry. The principles of good consultation are set out in the MPP and require the Government's commitment to 'meaningful discussion' with Māori, in which it will fully inform itself of their views, be receptive to those views, and give them 'full consideration' in making its decisions.[33] In order to give effect to these standards, the Crown submits that it follows best practice, involving:

> early consultation; provision of sufficient information; sufficient time for participation of the consulted party and consideration of the advice (including an ability to extend the initial 20 working day submission period by an additional 20 working days); and genuine consideration of the advice by the Secretary and Minister with open minds.[34]

Mr Robson's evidence for the Crown sets out the actual processes used for each opportunity to consult under the Act. In his view, the processes have been improved by the adoption, where appropriate, of the recommendations of consultant Michael Dreaver, who was commissioned by the MED in 2003 to provide advice on improving Māori participation in the petroleum management regime (see chapter 5).[35]

(1) *The draft MPP*

From 2003 to 2004, the Government developed a revised MPP, as it must do every 10 years. Consultation with Māori began with preliminary hui at four centres, after which a draft MPP and accompanying discussion paper was sent to all iwi and all Māori groups on the Crown Minerals Group's contact database.[36] There was then a 'second

2004 Recommendations for Improving Māori Participation in the MPP

In his evidence for the Crown, Rob Robson quoted from a report completed for the MED in 2004 by Michael Dreaver, which recommended improving Māori participation in the MPP by:

- improving the information available to Maori on the operation of the MPP and related matters;
- increasing the capacity of Maori to provide constructive input;
- building better relationships with hapu and iwi; and
- improving the information available to industry about hapu and iwi.

phase of kanohi ki te kanohi engagement', with formal hui at Whangārei, Hastings, New Plymouth, Hawera, Christchurch, and Dunedin.[37] These hui were followed by four written submissions from iwi, after which an MED official met with counsel for Whanganui iwi to discuss their submission further. A report and recommendations from the MED on the content of the consultation was then considered by the Minister when the MPP was finalised, and submitters were notified of the outcome. Mr Robson observed that Ngāruahine soon after complained in detail about the MPP but had not participated in consultation beyond the initial pre-draft hui at New Plymouth.[38] In counsel's submission, the changes that were made to the draft MPP as a result of this consultation were the exclusion of certain areas of land from its operation.[39]

(2) *Block offers and permits*

Mr Robson described the consultation process for block offers and permits as 'flexible'. Typically, the MED sends a letter inviting a response to those iwi authorities or groups that it believes have interests in areas covered by the block offers or permit applications. Māori have 20 working days to respond, though this can be extended by a further 20 days on request. Written responses can be supplemented by hui, 'if both iwi/hapu and the Crown think it is appropriate'.[40]

(3) *Decisions after consultation with Māori*

The Crown put to us that the importance of land to Māori – whether for cultural, spiritual, or economic reasons, or for some combination of such values – must be balanced against the prospective value of the petroleum located in that land and the potential benefit to the whole nation of exploiting that particular petroleum resource. Counsel did not, however, offer an explanation of how exactly the Minister weighs such interests in practice. We were left with the wording of the MPP itself:

- What it is about the area that makes it important to the mana of iwi and hapu;
- Whether the area is a known wahi tapu site;
- The uniqueness of the area; for example, whether it is one of a number of mahinga kai (food gathering) areas or the only waka tauranga (the landing place of the ancestral canoes);
- Whether the importance of the area to iwi and hapu has already been demonstrated, for example by Treaty claims and settlements and objections under other legislation;
- Any Treaty claims which may be relevant and whether granting a permit over the land would impede the prospect of redress of grievances under the Treaty;
- Any iwi management plans in place in which the area is specifically mentioned as being important and should be excluded from certain activities;
- The area's landowner's status. If the area is one of the special classes of land in section 55, landowner veto rights may [already] protect the area;
- Whether the area is already protected under other

legislation, for example the Resource Management Act 1991, Conservation Act 1987, Historic Places Act 1993; and
- The size of area and value of the potential resource affected if the area is excluded.[41]

We were told, however, that the claimants were wrong in their belief that Ministers have been prepared to exempt only small pieces of land that are wāhi tapu.[42] Crown counsel pointed to the exclusion of Mount Taranaki and ranges in the Egmont National Park as a large area exempted from the operations of the MPP at the request of Taranaki tribes.[43] Also, the Tītī and Beneficial Islands have been made exempt from petroleum development at the request of Ngāi Tahu. In terms of the Whanganui application to exclude from the MPP Mount Ruapehu in the Tongariro National Park and the bed of the Whanganui River and its tributaries:

> The conclusion was reached [by the Minister] that exclusion of such a large area of land was not in the public interest but that exclusion of particular areas could be requested on a case by case basis at the time of future block offers or permit applications. The report analysing the request for exclusion indicates a balancing of factors for and against exclusion.[44]

Mr Robson emphasised that, quite apart from balancing Māori interests against the national interest in exploiting petroleum, the Minister also takes into account whether the Māori interest can be (or is) protected by some other means. Thus, the Minister has to consider whether the land is already protected by heritage legislation or whether it will be protected (in terms of impacts) by RMA processes or, alternatively, whether it may be required to help settle a Treaty claim.[45] The Crown's view is that, in practice, there is an integrated Government approach to protecting Māori interests, and the exclusion of land from the MPP or a petroleum permit may not be necessary for achieving such protection.

In terms of the block offers and permit applications, Crown counsel pointed to the example of consultation with the Kanihi hapū in November 2006 about an offer 'over land on-shore and near-shore in Taranaki'.[46] (This situation is outlined in chapter 6.) A letter was sent to 10 groups (including Kanihi), with sufficient information to convey the extent of the block being offered for tender, the nature of the exploration that would follow, the right of iwi and hapū to request the amendment of the terms of the offer or the exclusion from it of land of importance to them, and the matters that the Minister would take into account in making his decision.[47] The letter also invited the affected groups to seek 'face to face consultation'.[48] Mr Robson met with Kanihi in December 2006, at which time further explanation of the process was made orally. The Minister then 'considered Kanihi hapu submissions'.[49] He decided that, on balance, any 'cultural sites of importance' in the coastal area that Kanihi wanted to exclude were already protected by 'the Resource Management Act, the Historic Places Act and the Māori Reserves Act'. On the other hand, the coastal area was under-explored, and its exclusion would 'substantially restrict the Crown's ability to manage its petroleum assets in the area.'[50]

This does not mean, however, that the Ministry took no action to make sure that appropriate protection would be provided: it alerted the petroleum company to Kanihi's concerns, advising it to enter into a relationship with the hapū, and it also alerted local councils and the Department of Conservation so that they would know of Kanihi's issues when managing the environmental effects of the petroleum exploration.[51] On this point, we note Mr Robson's observation that, although the MPP does not require the Crown to assist subsequent consultation between Māori and permit holders, the Ministry does advise the latter to consult with Māori. Even so, Mr Robson sees this more as the responsibility of the resource management regime to bring about.[52]

The Crown concluded:

> The examples of consultation over block offers and permit applications outlined in the evidence of Rob Robson show that the Crown actively assists and facilitates Māori

participation in the consultation process and makes informed and transparent decisions regarding petroleum management.[53]

This brings us to a key aspect of the Crown's response to the claims: How does it 'actively assist and facilitate Māori participation in the consultation process'?

(4) *The other side of consultation: Māori participation*

In the Crown's submission, many claimant criticisms are about the quality of participation in consultation by Māori, rather than by the Crown. The Crown can protect Māori interests only if it knows about and understands them, and for that it is dependent on the willingness and capacity of Māori to engage with it. We explain the Crown's position on Māori willingness first, as that was dealt with only briefly in submissions.

(a) *Māori willingness to provide the information needed:* In essence, the Crown took from our hearings that Māori are reluctant to provide information in advance – which is a cornerstone of how the Crown protects their interests under the CMA – because they are concerned that the Crown or other parties may take that as the sum total of their interests or sites and consult no further with them. Also, more generally, Māori are worried that information about their wāhi tapu may be put to improper use if it were to get out into the public domain.[54]

On the first point, counsel submitted that 'the evidence does not indicate this to be a likely result of identification of sites'.[55] The Crown relied on evidence that, after the Minister of Energy has granted a permit, consent authorities encourage applicants to consult with iwi and hapū.[56]

On the second point, the Crown submitted that the Official Information Act 1982 prevents the public disclosure of information where there is an 'obligation' to keep it confidential, and the CMA further provides that the Minister may refuse to disclose information where doing so would offend against tikanga or would publicly identify a wāhi tapu. In making such a decision, the Minister would need to be sure that the offence against tikanga or the risks to wāhi tapu of disclosure outweigh the public interest in the information being made available. According to the Crown, this is sufficient protection to enable Māori to participate in consultation with confidence.[57]

(b) *Māori capacity to participate in consultation:* As noted above, it is the Crown's submission that it 'actively assists and facilitates Māori participation in the consultation process'.[58] In saying this, it relied on the evidence of Mr Robson, who told us that face-to-face consultation with Māori is 'part of Crown Minerals culture'.[59] In part, this culture has been fostered as a result of the recommendations of Michael Dreaver. As recommended by Mr Dreaver, consultation is two tier (involving initial information and then hui if required). Also, Treaty settlement protocols are used to develop and foster relationships between the MED and tangata whenua. The MED consults on an ongoing basis groups that have protocols, and its actions may be made the subject of judicial review if it does not live up to the requirements of the protocols. As well, its staff are 'encouraged' to attend training modules on tikanga and Māori issues, and the Crown Minerals Group maintains an up-to-date database so that it knows who to consult. In essence, the Crown's argument is that it assists the capacity of Māori to engage by providing the kind of information and processes that best facilitates them to do so.[60]

In its submissions on the RMA, the Crown noted that local authorities' first obligation in terms of consultation is to consider ways of fostering and developing Māori capacity to respond to (frequent) invitations to consult.[61] It sees itself as having the same obligation with regard to the MED's consultation with Māori in regard to petroleum.[62] Mr Dreaver recommended that the Ministry needed to take steps for 'increasing the capacity of Maori to provide constructive input'.[63] In part, as noted, this involves making improvements at the Ministry end, such as providing better and more targeted information for iwi, so as to enable them to engage more effectively. According to Mr Robson, a discussion paper was originally drafted

for the MPP solely for Māori, but this was amended at the request of Ministers to cover the needs of the general public, while retaining material specifically for Māori. Also, brochures for Māori with explanations of MED processes are currently in preparation but have not been completed yet. In consulting iwi authorities over specific block offers and permits, however, information specific to the offer or permit is supplied.[64]

The question then arises as to whether Māori groups have sufficient time and resources to take professional advice, obtain technical information, research wāhi tapu and other issues, and make fully informed and effective submissions. Mr Robson commented:

> In relation to financial assistance for Māori to engage in issues arising from the minerals programme, the Government's position has been that MED does not fund Maori for consultation. However, MED may help if specific needs are identified. For example, MED may be able to provide information, resources such as self-stamped envelopes, or further consultative fora, such as arranging a hui.[65]

Māori articulated a need for assistance during the consultation on the MPP, and Mr Dreaver had also (as noted) identified such a need in his report. The Associate Minister of Energy was not prepared to 'enter into an exercise to identify further ways to address something so broadly framed'. He considered that 'if work was to be done in this area then it would need to be more specific'.[66]

One specific proposal eventuated. Te Puni Kōkiri advised the Government to accept a suggestion from Ngāi Tahu that the MED should commission reports on the

The MED Discussion Paper on Cultural Values Assessments

Claimant witness Tihi (Daisy) Noble provided us with a copy of a discussion paper by MED senior policy analyst Anne Haira that was referred to in evidence by Rob Robson.

In brief, Ms Haira prepared the paper in response to a suggestion from Ngāi Tahu and following the first stage of consultation with Māori over the draft MPP, when it was 'repeatedly emphasised' by Māori that a lack of resources was hampering their ability to participate in consultation processes under the current MPP, especially to prepare sufficient and compelling evidence on the factors which the Minister needed to consider.

Ngāi Tahu, who – unlike most iwi consulted – were able to employ staff to do this kind of work, suggested that cultural impact reports were an 'effective means of assisting' Māori to participate. Ms Haira also noted that, in the nine years that the MPP had been in operation, iwi had sometimes responded to consultation over block offers or permits by requesting assistance to research sites of significance. In Ngāi Tahu's submission, this kind of research could take the form of cultural assessment reports, which Ngāi Tahu had found a useful tool for both sides, assisting Ngāi Tahu, who 'face a considerable workload' as consultee under many statutes, and assisting 'timely and responsible' decision-making by Government agencies. Such reports would enable 'proactive' adherence to Treaty principles because they would 'accurately identify at an early stage [the need for] any restrictions on prospecting, exploration and mining'.

Cabinet was advised of the 'significant resourcing constraints that many Maori groups face in identifying areas of significance during MPP consultation processes', and it agreed that the MED should investigate the possibility of doing cultural values assessments when preparing block offers. This was the impetus for Ms Haira's discussion paper.

According to the paper, cultural assessment reports could be done either at an early stage, to identify tangata whenua values associated with an area, or – when proposals are more detailed – as an 'impact' report, outlining what the effects of the proposals would be on tangata whenua values and 'how the project

cultural values associated with areas being offered for petroleum exploration. In Te Puni Kōkiri's view, the question of who should prepare such reports, and what involvement hapū and iwi should have, would need to be considered. An internal discussion paper was prepared for the MED by senior policy analyst Anne Haira in 2004. Ultimately, the MED rejected the proposal as too expensive and as basically unnecessary for the decisions it had to make.[67] Future block offers, it was anticipated, would almost all involve deepwater rather than near-shore or land blocks and, 'as a result, the need to exclude areas from the permit were likely to be more limited'.[68] In any case, cultural impacts were more properly the concern of the resource management regime.[69] Nonetheless, the Crown pointed out, the Ministry could still commission cultural values reports on a one-off basis if requested, although Mr Robson's view was that they were not needed to enable consultation and informed decision-making.[70]

In terms of the sheer difficulty of identifying all the sites important to the mana of an iwi across such a large area as a block offer – particularly with the time and resources available – the Crown responded that higher-impact activities arise only from mining permits, which tend to cover a much smaller and therefore more manageable area.[71]

Finally, Crown counsel agreed with the Tribunal that the CMA was originally designed to interact with the Runanga Iwi Act 1990, which envisaged an empowerment of local iwi authorities that has not in fact eventuated.[72] Nonetheless, counsel suggested that consultation does take place with bodies representing iwi, and – as Treaty settlements take place and iwi governance authorities are established and well resourced – the capacity of iwi to

may be altered to avoid, remedy or mitigate those effects'. Costs would include site visits, travel, research, writing, and photocopying. Inevitably, the very large areas covered by block offers would involve the assessment of a wide range of different environments and values, and the costs might reach up to $50,000.

Iwi and hapū, having made their needs known during consultation on the MPP, agreed that the commissioning of cultural assessment reports by the MED would assist them to participate more effectively in processes initiated by the Ministry. Ms Haira pointed out that Māori did not stand to benefit from block offers: their interest was to 'ensure that areas of significance to them are adequately protected'. They would not face any costs in protecting such sites if the MED did not initiate block offers, so – in their view – it was right that the Ministry should bear the cost of assisting them to participate.

In terms of the MED's needs, Ms Haira's paper suggested that the contracting of cultural assessment reports would not delay consultation on block offers to any significant extent and would be of assistance to the Ministry.

From the petroleum industry's viewpoint, the reports would provide 'a useful basis for industry to develop positive and constructive relationships with iwi and hapu'. They might also reduce the amount of time needed for later consultation, if Māori values and interests were identified upfront, rather than letting a proposal get to the point of a resource consent application before Māori objected, simply because legal aid meant they could finally afford to do so at that late stage.

Industry feedback on the proposal was 'very positive', which encouraged Ms Haira to recommend the incorporation of cultural assessment reports into the MPP process at the time of block offers. Such reports, she suggested, should be done only at iwi request, by a mutually agreed contractor, and would have the status of an 'advisory', rather than authoritative, report on the values and sites concerned. Final, authoritative views could come only from the Māori groups themselves. It would be at the discretion of hapū and iwi whether reports would be disclosed to the petroleum industry, given the fears of some that disclosure of wāhi tapu could lead to desecration.

engage fully and properly in consultation processes for managing petroleum will be improved.[73]

> *'In concluding my introductory remarks, I would just note that the Crown considers that the Tribunal could be of great assistance to the Crown in commenting on how to improve the processes for engagement that exist under the Resource Management Act, the Crown Minerals Act and related statutes.'*
>
> Crown counsel, oral submissions, 6 May 2010, District Court, Wellington (paper 2.163, p 54)

7.4 The Resource Management Act 1991

In the Crown's view, the RMA creates a Treaty-compliant regime for managing the effects and impacts of petroleum exploration and mining. In particular, the Crown relied on the Privy Council's decision in the 2002 case *McGuire v Hastings District Council*, which considered sections 5 to 8 of the RMA and found:

> Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including '(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places] and other taonga [treasures].' By s 7 particular regard is to be had to a list of environmental factors, beginning with '(a) kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]'. By s 8, the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. [Translations inserted by Privy Council.][74]

Crown counsel pointed to the evidence of the Tribunal's witness, Sylvia Allan, that section 6(e) is a 'relatively forceful requirement on all persons exercising functions and powers under the RMA'.[75] Further, Ms Allan stated that local councils take the requirement to consult Māori in the preparation of their plans 'very seriously'.[76] With the RMA, however, as with the CMA, the Crown acknowledged that issues have been raised about the capacity of Māori to engage effectively in consultation processes.

In essence, the Crown's case is that the RMA and its processes provide sufficient opportunities for the protection of Māori interests and their cultural, social, and environmental values in relation to their ancestral lands, waters, and taonga.[77] Whether Māori are able to take proper advantage of those opportunities, however, is a different question. Crown counsel submitted that protection can really be achieved only if Māori are actually able to engage in RMA processes.[78] She pointed to examples of evolving techniques and 'incremental steps' that were beginning to assist Māori to engage effectively, and she expressed the hope that Treaty settlements would provide further means of Māori engagement.[79] Counsel invited the Tribunal to assist the Crown by advising on 'how to improve the processes for engagement' that already exist under the RMA and related statutes.[80]

7.4.1 Opportunities for protection under the RMA

As we have noted, the Crown's submission in relation to the RMA and its processes relied on the fact that the statute provides opportunities for Māori to have input to decision-making. We have described the Act and its

processes in chapter 4. Here, we note the Crown's view that the RMA, especially in conjunction with the Local Government Act 2002, makes provision for Māori to:

- have input to regional and district plans (which are the key documents governing petroleum-related activities) by means of consultation, submissions, and iwi management plans;
- have input to notified resource consent decisions;
- have input to non-notified resource consent decisions, if the local authority considers them to be an affected party; and
- have a right of appeal to an independent authority (the Environment Court).[81]

The Crown did not call any evidence in regard to how well these provisions work in practice. It relied mainly on the evidence of the local authorities which participated in the inquiry. In brief, the Crown submitted that the opportunities for Māori input are sufficient to meet its Treaty obligations. The balancing of impacts for the sustainable use of the environment is rightly left to local authorities – in consultation with their communities (including tangata whenua) – to decide. The claimants have complained about the content of specific rules in the various plans adopted by local authorities, but the Crown's view is that Māori had every opportunity to shape those rules and that their views and values were taken into account when the plans were finalised. In the last resort, Māori could have appealed to the Environment Court.[82]

Specifically, the Crown summarised the claimants' key concerns about the planning and consent processes as follows:

- 'Too many petroleum-related activities are classified as permitted activities under the relevant plans meaning iwi and hapu have no ability to object to the activities and are not consulted about them'.
- 'Where resource consents are required, these frequently proceed on a non-notified basis, lessening the opportunities for submissions or objections to be made'.
- 'Where resource consents are required, iwi and hapu may not be considered to be affected parties and hence would not have the opportunity to object to the activity.'[83]

In the Crown's view, the evidence of Sylvia Allan, Fred McLay, and others shows that local authorities take very seriously their requirements to consult Māori in the preparation of regional and district plans. Thus, Māori had ample opportunity to oppose or influence the classification of petroleum activities at the planning stage. Also, the evidence of these witnesses shows that many petroleum-related activities are rightly classified as being of minimum or low impact. Finally, their evidence is that, unless acceptable activities are classified as permitted or controlled and, in appropriate circumstances, are non-notified, the burden of processing consents would be too heavy for local communities (including Māori) to bear and, in any case, would be unnecessary. For these reasons, it is not a Treaty breach for regional and district plans to classify certain petroleum-related activities as permitted or controlled, or for certain consent applications to be non-notified.[84] In light of the Treaty of Waitangi Act 1975, and the onus on the Tribunal to keep its recommendations practical, the Crown urged that 'repeated consultation' was simply not necessary for activities that the region or district had already discussed and approved in its plans.[85]

Further, the Crown pointed to what it submitted were examples of the system working well and protecting Māori interests:

- The recent decision of the New Plymouth District Council to add Tikorangi Pā to the list of wāhi tapu in its district plan, which reflected 'the responsiveness of the council to tangata whenua concerns about protection of the site'.[86]
- The recent Environment Court decision to decline consent for the Te Waka wind farm, which showed how tangata whenua interests are protected through rights of appeal.
- Successful consultation with iwi and hapū prior to

resource consent decisions, thus obviating the need for notification.

- The development of positive relationships between iwi and petroleum companies during and after the consent process, including a role for iwi in monitoring effects.[87]

Nonetheless, in her oral submissions to the Tribunal, Crown counsel accepted that there were concerns about the capacity of iwi and hapū to participate effectively in the opportunities provided for them by the RMA.[88] We turn next to the Crown's position on that issue.

> *'The resource consent process . . . is an imperfect process and success lies not only in the use of the process but in other factors as well. For example, the relationship with the local council is important, as is the willingness of the council to explore mutually acceptable solutions with tangata whenua, and overcoming the resourcing issues faced by tangata whenua in discharging their responsibilities as kaitiaki and as Treaty partners.'*
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> Ministry for the Environment, *Effective Participation in Resource Consent Processes: A Guide for Tangata Whenua* (Wellington: Ministry for the Environment, 2005) (doc E47(a)), p 3

7.4.2 Māori capacity to engage in RMA processes

In their written submissions, Crown counsel emphasised the role of the Local Government Act 2002 and the responsibilities of local authorities to foster and build Māori capacity to engage in RMA processes. We have already described the relevant provisions of the Local Government Act in chapter 4. For the Crown, these provisions are the main answer to the claims in our inquiry:

> Concern was expressed about capacity to engage under the RMA. The Local Government Act 2002 contains a number of provisions targeted at increasing Maori capacity to participate in decision making. Local authorities are also required in their annual reports to outline activities that were undertaken in order to establish and maintain the capacity of Māori to contribute to decision-making processes.[89]

In the Crown's view, the 2002 provisions are 'an indication of the government's taking on board [Māori] concern and putting in place some mechanisms that will assist'.[90]

Earlier, we noted the Crown's view that, some 20 years after the passage of the RMA, and eight years after the enactment of the Local Government Act 2002, local authority assistance to Māori capacity building is still a work in progress. In oral submissions, counsel referred to evolving techniques and 'incremental steps' that are being developed to assist Māori and to build their capacity to engage. As part of this 'incremental' process, counsel noted that the iwi in this inquiry do not yet appear to have sought a delegation of authority from local bodies under section 33. That, then, is only a 'theoretical' concern on the part of the claimants.[91] Rather, counsel pointed to the reality of a series of examples of capacity-building and tools for Māori engagement being developed under the Act:

> What there is in evidence is the evolving use of a range of techniques, such as the appointment of iwi liaison officers, the entry into memoranda of understanding, the development of wahi tapu databases, the iwi management plans and so on. It is not unexpected that the steps that are involved are incremental ones and develop as iwi reach [Treaty] settlements and councils become more experienced in Resource Management Act procedures and in that respect I would also note the recent – the 2002 provisions of the Local Government Act that support and amplify those requirements in relation to capacity building and so on.[92]

Examples of Māori capacity-building included:

- The Taranaki Regional Council's provision of technical advice and support to Māori, when they have had to deal with resource consent applications, and its financing of Māori to contract 'specific advice, information, or expertise'.[93] In the case of Pohokura,

for example, Māori were provided with the services of 'an experienced petroleum engineer'.[94] (In response to a suggestion from the Tribunal that local authorities do not have large amounts of ratepayers' money to assist Māori, Crown counsel said that Mr McLay's evidence, in particular, suggested that councils can and do save their own funds by requiring consent applicants to assist iwi.[95])
- The creation of wāhi tapu databases.
- The entering into of draft memoranda of understanding.
- The the South Taranaki District Council's appointment of an iwi liaison officer and its creation of an iwi liaison committee (consisting of the mayor, the deputy mayor, the chair of the Environment and Hearings Committee, and eight iwi representatives) to facilitate Māori engagement with the council's processes.[96] In counsel's submission, 'that is quite a powerful opportunity for iwi to influence decision making and raise key concerns'.[97]

We note again, however, that counsel also emphasised the expected benefits of Treaty settlements in this respect; an expectation that Māori will be able to use governance entities and settlement resources to participate more effectively in RMA processes.[98]

7.4.3 The role of the Ministry for the Environment

We did not receive evidence from the Crown about the role of central government and its various Ministers and agencies in RMA processes or the overall direction and leadership of the resource management regime at a national level. In response to our request, the Crown provided the following submissions about the role of the Ministry for the Environment:
- It monitors the state of the environment and local government performance in RMA processes.
- It educates, informs, and guides Māori participants in RMA processes through website publications.
- It educates decision-makers as to how to take Māori views and values into account in RMA processes through its 'Making Good Decisions' training programme.
- It provides some targeted funding assistance for RMA-related projects through the Environment Centre Fund, the Education and Advisory Services Fund, and the Environmental Legal Assistance Fund. Māori have had some benefit from these funds, and also from Te Puni Kōkiri's Māori Potential Fund.[99]

7.4.4 Additional protection: the Historic Places Act 1993

The Crown submitted that wāhi tapu and archaeological sites can receive an additional and high level of protection from the Historic Places Act 1993. In brief, the Crown's view is that this Act supplements and assists CMA and RMA processes in the protection of Māori interests in specific sites.[100]

7.5 Protection outside the Scope of the RMA: The Regime beyond the 12-Mile Limit

The RMA does not apply outside the 12 nautical mile limit of New Zealand's territorial waters. The Crown's evidence and submissions confirmed that in the exclusive economic zone (the EEZ) or continental shelf area, which produces most of New Zealand's petroleum, there is no comprehensive environmental law regime in place. Instead, the Maritime Transport Act 1994 specifies technical and safety requirements for offshore installations and imposes obligations in respect of clean-up operations.[101] Other environmental issues are dealt with by what Crown counsel described as 'voluntary agreements entered into by exploration companies with the Government'.[102] Mr Robson explained that they were 'not so much agreements' as 'the formulation and construction of a voluntary environmental impact assessment'.[103] He described what is involved as 'self regulation that is certified by the government' and the implementation of which is dependent on 'the integrity of the operator'.[104] The rationales suggested by Mr Robson for the current situation were that there was a very remote chance of a very significant event occurring

and there were only responsible operators, with their own strict codes of conduct, in the EEZ. Mr Robson was not aware of any monitoring of the companies' performance in terms of their environmental impact assessments.[105]

In submissions filed after the hearing, in September 2010, Crown counsel advised that the Government had announced the establishment of a new standalone Environmental Protection Authority to perform environmental regulatory functions under existing legislation and international protocols and conventions, and also under 'proposed' legislation for EEZ environmental effects.[106] The Gulf of Mexico oil disaster, we were told, 'reinforces the importance of this work'.[107] The policy work on that proposed legislation was proceeding, and it was intended that the Ministry for the Environment would submit policy proposals to Cabinet for consideration late in 2010. Meantime, the MED had commissioned an independent study of 'New Zealand's health, safety and environmental provisions around minerals activities such as deep sea drilling' in order to compare them with international best practice. In addition, the study would 'enable re-assessment of whether and how the proposed EEZ legislation should regulate petroleum activities'.[108] Also under potential consideration was the possibility that the Environmental Protection Authority would become the consent authority for petroleum activities inside as well as outside New Zealand's territorial waters, taking that function away from regional councils.[109]

7.6 The United Nations Declaration of the Rights of Indigenous Peoples

After the hearing had concluded, counsel for Wai 39 sought, and was granted, leave to make a brief submission on the impact on the inquiry of the New Zealand Government's recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples.[110] The Crown in turn responded, stating that New Zealand's adoption of the declaration did not affect the Tribunal's statutory jurisdiction or the question of whether the regime for the management of petroleum and its effects was Treaty compliant. The declaration was important but it did not have the status of a treaty, a binding international covenant, or customary international law. Some of the rights it declares did have the status of New Zealand or international law (or both), but the rest were 'aspirational'; there were no additional legal rights or obligations arising from the declaration.[111]

In the Crown's view, the key practical issue raised by the claimants was the relevance of the declaration to Māori participation in decision-making.[112] Counsel submitted:

> The New Zealand Statement of Support also makes clear the government's approach to the concept of prior informed consent, namely that where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Maori for such involvement. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is required.[113]

Following from the question of Māori involvement in decision-making, the Crown understood the claimants' argument to be that the declaration required 'full, fair, and good faith consultation'.[114] In counsel's submission, this is what the Treaty of Waitangi requires in any case, and the Crown's petroleum regime is entirely consistent with it.[115]

> *'Viewed as a whole, the Crown submits that the Crown Minerals Act, the RMA and associated statutes and regulations create a regime which reflects Treaty of Waitangi principles. The regime also provides mechanisms to balance Maori interests in relation to the protection of land (and other taonga) with a range of other interests in the management of a strategic asset for the national good.'*
>
> Crown counsel, submissions, 25 June 2009 (doc D5), p 54

Text notes

1. Document D5, pp 2–3
2. Ibid, p 3
3. Document E30, p 10
4. Ibid, pp 9–10. For an explanation of the evolution of Crown policy on the possible use of petroleum as an asset in the settlement of Taranaki Treaty claims, see document A35, pp 25–26.
5. Document E30, pp 9–10
6. Ibid
7. Paper 2.163, p 59
8. Document E30, p 10
9. Document D5, pp 3–4
10. Document C6, pp 14–15; paper 2.154, p 286
11. Document E30, pp 2–4
12. Ibid, p 20
13. Document D5, p 21
14. Document E5, pp 22–47
15. Paper 2.163, pp 52–53
16. Document E30, pp 6–7; paper 2.163, p 54; paper 2.154, pp 307–312. Mr Robson accepted in cross-examination that the Minister had made his decision, although it had not yet been formally communicated to Te Aupouri.
17. Document E30, p 6
18. Paper 2.154, pp 333–336. See also document C6(a)(RR5), for the minutes of the Ngāi Tahu hui, attended by four Ngāi Tahu officers, and document C6(a)(RR11) for the minutes of the second New Plymouth hui, attended by three local Māori.
19. Document E43, p 7
20. See documents E43(c), E43(d), E43(e).
21. Document C6, p 10
22. Document E30, p 8
23. Document D5, p 11
24. Ibid, p 17
25. Ibid, p 12
26. Ibid, pp 4–20; doc E30, pp 2–3
27. Document D5, p 8
28. Ibid, p 16
29. Ibid, pp 8–9; doc E30, pp 8–9
30. Document D5, p 10
31. Ibid, pp 9, 13
32. Ibid, p 4
33. Ibid, p 17
34. Ibid, p 18
35. Document C6, pp 4–8
36. Ibid, pp 7–12
37. Ibid, p 12
38. Ibid, pp 13, 15–18
39. Document D5, p 15
40. Document C6, p 19
41. Document C5(D1), p 24
42. Document E30, p 6
43. Ibid; doc D5, p 15
44. Document E30, p 4
45. Document C6, pp 9, 14–15, 17, 24; see also doc D5, p 19
46. Document D5, p 18
47. Ibid
48. Ibid
49. Ibid, p 19
50. Ibid
51. Ibid
52. Document C6, pp 8–9. In response to Mr Dreaver's recommendation for 'improving the information available to industry about hapu and iwi', Mr Robson noted that Te Puni Kōkiri maintains a directory of iwi and Māori organisations. This, he said, was a 'useful consultation tool for any party, including the petroleum industry': ibid, p 7.
53. Document D5, p 20
54. Document E30, pp 4–5
55. Ibid, p 5
56. Ibid
57. Ibid, pp 4–5
58. Document D5, p 20
59. Document C6, p 6
60. Ibid, pp 4–15; doc E30, p 11
61. Document D5, p 25. The Crown referred here to clause 3B of schedule 1 to the Resource Management Act 1991.
62. Document D5, p 20
63. Document C6, p 4
64. Ibid, pp 5–6, 20
65. Ibid, p 10
66. Ibid, p 6
67. Ibid, pp 11, 13–15; see also paper 2.154, pp 345–347
68. Document C6, p 13
69. Ibid, pp 14–15
70. Ibid, pp 13–15; doc E30, p 4
71. Document E30, p 3
72. Document E43, pp 5–7
73. Ibid, pp 6–7; paper 2.163, p 53
74. *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC), 593–594; doc E30, pp 11–12
75. Document E30, p 12
76. Ibid, p 14
77. Ibid, pp 11–12; doc D5, pp 20–47
78. Paper 2.163, p 53
79. Ibid
80. Ibid, p 54
81. Document D5, pp 20–47
82. Ibid
83. Document E30, p 14
84. Ibid, pp 14–16

85. Document D5, p 38
86. Document E30, pp 15–16
87. Ibid, p 16
88. Paper 2.163, pp 53–70
89. Document E30, p 16
90. Paper 2.163, p 60
91. Ibid, pp 53–54
92. Ibid, p 53
93. Document E30, pp 16–17
94. Ibid, p 17
95. Paper 2.163, p 60
96. Document E30, p 17
97. Paper 2.163, p 58
98. Ibid, pp 53, 69–70
99. Document E43, pp 1–5
100. Document D5, pp 19, 42, 47–49
101. Paper 2.154, pp 300–301
102. Paper 2.188, p 2
103. Paper 2.154, p 303
104. Ibid, p 304
105. Ibid, pp 303–305
106. Paper 2.188, p 1
107. Ibid, p 2
108. Ibid
109. Ibid, pp 2–3
110. Papers 2.174, 2.176
111. Document E49, pp 2–4
112. Ibid, pp 4–5
113. Ibid, p 4
114. Ibid, p 5
115. Ibid

Sidebar notes

Page 135: Michael Dreaver, 'Maori Participation in the Minerals Programme for Petroleum' (commissioned research report, Wellington: Ministry of Economic Development, 2004), p 29 (quoted in doc C6, pp 4–5)
Pages 138–139: Document C1(DN17)

CHAPTER 8

TRIBUNAL ANALYSIS, FINDINGS, AND RECOMMENDATIONS

8.1 Introduction

In this chapter, we provide our analysis of the claims and our findings on whether the petroleum management regime is consistent with Treaty principles. In essence, our view is that the regime falls short of this standard by a considerable margin, because of three key systemic flaws that affect its operations and results. First, Māori lack capacity in terms of infrastructure and resources to engage effectively with Crown Minerals Act and Resource Management Act processes. Secondly, the Crown has failed to monitor the performance of its delegated Treaty responsibilities by local authorities. Although councils are trying, their efforts have been piecemeal and have not met with particular success. The Crown has failed to monitor this situation or assist with constructive solutions. Thirdly, partly as a result of the first two problems, Māori perspectives are not being adequately considered or protected in decision-making on petroleum matters. Also, the regime has specific flaws in Treaty terms: it fails to provide sufficient protection for the small surviving Māori land base or for Māori interests (including environmental interests) in the management of petroleum in the exclusive economic zone (the EEZ).

We finish by outlining the prejudice suffered by claimants as a result of the regime's Treaty failings and we discuss various remedies that might help both to make the management of petroleum Treaty compliant and to remove the prejudice currently being suffered by the claimants.

8.2 Tribunal Analysis and Findings

The Crown accepts that its regime for the management of petroleum must meet Treaty standards, including its duty actively to protect Māori interests. Both the Crown Minerals Act 1991 (the CMA) and the Resource Management Act 1991 (the RMA) have sections requiring decision-makers to consider Treaty principles when making their decisions. We begin our analysis, therefore, with a discussion of the relevant Treaty principles.

8.2.1 Treaty principles

The function of the Tribunal is to assess claims by Māori that actions or omissions of the Crown have breached the principles of the Treaty of Waitangi. When the Tribunal

finds claims to be well founded, it decides whether the claimants have been prejudiced as a result of those Treaty breaches. If they have been, the Tribunal may make recommendations for removing or remedying the prejudice. The fundamental starting point for our task, therefore, is to assess the Crown's actions, policies, and laws in light of Treaty principles.

The Crown is always bound by the Treaty, although its Treaty obligations are rarely endorsed to their full extent by law. The law that regulates the management of the petroleum resource requires the Crown and other decision-makers to 'have regard to' or to 'take into account' the Treaty principles, rather than to act consistently with them.

The Crown submitted that the regime for the management of petroleum complies with Treaty principles. In particular, it said, the regime recognises and reflects the following obligations:

> the duty of the Crown to act reasonably and in utmost good faith towards its Treaty partner; the duty of the Crown to make informed decisions on matters affecting the interests of Māori; the Crown's responsibilities of active protection towards Māori.[1]

With regard to the CMA, the Crown submitted that these obligations are met by the MED's consultation with Māori and by the Act's provisions for exempting from mining land of importance to the mana of iwi, for limiting permit holders' access to certain land, and for protecting land that is important for environmental reasons.[2] The RMA and other supporting legislation is Treaty compliant, the Crown submitted, because of its mechanisms which enable the protection of Māori interests and provide for Māori to be consulted and involved in decision-making.[3] Particular emphasis was placed by the Crown on the involvement of 'all members of the community including iwi' in the decision-making process by which local authority planning documents are made.[4] It was said that the plans are 'developed in consultation with the local community and follow significant iwi involvement'.[5]

The claimants' case is that, measured against the principles of the Treaty, the law that regulates the management of the petroleum resource is defective both in substance and in its processes. The claimants say that the Crown's view of its Treaty obligations is too narrow and, in particular, that it diminishes the role of Māori in the petroleum regime to such a degree as to deny their kaitiakitanga over their lands and other taonga.[6] A frequently voiced complaint was that Māori are reduced to occasional consultees or 'simply another interest group' in the regime by which the petroleum resource is managed.[7]

There is some common ground between the claimants' and the Crown's views of the relevant Treaty principles. Both sides recognise that the principle of active protection is central to the Crown's Treaty obligations in connection with the management of the petroleum resource.[8] They also agree that the Crown has a Treaty duty to consult and include Māori in decision-making.[9] The main difference is in their views of what the principles require when the subject area – the management of the petroleum resource – involves, in addition to Māori interests in the natural world and their culture, other important, and sometimes competing, interests.

We consider that the Treaty principles of active protection, partnership, rangatiratanga or self-government, and redress are the most relevant to the current claims. The principle of active protection of Māori rights and interests has been referred to in many Tribunal reports and court decisions. The *Te Tau Ihu* report described it as arising from:

> the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable',

and the Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.[10]

With specific reference to the resource management regime, the Tribunal has observed in several earlier reports that the Crown cannot avoid its Treaty duty of active protection by delegating responsibility for the control of natural resources to others. More particularly, it cannot avoid responsibility by delegating on terms that 'do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown'.[11] In 1999's *Whanganui River Report*, the Tribunal, referring back to the earlier *Report on the Manukau Claim* of 1983, emphasised that delegation must include mechanisms that protect Treaty obligations:

> In this case, functions under the Resource Management Act are generally exercised not by the Crown but by bodies that the Crown has established. The point has been well made, however, in earlier Tribunal reports, from 1983, that the Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to so delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.[12]

More emphatically, the *Whanganui River Report* stated:

> The Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi.[13]

In its report *He Maunga Rongo*, the central North Island Tribunal likewise found that the Crown has a duty actively to protect the lands, estates, and taonga valued by Māori, as well as their rangatiratanga over those taonga, 'including in environmental management'.[14] Citing the Privy Council, the Tribunal noted that active protection involves the concepts of 'reasonableness, mutual cooperation, and trust'.[15] The Crown has an enduring obligation to protect taonga, but only by the means reasonable in the circumstances. Where a taonga is in a parlous state, especially as a result of previous Treaty breaches, the Privy Council observed that the Crown may need to take 'especially vigorous action for its protection'.[16] This is particularly relevant where the land and resources in question are no longer under Māori ownership or control. As the Tauranga Tribunal underscored, the Crown's duty to protect Māori interests in that context remains undiminished:

> In our view, Māori have a right to act as kaitiaki, and participate fully in decision-making regarding all Māori historic places, wāhi tapu, and archaeological sites. Tauranga Māori face relatively few problems acting as kaitiaki, participating in decision-making, and protecting their ancestral sites, on land that they themselves own. However, very real problems can emerge in the case of land that they do not own, that is either in private or public ownership. In these situations, the Crown has further particular obligations, both to ensure its legislative provisions protect Māori taonga from damage and destruction, and to provide ways in which Māori are enabled to act as the kaitiaki over their taonga. The effectiveness of the Crown's protection of Māori cultural heritage in Tauranga Moana largely stands or falls on this basis.
>
> Article 3 guarantees Māori all the rights and privileges of British citizens. The principles of equity and equal treatment flow from this provision. This requires the Crown to treat Māori and non-Māori equally, impartially and fairly. The law must therefore protect Māori in the exercise of authority over their cultural heritage, and ensure that their heritage receives equivalent protection to Pākehā cultural heritage. This is a minimum standard against which the level of protection

afforded by the Crown to Māori cultural heritage at any particular time can be judged. However, where Māori cultural heritage is particularly threatened, especially where this is due to previous Crown actions or omissions, the Crown has a heightened responsibility to meet its obligations.[17]

By way of summary, the following proposition relevant to this inquiry may be distilled from the Treaty principle of active protection:

The Crown must protect Māori property rights and interests to the fullest extent practicable.

How is the protection of Māori interests to the fullest extent practicable to be achieved? Our answer is that, in an area of law as complex as petroleum resource management – where a number of important interests are involved, including Māori interests – the only way that the Crown can guarantee Treaty-compliant outcomes is by ensuring that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made. We consider this to be a critical element of the Treaty principle of partnership between the Crown and Māori. What is 'appropriate' for particular situations cannot always be prescribed with precision in advance. But, as will be seen, it has been proposed by previous Tribunals that, for certain issues of importance to Māori, the decision-making body must include, or indeed comprise, Māori representatives. In other words, consultation with Māori will not always suffice to fulfil the Crown's Treaty obligations. We agree.

The Crown submits that Māori interests must always be balanced against other interests in the regime for managing the petroleum resource. Even if one accepts that proposition, its credibility depends on the fairness of the method used to balance the various interests involved. In other words, the integrity of the outcome of the balancing operation depends on the integrity of the process by which that operation is performed. And so we are brought back to the Crown's obligation to ensure that appropriate decision-making processes are employed when decisions affect Māori interests.

The term 'partnership' is used both to describe a relationship between two peoples, settlers and Māori, and as a means of conceptualising (and managing) a relationship between their respective authorities, kawanatanga and tino rangatiratanga. The principle of partnership has been referred to many times by the Tribunal and the courts. In the *Report on the Orakei Claim*, the Tribunal stated that 'the Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other'.[18]

Among the obligations arising from the Treaty partnership is the Crown's duty to consult Māori on matters of importance to them. The Tribunal in the recent *Tauranga Moana* report highlighted that proper consultation 'must be undertaken with an open mind' and that the parties consulted 'must be provided with sufficient information for them to be able to engage meaningfully'.[19] It noted the Court of Appeal's explanation that consultation does not presume eventual agreement between the Crown and Māori, or even negotiation, but emphasised, citing other Tribunals' statements in support, that every effort must be made to achieve compromise.[20] One way of stating the result is that Māori must 'recognise those things that reasonably go with good governance', just as the Crown must 'recognise those things that reasonably go with being Maori'.[21] The Tribunal noted that, 'in making a place for two peoples, the need is always to ensure . . . that the rights, values and needs of neither should be subsumed'. With regard to decisions determining the fate of significant taonga that are also highly valued by the wider community, the Tribunal found in the *Tauranga Moana* report that 'the most straightforward way' to ensure that neither set of interests is subsumed is 'for each partner to have a place on the bodies that make [the] decisions'.[22]

Also in connection with significant taonga that may be adversely affected by proposed works, the Tribunal observed in the *Ngawha Geothermal Resource Report 1993*

that the Treaty guarantee of rangatiratanga requires 'a high priority for Māori interests'.[23] It elaborated:

> The degree of protection to be given to Maori resources will depend upon the nature and value of the resource. The tribunal considers that in the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection, save in very exceptional circumstances, for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. We would stress that the value attached to such a taonga is essentially a matter for Maori to determine.[24]

The inevitable connection between rangatiratanga over taonga and kaitiakitanga was made plain in the Tribunal's 1988 *Report on the Muriwhenua Fishing Claim*:

> 'Te tino rangatiratanga o o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of the taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.[25]

The inherent right of tribal self-regulation over tribal resources, including Māori land, was also underscored by the Tribunal in the *Report on the Motunui–Waitara Claim*:

> 'Rangatiratanga' and 'mana' are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.
>
> We consider that the Māori text of the Treaty would have conveyed to Māori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.[26]

In some circumstances, as the Te Tau Ihu Tribunal stated, partnership and the active protection of Māori rangatiratanga may involve decision-making by Māori.[27] It is because the precise decision-making process required by the Treaty principles may vary depending on the circumstances that the process used in any particular case must be able to be monitored.

By way of summary, the following proposition relevant to this inquiry may be distilled from the Treaty principles of active protection and partnership:

> *To guarantee that the outcomes of key decisions about the management of the petroleum resource are Treaty compliant, the Crown must ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made. Such processes may require more than consultation with Māori.*

The third Treaty principle relevant to this inquiry is the principle of redress. It relates particularly, but not exclusively, to the Crown's treatment of the findings and recommendations in 2003's *Petroleum Report*. It is well-established that, where the Crown has breached the principles of the Treaty and Māori have suffered prejudice as a result, 'the Crown has a clear duty to set matters right'. The foreshore and seabed Tribunal explained:

> This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Māori'. Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and

tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the Tarawera Forest Tribunal noted, it should not create fresh injustices for others.[28]

As the Tribunal found in the *Petroleum Report*, a Treaty interest has arisen in the petroleum resource as a result of past Treaty breaches. For Ngāruahine and other Taranaki claimants, those breaches were serious indeed and have cast long shadows. From the principle of redress and the Crown's obligation to take 'especially vigorous action'[29] where taonga have been affected by past Treaty breaches, we derive our third proposition:

> *The Crown's approach to current issues should not compound the injustice of past Treaty breaches in any situation where there is a viable alternative approach.*

Our assessment of the Crown's conduct in this inquiry may thus be summarised in three Treaty-derived propositions as to how the petroleum industry and its effects on matters of importance to Māori should be managed:

- The Crown must protect Māori property rights and interests to the fullest extent practicable.
- To guarantee that the outcomes of key decisions about the management of the petroleum resource are Treaty compliant, the Crown must ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made. Such processes may require more than consultation with Māori.
- The Crown's approach to current issues should not compound the injustice of past Treaty breaches in any situation where there is a viable alternative approach.

As we shall see below, our analysis reveals that, in Treaty terms, there are significant flaws in the substance and the processes of the law that governs the management of the petroleum resource. First, however, we turn to briefly consider the United Nations Declaration on the Rights of Indigenous Peoples, which claimant counsel raised and the Crown responded to at the conclusion of this inquiry.

8.2.2 The United Nations Declaration on the Rights of Indigenous Peoples

On 19 April 2010, the Minister of Māori Affairs, the Honourable Dr Pita Sharples, publicly confirmed the support of the New Zealand Government for the United Nations Declaration on the Rights of Indigenous Peoples.[30] At the time, he also issued an announcement that set out a number of key points about the significance and implications of the declaration for indigenous peoples, and for Māori in particular, emphasising its affirmation of existing rights while also recognising its 'aspirational' importance.[31]

Counsel for Wai 39 were given leave to file submissions on the declaration.[32] In summary, they contended that:

- while the declaration is a relatively simple document, its provisions are wide ranging;
- in accordance with international law and the doctrine of *contra proferentum*, the Māori version of the declaration should be preferred;
- the Crown appears to have failed to consider the implications of the declaration when developing its petroleum management policies, with the result that it is operating in a policy vacuum, and so the Tribunal should require details of the Crown's proposals to implement the declaration;
- the Tribunal, when inquiring into claims concerning petroleum, minerals, water, and other resource management issues, should have recourse to the declaration and its principles;
- the Treaty principle of consultation needs to be refined further in light of the declaration, given the plethora of examples in this inquiry of inadequate consultation; and
- the Tribunal should recommend that the Crown engage with Māori to develop a response to the declaration and the issues it raises.[33]

Crown counsel's submissions are set out in chapter 7. In

essence, the Crown's position is that, while it is important, the declaration:

- does not have the status of a treaty, a binding international covenant, or customary international law;
- does not create any additional legal rights or obligations; and
- acknowledges the existing constitutional processes of New Zealand.[34]

In our view, there is no doubt that, as the Minister recognises, the declaration is an important affirmation of existing fundamental rights of indigenous peoples. The right to self-determination is a central tenet, as the Tribunal has recognised. At the core of self-determination is the right of indigenous peoples to self-government and to make or be involved in the decisions that directly affect them and their lands and other resources. A further variation on self-management is co-management, and in recent times there have been ground breaking examples of central, local, and tribal government working cooperatively over the management of the Waikato River.[35] We see nothing controversial in this and note that the declaration provides a timely twenty-first century reminder of these core rights of indigenous peoples. Moreover, like the 1835 Declaration of Independence and the Treaty of Waitangi, the full import of the United Nations Declaration on the Rights of Indigenous Peoples remains a matter for further dialogue and discussion between Māori and the Crown. Inevitably, that process will take time as the relevance and extent of the declaration's influence is explored.

We also agree that it is not unreasonable for the claimants in this inquiry to expect to engage with the Crown over responses to the declaration and the extent to which it may impact on policies regarding the management of petroleum. In any event, for present purposes, limitations of time, resources, and submissions prevent an exhaustive analysis of the declaration and its meaning and implications, but given the significant historical claims that remain for hearing, it is probable that a more comprehensive discussion by the Tribunal will occur in due course.

8.2.3 The role of central, local, and tribal government

The effective management of the petroleum resource within the legislative framework of the CMA and the RMA depends on the cooperative engagement of three distinct parties, or participants, with overlapping roles – central, local, and tribal government. We use the term 'tribe' to mean both iwi and hapū, so when we refer to 'tribal interests', that can also mean the interests of hapū. The CMA defines tasks to be performed almost entirely by members of the Crown's party, led by the Minister of Energy. The RMA's much more extensive range of tasks are to be performed by other members of the Crown's party (led by the Minister for the Environment and the Minister of Conservation), by all local authorities in those parts of New Zealand where petroleum has been or may yet be found, and by the relevant iwi and hapū, usually (though not exclusively) through their authorised representatives.

The role of local authorities in managing the petroleum resource is one aspect of their wider statutory responsibilities. They also play a central role in attempting to reflect the aspirations of local communities in their own policies, plans, and rules. At a national level, however, the Crown has the responsibility for setting the policy for local authorities to ensure a consistency of approach nationwide. That is the purpose of the national policy statements and national environmental standards issued by the Minister for the Environment and the national coastal policy issued by the Minister of Conservation.

We understand that the RMA originally envisaged Māori participation in the planning process generally, and in the management of the petroleum resource in particular, through the vehicle of 'iwi authorities'. Those entities were expected to have immediate input into the initial plans and processes by which local authorities decided their resource management policy and rules. Twenty years ago, when the RMA was passed, it was intended that, as part of a deliberate policy of devolving responsibilities to Māori, tribal authorities would be well placed to become significant players in resource management activities

on behalf of iwi. They were also expected to continue to expand their service delivery activities, act as advocates for economic development, and strengthen the protection of tribal customs, culture, and language. This process of devolution and capacity building would assist with a restoration of rangatiratanga or tribal cohesion and self-government, concepts recently considered by the Tribunal in the central North Island report *He Maunga Rongo* and the *Te Urewera* report.[36] Ideally, iwi authorities were to provide tribal perspectives for tangata whenua and – as authorised bodies for iwi – to have input into RMA processes. Those proposed outcomes were intended to ensure that the resource management regime would grow more responsive to Māori while at the same time increasing central and local government capacity to respond more effectively to Māori aspirations and concerns.

This inquiry has required the Tribunal to examine how well the three parties are working together to manage the petroleum resource while protecting Māori interests and culture. Among the questions we have had to consider are these: Are the three parties performing the roles intended for them? If not, why not? Is the result consistent with the principles of the Treaty of Waitangi?

8.2.4 Systemic problems in the current regime

We consider that there are fundamental flaws in the operation of the current regime for managing the petroleum resource which arise from the combined effect of the following features:

- the limited capacity of 'iwi authorities' to undertake the role envisaged for them in the regime;
- the Crown's failure, despite its Treaty responsibility to protect Māori interests, to provide local authorities with clear policy guidance and to require them to adopt processes that ensure appropriate Māori involvement in key decisions; and
- the low level of engagement with te ao Māori and Māori perspectives exhibited by central and local government decision-makers.

The result, we consider, is that decision-makers tend to minimise the interests of Māori while elevating those of others in their decisions about the petroleum resource. We discuss the above three features of the current regime in turn.

(1) *The limited capacity of iwi authorities*

A major difficulty affecting Māori engagement with central and local government processes over petroleum is their limited capacity in terms of both access to expertise and infrastructural support. With few exceptions, tribal authorities struggle to respond effectively to the overlapping challenges they are required to confront as the representatives of iwi. Like most forms of government, tribal authorities have numerous competing responsibilities, limited resources, and a disparate constituency spread throughout New Zealand and overseas. Iwi rūnanga and trust boards are often involved in health and social service delivery, asset management, economic development (including of Māori land), the protection and promotion of Māori language and culture, archival functions as well as registry obligations, media and communication roles, and the oversight of tribal education initiatives.

In short, the Tribunal notes that, historically, authorised iwi organisations are frequently underfunded and lacking in sufficient resources and expertise to function as coordinating mechanisms for iwi development. In the context of petroleum resource management, the result is usually limited dialogue and engagement, often on a reactive basis, where the nature and volume of responses required further reduces the chances of having effective input. Despite original intentions, exemplified by the Runanga Iwi Act, tribal authorities are not structured or resourced to provide meaningful engagement with Crown processes when responding to activities governed by the CMA and the RMA. This is also apparent when considering tribal authorities that have had the benefit of Treaty settlements. Several of the Taranaki iwi have received settlements over the last decade, while others have not, and yet it could not be said of any that there is meaningful engagement at a level and to the degree of sophistication necessary to

fulfil the original intent of the three principal participants working cohesively in response to the activities of petroleum companies. So tribal representatives are inevitably playing catch-up but without the resources needed to fulfil their responsibilities. Central and local government have not provided Māori with anything like the support necessary to make the legislative framework function as effectively as it needs to in a Treaty-compliant manner.

As we noted in chapter 7, the Crown accepts that it has an obligation to foster and increase Māori capacity to participate in CMA and RMA processes. In terms of the latter, it has passed that obligation on to local authorities. From the evidence we heard in our inquiry (see chapter 5), this obligation is not being met. We find that the Crown's failure to give adequate assistance to Māori, so as to provide for their meaningful and successful participation in CMA and RMA processes, is inconsistent with the principles of the Treaty.

(2) *Delegation of Treaty responsibilities without policy, procedural, or monitoring requirements*

The second feature of the current petroleum management regime is that the Crown relies on local authorities to perform their extensive range of delegated resource management functions in a manner that is consistent with its Treaty obligations, yet it has failed to provide them with any clear guidance or direction about what it expects or requires of them. In terms of Treaty principles, this is a critical failing, because it is the Crown's sole responsibility to ensure that its Treaty obligations to Māori are fulfilled. Those responsibilities remain undiminished, even where delegation has occurred. But, as we saw in chapter 4, there are no national policy statements relating to the protection of Māori interests, despite their apparent suitability for that treatment in light of the matters listed in section 45 of the RMA. Nor are there any national environmental standards relating to the petroleum industry. We acknowledge that issuing national policy statements and national environmental standards may not be the most effective means of ensuring that local authorities act consistently with Treaty principles. On their own, statements of principle tend to be too general to offer practical assistance for particular cases. That is also true of the court decisions that have been issued on the meaning of sections 6, 7, and 8 of the RMA, which we discuss shortly: they are limited in number and most are pitched at a general level. But, in light of those matters, it is reasonable to expect that the Crown would have taken steps to require local authorities to adopt decision-making processes that genuinely involve Māori interests. An important step towards ensuring appropriate Māori involvement would be the imposition by the Crown of effective monitoring of local authority processes for their responsiveness in protecting Māori interests. By not taking steps to ensure that its delegates fulfil its own Treaty obligations, the Crown has breached the principles of the Treaty and has been content to let a policy of 'divide and rule' prevail.

We acknowledge that the Local Government Act 2002 gives guidance and encouragement to local authorities to consult with Māori, to provide further opportunities for Māori to contribute to the authorities' decision-making processes, and to work with Māori to achieve community outcomes. (See chapter 4 for an outline of the relevant provisions of the Act.) This is laudable. Ultimately, however, it is for each local authority to decide what it will do in pursuit of those ends, and the quality of the decisions made is not subject to audit by the Auditor-General. Put simply, what is audited is whether the local authority did what it said it would do with regard to those ends, not whether what it said it would do is a very good, an adequate, or a sub-standard response to the circumstances of local Māori.

Thus, while the Auditor-General plays a role in monitoring local authority performance and expenditure, that role is performed, as the Tauranga Tribunal has underscored, according to the law and not the Treaty. The 2008 review undertaken by the Local Government Commission recommended that there be an audit of the effectiveness of local authority engagement with Māori (see chapter 4). We agree that such an audit, and ongoing monitoring,

is needed. The fundamental problem with the present resource management system is this: having delegated its Treaty responsibilities to local authorities, the Crown has failed to include the necessary audit and monitoring processes to measure Treaty compliance. As local authorities are not the Crown, the Tribunal has no jurisdiction to assess whether any of their acts or omissions are in breach of Treaty principles. The result is that a number of local authorities act as the Crown's delegates in several areas of the resource management system – including in the (so far) geographically limited field of petroleum resource management – but they do so without any effective oversight as to Treaty compliance. While there have been attempts by local authorities to improve their relationships with iwi, most of these efforts remain embryonic. We turn next to outline some of the issues that have arisen in the claimants' experiences with local authorities, where monitoring and then action by the Crown was clearly needed and might have made a significant difference by now.

(a) *Māori experience with local authorities:* The evidence confirms that the efforts of some local authorities, in attempting to respond to Māori issues and concerns, might be regarded as a work in progress. As we noted in chapter 7, Crown counsel referred to evolving techniques and 'incremental steps', some 20 years after the enactment of the RMA.

The South Taranaki District Council (the STDC), for example, has implemented two important initiatives: the establishment of an iwi liaison committee and the creation of the position of iwi liaison officer. From the evidence, it is clear that the committee attempts to deal with general relationship issues between tangata whenua and the council regarding cultural events, street naming, and funding for community-based initiatives involving Māori. Its overarching focus appears to include devising ways of improving consultation with Māori as distinct from infusing Māori input directly into the actual decision-making. But, while the committee could consider petroleum-related issues, as STDC planning manager Blair Sutherland noted, its members have never raised them, implying, to some extent, that if the tribes were dissatisfied then they would have said so by now (see chapter 5).

More importantly, in the context of rangatiratanga the committee has no decision-making power, unlike some other council committees. This immediately limits the extent to which Māori interests and concerns can be reflected in council processes, let alone how Māori values might be incorporated into decision-making that directly affects iwi and hapū when exercising their roles as kaitiaki. The net result is that, despite the council's constructive attempts, the reality for iwi is that they simply have limited if any real capacity to engage beyond consultation. Put another way, while the initiative of an iwi liaison committee is sensible, without adequate resourcing and decision-making opportunities where the decision seriously affects Māori interests, the ability of the committee to deliver real protections is limited. As the iwi liaison position is new, it is simply not possible to assess the effectiveness of that role.

For its part, the Taranaki Regional Council (the TRC) has also made genuine efforts to engage with Māori on a range of resource management related issues. Te Pūtahi was a forum created specifically for that purpose, and the evidence confirms that the intentions surrounding its creation were both laudable and positive (see chapter 5). Yet, after a constructive start, the committee fell into abeyance, and thus it appears that its effectiveness has been mixed at best. While we acknowledge the evidence of the TRC that the iwi representatives themselves became disengaged for various reasons of under-capacity, the outcome for the affected iwi and hapū has been largely the status quo: lay volunteers committed to protecting wāhi tapu, taonga, and other resources having to respond to complex and detailed technical information without sufficient capacity to do so or access to professional expertise. So, any attempts at constructive dialogue and meaningful engagement would inevitably be limited. Fred McLay, the TRC's director (resource management), told us that, while it was correct that Te Pūtahi had gone into abeyance, in its place

the TRC had decided to consult with an iwi leadership group from time to time on resource management related matters. This, of course, does not address the capacity of iwi to respond effectively to that consultation.

(b) *Māori knowledge undervalued:* Turning again to the role of the three parties affected by the petroleum management regime – central government, local authorities and iwi – each is able to provide crucial contributions to a more rationalised and efficient process for the benefit of the community as a whole. The Crown is able to levy taxes and royalties on petroleum production. Local authorities can levy rates. From those funds, they are then able to provide the infrastructure and expertise to ensure that resource management processes remain effective. Māori lack the power to raise revenue from taxes or rates – although they pay both – but can contribute to the activities of a representative structure by providing expertise.

That expertise is often undervalued and usually unpaid. Māori knowledge is sometimes considered unscientific and lacking in intellectual rigour or value where it does not accord with Western secular and scientific norms. And yet that same knowledge base is increasingly mined for resources regarding conservation principles, the protection of cultural and intellectual property rights, the use of traditional remedies and practices for general wellness and for the treatment of mental health issues. Traditional navigation and waka building techniques and the revival of ancient musical forms and instruments have also gained currency in recent times. Despite a lack of protection, these customary knowledge systems have endured nonetheless and remain as essential building blocks in the retention of Māori lore and customary practices. However, in the context of this claim the recognition of the value of Māori knowledge at both central and local government level remains limited. In our view, the importance and value of Māori advice needs to be recognised and regarded appropriately as a means of enhancing resource management processes rather than being perceived as detracting from them. This is because the knowledge of wāhi tapu and taonga, which are a vital part of the cultural landscape for Māori, and part of the heritage of all New Zealanders, rests with Māori.

(c) *Lack of coordination between local authorities:* As we have noted, no part of central government seems to be monitoring whether local authorities carry out the Crown's devolved Treaty obligations, especially its duty of active protection, in respect of the management of petroleum. Problems were soon evident in our inquiry, however, highlighting the need for such monitoring.

In our assessment, both the STDC and the TRC have made efforts to respond to issues and concerns over impacts on Māori communities caused by local authority oversight of the petroleum industry. Those initiatives should be acknowledged. But one thing that is missing is any semblance of cohesion between local authorities on this specific issue of the management of petroleum. The problem with the existing processes, as we understand them, is that they remain ad hoc, fragmented, and underresourced. In the context of their policies on relationships with Māori, the local authorities appear to operate independently, with limited cooperation or sharing of experiences and ideas of how to improve their responsiveness to Māori with regard to petroleum management. This is despite the fact that the Local Government Act 2002 makes express provision under section 15 for coordination between local authorities. We discuss this below.

So the failure to monitor is then compounded by the lack of cooperation between local authorities dealing with essentially the same or similar subject matter. Effective monitoring, we expect, would have exposed this problem and resulted in solutions by now. We have seen that neighbouring district councils can operate as 'silos', not sharing ideas or resources even when the issue is the petroleum industry, which is very localised in its regional presence and effects (see chapter 5). For example, the claimants have highlighted the fact that, even though local authorities require the noting of sites of significance to iwi, it will not always be possible for such information to be revealed

if the principles of kaitiakitanga are to be respected. We were told that, on one occasion when disclosure was refused, it was suggested to iwi that they must be concealing their own lack of knowledge or simply making it up. The short point is that the claimants were frustrated by the local authorities' apparent failure to appreciate that a 'one size fits all' approach is inappropriate to culturally sensitive information.

Tribes are also required to deal on the same or similar subject matter with different local authorities having differing requirements. In other words, there is little or no coordination among the local authorities as to how the protection of Māori interests and concerns is to be achieved. Thus, the performance of the Crown's Treaty responsibilities is divided by the current system. But so, too, are the efforts of Māori, who should benefit from the performance of the Crown's Treaty obligations. We were told that some groups must deal with half a dozen local authorities in their efforts to protect their wāhi tapu and taonga. In such circumstances, the chances are much reduced that any failures in a local authority's performance of the Crown's Treaty obligations will be challenged and tested in the Environment Court or beyond. The costs of doing so are substantial, as we have seen, and there are issues of costs awards to consider – often a significant deterrent.

Then there are the triennial agreements, as required by section 15 of the Local Government Act 2002, which also provide an opportunity for improved coordination between local authorities. However, the extent of any coordination as contemplated by this provision has not been obvious in terms of improving Māori input and participation. As we have said, in July 2008 the Local Government Commission recommended an audit of the effectiveness of local authority engagement with Māori. That process of auditing may inform future local authority responses to Māori perspectives and concerns, provided it is recognised that, in the absence of clear requirements for Māori input and participation, any such audit will be of limited value.

(d) *Economic considerations and the possibility of a Crown conflict of interest:* In light of the Crown's control over the petroleum resource and its receipt of substantial revenue from petroleum exploitation, we find it surprising that it has such a low profile in the management of the industry and its effects.

We understand that the Crown will want to avoid being accused of a conflict of interest, as could happen were it to allocate permits for exploration and mining and also take a heavy hand in resource management regulation. But such an accusation would be credible only if the Crown's influence were seen to free up conditions for the industry. The leadership role we consider necessary to promote Treaty-compliant rules and behaviour would be most unlikely to be perceived that way. That is because the desired outcome would be the protection of Māori property rights and interests to the fullest extent practicable, by ensuring the use of appropriate processes to achieve that end.

We consider that, as history has demonstrated, unless the Crown takes the lead in these matters nothing is likely to happen. As we saw in chapter 1, the value of the petroleum industry to the New Zealand economy can be measured by its contribution to the gross domestic product (GDP), although that is an imperfect measure of a nation's or a local community's well-being. Various alternatives to the GDP have been proposed, but none has yet been widely accepted as a practical and preferable guide to economic and social progress. For as long as the GDP remains preeminent, the effects that are outside its scope must be considered through other mechanisms.

The problem is that there is no ready measure of the value to New Zealand of interests that might collide with the economic interest in petroleum production. The effects with which this Tribunal inquiry is concerned – including the erosion of kaitiakitanga and the desecration of wāhi tapu – are of a kind that cannot be measured by the GDP. But that does not make them any less real. Nor does it make the prevention of those effects less important to New Zealand, even without a quantitative measure of their value.

The result is a situation in which some effects, such as oil and natural gas production, are easily measured and valued, while others, such as impacts on Māori communities, are not. This imbalance poses the risk that the choices made between promoting New Zealand's GDP and protecting its unique cultural heritage will be skewed in favour of the GDP. We consider that the risk will be greatest when Crown agencies responsible for 'non-GDP' interests do not have significant interaction with others. In this regard, we note that the sole witness called by the Crown at the Tribunal's inquiry was from the MED. The only information about the role of the Ministry for the Environment was provided at the conclusion of the hearing, in response to the Tribunal's request.

(e) *Interpreting Treaty provisions – the role of the courts:* It might be thought that the Crown's reluctance to be more directly involved in setting Treaty-consistent policy and practice for its local authority delegates is due to its trust in the courts to provide ample guidance on those matters. We have considered the role of the Environment Court and the superior courts in articulating the value of Māori interests and so assisting decision-makers under the CMA and the RMA. The Treaty clauses in the CMA (section 4) and the RMA (section 8) require those who exercise functions under the Acts, respectively, to 'have regard to' and to 'take into account' the principles of the Treaty. The courts have not had occasion to interpret the CMA's Treaty section. That is testament to the very limited opportunities that exist to challenge decisions made under that Act: they are subject not to appeal but only to judicial review. Section 8 of the RMA has been the subject of judicial comment, always in connection with the meaning of the other provisions in part 2 of the Act (sections 5, 6, and 7).

It will be recalled from chapter 4 that section 5 defines the purpose of the RMA: namely, sustainable management. Section 6 sets out the seven matters of 'national importance' that must be recognised and provided for by decision-makers, three of which are relevant to Māori interests: 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga', 'the protection of historic heritage from inappropriate subdivision, use, and development', and 'the protection of recognised customary activities'. Section 7 sets out the 11 matters to which decision-makers must have 'particular regard', and one of these is 'kaitiakitanga'. Section 8 requires decision-makers to 'take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

From our examination of the cases that have considered these provisions, we note the following points of judicial guidance that have been given to RMA decision-makers:

- Sections 5 to 8 of the RMA must be read together, and the purpose of sustainable management has primacy and is to be achieved by due consideration of the matters identified in sections 6, 7, and 8.[37]
- The section 6, 7, and 8 matters have a descending order of priority for decision-makers, because to 'recognise and provide for' a section 6 matter is a firmer directive than to have 'particular regard' to a section 7 matter, which is itself stronger than the section 8 command to 'take into account' the principles of the Treaty.[38]
- In considering the various matters in sections 6, 7, and 8, the decision-maker (ultimately, the Environment Court and the appellate courts) must:

> weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. . . . In the end a balanced judgment has to be made.[39]

- To the same effect:

> cases involving Maori values require individual consideration and assessment, without there being any overriding presumption that tangata whenua may effectively veto a proposal. Issues of waahi tapu and the like

> require to be weighed and determined objectively in the circumstances of the particular case, without allowing the pressure of concerted and sustained opposition to achieve a predominant influence and deter an appropriate outcome consistent with the Act's overall purpose.[40]

- Taking account of the principles of the Treaty requires the relevant principles to be identified, 'for only then can [they] be taken into account by the decision-maker in the decision'.[41]
- The Treaty principles are to be approached in a 'broad way': a 'detailed articulation' of them is not required.[42]
- Consultation with Māori is not an 'end in itself', but there are occasions when, because of the relationship between Māori cultural and spiritual values and the natural resources of our environment, a proposal 'so affects Maori that consultation is required'. Further, the decision-maker is required by sections 5, 6(e), 7(a), and 8 of the RMA to 'consider matters pertaining to Maori' and 'can only fulfil its obligations under those sections if it has a full appreciation of the pertaining spiritual and cultural dimensions'. That appreciation 'can only be gained from those having rangatiratanga over the resources in issue. Consultation in these circumstances is therefore mandatory.'[43]
- 'Consultation by itself, without allowing the view of Maori to influence decision-making, is no more than window dressing.'[44]
- 'What might be a reasonable approach to s8 at the start of the process, when all alternatives are open for consideration, may be different from what is reasonable at the end of the process, when the function of the Environment Court is to approve, or reject, an alternative already adopted.'[45]
- 'There comes a time when those who are adversely affecting Maori by their activities need to "bite the bullet" if there are viable alternatives, especially when the activities were instigated without acknowledging Maori culture. It is even more so when that person is a local authority, which has statutory responsibilities that require the application of the principles that reflect Part 2 of the Act. As we have said, reflecting those principles in the relevant statutory instruments is not of itself sufficient. They need to be given effect to. We would also add that the Council has had many years to consider and plan for an alternative option.'[46]

Plainly, the particular facts of each of the cases cited above were varied and provide critical context to the judicial comments we have just quoted. That is an inherent feature of case law. But the points we wish to make are more generic and obviate the need to analyse each of the comments in light of the particular facts before the court. They are these:

- Judicial interpretation of, and guidance upon, the 'Māori protective' provisions of sections 6, 7, and 8 of the RMA is authoritative, but the occasions for judicial guidance on those provisions are not plentiful. By definition, in order for that guidance to be made available, there needs to be a litigant in the Environment Court or, on appeal, the High Court or, on further appeal, the Court of Appeal or Supreme Court who is concerned to invoke the 'Māori protective' provisions of sections 6, 7, and 8 of the RMA and bear the risks of litigation, including its costs.
- Judicial comments in particular cases can only ever provide limited practical guidance for a local authority which is regularly making decisions (for example, in policies, plans, rules, and consent applications) that are supposed to weigh the section 6, 7, and 8 matters.
- There is no ready way to convey the meaning or the tone of relevant judicial comments to the many local authorities in New Zealand. That is not only because cases turn on their facts but because there may be inconsistencies between apparently similar decisions and because the 'weighing up' exercise is susceptible to subjective judgments.

That conclusion is of great concern to us.

In our view, the major reason why it is possible for there

to be a gulf between the law and its application is that the task set for decision-makers by sections 5 to 8 of the RMA is described too broadly to be of assistance. That is because, of the many factors to be weighed, those that are concerned to protect Māori interests are not well-understood by decision-makers, and the people who do understand them are typically not involved in the decision-making process – or, at least, not in an organised and highly competent way. The result is a systemic failing in the RMA system, which, we consider, was clearly demonstrated in the evidence before us (see chapters 5 and 6). That result is not at all consistent with Treaty principles.

In sum, the Crown is not providing the kind of policy or procedural advice that would enable CMA and RMA decision-makers to give due weight to Māori and their interests and values. Nor is it monitoring matters to ensure that its Treaty obligation to protect Māori and their interests is being carried out. The courts cannot substitute for the absence of Crown direction or leadership. Resort to the courts on these matters is relatively infrequent and their decisions are narrow, arising from the facts of particular situations, and not necessarily widely communicated. The Crown is not prevented from providing direction by the fact that it has an economic interest in the discovery and mining of petroleum. But, in the absence of effective Māori participation, that economic interest may prevail more often than it should. We do not doubt that Māori have knowledge of wāhi tapu and taonga, and an imperative to protect them, nor that councils attempt to consult Māori so that their knowledge and kaitiakitanga can be given effect. It is to the question of how – and how effectively – Māori values and perspectives are taken into account by decision-makers that we turn next.

(3) *Decision-makers' low level of engagement with te ao Māori*

The third feature that we consider characterises the legal regime for managing the petroleum resource is that the decision-makers exhibit a low level of engagement with, and understanding of, Māori perspectives. The account given in chapter 2, which provided a brief insight into Māori philosophies and beliefs, was intended to assist readers' understandings of Māori perspectives as a coherent and enduring explanation of the natural, physical, and spiritual worlds. This framework of customs and practices demonstrates the binding of tangata whenua to their lands, resources, and other taonga with an intensity that is both spiritual and practical. That bond means that the responsibilities of kaitiakitanga cannot be shrugged off; nor can they be entrusted to people or entities that lack the necessary knowledge and experience of the tangata whenua and the desire to understand and engage. In particular, we have attempted to demonstrate what wāhi tapu mean – in a very real sense – to Māori people and the imperative for kaitiaki to protect them.

In our inquiry, it was notable that the MED officials and local authority decision-makers in New Zealand's sole petroleum-producing region were overwhelmingly non-Māori. Further, it is our view that neither the Crown Minerals Group nor the local authorities that we heard from have established sound processes for ensuring appropriate Māori participation in their decision-making. Despite the identification of sound consultation principles in the *Minerals Programme for Petroleum* (the MPP), the evidence we received about consultation by the MED in the course of the MPP review and the block offers process left us far from convinced that it was undertaken in the required, open-minded, manner, such that the views of Māori could influence the decision to be made. Indeed, some of the evidence of the consultation process, and the reporting back, on the exclusion of land from the MPP and block offers, strongly suggested that the Crown did not want to engage seriously with Māori on the issues of concern to them at all (see chapter 5). In the case of the local authorities that we heard from, we were left with the sense that many of the efforts that have been, and are being, made – while praise-worthy individually – are not integral parts of a strategic plan of action to improve Māori involvement in decision-making. Rather, a number of the initiatives we heard about seemed to be discrete and

uncertain responses to a need that is not well understood. We did not receive detailed evidence or argument about the mechanisms available under the Historic Places Act 1993 for the protection of Māori interests, but we note the Tauranga Tribunal's discussion and its finding that there are real limitations on the ability of that legislation to provide adequately for Māori concerns.[47]

We consider it inevitable that, because of their low level of engagement with Māori interests and perspectives, decision-makers will tend to minimise the importance to New Zealand of Māori values and concerns, consequently elevating the importance of other values and concerns. Such an outcome cannot be consistent with the Treaty. As the Tribunal in the *Te Tau Ihu* report acknowledged regarding the resource management regime generally, 'Māori are confined to being submitters rather than decision-makers, and, as a result, their core values are not well understood by those who are making the decisions'.[48] When key decisions must be made by weighing Māori interests against others, as is the norm under both the CMA and the RMA, the result is that Māori interests are minimised and systemically prejudiced. In particular, when measured against economic imperatives, it would appear that Māori concerns are often far outweighed.

Before due weight can truly be given to Māori interests, therefore, the system itself needs to be changed so as to make it inclusive of the Māori values and concerns that it needs to weigh. Until that happens, it will not meet Treaty standards, nor, we believe, the standards set for it in law.

(4) *The overall result is that interests are not being balanced in a manner fair to Māori*

There is no doubt that exploring for and mining the petroleum resource in and around New Zealand is a matter of importance to the nation. As we saw in chapter 1, that was the Crown's justification for appropriating the resource in 1937. However, some of the specific reasons for nationalisation given at the time no longer apply. Those that remain relevant relate to the efficient use of the resource and the encouraging of exploitation in this part of the world, despite the difficulties and disadvantages involved. Another feature of the situation in 1937 was that New Zealand's territory extended just three nautical miles from shore. So it was the petroleum within that zone that was appropriated by the Crown, without compensation being paid to its previous owners, and there were no dangers to the environment, wāhi tapu, and taonga from mining in what has become New Zealand's EEZ. Further, at that time the petroleum industry was in its infancy in New Zealand so prospecting, exploration, and mining activities posed little threat to other, potentially conflicting, interests.

Much has changed in the intervening 73 years. By dint of developments in international law, the Crown now owns the petroleum resource in the seabed out to 12 nautical miles from our shores and has the exclusive authority to allocate exploration and mining rights in a vast area beyond that. The technology used in the industry has advanced so that exploitation is possible in offshore locations that were not previously accessible. The mining of certain hydrocarbons that were not previously recoverable is now technologically and economically feasible, or nearly so. The costs of onshore exploration and production have reduced to the point where local companies can now participate in the oil and gas industries. And the extent of the prospecting, exploration, and mining activity in and around New Zealand has increased dramatically. It is now very plain that the economic interests of the petroleum industry can conflict with other interests that are of great moment to New Zealanders. Given that a balancing of those interests takes place, the question for the claimants is whether their interests are being balanced in a fair and Treaty-compliant manner.

The changes since 1937 have led us to ask whether and, if so, how they are reflected in the current legal regime for managing the petroleum resource. In particular, we have been interested to discover whether the Crown's current view of the 'national interest' in the petroleum industry reflects the fact that today a complex mix of economic,

environmental, and, in particular, Māori cultural interests and perspectives are involved. We have not found any clear evidence that this is so.

The Crown's overarching policy for the petroleum resource is to increase the level of productive activity in order to increase the industry's contribution to the economy. It seems, however, that it is not prepared to pursue that aim at all costs. The clearest indicator that non-economic interests also figure in the Crown's policies is the fact that certain lands, such as conservation lands, are excluded from petroleum mining. Other possible indicators are, however, more ambiguous. One example is the manner of exercise of the Minister of Energy's discretion to exclude from mining land of particular importance to the mana of iwi. For tribes that have applied without success for the exclusion of land that is of the greatest possible importance and that are aware of the two successful applications (although limited to land above sea level), the use of the Minister's discretion must appear inconsistent. But, more than that, the rejection of their applications is indefensible from their standpoint: there is no justification for failing to protect from mining lands that are inherently tapu. For them, economics do not enter the equation. We have seen no evidence that the Minister has engaged earnestly with that understanding.

Overall, our view is that the modern management of petroleum is a complex business, in which there are many interests. The Crown, as we noted above, has an interest both in seeing the resource developed for the good of the economy and in protecting the environment, wāhi tapu, taonga, Māori interests, and the heritage of this nation from unnecessary or inappropriate damage or interference. Because iwi lack the capacity to participate effectively in CMA and RMA processes, because the Crown is not monitoring the performance of its delegated Treaty duties so as to identify and solve problems, and because without the assistance of Māori central and local government lack the capacity to truly comprehend and therefore fairly assess and balance Māori interests, it is our finding that the Crown is failing in its Treaty duty actively to protect those interests to the fullest extent practicable.

8.2.5 Specific problems in the current regime

(1) *Limited protection for Māori land*

There is, we believe, an ambiguity in the Crown's current view of the 'national interest' in the petroleum industry in terms of the law governing access to Māori freehold land for prospecting, exploration, or mining activities. To Māori owners, it is illogical that, if their land is regarded as wāhi tapu, they can refuse access to a permit holder only for the purpose of preventing minimum impact activities being conducted there. For more invasive activities, Māori owners cannot refuse access because an access arrangement can be imposed upon them on 'reasonable terms', as determined by an arbitrator. Those terms cannot exclude access to the land altogether. As claimant counsel put it, the more significant the activity, the less protection is provided under the CMA.[49]

In this context, it is important to remember that the petroleum access regime is distinct among the New Zealand minerals programmes. As discussed in chapter 4, it provides for landowners and exploration licence holders to seek compulsory arbitration if they cannot agree terms for access onto land. That includes Māori land, and so the end result, in the absence of agreement, would be enforced access to Māori land. Rob Robson of the MED says that this provision has never been used and that landowners and companies have been able to reach agreement.[50] Tribunal witness Geoff Logan, however, suggested that access was an issue and that most countries guarantee land access when prospecting rights are licensed to an explorer.[51] If so, the current provision would be another example of making the licensing rules competitive with regimes elsewhere in order to attract the interest of international companies. While that argument could apply to any mineral industry seeking to attract interest from overseas investors, petroleum (except for natural gas) no longer has any special strategic significance for New Zealand in terms of its own

energy supply. In other words, the interest is now largely an economic one.[52]

A basic function of nationalisation – providing unified, coordinated control of the use of a resource – still applies, particularly with respect to offshore exploration, where the need for overseas capital and expertise is greatest. There is also, according to Professor Gary Hawke's evidence, a preference among oil companies for dealing with a single claimant on royalties and a single bargaining unit.[53] New Zealand's keenness to exploit its petroleum resources enabled oil companies to insist on having a single bargaining counter-party and a single claimant on royalties to deal with, following their experience of difficulties in operating in the United States where oil issues first arose. However, beyond that basic requirement of centralisation of control, it is not obvious that exploration for petroleum requires stronger access provisions than those for other minerals, most of which are not fluid. Modern advances in exploration and directional drilling should have increased the flexibility of oil explorers to work around limitations of access to the surface and made them more accommodating to concerns of surface owners. The key point is that, in the absence of negotiated agreements, the loss of direct access to Māori land is unlikely to affect petroleum exploration and extraction in any serious way.

Moreover, it will be remembered that Māori land today makes up approximately 6 per cent of the land mass of New Zealand. That land can be exempted from petroleum resource exploration processes only if it falls within section 55(2) of the CMA. However, the reality for Māori landowners is that, with 95 per cent of the land base alienated, the remaining 5 per cent requires particular protection. The Te Ture Whenua Māori Act 1993 created restrictions on the sale or other alienation of Māori land from the hands of its owners and their whānau and hapū. A significant number of Māori blocks have no management structure and much Māori land remains undeveloped. Added to that are the effects of urbanisation, which have resulted in many blocks having considerable numbers of absentee owners unable to participate or engage in the protection and development of those lands. As emphasised by the Tribunal in its 2003 *Petroleum Report*, there is also the history of major land loss through confiscation and the disempowerment and loss of rangatiratanga that has caused.

Given these realities, it can be argued that the remaining Māori land base should be subject to protections in the CMA, including the removal of compulsory access through arbitration. Yet, none of these factors has been recognised or given appropriate consideration in the application of the resource management and Crown minerals legislative regime to Māori land. And, while the provisions of section 51 of the CMA include a requirement for permit holders to ensure that reasonable efforts have been made to consult with those owners of the land able to be identified by the registrar of the Māori Land Court, that relates only to minimum impact activities. Equally importantly, 'owners able to be identified' is not defined, whereas a more comprehensive process would be for the Māori Assembled Owners Regulations 1994 to be triggered. That would then require the registrar to formally convene a meeting of assembled owners following directions from a judge. We return to this point in our recommendations below.

(2) *Limited protection for EEZ and continental shelf area*

Perhaps the most glaring example of the Crown's ambiguous regard for non-economic factors in its assessment of the 'national interest' in the petroleum industry is the absence of a tailor-made system for the EEZ and continental shelf area to safeguard the environment from oil spills and other potentially disastrous effects of petroleum mining. For many years, mining in that area has produced the majority of the industry's contribution to the New Zealand GDP. However, the concerted effort that is needed to devise an environmental protection system has not yet been made. We agree with the claimants that such an effort is essential and that it should be arranged in concert with Māori. Having highlighted the issue here, we return to it more fully later in this chapter, when we consider remedies.

8.3 Prejudice

The available evidence confirms that Māori, their authority, and their taonga are not being protected in the management of the petroleum resource. They are not included in the key decision-making that directly impacts on their role as kaitiaki, and nor are their interests adequately taken into account by the decision-makers. As a result, they are rendered 'powerless', as claimant witness Mere Brooks put it.[54] This, then, is a key prejudicial effect of the Crown's legislation and processes: Māori feel powerless where they ought to be partners. The effect is that Māori cannot exercise kaitiakitanga to protect and conserve for future generations the taonga with which they have been entrusted. Instead, they must watch as their sacred sites are 'modified', interfered with, or simply obliterated. They have been reduced to the role of submitters in a long line of interested and potentially affected parties. Largely lacking in adequate resources to properly engage with the decision-makers, their frustrations with the processes were readily apparent in the evidence. Over time, the capability of the claimants to protect their lands and other taonga has been significantly undermined.

This is a major blow to the iwi. The tribes struggle to exercise any semblance of autonomy where their duties as kaitiaki collide with the processes of the CMA and the RMA. At the extreme end of physical impacts on the Māori landscape, we heard evidence of wāhi tapu being damaged or destroyed. The harm that causes to Māori claimants compounds the prejudice of previous Treaty breaches, which, we were told, have so critically reduced the number of surviving wāhi tapu in either Māori or Pākehā hands. Many of those breaches of course remain unresolved and in the absence of appropriate remedies, the result is the inexorable eroding of the spiritual and cultural relationships that Māori have with their resources, wāhi tapu, and taonga, in breach of the principles of the Treaty. Moreover, the irreplaceable cultural heritage valued by both peoples is being diminished and, in some cases, lost forever. That outcome cannot be consistent with Treaty principles.

The effects of these continuing Treaty breaches, which undermine the claimants' ability to exercise rangatiratanga and kaitiakitanga, are not limited to physical examples of harm. Petroleum companies, for example, presume to intrude on sacred places and to name or rename 'their' sites, appropriating Māori names (sometimes entirely the wrong names). Essentially, Māori are prejudiced because, try as they might, they are rarely able to get land of immense importance to them excluded from the MPP, from block offers, from exploration permits, from mining permits, and from the activities that follow upon resource consents. The exploration of – and, more so, the mining of – land that Māori want and need protected is the inevitable result of the fact that they do not have their proper say in CMA and RMA processes; they cannot protect their own interests and the Crown is not protecting them either.

From the many examples given to us, it is evident that Māori do not wish to prevent development or to oppose for opposition's sake, but in good faith they seek to protect their wāhi tapu and other taonga and to participate in the decision-making that affects them directly. The statutes say that they should be able to do so, for good reasons. When these positive intentions cannot be carried out, we are all the poorer, but none more so than those at the sharp end of this continuing conduct – the claimants in this inquiry.

From a wider perspective, the claimants say that the laws and processes for the management of petroleum are damaging their relationships with local authorities, with petroleum companies, and – most importantly – with the Crown. Unsurprisingly, mistrust and misunderstanding prevail. The grievances of the past are then exacerbated when iwi and hapū struggle to protect their taonga while watching the benefits of the petroleum industry travel outside the region. Māori do not expect to always win, but it should not be usual, and, from their perspective, seemingly inevitable, that they should lose. That is why they seek participation in the decision-making process that is more than the consultation that is currently conducted, particularly where their interests are at greatest risk of damage or harm.

The result is that the claimants have been, and continue to be, prejudiced by the inadequate protection of their customary interests. The Crown, which receives substantial revenue from the petroleum industry, has not taken any steps to repair the system to provide greater protection for Māori interests. Rather, it seems content to trust that the outcome of the Treaty settlement process will increase Māori capacity to participate in the petroleum management regime. But, if the Crown's current petroleum policy is successful, by the time the Treaty settlement process is complete, there will have been an increase in exploration and mining activity and in petroleum production in New Zealand and off its shores. With most rohe in the country unexplored, and with parts of Taranaki being 'underexplored', there is a substantial risk in the years ahead that increasing levels of irrevocable harm will be done to Māori interests.

In our view, the Crown cannot restore its Treaty relationship with Māori on any legitimate and sustainable basis, which is the object of Treaty settlements, in such an environment. We consider that, if the partnership between the Crown and Māori is to be realised, this damage to relationships needs urgent attention. All these factors compel us to recommend the reform of New Zealand's regime for managing the petroleum resource.

8.4 Remedies

In this section, we explore some of the remedies that we think are necessary both to fix the specific and systemic flaws we have identified in the petroleum management regime and to remove the resultant prejudice that the claimants are currently suffering. We begin with a brief summary of the specific remedies proposed by the parties in our inquiry.

8.4.1 Parties' submissions

As we have discussed in chapter 5, the claimants called for general and specific changes to current laws. In addition, they proposed some specific remedies, which, as they saw it, would assist to restore their tino rangatiratanga in the management of petroleum, while providing properly and appropriately for the Crown's kāwanatanga. In brief, they suggested:

- Setting up co-management models, such as the recent arrangement for co-management of the Waikato River.[55]
- Creating local Māori oil boards to evaluate permit applications and to advise the Minister of Energy on a range of petroleum-related matters, with an ability to review the Minister's decision after it is made.[56]
- Giving Māori the power to exclude land from a permit after it is granted, to withhold Māori land entirely from any petroleum activities, and (at the least) to exempt wāhi tapu (on Māori land) from such activities.[57]
- Developing, in consultation with Māori, a comprehensive environmental protection statute to protect the environment beyond the territorial seas.[58]
- Developing, in consultation with Māori 'as a matter of urgency', a mechanism to 'address and provide for claims of customary rights within the Exclusive Economic Zone', because those rights may be being affected by the grant of petroleum permits.[59]
- Establishing a 'dedicated body', such as the Māori Heritage Council and representative of iwi in the regions most affected by petroleum activities, to provide the Minister of Energy with expert advice on matters relating to te ao Māori.[60]
- Regularly commissioning cultural impact reports.[61]
- Providing adequate resources to assist Māori tribal bodies to engage in CMA and RMA processes, partly through levying petroleum company applicants.[62]
- Establishing an independent entity, perhaps called a Treaty of Waitangi commissioner, to monitor tribal mandates and the interfaces between central, local, and tribal government.[63]
- Using petroleum assets in settlements, as recommended by the Tribunal in 2003.[64]

The Crown did not make detailed submissions about

remedies, although counsel advised that the Tribunal 'could be of great assistance to the Crown in commenting on how to improve the processes for engagement that exist under the RMA, the CMA and related statutes'.[65] As a general point, the Crown noted its expectation that Treaty settlements would help solve Māori capacity issues. It is to that issue that we turn next.

8.4.2 Can Treaty settlements solve some problems?

As we discussed in chapter 7, the Crown admitted that there is a problem with the capacity of iwi to engage in CMA and RMA processes, but it suggested that the situation is being (or soon will be) improved by Treaty settlements. This argument appears to have two foundations: the creation of tribal governance entities and the use by those entities – if they so choose – of settlement resources to engage more effectively in consultation processes. For this reason, and because of other incremental steps that councils themselves are taking, the Crown submitted that no additional remedy is required. At the same time, however, it maintained its view that petroleum royalties are not a suitable asset to use in Treaty settlements and that the Tribunal's 2003 finding that there is a Treaty interest in petroleum, requiring additional redress in Treaty settlements, should be rejected (see chapter 7). We address both issues in this section. We begin with the genesis of Treaty settlements because we think it important to underscore the point that these are designed to settle grievances and remove serious and wide-ranging prejudice, and they must therefore address a number of socio-economic purposes. But they are not, by their nature and intent, designed to solve the problem of Māori capacity to engage in petroleum management decision-making.

(1) *History of regional land alienation*

Given the limitations of time and resources for this urgent inquiry, we have not traversed the lengthy history of Māori customary land tenure and resource use in Aotearoa. Nor have we investigated the far-reaching impacts of colonisation during the last 170 years. The Tribunal has already assessed the extent of Māori land and resource loss in the claimants' rohe in the early years of colonial influence due to Crown laws, policies, and practices carried out in breach of Treaty principles.[66] The confiscation and wrongful appropriation of land, and the consequent weakening of the autonomy it protected, caused irreparable damage to the social cohesion of all Taranaki iwi, in many instances eroding, and in extreme cases destroying, the links between the tribes and their customary knowledge systems. The same can be said in part at least for the Ngāti Kahungunu and Tairāwhiti tribes claiming an interest in this inquiry and for those northern iwi likely to be affected by prospecting permits in the near future.

In short, the legacy of dislocation and dispossession wrought by the past actions of the Crown is grievance and loss. It is said that some New Zealanders seek to ignore this history and live only in the present. But the effects of such dispossession remain strong in the memories of a people whose whakapapa spans the generations back to the original custodians of the land. For them, some limited form of recompense through negotiation is one of the few realistic remedies available that may assist in making some provision for a more certain tribal future.

> *'The settlement of historical claims is not to pay off for the past, even were that possible, but to take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.'*
>
> Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 315

(2) *Treaty settlements*

By their very nature, Treaty settlements are limiting in two key areas. First, they provide less than full recompense for the historic Treaty breaches visited upon claimants, and so the amount of funding then available for protecting tribal

interests across a range of responsibilities will be limited. Any efforts at engaging with local authorities and central government over petroleum issues must be balanced against equally critical tribal survival and development imperatives. Secondly, settlements provide some underpinnings for the recognition of rangatiratanga or tribal self-government, although it will take some time for them to become embedded and fully effective, but they cannot solve all of the many problems facing iwi. They are a stepping stone toward increased tribal autonomy and responsiveness by enabling iwi to start some form of constructive engagement with local authorities and central government and to assist them in enhancing their existing efforts.

The reality for tribal authorities, which are already attending to present-day social, educational, and economic challenges, will be that the reconstruction of traditional processes and knowledge bases – even at a limited level – will require the ongoing attention of tribal managers. Consequently, their ability to engage with and participate in the CMA and RMA processes to reverse the minimisation that has occurred will often be tentative, given the structural and historical impediments to their full engagement.

Moreover, many iwi and hapū are still some distance from finally settling. Inevitably, the negative socio-economic repercussions of the past loom large in the daily lives of many who are striving now to strengthen the future prospects of their whānau by attempting to adhere to tikanga Māori (custom). From their standpoint, and especially when the subject matter is as important as the impact of human activity upon the natural world, it is difficult to accept that the central and local government systems can comprehend and reflect Māori knowledge and values, and their importance, let alone attempt to protect and enhance those values. This highlights one way in which the Treaty principle of redress is relevant to the law's treatment of the petroleum resource. While it is not the role of the petroleum management regime to heal past injustices, that legal framework should not compound them, especially where a viable alternative exists.

(3) *The use of petroleum royalties*

The bulk of petroleum extraction activities so far occur in and around Taranaki, a region where the most significant and devastating confiscations in breach of Treaty principles took place. This fact also has relevance to the redress principle: where sacred sites and places of significance have fallen outside of tribal control through confiscation and other unjust expropriations, the Crown has a duty to ensure not only that the redress for past wrongs is adequate but also that, where possible, it connects the tribes back to those places and the resources that might once have provided for an appropriate tribal endowment for the future. Such an endowment, we consider, involves both the means for economic and social development looking forward and the means to ensure the survival and well-being of tribal taonga, including language, culture, customs, lands, and other resources.

For example, regarding petroleum royalties, it is not necessary to change their level for Māori to receive a share to assist them to engage in current petroleum management processes. This could be done with no effect on New Zealand's attractiveness to international companies. Assigning royalties to individual landholders or to iwi or hapū would cause the same uncertainties as establishing ownership among surface landowners, and it would also provide a highly variable income stream for such recipients, as royalties are paid only on petroleum extracted. But those problems would not arise if, alternatively, a portion of royalty receipts were paid into a trust for the benefit of all Māori affected by the industry and from which individual iwi or hapū could apply for assistance to engage in the petroleum management processes. Such funding could be made available to those areas experiencing the most exploration activity, although not necessarily to the areas where the most oil is being produced and the most royalties generated.

While any diversion of royalty revenues has consequences for Government spending decisions, those revenues are relatively modest in the scheme of total Government income (around 0.9 per cent), and the Crown has

periodically borne the cost of reducing them to encourage more exploration. So, if it wanted to, the Crown could earmark some of the royalties it receives for inclusion in Treaty settlements or for assisting Māori affected by petroleum-related activities and developments (or for both) without major ramifications for fiscal stability and confidence in the petroleum industry. In our view, given the history of expropriation without compensation, including confiscation, these royalties could be regarded not as a tax but as a 'super' or 'special' rent, which would otherwise go with ownership. This point has already been made in the 2003 *Petroleum Report*. It could also be said that royalties fall into two classes: those received through extraction on land and within New Zealand territorial waters and those derived from outside of that area. The latter class, and issues surrounding ownership and rights, will presumably be contested in other fora in due course.

We also note, in relation to the earlier Tribunal's finding, that there are now only a small number of settlements that remain to be concluded in which it could be applied. We discuss this further below, when we affirm the findings and recommendations of the *Petroleum Report* on the Treaty interest and the appropriateness of using all available Crown resources, including petroleum, in any future settlements.

8.4.3 Can strengthening the 'Treaty clauses' solve the problems on its own?

The claimants submitted that the least that must be done to correct the systemic failing in the petroleum resource management regime is to boost the requirements of the Treaty sections in the CMA and the RMA to require decision-makers to, for example, give effect to the principles of the Treaty. We have considered whether the petroleum management regime could be made Treaty compliant merely by changing the Treaty provisions in the CMA (section 4) and the RMA (section 8). What would be the effect if those sections were amended to provide that all who exercise functions under the two Acts must act consistently with, or give effect to, the principles of the Treaty? Examples of stronger statutory language include section 9 of the State-Owned Enterprises Act 1986 and section 4 of the Conservation Act 1987. Such a change is essential to 'raise the bar' to the level required by the Treaty principles. By itself, however, we think it will not be effective to ensure that decision-makers under those Acts will meet the required standard.

Our first reason is that, as discussed earlier, no court or other entity can give precise guidance in advance about what is required in particular situations by any Treaty section, however it is worded. Particularly under the RMA, numerous factors are involved in the many decisions made by local authorities. Only general guidance can be given to them about the effect of Treaty provisions on particular decisions. Thus, as happens now, local authorities would be left largely to their own devices to determine what a changed Treaty section might require in the numerous situations with which they deal. The difference would be that, whereas the current sections of the RMA are quite readily satisfied, a new provision, with a higher threshold, would require a changed approach.

This brings us to our second reason: we do not believe that, without further assistance, current local authority decision-makers could make such a change successfully. Pulling oneself up by one's own bootstraps is never an easy task: existing resources must be applied to the task of changing one's current position and striking out in a new direction. The evidence confirms that current local authority decision-makers have not proven themselves adept in this regard. We note that the provisions in the RMA which encourage local authorities to delegate functions to, or to share functions with, Māori entities have rarely been used. But, more than that, the inconsistent and inadequate responses to the Local Government Act's encouragement of greater involvement of Māori in local authority decision-making indicates that local authorities are generally not yet equipped to meet a higher standard (see our discussion of the Local Government Commission review in chapter 4). For both reasons, we believe that more is needed than change to the Treaty

sections of the key statutes if the regime for managing the petroleum resource is to comply with the principles of the Treaty. Nonetheless, we reiterate that such change is needed in order to set the appropriate Treaty standard for decision-makers.

8.4.4 Law reform: the need for substantive changes

We consider that a broader strategy is required for Treaty compliance. Other changes must be made to the substance of the law, not only to the Treaty clauses. The necessary substantive law changes are, in our view, few in number but essential. They relate to the following:

- the land access and compulsory arbitration provisions of the CMA;
- the exclusion of land provisions under section 15(3); and
- the need for an enforceable environmental protection system for the EEZ and continental shelf area.

(1) *Access and compulsory arbitration*

As we have noted, Māori land makes up a very small part of the land area of New Zealand. While much of it is of inferior quality in terms of economic returns – many thousands of Māori land blocks do not have a management structure or development plans – it remains of great cultural and historic importance to the owners and their whānau and hapū. This is even more so in a region ravaged by significant land confiscations and expropriations. Despite these conditions, the land access sections of the CMA do not make adequate provision for recognising the importance of Māori land to the owners or the current condition of the Māori land base. The Crown has a duty of active protection, which may require exceptional responses where a resource or taonga has fallen into a parlous state. While much is made in the public domain of the financial success of several Māori land trusts and incorporations – and appropriately so – these achievements are more the exception than the norm. The key point is that the duty of active protection requires the Crown to take steps to protect the Māori land base from any unnecessary alienation and interference, except, it could be argued, in the most serious situations of national importance.

Given the developments in petroleum industry technology, including improved surveying methods and directional drilling, it seems clear that forced access onto Māori land by 'arbitration' is unnecessary. We consider it appropriate, therefore, that the current provisions of the CMA be amended to exempt Māori land from access, except where owner consent has been given or where a significant national interest is at stake. It will also be remembered that, according to claimant evidence, iwi are not anti development.[67] In accordance with the principles of kaitiakitanga, they are, to use a label, pro-conservation, and their interests often overlap with those of the wider community.

(2) *Exclusion of land by the Minister of Energy*

The claimants have argued that the process by which the Minister of Energy considers requests for the exclusion of land under section 15(3) of the CMA is not transparent and sets the bar too high for any exemption to be provided. This provision has particular application to iconic sites and to areas of land that, through previous Crown acts or omissions in breach of Treaty principles, have been alienated either to the Crown or to a private party. So, requests made under this section are likely to concern areas of considerable cultural significance to iwi, and applications submitted over the last decade – including those for Mount Taranaki, the Whanganui River, and Tongariro National Park – confirm this.[68]

However, according to the Crown's evidence, the Minister relies not on the advice and expertise of tribal elders and tohunga with knowledge of the significance of certain areas according to tikanga Māori but on his officials.[69] And, as Mr Robson acknowledged, according to claimant counsel, the MED did not undertake any assessment of the strength of association and mana but simply accepted that land was important to the mana of iwi and then balanced

that against other factors.[70] Mr Robson had also expressed the view that section 15(3) is intended to protect very specific areas, including wāhi tapu and tauranga waka, rather than broad areas. His view was that wāhi tapu traditionally meant smaller areas, even though in a contemporary sense they could be more expansive.[71] MED officials have also suggested that exemptions be considered on a case by case basis, preferably at the time that RMA resource consents are considered, rather than allowing larger areas to be exempt from the MPP.

We agree with claimant counsel that this approach is unsatisfactory and inconsistent with a Treaty-compliant process. The use of cultural assessment reports should, in our view, be provided for under the MPP and be required when Māori request them, and appropriate regard should be given to expert Māori knowledge. It seems inappropriate that the Minister must rely wholly on officials of the MED, who, as we have identified, appear to have little practical knowledge or experience of what may, in the opinion of a particular iwi, constitute an area of particular importance to that tribe's mana. In our view, this is not a question that can be addressed lightly, nor is it a simple matter to balance it against other, possibly competing, factors. It is unclear what specialist advice or information MED officials procure to assist in any legitimate assessment of requests made by iwi under section 15(3).

We recommend that the current process include provision for cultural assessment reports to assist the MED in providing appropriate advice and that the iwi making the application be provided with the opportunity to make detailed submissions and to comment on any draft cultural assessment reports that are commissioned. We also recommend that the Crown consider revising the MPP to provide for exemptions of iconic areas of land of deep significance to the mana of iwi. Finally in this context, we note the recent publicity regarding the continuing exclusion of conservation areas on Crown land for mining purposes. No doubt some iwi will make a comparison, even though the circumstances are not identical.

(3) *Regulation outside the 12-mile limit*

As we noted above, there is a gap in the law's regulation of the petroleum resource: the resource management regime does not apply beyond the territory of New Zealand – further than 12 nautical miles from New Zealand's shores – and no other regime is directed specifically at minimising the environmental risks of oil drilling in that area. Yet, the EEZ and continental shelf are the very areas in which most exploration and mining activity is taking place. The consistent theme of the Crown's evidence and submissions to the Tribunal was that the CMA governs the allocation of rights to prospect and explore for, and to mine, the petroleum resource, not the environmental effects of those activities, but that the petroleum regulatory regime is 'integrated' because the effects of those activities are dealt with by the RMA. To us, that explanation seems barely credible when it is known that the Minister of Energy grants many permits under the CMA in areas beyond the RMA's reach and that the efforts made to date to impose safety standards on those permit holders have not been the result of concerted effort by relevant Crown agencies and have not produced a clear outcome.

Crown counsel submitted that the Minister considers an applicant's past record and obtains a voluntary agreement about a permit holder's methods of operation (see chapter 7). We note, however, that the Crown's witness, Mr Robson, accepted that the RMA's non-application beyond the territory of New Zealand was an undesirable gap in the law's coverage. As he put it, the arrangements are 'not so much agreements' as 'the formulation and construction of a voluntary environmental impact assessment'.[72] What is involved, he told us, is 'self regulation that is certified by the government', the implementation of which is dependent 'on the integrity of the operator'.[73]

We are unsure exactly why permits in the EEZ and continental shelf area are not granted with clear, enforceable conditions on the standard of work and the mitigation of environmental risks and accidents. The factors involved seem to include the Minister's unfamiliarity with

managing environmental effects, the lack of authority of the Ministry for the Environment and Department of Conservation beyond the territorial seas, and an official view, at least in the past, that the risk of serious incidents was not sufficiently high to justify the difficulty and cost involved in devising, imposing, and enforcing such standards on permit holders.

For Māori, the precise origin of threats to the environmental safety of their rohe – whether they emanate onshore or from five or 15 nautical miles offshore – is immaterial. The experiences of Māori, plus those of Crown agencies other than the Crown Minerals Group (including the Department of Conservation, which administers New Zealand's national coastal policy, effective to the outer limit of New Zealand's territorial waters), must be relevant if the best possible solution to this situation is to be devised. As we discussed in chapter 7, the Ministry for the Environment is leading policy work for a proposal to establish a regulatory body, a stand-alone environmental protection authority, to take responsibility for these matters. The MED has commissioned a study of how the proposed policy would relate to the regulation of petroleum, but we were not told of any consideration of Māori interests or involvement of Māori in this process.

In our view, any new arrangements for managing petroleum in the EEZ must take full and proper account of Māori interests. This includes the issue of Māori rights in this zone, about which, as Crown counsel pointed out, we received little in the way of evidence or submissions. On this particular point, we note simply that most of the return the Crown obtains from petroleum is from mining activity outside New Zealand, in the EEZ and continental shelf area, where the Crown does not own petroleum. That said, it is acknowledged that the ownership issue regarding minerals and the continental shelf has not been conclusively determined. Those arguments remain extant, and in due course the relevant fora will consider such claims. Beyond this, in the absence of both jurisdiction on the one hand and comprehensive evidence and submissions on the other, we cannot comment further on the matter.

8.4.5 Changes also needed to decision-making processes

We wish to emphasise the critical importance of the procedural changes that we consider must be made to the current petroleum regime. We are disturbed by the extent to which the current regime depends for its protection of Māori interests on the ad hoc involvement of Māori individuals and groups who are ill-resourced to bear the burdens involved. In light of that feature of the current system, it is no surprise that it generates neither consistent protection of interests that are of importance to Māori – and to the nation – nor the trust and goodwill that is needed to make any collaborative venture work. We reiterate the proposition that we have derived from the Treaty principles of active protection and partnership: to guarantee that the outcomes of key decisions about the management of the petroleum resource are Treaty compliant, the Crown must ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made. Such processes may require more than consultation with Māori.

Procedural changes are necessary to ensure that decisions involving Māori interests are made with the benefit of high-quality information about those interests. In the highly devolved petroleum resource management system, the Crown needs to be particularly active to ensure that all decision-makers act consistently with Treaty principles. To that end, the Crown must exercise firm leadership, in matters of both policy and procedure, to assist local authorities to conduct themselves appropriately. To formulate clear policy statements and procedural rules about the discharging of the Crown's Treaty obligations, and to monitor local authorities' performance, the Crown will itself need to model processes that incorporate Māori knowledge and values.

Only the Crown can ensure nationwide consistency in policies and rules, where that is needed, and only the Crown can rationalise the unnecessarily fragmented processes of the current regime. We refer here to the unduly sharp separation between the roles of the Crown Minerals Group and those of local authorities, and the duplication

of effort between different local authorities dealing with the same issues. There are also numerous central government bodies involved in the management of the petroleum resource, and their efforts appear to be imperfectly coordinated. Quite apart from the roles of the MED (in relation to Crown minerals), the Ministry for the Environment (national policy statements, national environmental standards, and matters of national significance), and the Department of Conservation (the national coastal policy), other Crown offices with roles to play are Te Puni Kōkiri (the database of iwi and hapū groups) and the Department of Internal Affairs (local government responsibilities). Greater coordination and rationalisation of the roles of all of these bodies is solely within the power of the Crown to effect.

In the circumstances with which we are concerned, four criteria must be met in decision-making processes. Namely, tangata whenua must be able to:

- count on being involved at key points in decision-making processes that affect their interests;
- make a well-informed contribution to decisions;
- afford to have that level of involvement; and
- be confident that their contribution will be understood and valued.

In our view, when assessed against these criteria the processes of the CMA and the MPP are far from adequate to achieve the outcome of protecting Māori interests in a manner consistent with the principles of the Treaty of Waitangi. To some extent, we think that the failings derive from the isolation of CMA functions, both from top-level Crown policy about the petroleum resource and from the resource management system. But that does not account for all the deficiencies in the Crown minerals system, which include:

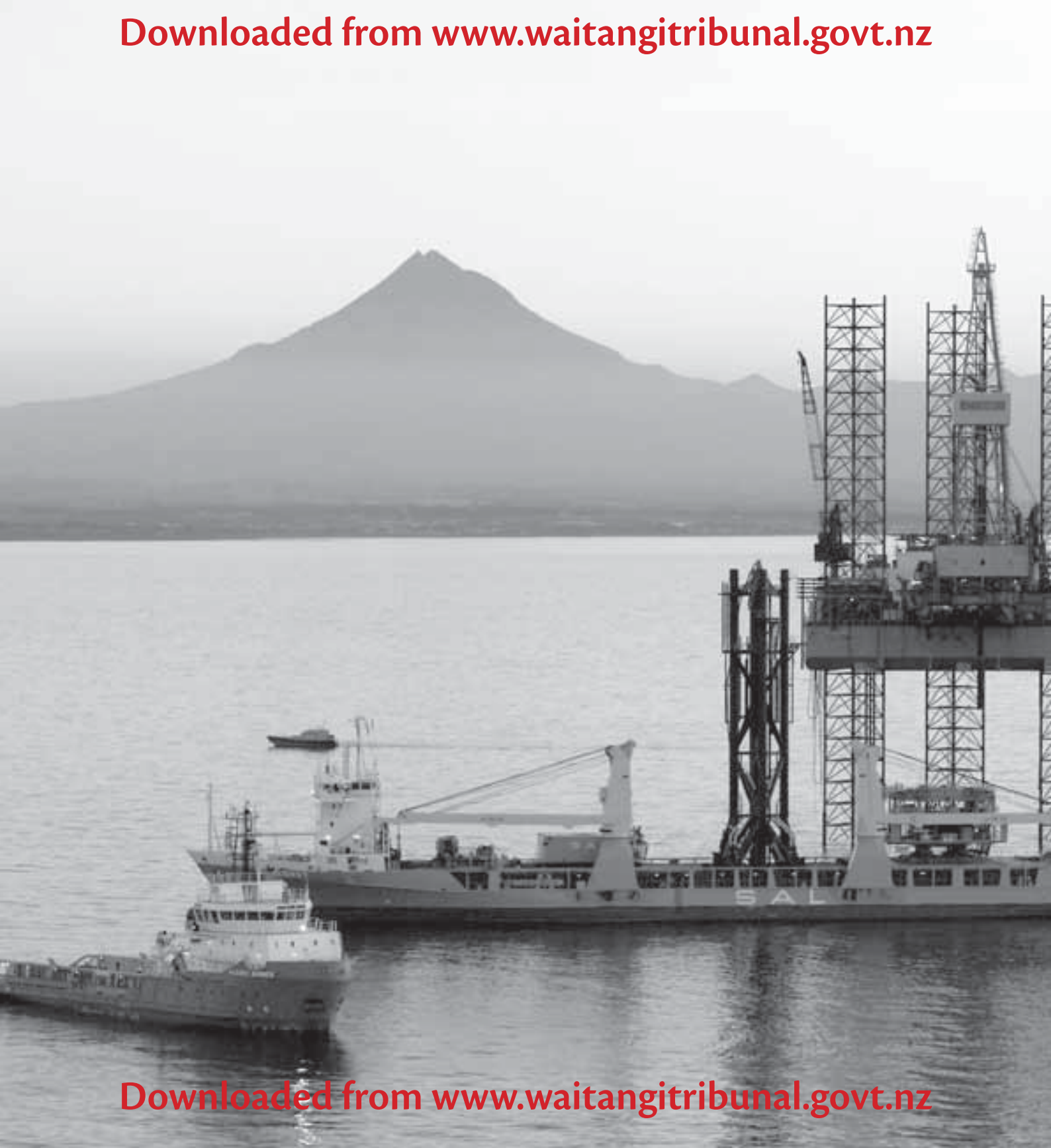
- the lack of provision for Māori involvement in top-level policy decisions;
- the absence of opportunities for discussion between the Crown and the few Māori groups affected of the implications of their Treaty interest in the petroleum resource;
- the treating of the Crown's exclusive authority to allocate rights in the EEZ and continental shelf as being equivalent to Crown ownership of the petroleum resource there when it is not and in the face of assertions of Māori ownership in some of that area;
- the lack of provision for Māori input into the Minister's decisions to exclude from mining, or not, defined areas of land of particular importance to the mana of iwi;
- the absence of any requirement for formal engagement between the companies to whom petroleum permits are granted and tangata whenua, which could include cultural values assessments being conducted where appropriate;
- the lack of provision for the procuring of cultural values assessments by the Crown or for the funding or supporting of tangata whenua to conduct such assessments;
- the limited opportunities for Māori to apply to the Minister to exclude from mining land that is of particular importance to the mana of iwi; and
- the fact that the consultation that is conducted in the limited number of circumstances in which Māori input is sought is not clearly characterised by the decision-makers' openness to being influenced by the information received.

By comparison, the processes required by the RMA – supported by the Local Government Act 2002 – make a far better attempt to incorporate Māori knowledge and values. But in our view they still fall short of the standard required by Treaty principles. We highlight the following examples of petroleum resource management processes that do not provide sufficient protection for Māori interests:

- the continuing but unfounded reliance on 'iwi authorities', and iwi management plans, being influential during the key policy-setting stage of relevant national, regional, and district plans;
- the failure to require decision-makers to ensure, in the absence of iwi authorities having the intended

▲ The supertanker *Umuroa* anchored off New Plymouth, April 2007. With a capacity of 700,000 barrels of crude oil, the *Umuroa* has been moored 55 kilometres off west Taranaki since 2007 and used as a reservior for oil from the Tui oilfield, New Zealand's first subsea development.

► A heavy lift ship positioned under the Ensco 56 drilling rig to offload equipment for the Shell Todd Oil consortium's Pohokura gas field development eight kilometres off the north Taranaki coast, May 2005



input, that they obtain by other means well-informed Māori involvement in all decisions affecting Māori interests;

- the lack of coordination among local authorities in their engagements with Māori on the same or very similar matters, both at the policy setting stage and at the resource consent stage;
- the large variation or lack of consistency in local authorities' efforts to involve Māori in their decision-making, even where the subject matter may be the same;
- the lack of any actual or effective monitoring of the extent to which local authorities are performing their Crown-delegated functions in a Treaty-compliant manner;
- the lack of a responsive system for acknowledging wāhi tapu sites in a manner sensitive to their importance;
- the absence of notification requirements or conditions on resource consents that compel a consent applicant or consent holder to engage with tangata whenua in order to achieve clear outcomes, agreed between the local authority and tangata whenua (this includes the requirement that Māori groups that may be affected or interested receive from the applicant as soon as possible comprehensive information disclosing the nature of the proposed activity); and
- the cost of engaging with the resource consent process, coupled with the unavailability of assured resourcing to assist Māori.

We believe that the procedural deficiencies can be remedied by a reform package, which we discuss in more detail below in our specific recommendations.

8.4.6 Recommendations

(1) *Treaty interest and use of petroleum in settlements*

We affirm the recommendations of the 2003 *Petroleum Report* regarding, first, the existence of a Treaty interest and, secondly, the appropriateness of using the petroleum resource as part of any settlement package with the affected tribes. We have not heard anything that dissuades us from the Tribunal's previous recommendations and conclusions. Indeed, having reviewed present-day considerations and the continuing relevance of the nationalisation rationale from 1937, we think the previous recommendations are strengthened by the findings in this inquiry. Nonetheless, as we have noted above, at the very least we also think that petroleum royalties could be used to establish a fund, to which iwi and hapū could apply for assistance in order to participate more effectively in petroleum management processes.

(2) *Recommendations with minimal legislative and fiscal implications*

(a) *Compulsory notification regarding Māori land:* The pressures on the existing Māori land estate to remain sustainable for future generations remain real. With only 5 per cent of the national land base classified as Māori land, the need to protect that resource is still apparent. Consistent with both tribal aspirations for improvement and protection and the principles of retention, development, and utilisation in the Te Ture Whenua Māori Act 1993, we consider it appropriate that the CMA also makes provision for reflecting those aspirations. Compulsory notification through the assembled owners provisions of the 1993 Act of any activity that may be allowed to a permit holder is one way of improving the consultation process. But the form of notice and the process for notification are just as important as the content. The example given in evidence of one day written notification for entry onto Māori land cannot be reasonable or acceptable under the general law, let alone the Treaty.

So, under this recommendation, whenever a permit holder under the CMA seeks to prospect, enter, explore, or mine any Māori land, then the assembled owners provisions of the Te Ture Whenua Māori Act would be activated.[74] That would require a district registrar of the Māori Land Court where the land was situated to convene a meeting of owners for the purpose of ensuring appropriate notice to those owners and providing a forum for the

purpose of consultation and engagement as to the effects and implications of the proposed activity. This is a more thorough and comprehensive process than is required by section 51(1)(a) of the CMA, which simply says that permit holders are to ensure that reasonable efforts have been made to consult with the owners of the land able to be identified by the registrar of the Māori Land Court.

The networks of the court into communities of Māori owners and their whānau and hapū will be more extensive than anything local authorities could seek to imitate and so, on one level at least, the extent of notification would improve at little real cost to any of the parties. Moreover, where notification falls to the registrar to arrange, should any issues arise requiring further input from the court in a facilitation context, that too could be considered. Research into the block history of a particular site could also be undertaken to assist the applicant and the affected landowners where necessary. While the ultimate outcome may or may not change, the level of engagement with owners is likely to improve. The need for the notification of tribal authorities would be important since, as foreshadowed, many blocks have considerable numbers of absentee owners. It may be possible for this recommendation to be implemented by simple changes to local authority processes without the need for any legislative change. The use of national environmental standards, as discussed below, may also provide an additional means of ensuring appropriate notification.

(b) *National policy statements:* In chapter 4, we referred to section 45 of the RMA, which sets out the purpose of national policy statements, that being to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA. When developing a national policy statement, the Minister for the Environment, under section 45(2)(h), can consider anything which is significant in terms of section 8 (which refers to the principles of the Treaty of Waitangi). Section 45(2)(f) is also relevant, since it refers to the scale or the nature or degree of change to a community or to natural and physical resources, which may have an impact on, or is of significance to, New Zealand. In short, national policy statements are intended to give guidance to local authorities charged with balancing competing national benefits and local costs. When developing a national policy statement, the Minister is required to seek and consider comments from 'relevant iwi'. They are, therefore, a potentially useful tool for, among other things, protecting particular interests, including those relevant to the Treaty.

In our view, the Crown can improve fulfilment of its Treaty obligations of active protection over Māori lands, waterways, resources, and land no longer in Māori ownership, by using a national policy statement to provide much-needed guidance to local authorities on enhancing and protecting taonga and wāhi tapu in terms of petroleum activities. Accordingly, we recommend that the Crown develop such a statement on petroleum management for these purposes.

(c) *National environmental standards:* National environmental standards are another device by which the Crown can facilitate improved protections for Māori interests, but in a more direct way. As we mentioned in chapter 4, these standards are regulations prescribing technical standards, methods, or requirements for environmental matters. Through them, conditions could be imposed on consents and permitted activities. These might include requiring notification of proposed activities to all Māori in a district as a means of encouraging engagement between the tribes and petroleum companies. Local authorities would be involved at an early stage to facilitate dialogue through, say, iwi liaison committees. This involvement would be especially relevant in terms of permitted activities, where, if difficulties arose between petroleum companies and particular tribal interests, the issue would then be referred to the district iwi liaison committee of the local authority.

(d) *Joint hearings:* We consider that a more rationalised and efficient approach to consent hearings would involve greater use of joint processes between regional and district

councils. In that way, all participants, including the petroleum industry, tribal interests, local authorities, and other affected groups, could be heard at the same time. From the perspective of Māori, we acknowledge their evidence of a lack of capacity and resources to engage in a multiplicity of hearings and processes in overlapping fora, and the serious difficulties these two factors can cause for tribal protection of taonga and wāhi tapu. As was noted in chapter 5, one claimant group stated that it had to deal with at least six local authorities at any one time.[75]

While we agree that joint hearings will not necessarily have relevance to all petroleum-related activity, we see every reason why there should be, from a first principles perspective, greater use of them, simply for reasons of efficiency and economy. It is telling, in our view, that there has not been a joint hearing involving the STDC and the TRC since 1999. According to the evidence of planning expert Sylvia Allan, this can be explained in part by the reality that the more piecemeal approach tends to favour applicants for the reasons outlined in chapter 5. And Mr Sutherland acknowledged that decisions on dealing with applications, either individually or as a set, were made in consultation with applicants.

(3) *Recommendations with legislative and fiscal implications*

(a) *Reform of the CMA:* As we have discussed, we consider it necessary for the Crown to amend the CMA by:

- strengthening the Treaty provisions, as set out in section 4, to at least achieve congruence with the comparable sections of the Conservation Act 1987 and the State-Owned Enterprises Act 1986;
- changing the compulsory arbitration provisions to provide exemptions in respect of Māori land;
- enhancing protections for sites of importance where land is no longer Māori-owned; and
- establishing a statutory advisory committee to provide the Ministers of Energy and Māori Affairs with advice on Māori perspectives on petroleum issues and related matters.

Section 4 of the CMA does not provide adequately in our view for compliance with Treaty principles. We recommend that the Crown review that section so as to achieve improved protections for Māori interests by requiring decision-makers to give practical effect to (rather than have regard to) Treaty principles. In addition, for the reasons we have outlined previously, we recommend that Māori land be exempt from compulsory arbitration to enforce access without owner consent. Further, we consider it necessary that the provisions regarding the exemption of iconic areas of particular importance to the mana of iwi be reviewed to ensure that the likelihood of actual protection of those areas is increased. We also recommend that cultural assessment reports be commissioned whenever an application under section 15(3) is submitted, if the relevant tribal groups wish it, and that the Crown consider enhancing its processes for increased protection of wāhi tapu and taonga by improving provision for exemptions to the MPP.

(b) *Ministerial advisory committee:* As we have found, participation and input by Māori into the management of the petroleum resource is limited to specific opportunities for consultation in the Crown minerals system and via local plans or resource consent mechanisms in the RMA system, or as part of the general submission process available to the wider community on policy and law reform. While we acknowledge that the iwi and hapū in our inquiry occasionally secure positive outcomes over resource consent applications, they have little direct input into policy-making and discussion at a high level over important matters, including the classification of coal seam gas and broader questions of the extent and pace of mineral extraction in their respective rohe. The Crown submitted that it was appropriate that it should preserve for itself the right to 'balance' competing and overlapping interests when developing its policies, but we consider it necessary for the Crown to receive advice from Māori at the highest levels to inform the formulation of those policies in a Treaty-compliant manner. This is because of the particular

circumstances of the petroleum resource and the history of limited Māori input into policy development. While we are aware that the Crown uses several processes for consultation, the evidence confirms that those efforts have not been as successful as they need to be to ensure Treaty compliance. The short point is that the Crown needs to significantly improve its existing methods for carrying out its active protection and consultation responsibilities, because they are failing to accord Māori perspectives and concerns appropriate consideration in the decision-making processes of both the Crown and local authorities.

One of the principal claimant complaints, as outlined in chapter 5, was the failure to consult on high-level policy issues, such as the rate of exploration, the conditions that might be relevant for such exploration, and the potential impact of developing technologies in respect of coal seam gas. The starting point for improving policy making is to provide for direct Māori input at ministerial level through an advisory body drawn from a district and regional structure. Iwi and hapū could nominate representatives to district council iwi committees, and those committees would then make nominations to the regional committee. The members of the ministerial advisory committee would in turn be drawn from the regional committees. We therefore recommend that a ministerial advisory committee be established to provide high-level advice on a formal and regular basis to the Ministers of Energy and Māori Affairs on Māori perspectives as they affect the management of the petroleum resource.

Advice could be provided through an advisory committee, for example, on the pace and extent of petroleum resource exploitation and extraction, the classification of coal seam gas, the Treaty interest issue, and the matter of royalties, especially concerning petroleum production in the EEZ and continental shelf area. Such committees are not unprecedented. They are also relevant, for example, to statutory bodies making decisions affecting resource management and environmental matters. We note that the Environmental Protection Authority Bill 2010 makes provision under clauses 17 and 18 for the creation of a Māori advisory committee to 'provide advice and assistance to the EPA [Environmental Protection Authority] on matters relating to policy, process, and decisions of the EPA under an environmental Act'. More importantly, clause 18 provides that any such advice and assistance 'must be given from the Māori perspective' and come within terms of reference for the committee.

While not exactly comparable, we still see strong parallels with the more specific petroleum resource framework and how compliance with Treaty obligations can be improved through the provision of advice at ministerial level on policy issues relevant to Māori. As the function and purpose of the committee would be to provide a Māori perspective, we suggest that its members be appointed either by the Minister of Māori Affairs in consultation with the Minister of Energy or by both Ministers jointly. In addition, we also consider it appropriate that the members of an advisory committee should be drawn from regional representative bodies, as discussed in the next section. Those bodies would in turn be made up of tribal experts who have experience of the regime and who would thus be well placed to understand the issues and provide meaningful feedback on any policy proposals. In our view, for an advisory committee to function effectively, it is essential that the members have direct experience of how the petroleum regime impacts on iwi and hapū in the exercise of kaitiakitanga and the protection of wāhi tapu and tribal taonga. We note, too, that the Crown, acting in good faith as a Treaty partner, will then be in a position to have the kind of Māori advice that – if understood and taken seriously, as the principles of the MPP require – will enable it to make properly informed decisions for the management of petroleum.

(c) *Re-establishment of improved regional representative body:* In our view, greater coordination between local authorities is essential in attempting to improve the responsiveness of their processes to Māori interests. Increased use of joint hearings is one possible solution in a set of responses. Another solution is the establishment in Taranaki (and in

any other regions where petroleum is operating or imminent) of a representative body at regional level based on district input. This body could have petroleum management as its initial focus but in due course could encompass resource management issues more generally.

A possible structure is for the re-establishment at regional council level of an iwi advisory body comprising representatives nominated from iwi liaison committees at district council level. From a practical perspective, we see little point in duplication of effort by having a regional representative body made up of nominees who are not part of the local district structure. We understand that, under existing legislation, each local authority at district level can create, as the STDC has done, an iwi liaison committee. Representatives, supported by tribal authorities, could then be elected to the regional body by the committee, thus ensuring a continuity of knowledge and expertise on resource management applications and CMA issues. In other words, the district representatives would form the pool from which the regional body is drawn, based on agreed criteria, including perhaps experience with resource management and petroleum issues at a local level. Endorsement of the local representatives by the relevant tribal authorities would ensure that the risk of mandate challenges is minimised, if not eliminated.

The exact detail of how such a structure might be created is ultimately a matter for the affected parties, since there is a range of issues and dynamics to consider, including the place of Māori interests that fall outside of existing iwi authorities. We offer these recommendations merely as a guide. While the TRC may prefer to deal directly with iwi leaders at the present time, in the medium to long term more durable outcomes are likely if a more formalised and structured process for consultation and Māori input on petroleum management issues is implemented, so long as it has the support of the relevant tribal groups. But the recreation of a regional representative body for Māori participation is only part of the equation. In order to function effectively, any regional or district representative body must be adequately resourced. With local authorities having been delegated Treaty-compliance responsibilities by the Crown, the means to achieve such compliance must also follow.

As the *Te Tau Ihu* report underscores, the Crown's continuing failure to ensure that iwi have adequate capacity to engage in resource management processes requires a remedy. And that may include not only capacity for the tribes but also a distinct central government fund to assist with legal and related expertise:

> It is a difficult matter to determine exactly how and in what manner claimants should be resourced to participate, but we accept the Crown's acknowledgement that it should devote significant resources to that end. In the absence of submissions on the point, we make no recommendations. From the evidence available to us, it appears that each iwi organisation needs a fulltime resource management professional with access to legal and other expertise as necessary. A distinct central government fund may well be appropriate to assist with that need. We recognise that this is a wider matter than can be arranged in negotiations between Te Tau Ihu iwi and the Crown, but it is clear that action must be taken if prejudice is to be avoided for Te Tau Ihu iwi in the future.[76]

We consider what is proposed by the *Te Tau Ihu* report to be the first of two essential steps: first, sufficient infrastructure (including funding and personnel) for tribal authorities and, secondly, appropriate resourcing for the representative bodies at district and regional levels. Making provision for resource management staff for tribal authorities will assist in raising the capacity of iwi to respond, but that alone will not ensure that the conduct of local authorities is Treaty compliant. Local authorities need to directly support the representative bodies, as does the Crown. So, while it is evident that local authorities will need to improve their levels of resourcing for their own processes so as to enhance Māori participation and input into decision-making, some assistance from central government will also be necessary if the processes as originally envisaged are to function effectively. The Crown may

have delegated its Treaty-compliance responsibilities to local authorities, but the evidence suggests that without sufficient resources local authorities are struggling both to understand and to meet their obligations as delegates of the Crown's Treaty responsibilities. Indeed, based on the evidence presented to us, we cannot see how the Crown's obligations are being fulfilled, beyond the modest efforts previously outlined in this chapter.

There are precedents for regional representative structures that include both Māori and local authorities at district, city, and regional levels. For example, in Southland a joint committee has been established called Te Ao Marama, which comprises tribal representatives from four individual rūnanga. It is concerned with resource consents in the respective takiwā (tribal domain) of each rūnanga.[77] This committee has developed a charter in concert with four local authorities – the Southland District Council, the Gore District Council, the Invercargill City Council, and Environment Southland – which provides a basis for the relationship and for consultation between the committee and the local authorities. The charter also confirms the committee's desire to assist local authorities with consultation. Equally importantly from a practical perspective, the four local authorities fund Te Ao Marama and have created a collaborative structure, Te Roopu Taiao, which meets quarterly, to give effect to the charter. This example includes four ingredients essential for any genuine attempt to create a representative body:

- authority from the constituents of the two participants, local and tribal authorities, for those bodies to enter into these arrangements;
- a formal structure that includes the relevant tribal interests and local authorities;
- a charter setting out the purpose of the relationship and its operating terms; and
- funding and regular meetings.

Another possibility is the concept of a local leadership body. This is a statutory body established, in part, through use of the joint committee provisions of the Local Government Act 2002 and settlement legislation. Its purpose is to provide opportunity for tribal input into local authority decision-making. The Gisborne District Council passed a unanimous agreement in 2009 to create such a body for the purpose of engaging with local iwi as part of the Treaty settlement process.[78]

It is not difficult to envisage how, with the necessary political will on all sides, such a structure might be established within those regions affected by the petroleum management regime. While the mandate of such a body would in time become more wide-ranging than petroleum management, we consider such a focus to be a useful starting point to provide some impetus for the revival of a representative structure at a regional level in Taranaki. Whether or not such a structure will prove suitable for other affected regions is something that will need to be considered.

We also refer back to the element of the principles of rangatiratanga and active protection that, in certain instances, especially where a resource has been left in a parlous state or otherwise seriously compromised, protection is likely to involve Māori participation in the decision-making process, and not simply as consultees. We envisage, therefore, that the regional and local committees will have some decision-making authority, in conjunction with the councils. We also envisage the regional committee having a central role in developing policies for exploring co-management and delegation possibilities, where appropriate. There are now practical examples of co-management involving central, local, and tribal government working cooperatively to manage important natural resources.

In addition, when developing improved relationships with Māori, local authorities need to work more directly with the tangata whenua to find ways in which the integrity of sites can be protected while balancing the need for confidentiality against the limited disclosure necessary for some resource consent processes. Silent files (defined in chapter 5) may work in some situations but will not be appropriate for others. A wide range of techniques and processes need to be developed by iwi and

local authorities to protect important areas and to secure tangata whenua cooperation on an on-going basis. The district and regional representative bodies are the proper place for the formulation of appropriate plans and policies to ensure that Māori perspectives and input are properly considered and, where necessary for the protection of lands, implemented. The extent to which information provided to local authorities remains confidential, subject to limited public access, or available only through legal processes should also be a matter for close consideration by the iwi liaison committees when devising policies relevant to the protection of wāhi tapu and taonga.

(d) *Application of user pays:* For over two decades, 'user pays' has become embedded in the New Zealand lexicon. From prescription charges to university tuition fees to significant increases in ACC levies for motorcycle owners, user pays is now part of our everyday existence. We received only limited evidence of the cost to applicants of resource consent processes but consider that the cost of some hearings could be avoided or reduced by early consultation and constructive engagement with tangata whenua on issues of concern to them.

In addition, as we have mentioned, the MED's internal discussion paper prepared by Anne Haira recorded that both tribal groups and petroleum companies were in favour of the use of cultural values reports in assessing Māori perspectives and cultural impacts as part of the block offer process.[79] Indeed, she recorded that industry feedback on this issue was 'very positive' and accordingly recommended that cultural assessment reports be procured at the time of block offers (see chapter 7). Despite those comments, this proposal was ultimately rejected by the MED. Clearly, the increased use of such reports would assist Māori to convey their views on the protection of wāhi tapu and taonga, particularly over land no longer in tribal hands. They would also assist the Crown, petroleum companies, and local authorities in their efforts to become more informed about and responsive to Māori perspectives and concerns. Ms Haira noted that Māori would derive little if any benefit from block offers, and argued that they should not bear the costs of these reports. We agree. Instead, as petroleum companies and, to an extent, local authorities will be the end users of such advice, it seems appropriate that the costs of procuring the reports be borne by them or that local authorities should contribute staff and other resources to assist. On the other hand, when Māori seek the exclusion of land from the general operation of the MPP, the Crown should bear the cost of such reports.

We also envisage situations where Māori will, from time to time, need advice independent of the applicant or the local authority. As foreshadowed, there will be instances where a central government fund, referred to by the Te Tau Ihu Tribunal, will be needed for this purpose.[80] The extent to which the petroleum company and the local authority may need to contribute, where the end result is a more efficient and inclusive process, is a matter for further consideration. There will also be occasions where the monitoring of the various activities of petroleum companies will be necessary. That process may involve the applicant meeting the costs of monitoring by tangata whenua, especially where there are potential risks to tribal assets, including wāhi tapu and other taonga. The principle that the user of a resource must bear the costs of the processes that are designed to improve its effective management remains sound. In our view, Treaty compliance includes effective processes that improve outcomes for Māori and for all other members of the community. We see no reason why there should be any exception made in the case of the petroleum industry to the general principle that the user ought to pay for the services required.

(e) *Commissioner for the Treaty of Waitangi:* We have noted that it is not difficult for iwi and hapū, let alone individual Māori, to become mired in the morass of procedures, technical evidence, and processes when confronted with applications under the RMA and CMA. The short point is

that, from the claimants' perspective, the existing processes are not working and Māori consider themselves at a serious disadvantage when attempting to respond to the requirements of local government and resource management regimes in terms of petroleum management. One of the core concerns of claimants has been the lack of monitoring of Treaty responsibilities by local authorities.

As we have found, there are few existing or effective processes for the auditing, or even monitoring, of Treaty compliance when the Crown delegates its responsibilities to other agencies and bodies, including local authorities. The Tribunal's *Whanganui River Report* confirmed the Crown's responsibility to ensure that any delegation of Treaty obligations did not result in the dilution and eventual disappearance of those duties.[81] Otherwise, the Crown could simply hand over its Treaty responsibilities safe in the knowledge that its delegates could, in the absence of effective oversight or sanction, conduct themselves without regard to Treaty principles. The Auditor-General has a limited role in reviewing the compliance of local authority plans. But, as those plans are based on objectives that local authorities have set for themselves, unless there is relevant Māori input at the outset into the content, any audits will only confirm either a lack of compliance without any meaningful sanction or recommendations for practical improvement or an absence of regard for Māori perspectives. This is unsatisfactory and, as we have already mentioned, conflicts with the Crown's obligation to make sure that its delegations include mechanisms for guaranteeing Treaty-compliant policies and practices. Care must be taken to ensure that delegation does not lead to derogation by stealth and the eventual abrogation of the Crown's Treaty responsibilities.

While auditing and monitoring functions over petroleum management do exist – including the roles of the Ministry for the Environment regarding environmental effects, the Department of Internal Affairs in terms of relationships with central government, and the Auditor-General in the context of governance, performance, and planning – there is no independent authority assessing whether or not there is compliance with Treaty principles. In particular, there is no monitoring of the relationship between Māori and local authorities. The evidence also suggests that Te Puni Kōkiri does not have any role at all in this context, apart from maintaining a list of representatives and their contact details. Apart from the Tribunal, no one else possesses a mandate to review and assess compliance from a Treaty perspective. And, even then, the Tribunal's role is limited to reviewing the acts or omissions of the Crown, not its delegates. We consider this a significant omission by the Crown in the delegation of its Treaty obligations to local authorities. One solution, therefore, is for the Crown to establish an independent officer of Parliament, much like the Parliamentary Commissioner for the Environment, charged with auditing and monitoring for compliance with the principles of the Treaty of Waitangi.

At present, there are three independent officers of Parliament – the Auditor-General, the Ombudsman, and the Parliamentary Commissioner for the Environment. As a starting point only, the parliamentary commissioner is a useful example to consider. Section 16 of the Environment Act 1986 sets out the functions of the commissioner. As summarised by the commissioner's website, the commissioner is, among other things, to:

- *Investigate* the effectiveness of environmental planning and management by public authorities, and *advise* them on remedial action.
- *Investigate* any matter where the environment may be or has been adversely affected, advise on preventative measures or remedial action, and report to the House.
- *Report*, on a request from the House or any select committee, on any petition, Bill, or any other matter which may have a significant effect on the environment.
- *Inquire*, on the direction of the House, into any matter that has had or may have a substantial and damaging effect on the environment. [Emphasis in original.][82]

The website further states:

> The Commissioner has wide powers to investigate and report on any matter where, in her opinion, the environment may be, or has been, adversely affected. Parliament or any parliamentary select committee may also ask her to report on environmental matters.
>
> The Environment Act 1986 outlines her functions and provides for powers including:
>
> - obtaining information
> - summoning people and examining them under oath
> - protecting sources of information and maintaining confidentiality
> - employing staff and consultants.
>
> The Commissioner also has wide powers to report findings and make recommendations. However, she does not have the power to make any binding rulings and nor can she reverse decisions made by public authorities.
>
> The acceptance and effectiveness of the PCE's advice depends to a large degree on the independence, integrity, and quality of the investigations undertaken by the office.[83]

As we have explained, the particular issue of concern is that the monitoring of Treaty compliance at a local authority level remains unfulfilled, beyond the limited role of the Auditor-General and the case-by-case consideration of claims by the Tribunal. One of the roles for a Treaty commissioner would be to act as that auditor and monitor, to assess and review existing and proposed policies, and to provide recommendations on Treaty-compliant outcomes where specific concerns have been raised, as well as at a more general level to assist policy makers in developing compliance measures. In certain instances, the commissioner could refer an issue for inquiry by the Tribunal. It might also be appropriate for a protocol to be drawn up between the commissioner and the Crown setting out response times between them, similar, we understand, to the current arrangement with the Law Commission. We therefore recommend the establishment of a Treaty commissioner charged with, inter alia, monitoring compliance with the principles of the Treaty of Waitangi by any person or body delegated responsibilities from the Crown.

(f) *Legal assistance:* The claimants have expressed concerns at their inability to fund legal proceedings regarding, for example, the resource consent process, so as to protect their interests. There are also issues over eligibility and the availability of legal aid generally under the Legal Services Act 2000, as well as through the specialist Environmental Legal Aid Fund. To assess its continuing availability to Māori confronted with possible proceedings in respect of processes under the RMA and the CMA, we recommend that a review be undertaken to determine whether or not current levels of funding and the criteria for eligibility remain relevant in light of the issues highlighted in this report.

8.4.7 Summary of recommendations

The current laws and processes for the management of petroleum are not Treaty compliant. In order to put matters right, we have made a number of general and specific recommendations to the Crown, which we summarise here:

- the recognition of the claimants' Treaty interest requires the inclusion of petroleum assets in any relevant settlement package between the affected iwi and the Crown in the settlement of historical claims;
- the use of petroleum royalties to establish a fund, to which iwi and hapū could apply for assistance to participate effectively in petroleum management processes;
- the provision for compulsory notification of any applications concerning petroleum-related activities that may concern Māori land;
- the use of national policy statements and national environmental standards to provide guidance to local authorities;
- greater use of joint hearings by local authorities on applications regarding petroleum management issues;

- reform of the CMA, including strengthening the Treaty provisions, amending the compulsory arbitration requirements, and enhancing the protection of sites provisions;
- the establishment of a ministerial advisory committee to provide advice directly to the Minister of Energy on Māori perspectives and concerns, including advice on issues relating to coal seam gas, the question of Māori interests in the EEZ, and particular iwi applications to protect land of importance to their mana;
- the re-establishment of district and regional representative bodies for tangata whenua for the purpose, among other things, of considering petroleum management issues, with such bodies to be adequately resourced by the provision of funding from central government and empowered with some decision-making responsibilities by local authorities;
- the increased application of user pays principles, where applicants for petroleum-related activities bear the costs of engagement with Māori, including the use of cultural values assessments;
- the establishment of the role of Treaty commissioner to, among other things, monitor the Treaty compliance of any person or body that has been delegated responsibilities by the Crown; and
- a review of the adequacy of legal assistance available to Māori from the Environmental Legal Aid fund and under the Legal Services Act 2000, in terms of both the levels of funding and the criteria for eligibility.

8.5 The Relevance of this Inquiry to Resource Management Generally

Finally, we wish to comment on the relationship between our inquiry and the resource management system more generally. Clearly, our inquiry has been limited to the system for managing the petroleum resource, which has some features that are not present in the general resource management system. Crown ownership of, or sovereign authority over, petroleum is one such feature. Another is that the petroleum regime is very largely focused – and has been for many years now – on just one region of New Zealand. And that region has a particularly sad history, and legacy, of Crown–Māori relations. These factors could mean that certain elements of the petroleum regime that we have identified as problematic may not be as problematic elsewhere in the country.

On the other hand, however, the basic features of the petroleum regime that we have identified as defective in Treaty terms are also features of the general resource management system. We refer to the Crown's non-delegable responsibility to ensure Treaty compliance in matters of resource management (where it has delegated its Treaty duties) but its failure to ensure that Māori interests are in fact protected in local authority decision-making processes. Those features strongly suggest that the lessons from our inquiry are applicable more generally across the resource management system.

The Waitangi Tribunal has found on a number of occasions now that the general resource management system does not comply with the principles of the Treaty of Waitangi. Two years after the RMA was enacted, for example, the Ngawha Tribunal considered the 'Treaty clause' in section 8, and found:

> Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which 'particular regard' must be given under s 7). The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.
>
> It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.[84]

The *Te Tau Ihu* report has also highlighted the central flaws in the resource management regime both in terms of the failure adequately to incorporate Māori values and views and in terms of the lack of capacity of Māori to participate:

> We find the Crown in breach of the Treaty principles of partnership and active protection. It has failed to ensure that the Resource Management Act 1991 is implemented in accordance with its stated intention to protect Maori interests and to provide for their values, custom law, and authority in resource management decisions. It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. As a result, iwi are faced with insufficient regard to, or even understanding of, their values and interests, and an inability to participate on a level playing field with consent applicants and authorities. Although the Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it. Clearly, the claimants have been prejudiced by these breaches of Treaty principle.[85]

More recently, the *Tauranga Moana* report reiterates the basic problem that, while the broad provisions may appear compliant, the detail can be used to override Māori concerns and meaningful participation:

> The general provisions of the Resource Management Act 1991 are Treaty compliant. The sting is in the detail: kaitiakitanga, for example, can be narrowed to those resources where the two cultures have a common mind; relationships to wāhi tapu can be weighed up against other matters and set aside; the principles of the Treaty can be taken into account and then outweighed by other criteria.[86]

The Crown's failure to respond to the Tribunal's repeated recommendation to cure the RMA of its 'fatal flaw' is a continuing source of grievance for many claimants. Our inquiry has been closely focused on just one corner of the resource management system, and as a result we have been able to make specific recommendations to the Crown about how to make that corner Treaty compliant. While there are some differences between the petroleum 'corner' and the rest of the regime, we are confident that our recommendations for the reform of the petroleum corner will, if adopted, have beneficial flow-on effects right through the resource management system. In other words, we believe that, if the Crown 'gets it right' for Māori in the management of the petroleum resource, it will also get it right – or, at least, see how to get it right – for Māori throughout the entire resource management system. That is because our recommendations for reform have a very large procedural focus. And that is because, in an area of law as complex as resource management – where numerous interests are involved and very few fixed answers can be given in advance to any problems that may arise – we consider that the best way of ensuring Treaty-compliant outcomes is to ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made.

In our view, while the Local Government Act 2002 encourages such processes, it has proven inadequate to ensure that local authorities discharge the Crown's Treaty obligations. And, while central government entities are more familiar with the Crown's obligations, they too can lack the capacity and the will to incorporate Māori knowledge and values systematically in their decision-making processes. Māori are the clear losers from this state of affairs, in a subject area of vital importance to their culture. But in fact all New Zealanders lose out, for Māori interests often coincide with other environmental interests, and the preservation of Māori culture is truly a matter of national importance.

In sum, then, we believe that this inquiry provides a snapshot of one part of a large and complex system, from which a manageable plan for reform can be developed that will apply with beneficial effects throughout the system.

Text notes

1. Document D5, pp 2–3
2. Ibid, p 4
3. Ibid, p 4
4. Ibid, p 22
5. Ibid, p 53
6. For example, see document D4, paras 5.2–5.4, 31.
7. For example, see paper 2.55, p 7.
8. For example, see document D4, paras 31.3, 36.1–36.3, and document D5, pp 3–5, 14, 53–54.
9. For example, see document D4, paras 34.16–34.23, and document D5, pp 3–4, 17–18.
10. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4
11. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 100–101
12. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 330–332
13. Ibid, p 332
14. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1235–1245
15. Ibid, p 1242
16. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 per Lord Woolf (quoted in Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1242)
17. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 631
18. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207
19. Waitangi Tribunal, *Tauranga Moana*, vol 1, p 20
20. *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA), 551 per Cooke P
21. Waitangi Tribunal, *Tauranga Moana*, vol 1, p 20
22. Ibid, vol 2, p 604
23. Waitangi Tribunal, *Ngawha*, p 102
24. Ibid, p 152
25. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 181
26. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1983), p 51
27. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 4
28. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 134–135
29. *New Zealand Maori Council v Attorney-General*, p 517 per Lord Woolf
30. Pita Sharples, Minister of Māori Affairs, 'Supporting UN Declaration Restores NZ's Mana' (press release, Wellington, 20 April 2010). In his announcement issued at the time, Dr Sharples noted that 143 member states of the United Nations General Assembly agreed in September 2007 to support the Declaration on the Rights of Indigenous Peoples, while four – Australia, Canada, the United States, and New Zealand – did not. See also 'United Nations Declaration on the Rights of Indigenous Peoples', United Nations Permanent Forum on Indigenous Issues, www.un.org/esa/socdev/unpfii/en/declaration (accessed 14 December 2010).
31. Document E49, pp 6–8
32. Papers 2.174, 2.176
33. Document E44
34. Document E49, pp 2–4
35. See the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010.
36. See Waitangi Tribunal, *He Maunga Rongo*, vol 1, pt 2; Waitangi Tribunal, *Te Urewera: Pre-publication, Part 1* (Wellington: Waitangi Tribunal, 2009), chs 2, 3; Waitangi Tribunal, *Te Urewera: Pre-publication, Part 2* (Wellington: Waitangi Tribunal, 2010), chs 8, 9
37. *Land Air Water Association v Waikato Regional Council* unreported, 23 October 2001, Judge Whiting, Environment Court, Auckland, A110/01, para 447
38. *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433, 456
39. *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA), 305
40. *Te Kupenga o Ngati Hako Inc v Hauraki District Council* unreported, 23 January 2001, Judge Bollard, Environment Court, Auckland, A010/2001, para 50
41. *Takamore Trustees*, p 456
42. *Waikanae Christian Holiday Park v Kapiti Coast District Council* unreported, 27 October 2004, Mackenzie J, High Court, Wellington, CIV-2003–485–1764, p 40
43. *Land Air Water Association v Waikato Regional Council* unreported, 23 October 2001, Judge Whiting, Environment Court, Auckland, A110/01, p 120
44. *Takamore Trustees v Kapiti Coast District Council*, p 434
45. *Waikanae Christian Holiday Park*, p 38
46. *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331, 362–363
47. Waitangi Tribunal, *Tauranga Moana*, vol 2, pp 684–701
48. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1224
49. Document D7, p 4
50. Paper 2.154, p 292
51. Document A37, pp 35–36
52. We also note that, in the 2003 petroleum inquiry, Dr John Yeabsley drew examples from fuel price protests and supply disruptions in Europe to suggest that problems in the physical supply of petroleum products can emerge remarkably quickly, as modern supply chain

management ensures the quantity of costly oil held in the system is the minimum needed to meet market expectations. However, it is questionable whether making it easier to extract crude oil from the ground provides any strategic advantage for the sort of short-term supply disruptions described above. Oil consumers' demands are more exacting than they were in the 1930s, when the strategic priority was to have heavy fuel oils to burn in the boilers of warships. Modern vehicles require fuels of different specifications, some of which could not be produced effectively from the range of crudes and condensates produced in New Zealand. Ensuring the sustained supply of these fuels does not depend on the speed at which prospectors can gain access to land.

53. Document A32, p 5
54. Document C3, p 12
55. Document D4, paras 39.10–39.20
56. Document E31, p 24; doc E36, p 6. There were some differences of approach between the Ngāruahine and Ngāti Kahungunu claimants as to the exact composition and functions of such boards.
57. Document E31, pp 24–25
58. Ibid, p 25
59. Ibid
60. Document E36, p 6
61. Ibid, p 7
62. Ibid, p 10; paper 2.163, pp 27, 30–32, 46
63. Paper 2.163, pp 38, 41
64. Document E31, p 26
65. Paper 2.163, p 54
66. See Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995); Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996); Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *Te Urewera: Pre-publication, Part 1*; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010)
67. Document C1, p 16
68. Document A29, pp 74–75
69. Paper 2.154, pp 336–342
70. Document E28(g), p 11
71. Paper 2.154, pp 337, 369–370
72. Ibid, p 303
73. Ibid, p 304
74. Te Ture Whenua Māori Act 1993, ss 169–179
75. Paper 2.154, pp 98, 149
76. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1223
77. Controller and Auditor-General of New Zealand, *Turning Principles into Action: A Guide for Local Authorities on Decision-making and Consultation* (Wellington: Controller and Auditor-General of New Zealand, 2007), p 25
78. See the Office of Treaty Settlements' website at www.ots.govt.nz and Craig Bauld, 'Trust Farm-Share-Buy Offer to Ease Wastewater Costs', *Gisborne Herald*, 28 October 2009.
79. Document C1(DN17), pp 8–11
80. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1445
81. Waitangi Tribunal, *The Whanganui River Report*, p 265
82. 'Functions and Powers', Parliamentary Commissioner for the Environment, http://www.pce.parliament.nz/about-us/functions-and-powers (accessed 14 December 2010)
83. Ibid
84. Waitangi Tribunal, *Ngawha*, p 145
85. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1223
86. Waitangi Tribunal, *Tauranga Moana*, vol 1, p 467

Dated at Wellington this 29th day of March 2011

L R Harvey, presiding officer

J R Morris, member

B J Morrison, member

W T Temara, member

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APPENDIX I

PARTICIPANTS IN THE MANAGEMENT OF THE PETROLEUM RESOURCE INQUIRY

The Claimants

The claimants were:

- Ngā Hapū o Ngāruahine (Wai 796), represented by Richard Boast, Deborah Edmunds, Niki Sharp, and Tom Bennion.
- Ngāti Kahungunu (Wai 852), represented by Grant Powell, Lucy Gay, and Roimata Smail.

Claimants with Watching Briefs

Those claimants with watching briefs were as follows:

- Ngāti Ruapani ki Waikaremoana (Wai 144), represented by Kathy Ertel and Jeremy Shoebridge;
- Ngāti Kahungunu ki Wairoa (Wai 621), represented by Paul Harman;
- Te Runanganui o Te Pakakohi Trust Incorporated (Wai 99), represented by Campbell Duncan;
- Te Rūnanga o Ngāti Ruanui, represented by Damien Stone;
- Ngāti Koata (Wai 566), represented by Hemi Te Nahu/Paul Cochrane;
- Te Rūnanga o Ngāti Porou (Wai 272), represented by James Johnston, Olivia Lund, Campbell Duncan, and Liana Poutu; and
- a cluster of groups with claims that also fell into the East Coast and Te Rohe Pōtae inquiry districts, represented by Darrel Naden and Joshua Hitchcock. The Wai numbers and claimants represented were: Wai 74 (John Puke), Wai 849 (James Taitoko), Wai 901 (Laura Thompson), Wai 1082 (Nikora Tautau), Wai 1089 (Maggie Ryland-Daigle), Wai 1269 and Wai 1337 (Tony Evans), Wai 1300 (Matekino Smith), Wai 1409 (Marge Rameka), Wai 1498 (Floyd Kerapa), Wai 1974 (Koha Hepi), Wai 1975 (Susan Clark), Wai 1976 (Mariata King), and Wai 1866 (Tamati Reid).

Those claimants with watching briefs who were granted leave to present evidence, question witnesses, and make submissions were as follows:

- Ngā Hapū o Poutama (Wai 1747), represented by Annette Sykes and Miharo Armstrong; and

- the Otaraua hapū (Wai 2262), represented by Liana Poutu.

Herewini Kaa (Wai 39), represented by Charl Hirschfeld and Tavake Afeaki, had a watching brief and was granted leave to file limited submissions.

The Crown

The Crown was represented by Helen Carrad, Sarah Inder, Ben Francis-Hudson, and Virginia Hardy.

Interested Parties

Interested parties were:

- The South Taranaki District Council, which was represented by Matt Conway.
- The Taranaki Regional Council, which was represented by Matt Conway.
- The Wairoa District Council, which was unrepresented.
- Ngā Rauru and Ngāti Ruanui, which were unrepresented.

APPENDIX II

PROCEDURAL STEPS FROM THE 2003 REPORT TO THE PRESENT REPORT

The Original Plans for a Further Report

The Waitangi Tribunal's *Petroleum Report* of 2003 dealt with the interest Māori have in the petroleum resource since the enactment of the Petroleum Act 1937, which nationalised the resource. A second report was to address the regulatory regime for managing the exploitation of the resource.

In February 2004, the then Associate Minister of Energy wrote to the Tribunal advising that officials had commenced a review of the *Minerals Programme for Petroleum* and that, under the Crown Minerals Act 1991, a replacement programme had to be issued before 1 January 2005.[1] The Associate Minister asked when the Tribunal would be reporting on the issues not dealt with in the 2003 report concerning the management of the petroleum resource. At the time, the Tribunal was reviewing the evidence it had received on those issues. The Tribunal's acting director advised the Associate Minister that the report was expected to be completed by the end of 2004.[2]

In November 2004, counsel for Ngā Hapū o Ngāruahine sought to file further evidence concerning the *Minerals Programme for Petroleum*.[3] This request coincided with the Tribunal's conclusion that it had received insufficient evidence to report on petroleum management issues. The Tribunal's registrar invited Ngā Hapū o Ngāruahine to submit further material relevant to those issues, advising that once this material was received the Tribunal would decide if it would hear further from the Crown. It was said that no firm undertaking could be given that the Tribunal would respond before January 2005.[4]

The Deferral of the Report

In May 2007, counsel for Ngā Hapū o Ngāruahine sought from the Tribunal a direction that the Crown file all documents from the year 2000 onwards relating to petroleum management issues on which the Tribunal was yet to report.[5] Ngā Hapū o Ngāruahine also asked the Tribunal to convene a short hearing to update the evidence and submissions from parties. Chief Judge Joseph Williams responded that the Tribunal was not inclined to take steps to enable the preparation of a further report unless there were reasons to

justify diverting resources away from the full inquiry and report-writing programme that was then underway.[6] In response to its request, the Tribunal received submissions on this matter from the Crown, Ngāti Kahungunu, and Ngā Hapū o Ngāruahine.[7]

Upon reviewing the submissions, Chief Judge Williams advised parties that the Tribunal would defer the completion of the inquiry into petroleum management issues, with the deferral to be reviewed on 1 August 2008. Counsel for the claimants and the Crown were given leave to file further relevant evidence and information at any time before that date.[8]

In November 2008, Judge Carrie Wainwright, the acting chairperson of the Tribunal, delegated to Tribunal member Joanne Morris the task of determining the interlocutory matters regarding the inquiry.[9] Ms Morris approved a timetable for the filing of further evidence and submissions and advised the parties that, once these were received, a judicial conference would be convened to consider how and when the Tribunal would report on the issues.[10] When all the timetabled steps were completed, Ms Morris set down the judicial conference for 13 October 2009.[11] At that point, the Tribunal renamed the inquiry 'the management of the petroleum resource inquiry'.[12]

The Reasons for a Hearing

At the judicial conference on 13 October 2009, the Crown submitted that a hearing was not needed and that the Tribunal could, and should, proceed to write its report for the management of the petroleum resource inquiry. However, claimant counsel submitted that a brief hearing was needed for a number of reasons, including the following:

- With the departure from the Tribunal in 2008 of Chief Judge Williams, who presided over the earlier petroleum inquiry, the Tribunal panel inquiring into and reporting on petroleum management issues would include at least one new member, who would not have heard the relevant evidence and submissions from the earlier inquiry, and a hearing would likely benefit that person's understanding of the issues.
- Eight years had passed since the original hearing and the Tribunal members who were present would need to refresh their memories on the relevant evidence and their understanding too would likely benefit from a hearing.
- Important evidence had recently been filed and it would not be subject to cross-examination unless there were a hearing.
- The 'generic' approach to the earlier inquiry, by which two claimant groups participated fully and others had a watching brief,[13] worked well, and the same approach would limit the length of a hearing.
- Opposing legal submissions from claimant and Crown counsel would be better tested orally at a hearing rather than by further written submissions.

Ms Morris considered that a hearing was needed before the Tribunal could report on the issues in the management of the petroleum resource inquiry.[14]

The Appointment of the Tribunal

The Tribunal panel for the petroleum inquiry was Chief Judge Williams, John Baird, John Clark, and Ms Morris. Chief Judge Williams's appointment to the High Court bench in September 2008 rendered him unable to preside in the present inquiry. Mr Clark, who resigned from the Tribunal upon his appointment as cultural adviser to the Office of Treaty Settlements, considered that he should not be part of the panel as there could be an issue of actual or perceived bias if he were involved in determining a contemporary claim against the Crown.[15] Mr Baird has until recently served as a director of Mighty River Power Limited, and the question of his involvement in the current inquiry was referred to the new chairperson of the

Tribunal, Chief Judge Wilson Isaac, to decide. Chief Judge Isaac determined that Mr Baird may have had a conflict of interest and would not be a member of the panel.[16]

In January 2010, Chief Judge Isaac appointed a Tribunal panel for the inquiry into the management of the petroleum resource comprising Judge Layne Harvey as presiding officer and Tribunal members Ms Morris, Pou Temara, and Basil Morrison.[17]

Text notes

1. Document c5(12), p 441
2. Ibid, p 245
3. Paper 2.51
4. Paper 2.51(a)
5. Paper 2.52, p 2
6. Paper 2.53, p 1
7. Papers 2.54, 2.55, 2.56, 2.57
8. Paper 2.58, pp 3–4
9. Paper 2.65, para 4
10. Papers 2.62, 2.66, 2.68, 2.69, 2.70, 2.71
11. Paper 2.86, p 1
12. The first inquiry was named 'the petroleum inquiry'. The second inquiry was renamed to provide a more descriptive title of the issues it was to examine and to distinguish it from the first inquiry: see paper 2.86, p 1.
13. Parties with a watching brief are acknowledged as having a greater interest than the general public but do not directly participate in the inquiry. Their role is limited to that of observers with the ability to seek leave from the Tribunal to make oral or written submissions, or to question witnesses, on particular points.
14. Paper 2.97, pp 3–4
15. Ibid, p 6
16. Paper 2.113, para 3
17. Ibid, para 4

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APPENDIX III

SELECT RECORD OF INQUIRY

RECORD OF PROCEEDINGS

1. Claims

1.1 Wai 796

(a) Thomas Ngatai, amended statement of claim, 20 December 1999

1.2 Wai 796

(a) William Blake, Toro Waaka, Marei Apatu, Murray Hemi, amended statement of claim, 21 August 2000

2. Papers in Proceedings

2.55 Counsel for Ngāti Kahungunu, memorandum concerning contemporary issues and remedies, 20 July 2007

2.107

(1) Crown Minerals Group, 'Taranaki Petroleum Wells', map

(2) Crown Minerals Group, 'Petroleum Wells within Ngāti Kahungunu Rohe', map

2.115 Presiding officer, memorandum concerning hearing dates and logistics, evidence on relevant local government process, and Wai 99 participation in the inquiry, 10 February 2010

2.144 Counsel for Wai 272, memorandum seeking leave to participate in inquiry, 22 April 2010

2.154 Transcript of evidential hearing, Aotearoa Pā, Okaiawa, 26–29 April 2010

2.163 Transcript of legal submissions, District Court, Wellington, 6 May 2010

2.177 Counsel for Wai 1747, memorandum submitting question to Vincent Webb concerning his affidavit on behalf of Vector Ltd, 31 May 2010

2.185 Presiding officer, memorandum setting date for Crown to file information concerning new Environmental Protection Authority and resultant effect on issues and evidence, 16 August 2010

2.188 Crown counsel, memorandum responding to paper 2.185, 9 September 2010

2.189 Counsel for Ngā Hapū o Ngāruahine, memorandum responding to papers 2.185 and 2.188, 14 September 2010

2.190 Counsel for Ngāti Kahungunu, memorandum responding to paper 2.188, 24 September 2010

2.192 Presiding officer, memorandum responding to paper 2.189, setting filing dates, requesting information from Crown, and granting filing extension in response to paper 2.191, 28 September 2010

2.193 Counsel for Ngāti Kahungunu, memorandum responding to paper 2.192, 5 October 2010

2.194 Counsel for Ngā Hapū o Ngāruahine, memorandum responding to paper 2.192, 5 October 2010

2.196 Crown counsel, memorandum responding to paper 2.192, 15 October 2010

2.198 Counsel for Ngā Hapū o Poutama, memorandum concerning ownership issues and legislation, 22 October 2010

2.199 Counsel for Ngā Hapū o Ngāruahine, memorandum responding to paper 2.196, 22 October 2010

2.200 Counsel for Ngāti Kahungunu, memorandum responding to paper 2.196, 26 October 2010

2.201 Presiding officer, memorandum requesting Crown to extend proposed timeframe for current Crown Minerals Act 1991 review process to allow consideration of Tribunal report, 27 October 2010

RECORD OF DOCUMENTS

A. Documents Filed up to End of First Hearing

A16 Ronald Hudson, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 21 August, 2000

A18 Thomas Ngatai, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 21 August 2000

A20 Marylinda (Mere) Brooks, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 21 August 2000

A21 Ngā Hapū o Ngāruahine, comp, supporting papers to briefs of evidence, various dates

A23 Takirirangi Smith, brief of evidence on behalf of Ngāti Kahungunu, not dated

A29 Evelyn Cole, brief of evidence on behalf of Crown, not dated

A31 Dr John Yeabsley, brief of evidence on behalf of Crown, not dated

A32 Professor Gary Hawke, brief of evidence on behalf of Crown, not dated

A37 Geoffrey Logan, 'A Review of the New Zealand Petroleum Industry' (commissioned research report, Wellington: Waitangi Tribunal, 2000)

C. Documents Filed after 24 November 2004

C1 Tihi (Daisy) Noble, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 31 October 2008

C2 Maria Robinson, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 31 October 2008

C3 Marylinda (Mere) Brooks, brief of evidence on behalf of Ngā Hapū o Ngāruahine, 31 October 2008

C4 Michael Dreaver, brief of evidence on behalf of the Crown, 31 October 2008
Michael Dreaver, 'Maori Participation in the Minerals Programme for Petroleum' (commissioned research report, Wellington: Ministry of Economic Development, 2004)
(a) Michael Dreaver, presentation summary of evidence, not dated

C5 Tihi (Daisy) Noble, Maria Robinson, and Marylinda (Mere) Brooks, comps, supporting papers to documents C1, C2, and C3 , various dates

(A1)–(A30) Petroleum exploration information and legislation
(B1)–(B9) Resource Managment Act 1991 planning documents
(C1)–(C5) Papers concerning response from Ministry of Economic Development to Official Information Act 1982 request
(D1) Ministry of Economic Development, *Minerals Programme for Petroleum* (Wellington: Ministry of Economic Development, 2005)
(D2)–(D6) Papers concerning minerals programmes
(E1)–(E11) Papers concerning agreements and protocols
(F1)–(F9) Legislative reform materials
(G1)–(G11) Background and policy papers
(H1)–(H15) Papers concerning local government environmental management and engagement with Māori
(I1)–(I10) Papers concerning co-management

C6 Rob Robson, brief of evidence on behalf of the Crown, 27 January 2009
(a)(RR1)–(RR32) Rob Robson, comp, supporting papers to document C6, various dates

D. Documents Filed after 14 April 2009

D1 Donna Eriwata, brief of evidence on behalf of Otaraua, 20 April 2009
(a) Katrina Brunton, New Plymouth District Council, letter to Liana Poutu concerning proposed Kowhai A pipeline, 26 March 2009
(c) Andy Dodd, New Zealand Historic Places Trust, letter to Liana Poutu concerning proposed Kowhai A pipeline, 27 March 2009
(d) Donna Eriwata, presentation summary of evidence, 20 April 2010
(e) New Plymouth District Council, 'Decision on Plan Change PLC09/00019: Addition of Tikorangi Pa to Schedule 26.1: Waahi Tapu and Archaeological Sites' (Stratford: New Plymouth District Council, 19 February 2010)

D2 David Doorbar, brief of evidence on behalf of Otaraua, 20 April 2009
(b) David Doorbar, presentation summary of evidence, 20 April 2010

D4 Counsel for Ngā Hapū o Ngāruahine, closing submissions, 29 April 2009

D5 Crown counsel, further submissions, 25 June 2009

D6 Counsel for Ngā Hapū o Ngāruahine, submissions responding to document D5, 29 July 2009

D7 Counsel for Ngāti Kahungunu, submissions responding to document D5, 30 July 2009

E. Documents Filed after 16 September 2009

E1 Rob Robson, supplementary brief of evidence on behalf of the Crown, 23 December 2009

E4 John Kidd, Michael Moore, and Roger Paterson, *Stepping Up: Options for Developing the Potential of New Zealand's Oil, Gas and Minerals Sector* (Wellington: McDouall Stuart, 2009)

E8 Toro Waaka, brief of evidence on behalf of Ngāti Kahungunu, 8 March 2010

E12 Blair Sutherland, brief of evidence on behalf of the South Taranaki District Council, 24 March 2010
(a) Blair Sutherland, summary of evidence on behalf of the South Taranaki District Council, 15 April 2010
(d) Iwi Liaison Committee, minutes of meetings, various dates
(g) Jefferson Rakau Ltd, 'Review of the Iwi Liaison Committee of the South Taranaki District Council' (report to the South Taranaki District Council, Hawera: Jefferson Rakau Ltd, 2007)

E13 Alan McLay, brief of evidence on behalf of the Taranaki Regional Council, 24 March 2010
(d) Document summarising appeals against Taranaki Regional Council planning and consent decisions involving Māori
(h) Taranaki Regional Council, *Joint Hearing Committee Report on Applications by Shell Todd Oil Services Limited for Discharge Consents under the Resource Management Act 1991 Relating to the Ngarewa Wellsite* (Stratford: Taranaki Regional Council, 1999)
(i) Ian McDonald, South Taranaki District Council, letter to Maraeakura Horsfall concerning proposed exploration wells in Ahipaipa Road, Okaiawa, 3 June 1999

E14 Sylvia Allan, brief of evidence on behalf of the Tribunal, 14 April 2010

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E31 Counsel for Ngāti Kahungunu, closing submissions, 5 May 2010
(b) Extract from supplementary submissions on behalf of Ngāti Kahungunu in the Wai 262 inquiry concerning changes to the Resource Management Act 1991, not dated

E32 Counsel for Otarau, closing submissions, 5 May 2010

E34 Counsel for Ngāti Kahungunu, submissions responding to Crown submissions, 17 May 2010

E35 Counsel for Ngā Hapū o Poutama, submissions responding to Crown submissions, 17 May 2010

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E38 Vincent Webb, affidavit on behalf of Vector Gas Ltd, 19 May 2010
(a) Vector Ltd, 'Transmission Pipelines Clifton Road – Tongaporutu', map, not dated
(b) Vector Ltd, 'Maui and Kapuni High Pressure Pipelines', map, not dated
(c) Pipeline easement certificate for Maui gas pipeline, 28 March 1980
(d) Russell and Parani Gibbs, email to Vincent Webb concerning Maui pipeline realignment project, 6 September 2007
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(e) Russell and Parani Gibbs, email to Vincent Webb concerning Maui pipeline realignment project, 12 September 2007
(f) Vincent Webb, email to Russell and Parani Gibbs concerning release of reports, 8 November 2007
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(h) Russell McVeagh letter to Russell and Parani Gibbs concerning Kapuni and Maui gas pipeline negotiations, 30 September 2008
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(l) Vincent Webb, email to Russell and Parani Gibbs concerning cultural assessment report, 21 October 2006
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GLOSSARY OF MĀORI WORDS

Compiled with the assistance of Herbert Williams's *Dictionary of the Maori Language*, 7th ed (Wellington: Legislation Direct, 2001). This glossary covers Māori words used in the English text. Many of these words are open-textured words capable of bearing many meanings, depending on the context. The definitions given here relate to the way in which they are used in this report.

aroha love, affection, consideration, goodwill, charity
Aruhe *Pteridium aquilinum var esculentum*, an edible fernroot
atua god, supernatural being
awhitū remorse

hā breath
hahunga gathering of bones
hapū extended family, subtribe
hara sin
hui meeting, gathering
iwi tribe, people

kaitiaki guardian, caretaker
kaitiakitanga guardianship, stewardship
Kaponga *Cyathea dealbata*, a tree fern
karakia prayer, spiritual incantation
karanga call, summon
kaumatua elder
Kiekie *Freycinetia banksii*, a climbing plant
kōhatu stone, rock
koiwi human remains
korero discussion, speech
Kotukutuku *Fuchsia excorticata*, a tree
Kōuka *Cordyline australis*, the cabbage tree
kuia woman elder

mahinga kai gardens
Māikaika wild onions
maioro defensive ditches
Mamaku *Cyathea medullaris*, an edible tree fern
mana a form of power and authority derived directly from the gods
mana whenua customary rights and prestige and authority over land

manaakitanga hospitality
Māoritanga Māori culture
Matariki the Pleiades, beginning of Māori year
mātauranga knowledge, knowledgeable
mātauranga Māori Māori knowledge
Mauku *Asplenium bulbiferum* and *Hymenophyllum*, ferns
maunga mountain
maunga tipuna ancestral mountain
mauri life force, aura, mystique, ethos, lifestyle; purposefulness, a design, a will to fulfil; spark of life
mauri o te motu mauri of the land
moenga tuatahi first act of procreation
moenga tuarua second act of procreation
mokopuna grandchild, child of a son, daughter, nephew, niece, etc

pā fortified village, village
paru kōkōwai clay which contains ochre
pito umbilical cord
pou whenua boundary post
pū harakeke clump of flax
pū kiekie clump of kiekie (*Freycinetia banksii*)
pū oneone clod of soil
pū pīngao clump of pīngao (seaside grass)
pū rākau clump of trees
pū whakapapa whakapapa expert
puke hills

rākau tree, wood
rangatira chief
rangatiratanga authority of a chief, chieftainship
Rarohenga underworld
reo language
ringa mutu missing finger
rohe territory
ruku kai diving for food
rūnanga council

taiaha weapon of hard wood
takiwa district, space
takutai moana sea coast
tangata person

tangata whenua people of the land
taniwha water monster
taniwha kaitiaki spriritual or water guardian
taonga items that are greatly treasured and respected
tapu sacred
tatau pounamu peace pacts
tauranga waka waka anchorage
Tawa *Beilschmiedia tawa*, a tree
Tāwhara vine used for food and drink
te ao Māori the Māori world
te ao Tukupū the universe
tihe mauri ora sneeze of life
tikanga principles, customary practices
tipua goblin, demon, object of terror
tipua kaitiaki supernatural guardian
tīpuna ancestors
tohi baptise
tohunga priest, specialist
tohunga whakairo carving expert
Tōi *Cordyline indivisa*, a tree
tuāhu sites of religious ceremonies
tuakana older relations
tūpapaku the body of the dead
tupua Taranaki version of tipua

urupā burial grounds
uruuru whenua a place of ritual, or a ritual to ensure safe passage through a strange land

waewae tapu first-time visitors
wāhi place
wāhi tapu place of historical and cultural significance, sacred place
wai water
wai hohou rongo waters to implement peace
wai paru water which contains certain clay
wai tohi waters of baptism
waka canoe
waka tauranga landing places of ancestral canoes
wānanga lore of the tohunga
whaikōrero art of oratory; formal speech-making
whakaika waters of dedication
whakapapa genealogy

whakaparu to render dirty
whakatauki proverb
whānau family
whānau atua pantheon of god children
whanaungatanga family and kinship links
whare tū tahanga house which stands alone
whare wānanga sites or houses for passing on knowledge
whatu stone
whenua afterbirth, land

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