RECOGNISING RANGATIRATANGA: SHARING POWER WITH MĀORI THROUGH CO-MANAGEMENT

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To the memory of my great-great grandfather
William Rolleston
Minister of Native Affairs and Minister of Justice

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Glossary of Māori Terms

Hapū	Extended family group; sub-tribe
Iwi	Tribe
Kaitiaki	Guardian
Kaitiakitanga	Guardianship
Kāwanatanga	Governance
Mana whakahaere	Power to manage
Mātauranga	Māori science and knowledge
Tangata whenua	Māori people with customary authority in a particular area; people of the land
Tangihanga	Funeral ceremony
Taonga	Treasured thing; valued things and resources
Tikanga	Māori custom or law
Tino rangatiratanga	Māori constitutional authority; tribal self-government

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INTRODUCTION

The constitutional terrain in New Zealand is shifting. An analysis of the place of tangata whenua in Aotearoa's resource management laws makes this clear. New Zealand governments have progressively been involving Māori in decision-making regarding natural resources from the early 1990s. Many general, and largely unsatisfactory, provisions were initially enacted in an attempt to meet obligations under the Treaty of Waitangi. Building on this trend, resource co-management regimes have been enacted. The impetus for this dissertation is one such regime: the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. In that legislation, it will be posited, the New Zealand government has acknowledged tino rangatiratanga and shared power with Māori more than it ever has. Treaty jurisprudence has long been characterised by aspirations and a confidence that time will see the promise of early case law fulfilled.[1] The Waikato regime juridifies that promise as never before.

Part One of this dissertation establishes a framework for the critique of co-management arrangements. Within this Part, Chapter One outlines a Treaty-based analysis of resource management statutes, and explains the origins of statutory co-management. Chapter Two elaborates upon the notion of co-management of resources and outlines the regimes to be analysed. Chapter Three then establishes the evaluative paradigm for analysing co-management regimes. That paradigm is based on a conception of the Crown-Māori relationship as containing degrees of power sharing, indicated by the extent to which clusters of administrative (and occasionally property) arrangements establish collaborative management between government and local users. Specifically, those clusters of statutory arrangements show varying degrees of recognition of Māori rangatiratanga (indigenous constitutional authority) over local taonga (valued things). These can be arranged along a spectrum that aims to clarify the mix of power-sharing arrangements that now govern the Crown-Māori relationship in resource management. The various points and provisions on that spectrum will then be analysed against Treaty principles.

[1] See generally Rt Hon Geoffrey Palmer "The Treaty of Waitangi - Where to from here? Looking back

Part Two will apply this analytical framework. Within it, Chapter Four will analyse specific resource management provisions, revealing the degrees of power sharing in the Crown-Māori relationship, and aspects of Treaty-compliance. Chapter Five will then analyse the Waikato regime as a whole on these parameters. These two modes of analysis - along a spectrum of power-sharing arrangements and against Treaty principles - then permit us to judge the Treaty-consistency of co-management regimes as a whole.

Part Three then concludes with a discussion of the constitutional implications of the trend towards sharing power through co-management.

PART ONE

Chapter One: The legal framework for co-management

Statutory co-management regimes that share the management of natural resources between central government, local government and tangata whenua (Māori customary groups) are gaining in prominence. They have arisen in response to Māori claims to natural resources based on the Treaty of Waitangi and customary rights. Most recent and notable of these regimes covers the Waikato River as part of a multi-iwi settlement. That regime places rangatiratanga in a modern and practical context and spurred this dissertation. At the outset, it is important to understand the legal context for these regimes, and why that has led to statutory co-management in the quest to strengthen rangatiratanga.

1.1 The legal background to statutory co-management

The Treaty of Waitangi, viewed as a treaty at international law, is not considered directly enforceable in New Zealand courts.[2] Treaty principles must be incorporated into legislation for our courts to recognise them.[3] Legislation doing so constituted one early attempt by the Crown to meet its Treaty obligations.[4] Indeed, the notion of Treaty principles was brought about by legislation and given meaning through the courts' interpretations.[5] Moreover, with a sovereign Parliament in New Zealand, not bound by Treaty principles, resource management statutes cannot be challenged in the courts for Treaty-inconsistency.[6]

While Māori have made customary rights claims to natural resources, those claims are often deflected, therefore, by existing statutory regimes. The Resource Management Act 1991 (RMA) is a good example. Under it, the power to make most decisions about resources is devolved to local government, precluding most Māori claims to

[2] *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).
[3] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands case*].
[4] See Conservation Act 1987, s 4; Resource Management Act 1991 [RMA], ss 6(e), 7(a), 8; State-Owned Enterprises Act 1986, s 9; Fisheries Act 1996, s 174.
[5] See *Lands case*, above n 3.
[6] See *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA).

control their use. Those statutory regimes might give Māori some role to play in resource management, but might not do enough to give effect to Māori rangatiratanga over resources as guaranteed by Article Two of the Treaty.[7]

Further, action by Māori to have their rights enforced is often unsuccessful. Litigation to require Treaty-consistent public decision-making is costly and often *ex post facto*. As litigation usually occurs through judicial review, it can result in decisions being quashed only for the same result to subsequently be reached by an amended process. The Waitangi Tribunal has done much to put Treaty issues on the agenda. However, a successful claim to the Tribunal usually only results in recommendations being made to government, which may not be followed. Even where Māori customary rights to resources have not been fully extinguished (as may be the case with fresh water or land under rivers),[8] litigation to enforce those rights could be protracted. Furthermore, Parliament's ability to legislate over any customary rights 'victory', as occurred with the Foreshore and Seabed Act 2004, renders the outcome of such litigation uncertain. Of course, Parliament could also legislate to end statutory co-management, but the repeal of legislation may take more political will than overriding a court decision.

Fundamentally, Māori have no legal sovereignty to make laws, nor legal powers of public decision-making outside those given to them by legislation. While they may have political sovereignty, they are not viewed in New Zealand's courts as having legal sovereignty.[9] Parliament is considered sovereign in New Zealand, and any delegated legislative or administrative power conferred on iwi could only be derived from Parliament. While rangatiratanga is a form of authority arising from prior occupation, and does not rely on Parliament for its validity, the only way in which Māori can truly exercise rangatiratanga as a matter of current public law is through Parliament devolving power.

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[7] Hirini Matunga "Decolonising Planning: The Treaty of Waitangi, the Environment and a Dual Planning Tradition" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 36.
[8] *Paki v Attorney-General* [2010] NZSC 88.
[9] Albert Venn Dicey *An Introduction to the Law of the Constitution* (10th ed, MacMillan & Co, London, 1959) at 70.

In light of these issues, it becomes clear why statutory co-management regimes have become the preferred legal and political solution to Māori claims to natural resources. Treaty rights must be incorporated into legislation for them to have meaning, other statutory frameworks inconsistent with Māori authority need to be modified, and a more solid legal foundation for rangatiratanga can be recognised.

1.2 The evaluation of co-management regimes

This dissertation aims to evaluate current co-management regimes between government and Māori. The text and principles of the Treaty will be the evaluative paradigm. Treaty principles are relevant to co-management regimes because these regimes have arisen in the context of Crown-Māori relations and Treaty settlements, where both parties rely on the Treaty to justify their positions. Moreover, Treaty principles are the appropriate evaluative tool because government should comply with those principles.

Government should comply with those principles because the Treaty is our founding document of government, and justifies the presence of a Westminster system in Aotearoa. It is integral to New Zealand's constitutional fabric,[10] and the honour of the Crown and constitutional morality dictate compliance.[11] Further, all Crown policies, acts or omissions can be challenged as inconsistent with the principles of the Treaty through the Waitangi Tribunal.[12] Treaty principles thus have a pedigree as a tool for evaluating government action. Lastly, if Treaty principles became a part of a written New Zealand constitution, co-management regimes could be judged according to those principles by the courts. To engage in that exercise now, before any change in the *grundnorm* towards a written constitution,[13] is therefore justified.

[10] Cabinet Office *Cabinet Manual 2008* at 1-2.
[11] *Lands case*, above n 3, at 703; see Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Mass.), 1977) at 126, where Dworkin defines 'constitutional morality' as the moral principles "presupposed by the law and institutions of the community."
[12] Treaty of Waitangi Act 1975, s 6.
[13] See Paul McHugh "Constitutional Voices" (1996) 26 VUWLR 499 at 503, where *grundnorm* is defined as "the fundamental political fact upon which governance by law is based."

1.3 What do Treaty principles require?

(a) The relevant principles

Various Treaty principles have been expressed and interpreted by the courts and the Waitangi Tribunal. It is therefore necessary to determine which principles should be used to evaluate co-management. Waitangi Tribunal reports are not binding on the courts, and should be used with care. However, the Tribunal's sole jurisdiction to determine the meaning of the Treaty (for the purpose of claims to it) means its reports should be given much weight.[14] The strongest exposition of Treaty principles has come from the Tribunal: its reports should be considered closely.

The pre-eminent principle concerns the acquisition of sovereignty by the Crown in exchange for the protection of rangatiratanga, which was said to be the essence of the bargain by the Waitangi Tribunal during Justice Durie's tenure.[15] While it is true Māori only ceded kāwanatanga (governorship) and retained tino rangatiratanga (indigenous chiefly authority), Parliament is sovereign. Māori have no legal sovereignty existing outside of Parliament's control.[16] This dissertation will thus proceed on the basis that Māori have some political sovereignty in New Zealand, whereas their legal sovereignty has been eroded over time such that arguments advocating Māori legal sovereignty do not fit readily with current constitutional arrangements. The Crown, through Parliament, and under the law, has freedom to govern.[17] More recent Waitangi Tribunal reports have said, however, that while this exchange did occur, it does not preclude some degree of self-governance or autonomy for Māori.[18]

The Treaty establishes a partnership between Crown and Māori, where both partners are to act towards one another reasonably and with the utmost good faith.[19] That

[14] Treaty of Waitangi Act 1975, s 5(2); *Lands case*, above n 3, at 661-662.
[15] *Lands case*, above n 3, at 673.
[16] *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC).
[17] *Lands case,* above n 3, at 665-666.
[18] Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 200.
[19] *Lands case,* above n 3, at 667, 715.

partnership is not necessarily equal,[20] so the Crown is obliged to actively protect Māori interests, including Māori use of their lands and waters, to the fullest extent practicable.[21] Consultation with Māori is often required of government in furtherance of active protection, but is not a duty applicable in all situations.[22] Further, compromise is required between the partners to meet the needs of Māori and the general populace.[23]

The rangatiratanga to be protected by the Crown includes input into the management of resources and other taonga according to Māori cultural preference.[24] Māori have a right to tribal self-regulation and management, within the law, as a part of their guaranteed rangatiratanga.[25] Related to this is the Crown obligation to legally recognise tribal rangatiratanga by providing the foundation and resources for iwi to contribute more fully to local affairs.[26]

Lastly, the Treaty is a 'living instrument'. It is the foundation for a developing social contract capable of adaptation to new circumstances provided there is a measure of consent and adherence to broad principles.[27] The advent of co-management regimes shows the Treaty relationship is constantly developing.

(b) The importance of context

In balancing the Crown's right to govern and tino rangatiratanga, context greatly influences what the Treaty requires. The context of this dissertation is resource management.

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[20] *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 527.
[21] *Lands case,* above n 3, at 664.
[22] Ibid, at 683.
[23] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 52; *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11, 1986); *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 137.
[24] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984) at 13.
[25] *Ngawha Geothermal Resource Report,* above n 22, at 101.
[26] Waitangi Tribunal *Report of the Waitangi Tribunal on Mangonui Sewerage Claim* (Wai 17, 1988) at 47.
[27] *Lands case,* above n 3, at 715.

If rangatiratanga is the authority for Māori to make decisions for Māori, they have lost much of that power since 1840.[28] For Māori to have rangatiratanga in a legal sense thus requires government action. That may be through devolution of power, or through monetary Treaty settlements that allows a tribal base to develop.[29] But, the decision to take that course is influenced by context, and what government sees as the appropriate balance between kawanatanga and rangatiratanga.

The Tītī Islands are a good example. There, on isolated islands, Māori have control over the harvest of tītī (muttonbirds). This is based on their rangatiratanga over that harvest. The Ngāi Tahu Claims Settlement Act 1998 returned the title of the islands to Rakiura Māori, and they are managed as nature reserves. This was the first formal and comprehensive co-management agreement to emerge from the Treaty settlement process.[30]

Now consider Queen Street in Auckland. Even if Māori could demonstrate rangatiratanga over the land under Queen Street, the public interest would militate against them being given management of the area. The rangatiratanga might be of the same order as that of Māori over the tītī harvest, and the land might have been taken in breach of the Treaty, but the context would determine the manner in which the Crown meets its Treaty obligations.

Seeing how context affects how Treaty obligations might be met, we can form a more holistic understanding of what is important (and to whom), and of the degree to which Treaty principles should be followed. If the Crown allows for greater Māori involvement in public decision-making over key resources, that shows a greater commitment to protection of rangatiratanga than if the resources were of no interest to the Crown.

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[28] Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, Dunedin, 2005) at 100.
[29] See, for instance, the Ngāi Tahu Treaty Claims Settlement of 1998, and the Waikato-Tainui Raupatu Claims Settlement of 1995.
[30] Henrik Moller and others "Co-Management by Māori and Pakeha for Improved Conservation in the Twenty-First Century" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 156 at 163.

(c) Resolving conflicts between principles

In evaluating the degree to which a co-management regime accords with Treaty principles, the conflicting imperatives of Treaty jurisprudence must be kept in mind, as a regime might satisfy one principle to the detriment of another.

The principal conflict of imperatives lies between Articles One and Two - between the Crown's right to govern and the Māori right to the protection of their rangatiratanga. Indeed, this conflict leads to others: Crown management of natural resources on behalf of all New Zealanders runs counter to Māori claims to management of resources according to their cultural preferences. Central government authority and the notion of an indivisible Crown sovereignty also run counter to Māori tribal regulation and self-determination.

However, compromise, partnership and good faith are also required by Treaty principles. These notions can help resolve the kāwanatanga/ rangatiratanga conflict, because they evolved to regulate the Crown-Māori relationship.[31] Each policy or action by the Crown can be assessed according to the balance established between Treaty imperatives in a particular context. Reference to that context, and to how that balance fits with notions of compromise and partnership, should allow for conflicts between principles to be resolved and permit an overall judgement of Treaty-consistency.

1.4 How co-management might comply with Treaty principles

Co-management of natural resources might, in some contexts, reconcile the Crown's right to govern with rangatiratanga over resources. The principle of partnership will likely be satisfied by some degree of co-management, though this will depend on the manner in which power is shared. It could also meet the duty of active protection. If other Treaty principles are satisfied, then co-management might fit with the notion of the Treaty as a developing social contract. A template for future Crown-Māori

[31] See generally *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) and *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

interaction may be established. Indeed, the Waitangi Tribunal's most recent report considers co-management is Treaty-consistent, and the way forward in resource management.[32]

[32] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

Chapter Two: The concept of co-management

2.1 Understanding co-management

Co-management refers to a continuum of arrangements involving various degrees of sharing power and responsibility between government and the local community.[33] It is the sharing of power between government and local resource users to manage a specified resource,[34] and conflicts with Hobbesian conceptions of limitless, indivisible authority.[35] The extent and manner of power sharing can vary greatly.

Common resources have often been managed by the state, with legitimacy derived from legislative and executive power. Co-management, however, stems from the notion of self-regulation, with legitimacy derived from community-based knowledge. This is based, in turn, on the notion that stakeholders affected by the state of a resource are better placed to make decisions regarding that resource than central government. [36] Co-management regimes may also result in more comprehensive approaches to ecological problems by involving a range of stakeholders with different interests and knowledge.[37]

Co-management usually occurs within a legal framework established by government.[38] It therefore has two sources of legitimacy: constitutional power and self-regulation. Our Resource Management Act 1991, for instance, has largely devolved decision-making power over natural resources to the local level, but within a statutory scheme.

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[33] Fikret Berkes and others "The benefits of the commons" (1989) 340 Nature 91-93.
[34] Ibid.
[35] For an anlaysis of New Zealand power structures in relation to Hobbesian theory, see Paul McHugh "Sovereignty this century – Maori and the common law constitution" (2000) 31 VUWLR 187 at 191.
[36] Moller, above n 30, at 157.
[37] Michael Bathgate and P Ali Memon "Towards Co-management of Fisheries in New Zealand" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 251 at 254.
[38] Svein Jentoft and Bonnie McCay "User participation in fisheries management: Lessons learned from international experiences" (1995) 19 Marine Policy 227–246.

Tipa considers a spectrum of co-management forms are available in New Zealand.[39] Her analysis focuses on degrees of power sharing, emphasising means of ensuring local resource users have the capacity to effectively participate in management.[40] Moller et al. dismiss the idea that consultation is adequate co-management, believing decision-making power must be shared equitably between stakeholders for the 'co' in co-management to have meaning.[41]

2.2 Co-management with indigenous populations

Co-management can help to strengthen indigenous self-governance and autonomy.[42] Strong tribal structures and knowledge of the local environment can make indigenous peoples ideal partners in co-management.[43] Culture and traditions can be preserved by the incorporation of traditional resource management techniques into co-management regimes.[44]

In Australia, co-management arrangements exist over various protected areas. At Kakadu National Park, there is an Aboriginal majority on the management board.[45] In Canada, First Nations have become involved in co-management through the treaty settlement process. Most significant of these is the Nisga'a Treaty.[46] That allowed for the Nisga'a to self-govern, and provided for joint management committees to be established (made up of equal numbers of Nisga'a and government members), which provide advice to the British Columbia and Nisga'a governments. Joint management arrangements are also in place between the Cree and Quebec in the James Bay area,[47]

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[39] Gail Tipa "Co-Management: An Indigenous Perspective" in Michelle Thompson-Fawcett and Claire Freeman (eds) *Living Together: Towards Inclusive Communities* (Otago University Press, Dunedin, 2006) 155.
[40] Ibid.
[41] Moller, above n 30, at 157.
[42] David Witty "The Practice behind the Theory: Co-management as a community development tool" (1994) Plan Canada 23-27, cited Ian Blundell "Co-management: a tool for genuine Māori involvement in coastal management" (Master of Resource and Regional Planning thesis, Otago University, 2003) at 32.
[43] Moller, above n 30, at 157.
[44] Ibid.
[45] Grazia Borrini-Feyerabend and others *Sharing Power: A Global Guide to Collaborative Management of Natural Resources* (Earthscan, London, 2004) at 143.
[46] Nisga'a Final Agreement (1998), Chapters 11, 8 at [77] <www.ainc-inac.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/nis_1100100031253_eng.pdf>.
[47] James Bay and Northern Quebec Agreement (1975) <www.gcc.ca/pdf/LEG000000006.pdf>.

as well as between the Inuvialuit and Parks Canada in the form of the Aulavik National Park Management Planning Team.[48]

2.3 The regimes to be investigated

The context of this dissertation is resource management. There are currently various forms of statutory co-management in New Zealand. This dissertation will examine a handful of these, and consider them against each other. This is crucial to considering co-management in the context of Treaty jurisprudence. The main regimes to be examine are as follows:

Resource Management Act 1991

This legislation saw a fundamental shift from central control of resources to regional control. It was also one of the first Acts to incorporate references to Māori interests and the principles of the Treaty.

Part 9 Fisheries Act 1996

Arising from the fisheries settlements of the 1990s, this was designed to give effect to the obligations stated in the Treaty of Waitangi Fisheries Claims Settlement Act 1992. It establishes frameworks through which local Māori can customarily manage fisheries.

Ngāi Tahu Claims Settlement Act 1998

This settlement covered most of the South Island, and was the first settlement legislation to incorporate co-management paradigms. This was done through the use

[48] Parks Canada "Aulavik National Park Management Plan" (2002) <www.pc.gc.ca/pn-np/nt/aulavik/docs/plan2.aspx>.

of statutory overlays, joint-management committees and amended resource management processes.

Te Arawa Lakes Settlement Act 2006

This settlement vested the beds of the Rotorua lakes in Te Arawa. As well as powers arising from this property ownership, resource management processes were modified and a joint strategy group established, which is to propose policy for the lakes.

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and Ngati Tuwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010

This settlement instigates a new era of co-management over the Waikato River by government and iwi. It does so through various tools: a higher-level regional co-management body with equal numbers of Māori and government members, a contestable trust fund, localised joint-management between iwi and councils and incorporation of Māori knowledge and culture.

Marine and Coastal Area (Takutai Moana) Act 2011

This Act establishes statutory frameworks for recognition of customary rights in the foreshore and seabed. Powers to veto resource consents and fetters on local government discretion are of interest for this study.

Different aspects of these regimes will be identified and located along a spectrum of power-sharing co-management arrangements. That analaytical framework must therefore be described.

Chapter Three: The spectrum of power-sharing

3.1 The analytical method

This study will analyse co-management regimes by degrees of power sharing between the Crown and Māori. Various regimes, containing different powers and rights, exercisable by either government or Māori, exist across the country. Some are nationally applicable; some are area or resource-specific. Analysis of co-management is thus a complex and context-specific task.

First, the range of provisions within different resource management regimes must be understood: a whole regime must be understood by the sum of its parts. A framework must thus be established to consider specific elements of co-management. That framework will be a spectrum representing the varying degrees of power sharing between government and Māori. This is merely an analytical tool; it is accepted there may be overlap in the degrees of power sharing on the spectrum.

In effect, each co-management regime contains a basket of power-sharing provisions. Considering one basket against another, we can understand how government is sharing power. Regimes can then be considered in their totality against a Treaty framework, to determine whether one regime is more in keeping with Treaty principles than another. Recommendations as to how government might best give effect to the Treaty relationship in future can then be made.

3.2 What the spectrum represents

Various forms of power are apparent in New Zealand's resource management regimes. We can speak of a spectrum of property rights and the powers they entail; of central versus local government power; and of vertical power sharing arrangements as opposed to horizontal arrangements. For my purposes, I will examine the arrangements along a spectrum from full government decision-making power over resources, at one end, to full Māori management of resources, at the other. The

reasons for this analytical perspective become clear when we consider the distinction between property and authority.

The rights and powers arising from property clearly differ according to the type of property concerned. However, all owners generally enjoy the same rights and powers concerning a single kind of property: for instance, the power to exclude others from use of the resource. Compare this to public authority: the justifications for it and attendant entitlements can vary greatly, and depend largely on legislation. It is true that if Māori own property, they may largely exercise rangatiratanga over it. But if this was the only way in which rangatiratanga was exercised, the constitutional position of Māori would be no different to other private owners. They would have the same rights and powers as any other with property, and public power could still be wielded over that property by the government (through resource management requirements).

Therefore, the constitutional place of Māori, their rangatiratanga, is best recognised through statutory devolution of public authority, as opposed to vesting of property alone. Placing fee simple in the hands of Māori is not recognition of any constitutional status of Māori: it does not change how power is exercised through the state. However, Parliament may confer public authority upon citizens by reason of their holding property. The Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA) shows this in granting to those with customary marine title the power to veto resource consents.[49]

Considering a co-management regime in its entirety, public authority coupled with property rights would likely be the most Treaty-consistent structure. Conferral of public authority by itself, in contrast, might be more Treaty-consistent than merely vesting title.

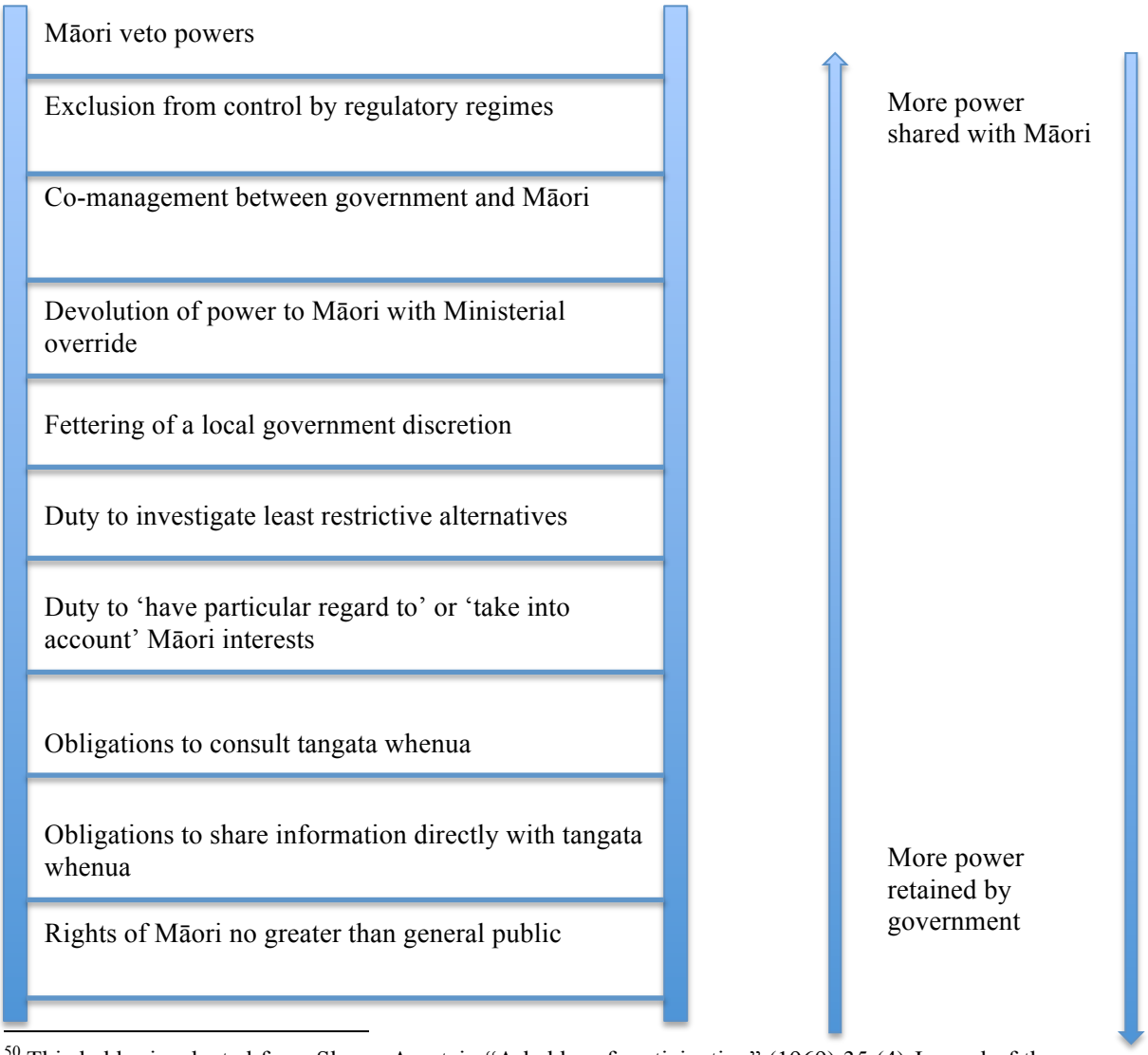
[49] Marine and Coastal Area (Takutai Moana) Act 2011 [MCAA], s 66(2).

So, rights and powers arising from property and those arising from public authority are incongruous, and cannot form different parts of the same scale. With different pedigrees, they should be kept separate. The spectrum used here will thus consist of various forms of public authority as shared between government and Māori. This is the most constitutionally significant factor and will aid Treaty analysis of co-management regimes.

3.3 The spectrum

The spectrum below can be used to locate the current range of provisions in New Zealand in the realm of co-management.[50]

Figure 1. The spectrum of power sharing in resource management



[50] This ladder is adapted from Sherry Arnstein "A ladder of participation" (1969) 35 (4) Journal of the American Institute of Planners 216.

This framework will now be applied to the complex and layered realm of resource management law, to better understand the Crown-Māori relationship in this context.

PART TWO

Chapter Four: Analysis of provisions along the spectrum

5.1 Rights no greater than the general public

At this end of the spectrum, legislation treats Māori as having the same interest in the environment as other citizens, and co-management is not apparent. The RMA has such provisions. If an application for consent is publicly notified, any person may make a submission on that application, and then only those who submit may appeal a decision.[51] If we accept the paradigm that government makes resource decisions for all New Zealanders (under Article One of the Treaty), then these sections may be Treaty compliant: Māori have an opportunity, like all others, to make an input and for that to be considered. However, where applications for resource consent are not notified (which is the majority of the time),[52] Māori would have no right of input. These sections may thus be a breach of the Treaty principles of partnership and active protection.

In the wider RMA context, though, Māori values are given special consideration by decision-makers. The matter is thus more complicated. To those provisions we now turn.

5.2 Sharing information directly with Māori

Māori interests may be given prominence among the factors that decision-makers exercising RMA powers must consider.[53] The courts have also placed Māori in a position above that of the general public in some contexts. For example, they may be

[51] Resource Management Act 1991 [RMA], ss 96, 120; see *Nga Tai O Kawhia Regional Management Committee v Waikato Regional Council* [2009] NZRMA 184, where the hapū was unable to substitute itself into proceedings as a group 'having an interest greater than the public generally' (per s 274(3) of the RMA) because of a failure to submit on an initial resource consent application (s 274(5)).
[52] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 255.
[53] RMA, ss 6(e), 7(a), 8.

able to give evidence at appeals, as tangata whenua status might give them an interest in proceedings greater than the general public.[54]

Statutory Treaty settlements have affirmed this 'special interest' status by requiring decision-makers in resource consent processes to share information with local Māori upon receipt of applications. Such obligations have been imposed in favour of Ngāi Tahu and Te Arawa.[55]

So, Māori may sometimes have a greater say in resource management processes than the general public. This recognises that Māori have rangatiratanga and kaitiakitanga over their taonga. However, practical recognition is limited: Māori have little power to exercise their rangatiratanga, and decision-making power rests wholly with government. The latter point forms the general paradigm in resource management, and is justified by Article One of the Treaty. It is questionable, however, whether it properly balances Article One and Two imperatives.

5.3 Obligations to 'have particular regard to' or 'take into account' Māori interests

These requirements force decision-makers to follow certain processes and consider Māori interests, thus somewhat constraining the Article One right to govern. The Waitangi Tribunal accepts that this should be a point on the spectrum of Crown-Māori relations, and calls it 'effective influence' by kaitiaki.[56]

The Crown manages many natural resources for the benefit of all New Zealanders,[57] with the RMA's primary purpose being sustainable management of resources.[58] Within that paradigm, various statutory provisions, notably Part 2 RMA, place

[54] See *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197.
[55] Ngāi Tahu Claims Settlement Act 1998 [NTCSA], s 207; Te Arawa Lakes Settlement Act 2006 [TALSA], s 66.
[56] Wai 262, above n 52, at 272.
[57] Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990) at 42.
[58] RMA, s 5(1).

varying degrees of emphasis on Māori interests. Strongest is the requirement that decision-makers "recognise and provide for … the relationship of Māori … with their ancestral lands … and other taonga" and "the protection of recognised customary activities."[59] These are deemed matters of national importance, alongside various environmental imperatives. Then, a lesser requirement is imposed that decision-makers shall exercise their powers with "particular regard to … kaitiakitanga."[60] An even weaker requirement is that decision-makers "take into account the principles of the Treaty of Waitangi."[61]

The Treaty of Waitangi is thus the least important mandatory consideration for decision-makers under the RMA. There is some discretion as to whether to provide for the Treaty of Waitangi and kaitiakitanga; they must only be considered, and may not prevail, ultimately, in the balance of interests. Only in s 6(e) is there a duty to provide for the relationship of Māori with their lands.[62] Overall, though, the Privy Council has stated that these provisions provide "strong directions to be borne in mind at every stage of the planning process."[63]

Arguably the greatest Māori input into RMA decision-making is through s 61(2A). This requires regional councils to take into account relevant iwi planning documents when reviewing or changing its regional policy statement. These documents allow iwi to influence resource management actively, without further consent of government.[64] That they may be prepared without any form of title (customary or fee simple) recognises that a kaitiaki relationship with taonga might justify Māori input in decision-making: that rangatiratanga can have practical meaning. Provisions that only allow for iwi to make such planning documents when they have title are less in keeping with that notion.[65]

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[59] Ibid, s 6(e).
[60] Ibid, s 7(a).
[61] Ibid, s 8.
[62] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [73] per McGechan J, cited in *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2003) 9 ELRNZ 111 at [35].
[63] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at 594.
[64] Wai 262, above n 52, at 116.
[65] See MCAA, ss 85, 93.

However, none of these provisions amount to a right to veto under the RMA: Māori interests must be balanced against other economic and public interests.[66] The Waitangi Tribunal has held that the kaitiaki interest is important, "but it is not a trump card."[67] Case law confirms this: Māori interests are only one of many in ss 6 and 7, and defer to the RMA's overall purpose.[68] The overall operation of the RMA, then, manifests the typical legislative understanding of the Article One / Two relationship. The Article One imperative to govern on behalf of all takes precedence, with Article Two interests only to be considered. Government has ultimate decision-making power. Thus, while government decisions may be invalidated for failure to properly take into account the Part 2 provisions,[69] Māori interests can be outweighed.[70] Litigation in response to decisions against Māori interests is therefore often unsuccessful,[71] and when it is successful, government might simply make the same decision again after a more rigorous consideration of Māori interests.[72]

Statutory settlements have also placed obligations upon government that require special consideration of Māori interests when making decisions, in the form of statutory acknowledgements. These require special consideration of Māori interests by consent authorities,[73] but they may only influence procedural issues around resource consent notification. They may not constrain the final decisions reached.[74] However, localised provisions can require consideration of more specific issues.

An example of this is s 17(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act (WRSA). This requires that those exercising functions under conservation legislation have particular regard, among other things, the restoration of

[66] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 305; *Friends and Community of Ngawha v Minister of Corrections* [2003] NZRMA 272; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] NZRMA 395; *McGuire,* above n 63; *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 at 86.
[67] Wai 262, above n 52, at 272.
[68] RMA, s 5(1).
[69] *Te Runanga o Ngati Taumarere v Northland Regional Council* [1996] NZRMA 77.
[70] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347.
[71] Jacinta Ruru "Undefined and unresolved: exploring indigenous rights in Aotearoa New Zealand's freshwater legal regime" (2010) 20 The Journal of Water Law 236, where she notes that only 2 of 19 cases litigated by Māori regarding water rights have been successful.
[72] *Te Runanga o Ngati Taumarere*, above n 69.
[73] NTCSA, ss 215, 217; TALSA, s 62.
[74] *Kemp v Queenstown Lakes District Council* [2000] NZRMA 289.

Waikato-Tainui's relationship with the Waikato River.[75] Section 241 of the Ngāi Tahu Claims Settlement Act 1998 (NTCSA) requires conservation boards to have particular regard to tōpuni (statutory overlays) in a particular area, which outline specific Ngāi Tahu values for that area. Section 49 of the MCAA also requires that particular regard be had to views of affected tangata whenua in considering conservation applications.[76]

Kaitiakitanga is the justification for these obligations being imposed upon decision-makers. Yet, final decision-making power remains with government. This is hardly active protection of Māori in "the use of their lands and waters to the fullest extent practicable."[77] The Treaty requires the Crown to protect the continuing obligations of kaitiaki towards the environment.[78] This flows from the need to protect rangatiratanga, an aspect of which is management of resources.[79] Although the government may seem to recognise tangata whenua as kaitiaki, a strong emphasis on the Article One right to govern leaves that status without much recognition through public power. These provisions thus barely comply with the partnership and active protection principles, and are largely Treaty-compliant through reliance on Article One.

5.4 Obligations upon decision-makers to consult tangata whenua

The previous point on the spectrum required certain factors to be borne in mind by decision-makers. Here we begin to see decision-makers obliged to positively undertake certain actions.

[75] Decision-makers must have regard to Schedule 2 of that Act, which includes the restoration of tangata whenua relationships with the river.
[76] MCAA, s 47(1): 'Affected tangata whenua' are those who the Minister regards as exercising kaitiakitanga over a particular area.
[77] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.
[78] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 284.
[79] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984) at 13.

For instance, regional policy statements must be prepared in consultation with iwi authorities under the RMA.[80] Further, the Local Government Act 2002 (LGA) requires local authorities to provide opportunities for Māori to contribute to decision-making processes.[81] A local authority can address these requirements by ensuring processes for consulting Māori are in place.[82]

The Fisheries Act 1996 allows the Minister to temporarily close any fisheries waters to either improve sustainability or recognise customary fishing in that area.[83] The Minister may only do so, however, after consulting tangata whenua, and providing for their input and participation in that decision-making process.[84]

The NTCSA also requires consultation: certain public authorities must consult Ngāi Tahu as to the effect on Ngāi Tahu values of policy for a given area.[85] Consultation with customary marine title groups is also required by the MCAA where coastal policy statements are being proposed or changed.[86] This requirement is of a lesser pedigree than those under the RMA and LGA, which arise from tangata whenua status, not from title. As the Waitangi Tribunal has noted, the justifications for Māori involvement in resource management should be the strength of kaitiakitanga relationships, not customary title or historical wrongs.[87]

Hayward has written that Waitangi Tribunal jurisprudence shows consultation has become a Treaty principle in its own right.[88] Ultimately, though, consultation must surely be understood as merely a mechanism by which the principles of a good-faith partnership and active protection of rangatiratanga might be met.[89] Consultation is not

[80] RMA, Schedule 1, cl 3(1)(d).
[81] Local Government Act 2002 (LGA), s 81.
[82] Wai 262, above n 78, at 259.
[83] Fisheries Act 1996, s 186A.
[84] Ibid, s 186A(7).
[85] NTCSA, s 242.
[86] MCAA, s 77.
[87] Wai 262, above n 78, at 279.
[88] Janine Hayward "'Flowing from the Treaty's words': the principles of the Treaty of Waitangi" in Nicola Wheen and Janine Hayward (eds) *The Waitangi Tribunal – Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 29, at 37, citing Waitangi Tribunal *The Ngati Rangiteaorere Claim Report* (Wai 32, 1990).
[89] Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 776, 1999).

a necessary condition for adherence to these other Treaty principles, it seems, because policies which protect rangatiratanga can be created without consultation.

Consultation is a means by which the Crown can act reasonably and in good faith towards Māori, thus meeting the partnership and active protection principles. At the same time, the Crown maintains its right to govern as promised in 'the exchange'.[90] However, over-reliance on consultation to bring in an iwi perspective can be criticised.[91] While the government expresses a willingness to protect rangatiratanga, Māori have limited means of exercising that rangatiratanga. If rangatiratanga includes the right to manage resources,[92] consultation in lieu of transfer of managerial power falls short of protecting rangatiratanga. This is not to say rangatiratanga should not be balanced with kāwanatanga. But how that balance is struck is a vital concern.

5.5 Duty to investigate the least infringing alternative

The obligation to consult iwi can be met by having certain processes in place that are routinely used. The additional duty to investigate the least infringing alternative in a given case, though, may require the government to engage consultants, and delay a decision it might have made earlier. This may be a more onerous restriction on government than general obligations to consult.

This technique was used to force the Far North District Council to reconsider a decision on effluent discharge. Assiduous consultation with iwi was not enough to satisfy the Planning Tribunal that proper consideration of Māori values in the RMA had been satisfied. This was because an alternative technique, which would have been less offensive to iwi relationships with the local waterways, was not fully investigated. The council was thus required to make further investigations into the

[90] *Lands case*, above n 77, at 673.
[91] Hirini Matunga "Decolonising Planning: The Treaty of Waitangi, the Environment and a Dual Planning Tradition" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 36 at 44.
[92] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 51; *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984) at 13; *Report of the Waitangi Tribunal on the Manukau Harbour Claim* (Wai 8, 1985) at 67.

proposal that least infringed the cultural connection tangata whenua had with the area.[93]

The requirement of investigating the alternative that least impinges on Māori interests has since been cited with approval by the Privy Council.[94] The Canadian courts, in examining justifications for limits on aboriginal rights, have also asked whether infringements were the smallest possible to achieve the desired result.[95] Indeed, the duty to investigate alternatives that least impinge on Māori interests has some similarity to the human rights doctrine whereby the least restrictive alternative is preferred.[96]

As Māori interests are actively protected in cases such as these, there is Treaty compliance. Further, it requires good faith efforts by government to work with Māori to achieve mutually beneficial outcomes (if possible), which follows the partnership principle. However, the final decision can still ultimately go against Māori interests. It would seem, then, that the only way Māori interests might be given more weight would be by fettering local government or greater power sharing.

5.6 Fettering a local government discretion

So, government discretion in resource management can be constrained procedurally through administrative law concepts of relevant considerations and due process. In limited contexts, though, local government discretion to issue resource consents is substantively fettered. This is a greater limit on government power that sits further along the spectrum.

Section 55 of the MCAA is such a limit, which prevents a consent authority from granting resource consents for an activity that will have more than minor effects on

[93] *Te Runanga o Ngati Taumarere v Northland Regional Council* [1996] NZRMA 77.
[94] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].
[95] *R v Sparrow* [1990] 1 SCR 1075.
[96] *Hansen v R* [2007] NZSC 7 at [126]; compare *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

the exercise of a protected customary right.[97] However, protected customary rights are likely to be rare, given the stringent legal tests.[98] Further, the s 55 restriction does not apply to a wide range of activities.[99] Thus, while the restriction is nominally strong, it is likely to be of little utility. As such, Māori interests will not be protected in accordance with Article Two imperatives as they might have been.

5.7 Devolution of power to Māori with government override

The previous points on the spectrum have seen decision-making power retained by government, with Māori interests able to be overridden in the balance of various imperatives. At this point, we see genuine devolution of power, albeit subject to Ministerial override. We begin to see that resources are co-managed to a degree, through vertical arrangements. This is to be contrasted with what I will call 'true co-management' (where decision-makers sit equal to each other) at the next point on the spectrum.[100]

For instance, the MCAA devolves to tangata whenua (who meet certain criteria) the power to exercise customary rights on land they do not own.[101] The ability to do so practically recognises kaitiakitanga and rangatiratanga. However, the Minister retains the ability to impose controls if the exercise of that customary right has a significant adverse effect on the environment.[102] This Ministerial power is also seen in the RMA,[103] and balances Article Two rights (which tend to be similar in nature to customary rights[104]) and the Article One imperative to govern on behalf of all.

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[97] MCAA, s 55(2).
[98] Ibid, s 52.
[99] Ibid, s 55(3), which excludes existing aquaculture activities, emergency activities, existing accommodated infrastructure (including network utilities and port companies), and mining activities from this limitation.
[100] Henrik Moller and others "Co-Management by Māori and Pakeha for Improved Conservation in the Twenty-First Century" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 156 at 157.
[101] MCAA, ss 51, 52; the idea that customary rights exist independently of title to land was famously enunciated in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
[102] MCAA, s 56(1).
[103] RMA ss 17A, 17B, Schedule 12.
[104] *Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 27.

Customary fisheries management groups under Part 9 Fisheries Act 1996 are also apropos. These provisions are expressly to make better provision for the rangatiratanga over fisheries guaranteed by Article Two of the Treaty.[105] Any tangata whenua group may apply to the Minister stating their special spiritual or cultural relationship with the fishery they wish to customarily control.[106] If the Minister is satisfied, he can recommend the Governor-General declare a 'taiapure fishery' for that area.[107] A management committee consisting of local Māori are then appointed to manage the fishery.[108]

Regulations have also been made pursuant to s 186 of that Act, recognising and providing for customary food gathering.[109] Those regulations allow for the creation of mātaitai reserves, within which kaitiaki can make bylaws restricting the taking of particular species of fish.[110] As with taiapure and the MCAA, the Minister retains residual powers to manage the environment: in this case, the ability to cancel the appointment of kaitiaki.[111] However, with mātaitai, the rangatiratanga of Māori over the fishery is given greater recognition. This is through a requirement that the Minister must first work with tangata whenua to resolve the sustainability issue before invoking his or her powers.[112]

Fisheries are specifically mentioned in Article Two, which made them a central issue in settlements.[113] The power devolved to customary management groups in this context is thus a strong recognition of Treaty principles. The residual override power is also in line with the obligation of government to manage natural resources on behalf of all. Indeed, that imperative was considered a justified reason for limits being placed on customary fishing rights by the Supreme Court of Canada in *R v Sparrow*.[114] The exercise of the Minister's power in the case of the Fisheries Act is

[105] Fisheries Act 1996, s 174.
[106] Ibid, s 177.
[107] Ibid, ss 175-176.
[108] Ibid, s 184.
[109] Fisheries (South Island Customary Fishing) Regulations 1999.
[110] Ibid, cl 25.
[111] Ibid, cl 31.
[112] Ibid, cl 30.
[113] See Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
[114] *R v Sparrow*, above n 95.

prescribed by legislation that ensures certain processes are followed. The *Sparrow* justifications for limiting aboriginal rights may be met by those provisions: the limitations are reasonable, related to a sufficiently important objective, and in line with the honour of the Crown *vis-à-vis* Māori.[115]

Considering provisions along the spectrum of power sharing as a whole, however, the dominant paradigm in resource management is still government control of resources in line with Article One. This is because the government recognises other important interests in New Zealand's natural resources.[116] Chapter One of this dissertation clearly supports the view that this model is sometimes appropriate. However, if the Treaty is the foundation of a developing social contract and a partnership,[117] questions must be asked as to whether it is time to give that partnership new meaning and greater practical recognition through shared public power.

5.8 'True co-management' structures

At this point on the spectrum, we begin to see decision-making power exercised jointly by government and Māori, where before government alone exercised power.

The RMA has structures for co-management with Māori; they are simply not used. Section 33 allows a local authority to transfer power to another public authority (which includes any iwi authority).[118] However, that public authority must satisfy certain criteria as to efficiency and capability.[119] This section is yet to be used to devolve power to Māori.[120]

Tangata whenua could also be given status as a heritage protection authority over places of spiritual or cultural significance, which would give them power to control

[115] Ibid.
[116] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011), at 270.
[117] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 715.
[118] RMA, s 33.
[119] Ibid, subss 33(4)(c)(ii)-(iii).
[120] Wai 262, above n 116, at 258.

use and development of that place.[121] However, only Ministers may grant such status, and this has not occurred with Māori.[122]

With s 33 not being used, Parliament enacted s 36B, providing "a less empowering and conversely more palatable mechanism for local authorities to reach joint management agreements with … iwi."[123] These agreements allow the parties to jointly exercise local authority functions, powers or duties under the RMA. The RMA does not require local authorities to consider or use s 36B. Quite possibly as a result of this, only one s 36B joint-management agreement has been entered into so far.[124]

Now consider the power sharing in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (WRSA) and the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010. This legislation's main purpose is to "restore and protect the health and wellbeing of the Waikato River for future generations,"[125] through a "new era of co-management [including] the highest level of good faith engagement and consensus decision-making as a general rule."[126]

The most important co-management structure established is the Waikato River Authority (WRA). This statutory body has five members representing river iwi (Waikato-Tainui, Te Arawa, Raukawa, Ngati Tuwharetoa and Ngati Maniapoto) and an equal number of Crown appointees. It has one government co-chair and one Māori co-chair.[127] The WRA will set the primary direction through its 'vision and strategy' (to be analysed in depth in the next chapter) to achieve restoration of the river.[128] It will also promote an integrated, holistic and co-ordinated approach to the implementation of the vision and strategy, and fund rehabilitation of the river through its trusteeship of the Waikato River Clean-up Trust.[129] It has general functions

[121] RMA, s 188.
[122] Wai 262, above n 116, at 259.
[123] Ibid.
[124] This agreement is between the Taupō District Council and Ngāti Tūwharetoa.
[125] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 [WRSA], s 3.
[126] Ibid, Schedule 1 cl 4, which is given statutory recognition through s 5(2)(c).
[127] Ibid, ss 4(d), 22(1), Schedule 6.
[128] Ibid, s 22(2)(a).
[129] Ibid, subss 22(2)(b)-(c).

relating to engagement with, and the provision of advice to, local government in order for it to give effect to the vision and strategy.[130]

The vision and strategy is deemed part of the Waikato Regional Policy Statement.[131] It aims to achieve sustainable management of resources by outlining regional issues and objectives, and policies or methods to achieve integrated management of resources.[132] Further, local government agencies must adapt their RMA planning documents to give effect to the vision and strategy.[133] If the WRA recommends amendments to the vision and strategy which meet certain criteria, the Minister must advise the Governor-General to enforce those amendments by Order in Council.[134] As the WRA can thus amend the vision and strategy, and include targets and programmes of action that achieve the vision,[135] it has a quasi-legislative power by which it can manage the Waikato River.

The WRA is also involved in resource consent decisions. If the Regional Council convenes a hearing committee to decide applications for activities relating to the river, half of that committee must be commissioners appointed by the WRA.[136] If the Council delegates that hearing to commissioners, it can only substitute the members it appointed to the committee, not the WRA appointees.[137] The Council must ensure the number of commissioners delegated to hear the application are equal in number to WRA appointees.[138] If an application is called-in, the board that decides that application must have members appointed by the WRA.[139]

The settlement also forces local authorities along the river to enter into joint-management agreements (JMAs) with local iwi.[140] These agreements must promote

[130] WRSA, s 23.
[131] Ibid, s 11(1).
[132] RMA, ss 59, 62.
[133] WRSA, ss 10-13.
[134] Ibid, s 21.
[135] Ibid, Schedule 2 cls 2(c)-(d).
[136] Ibid, ss 26, 28.
[137] Ibid, s 30(2).
[138] Ibid, s 30(3).
[139] Ibid, s 29(3).
[140] WRSA, s 41; Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010

the principle of co-management, respect the mana whakahaere (management power) rights of iwi, and reflect a commitment to work together cooperatively and in good faith.[141] They must also provide for the local authority and iwi to work together in carrying out RMA functions relating to monitoring and enforcement, development of planning documents and resource consents.[142] For instance, the agreement must provide that the local authority and iwi decide jointly on recommendations to the local authority on whether to amend RMA planning documents.[143] Iwi thus jointly make decisions as to changes in those documents at the WRA and the local level.

Two forms of planning document are required by the settlement. First, 'integrated river management plans' must be prepared jointly by iwi, the Crown and local agencies.[144] These plans are to achieve an integrated approach to conservation, fisheries, and regional council policies.[145] Local authorities preparing RMA planning documents must have regard to the integrated plan.[146] Second, environmental plans are to be prepared by iwi.[147] Local authorities preparing planning documents must 'recognise' those plans as they would under s 61(2A) of the RMA.[148]

The Te Arawa settlement established the Rotorua Lakes Strategy Group (RLSG),[149] which is made up of equal members representing the Regional Council, District Council, and Te Arawa.[150] It has less power than the WRA as its role is confined to policy formulation and drafting of proposals for statutory plans.[151] While the RLSG has some involvement in resource consent issues,[152] no statutory authority is devolved to it as with the WRA. Where certain consent applications are called-in, the Minister

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[NTWRA], s 43.
[141] WRSA, s 44; NTWRA, s 46.
[142] WRSA, s 43; NTWRA, s 45(1).
[143] WRSA, s 46(2)(b); NTWRA, s 48(2)(b).
[144] WRSA, s 35; NTWRA, s36.
[145] WRSA, s 35(2).
[146] Ibid, s 37(4).
[147] WRSA, s 39; NTWRA, s 41.
[148] WRSA, s 40; NTWRA s 42.
[149] TALSA, ss 48-50.
[150] Deed of Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues: Relationship Schedule, Te Arawa-Her Majesty the Queen in Right of New Zealand (18 December 2004), Part 1 cl 2.
[151] Ibid, cl 4.6.
[152] Ibid, cl 4.7.

need only consult Te Arawa on membership of the decision-making board.[153] This gives Te Arawa less authority than the iwi interests represented in the Waikato regime.

The power to implement the RLSG's recommendations rests with the Councils, which make up two-thirds of that group. While the RLSG may have little formal power, it could have large practical power, as the Councils are unlikely to agree to policies in the RLSG that they themselves would not implement. Further, Te Arawa members may well be elected directly to the Council by popular vote, considering Te Arawa's sizeable percentage of the local population.[154]

Māori have much more influence over plans and resource consent processes in these co-management structures than in general RMA provisions, which is clearly a result compliant with partnership and active protection. This form of co-management, where decisions of legal consequence are made jointly, therefore represents a shift away from the government power paradigm.

5.9 Exclusion from regulatory regimes

Here, Māori may exercise customary rights outside the normal regulatory frameworks that apply to the use of a resource. If Māori can determine how to carry out their customary practices, this strongly recognises rangatiratanga. Nominally, it shares more power than do co-management structures. However where those structures pertain to important resources, the latter affords more practical power.

Customary rights exercisable under Part 9 Fisheries Act 1996 are placed outside of normal regulatory regimes, insofar as regulations made for the purpose of customary

[153] Ibid, Environment Protocol cl 8.
[154] According to the 2006 census, 36.4% of the Rotorua District Population identify as Māori, compared with 14.6% for all of New Zealand. Statistics New Zealand *Census of Population* (2006) <http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace/SnapShot.aspx?type=ta&ParentID=1000004&tab=Culturaldiversity&id=2000024>.

fishing take precedence over other regulations for the same area or fishery.[155] However, as a Ministerial override still exists, that exclusion is not fully in accordance with rangatiratanga.

The Waikato regime, by contrast, excludes customary activities from regulatory regimes and has no Ministerial override. Those activities may be carried out by members of Waikato-Tainui despite ss 9-17 of the RMA, any rule in a district or regional plan, a navigation bylaw, or a permit requirement under the Reserves Act 1977.[156] Health and safety requirements are all that may be imposed,[157] and no Ministerial power may be exercised over s 57 customary activities.[158] This renders the Waikato exclusions a stronger power-sharing arrangement.

Devolving managerial power by allowing the exercise of customary rights, in the absence of regulatory frameworks and Ministerial override, is active protection of the exercise of rangatiratanga. While Parliament can re-legislate to end such exclusions, that is a much higher hurdle to overcome than exercising a Ministerial discretion. There is thus a higher degree of protection for Māori interests and greater autonomy to exercise customary rights where there is no Ministerial override.

5.10 Māori veto powers

This point on the spectrum sees the strongest devolution of power to tangata whenua. Where before government made the final decision regarding use of resources, that power now may now rest, in practice, with Māori.

It is important to contrast two different types of veto power: that arising from property (private power), and that arising from authority (public power).

[155] Fisheries Act 1996, s 186(2)(a).
[156] WRSA, s 57(1), subss 57(3)(a)-(d).
[157] Ibid, s 57(3)(e)(i).
[158] Ibid, s 61, which requires the Minister to work in conjunction with tangata whenua to resolve environmental issues arising from the exercise of customary rights.

For example, Māori who are able to meet a statutory test of customary title for an area are given status as 'customary marine title holders' under the MCAA.[159] With that 'title', certain minerals are vested in the customary marine title group (CMTG).[160] Power to prevent others exploiting those resources then arises from that statutory vesting of property, rather than from an explicit conferral of public authority. The Te Arawa settlement shows this again. By vesting the beds of Rotorua lakes in the iwi, Te Arawa can veto limited activities and structures that would usually require the consent of the landowner.[161]

The 'RMA permission right' created by the MCAA, by contrast, is a public power not connected to an explicit conferral of property.[162] Section 66(2) allows a CMTG to "give or decline permission, on any grounds, for an activity to which an RMA permission right applies."[163] Although a CMTG has a form of title, their property rights are distinct from this additional power, which is more clearly public in nature,[164] rather than a manifestation of private property rights.

The test for customary marine title is stringent,[165] and the activities over which the RMA permission right extends are very narrow.[166] The conservation permission right is similarly limited in its application.[167] In this sense, the significant powers of CMTGs to veto resource consents, or prevent a Minister from considering a conservation proposal,[168] are diluted. While Māori might have a strong power in certain contexts, those contexts are so narrow that this recognition of rangatiratanga has very limited utility.

[159] MCAA, s 58.
[160] Ibid, s 62(1)(f).
[161] TALSA, s 41.
[162] MCAA, ss 66, 72.
[163] Ibid, s 66(2).
[164] See RMA, ss 9-17, which prevent one from doing certain actions with regards to resources even on one's own land.
[165] MCAA, ss 58(1), 64.
[166] Ibid, ss 66(4), 64, which exclude existing aquaculture activities, the operations of port companies and network utilities and petroleum mining from the ambit of the RMA permission right.
[167] Ibid, s 71(6).
[168] This is the effect of the 'conservation permission right', under MCAA, s 71.

Conceptually, Māori power to grant permission (as the consent authority) for activities (as opposed to vetoing them) would be the spectrum's endpoint. Such a status for Māori groups has been suggested in the past.[169] However, no such provisions currently exist. Exclusive Māori authority over natural resources would recognise rangatiratanga, but having such power in Māori hands may contravene Article One of the Treaty. Like the lowest point on the spectrum, such a power would not represent co-management.

5.11 Summary

There are various statutory provisions that, when considered on their own, represent a certain understanding of the balance between Treaty imperatives in a given context. By analysing these provisions, we see the different aspects of the Crown-Māori relationship in resource management. But to fully establish a jurisprudence of co-management in New Zealand, analysis of whole resource management regimes, and the total basket of arrangements they offer, is also necessary.

[169] Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 343.

Chapter Five: Holistic analysis of the Waikato regime

Within a single regime there will be multiple provisions, representing different levels of power sharing. A global judgement about a cluster of power-sharing arrangements is then required to analyse a full regime against Treaty principles. This chapter will illustrate how such a global judgement might be reached, applying the above analytical tools to the co-management framework over the Waikato River.

5.1 Overview

The Waikato regime engages multiple levels of government and various bodies by allocating a range of powers and duties. The following relationship diagram and table of legal powers and instruments outlines its framework.

Figure 2. Key relationships in Waikato regime

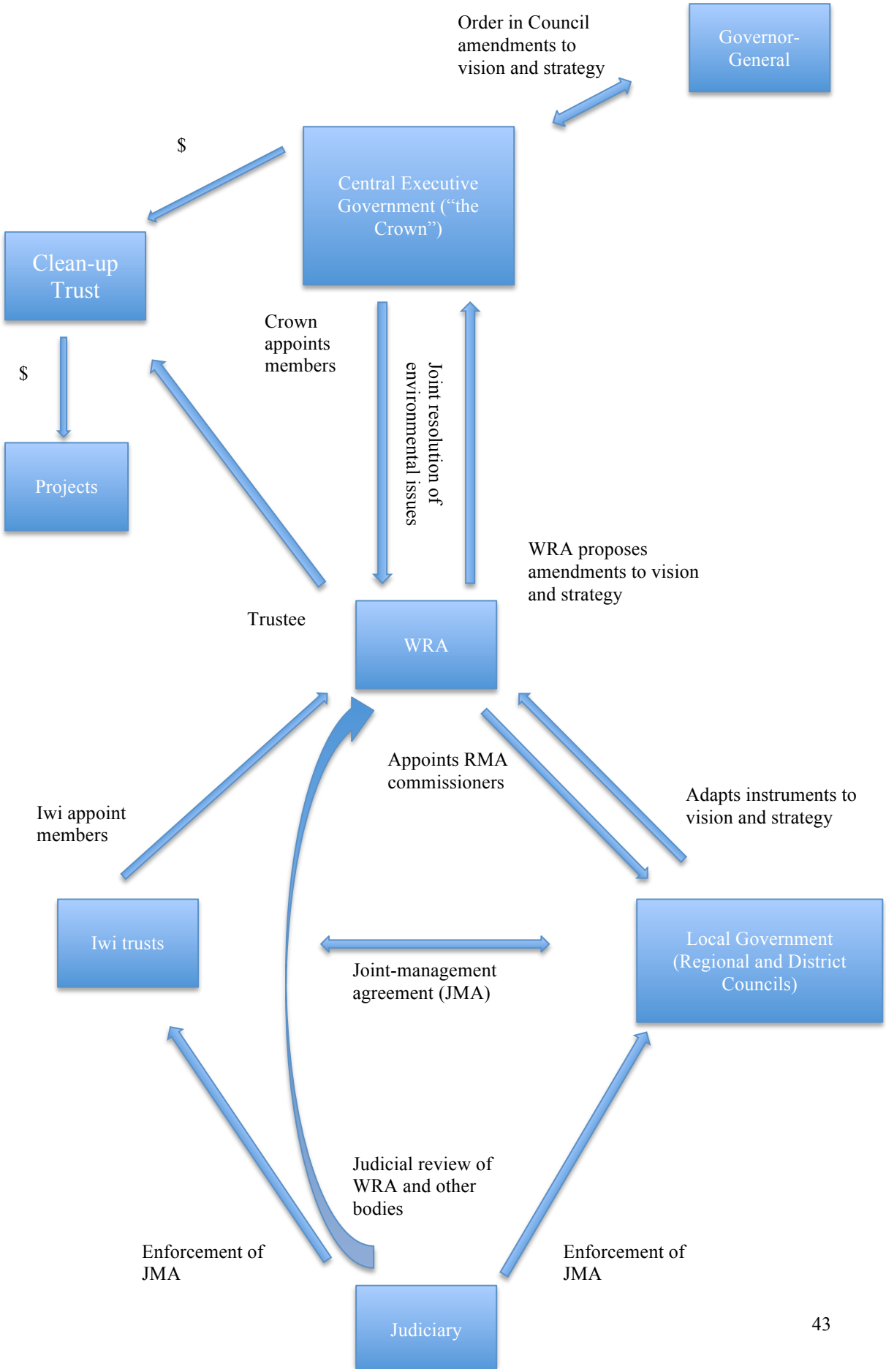

Figure 3. Instruments and powers in Waikato regime

Instrument / Power	Body responsible	Effect
Vision and Strategy (V&S)	WRA, Executive Council responsible for amendments	Local government adapt planning documents to the V&S; V&S can be amended on WRA recommendation; government decision-makers must have particular regard to V&S
Joint-management agreements (JMAs)	Local authorities, iwi	Partners to jointly carry out certain RMA functions; courts can enforce JMAs
Resource consent powers	Regional council, WRA, Minister	Consent decisions made jointly with WRA appointees, WRA appointees participate in call-in decisions
Customary management and bylaws	Waikato-Tainui Raupatu Trust, Minister, Executive Council	Iwi may regulate customary fishing and propose bylaws of wider application
Iwi environmental plans	Iwi, local authorities	Iwi environmental priorities must be considered by local government
Integrated River Management Plans (IRMP)	Iwi and relevant departments, local authorities and agencies	Local authorities must have regard to IRMP when preparing planning documents; components have legal effect in other legislation

5.2 The Waikato River Authority – a high level co-management body

The Waikato River Authority is the core of the multi-agency co-management arrangements over the Waikato River, and represents a strong form of power sharing. It develops policy and strategy to protect and restore the river.[170] While still in its infancy, the Act indicates the WRA's ability to suggest amendments to the vision and

[170] WRSA, s 24.

strategy and its resource consent functions will be important. Its impact will also be seen in its trusteeship of the Waikato River Clean-up Trust.

The vision and strategy is the primary direction-setting document for the Waikato River and activities within its catchment.[171] It was a cornerstone of the Deed of Settlement reached in relation to the Waikato River by negotiation between the Crown and iwi, and is given statutory force by the WRSA.[172] While this dissertation is focused on the Treaty-consistency of statutes, not political processes, its joint creation is consistent with the partnership principle.

As local government must adapt planning documents to the vision and strategy, it has real force. For instance, local authorities must amend regional or district plans to give effect to the vision and strategy.[173] The vision and strategy currently has general goals: restoration of the river, use of a holistic and integrated approach to management, restoration of iwi relationships with the river according to their tikanga, utilisation of mātauranga Māori (Māori customary knowledge), and the development of programmes to improve river health.[174] However, the legislation requires the WRA to review this, and to suggest amendments, at its discretion.[175] Those amendments might include targets to achieve the vision and strategy and methods of implementation.[176] During the amendment process, the WRA must take iwi management plans and objectives for the river into account.[177] Moreover, Māori interests are already represented on the WRA through strong iwi representation.

If the WRA recommends amendments to the vision and strategy which the Minister deems consistent with the settlement's purpose (to restore and protect the health and wellbeing of the Waikato River for future generations),[178] the Minister must advise

[171] Ibid, s 5.
[172] Deed of Settlement in relation to the Waikato River, Waikato-Tainui-Her Majesty the Queen in Right of New Zealand (17 December 2009), Chapter 6.
[173] WRSA, s 13(4); NTWRA, s 14(4).
[174] WRSA, Schedule 2.
[175] WRSA, ss 18-20; NTWRA, ss 19-21.
[176] WRSA, s 20(4); NTWRA, s 21(4).
[177] WRSA, s 20(2); NTWRA, s 21(2).
[178] WRSA, s 3; NTWRA, s 3.

the Governor-General to amend the vision and strategy by Order-in-Council.[179] A Minister might determine proposed amendments were inconsistent with that purpose, but that decision could be judicially reviewed on the grounds the Minister erred in law regarding application of the test of consistency. Successful review could then force the Minister to recommend amendments by Order-in-Council.

Thus, the vision and strategy could have specific targets or methods by which the river might be restored added by Order-in-Council. Local government would then have to bring their planning documents into line within 12 months,[180] and review district or regional plans (which include resource management rules).[181] Those rules have the status of enforceable regulations under the RMA.[182] So, the WRA has a quasi-legislative public power over resource management on the Waikato River.

The WRA also has decision-making power with regards to resource consent applications for activities on the river.[183] As previously mentioned, its appointees make up half of any hearing committee that hears and makes decisions on such applications, as well as forming part of any board of inquiry established under Part 6AA RMA.[184]

The last function of the WRA is trusteeship of the Waikato River Clean-up Trust, whose object is the same as the purpose of the settlement.[185] The Trust was endowed with $21,000,000 upon settlement, and will receive an additional $7,000,000 per annum.[186] The WRA will administer this contestable fund, using it to pay for projects to achieve the object of the trust.

[179] WRSA, s 21; NTWRA, s 22.
[180] WRSA, s 13(2)(b); NTWRA, s 14(2)(b).
[181] WRSA, s 13(4); NTWRA, s 14(4).
[182] RMA, subss 76(1)-(2).
[183] WRSA, ss 25-31; NTWRA, ss 26-32.
[184] WRSA, s 28; NTWRA, s 29.
[185] WRSA, s 32; NTWRA, s 33.
[186] Waikato Deed of Settlement, above n 172, cl 7.14.

5.3 Other provisions in the Waikato regime

The provisions of the Waikato regime can therefore be portrayed as representing various points on a spectrum of power-sharing arrangements. Key provisions relating to matters other than the WRA, and the Treaty-consistency of the whole regime, will now be analysed in more depth.

(a) Joint-management agreements

As mentioned in Chapter Four, iwi and local councils must enter into JMAs, providing for the joint exercise of powers and functions under the RMA.[187] Joint powers are then exercised under these agreements, somewhat like the powers exercised by the WRA, but the powers exercised are less important.

The process for making JMAs is also significant. When making JMAs, the potential for persons nominated by iwi to participate in RMA enforcement must be discussed.[188] Moreover, before the local authority prepares or amends an RMA planning document, the partners must convene a working party to discuss such changes.[189] The local authority and the iwi Trust must then decide jointly on their final recommendation to that authority regarding amendments.[190]

Practically, requiring joint recommendations regarding planning documents increases the likelihood of local authorities accepting those recommendations. The JMA partners are incentivised to work cooperatively to finalise such agreements, as the Minister has a power to decide any issue of contention between the parties as to the establishment of the JMA.[191]

[187] WRSA, ss 41- 43; NTWRA, ss 43- 45.
[188] WRSA, s 45(2)(e); NTWRA, s 47(2)(e).
[189] WRSA, s 46(2); NTWRA, s 48(2).
[190] WRSA, subss 46(2)(b)-(c); NTWRA, subss 48(2)(b)-(c).
[191] Ibid, s 48(9).

The JMA also require adherence to certain processes surrounding resource consent applications relating to the river.[192] The agreements must require each local authority to provide information on such applications to the iwi trust.[193] Further, the partners must develop best practice frameworks to assist consent authorities.[194] However, these criteria are only additional to, and must not derogate from, the criteria the local authority applies under the RMA, and they cannot require changes to consent conditions.[195]

JMAs must include processes by which local authorities can consider imposing conditions on consented activities to prevent adverse effects on customary activities.[196] Processes must also be included that avoid the granting of statutory authorisations which impinge on customary activities.[197] Importantly, these JMAs are enforceable between the parties.[198] JMAs contain elements that protect Māori interests, and those processes must be followed.

In jointly carrying out RMA functions, each partner must bear their own costs.[199] A lack of capacity on the part of Māori to properly engage is a possible reason for the lack of Māori involvement in resource management. However, to enable the exercise of rangatiratanga, iwi Trusts were endowed with funds.[200]

(b) Co-management of managed properties

The WRSA vests certain properties first in the Trust, then immediately in the Regional Council.[201] Those two bodies must enter into a co-management agreement

[192] WRSA, s 47; NTWRA, s 49.
[193] WRSA, subss 47(2)(a)-(c); NTWRA, subs 49(2)(a)-(c).
[194] WRSA, s 47(2)(d); NTWRA, s 49(2)(d).
[195] WRSA, s 47(3); NTWRA, s 49(3).
[196] WRSA, ss 62(2), 58(3).
[197] Ibid, s 62(4).
[198] Ibid, s 51(4); NTWRA, s 53(4).
[199] WRSA, s 47(4); NTWRA, s 49(4).
[200] Deed of Settlement in Relation to the Waikato River, above n 172, subcls 15.3, 15.4, 15.6, 15.7.
[201] WRSA, s 74.

to enable Council soil conservation and river control, and further the mana whakahaere of Waikato-Tainui.[202]

(c) Exercise of customary rights with no override; Power to make fisheries bylaws

The legal arrangements also allow Waikato-Tainui to carry out customary activities on the river.[203] Tangihanga (funeral ceremonies) on the river take precedence over any activity granted a statutory authorisation which conflicts with that tangi.[204] Customary activities may be carried out despite RMA restrictions on land and river use or a contrary rule in a regional or district plan.[205] The Waikato Raupatu River Trust (the Trust) may determine who carries out those customary activities, to specify conditions on them, and to limit or suspend them.[206] Co-management also flows the other way: Waikato-Tainui must give notice to local authorities of customary activities to be exercised.[207]

Ministers can usually override customary rights for environmental reasons,[208] however the WRSA requires the Trust and Minister to "work in a constructive and timely manner to seek to address" such issues - another example of co-management and consensus being the new paradigm for Waikato resource management.[209]

Pursuant to the WRSA, regulations authorise the Trust to manage customary fisheries by appointment of kaitiaki, who issue fisheries permits.[210] The Trust may also propose fisheries bylaws applicable to all in the Waikato-Tainui fisheries area for sustainability or cultural reasons.[211] The Minister may only refuse consent if there

[202] Ibid, s 76, subss 80(1), (3).
[203] Ibid, s 57(1).
[204] Ibid, s 60(3).
[205] Ibid, Schedule 3, ss 57(1), (3).
[206] Ibid, s 58(7).
[207] Ibid, s 58.
[208] RMA, Schedule 12.
[209] WRSA, s 61(5).
[210] Ibid, s 93; Fisheries Act 1996, s 186; Waikato-Tainui (Waikato River Fisheries) Regulations 2011, cl 11.
[211] Ibid, cl 22.

would be an undue adverse effect on fishing.[212] Other than this power, the Trust may manage how iwi members customarily gather food, including the setting of fines.[213]

(d) Power to jointly make IRMPs

These plans further exemplify co-management "at a number of levels and across a range of management agencies."[214] As outlined in Chapter Four, iwi and various governmental organisations must work jointly to create these plans over the river.[215] Their components must be approved both by iwi and the relevant agency.[216] Those components have legal consequences, as local authorities preparing RMA planning documents must have regard to them.[217] Fisheries components have the status of fisheries plans under the Fisheries Act 1996 (plans that may include sustainability measures).[218]

(e) Iwi environmental plans

Iwi also have the power to make environmental plans without further government approval.[219] These may state iwi environmental objectives, and promote mātauranga and tikanga Māori. These plans must then be recognised by local authorities preparing RMA planning documents,[220] and by consent authorities who deem the plans relevant.[221] As stated earlier, consent applications may be heard by a committee half appointed by the WRA,[222] so iwi environmental plans will likely be considered by that committee in those cases.

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[212] Ibid, cl 23(6).
[213] Ibid, cls 25-27.
[214] WRSA, Schedule 1 cl 4(2)(a).
[215] Ibid, s 35; NTWRA, ss 36-38.
[216] WRSA, s 36(2); NTWRA, s 37(3).
[217] Ibid, s 37(4).
[218] Ibid, s 37(3); Fisheries Act 1996, s 11A(3)(b)(i).
[219] WRSA, s 39; NTWRA, s 41.
[220] WRSA, s 40(1); NTWRA, s 42(1).
[221] Ibid, s 40(2); RMA, s 104(1)(c).
[222] WRSA, s 28(2); NTWRA, s 29(2).

(f) Duty to have particular regard to vision and strategy

This obligation reminds us of obligations in Part 2 RMA, and of obligations in the Ngāi Tahu settlement.[223] The duty rests on those carrying out functions or powers relating to the Waikato River under certain legislation.[224]

The vision and strategy gives tikanga prominence and promotes the use of mātauranga Māori.[225] The inclusion of mātauranga is significant in that the Crown has previously argued it has no responsibility to preserve or transmit mātauranga through fostering the kaitiaki relationship.[226] Importantly, those exercising powers or functions relating to the river must have particular regard to the goals in the vision and strategy as well as those considerations included in the legislation that empower them to act.[227]

(g) Duty to consult

The RMA and LGA require local authorities to consult Māori before exercising certain powers. Such clauses are conspicuously absent in this regime. This reflects the settlement's intention that Māori have early input and participation in decision-making, and not merely be a group to consult.[228] Local government must still consult iwi when it intends to carry out certain maintenance before joint-management agreements come into force.[229] Otherwise, the consultation requirements are placed upon both government and Māori as they participate in co-management.[230] Indeed, the WRA must consult Ministers, iwi and local government when it undertakes amendments to its vision and strategy: power sharing flows both ways.[231]

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[223] RMA, ss 7(a), 8; NTCSA, s 241.
[224] WRSA, s17; NTWRA, s 18. These provisions state that the duty rests on those carrying out functions under the RMA, Conservation Act 1987, Reserves Act 1977 and National Parks Act 1980, among others.
[225] WRSA, Schedule 2.
[226] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 266.
[227] WRSA, s 17(6); NTWRA, s 18(6).
[228] WRSA, Schedule 1 cl 4(2)(b).
[229] Ibid, s 70(8).
[230] Ibid, s 48(6).
[231] Ibid, Schedule 4 cl 3(2).

(h) Notification of resource consent applications

Section 27 of the WRSA obliges the Regional Council to give notice to the WRA of resource consent applications relating to the river.[232] Such notification requirements are similar to those in the Ngāi Tahu and Te Arawa settlements.[233]

5.4 Holistic understanding of how power is shared

Overall, the Waikato regime shares power such that it sits at the 'co-management point' on the spectrum. Co-management pervades the regime, and areas where more power might have been devolved are balanced by strong devolution to Māori concerning customary rights.

If JMAs were allowed to impose resource consent conditions, Māori would have had even more say. More radically, joint Māori and local government bodies might have been given the right to prepare RMA planning documents, as opposed to Māori being in an advisory role. This would enable co-management at the ground level by setting rules for local areas, complimentary to the WRA's powers.

However, Māori input on planning documents (through iwi environmental plans and integrated plans) improves on normal RMA processes. Requiring Māori representation on all local government bodies might actually be undemocratic and over-emphasise Article Two, to the detriment of Articles One and Three. Māori should not unduly restrain kāwanatanga, just as the Crown should not unduly interfere with rangatiratanga.[234] Government institutions must retain their democratic structure to honour their obligation to the people to be amenable to electoral sanction. In that local government maintains substantial power, we see compliance with Article One. The principle of exchange is founded upon the ability of government to establish the structure of its own institutions, and to make laws.[235]

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[232] Ibid, s 27.
[233] NTCSA, s 207; TALSA, s 66.
[234] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 665.
[235] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 52.

The Waikato regime shares with Māori the exercise of public power as never before. Not only are there multiple co-management bodies, but consensus decision-making and collaborative dispute resolution are recurring themes.[236] Moreover, adverse environmental effects of customary activities are to be jointly addressed by iwi and government. If members of the WRA are unable to come to a decision on a matter (which is possible due to the 50/50 nature of the body), that matter must be referred to the Minister and an iwi appointee,[237] who must "work in good faith to resolve the matter."[238] If it is resolved, they must recommend the Authority take a course of action, which, if not followed, renders their recommendation binding.[239] No process is in place to deal with a failure by those two to reach a decision. Thus, joint-decision making is strongly incentivised.[240]

Of course, some powers remain whereby government can override the decisions of Māori. But these are limited: to cultural harvest of flora (outside authorised customary activities);[241] and to the Minister's power in relation to failure to agree on the content of JMAs.[242] The latter power only arises after a two-month period where the joint management partners must attempt reconciliation.[243]

To summarise, iwi and local authorities must jointly carry out certain RMA functions. The nature of their relationship is partially determined by statutory requirements as to the content of their management agreement, which is then enforceable. Iwi and government agencies must work together to create integrated management plans, which must be considered by local government preparing RMA planning documents. And iwi have the power to create environmental plans that must be considered by local government. At a higher level, river iwi are given membership on the WRA with equal standing to government members. That body will implement a vision and strategy for restoration of the Waikato River. Its quasi-legislative powers, and the fact

[236] WRSA, Schedule 6 cl 9.
[237] Ibid, Schedule 6 cl 10.
[238] Ibid, cl 10(3).
[239] Ibid, cl 10(6).
[240] Ibid, cl 10(7).
[241] WRSA, s 63(6).
[242] Ibid, s 48(9).
[243] Ibid, subss 48(6), (7), (9).

local authorities must give effect to its vision and strategy, enable it to manage the river by public authority. The implementation of its goals is made possible by its funding of clean-up projects. Waikato-Tainui are then able to manage their own customary rights, as well as being able to propose fisheries bylaws applicable to all who use the river.

Now we must analyse this complex set of arrangements against Treaty principles.

5.5 Treaty analysis of the whole regime

Co-management of the Waikato River gives practical meaning to the partnership principle. The Crown and Raukawa, for instance, agree that this is so.[244] The settlement legislation, indeed, requires good faith engagement and working together.[245] It sets in place structures to protect rangatiratanga, while maintaining the Crown's right to govern. Shifting away from the government exercising all the power regarding resources, co-management develops the social contract founded by the Treaty. By its nature it accords with and requires good faith partnership and protection of Māori interests.

The principles of partnership and active protection have been prevalent in Treaty jurisprudence for many years.[246] However, from the mid-19th century, the Crown has dominated the Crown-Māori partnership. It has maintained Article One control of the governance of New Zealand, only restraining that power by obliging itself to consult with and consider Māori as a matter of policy, or under legislation. The courts have then restrained Crown power within the law, deeming Māori to have legitimate expectations that the Crown consult them, have regard to their interests, and uphold statutory Treaty obligations.[247] That Treaty obligations have taken the form of legitimate expectations should be no surprise, as those expectations are based on the

[244] Deed in Relation to a Co-management Framework for the Waikato River, Raukawa-Sovereign in Right of New Zealand (17 December 2009), cl 1.35.
[245] WRSA, Schedule 1 cl 4.
[246] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).
[247] *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 184 per Thomas J.

notions that government should act fairly and reasonably,[248] which pervade *New Zealand Maori Council v Attorney-General* (*Lands case*).[249]

Legislation has required the Crown (or its delegates) to consult with Māori and have particular regard to their interests, which is consistent with Treaty principles to some degree. That such processes were required of the Crown in the *Lands case* shows this.[250] However, other arrangements might be more consistent with Treaty principles.

Consider the principle of good faith partnership. The Crown meets this principle by exercising authority only after consultation with affected Māori.[251] But partnership is only evident until a certain stage: government still makes the final decisions on its own. Consider then the WRA, where power is exercised jointly. Partnership is more strongly recognised in the latter, as decisions are jointly made.

The same is true with active protection. The Crown actively protects Māori in a decision-making process by having particular regard to their interests. But, when it makes decisions, it alone exercises that power. If Māori jointly make that decision, active protection is seen in the decision itself (as Māori may protect their interests through government structures), not just in preliminary processes.

Treaty principles can be met to different degrees, and can be complied with in different ways. However, the degree of compliance reflects the balance established between Articles One and Two in any given context. Since context determines the manner of compliance, the same process might be Treaty-compliant in one context but not another.

[248] *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 at [141] per Randerson J.
[249] *Lands* case, above n 246, at 664.
[250] Ibid, at 643.
[251] Ibid, at 683.

The Article One imperative to govern resources on behalf of all is strong, but not mutually exclusive of Article Two imperatives. The provisions of the RMA and government policies on this matter, taken together, have not hitherto been consistent with partnership or active protection. The right to govern has been given too much weight, and the obligations of the Crown towards Māori too little.

Outside of the RMA, joint management has rarely occurred.[252] While the RMA can allow partnership, local government does not use those processes.[253] The Crown has argued that, as it has devolved resource management functions to local government, that is not a breach of its Treaty obligations.[254] However, the Crown cannot devolve its Treaty obligations. Those obligations might not rest with local government unless imposed by statute, but the Crown must devolve power in a manner that ensures local government complies with those principles. [255]

Merely permitting local government to enter JMAs is insufficient for the Crown to meet the partnership and active protection principles. Arguments that it would be inappropriate to force local government into partnership with iwi are now redundant as the WRSA does just that. Any arguments that such wide-ranging obligations in the RMA would fail to account for context are also partly displaced, as the WRSA covers a crucial natural resource: genuine partnership over the Waikato River sets a powerful example.[256]

Mixing co-management with normal local government power further justifies co-management. Natural resources are of immeasurable spiritual and cultural importance to Māori,[257] which is to be balanced against the national interest in resources. But,

[252] For examples of joint management, see: Department of Conservation *Te Waihora Joint Management Plan* (Department of Conservation, Wellington, 2005), made pursuant to Ngāi Tahu Claims Settlement Act 1998 (NTCSA), s 177; NTCSA, s 336 (which empowers the Minister to appoint tangata whenua as managers of the Tītī Islands).
[253] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 272.
[254] Ibid, at 269.
[255] Ibid at 269-270; *Ngati Maru ki Hauraki v Kruithof* [2005] NZRMA 1 at 14.
[256] Wai 262, above n 253, at 276, where the Tribunal says of the Waikato River: "If genuine partnership can work here, it can work anywhere."
[257] Wai 262, above n 253, at 239; Margaret Orbell *The Natural World of the Maori* (David Bateman,

given that Crown control of resources has produced the Waikato River's degradation, and given the strong environmental history of Māori,[258] these two imperatives are not mutually exclusive. Local authorities must maintain their democratic structure and right to govern in some circumstances. But there must also be public powers through which Māori may exercise rangatiratanga over their taonga. So, for consistency with Treaty principles, a co-management body must not overly restrict local government's authority.

Articles One *and* Two must thus be recognised. Normal consultation and considerations processes for local government are Treaty-compliant. But Treaty compliance in resource management as a whole requires more: different areas of influence require different policies. Government represents one set of interests (those of the general public), and should thus retain significant power. The WRA and joint-management represent another set of interests: the rangatiratanga of Māori over their taonga. Both areas of influence should be represented for Treaty compliance. The WRA is Article One-compliant as it is established by statute and has government appointees: Parliament and Ministers are thus politically accountable for their actions. Moreover, Waikato-Tainui is able to exercise rangatiratanga according to its cultural preferences over its people and fisheries, which is Article Two-compliant.[259]

The Treaty partnership is usually characterised as an unequal one: it is because of this power imbalance that active protection obligations analogous to fiduciary duties rest on the Crown.[260] Simultaneous provision for *equal* partnership and active protection is, however, justified. Equal partnership may be required by Treaty principles where the Māori interest is sufficiently strong and any adverse impact on the national interest sufficiently small. Indeed, active protection of Māori relationships with the

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Auckland, 1996) at 120–121.

[258] Henrik Moller and others "Co-Management by Māori and Pakeha for Improved Conservation in the Twenty-First Century" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 156 at 159, 167.

[259] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 51; Roger Maaka and Augie Fleras "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison and Paul Patton (eds) *Political Theory and the Rights of Indigenous Peoples*, (Cambridge University Press, Cambridge, 2000) 89.

[260] *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA).

environment might be best recognised through equal partnership and Māori ability to jointly-manage taonga. Equal partnership is commensurable with active protection.

Government has hitherto sought to meet its Treaty obligations by placing consultation and considerations obligations upon public decision-makers. With co-management, the very structure of the body meets the purpose of such processes. Therefore, the devolved power can be exercised largely without hindrance. Treaty obligations during the decision-making process are strictly unnecessary: due to half-Māori membership, Māori interests are accorded a "reasonable degree of preference",[261] and partnership is attained. Further, litigation by Māori in response to local government decisions should lessen: Māori members carrying out their function will likely have represented those litigants' interests.[262]

The WRA accords with partnership and active protection because Māori exercise public power through that body. This follows Tribunal jurisprudence requiring the Crown to recognise tribal rangatiratanga by providing for their input into local affairs.[263] Indeed, the Waitangi Tribunal suggested tangata whenua be given the status of a consent authority over the Whanganui River.[264] The Waikato Regime goes some way to fulfilling that recommendation.

The fact the WRA, by its terms of reference, is obliged to achieve a vision that recognises Māori interests is a further degree of Treaty-compliance.[265] Mere Māori membership within a standard legislative framework might not enable true partnership, as the authority's operation would be a monocultural affair. The vision and strategy - requiring the restoration of tikanga by a holistic approach to resource

[261] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 562.
[262] See WRSA, s 22: that function is to achieve the vision and strategy, which emphasises Māori interests.
[263] Waitangi Tribunal *Report of the Waitangi Tribunal on Mangonui Sewerage Claim* (Wai 17, 1988) at 47.
[264] Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 343.
[265] See WRSA, Schedule 2, subcls 3(b), (c), (e), (m).

management - avoids such issues, and goes further than the RMA.[266] This fits the generally aspirational trend of Treaty jurisprudence whereby Māori interests are to be protected as far as possible,[267] in the utmost good faith,[268] and gives Māori members a statutory foundation for managing taonga according to their cultural preference.[269]

The RMA might be a continuing and serious breach of the Treaty as it fails to adequately deliver partnership and recognition of rangatiratanga across the resource management field.[270] Indeed, the WRSA accepts the RMA does not provide for protection of mana whakahaere.[271] This is not surprising, as that legislation gives little status to Treaty principles.[272] General legislation should be the means to rectify this. Any amendment to the RMA must ensure Māori are supported fiscally, to ensure capacity issues, which hitherto have prevented transfer of power under the RMA, do not linger.[273] Fiscal support would also actively protect rangatiratanga through allowing iwi to develop or sustain tribal institutions.

Co-management is not justified by customary title or historical grievance alone.[274] Claims to customary title to fresh water are left untouched by the WRSA,[275] and the settlement claim and legislation focus on the power to manage.[276] But unextinguished customary title could justify even stronger indigenous involvement in co-management.[277] If historical grievance were the only reason for co-management, then

[266] See RMA s 269(3), which only requires the Environment Court to recognise tikanga "where appropriate."
[267] *Te Runanga o Ngati Taumarere v Northland Regional Council* [1996] NZRMA 77.
[268] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 642.
[269] *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, above n 259, at 51.
[270] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 149, per counsel for Ngāti Kahungunu; Hirini Matunga "Decolonising Planning: The Treaty of Waitangi, the Environment and a Dual Planning Tradition" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 36 at 44-45.
[271] WRSA, Preamble para (14).
[272] See Chapter Four discussion of Part 2 RMA.
[273] Wai 262, above n 270, at 266, 283.
[274] Ibid, at 279.
[275] WRSA, s 90.
[276] Ibid, Preamble paras (2), (10).
[277] See Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford University Press, New York, 2004) at 605, 596-599. Here McHugh refers to the impact of *United States v Washington* 384 F Supp 312 (WD Wash 1974) and *United States v Washington* 506 F Supp 187 (WD Wash 1980), when customary title was crucial in establishment of strong co-management involvement in the Pacific Northwest.

Te Arawa might not be a member of the WRA, as Te Arawa forces supported the government invasion of the Waikato (which founded Waikato-Tainui's raupatu claims).[278] Historical grievance might be one justification for co-management, but it does not go to the real co-management issue: authority of Māori over resources.

Māori representation on the WRA is based on prior constitutional authority and status as kaitiaki.[279] That this status justifies Māori involvement in resource management has already been shown in s 61(2A) of the RMA.[280] The WRSA expressly recognises the mana whakahaere of iwi,[281] and sees the Crown fulfil its obligation to manage certain areas of Aotearoa in partnership with Māori by recognising the rangatiratanga it swore to protect. Māori should not have to expend their Treaty grievance claims to obtain such results.[282]

That co-management had to come about through ad hoc and localised settlements is not Treaty consistent. Historical settlements cannot provide a fair and principled system for balancing Treaty imperatives, due to their ad hoc nature: the size of an iwi and political considerations should not determine kaitiaki status. For instance, Ngāti Korokī Kahukura have been left out of co-management in the Waikato, seemingly because of their size.[283] Co-management only occurring through large Treaty settlement packages is a breach of the Crown's Article Two promise, and will lead to inequitable balances being struck between Article One and Two across the country. The WRSA resulted from expensive negotiations, which were likely only possible due to Waikato-Tainui's previous monetary settlement.[284] Smaller iwi may thus be unable to achieve co-management.

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[278] Stephen Oliver "Te Pokiha Taranui: Ngati Pikiao leader, soldier" in *The Dictionary of New Zealand Biography* <http://www.teara.govt.nz/en/biographies/1t14/1?setlang=en>.
[279] Wai 262, above n 270, at 279.
[280] See Chapter Four of this dissertation.
[281] WRSA, Schedule 2 cl 2.
[282] See Hon Pita Sharples, Minister of Māori Affairs "Treaty Relationships Need Rebalancing" (press release, 21 October 2010).
[283] Ngāti Korokī Kahukura "Submission to Māori Affairs Select Committee regarding the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill 2010."
[284] Waikato-Tainui Raupatu Claims Settlement (1995), which included approximately $170 million in redress < http://www.tainui.co.nz/docs/1995_Deed_of_Settlement.pdf>.

If context influences how Treaty imperatives might be balanced, it also characterises the significance of power arrangements. The importance of the Waikato River and its problems shows how strongly Article Two was weighted in the balance against Article One imperatives regarding those issues.[285] Co-management over the Waikato exemplifies greater commitment to partnership and protection of rangatiratanga than co-management of the Tītī Islands, which affects far fewer people. The degree of autonomy achieved by Waikato-Tainui particularly, and their new powers of public authority, means the regime should satisfy Māori. It is not pure autonomy, but such was unlikely with so many interests in the river. That rangatiratanga has been afforded such preference in the Waikato co-management bodes well for future settlements,[286] and shows the compromise expected of the Treaty partners.[287]

[285] See generally NIWA *Waikato River Independent Scoping Study* (NIWA, Hamilton, 2010) for scientific information on the degraded state of the Waikato River.
[286] For an example of a future settlement using co-management, see Ngāti Pāhauwera Treaty Claims Settlement Bill 2011 (273-2), cls 58-61.
[287] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 52.

PART THREE

Chapter Six: Trends and constitutional implications

6.1 The trend towards co-management

Co-management has been increasingly prevalent in local government procedures. This has been in response to landmark judgments in the courts and the strengthening voice of Māori in the political process. However, these developments have been largely informal, and only a quarter of councils have such arrangements.[288] While s 36B of the RMA allows formal power sharing, it has only been used once.[289]

Treaty settlements have been required for greater co-management. This was first seen in the Ngāi Tahu Settlement. There, management of the Tītī Islands was devolved to Māori and a joint-management committee was established to manage Lake Ellesmere.[290] Eight years later the Te Arawa Settlement established the Rotorua Lakes Strategy Group.[291] Last year the Waikato River Authority came into being.[292] Soon, legislation will see co-management in the Ngāti Pāhauwera settlement.[293]

So, while it is important not to overstate the incidence of co-management, a trend has developed. Recent enactments have shared more power with tangata whenua, which is a move away from the paradigm of government control, towards a partnership actively protecting Māori interests. The constitutional implications of this must thus be considered.

[288] Local Government New Zealand *Local Authority Engagement with Māori: Survey of Current Council Practices* (Local Government New Zealand, Wellington, 2004) at 13, 60–61.
[289] This agreement is between the Taupō District Council and Ngāti Tūwharetoa.
[290] Ngāi Tahu Claims Settlement Act 1998, ss 334-336, Schedule 12.
[291] Te Arawa Lakes Settlement Act 2006.
[292] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
[293] Ngāti Pāhauwera Treaty Claims Settlement Bill 2011 (273-2), cls 58-61.

6.2 Constitutional implications of the trend

A constitution is about public power and how it is exercised.[294] Significant for our purposes are: the level at which constitutional change has occurred; the unentrenched nature of our constitution; the broader rule of law trends of which co-management might be a part; and the nature of Crown sovereignty. We must conclude that co-management amounts to a significant shift in the Crown-Māori constitutional relationship, whilst maintaining the *grundnorm* of parliamentary supremacy in our legal system.[295]

(a) The levels of the constitution

The constitution of New Zealand could be described as operating at two levels: the macro and the micro level. The macro elements are those fundamental to the whole of the constitution. Our unitary state, three branches of central government, unicameral legislature, Westminster system of government, and the common law doctrine of parliamentary sovereignty are such macro elements.[296] The micro elements are those which may change without concurrent change at the macro level. The MMP system, the parliamentary term, human rights legislation, and criminal and administrative law are examples of the micro constitution. Those elements govern the relationship between the government and the people within the macro framework. As such matters feature in other nations' constitutions, it is clear they are constitutional in nature.[297]

The relationship between Crown and Māori straddles these two levels. If Māori sovereignty were to limit Parliamentary power, the macro constitution would change. By contrast, co-management regimes are administrative arrangements within the general public sector, established through parliamentary sovereignty by statute. Co-management shares public power with Māori, enabling them to share in public

[294] Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public-office holders" (2006) 17 PLR 133 at 134.
[295] Paul McHugh "Constitutional Voices" (1996) 26 VUWLR 499 at 503, where *grundnorm* is defined as "the fundamental political fact upon which governance by law is based."
[296] Lord Steyn "Democracy, the rule of law, and the role of judges" (2006) 3 EHRLR 243.
[297] See Constitution of the United States of America, Articles 1 and 3, Amendments V and XIV; *Reynolds v Sims* 377 US 533 (1964); *Miranda v Arizona* 384 US 346 (1966); *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

decision-making. This shifts the way power is exercised, and by whom. It is a change in New Zealand's micro constitution.

Since the abolition of the provinces and the Upper House of Parliament,[298] 'micro-change' is virtually the only constitutional change New Zealand has experienced. Change has occurred at the micro level without major redesign of our central organs of government, and largely through the passage of ordinary legislation. This reflects the generally pragmatic approach we take to our constitution.[299] Nevertheless, as constitutions are made up of the structures and processes by which power is exercised,[300] power sharing between the Crown and Māori is a new 'constitutional fact' that reflects the will of the body politic.[301] Because this change is occurring at the micro-level, however, its constitutional significance may go almost unnoticed.

(b) Our unentrenched constitution

The pragmatic approach we often taken to our constitution is possible due to its unentrenched nature,[302] which we inherited from Britain. Lack of entrenchment makes the constitution inherently evolutionary and responsive to social change.[303] As Fuller has written, with unentrenched constitutions we must consider whether changes comport with our demands for government.[304] The constitution thus keeps its sense of purpose and applicability to society.[305] The benefits of this are displayed in the advent of co-management, an innovative power structure that responds to Māori claims in the realm of natural resources, which has been achieved without resorting to referenda or macro-constitutional change.

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[298] Abolition of Provinces Act 1875; Legislative Council Abolition Act 1950.
[299] Constitutional Arrangements Committee "Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A" (House of Representatives, Wellington, 2005) at 26; Matthew Palmer "New Zealand Constitutional Culture" (2007) NZULR 565 at 576-7.
[300] Palmer, above n 294, at 134.
[301] John Salmond *Jurisprudence, or the Theory of the Law* (Stevens and Haynes, London, 1902) at 205, where the author considers that "the will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory."
[302] See generally Palmer, above n 299.
[303] Palmer, above n 294, at 136; Jane Peck "Things better left unwritten? Constitutional text and the rule of law" (1980) 83 NYU L Rev 1979.
[304] Lon Fuller "A review of Edwin W. Patterson's 'Jurisprudence, Men and Ideas of the Law'" (1953) 6 Journal of Legal Education 457 at 464.
[305] Ibid.

As an unentrenched constitution is largely dependent on history for its validity, it is no surprise that as perceptions of history change, so does our constitution. Treaty jurisprudence clearly exemplifies this. When questions were raised about state power in New Zealand, the Court of Appeal referred to our constitutional origins. And so the justification given by judges for the constitution (our Dworkinian 'constitutional morality'[306]) changed with the *Lands* and *Ngati Apa* cases.[307] By reference to the notion of Treaty partnership, doctrines of native title and a new interpretation of the English Laws Act 1858, those cases reaffirmed something lost during the 'positivised' and 'ahistorical' period of our constitution:[308] reasserting that English law was only introduced to New Zealand insofar as it accommodated local custom.[309]

Moreover, the *Lands case* seemed to suggest that, if governance in New Zealand came about through the Treaty, and history is the validity-check of an unentrenched constitution, then that Treaty must form a part of the framework by which New Zealand is to be governed. Co-management fits these constitutional themes, and has come about precisely because our constitution allows such change.

(c) Māori interests and the rule of law

The Diceyan pillars of the common-law constitution are the sovereignty of the Crown-in-Parliament and the rule of law. [310] Dicey saw the latter as subservient to the former, and while the omnipotence of Parliament vis-à-vis the rule of law has been

[306] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Mass.), 1977) at 126.
[307] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 681; contrast *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72.
[308] See Paul McHugh "Sovereignty this century – Maori and the common law constitution" (2000) 31 VUWLR 187 at 196-197.
[309] *Ngati Apa*, above n 307, at 655-656; this point was also made in *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 21.
[310] Albert Venn Dicey *Introduction to the study of the constitution* (10th ed, Macmillan & Co, London, 1962) cited in Paul McHugh "A History of Crown Sovereignty in New Zealand" in Andrew Sharp and Paul McHugh (eds) *Histories, power and loss: uses of the past - a New Zealand commentary* (Bridget Williams Books, Wellington, 2001) 189 at 191.

questioned,[311] such questions are not at issue with co-management. Indeed, the rule of law may be a vulnerable constitutional value in New Zealand, as it is not well-supported by our cultural values (claims Matthew Palmer), while Parliamentary supremacy, democratic representation and our unentrenched constitution are.[312]

Nevertheless, courts have increasingly strengthened the rule of law to counter the broadening power of the modern state. The widening grounds for judicial review of administrative action to protect human rights are one clear example of this.[313] Just as human rights legislation requires the least infringing alternative be adopted,[314] the option that least infringes Māori interests has been required of government in some cases.[315] Through this route, courts have required active protection of indigenous interests, both here and in Canada.[316] The 'rights conception' of the rule of law has thus "been redrawn … to include Māori relations with the Crown."[317] Indeed, Joseph considers Treaty principles support a form of high-scrutiny constitutional review of public authorities.[318] Further, Lord Bingham and Lord Steyn's understanding of the rule of law as including judicial protection of rights could incorporate Treaty principles, in the New Zealand context, as a means of protecting indigenous peoples' rights.[319] Indeed, by Palmer's conception of the rule of law,[320] rangatiratanga (existing independently of Parliament) should form a part of the rule of law in New Zealand.

Co-management is a limit on government power that protects Māori interests, and thus fits into the rule of law trend. It is significant as it more comprehensively represents in statute what the courts have previously expressed, through a process of

[311] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398; Lord Steyn, above n 296; *R (on the application of Jackson) v Attorney General* [2005] UKHL 56.
[312] Palmer, above n 299, at 589.
[313] *Wolf v Minister of Immigration* [2004] NZAR 414, where Wild J used the protection of the family unit as a justification for a more stringent administrative reasonableness inquiry.
[314] New Zealand Bill of Rights Act 1990, s 6; Human Rights Act 1998 (UK), s 3.
[315] *Te Runanga o Ngati Taumarere v Northland Regional Council* [1996] NZRMA 77.
[316] *R v Sparrow* [1990] 1 SCR 1075.
[317] Paul McHugh "Sovereignty this century – Maori and the common law constitution" (2000) 31 VUWLR 187 at 212.
[318] Philip Joseph "Constitutional review now" (1998) NZ Law Review 85.
[319] *A v Secretary of the State for the Home Department* [2004] UKHL 56 at [42] per Lord Bingham; see generally Lord Steyn "Democracy, the rule of law, and the role of judges" (2006) 3 EHRLR 243.
[320] Palmer, above n 299, at 587, where he describes the rule of law as containing elements which exist legitimately and independently of those who makes and apply laws (typically, notions of fundamental human rights).

interpretation, following bare statutory references to Treaty principles. Somewhat paradoxically, it redefines the Crown-Māori relationship through an exercise of the sovereign Parliament's legislative power.

(d) The Crown-Māori relationship

Thus, the Crown-Māori relationship evidenced by co-management does not address the root of the sovereignty debate in Aotearoa. Instead, it successfully avoids confronting that issue. Nevertheless, the shift to co-management acknowledges the prior constitutional authority of Māori. It affirms that iwi hold political sovereignty independently of the Crown. This notion is reconcilable with Westminster parliamentary sovereignty, and has some parallels with the manner in which limited legislative authority has been devolved to Scotland, Wales and Northern Ireland, by Acts of the Westminster Parliament.[321]

As co-management proceeds under statutory authority, the core premise of our constitution (that ultimate public power resides in the Crown-in-Parliament) is reaffirmed. As with any public power, Māori may only exercise that power as the law permits.[322] While the Treaty might be a limit on the political sovereignty of Parliament (which Dicey admitted could exist),[323] no limit is imposed by co-management on Parliament's legal sovereignty. The usual view is that, while the acquisition of sovereignty in Aotearoa arose from the consent of Māori, once it was acquired it vested in the Crown, and then in Parliament. The primary route for constitutional recognition of Māori interests has therefore been statute.

Co-management makes it clear, however, that the contract between Crown and Māori is really about a governance partnership, and is not akin to a private engagement.[324] It shows a new and nuanced conception of Article One governance that might encapsulate power sharing in appropriate contexts (based on Treaty principles and the

[321] Scotland Act 1998 (UK); Government of Wales Act 1998 (UK); Northern Ireland Act 1998 (UK).
[322] See Lord Steyn, above n 319, at 246, discussing how government may only do what the law permits.
[323] Dicey, above n 310.
[324] McHugh, above n 310, at 208.

honour of the Crown), while its statutory nature shows the relationship is ultimately vertical.

6.3 Future considerations

How co-management bodies such as the WRA will be judicially reviewed remains to be seen. As statutory bodies, they are clearly amenable to review.[325] That body's procedures regarding the preparation of documents and conduct of meetings are set out in statute, so policing those will hardly be contentious.[326]

Of interest are issues around predetermination, bias and conflicts of interest. Public decision-makers must apply an open mind to issues before them,[327] so WRA members appointed by iwi must approach issues with an open mind, and not predetermine outcomes in their iwi's favour. In particular, predetermination or bias might arise if continued tenure of iwi-appointed members on the WRA was contingent upon voting in the iwi's favour. However, the WRSA provides that members, once appointed, may only be removed for neglecting to carry out their duties, bankruptcy, misconduct or inability to carry out the functions of the office.[328] Essentially, they cannot be recalled by iwi during their term. This certainly promotes their independence.

Further, material interests that might give rise to conflicts of interest are deemed not to arise merely because of a member's iwi or hapū membership, or because the values of tangata whenua are advanced in a WRA matter.[329] As statute requires iwi appointments to the WRA, at common law such appointees cannot be biased by nature of that appointment alone.[330] Moreover, with the WRA required to advance certain Māori values in its decision-making, a member's applying those values is not a form of bias.[331] However, if the WRA member's iwi membership resulted in a vested interest in a specific matter and gave the appearance of improperly influencing

[325] Judicature Amendment Act 1972, s 4(1).
[326] WRSA, Schedule 6 cls 7-8.
[327] *Loveridge v Eltham County Council* (1985) 5 NZAR 257.
[328] WRSA, Schedule 6 cl 4(5).
[329] Ibid, cls 13 (7)(c), (d).
[330] *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA).
[331] WRSA, s 22(2), Schedule 2 cls 3(b)-(c).

a decision, a material interest would arise.[332] Failing to declare such an interest would result in that member's participation not being counted towards a quorum or vote.[333]

The Waitangi Tribunal's most recent report (Wai 262) is an indication of how the post-Treaty settlement era might look.[334] It suggests co-management frameworks for natural and cultural resources as a means of recognising rangatiratanga and moving Aotearoa forward. While courts have said that the RMA adequately protects Māori land rights,[335] Wai 262 declares the RMA has not fulfilled its promise and does not protect rangatiratanga or kaitiakitanga.[336] It contends that co-management achieved by Treaty settlements need not be restricted to settlements.[337] As outlined in Chapter Five, the way forward requires a Treaty-compliant RMA system with compulsory iwi involvement.[338] The Tribunal proposes enhanced iwi management plans prepared in negotiation with local authorities and improved provision for partnership and co-management.[339] As this dissertation has argued, the WRSA shows it is possible for the Crown and Māori to share environmental management.[340] The next step is to extend that insight to resource management law as a whole.

6.4 Summary

Through co-management, governmental power has not been limited, but shared. It involves juridification of the Crown-Māori partnership, and improves that constitutional relationship by reference to Treaty jurisprudence. It shows the results of dialogue between the Courts and Parliament, with the aspirational nature of the partnership and active protection principles given practical expression. It fits with broadening notions of the rule of law and signifies clearly the benefits of an unentrenched constitution. However, despite strong Māori claims to resources, Article

[332] WRSA, Schedule 2 cl 13(6)(e).
[333] Ibid, cl 13(5).
[334] *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).
[335] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [29].
[336] Wai 262, above n 334, at 273.
[337] Ibid, at 284-285.
[338] Ibid, at 281.
[339] Ibid, at 281-282.
[340] Ibid, at 285.

One must still be considered. Considering this imperative, we can say co-management sufficiently recognises rangatiratanga in a modern context and affirms the *grundnorm* of Parliamentary supremacy. New Zealand's constitutional development has always proceeded by consensus,[341] and co-management exemplifies this. It meets Māori and government desires for incremental change in the constitution, while concurrently stabilising the foundation of the state.

[341] Dame Silvia Cartwright "The Role of the Governor-General" (NZCPL Occasional Paper, 2001) at 15.

CONCLUSION

This dissertation has attempted to create a jurisprudence of co-management in Aotearoa. First, statutory provisions within co-management regimes were classified on a spectrum of power sharing. This enabled a wide-lens view of the Crown-Māori relationship in resource management. Against that background, statutory arrangements were grouped into clusters to characterise the power sharing in the WRA as a whole. The WRA was then used to exemplify how whole regimes might be analysed against Treaty principles.

The Waikato regime shows how co-management can improve the Crown-Māori relationship in line with Treaty principles. Co-management shows the Treaty indeed founded a developing social contract: a project of two peoples living together. By the very structure of co-management, partnership is attained between Crown and Māori, and rangatiratanga of tangata whenua over their taonga is protected. At the same time, a smooth transition to this new reality is promised because these developments have reaffirmed our constitutional core. Such developments are the best means of recognising rangatiratanga: discord and threats to the majoritarian power of the people can only weaken the Crown-Māori relationship. Co-management may well lessen conflict, with more efficient decision-making and less reactive litigation.

Because history justifies our constitution, Treaty-consistent developments enhance its legitimacy. Co-management confirms that our constitution is autochthonous. It confirms Māori do, and should, occupy a special constitutional space in our administrative arrangements. Micro-constitutional change recognises the rangatiratanga of Māori in a practical manner while allowing governance under Article One and incorporating Māori into a new conception of that governance. It shows how differences can be reconciled in the long run. Co-management is a tool for that reconciliation.

APPENDIX 1. STATUTORY PROVISIONS

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

11 Vision and strategy is part of Waikato Regional Policy Statement

(1) On and from the commencement date, the vision and strategy in its entirety is deemed to be part of the Waikato Regional Policy Statement without the use of the process in Schedule of the Resource Management Act 1991.

(2) As soon as reasonably practicable after the commencement date, the Council must—

(a) insert the vision and strategy into the policy statement without using the process in Schedule 1 of the Resource Management Act 1991.

22 Establishment and purpose of Authority

(1) This Act establishes a statutory body called the Waikato River Authority.

(2) The purpose of the Authority is to—

(a) set the primary direction through the vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations:

(b) promote an integrated, holistic, and co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River:

(c) fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-up Trust.

(3) The duty of the members of the Authority is to act to achieve the purpose of the Authority.

23 General functions

(1) The principal function of the Authority is to achieve its purpose.

(2) The other functions of the Authority are to—

(a) engage with and provide advice to local authorities on amending Resource Management Act 1991 planning documents to make them give effect to the vision and strategy:

(b) engage with and provide advice to the range of agencies with responsibilities relating to the Waikato River, including, without limitation, local authorities and biosecurity, conservation, and fisheries agencies, to achieve an integrated, holistic, and co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River:

(c) engage with and provide advice to the Environmental Protection Authority:

(d) act as trustee for the Waikato River Clean-up Trust and, in that capacity, administer the contestable clean-up fund for the Waikato River:

60 Tangihanga and hari tuupaapaku

(3) A statutory authorisation granted by a local authority after the

commencement of this section for use of the Waikato River is deemed to include a condition stating that, where the part of the Waikato River to which the statutory authorisation relates is required by Waikato-Tainui for the purpose of tribally significant tangihanga and hari tuupaapaku,—

(a) the tangihanga or hari tuupaapaku takes precedence over the activity covered by the statutory authorisation; and

(b) the local authority may suspend the statutory authorization for a period of no more than 5 days if the activity covered by the statutory authorisation is likely to prevent or have a significant adverse effect on the carrying out of the tangihanga or hari tuupaapaku.

61 Process to deal with significant adverse effects on environment

(1) This section applies if the Minister or the Trust is of the opinion that—

(a) a significant adverse effect on the environment has arisen or is likely to arise from the carrying out of an authorised customary activity, or the use of traditional whitebait stands or eel weirs, on the Waikato River; or

(b) a significant adverse effect on the environment has arisen or is likely to arise that affects the ability of members of Waikato-Tainui to carry out an authorized customary activity, or use traditional whitebait stands or eel weirs, on the Waikato River.

Te Arawa Lakes Settlement Act 2006

41 New commercial activities and new structures require written consent of Trustees

(1) Unless the Trustees of the Te Arawa Lakes Trust first give their written consent as the owners of the Te Arawa lakebeds, no person may, on or after the settlement date,—

(a) perform a commercial activity that, under an enactment or rule of law, requires the consent of the owners of a Te Arawa lakebed; or

(b) erect or modify a structure in or on, or attach a structure to, a Te Arawa lakebed.

(2) However, subsection (1) does not apply if—

(a) the activity or structure is permitted or otherwise authorised under sections 31, 32, 33, 36, or 38; or

(b) section 39 or section 42 applies to that activity or structure.

(3) The Trustees of the Te Arawa Lakes Trust may impose conditions on the grant of their consent, including the imposition of a charge.

Marine and Coastal Area (Takutai Moana) Act 2011

71 Scope and effect of conservation permission right

(1) A conservation permission right enables a customary marine title group to give or decline permission, on any grounds, for the Minister of Conservation or the Director-General, as the case requires, to proceed to consider an application or proposal for a conservation activity specified in subsection (3).

Fisheries Act 1996

186A Temporary closure of fishing area or restriction on fishing methods

(7) Before giving a notice under subsection (1), the Minister must—

(a) consult such persons as the Minister considers are representative of persons having an interest in the species concerned or in the effects of fishing in the area concerned, including tangata whenua, environmental, commercial, recreational, and local community interests.

Ngāi Tahu Claims Settlement Act 1998

207 Distribution of applications to Te Rūnanga o Ngāi Tahu

(1) The Governor-General may, on the recommendation of the Minister for the Environment, from time to time, by Order in Council, make regulations, as contemplated by clause 12.2.3 of the deed of settlement,—

(a) providing for consent authorities to forward to Te Rūnanga o Ngāi Tahu a summary of any applications received for resource consents for activities within, adjacent to, or impacting directly on statutory areas.

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