Guidelines for Consulting with Tangata Whenua under the RMA

An Update on Case Law

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1 Introduction

1.1 Purpose

The purpose of *Guidelines for Consulting with Tangata Whenua under the RMA: An Update on Case Law* is to outline the current legal position on consultation with tangata whenua under the Resource Management Act 1991 (RMA). The paper builds on and updates earlier papers published by the Ministry for the Environment, in particular:

- *Case Law on Consultation*, Working Paper No. 3, June 1995
- *Case Law on Tangata Whenua Consultation*, RMA Working Paper, June 1999.

This paper is primarily targeted at local authorities, applicants for resource consent and tangata whenua groups. It is intended to provide a workable framework to determine, on a case-by-case basis, whether tangata whenua should be consulted under the RMA, and if so, how this should be done. It also aims to provide a general overview of the principles applying to tangata whenua interests and consultation under the RMA.

Although this is intended to be a stand-alone document, because it is an update on case law since 1999 it puts more focus on the effects of decisions by the Environment Court and higher courts since this date. So although the leading earlier cases are still discussed, the 1999 paper contains a more in-depth discussion of their particular details.

This paper also briefly discusses the effect of the Resource Management Amendment Act 2003 on tangata whenua interests and consultation.

1.2 Structure

This paper has been structured to try to provide a practical and logical approach to the issue of consultation with tangata whenua. The aim is to enable readers to determine whether a duty of consultation exists in any particular case, and then to adopt a flow chart-type approach as to what to do next.

The first question to resolve is whether there is a duty on a party to consult tangata whenua. Section 0 discusses who may need to be consulted and when that duty arises. Section 0 then explains the basis for this duty, both statutory and otherwise. Sections 4 and 5 discuss what constitutes consultation and how it may be conducted. The final issue to be resolved is which tangata whenua group or groups should be consulted. This matter is discussed in section 6.

The first time a case is noted in the text its citation is given in full, and afterwards it is referred to simply by a key word (eg, *Beadle*). Numbers that appear next to indented quotes refer to the paragraph number of the decision where that quote can be found. Italics within a quote is used to emphasise a point being made in this paper, rather than reflecting any emphasis in the decision itself.

1.3 Disclaimer

While every effort has been made to ensure that this paper is as clear and accurate as possible, the Ministry for the Environment will not be held responsible for any action arising out of its use. In cases where there is uncertainty, the readers should refer directly to the RMA and/or cases cited in this paper. Any advice given through this paper is intended as a guide only and should not be taken as defining or providing a definitive interpretation of the RMA or case law.

1.4 Acknowledgements

A draft of this paper was prepared for the Ministry for the Environment by Helen Atkins, Partner, Daniel Clay, Senior Associate, and Michaela Stirling, Solicitor, all of Phillips Fox Lawyers.

2 Who Needs to Consult, and When Does the Duty Arise?

2.1 Summary

This section of the paper considers the issue of who, if anyone, is required to consult with tangata whenua under the RMA and when this duty arises. Generally, the provisions of the RMA determine the timing of when consultation should occur. This section discusses the responsibilities of applicants for resource consents, local authorities and the Crown.

After analysing the relevant provisions of the RMA and case law in this area, the conclusions of this section are as follows.

- Applicants have a duty to report on consultation when constructing an assessment of environmental effects, but this does not amount to a legal duty to consult.
- Despite this, it is recognised good practice that applicants for resource consents should engage in consultation with tangata whenua where their proposals may affect the matters referred to in sections 6(e) and (f), section 7(a) and section 8 of the RMA.
- Local authorities must consult when preparing planning documents and where proposals are likely to affect tangata whenua interests recognised in sections 6(e), 7(a) and 8 of the RMA.
- There may also be a higher obligation on consent authorities to consult with tangata whenua when they know tangata whenua have a special relationship with the area affected by a proposal.
- Where a council is acting in its role as consent authority, any consultation should be done by a council officer and then reported to council, to avoid conflicts with the council's role as the decision-maker.
- Consent authorities should also carefully assess, after reasonable inquiry, whether an iwi, hapu or particular Maori representative should be personally notified of a resource consent application.
- The Crown, as a Treaty partner, is under a stricter duty to consult whenever it takes actions that may affect tangata whenua interests. However, the extent of this will be determined by the relevance of Part II of the RMA on tangata whenua interests.

2.2 Resource consent applicants

A resource consent application must include an assessment of environmental effects (AEE). Under Clause 1(h) of the RMA's Fourth Schedule, this AEE must identify the people interested in or affected by the proposal, the consultation that has been undertaken, and any response to the views of the people consulted.

Therefore, under the RMA an applicant is obliged to report on consultation, but is not obliged to consult *per se*. This was recently confirmed in *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (C168/2002), which stated:

> [66] Part VI of the RMA imposes no invariable obligation on a potential applicant to consult with anyone. The only obligation imposed by the words of the Fourth Schedule is to report on consultation. While that suggests consultation should occur it is silent as to the consequences if it does not.

This theme was mirrored in the case of *Carter Holt Harvey v Te Runanga o Tuwharetoa ki Kawerau & Bay of Plenty Regional Council* (AP42/2002). The Court held:

> [31] The duty to consult arises out of the relationship of Treaty 'partners' – it is not an obligation cast on individual or corporate citizens.

However, the Court noted that it was good practice for applicants to engage in consultation with tangata whenua, despite the fact that it was not a legal obligation. It stated:

> [51] Responsible holders of resource consents will, undoubtedly consult regularly with tangata whenua interests to ensure efficient despatch of such applications. While this is good practice, there are difficulties in elevating the obligation to consult to the status of a legal obligation ...

Consultation was also described as "recognised good practice" in the case of *Paihia & District Citizens Association Inc v Northland Regional Council (*A71/95), where the Court noted:

> The Act does not make any specific requirement of consultation by applicants for resource consents, or by local authorities when acting in their function as consent authorities ... *it is recognised good practice that applicants for resource consent engage in consultation with the tangata whenua where their proposals may affect the matters referred in section 6(e) and 7(a)*, and that those reporting to consent authorities on such applications to inform themselves and advise on those matters. [emphasis added]

The *Ngati Hokopu* case also held:

> [65] Consultation must necessarily take place before the application is lodged with the council. Therefore, any discussion between the applicant and other persons which takes place after the application is lodged is not consultation for the purposes of the AEE report.

Accordingly, the approach of the courts has been relatively consistent. An applicant has no legal duty to consult with tangata whenua, but it should be encouraged as a matter of good practice.

2.3 Local authorities

Local authorities, incorporating regional councils and territorial authorities (district and city councils), have two distinct functions under the RMA which may create a duty to consult:

- preparing and changing policy statements and plans
- determining applications for resource consent.

Preparing policy statements and plans

Clause 3(1)(d) of the First Schedule of the RMA requires local authorities to consult with tangata whenua when preparing a plan or policy statement, or a change to a plan or policy statement. It states that local authorities must consult:

> ... the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga.

This obligation applies in relation to regional policy statements, regional plans (including coastal plans, water, soil and land plans) and district plans.

Ngati Kahu and Pacific International Investments Limited v Tauranga District Council [1994] NZRMA 481 indicates that consultation on a proposed plan should be ongoing, and that a council should re-open consultation if other factors and information are brought to its notice which necessitate a review of the understanding previously reached.

However, the case also noted that consultation should not fetter the council's decision-making responsibility, and that a council must be free to consider a submission or cross-submission made to it on a policy statement or plan, without being restricted in its decision-making responsibility by an understanding reached before the policy statement or plan was notified.

Applications for resource consent

However, this position is slightly less clear-cut when a local authority is acting in its role of determining resource consent applications under section 104 of the RMA. Section 104 directs councils to consider the effects of a proposal, which are outlined by the applicant in its assessment of environmental effects (AEE).

As discussed earlier in this section, an applicant is only required to report on the consultation it has undertaken. There is no specific duty on the applicant to consult widely, although it is good practice to do so. Because the effects of a proposal may impact on tangata whenua interests, this raises the question as to whether there is a duty on a local authority to make sure that appropriate consultation has occurred.

A council is subject to Part II of the RMA when it exercises its powers under section 104, including section 8, which requires persons exercising functions and powers under the RMA to take into account the principles of the Treaty of Waitangi (the Treaty). Although councils are not party to the Treaty, in acting under section 104 they are bound to consider its principles as part of the Part II provisions.

In considering the duty of active protection under the Treaty, the Court in *Mason-Riseborough v Matamata-Piako District Council (*A143/97) concluded that there may be an obligation on council officers to consult independently of any consultation by an applicant in order to fulfil the Treaty principles:

> Certainly there will be times when that duty obliges the person reporting to the Council to engage in consultation with the tangata whenua. At other times, depending on the circumstances, an applicant's consultation may be sufficient.

This appears to follow the *Aqua King Limited v Marlborough District Council* (W19/95) line of cases, where the Planning Tribunal stated:

> We accept that there are two stages of consultation under the Act that are required where there are issues of moment to Maori. They are the applicant's consultation or otherwise under the Fourth Schedule, and the Council officers' consultation under Part II of the Act which arises from the principles of [the Treaty]. That consultation is an obligation which pertains only to Councils.

Planning Tribunal decisions released in the early 1990s appear to suggest that there was a duty for councils to consult (eg, see *Gill v Rotorua District Council*, [1993] 2 NZRMA 604, *Haddon v Auckland Regional Council* [1994] NZRMA 49.)

However, in the latter part of the 1990s, the courts have been wary to ensure that a consent authority's quasi-judicial capacity was not compromised by any consultation that may take place by the consent authority. In *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193, the Court held that a council should not prejudice its own position as a quasi-judicial body by undertaking consultation itself. Therefore it found it was appropriate for council officers (in a non-judicial capacity) to undertake consultation and report the results for the council to consider as decision-maker.

Regardless of how the consultation is achieved, the implication that councils need to consult in order to make informed decisions on Part II matters was noted in *Director-General of Conservation v Marlborough District Council (*A89/97), where the Court held:

> ... we fail to see how under section 6 of the Act consent authorities are able to recognise and provide for the matters listed in section 6(e) if they do not consult with iwi because they would not have adequate knowledge of the issues on which to make an informed decision.

In *Berkett v Minister of Local Government* (A6/97), the Court held:

> Where an applicant has not consulted with Maori in a case involving matters of Maori interest and concern it is good practice for the planner preparing a report to carry out such consultation.

In *Kotuku Parks Limited v Kapiti Coast District Council* (A73/2000) the Court agreed that a consent authority does not have a duty to consult under the Treaty, but that it should be on enquiry that consultation has occurred, where consultation was appropriate. This could occur through a planner's report. It also stated:

> In practice, it is the applicant who will need to consult with Maori, in cases where that is appropriate, to avoid the risk of the application being postponed or refused by the consent authority if it is not satisfied that grant of the resource consent would be consistent with its duty to take into account the principles of the Treaty.

In *Land Air Water Association v Waikato Regional Council* (A110/2001), the Court took a more holistic approach to the issue of who must consult:

> [448] In our view it matters little who facilitates or carries out the consultation. In some cases it may be the applicant. In other cases officers of the consent authority or a combination of both ...

Therefore, it appears from case law that there is an obligation for councils to undertake consultation through their officers, to the extent required to fulfil the requirements of Part II of the RMA. This will vary from case to case.

Finally, the Local Government Act (LGA) 2002 imposes new requirements for local authorities on consultation and to undertake capacity-building for Maori. In particular, section 81 of LGA 2002 requires local authorities to establish processes to provide opportunities for Maori to contribute to decision-making. Section 82 sets out standard principles for local authorities to follow when undertaking consultation, and specifically requires local authorities to adopt processes to consult with Maori in accordance with these principles.

As yet, there is no case law to assist in interpreting how these sections may affect consultation by local authorities under the RMA, but the existence of these guidelines may help to standardise procedures between different councils.

Certificates of compliance

In contrast to a council's role in determining resource consent applications, there appears to be no obligation for a council to consult when it determines an application for a certificate of compliance under section 139 of the RMA. This is on the basis that a council's role in this process is simply to interpret the provisions of its plan (*Waitutu Incorporation v Southland District Council* (C68/94)).

2.4 The Crown

Section 8 of the RMA requires persons exercising functions and powers under the Act to take into account the principles of the Treaty. As the Crown is a Treaty partner, this places a special obligation on the Crown, whether it is acting in its capacity as a decision-maker or as an applicant under the RMA.

Crown as decision-maker

Instances where the Crown is the decision-maker under the RMA include the following:

- the Minister for the Environment when:
    - a) making recommendations concerning national policy statements
    - b) calling in an application of national significance
    - c) considering coastal tenders
    - d) determining applications for water conservation orders

- the Minister of Conservation when:
  - a) preparing New Zealand coastal policy statements
  - b) approving a regional coastal plan
  - c) deciding applications for restricted coastal activities
- any Minister of the Crown, as a Heritage Protection Authority, when determining territorial authority recommendations on applications for heritage protection orders.

As any decision made by the Crown in the above capacities will be an exercise of a function or power under the RMA, the provisions of Part II providing for Maori interests will be relevant to any decision made. In such cases, the Crown is in the same position as a consent authority and, *prima facie*, is bound by the same requirements regarding consultation.

Crown as applicant

There has been some inconsistency in case law on the question of whether consultation is a Treaty principle *per se* or if the obligation to consult arises out of the Treaty principle to act in good faith and in partnership. Despite this question of interpretation, it is clear that consultation does fall under the Treaty principles as recognised by section 8.

In *Beadle v Minister of Corrections* (A74/2002), the Minister accepted that he had an obligation to consult tangata whenua arising out of the Treaty principles.

In the *Ngati Hokopu* case the Court appeared to raise the bar for consultation where an applicant is the Crown. After noting that it was "unlikely that Parliament intended that consultation should be compulsory in applications for resource consent", the Court noted that the position may be different for an applicant that is an arm of the Crown:

> Where the applicant for resource consent is the Minister of the Crown the position may be different because then the applicant (as a Treaty partner) must consult because this may be a duty in certain circumstances which arises out of the Treaty principles of partnership and good faith: *Beadle v Minister of Corrections*.

2.5 Requiring authorities

In relation to designations under the RMA, requiring authorities that are also Crown entities will also be under an obligation to consult with tangata whenua under Treaty principles. Requiring authorities include Crown ministers, local authorities and approved network utility operators. Where a requiring authority is not the Crown, its position in relation to consultation is similar to that of an applicant for resource consent.

Where a requiring authority seeks a designation, it must give notice to a territorial authority of such requirement. As with AEEs, this notice must include a statement of "the consultation, if any, that the requiring authority has had with persons likely to be affected by the designation".

When a territorial authority makes its recommendation on an application for a designation, it will consider whether adequate consideration has been given to alternative sites, routes or methods of achieving the public work. As with applicants for resource consent, and in considering alternatives, consultation may be seen as good practice in order to ensure that any alternatives that might incorporate tangata whenua concerns can be determined.

3 Why Consultation is Necessary

3.1 Summary

This section examines the basis for consultation, both statutory and otherwise. Essentially, the basis for the requirement to consult with tangata whenua can be found in the provisions of Part II of the RMA. Therefore, this section examines what the Courts have said on taking account of sections 6(e), 7(a) and 8 of the RMA when making decisions on plans and consents.

- Express or implied obligations are imposed by particular provisions of the RMA such as sections 6(e), 7(a) and 8 and clause 3(1)(d) of the First Schedule.
- Consultation is part of a recognised principle of protection and partnership under the Treaty which "all persons exercising functions and powers ... shall take into account" under section 8 of the RMA.

The early cases that considered the meaning of sections 6(e), 7(a) and 8 tended to focus on whether consultation was required under the RMA and on identifying the parties that should be doing the consulting. More recent cases have seen a significant shift away from the narrow focus on consultation to encompass a holistic application of sections 6(e), 7(a) and 8 to the whole decision-making process. These cases indicate a move away from mere consideration of consultation to a wider consideration and understanding of all the relevant Treaty and Maori provisions of the RMA.

After analysing the relevant statutory provisions and other instruments, together with how the courts have interpreted the basis for consultation, this section concludes that:

- the RMA provides for tangata whenua interests to be fed into the mix of considerations that must be balanced under Part II of the RMA
- sections 6(e), 7(a) and 8 place specific obligations on local authorities and decision-makers to incorporate tangata whenua interests into their decision-making
- consultation is a sub-set of these obligations, but it is required in order to inform decision-makers how to discharge their obligations under Part II of the RMA, and sections 6(e), 7(a) and 8 in particular.

3.2 The purpose of the Act

The purpose of the Act is stated in section 5:

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

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

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The interests of tangata whenua may be relevant under section 5 through both the wide definition of 'environment' in section 2 of the RMA (which includes people and communities and cultural conditions affecting natural and physical resources), and through the reference to the cultural wellbeing of people in communities in section 5(2).

The High Court in *Beadle* held that although tangata whenua beliefs are not natural or physical resources, they can be considered as part of cultural and social wellbeing.

This reflects the decision in *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 557, where the High Court found that although a proposed television translator (to be built on land with a long history of occupation by ancestors of tangata whenua) would represent a use of resources that would enable people to watch television and to provide for their social and cultural wellbeing, it would fail to enable the tangata whenua to provide for their social and cultural wellbeing. However, the Court noted that in this instance the cultural uniqueness of the land was significant. The Court stated:

> A rule of reason approach must surely prevail: the question is whether, objectively, the particular kind of activity is intrinsically offensive to an established waahi tapu, or other cultural considerations.

3.3 Sections 6(e) and 6(f)

Maori interests are also recognised as a matter of national importance in section 6(e), and potentially under section 6(f). These subsections read:

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

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

(f) The protection of historic heritage from inappropriate subdivision, use, and development.

Subsection (f), which was introduced under the Resource Management Amendment Act 2003, may also give rise to Maori issues due to the wide definition of historic heritage, which includes sites of significance to Maori, including waahi tapu.

Section 6(e) requires decision-makers to 'recognise and provide for' the relationships between tangata whenua and their taonga.

An example of a strong relationship between tangata whenua and the environment can be seen in *Te Awatapu o Taumarere v Northland Regional Council* (A34/98), where the Court directed the regional council to impose a condition in its proposed regional policy statement to recognise Nga Puhi's kaitiaki status in relation to the Taumarere River. The Court agreed that the regional policy statement should be amended to provide for cultural purposes and to give effect to sections 6(e) and 7(a) of the RMA.

However, the Court in *Ngati Hokopu* found that the extent to which relationships between tangata whenua and the environment must be provided for under section 6(e) could vary, depending on the strength of that relationship:

> [45] ... although section 6(e) suggests that these relationships must be provided for, it is inherent in the concept that the weaker the relationship, the less it needs to be provided for.

Recently in *Te Runanga o Ati Awa ki Whakarongotai Inc & Takamore Trustees & Waikanae Christian Holiday Park Inc v Kapiti Coast District Council* (W50/2003) ("Takamore"), the Environment Court (in a decision referred back from the High Court) found that consultation was a part of recognising and providing for section 6(e) interests:

> [54] It is accepted that a consultative process is but part of the recognition process (under s6).

In *Ngati Hokopu*, the Court noted that this requirement of section 6(e) could go further than the commitments to Maori under the Treaty:

> [37] ... section 6(e) may exceed the Treaty's obligations on the Crown.

The inclusion of matters pertaining to historic heritage in section 6, which were introduced by the 2003 amendments to the RMA, may result in further reasons to consult. Section 6(f)'s aim of protecting historic heritage from inappropriate uses, where historic heritage includes sites of significance to Maori, may result in a need to canvass the views of tangata whenua.

However, as the effect and scope of section 6(f) has not yet been tested in the courts, it is difficult to predict how that requirement will be interpreted. Nevertheless, as one of the matters listed in section 6, historic heritage is likely to be given equal importance to the matters contained in section 6(e).

3.4 Section 7(a)

Section 7(a) provides for kaitiakitanga to be recognised and reads:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> (a) Kaitiakitanga
>
> ...

The term 'kaitiakitanga' is defined in the Act as meaning:

> [t]he exercise or guardianship by the tangata whenua of an area in accordance with Tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

Several cases have examined what having 'particular regard' to kaitiakitanga should mean for decision-makers. In particular, there has been some conflict between the role of a consent authority to make decisions under the RMA and the ability of Maori to exercise kaitiakitanga over a resource.

In *Contact Energy Ltd v Waikato Regional Council & Taupo District Council* (A4/2002), local iwi wanted the Court to require Contact to enter into an arrangement with the local iwi holding kaitiakitanga over the geothermal resource, giving them future involvement in its management, and requiring them to be consulted so that the resource could be actively protected. However, the Court held that section 7(a) has to be read in the context of the RMA, which entrusts decisions on the sustainable management of natural and physical resources to particular classes of consent authorities, not iwi authorities. Despite this, the Court said that some of the iwi's concerns could possibly be met through conditions requiring them to be provided with ongoing information and arranging for karakia (prayers) to be performed.

It is again clear that consultation is part of the obligation on a decision-maker when considering section 7(a). However, in *Takamore*, the High Court (on appeal) held that the process of consultation is distinct from the requirements of section 7(a). In particular, the Court held that the fact that consultation had occurred did not mean that a consent authority had necessarily given particular regard to kaitiakitanga in its decision:

> [86] Consultation by itself without allowing the view of Maori to influence decision-making is no more than window-dressing. Section 7 requires the decision maker to have particular regard to how Maori view the way in which the land is to be used. The Court appears to have limited its consideration of this issue to consultation. This was less than required by law.

3.5 Section 8

Section 8 incorporates principles of the Treaty in decision-making under the RMA and reads:

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

There is no comprehensive or authoritative list of the principles of the Treaty of Waitangi available for decision-makers to consider. A list of 'central principles' extracted from decisions of the Waitangi Tribunal is set out in *Laws NZ, Treaty of Waitangi,* paragraph 12. This list includes the following principle, inconsistently referred to as the 'consultation principle' in Environment Court decisions:

> The Crown and Maori have mutual obligations to act reasonably and in good faith. Good faith consultation between parties is necessary to sustain the Treaty relationship: *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) at 150.

This principle has been analysed in *Laws NZ, Treaty of Waitangi* at paragraph 75 in the following terms:

> The duty to consult has been formulated as part of the obligation for Treaty partners to work in good faith in their dealings with each other. Therefore, the Crown has a duty, when acting within its sphere, to make an informed decision; that is, a decision which is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard to the impact of the principles of the Treaty.

Other principles of the Treaty include what are commonly referred to in Environment Court decisions as the 'active protection principle' and the 'mutual benefit principle'. *Carter Holt Harvey* contains a thorough analysis of the application of the Treaty principles in pages 10–18.

In *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA), the Court of Appeal held that the requirement to take account of the principles of the Treaty should be interpreted and applied widely. The Court held that the Treaty principles in terms of the RMA were not limited to consultation but also included active protection of tangata whenua interests.

The Court in the *Beadle* case considered the numerous decisions concerning the effect of section 8 of the RMA, and arrived at the following proposition as representing the law as it concerns the active protection principle of the Treaty, as applied in that particular case:

> [671] The person making a decision on a designation requirement or resource consent application has to take into account the principle of the Treaty by which the Crown has an obligation of active protection of Maori property and taonga, which are not limited to physical and tangible resources but extends to spiritual and intrinsic values.

The Court went on to say that the Crown's obligation is not absolute, as it is qualified by its other responsibilities as the government, but the Crown must take the action that is reasonable in the circumstances prevailing at the particular time.

In *Mason-Riseborough* the Court noted that the importance of recognising the views of Maori cannot be denied, but that this does not extend to giving these views paramount status. A balanced, objective consideration of the relevant interests is required based on the circumstances.

As this indicates, section 8 is to be balanced against the other principles and purposes of the Act and is subordinate to the purpose of sustainable management contained in section 5. In fact, the *Takamore* High Court decision noted that if a decision-maker has properly incorporated section

6(e) and 7(a) concerns into its decision, it may have already discharged its obligation under section 8:

> [91] It has been suggested that if the decision-maker properly takes into account s6(e) and s7(a) matters, it may well have fulfilled its s8 objectives in any event. This will depend very much on the facts of each case ...

3.6 Part II purpose and principles

The courts adopt a holistic application of sections 6(e), 7(a) and 8. All these sections, including the Treaty principles of active protection and partnership, as well as consultation, need to be taken into account when making decisions. Consultation is also to be approached in a holistic manner. It is not an end in itself, but a means to take into account the relevant Treaty principles and the requirements in sections 6(e) and 7(a) in the decision-making process.

A number of cases have discussed how to balance the objectives set out in Part II of the RMA. In *Mahuta & Ors v Waikato Regional Council* (A91/98), the Court noted that sections 5–8 of the RMA have different weights, in terms of the extent to which a decision-maker must incorporate them into a decision:

> ... embracing all elements set out in section 5(2), in that sections 6, 7 and 8 are subordinate and accessory to it.

In *Mangakahia Maori Komiti* the Environment Court emphasised that sections 6, 7 and 8 must be read in context against the background of Part II as a whole and how it is framed. The provisions are intended to be applied to promote the purpose of the RMA expressed in section 5, not to counterbalance it.

In *Carter Holt Harvey* the Court particularly considered the relationship of section 8 to the rest of the principles in Part II, commenting on the *Mangakahia Maori Komiti* decision. It stated:

> [25] The obligation, set out in s8 of the Act, to take into account the principles of the Treaty of Waitangi does not elevate that factor above other factors which those responsible for exercising functions and powers under the Act are required to consider. Indeed, the fact that the Act does not require persons exercising functions and powers under it to act in conformity with the principles of the Treaty has been criticised by the Waitangi Tribunal: Ngawha Geothermal Resource Report (Wai 304) at 147. The question whether the obligation of those responsible for exercising functions and powers under the Act to consider the principles of the Treaty should be elevated is, of course, a matter for Parliament, not for this Court. There is a consistent line of authority in the Environment Court which has emphasised the need for s8 to be read and understood in the context of the whole Act: eg Mangakahia Maori Komiti v Northland Regional Council [1996] NZRMA 193 at 214. [emphasis added]

This contemplates that choices will need to be made. In *Mahuta* the Court was faced with balancing the interests of Waikato-Tainui and the wider community over the expansion of a dairy factory, which would discharge wastewater into the Waikato River. In the circumstances of the case, the Court held that the applicant had taken a number of steps to meet the cultural concerns of the Waikato-Tainui which meant that the adverse effect on the relationship Waikato-Tainui had with the river and on kaitiakitanga would be recognised and provided for and mitigated.

The Court held:

> It is our judgment that because of the community value of the proposed expansion of the dairy factory, and because the cultural interests of the Waikato-Tainui people would be provided for in so many other ways which avoid tangible harm to the river, the perceptions which are not represented by tangible effects do not deserve such weight as to prevail over the proposal and defeat it.

In comparison, in *Te Runanga o Taumarere v Northland Regional Council* (A108/95), the Planning Tribunal found that a planned discharge into Uruti Bay would have an adverse effect in that it would be incompatible with the cultural and spiritual values of the Bay to tangata whenua. This was the case even though the effluent discharged would be of a very high quality and there were significant positive environmental effects.

Sections 6(e), 7(a) and 8 are the main provisions that refer to tangata whenua interests. However, as these examples illustrate, they must be balanced against the other interests set out in Part II.

3.7 Iwi planning documents

Through the 2003 Amendment Act, iwi planning documents have been given greater recognition. Prior to the Amendment Act, regional and district councils were required, when preparing a regional policy statement, regional plan or district plan, to "have regard to" any relevant planning document recognised by an affected iwi authority. The 2003 Amendment Act has elevated the status of these documents. The relevant councils must now "take into account" any such documents when preparing or changing a policy statement or plan.

The term 'iwi authority' means the authority that represents an iwi and that is recognised by that iwi as having authority to do so. There is no definition nor requirement for matters to be included in iwi planning documents. However, these documents will undoubtedly assist in determining what is, and what is not, of concern to the relevant iwi authorities.

There does not appear to be any guidance given by the courts regarding the purpose and status of iwi planning documents. Accordingly, the extent to which an applicant or council may rely on their contents to determine the concerns of tangata whenua and whether they are likely to be affected by any particular proposal is unknown.

Nevertheless, it is anticipated that iwi planning documents will assist applicants and consent authorities in (at least at an initial stage) identifying matters of concern to an iwi authority. The Select Committee's report on the Amendment Bill noted that it was neither desirable nor practicable to specify a process for the preparation of iwi planning documents to ensure they are rigorous and properly represent the interests of relevant iwi. The Committee went on to note that an iwi planning document that is prepared by an iwi authority (being an authority that represents an iwi and that is recognised by that iwi as having the authority to do so) "legally covers the concerns of that iwi", and that it is "for the people of each iwi to hold their iwi authority to account". This suggests that it may be reasonable for a council or applicant for resource consent to rely on the content of an iwi planning document in determining the matters of concern to iwi for the purpose of deciding whether consultation is appropriate.

For further discussion on iwi management plans, refer to the Ministry for the Environment publication *Making the Best of Iwi Management Plans under the RMA* (revised June 2003).

4 What Constitutes Consultation?

4.1 Summary

Once it is determined that consultation is necessary, the question arises as to what this means in practice. This section investigates the concept of consultation and analyses what is likely to constitute sufficient and reasonable consultation. The section is linked with section 5 of this paper, which considers methods of conducting effective consultation.

The section reaches the following conclusions.

- The method or degree of consultation will depend on the facts of each particular case.
- The purpose of consultation is to both recognise the rights of Maori under the Treaty and to gain information on the potential effects of a proposal on the environment and on tangata whenua.
- Maori spiritual values should be considered, but there are limits on the extent to which they can be taken into account.

4.2 The purpose of consultation

The Court in *Beadle* discussed a dual purpose of consultation, as follows:

- *recognition* – to recognise the rights of Maori under the Treaty as a party who has a right to be consulted
- *information* – to obtain appropriate and accurate information on the potential effects and effects on affected Maori.

The 'information' purpose was discussed in the *Mason-Riseborough* decision, as follows:

> Realistically, active protection of Maori interests requires positive action. It also requires access to sufficient information of an appropriate quality to be in a position to fully consider the implications of the application on those interests.

Regarding the purposes of consultation, the Court in *Land Air Water Assn* stated:

> [445] In our view the reason for consultation with Maori is their special cultural relationship with the natural resources of our environment. *The purpose of consultation is to enable an informed decision to be made*. [emphasis added]

Therefore, it is suggested that these purposes should be used for guidance in determining how consultation should be approached and conducted.

In the *Beadle* case, in relation to allegations of inadequate consultation, which an iwi alleged caused a failure to understand its concerns, the Court appeared to place some weight on the formal resource consent process. In particular, it noted that the iwi had the opportunity to participate in the hearing process. The Court linked this participation to the information purpose of consultation and noted that:

> ... [t]he opponents have had full opportunity to present to the Court, face-to-face in a public sitting, all the information that they possess that they consider should influence the Court's decision. They had the services of experienced professional counsel and expert witnesses. They took full advantage of those opportunities, and also of the opportunity to cross-examine the witnesses called on behalf of the Minister.

It is clear from analysing Part II matters that consultation is just a part of what a decision-maker must do to comply with the obligations under sections 6(e), 7(a) and 8. Recent cases have focused on the purpose of consultation and what it is designed to achieve, in the wider scheme of incorporating sections 6(e), 7(a) and 8 into a decision.

4.3 Flexibility required

There is no set formula for adequate consultation. What will be considered adequate must be judged by reference to the particular circumstances and on a case-by-case basis. This was confirmed by the *Land Air Water Assn* case:

> [448] The method or degree of consultation will depend on the facts of each particular case ...

In *Paul v Whakatane District Council* (A12/95) the Planning Tribunal said the extent of the consultation should be proportionate to the extent and likely effects of the proposal in question.

In *Mason-Riseborough* the Court held that the question of consultation is to be approached in a holistic way:

> It is our opinion that the question of consultation is to be approached in a holistic manner, not as an end to itself, but in order to take the relevant Treaty principles into account. (p. 12)

4.4 Recognising Maori spiritual values

Maori have usually been able to invoke sections 5, 6(e), 7(a) and 8 of the RMA together in seeking to protect matters of cultural and spiritual value. There is often an overlap between tangible and intangible values, as many tangible values (eg, urupa sites) have intangible values associated with them. Tangible and intangible values are equally important.

There is no doubt that Maori spiritual values are relevant considerations under the RMA. The issue is the extent to which such values should be given weight when balancing all alleged adverse effects. In *Mahuta* the Court accepted that the Waikato/Tainui people have a special relationship with the Waikato River, which is of fundamental importance to their social and cultural wellbeing. The issue for the Court was the significance to be given to that relationship in determining the resource consent applications before it.

After confirming that the effects on cultural conditions that affect tangata whenua are irrelevant, and in response to an assertion made by evidence presented by Waikato/Tainui that there is no need for a discernible physical adverse effect to constitute a serious adverse effect on the relationship of Waikato/Tainui to the Waikato River, the Court held as follows:

> [170] We have found no adverse effects on the Waikato River from the proposed taking of water from it, nor adverse effects on fish from entrainment in the intake structure ... There would be an adverse effect on the relationship of Maori with the Waikato river in that many of them ... have a deep spiritual respect for the river, and perceive any discharge into it as a serious effect, whether or not there is any discernible physical effect, and despite the design of the discharge and outfall structure to meet their cultural requirements.

The Court balanced the alleged metaphysical effects with aspects of the application that provided for the spiritual relationship with the river. In granting the consents sought, the Court accepted that, although the adverse effect on the relationship of Waikato/Tainui with the river would be recognised, provided for and mitigated by the application:

> [260] ... those ways in which the cultural needs of the Waikato/Tainui would be recognised and provided for would not extend to avoiding all perception of contaminants flowing into the river, irrespective of physical effects ...

The Court went on to acknowledge that granting consent would not avoid the metaphysical effects claimed, but nevertheless in balancing the competing factors, acknowledged the relevance of such effects.

Maori spiritual values were also acknowledged as being relevant under the RMA in the High Court decision *TV3 Network Services*. That case involved an application for resource consent to construct a television translator on land alleged to be waahi tapu, which was declined by the Environment Court. The Environment Court had recognised that:

> Because of the long history of occupation of Horea generally by ancestors of the tangata whenua, the whole area is closely associated with deep respect for their ancestors and the places where they lived, fought, and were buried, and that any disturbance of the ground for the translator would be regarded by them as a desecration.

The High Court, in upholding the Environment Court's decision, acknowledged that the Environment Court found the overall cultural uniqueness of the site to be significant and to outweigh the technological activity for which consent was sought. The High Court held that, in doing so, the Environment Court recognised the correct position in law and gave particular weight to section 6(e). The Court went on to note the conflict between the driving forces behind the applicant and tangata whenua. At p. 549 it said:

> The developer derives her justification from the belief that stands on 'the common good'; in this case, better television signals. Strip the land of dignity, and doubtless the justification is powerful. But for others – as for Tainui here – what occurs is then culturally debilitating: what is lost is something to do with the integrity, and the spirit of a place, that no element of economic advancement can ever justify.

However, the Courts have struggled to recognise these values in other decisions, particularly where Maori disagree about what the intangible values are in an area. The *Beadle* case indicates that there are limits to the extent that intangible values can be taken into account:

> [497] The Maori traditional 'holistic' view of the environment does not warrant treating [sections 6(e) and others] as if they extended to diffuse relationships with whole districts, and with features many kilometres distant.
>
> [439] Neither the statutory purpose, nor the texts of [sections 6(e), 7(a) and 8] indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities ...

In *Otararua Hapu v Taranaki Regional Council (*A124/98) the cultural values said to be affected were described as metaphysical and spiritual. The Court stated that "in the absence of evidence we cannot claim to have a full understanding of them". This appeared to count against the hapu, as the Court rejected claims that the proposed site was a marae called Hanga Rua. There was no evidence to support this, and the Court preferred the evidence of Fletcher Challenge's programme manager and consultant archaeologists.

This approach can be compared with the recent decision *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, which was a decision in part on the effect of section 6(d) of the Hazardous Substances and New Organisms Act 1996 (phrased in almost identical terms as section 6(e) of the RMA). The Court held that the use of the phrase 'other taonga' included intangible cultural and spiritual taonga as well as physical objects. It held that the Authority had correctly understood taonga to include spiritual beliefs, and had taken them into account as required by the section.

These cases illustrate the importance of using consultation to understand how Maori spiritual values should be taken into account in the balancing exercise required under Part II of the Act.

5 How Consultation may be Conducted

5.1 Summary

This section follows on from the discussion in section 4 by analysing, on a more practical level, how consultation may be conducted in order to discharge a duty to consult with tangata whenua. Although each case depends on its own facts and circumstances, there are some general principles that will apply to any obligation to consult with tangata whenua.

Relevant case law on this issue indicates that:

- fairness is paramount
- consultation must be conducted with an open mind
- the right of tangata whenua to be consulted does not extend to having a right of veto over the project
- consultation is a two-way process – if iwi refuse to consult then they cannot expect the Court to hold that consultation has been inadequate
- where the consent authority will be hearing a resource consent application it must not consult unilaterally with any party
- iwi as submitters should ensure that they clearly express their concerns about a resource consent application so that the relevant issues can be clearly identified during the application process and additional information sought as required.

This section also considers the potential consequences of inadequate consultation, which provide further support to the desirability of consulting with tangata whenua.

5.2 Consultation guidelines

The leading case on consultation generally is *Wellington International Airport Ltd v Air NZ* [1991] 1 NZLR 671 (Court of Appeal). However, the recent *Land Air Water Assn* decision discusses tangata whenua consultation rather than consultation more generally, and distilled the following points from the leading cases (at paragraph 453).

- The nature and object of consultation must be related to the circumstances.
- Adequate information of a proposal is to be given in a timely manner so that those consulted know what is proposed.
- Those consulted must be given a reasonable opportunity to state their views.
- While those consulted cannot be forced to state their views, they cannot complain if, having had both time and opportunity, they for any reason fail to avail themselves of the opportunity.
- Consultation is never to be treated perfunctorily or as a mere formality.

- The parties are to approach consultation with an open mind.
- Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement.
- Neither party is entitled to make demands.
- There is no universal requirement as to form or duration.
- The whole process is to be underlain by fairness.

5.3 Possible outcomes of consultation

This *Land Air Water Assn* list has been cited with approval in subsequent cases on tangata whenua consultation. The Court in *Beadle* also focused on the possible outcomes of consultation. It held that while a fair and meaningful process should be followed, consultation does not require the parties to negotiate or agree, and it does not give tangata whenua a right of veto over the project:

> [549] Those consulting need to impart enough about the proposal that those consulted are able to respond with appropriate and accurate information on the potential effects on affected Maori, so that it may be considered by the decision maker. The consulting party, while entitled to have a working plan in mind, has to keep its mind open and be ready to change or even start afresh. However, although consultation involves meaningful discussion, it does not require agreement, and does not necessarily involve negotiation toward an agreement. *As counsel for the Minister submitted, the principle does not give a right to veto any proposal*. [emphasis added]

This restates the established position that the right of consultation does not amount to a right of veto, articulated by the Court of Appeal in *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113, which stated:

> [The argument that there is an ability to veto] is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to embrace them. (pp. 18–19)

In *Otararua Hapu* the Court rejected submissions about the rights that section 8 confers upon Maori. The Environment Court emphasised that section 8 of the RMA needs to be read and understood in the context of the whole Act. It does not provide that tangata whenua will necessarily decide who is to be on a consent committee, that decisions will be made on the marae, or that this should be by tangata whenua in accordance with their values and laws.

In *Takamore* the Environment Court (in its decision referred back from the High Court appeal) also took into account the fact that the road would provide a mutual benefit to both Treaty partners, despite the fact that it was planned to cut across an urupa. In its final decision, however, the Court declined the designation.

> [81] We must also observe that the proposed road confers [a] mutual benefit under the Treaty principles – a benefit which may well not eventuate if the requirement is not confirmed.

This reflects the decision in *Mangakahia Maori Komiti*, where the Court weighed the values and benefits of an activity to the cultural wellbeing of non-Maori, as well as Maori New Zealanders, and held that this was within the spirit of partnership recognised under the principles of the Treaty.

5.4 Tikanga Maori

As one of the purposes of consultation is to obtain information concerning potential adverse effects on tangata whenua interests, it may be necessary for those consulting to be aware of, and act in accordance with, the relevant tikanga or protocol for the particular tangata whenua group. As discussed later in this paper, tikanga Maori also provide guidance as to which group should be consulted where there are conflicting claims to tangata whenua status.

It should be noted that the tikanga applicable to any particular tangata whenua group may vary from group to group, and those consulting should be aware of such potential differences in systems.

Tikanga may also provide guidance as to what is acceptable or reasonable conduct when attempting to consult. It is important to consult in a manner that is appropriate to the tikanga of the tangata whenua. An example of good practice might be to consult at a hui convened for the purpose, where a larger project is involved. However, the courts have put limits on the extent to which tikanga should be followed. In the *Beadle* case, the allegation was made that no formal consultation had taken place with tangata whenua members living in Auckland and Wellington. In dismissing this claim, the Court recognised relevant tikanga and noted as follows:

> [627] The Maori cultural tradition is one of living collectively in the whanau, hapu and iwi and of ahi kaa. If the appropriate whanau, hapu and iwi are consulted, both the recognition and the information purposes of consultation can be met. We do not accept that as a matter of law the Treaty principle of consultation requires a proponent to trace every member of every tribe to wherever in the world he or she has gone, and consult with them individually.

5.5 Who pays?

The starting point is that there is nothing in the RMA requiring payment to tangata whenua for consultation. The RMA does not provide any mechanism where the party consulted with can claim any money for the cost of that consultation from the party doing the consulting. In practical terms, anecdotal evidence would suggest that a number of applicants and councils pay iwi authorities to undertake consultation. The RMA does not prevent this from happening; it simply does not set up a mechanism under which it must happen.

In the *Beadle* case, the Department of Corrections was criticised for making payments to various local residents for services rendered, mostly in the consultation process. The Court considered whether it was appropriate for people being consulted to be paid for their efforts. The Court held that while "buying support" was inappropriate, it was not the Court's role to determine whether improper payments had occurred:

> [653] The Minister could not be expected to carry out the consultation personally. Engagement of people with local knowledge was reasonable and practical. Engagement of opponents of the proposal would be counter-productive. We find

> no objection in principle to the Department making payments to those who provided services.
>
> [654] Of course there is a risk of payments of amounts that so greatly exceed the value of the services provided that they might be misunderstood as buying people's support for the project. It is not the task of the Environment Court, of its own initiative, to probe for evidence of misdoing of that kind ...

5.6 Examples of acceptable processes

It is important to note that there are no universal requirements as to the form consultation must take. Any manner of oral or written interchange that allows adequate expression and consideration of views will suffice. Nor is there a universal requirement as to duration required for consultation to be adequate. Consultation could range from one telephone call to years of formal meetings. However, the following cases are examples of what the courts have found to be acceptable consultation.

In *Tangiora v Wairoa District Council* (A6/98), consultation was held to be adequate. The local marae had been notified concerning the proposal and plans were available. The proposal was a well-known topic for discussion. The Court noted that copies of the plans were on the local store notice board during its site visit. The appellant spoke against the proposal when it was considered at a tangata whenua meeting. The Court held that appropriate steps had been taken by Maori to consider the proposal and advise the applicant as to whether or not it was generally supported.

The Court was satisfied that everyone had acted in good faith. The proposal was duly considered within Maoridom and resulted in a response that was generally supportive of the proposal.

In *Te Atiawa Tribal Council v Taranaki Regional Council* (A15/98) the issue was an application for a coastal permit to dredge sand from Port Taranaki and deposit it offshore. The Environment Court found that the appellant had been un-cooperative, and that the council had consulted adequately through its actions. These included sending letters to 11 local iwi bodies inviting them to consultation meetings and requesting how the applicant might effectively conduct its consultation with them. The appellant had attended a pre-hearing meeting.

At the conclusion of this meeting, the council asked the appellant's representative if there was anything the applicant could do to prevent an appeal. The response had been a blunt 'no'. The Court held:

> It is our understanding that consultation with Maori is required in application of the Treaty principle of partnership. It does not give Maori a veto over proposals the subject of resource consent applications. A partnership involves some reciprocity and so does consultation. If one party offers consultation and the other party does not respond, the latter party's assertion of lack of consultation is empty of meaning.

In *Land Air Water Assn* the Court found that a structure that was established to facilitate consultation with the recognised iwi authorities of Waikato Tainui had become unstable, through no fault of the applicant's, and without its knowledge.

In that case the applicant had initiated consultation, made technical presentations and site visits, undertaken regular briefing sessions, formed protocols for possible discovery of cultural or

archaeological artifacts, and regularly engaged with the structure. The Court held that the applicant's efforts meant that tangata whenua representatives were given every opportunity of presenting their concerns after being fully informed, and that as a result the consultation process was underlain by fairness.

As the applicant had consulted in good faith with the recognised iwi authorities, it was entitled to rely on the integrity of that process.

5.7 Examples of unacceptable processes

In *Aqua King* the Court stated (in relation to consultation by a council):

> Consultation to be meaningful requires more than sending out information to the various iwi about an application.

In *Marlborough Seafoods Ltd v Marlborough District Council* [1998] NZRMA 241, the Court commented that, although the applicant (and the council) had recognised that the local iwi was the kaitiaki of an area, there was no point in stating this if the iwi had no involvement in what occurs.

The council was also criticised for failing to do more than just advising the applicant to contact a number of local iwi representatives. The Court held that it should have done more, as it had acknowledged that it understood the historical relationship of Maori with the local area, and that the principle of exercising kaitiakitanga was an important consideration for the Court / the council to take into account. The Court held that in this situation both the applicant and the council had failed in their duties to consult.

In *Kotuku Parks* the applicant consulted solely with a whanau claiming mana whenua over land that was subject to its application for subdivision consent, and not the wider iwi group. The Court held that as the whanau owned part of the land that was subject to the subdivision, this whanau were 'virtually co-proponents of the subdivision' and could have had a disincentive to raise any Maori cultural issues about the development. As a result, this consultation was not adequate to allow the council to take into account the principles of the Treaty under section 8 of the RMA.

The Court in *Kotuku Parks* also accepted that an applicant needs to have a concept to be the subject of consultation. However, it noted that greater gains can be expected from consultation before a concept has been developed to the stage necessary to make a resource consent application. In that case, as the iwi were only consulted during an adjournment in the hearings process, the Court found that this consultation could not have had the same quality as consultation occurring before the applications were lodged. As a result of these factors, and the fact that the later consultation focused on archaeological concerns rather than wider issues, it held that consultation had been inadequate at the hearings stage.

5.8 Consequences of inadequate consultation

As stated in the *Ngati Hokopu* case, the RMA does not specifically deal with the consequences of inadequate consultation. Case law illustrates that there can be a number of consequences resulting from the failure to sufficiently consult with tangata whenua. In relation to applications

for resource consent, these consequences can range from invalidation of the application to declining an application. Even where a resource consent application is granted, where the adequacy of consultation is at issue, dissatisfied parties may appeal the grant of consent to either the Environment Court or higher courts. Where an application is processed on a non-notified basis, and the adequacy of consultation is at issue, this could result in allegations that the decision not to notify the application was flawed because not all effects were considered. In such a case, a dissatisfied party may apply to the High Court for judicial review of the decision not to notify the application.

An AEE is required to include a statement of any consultation undertaken and the results of such consultation. As the AEE forms part of the application for resource consent, which provides the foundation for the subsequent determination of the council or court, it is an important document and is part of the matters that determine a decision-maker's jurisdiction.

In *Ngati Hokopu*, the Court considered the effects of an inadequate AEE. It noted that despite the fact that there is no duty on the applicant to consult, if an AEE is silent or misrepresents the applicant's efforts at consultation, then the application may be invalid:

> [74] Whether or not an [AEE] is invalid because there is an inadequate report on consultation will depend on the facts and circumstances of the individual case having regard to section 88(6) and section 92(3) of the RMA.

The *Ngati Hokopu* case also shows that a deficient AEE can trigger several further steps if a consent authority is not convinced that appropriate consultation has occurred, as follows:

> [76] A consent authority may, if it is dissatisfied as to the report on consultation in the AEE, ask for further explanation and, if still not satisfied, commission its own report on the potential effects on the environment (including ... s6(e) and 7(a) matters). Secondly, the whole submission, hearing and appeal process can be invoked by any person who thinks they have an interest in an application and should have been consulted.

However, the Court went on to suggest that, in practice, there are unlikely to be cases where an AEE is so defective that it would invalidate an application. At paragraph [77], the Court held that:

> ... at least for applications for land use consents, only in truly exceptional cases (and we cannot think of an example) would a total failure to refer to consultation mean that an AEE was so defective as to entail that an applicant should start again because the Council or Court had no jurisdiction to consider the application. The more likely consequences of a failure to report on consultation under the RMA will be justified delays under section 92 – and a possible loss of priority as in *Aqua King Ltd v Marlborough District Council* – or, on appeal, an order for costs.

Therefore, even where an AEE accurately represents the position concerning what consultation has taken place, there is also the possibility that the council will request further information under section 92 of the Act where no or inadequate consultation has occurred. A consent authority is entitled to issue a section 92 request at any time before the hearing of an application relating to the application.

In *AFFCO New Zealand Ltd v Far North District Council* [1994] NZRMA 224, the Court outlined the possible basis for a further information request in relation to the role of applications in the submission process, as follows (p. 234):

> The proposed activity has to be described in detail sufficient to enable the effects of carrying it on to be assessed in the way described by the Fourth Schedule. The description is intended to include whatever information is required for a consent authority to understand its nature and the effects that it would have on the environment ... The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to oppose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials.

Therefore, to place the consent authority in a position to properly determine the likely adverse effects, which in some cases may include tangata whenua interests, an application needs to address such effects. Where consultation is inadequate, an applicant may not be in a position to address these matters due to a lack of understanding of these issues.

On a practical level, inadequate consultation can also result in public notification of the application under section 93. Where consultation has been inadequate and as a result either the effects on tangata whenua are not sufficiently addressed or written approvals on behalf of tangata whenua have not been obtained, an application may be publicly notified where it otherwise may not have.

Although the Resource Management Amendment Act 2003 amends sections 93 and 94, which concern public notification of resource consent applications, the underlying issue remains the same; that is, whether there are affected parties. Although under the new regime, obtaining written approval to an application does not necessarily mean those parties will not be notified, obtaining written approvals will support a decision not to notify the application.

In *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269, the Tribunal noted a council's requirement to enquire into and carefully assess what persons are likely to be affected by an application. This supports the suggestion that adequate consultation may place an applicant in a stronger position to assert who may and may not be adversely affected.

A consequence of consultation may be that tangata whenua give written approvals to an application for resource consent. This means that any adverse environmental effects on persons who have given their written approvals to an application are not relevant when determining an application for resource consent. It would therefore be in an applicant's interest to adequately consult with relevant tangata whenua groups as a starting point in obtaining any written approvals that may eventuate from the consultation process.

As with the delay caused by a section 92 request concerning tangata whenua interests, delays can also be the result of a failure to consult where proceedings are adjourned to enable consultation to occur. In *Berkett v Minister for Local Government* (A103/95 (interim decision)), the Planning Tribunal considered whether tangata whenua interests were adequately consulted prior to the council hearing. After noting the (then) indications of the Planning Tribunal that it is good practice for a planner preparing a report for a hearing body to consult with Maori, the Court adjourned the hearing pending consultation with tangata whenua. It noted:

> In the special circumstances of the case, we consider that it would be reasonable or indeed appropriate, that a suitably qualified person be engaged on the Minister's behalf to facilitate consultation ... the applicants or their representatives should, of course, be invited to participate and assist in the consultation process. We apprehend that matters might be discussed between them and the consultees that may be useful in assisting a better understanding of respective standpoints and

> hopefully in finding some mutually acceptable approach to help resolve, or at least reduce, differences.

The case of *Purnell v Waikato Regional Council* (A85/96) is another example of where proceedings were adjourned pending consultation.

Failure to consult adequately may lead to an application being declined or planning provisions overturned. In *Gill*, the Tribunal held that the council failed in its duty to consult with tangata whenua, and this finding was relevant to the matters on which the Court relied in declining the application for resource consent. The Court appeared to link the failure to consult with a failure to have sufficient regard to the tangata whenua interests as contained in the RMA. At p. 616, the Court noted that:

> We have no evidence that the Council gave especial regard to the Maori issues in its investigations into the proposal.

The failure to consult, or adequately consult, may effectively result in delays through the resulting participation of tangata whenua groups. In some cases, the relevant tangata whenua groups may be the only parties involved in any given process.

Of course, should any participant in an Environment Court hearing participate in a way that unduly delays matters, the aggrieved party may apply for an award of costs against that party. However, in the case of tangata whenua groups and interests, the courts have tended to refuse to order costs against tangata whenua groups where the provisions providing for Maori interests were invoked.

For example, in *Te Rohe Potae o Matangirau Trust v Northland Regional Council* (C60/97), the council sought full costs against a tangata whenua group on the grounds that its appeal was brought vexatiously and not in good faith. In response to the council's claim that the tangata whenua group was "using the appeal process to thwart" the applicant's oyster farm, the Court noted the legitimate grounds on which the tangata whenua group could participate, which had a bearing on its determination on costs. At p. 2 the Court noted:

> That [the appellants were using the appeal process to thwart the application] is correct and normally such an attitude would produce at least a significant award of costs or perhaps an award equivalent to solicitor and client costs. *However, in this particular case there are more than environmental factors to be borne in mind. The appellant is a Maori trust representing some of the tangata whenua.* The following sections of the Act are therefore relevant. Section 6(e) ... section 7 .... However section 8 states that the Court must also take into account the principles of the Treaty of Waitangi ... I am conscious that there is a raft of unresolved issues for tangata whenua in relation to coastal marine areas and the placement of marine farms in them. I do not see how in such circumstances (at present) any appeal by tangata whenua could be seen as being in *bad faith*, even if section 8 was not argued appropriately or even relied on in this case. So an award of costs on an indemnity basis is appropriate here. [emphasis added]

Therefore, although the tangata whenua group were required to meet some of the council's and applicant's costs, the amount of costs was reduced due to the factors stated above.

6 Which Groups should be Consulted?

6.1 Summary

Once it is determined that there is a duty to consult with tangata whenua, or it is considered good practice to do so, and the method and process to be followed when consulting are established, the next and final issue is to determine which group or groups should be consulted.

This can be a controversial issue as it involves concepts of tangata whenua and mana whenua, particularly in relation to areas in relation to traditional rohe (boundaries) of iwi or hapu areas. Consequently, and particularly in the case of an applicant for resource consent, the question may arise as to what steps such parties can reasonably be expected to take to ascertain the correct tangata whenua group to be consulted.

Analysis of the relevant provisions of the RMA and applicable case law lead to the following conclusions.

- The terminology of the RMA should be used to guide the determination of which Maori group should be consulted.
- Tikanga Maori is recognised by the RMA as determining tangata whenua status. Tikanga is a matter for expert assessment.
- Council records and any statutory acknowledgements should be checked to assist in determining tangata whenua status.
- Reasonable steps must be taken to identify the correct tangata whenua group.

6.2 Definitions in the Act

The starting point for determining which groups should be consulted, when there is a duty to consult, is the RMA. The RMA includes the following definitions, which may be relevant when investigating which group should be consulted.

> *Tangata whenua* in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area.
>
> *Mana whenua* means customary authority exercised by an iwi or hapu in an identified area.
>
> *Iwi authority* means the authority that represents an iwi and that is recognised by that iwi as having authority to do so.
>
> *Tikanga Maori* means Maori customary values and practices.
>
> *Kaitiakitanga* means the exercise or guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

Of course not all of the above definitions will apply in any given case and the applicability of each term will depend on which provisions of the RMA are being invoked.

In addressing the likely effects of an application, an applicant (if it decides to consult with tangata whenua) or a council, when it determines the application, needs to determine who the tangata whenua of the affected area are. To do this, an applicant or council needs to ascertain which iwi or hapu holds mana whenua over that area. To determine mana whenua, an applicant or council needs to ascertain which iwi or hapu exercises customary authority over that area. Customary authority may be determined by reference to tikanga Maori, meaning Maori customary values and practices.

Determining these issues is a matter of expertise, and often an applicant – and in some cases councils – may not possess the expertise to decide which group to consult with. Even where expertise is available, there may nevertheless be disputes between Maori groups as to who holds mana whenua or kaitiakitanga in relation to a particular area.

Similar issues can arise in relation to preparation of local authority policy statements or plans, as local authorities are required to consult the "tangata whenua" of the area which may be affected by proposed planning controls, through "iwi authorities and tribal runanga" (clause 3(1)(b), First Schedule). In relation to regional coastal plans, the regional council must consult with "iwi authorities" of the region.

The issue in these cases becomes the extent to which an applicant or council must attempt to identify which group has status as tangata whenua and, in cases of disputes over tangata whenua status, which of the disputing groups should be regarded as tangata whenua for the purpose of consultation.

6.3 Determining who is tangata whenua

Under tikanga Maori, kaitiakitanga determines who has the right to be consulted over proposals affecting a particular resource. Where there is a dispute over which group has mana whenua over an area of land, this must be determined by the Maori Land Court (*Winter & Ors v Taranaki Regional Council* (A106/98)). The Maori Land Court, acting under section 30 of Te Ture Whenua Maori Act 1993, has jurisdiction to determine who are the most appropriate representatives of a class or group of Maori. This jurisdiction can arise when another court or tribunal requests the Maori Land Court to provide such advice, or when any person seeks an order from the Maori Land Court to that effect.

In the *Beadle* case, the Court was faced with the issue of which group or persons represented the tangata whenua interests. The Court noted that it was for tangata whenua, not the Court, to determine who had the right to speak on behalf of any group:

> [408] In these proceedings the Court has no occasion to make any finding about who has the right to speak on behalf of any whanau, hapu or iwi, according to its tikanga. No opinion on that topic is to be inferred from anything in this decision.

In *Tangiora* the Court considered the weight to be given to competing tangata whenua evidence. In this case the Court took an unusual step and moved the proceedings to a location where it could hear evidence from a senior kaumatua of the local tangata whenua. Two other tangata whenua witnesses had contended that the land was waahi tapu, being the site of an old burial ground.

However, the kaumatua, described as an “impressive witness” by the Court, gave evidence that the beach front was more likely to have been used for food gathering and therefore it could not have been a burial ground. In terms of the weighting of scientific and tangata whenua evidence, this case is another in which there appears to be no contest between anecdotal evidence, and the “opinions of well qualified evidence based on following scientific method, and formed with professional integrity”. Therefore, tikanga is likely to be applied by the Court to determine tangata whenua status and in order to decide the weight to be placed on conflicting tangata whenua evidence.

6.4 Council registers

In some cases the local authority may hold information concerning tangata whenua groups and the areas over which they hold mana whenua. It would be prudent for an applicant seeking to consult with and identify the relevant tangata whenua group to enquire with the council to determine this issue (see *Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council* (A80/02)).

As mentioned above, the RMA recognises planning documents produced by iwi authorities. The purpose of these documents appears to be to provide a vehicle for expressing the concerns of tangata whenua in any given area. However, as mentioned, the purpose and effect of iwi planning documents in relation to defining issues of concern to iwi does not appear to have been specifically dealt with by the courts. Nevertheless, it is suggested that, where an iwi planning document is registered with a council, its contents can be reasonably relied on by an applicant or a council in determining which group should be consulted.

6.5 Statutory acknowledgements

Acknowledgements of tangata whenua interests in particular areas can be contained in other legislation, particularly legislation that gives effect to Treaty settlements between the Crown and Treaty claimants. For example, the Ngai Tahu Settlement Act requires statutory authorities to have regard to a statutory acknowledgement relating to a particular area when deciding whether Te Runanga o Ngai Tahu is likely to be affected by resource consent applications.

Therefore, any statutory acknowledgements concerning tangata whenua status should be considered when determining this issue for the purpose of consulting under the RMA.

Section 94B(2) of the Act (as amended in 2003) requires a consent authority to have regard to every relevant statutory acknowledgement specified in Schedule 11, which lists particular statutes, when determining who may be adversely affected by an application for consent. Schedule 11 should therefore be referred to in determining who may be adversely affected by a particular proposal.

6.6 Reasonable attempts to identify relevant parties

Where there is uncertainty as to which group is tangata whenua, a council or applicant seeking to consult is only expected to take reasonable steps to identify the correct group (*Luxton v Bay of Plenty Regional Council* (A49/94)).

In *Winstone Aggregates*, where the applicant relied on the council's information concerning the tangata whenua group, it was held that the applicant was entitled to rely on such advice and in the circumstances it would be unfair to require more. At paragraph [240] the Court stated:

> Winstone not only relied on Council to identify Maori parties, but also made efforts through the Tainui Trust Board to identify any possible additional party. To require more of Winstone or the Council would put applicants and consent authorities in an impossible situation. It would mean that consultation with Council identified parties would not be sufficient, nor would consultation with those other parties who identified themselves during the process, as occurred here. To require more in the present circumstances would be impracticable and unfair.

In *Contact Energy Ltd,* the Court determined that Contact had respected the Treaty principle of consultation by correctly identifying the relevant tangata whenua, holding three hui, and by meeting with a representative committee, although there were problems finding someone with a mandate to speak for the affected hapu. Although the mandate issue was never resolved, the Court focused on Contact's actions and dismissed an argument that it had failed to consult appropriately.

6.7 Disputes over status

While the issue of which tangata whenua group should be consulted can, on its own, be difficult to answer, the situation will obviously be more difficult where there is a dispute between tangata whenua groups over who has authority to speak for tangata whenua. As already noted in section 6.3 of this paper, resort may be had to the Maori Land Court. Alternatively, a broader approach can be taken, as illustrated by the *Beadle* case.

The *Beadle* case deals with the issue of determining the status of tangata whenua groups where this is in dispute. In that case, various persons or groups claiming to represent tangata whenua interests held opposing views on the appropriateness of the proposed prison: some supported it, while other groups remained fundamentally opposed to the application.

The concept of 'tuakanatanga' (seniority) was raised by the parties in an attempt to resolve the issue. The regional council in that case submitted that neither it nor ultimately the Environment Court were in a position to judge whether or not tuakanatanga was the tikanga of Nga Puhi (the local iwi) and to make an assessment of who is and who is not tuakana (senior) as, in the council's view this would be a recipe for an administrative quagmire.

The Court was not persuaded that the concept of tuakanatanga has significance in decision-making under the Act. In this connection, it made the following comments:

> [405] First, the Court has to make findings on issues raised by the purpose of the Resource Management Act which is described in section 5, and the particular

> aspects of that purpose described in sections 6(e), 7(a) and 8. *None of those sections indicates that persons of particular status are to be preferred over others.*
>
> [406] Rather, on the issues raised by those provisions, findings have to be made on the evidence. Where the evidence of one of more witnesses is in conflict with that of other witnesses, the Court has to make a finding. In doing so, it may give greater weight to the testimony of a witness of greater experience of the subject, or it may be persuaded by the evidence of another witness who may lack customary authority but whose testimony carries conviction for other reasons. [emphasis added]

While the Court confirmed that the relevant people to be consulted should be those who had rangatiratanga (chieftainship) over the resource, it also held that this class of people could extend to include others who held relevant information about the possible adverse effects of the proposal on that resource. It noted:

> [548] ... Maori who are to be consulted are those who hold rangatiratanga or kaitiakitanga in respect of natural and physical resources affected by the proposal *and* those who possess appropriate and accurate information on the potential effects of the proposal on affected Maori. In a particular case, the second class *might extend beyond those who hold rangatiratanga or kaitiakitanga* in respect of the resource affected. [emphasis added]

In the *Beadle* case, the hapu opposing the prison claimed that consultation with them had been defective as "instead of all kaitiaki being 'heard' (in the natural justice sense) on an equal footing, some appear to have been 'heard' more than others". After considering the relevant evidence, which did not include evidence concerning rangatiratanga, and relying on its findings about who primarily held kaitiakitanga (Ngati Rangi), the Court prioritised the views of Ngati Rangi, based on its kaitiakitanga over the specific resource.

The Court held that the consultation was not defective just because the group with the primary kaitiakitanga role in respect of the affected resource had been consulted with more rigorously. It stated:

> [629] As Ngati Rangi hold the primary kaitiakitanga role in respect of those resources, and have done for more than a century, it was appropriate that consultation with them was regarded as the first priority, and indeed their views were important to the Minister ... The views of others were also canvassed, particularly those of Te Uri o Hua. However because their kaitiakitanga in respect of the resources to be affected ... is additional to that of Ngati Rangi, we find that consultation with Te Uri o Hua was not defective by being supplementary to that with Ngati Rangi.

The fact that the hapu that held ancillary kaitiakitanga was also consulted, as were other hapu, appeared to have had bearing on the Court's finding that consultation was adequate.

The Court also commented that it placed little weight on the number of people opposing the application compared with the number of people supporting it. In this respect, it noted that:

> [380] [i]t is the Court's understanding that the Resource Management Act regime allows for differing points of view to be expressed and explained ...
>
> [381] It is also our understanding that the Resource Management Act does not provide for decisions on proposals to [be] made according to whether more people

support the proposal or more oppose it. Where Parliament has wanted decisions to make on that kind of basis, it has provided for elections or polls.

Appendix I: Glossary (definitions from the Resource Management Act 1991)

Consent authority: the Minister of Conservation, a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act.

Effect: this includes –

(a) Any positive or adverse effect; and

(b) Any temporary or permanent effect; and

(c) Any past, present, or future effect; and

(d) Any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the effect, and also includes –

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact.

Environment: this includes –

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

Iwi authority: the authority that represents an iwi and that is recognised by that iwi as having authority to do so.

Kaitiakitanga: the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; it includes the ethic of stewardship.

Local authority: a regional council or territorial authority.

Mana whenua: customary authority exercised by an iwi or hapu in an identified area.

Tangata whenua (in relation to a particular area): the iwi, or hapu, that holds mana whenua over that area.

Tikanga Maori: Maori customary values and practices.

Treaty of Waitangi (Te Tiriti o Waitangi): has the same meaning as the word 'Treaty' as defined in section 2 of the Treaty of Waitangi Act 1975.

Appendix II: Cases cited (in chronological order)

Te Runanga o Ati Awa ki Whakarongotai Inc & Takamore Trustees & Waikanae Christian Holiday Park Inc v Kapiti Coast District Council (W50/2003) (revised Environment Court decision).

Takamore Trustees v Kapiti Coast District Council (AP191/02 and AP192/02) (High Court).

Ngati Hokopu ki Hokowhitu v Whakatane District Council (C168/2002).

Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council (A80/02).

Shayron Lee Beadle & Ronald Wihongi & Riana Wihongi v Minister of Corrections (A74/02).

Carter Holt Harvey v Te Runanga o Tuwharetoa ki Kawerau & Bay of Plenty Regional Council (AP42/2002).

Contact Energy Ltd v Waikato Regional Council & Taupo District Council (A4/2002).

Land Air Water Association v Waikato Regional Council (A110/2001).

Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213.

Kotuku Parks Limited v Kapiti Coast District Council A73/2000.

Otararua Hapu v Taranaki Regional Council (A124/98).

Mahuta & Ors v Waikato Regional Council (A91/98).

Marlborough Seafoods Ltd v Marlborough District Council [1998] NZRMA 241.

Watercare Services Ltd v Minhinnick [1998] NZRMA 113 (CA).

Winter & Ors v Taranaki Regional Council (A106/98).

Te Awatapu o Taumarere v Northland Regional Council (A34/98).

Te Atiawa Tribal Council v Taranaki Regional Council (A15/98).

Tangiora v Wairoa District Council (A6/98).

TV3 Network Services Ltd v Waikato District Council [1997] NZRMA 557.

Mason-Riseborough v Matamata-Piako District Council (A143/97).

Director-General of Conservation v Marlborough District Council (A89/97).

Te Rohe Potae o Matangirau Trust v Northland Regional Council (C60/97).

Mangakahia Maori Komiti v Northland Regional Council [1996] NZRMA 193.

Purnell v Waikato Regional Council (A85/96).

Te Runanga o Taumarere v Northland Regional Council (A108/95).

Berkett v Minister of Local Government (A103/95) (interim decision) (A6/97) (final decision).

Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA).

Paihia & District Citizens Association Inc v Northland Regional Council (A71/95).

Aqua King Limited v Marlborough District Council (W19/95).

Paul v Whakatane District Council (A12/95).

Ngati Kahu and Pacific International Investments Limited v Tauranga District Council [1994] NZRMA 481.

Luxton v Bay of Plenty Regional Council (A49/94).

AFFCO New Zealand Ltd v Far North District Council [1994] NZRMA 224.

Ngatiwai Trust Board v Whangarei District Council [1994] NZRMA 269.

Haddon v Auckland Regional Council [1994] NZRMA 49.

Waitutu Incorporation v Southland District Council (C68/94).

Gill v Rotorua District Council [1993] 2 NZRMA 604.

Wellington International Airport v Air NZ [1991] 1 NZLR 671 (CA).