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Contents

1 Introduction 1
1.1 Purpose of the paper 1
1.2 Format of the paper 1
1.3 Disclaimer 2
1.4 Acknowledgement 2
2 Making decisions on plans and consents 3
2.1 Introduction 3
2.2 The approach of the courts 3
2.3 Giving effect to sections 6(e), 7(a) and 8 in decision making 4
2.4 The relationship between sections 5, 6(e), 7(a) and 8 5
2.5 Balancing conflicting values 6
2.6 How to assess Maori values 7
2.7 The holistic approach to consultation 8
3 Consultation with tangata whenua under the RMA 10
3.1 Common themes and guidance 10
3.2 What is consultation? 11
3.3 When consultation must take place and who is to do the consulting 12
3.4 The basis for consultation with tangata whenua 17
3.5 Who to consult? 19
3.6 Who pays for consultation? 21
3.7 Other matters relating to consultation 21
Appendix I: Glossary 25
Appendix II: Runanga Iwi Act 1990 (repealed) 26
Appendix III: Cases cited 28

1 Introduction

1.1 Purpose of the paper

This paper builds on and updates an earlier paper, entitled Working Paper No 3 – Case Law on Consultation, June 1995 (regarding consultation with tangata whenua).

As with the earlier paper, this paper is primarily targeted at local authorities and iwi authorities operating under the Resource Management Act 1991 (RMA). It aims to assist in an understanding of the principles emerging from case law on taking into account sections 6(e), 7(a) and 8 in making decisions under the RMA, with specific reference to consultation.

1.2 Format of the paper

Part 2 contains an analysis of the latest developments in case law with regard to taking account of section 6(e), 7(a) and 8 when making decisions under the RMA. This provides advice on how these sections have been interpreted. It also describes the holistic view the courts have taken of consultation within the whole decision making process. This leads onto Part 3's analysis of what the case law now says are the requirements for consultation.

- Making decisions on plans and consents:
  - Giving effect to section 6(e), 7(a) and 8 in decision making
  - The relationship between sections 6(e), 7(a) and 8
  - Balancing conflicting values
  - Assessing Maori values
  - The holistic approach to consultation
- Consultation with tangata whenua under the RMA:
  - Common themes and guidance
  - What is consultation?
  - When consultation must take place and who is to do the consulting
  - The basis for consultation with tangata whenua
  - Who to consult?
  - Who pays for consultation with tangata whenua?
  - Other matters relating to consultation
- A glossary of terms in Appendix I.
- The repealed Rununga Iwi Act in Appendix II.
- A bibliography of the cases cited in Appendix III.

1.3 Disclaimer

Please note that, 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 reader should refer directly to the RMA. Any advice given is intended as a guide and should not be taken as defining or providing a definitive interpretation of the RMA or case law.

1.4 Acknowledgement

A draft of this paper was prepared for the Ministry for the Environment by Helen Atkins, Partner, and Nicola Carrell, Solicitor, Phillips Fox, Wellington.

2 Making decisions on plans and consents

2.1 Introduction

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.

Section 6 provides for matters of national importance. It requires decision makers to recognise and provide for (amongst other matters) the 'relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' (section 6(e)).

Section 7 provides for other matters that decision makers must have particular regard to including, 'kaitiakitanga' (section 7(a)), and 'the ethic of stewardship' (section 7(aa)). Kaitiakitanga is defined as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources, and includes the ethic of stewardship' (section 2(1)). Neither 'stewardship' nor 'the ethic of stewardship' are defined.

Section 8 provides that decision makers under the RMA shall take into account the principles of the Treaty of Waitangi.

2.2 The approach of the courts

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. A summary of these cases is provided in part 3 of this paper.

The recent cases have seen a significant shift away from the narrow focus on consultation, to encompassing 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.

The key points from recent cases

The following is a summary of the key points that can be drawn from the cases. The main cases are considered in more detail after this summary.

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.

Active protection of Maori interests requires positive action. It also requires access to sufficient information of an adequate quality to be in a position to fully consider the effects on those interests.

The principle of partnership is a basis for the practice of consulting Maori who may be adversely affected by a proposal.

Sections 6, 7 and 8 should not be read in isolation. They are integral to achieving sustainable management, and not a counterbalance to that end. They are not an objective in themselves.

Decision makers must balance the conflicting values of Maori and non-Maori to take account of the principles of the Treaty.

In assessing Maori values the intangibles, that is, the spiritual and metaphysical values, are important.

Consultation is 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.

2.3 Giving effect to sections 6(e), 7(a) and 8 in decision making

Te Awatapu O Taumarere v. Northland Regional Council concerned a reference on the proposed Northland regional policy statement relating to the objectives for water quality.

The case is significant as it discusses how to give effect to sections 6(e), 7(a) and 8, including the Treaty principle of active protection of the Maori people in the use of their lands and water.

Te Awatapu O Taumarere was a committee of Ngapuhi formed to act on behalf of the kaitiaki of the waters of the Taumarere River and those parts of the Bay of Islands into which it flows. Te Awatapu sought to include an additional objective in the regional policy statement requiring cultural purposes to be among the purposes for which water quality is to be maintained or enhanced. Te Awatapu also sought to include an objective relating to the gathering of shellfish for human consumption as a purpose for which the quality of water in estuaries, and in areas of inner harbours, which are influenced by major river inflows, is to be maintained or enhanced.

The Regional Council considered that the management of water for cultural purposes ought not to be mixed with its management for other purposes because there were no measurable standards for managing waters for cultural purposes. The Council had already provided a specific objective for the tangata whenua in the proposed policy statement provisions which sought to avoid, remedy or mitigate the adverse effects of discharges of contaminants on the traditional cultural and spiritual values they held in respect of the waters. The Council was concerned that to do what Te Awatapu requested would create a false expectation as to what might be able to be achieved.

The Environment Court agreed with Te Awatapu that the objectives should be amended to give effect to s6(e) of the RMA, which requires that the relationship of Maori with the Taumarere waters be recognised and provided for; and on s7(a) which requires that particular regard be had to kaitiakitanga. The Court pointed out that Ngapuhi had long had a cultural and spiritual relationship with the Taumarere waters and maintained kaitiakitanga responsibility in respect of them. The Court held that Ngapuhi were concerned not only about the quality of the waters for practical reasons, such as shellfish gathering, but also because poor water quality denigrates the mauri or life force of those waters.

The Court directed the Council to amend the regional policy statement to provide for cultural purposes in the water quality objective. In relation to the shellfish gathering issue the Court supported Te Awatapu, but adjourned the case to allow the parties time to discuss it further. The decision represents a positive affirmation of a necessity to provide for Ngapuhi's cultural well being by, firstly, recognising the tribe's interests in the waters and fisheries of the district and, secondly, by providing for that recognition with a practical measure such as educating pastoral farmers in the value of riparian strips.

In *Te Atiawa v Taranaki Regional Council* the Environment Court held that the principles of the Treaty, which are relevant in this case, are the principles of partnership and protection.

Section 8 of the RMA required the Court to take into account the principles of the Treaty of Waitangi. The principle of protection is supported by s6(e) and in this case required the decision maker to take into account the importance of protecting Maori traditional kai moana habitats from harm. The principle of partnership is a basis for the practice of consulting Maori who may be adversely affected by a proposal. Such consultation is for assessing the effects so that they can be taken into account when making decisions.

In *Ngai Tahu Maori Trust Board v. Director-General of Conservation* the Court of Appeal held that the requirement to take account of the principles of the Treaty of Waitangi should be interpreted and applied widely. The Court of Appeal held that the Director-General of Conservation had been wrong to reject protection of Ngai Tahu's interests as a relevant factor. The Treaty principles were not limited to consultation but also included actual protection of tangata whenua interests.

2.4 The relationship between sections 5, 6(e), 7(a) and 8

In *Mangakahia Maori Komiti v. Northland Regional Council*, 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 invoked and applied in the promotion of the RMA's purpose expressed in section 5, not in counterbalance to that end.

In *Mahuta & Ors v. Waikato Regional Council* the Court held that section 5:

> Is a single purpose, embracing all elements set out in section 5(2), and that sections 6, 7 and 8 are subordinate and accessory to it. (p 42)

The Court noted, in *Mason-Riseborough v. Matamata-Piako District Council*, that sections 6, 7 and 8 all begin with the same phrase, which indicates that each has a direct relationship to achieving the purpose of the Act, which is sustainable management as defined in section 5. For this reason, section 8 does not stand alone, nor does it feed directly into the provisions of section 6(e) or section 7(c).

In *Otararua Hapu v. Taranaki Regional Council* 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 Maori will necessarily decide who is to be on a consent committee, nor that decisions be made on the marae, nor that this be by Maori people in accordance with their values and laws.

2.5 Balancing conflicting values

The Court considers that decisions involving a consideration of sections 6(e), 7(a) and 8 often require it to take into account and balance conflicting values.

In *Mangakahia Maori Komiti v. Northland Regional Council* (the details of which are considered in Part 3 of this paper) the Planning Tribunal was faced with having to take into account and balance conflicting values (p 209). The Tribunal referred to an article by BV Harris in the *Otago Law Review* (1993) 80 LR51 at 60. In that article the author stressed that the wording of section 5(2) of the RMA is concerned with enabling the provision of cultural wellbeing for New Zealand's non-Maori peoples, as well as Maori peoples. Therefore, to weigh the values and benefits of an activity to the cultural wellbeing of non-Maori, as well as Maori New Zealanders, was within the spirit of partnership recognised under the principles of the Treaty.

The balancing approach was also endorsed by the High Court in *TV 3 Network Services Ltd v. Waikato District Council*. The judge, Hammond J quoted from Barry Lopez's book *Arctic Dreams* (1986):

> What every culture must eventually decide, actively debate and decide, is what of all that surrounds it, tangible and intangible, it will dismantle and turn into material wealth. And what of its cultural wealth, from the tradition of finding peace in the vision of an undisturbed hillside to a knowledge of how to finance a corporate merger, it will fight to preserve.

The High Court held that the decision of the Environment Court (further discussed below) was consistent with the purposes of the RMA, in assessing what, in this case, was essentially a clash between technology and culture. In preferring the latter the Environment Court '*was acting on evidence which was available to it and making precisely the kind of choice the Act contemplates'*.

Likewise in *Mahuta & Ors v. Waikato Regional Council* the Court was faced with balancing the interests of Waikato-Tainui and the wider community. The case related to the expansion in capacity of Anchor Products Ltd's dairy factory at Te Rapa. Waikato-Tainui appealed the Council's decision to grant consent on the basis that the proposal would have an adverse effect on their spiritual relationship with the Waikato River. The only matter that could not be mitigated was the perception of contamination of the River irrespective of any perceptible physical effect. The only way to avoid this perception was for the wastewater to be discharged to land, an option which had considerable practical difficulties.

In the circumstances of this 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 by:

- minimising the taking of water from the Waikato River
- the treatment of waste water and the design of discharge structure
- early review of the contaminant limits in the discharge
- acknowledgements by the applicant of the deep cultural and spiritual significance of the Waikato River to Waikato-Tainui, backed up by undertakings in support of enhancing the quality of water in the river, and about protection of the nearby Pa site.

The Court held:

> It is our judgement 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 contrast, the Environment Court came to a different conclusion in *Te Runanga O Taumarere v. Northland Regional Council* in relation to a proposed sewage treatment system for Russell and connected settlements. The Council granted consent to the proposal which involved the discharge of very high quality effluent into a natural wetland in the catchment of Uruti Bay. Te Runanga O Taumarere appealed on the grounds that: the Bay is an important source of kaimoana and has considerable cultural and historical significance; they were opposed to all discharges of waste to water; and that the proposed discharge would be spiritually and culturally sensitive and an affront to the Ngapuhi tribe.

The Tribunal found that the discharge 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.

The Tribunal held that the applicant had not sufficiently considered the alternative to discharging to the Bay, namely a deep bore. The Tribunal stated that if the applicant further considered the alternative and found it not to be feasible then it could pursue its original discharge option.

2.6 How to assess Maori values

The Court has considered how to assess the weight to be given to Maori values where a site has spiritual or metaphysical value but no actual physical value can be identified.

In *Otararua Hapu v. Taranaki Regional Council* 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.

The *TV3 Network Services Ltd v. Waikato District Council* case concerned an appeal to the High Court against the Environment Court's decision to disallow a resource consent for a television translator to be constructed on a hill known as Horea on the Raglan Harbour.

In its decision the Environment Court found that, even though damage to land was minimal (ie, less than farming) and the land was not known to have any archaeological remains, because of a long history of occupation by ancestors of tangata whenua, any disturbance of the ground would be regarded by tangata whenua as a desecration.

The High Court disallowed the appeal and found that although the proposed translator would represent a use of resources in a way which would enable people to watch television and to provide for their social and cultural well-being, it would fail to enable the people who are the tangata whenua of the area to provide for their social and cultural well-being.

The question was whether, objectively, the particular kind of activity proposed is intrinsically offensive to established waahi tapu or other cultural considerations. In this case the overall cultural uniqueness of Horea was held to be significant. The High Court held that placing a television tower on the ground in question extends to more than merely the disturbance of the ground under the structure. It must extend beyond its physical presence to the effect of that structure on the site in its cultural context.

In *Mangakahia Komiti v. Northland Regional Council* the Council and Court considered the evidence of Komiti regarding the *'unswerving and close affinity which the tangata whenua have with the river as a life sustaining and vibrant entity'*. The effect of this evidence was to persuade the Court to reduce the consent period to enable all parties to gather data on the effects of the proposal and to reconsider the issue.

In the *Tangiora v. Wairoa District Council* case 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 beachfront 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'*.

In the case of *Mason-Riseborough v. Matamata-Piako District Council* the Court noted that recent decisions of the appellate courts have considered the weight which is to be given to the opinions of tangata whenua, particularly when expressed on Part II matters. The clear signal from the appellate courts is that there is no right of exclusionary veto. The importance of recognising the views of Maori cannot be denied, but not to the extent that they are given paramount status. A balanced, objective consideration of the relevant interests is required based on the circumstances. The Environment Court quoted Hammond J in *TV Network Services Ltd v. Waikato District Council*:

> 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.

The Court of Appeal in *Watercare Services Ltd v. Minhinnick* was also cited by the Court in *Mason-Riseborough*. In the former the Court held:

> This question involves Mrs Minhinnick's proposition that the Treaty of Waitangi gives her a right to veto Watercare's proposed work and activity. Salmon J dealt with this point by saying that section 6 in its reference to the principles of the Treaty did not give any individual the right to veto any proposal. We entirely agree. It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to embrace them. (pp 18-19)

2.7 The holistic approach to consultation

In *Pahia v. Northland Regional Council* the Tribunal focused on the wider Treaty principle of informed decision making rather than the narrower one of consultation. The Tribunal noted that while consultation may be a means to this wider end, it is not in all cases regarded as a necessary implication of the wording of section 8.

In the case of *Mason-Riseborough v. Matamata-Piako District Council* 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)

The Court described the impossibility of promulgating a comprehensive or complete set of Treaty principles. It emphasised Cooke P's approach to the Treaty, that *'what matters is the spirit'* and that the *'principles are not to be founded in tablets of stone like the 10 commandments'* (p 12).

Reinforcing its holistic approach to consultation, and its acceptance of the requirement for 'active protection', the Court then applied a higher burden on councils to take positive action to actively protect Maori interests.

> 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. (p 13)

The case of *Tangiora v. Wairoa District Council* endorses the Court's decision in *Mason-Riseborough*. The Court emphasised a holistic approach to consultation as a part of the Treaty principle of active protection.

The Court reiterated that the general aim where matters of significance to Maori are involved must be to see that the principles of the Treaty (including, but by no means limited to, consultation) are properly taken into account in the decision making process, against the background of the individual circumstances.

3 Consultation with tangata whenua under the RMA

This section looks in more detail at the holistic approach that the Courts have taken to consultation. It also traces how the case law on the requirements of consultation has evolved. Some common themes and guidance from the case law is set out below to provide a quick reference to the key points.

3.1 Common themes and guidance

While the *'analyst should not too readily extract principles of general application from decisions in respect of individual fact situations'* (*Mason-Riseborough*) the following points can be drawn from the cases:

General comment

- Each case depends on its own facts. At times the duty to consult (ie, by virtue of section 8 of the RMA) obliges the council officer reporting to the council to engage in consultation with tangata whenua. At other times, depending on the circumstances, the applicant's consultation may be sufficient.
- Consultation is to be approached in a holistic manner, not an end in itself, but in order to take the relevant Treaty principles and the requirements in sections 6(e) and 7(a) into account when making decisions.

Specific comments

- There is a higher obligation on consent authorities to consult with the tangata whenua when they know the tangata whenua have a special relationship with the area affected by a proposal.
- Where the consent authority will be hearing a resource consent application it shall not consult unilaterally with any party.
- A council officer acting in a non-judicial capacity in preparing a report for pre-hearing distribution may have a duty to consult the tangata whenua, to enable the consent authority to take account of matters arising under section 6(e), 7(a) and 8 when making decisions.
- Where the Crown is the consent authority it is required to consult with tangata whenua prior to a resource consent application hearing.
- Consultation by a council in the course of preparing a proposed policy statement or plan is mandatory but consultation by the applicant in a resource consent application is not.

- The Fourth Schedule requires an applicant to identify those persons interested in or affected by a proposal, the consultation undertaken and any response to the views of those consulted. An applicant who fails to adequately consult at an early stage runs the risk of being required to remedy the situation before the application proceeds.
- It is recognised good practice that applicants for resource consents engage in consultation with the tangata whenua where their proposals may affect the matters referred to in section 6(e) and section 7(a).
- Consent authorities should carefully assess, after reasonable inquiry, whether an iwi, hapu, or particular Maori representative should be personally notified of a resource consent application.
- It is not for councils to decide who is entitled to manawhenua over an area, the appropriate forum for this is the Maori Land Court.
- Consultation does not mean consensus. Maori have no right of exclusionary veto.
- A consent authority should carefully consider what supporting information it should require from applicants.
- Consultation is a two-way process. If iwi refuse to consult then they cannot expect the Court to hold that consultation has been inadequate.
- 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 need be.

3.2 What is consultation?

"Did you go there with the capacity to change your mind? If you didn't you weren't consulting. Did you go there with a genuine intention to elicit views and respond to them? If you didn't you weren't consulting."[1]

The leading case on consultation generally is *Wellington International Airport Ltd v. Air NZ* (1991) (Court of Appeal). The elements of consultation can be summarised as including, but not limited to the following:

- Consultation is the statement of a proposal not yet finally decided upon.
- Consultation includes listening to what others have to say and considering responses.
- Sufficient time must be allowed and a genuine effort must be made.
- There must be enough information made available to the party obliged to consult, to enable the consultee to be adequately informed so as to be able to make intelligent and useful responses.
- The party obliged to consult must remain open minded and be ready to change and even start afresh. However, the party consulting is entitled to have a working plan already in mind.

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[1] Jones, S. 1992. "Perspectives on the Environment" in *Seminar Proceedings: Resource Management and the Treaty of Waitangi*. Bay of Plenty Regional Council: Whakatane, p 42.

- Consultation is an intermediate situation involving meaningful discussion.
- The party obliged to consult holds meetings, provides relevant information and further information on request, and waits until those being consulted have had a say before making a decision.

Consultation is not:

- merely telling or presenting or
- intended to be a charade or
- the same as negotiation, although a result of consultation could be an agreement to negotiate.

There are no universal requirements as to the form consultation must take. Any manner of oral or written interchange which 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.

3.3 When consultation must take place and who is to do the consulting

The discussion of the case law below gives some background to how the case law has evolved and to how the key points have been arrived at in the various cases.

Recent case law

Mason-Riseborough v. Matamata-Piako District Council (1997)

This case involved an appeal against the grant of a resource consent to build a cell site on the lower slope of Mt Te Aroha, a mountain sacred to the local tangata whenua.

The Environment Court commented that much of the discussion up until 1996 concerned whether section 8 confers an obligation upon a council (in its various roles) to consult with tangata whenua over resource consent applications. The Court went on to describe the main branches of approach as the ‘obligation’ line of decisions (following on from *Gill*) and the ‘no obligation’ decisions (developing the *Ngatiwai* line of reasoning).

The Court conducted a review of the Court of Appeal cases and the opinions expressed in the reports of the Waitangi Tribunal and concluded that the Courts have only articulated those principles of the Treaty which were relevant to the cases before them, adopting a case by case approach. Therefore, the Court stated, the analyst must be careful not to readily extract principles of general application from decisions given in respect of individual fact situations (p 12).

In considering the duty of active protection under the Treaty, the Court concluded:

> 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.

The fact that in this case the proposal affected a mountain referred to in the proposed district plan as sacred to Maori, and is recognised as waahi tapu, means that section 8 obliges the Council to initiate, facilitate and monitor the consultation process as part of the duty to take into account the principles of active protection and rangatiratanga (p 13). In this case, where consultation was initiated by the applicant at a late stage the Council fell well short of its obligations to consult. The result being that the Council's decision to approve the cellsite was overturned.

This decision continues a case law trend of imposing a higher obligation on consent authorities than just consultation, as the Court links consultation to a wider discussion of sections 6, 7 and 8, and the concept of rangatiratanga.

Marlborough Seafoods Ltd v. Marlborough District Council (1998)

This case concerned the appeal of an application for consent for a marine farm, which had been opposed by local residents and local iwi, and declined by the Council. There had been no consultation with iwi beyond formal notification. Iwi raised important concerns at the hearing which should have been addressed at the Council level, through consultation. However, as the Council had declined the application, this lack of consultation did not affect its decision.

The Court addressed consultation in terms of the responsibility of applicants and councils to gather all relevant information and give the decision maker an indication of the weight to be placed on such information.

The Court commented that, although the applicant (and Council) had recognised and stated that the iwi has the kaitiaki of an area, there is no point in stating this if iwi have 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. It should have done more as it 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. The Court made the important comment that an applicant who fails to adequately consult at an early stage runs the risk of being required to remedy the situation before the application proceeds. In other cases, the failure to consult has been more central to the issue at hand, and the failure has led to the rejection of the application or plan change. In this case, the lack of consultation had not been fatal to the decision, but led to expensive intervention by the iwi during the proceedings (p 271)

Mangakahia Maori Komiti v. Northland Regional Council (1996)

This is a decision which focuses on consultation by councils in the resource consent application context. It also provides guidance for councils when two sides, one being tangata whenua, are in clear opposition over their points of view, and it is clear that consultation will not result in consensus.

The applicants were 17 dairy farmers who sought to abstract water from the rivers adjacent to their properties for irrigation purposes. The Mangakahia Maori Komiti appealed on the grounds that the Mangakahia River was a resource of the tangata whenua and a taonga guaranteed under the Treaty of Waitangi. The Council engaged in a series of consultative meetings with both parties. A walk-out by the tangata whenua occurred at one meeting,

although it was not clear whether any party was to blame for this. Certainly, it was clear that complete agreement between the parties was not going to be possible.

The Komiti argued that the Council had failed to observe the principles of the Treaty in the way consultation had been carried out. They argued that the Council should have become more actively involved by exploring how the concerns of Komiti might be responded to and accommodated in the context of realistic planning options – ie, mediate a compromise between the two parties.

But the Planning Tribunal acknowledged that the Council was faced with having to hear and consider the case, as both parties were clearly not going to agree. The Council was in no position to enter the arena and seek to persuade one side or the other to substantially modify, let alone abandon, their position. It concluded that while a consent authority may encourage consultation between applicants and tangata whenua, where the two sides are in clear opposition over their points of view the consent authority cannot prejudice its own position as a quasi-judicial body by seeking to reach an understanding with one body of interest to the disadvantage of, or at odds with, another body of interest.

The Council acted appropriately by leaving it to its officers to consult with the Komiti, and to obtain a report from its Council officer detailing the concerns of Komiti for presentation to the Council when the Council hearing took place. The Council and its officers could do little more.

Director General of Conservation v. Marlborough District Council (1997)

This case involved an application to establish two marine farms in the Marlborough Sounds. In this case the Court held:

> In terms of section 6(e) we have concluded that the relationship of iwi and their cultures and traditions were not recognised and provided for as a matter of national importance in the coastal marine area of [the] Bay ... Meanwhile 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.

The early approach of the courts

As discussed in *Mason-Riseborough* the early Environment Court (previously the Planning Tribunal) and High Court cases provide two differing trends of decisions in respect to consultation with tangata whenua. One line seems to support the argument the consent authorities should consult with tangata whenua prior to an authority's determination of a resource consent application as in:

> *Gill v. Rotorua District Council* (1993) (Planning Tribunal)
> *Haddon v. Auckland Regional Council* (1994) (Planning Tribunal)
> *Quarantine Waste (NZ) v. Waste Resources Ltd* (1994) (High Court)

Another line of cases suggests a consent authority is not under a duty to consult with any party before proceeding to determine a resource consent application, as in:

> *Ngatiwai Trust Board v. Whangarei District Council* (1994) (Planning Tribunal)
> *Hanton v. Auckiand City Council* (1994) (Planning Tribunal)
> *Rural Management Limited v. Banks Peninsula District Council* (1994) (Planning Tribunal)

Since this line of cases, more consistent themes have emerged in the following cases:

> *Whakarewarewa v. Rotorua District Council* (1994) (Planning Tribunal)
> *Greensill v. Waikato Regional Council* (1995) (Planning Tribunal)
> *Paul v. Whakatane District Council* (1995) (Planning Tribunal)
> *Tawa and Ngatai v. Bay of Plenty Regional Council* (1995) (Planning Tribunal)
> *Aqua King Ltd v. Marlborough District Council* (1995) (Planning Tribunal)
> *Berkett v. Minister of Local Government* (1995) (Planning Tribunal)
> *Pahia v. Northland Regional Council* (1995) (Planning Tribunal)
> *Banks v. Waikato Regional Council* (1995) (Planning Tribunal)

A selection of the most important comments from the earlier cases follows.

Gill v. Rotorua District Council

> One of the nationally important requirements of the Act under the Part II consideration is that account be taken of the principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua. (p 616)

Haddon v. Auckland City Council

Where tangata whenua interests are well known:

> The Treaty principle of consultation in respect of the development and protection of the resource … [must be complied with early in the application process.] (p64).

Quarantine Waste (NZ) v. Waste Resources Ltd

It was noted that the local authority is not entitled to rely on 'second hand' consultation by the applicant and is under a separate duty to consult.

> It should be emphasised that the statutory and Treaty obligation of consultation is that of the consent authority – as the local governmental agency not that of the applicant. (p21).

Ngatiwai Trust Board v. Whangarei District Council

The Tribunal stated that a Council must exercise its opinion under section 93(1)(e) by *'carefully assessing after reasonable enquiry what persons are likely to be directly affected by the application ...'* (p 5).

Hanton v. Auckland City Council

The Tribunal held that a consent authority is not obliged to consult with the tangata whenua on a resource consent application. The Tribunal stated that although section 8 requires consent authorities to take into account the principles of the Treaty, *'we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles'*.

Rural Management v. Banks Peninsula District Council

The Tribunal stated that consultation is a two-way process. If a party chooses to withdraw without giving reasons, that party cannot later be heard to complain that the principles of the Treaty have been infringed.

The Tribunal also confirmed that a consultative process can be undertaken by officers of the consent authority, not on behalf of the consent authority, but merely 'for the purposes of obtaining information which can be relayed back to the consent authority for its consideration along with other evidence' (p 13).

Whakarewarewa v. Rotorua District Council

This case attempts to clear up the confusion as to what is a 'consent authority', a 'local authority' and 'council' in terms of the duty to consult.

- 'Consent authority' is a council acting in its quasi-judicial capacity.
- 'Council officer' is a council acting in a non-judicial capacity.

The latter may have a duty to consult with tangata whenua, the former does not.

Greensill v. Waikato Regional Council

This case reiterated that consultation by a council in the course of preparation of a proposed policy statement or plan is mandatory but consultation by the applicant in a resource consent application is not. Consultation is a two-way process and means to take into consideration the feelings or interests of another. 'It is not intended to mean having deliberations with any party and abandoning the project if more deliberations do not appear fruitful' (p 9).

Paul v. Whakatane District Council

On the extent of the consultation the Tribunal said this should be proportionate to the extent and likely effects of the proposal in question (p 8).

Aqua King Ltd v. Marlborough District Council

In relation to what an applicant should do the Tribunal held:

> Consultation to be meaningful requires more than sending out information to the various iwi about an application. (p 3)

The Tribunal also confirmed that 'the obligation on the council officer to consult under s8 arises independently of anything the applicant may do'.

Berkett v. Minister of Local Government

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.

Pahia v. Northland Regional Council

In this case the Tribunal held, 'It is recognised good practice that applicants for resource consents engage in consultation with the tangata whenua where their proposals may affect the matters referred to in section 6(e) and section 7(a)'.

Banks v. Waikato Regional Council

In this case the Tribunal commented on the difficulties with identifying tangata whenua and held that the applicant was under no duty to consult with tangata whenua about preparatory work for the harvesting of pine trees, for which a consent application was needed. The preparatory works permitted by the transitional regional plan was not part of the consent application. Tangata whenua claimed the Council had not adequately consulted.

> Although consent authorities are directed, by section 8, to take into account the principles of the Treaty of Waitangi, that does not invest them with authority to decide whether the Crown is in breach of its obligations under the Treaty in any respect; let alone to decide what redress might be appropriate.

3.4 The basis for consultation with tangata whenua

The duty to consult with tangata whenua arises from two main sources in the RMA.

- Express or implied obligations imposed by particular provisions of the RMA such as sections 6(e), 7(a) and 8 and clause 3(l)(d) of the First Schedule and
- Consultation as a recognised principle of the Treaty of Waitangi which by virtue of section 8 'all persons exercising functions and powers ... shall take into account' (see Part 2).

The RMA expressly contemplates consultation in two instances, namely:

- the preparation and change of policy statements and plans (clause 3(1)(d) of the First Schedule) and
- the preparation of assessments of environmental effects as part of the information accompanying applications for resource consents (clause 1(h) of the Fourth Schedule).

Clause 3(1)(d) of the First Schedule

Clause 3(1)(d) of the First Schedule to the RMA requires local authorities, when preparing and changing policy statements and plans, to 'consult' with the tangata whenua of the area who may be affected.

The First Schedule requirements operate when any of the following are in the process of being prepared or changed:

- regional policy statements
- regional plans
- regional coastal plans
- district plans.

A key case considering clause 3(1)(d) is *Ngati Kahu and Pacific International Investments Limited v. Tauranga District Council* (1994).

The following key points can be drawn from the case:

- Consultation needs to be conducted in mutual good faith and to a degree sufficient so that a council familiarises itself as to the nature and substance of the interests and concerns of tangata whenua.
- Consultation does not mean consensus. A council must consult for a reasonable time in a spirit of goodwill and open-mindedness so that all reasonable planning options are carefully considered and explored. If the outcome is disagreement, then this has to be accepted.
- Consultation should be ongoing. A council should re-open consultation if other factors and information are brought to its notice and necessitate review of the understanding previously reached.

- Consultation should not fetter the council's decision-making responsibility. A council must be free to consider a submission or cross-submission made to it on a policy statement or plan, without being fettered in its decision-making responsibility by an understanding reached prior to the notification of the policy statement or plan.

The *Ngati Kahu* case involved a change to the transitional Tauranga District Plan to implement the residential aspects of Tauranga's urban growth strategy. Prior to notification of the change, a draft of the change was released for public comment. Ngati Kahu lodged a submission in response to the draft. Ngati Kahu objected to the proposals in the change relating to the subdivision and disposition of the land.

Those representing Ngati Kahu argued that just because a submission to the draft had been lodged this cannot be regarded as a suitable discharge of the duty upon the council to consult with Ngati Kahu. It was further argued that the Council had failed to fulfil its obligations under the RMA and under the principles of the Treaty of Waitangi. The argument that a Waitangi Tribunal claim would be prejudiced was rejected.

The Planning Tribunal stated that it was *'concerned with the question of what consultative duty lay upon the Council in the course of procedures and events leading up to public notification of the change'*. The Tribunal held that there was no consultation with Ngati Kahu until after the draft plan change was released for public comment.

In the *CDL Land New Zealand Limited v. Whangarei District Council* (1996) case the Court considered the extent of consultation required for a private plan change to rezone a block of land to enable subdivision for residential use.

The Court held that where the tangata whenua had been given the opportunity to respond but had not done so, it would be wrong to hold that inadequate consultation had taken place. What that would essentially amount to 'would be more than consultation: it would approach giving the tangata whenua a veto, and Parliament [through the RMA] has not done that' (p 4).

The Council had declined the privately promoted plan change and the applicant appealed that decision. The Court held that the applicant had sought to consult with the people indicated by the district council as representatives of the tangata whenua. The applicant held a meeting with local residents to ascertain their views and altered its proposal as a result. The district council sent a copy of the plan change to the Maori executive. The relevant kaumatua became aware of the proposal and met with the applicant's representative and was given details about the proposal and invited to seek further information. No submission was lodged on the plan change and no views were expressed to either the applicant or the district council regarding how the proposal might impact on Maori cultural or spiritual interests.

However, it should be noted that due to concerns about section 6(e) matters (the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga) the decision of the Council (ie to decline the plan change) was not overturned by the Environment Court.

3.5 Who to consult?

Background

The question of 'who to consult' is not an easy one to answer and will depend on the circumstances of a particular situation.

The RMA uses different terms for who is to be consulted in given situations. Clause 3 of the First Schedule mentions 'tangata whenua', 'iwi authorities' and 'tribal runanga' in respect of policy statements and plans. Section 2 of the RMA defines 'tangata whenua' and 'iwi authority' but not 'tribal runanga'. Historically, this term was related to the provisions of the now repealed Runanga Iwi Act 1991 which itself prescribed characteristics of iwi and runanga. The repeal of the Runanga Iwi Act has left the RMA terms, to some extent, unclear. The relevant provisions of the Runanga Iwi Act are contained in Appendix II.

The Environment Court has not yet considered what constitutes an 'iwi authority' or a 'runanga'. Whilst there has been discussion in a number of other forums, such as the Waitangi Tribunal and the High Court (for the latter see *Te Runanga o Muriwhenua v. Te Runanga o Te Upoko o Te Ika Assn* (1996) 2 NZLR 10; *Te Waka Iti Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission* (P395/93)), this does not assist the debate in the context of the RMA.

Section 93 of the RMA states who a consent authority should notify when it is faced with a resource consent application. Under section 93(1) a consent authority must send notice of every resource consent application to a number of specified persons and bodies. Among those to be notified are:

- persons who in the opinion of the consent authorities are likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate (section 93(1)(e)) and
- local authorities, iwi authorities and other persons or authorities as the consent authority considers appropriate (section 93(1)(a)).

What does the case law say?

Haddon

In the *Haddon* case, the application by Auckland City Council was publicly notified and a number of other people were personally notified, but not Mr Haddon. The Ngatiwai Trust Board was personally notified and subsequently notified Mr Haddon, who belongs to a hapu or sub-tribal hapu of the Ngatiwai iwi. Mr Haddon was aggrieved that *'as tangata whenua he and his family members were not personally notified given his known commitment to the area'* (p 54). The Tribunal understood that Mr Haddon's interest was well known and should have been known to the Auckland City Council.

The Tribunal stated that the onus is upon councils not only to notify the iwi, but also the hapu as 'the appropriate land-owners adjacent to the resource' (p 62). *'It is Te Wai, not some other hapu, which is directly affected by the application'* (p 62).

The obligation under section 93(1) to notify Mr Haddon was seen as a separate issue to that of consultation under section 8 of the RMA. In that case it was held that consultation should have taken place in the process that formulated the application which would have been at an earlier time to notification under section 93(1).

In the *Ngatiwai* case the Tribunal stated that a council must exercise its opinion under section 93(1)(e) by *'carefully assessing after reasonable enquiry what persons are 'likely to be directly affected by the application'* (p 7).

Panekiri Tribal Trust v. Wairoa District Council

This case concerned a resource consent to establish a guided kayak tour service on Lake Waikaremoana. The appellant appealed the Council's decision, claiming it had not been adequately consulted as the representative of tangata whenua. As representatives of an ancient hapu in the area, the Panekiri Tribal Trust claimed it had a certain primacy over other trusts which had been consulted.

The Court noted that where there are numerous Maori groups and some in conflict with others, there must be a limit to what the Council can do to account for all parties interested in the resources. On this occasion it took the best advice available and, as a result, Maori in the district were widely notified. There was also evidence in this case that members of the Panekiri Tribal Trust Board or at least their whanau attended some of the hui and meetings. Therefore, for the Trust to appear before the Court on the grounds it had not been consulted bore closely on the vexatious.

Otararua Hapu v. Taranaki Regional Council

The issue of which Maori group to consult was a peripheral issue in *Otararua Hapu v. Taranaki Regional Council*. It was asserted by the appellants that there had been a failure to recognise relevant iwi and hapu structures. The Court rejected this, noting that no fewer than four iwi or hapu were represented before the Court. It did not accept that its ability to give an acceptable decision in this appeal was limited by the alleged failure to identify relevant iwi or hapu.

Mandate and manawhenua

However, where there is a dispute as to who has manawhenua over land the Tribunal has held that:

> It was not for the Regional Council to decide which of the competing tribes is entitled to manawhenua over the area of foreshore ... the appropriate forum for resolving claims of that kind is the Maori Land Court ... (see *Tawa* case (p 11) which was referred to with approval in *Banks*).

In the case of *Winter & Ors v. Taranaki Regional Council* the Court considered whether a body made up of a number of people from two different hapu (Ohu Motunui) claiming to have manawhenua and kaitiakitanga over the site in question (a site of a proposed gas well in North Taranaki) had an interest greater than the public generally.

In this case, another hapu (Ngati Rahiri) claimed that they had manawhenua and kaitiakitanga over the site. The Court noted that the procedure for deciding disputes of this kind is prescribed in the Maori Land Act (Te Ture Whenua Act). However, the Court held that the

interests of Ngati Rahiri do not exclude the claim by Ohu Motunui. The Court also did not accept that the interests of Ohu Motunui could be represented by the other hapu already involved in the proceedings.

The Court '*found nothing in the Act which direct that one hapu should have to accept representation by another*.' The Court concluded '*that Maori for whom this site is ancestral land have a greater interest in it and in proceedings about it than the public generally*'.

Statutory acknowledgements: Ngai Tahu Claims Settlement Act 1998

Statutory acknowledgements contained in Treaty settlement legislation can affect who should be notified of a resource consent application. A statutory acknowledgement is an acknowledgement by the Crown of a statement by an iwi of a particular cultural, spiritual, historical and traditional association with specified areas. Statutory acknowledgements are included in the Ngai Tahu settlement legislation and are likely to be included in other settlement legislation. In summary, the Ngai Tahu Settlement Act, in providing for statutory acknowledgements:

- requires consent authorities to forward to Te Runanga o Ngai Tahu summaries of resource consent applications for activities within, adjacent to, or impacting on any identified statutory area
- requires statutory authorities to have regard to a statutory acknowledgement relating to a particular area in forming an opinion as to whether Te Runanga o Ngai Tahu is an affected party in relation to resource consent applications concerning the relevant statutory area
- enables statutory acknowledgements to be used in submissions to consent authorities as evidence of Ngai Tahu's association with a statutory area
- requires local authorities within the Ngai Tahu claims area to record all relevant statutory acknowledgements on plans and policy statements.

3.6 Who pays for consultation?

The RMA does not provide any mechanism whereby 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 preclude this from happening, it simply does not set up a mechanism whereby it must happen.

3.7 Other matters relating to consultation

There are a number of matters relating to consultation where the Court has provided some guidance:

- in the context of considering what must be included in an assessment of effects
- what must be included in submissions

- in relation to the requirements for consultation in the context of certificates of compliance and
- what are the consequences of inadequate consultation.

In addition there are some examples of cases where consultation has been held to be adequate. These matters are all dealt with in this part of the paper.

Insufficient information

Clause 1(h) of the Fourth Schedule requires an applicant for a resource consent to identify those persons interested in or affected by a proposal.

In the *Ngatiwai* case the Tribunal stated that the council must be careful to consider what supporting information it should require from an applicant in the particular circumstances (p 7).

A consent authority may, at any reasonable time before the hearing of an application, require an applicant to provide further information relating to the application (section 92). In *AFFCO New Zealand Limited v. The Far North District Council* the Planning Tribunal stated that the application needs:

> ... to be full enough that a would-be submitter could give reasons for a submission about it and state the general nature of conditions sought. 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 impose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials (p 14).

A consent authority may require an applicant to supply further information, which may include Maori issues if the information supplied is not regarded as being sufficient, for the consent authority to make an informed decision.

In the *Aqua King* case (discussed above) the Tribunal held that the applicant must do more than merely send out a notice of the application to seek comment.

Information in submissions

In the *Ngatiwai* case the Tribunal stated that people lodging submissions have a responsibility to clearly express their concerns, so that relevant issues can be readily identified during the application process and additional information sought as need be (p 8). It was held that the Trust Board or the Committee should have raised concerns about the proposal because of the site's waahi tapu status in the objection which each body lodged (p 10).

The *Rural Management Ltd* case highlighted that there is an obligation upon iwi as submitters, to provide enough detail in their submissions for the consent authority to be able to readily identify the concerns raised.

Consultation in the context of certificates of compliance

In *Waitutu Incorporation v. Southland District Council* the Court noted that consultation does not arise in the context of a certificate of compliance. The Court stated that it is doubtful whether the Court is required to give due consideration and weight to the principles in Part II, in particular section 8, when all it is being called upon to do is simply to interpret the provisions of a district plan.

What can be the consequences of inadequate consultation

One consequence of inadequate consultation is for proceedings to be adjourned on an interim footing to enable consultation to occur – *Berkett v. Minister for Local Government* and *Purnell v. Waikato Regional Council*. In *Berkett* it was recognised that the resource management consultant should have consulted with certain tangata whenua interests, even though other interests had been appropriately consulted. In *Purnell*, the Judge issued a minute in the course of proceedings requiring that consultation be undertaken, and the proceedings then relisted for further hearing after the consultation and other matters specified had been attended to.

Failure to adequately consult may also lead to the Council's decision being overturned – for example, in *Gill*. In *Ngati Kahu*, the absence of consultation meant that the plan change was rejected and the whole process sent back to Council to recommence in the light of the Planning Tribunal's comments.

Examples of adequate consultation

In *Tangiora* the 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 generally supportive of the proposal.

In *Te Atiawa Tribal Council v. Taranaki Regional Council* 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 uncooperative, 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 *Otararua Hapu v. Taranaki Regional Council*, Fletcher Challenge asserted that it could not adequately consult with the tangata whenua as the particulars given by it as to the nature, location and extent of waahi tapu were unclear. The Court held that there were sufficient particulars to give Fletcher Challenge and the Regional Council notice that the appellant is concerned to protect cultural values associated with the area of the well site. Regrettably, the particulars of the locations or extent of waahi tapu were not detailed, but the nature of the waahi tapu was set out to give sufficient notice of the concerns.

Appendix I: Glossary

'Tangata whenua', in relation to a particular area, means the iwi, or hapu, that holds manawhenua over that area (Section 2 RMA).

'Manawhenua' means customary authority exercised by an iwi or hapu in an identified area (Section 2 RMA).

'Iwi authority' means the authority which represents an iwi and which is recognised by that iwi as having authority to do so (Section 2 RMA).

'Kaitiakitanga' means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship (Section 2 RMA).

'Local authority' means a regional council or territorial authority (Section 2 RMA).

'Consent authority' means the Minister of Conservation, a regional council, a territorial authority, or a local authority that is both a regional council and territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act (Section 2 RMA).

Appendix II: Runanga Iwi Act 1990 (repealed)

There is no definition of what an iwi is but it could be helpful to refer to the Runanga Iwi Act 1990 which was repealed in 1991.

Some terms referred to in that Act were:

'**Essential characteristics of iwi** – For the purposes of this [the Runanga Iwi] Act, the essential characteristics of an iwi include the following:

(a) Descent from tupuna

(b) Hapu

(c) Marae

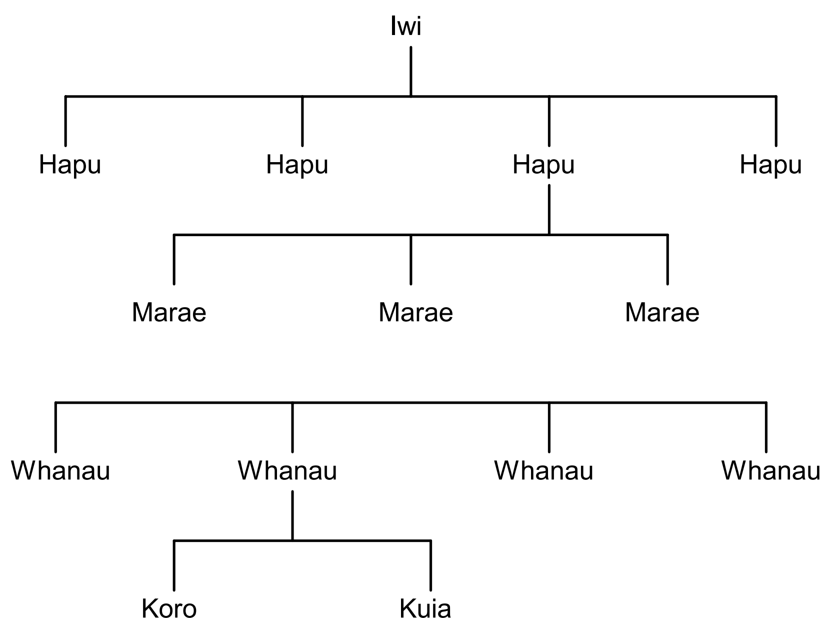
(d) Belonging historically to a takiwa

(e) An existence traditionally acknowledged by other iwi' (Section 5, Runanga Iwi Act).

'Runanga' means a council of an iwi, or of 2 or more iwi (Section 2, Runanga Iwi Act).

'Takiwa', in relation to an iwi, means the territory in which the members of the iwi are tangata whenua (Section 2, Runanga Iwi Act.)

In simple terms the Runanga Iwi Act saw the structural relationship of basic Maori society as follows:



Whanau includes extended family and nuclear family.

Extended family includes those not necessarily related by direct blood tie. It is the degree of regard or closeness for whatever reason or relationship that defines membership of the extended family. It is fluid and changeable and must be seen in the context of individual circumstances.

More simply put it could be said:

- an iwi resembles a confederation of hapu and
- a hapu resembles a confederation of whanau who are affiliated to a marae.

Note: The above is not how it is all the time. There are variations.

For example, some hapu, and whanau consider themselves an iwi as of right. The Runanga Iwi Act by virtue of section 6 recognised only iwi as the enduring, traditional, and significant form of social, political, and economic Organisation for Maori.

The runanga (council) of each iwi that chose to incorporate under the Runanga Iwi Act would be deemed to be the 'authorised voice' of that iwi (section 26 Runanga Iwi Act).

Thus when the RMA talked about iwi authorities it was implicitly referring to tribal runanga that would have been incorporated under the Runanga Iwi Act.

From that also came conflicting messages and debates about whether it was better to be known as an iwi or a hapu.

Appendix III: Cases cited

Otararua Hapu v. Taranaki Regional Council A124/98

Winter & Ors v. Taranaki Regional Council A106/98

Mahuta & Ors v. Waikato Regional Council A91/98

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

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

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

Watercare Services Ltd v. Minnhinnick [1998] NZRMA 113

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

Director General of Conservation v. Marlborough Sounds District Council A89/97

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

CDL Land New Zealand Ltd v. Whangarei District Council A99/96

Purnell v. Waikato Regional Council A85/96

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

Ngai Tahu Maori Trust Board v. Director-General of Conservation [1995] 3 NLZR 553.

Te Runanga O Taumarere v. Northland Regional Council A108/95

Pahia & District Citizens Assn v. Northland Regional Council A71/95

Greensill v. Waikato Regional Council (1995) W17/95

Paul v. Whakatane District Council (1995) A12/95

Tawa and Ngatai v. Bay of Plenty Regional Council (1995) A18/95

Aqua King Limited v. Marlborough District Council (1995) W19/95

Banks v. Waikato Regional Council (1995) A31/95

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

Haddon v. Auckland Regional Council [1994] NZRMA 49

Quarantine Waste (NZ) Waste Resources Ltd [1994] NZRMA 529 (High Court)

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

Hanton v. Auckland City Council [1994] NZRMA 289

Rural Management Limited v. Banks Peninsula District Council [1994] NZRMA 412

Whakarewarewa Village Charitable Trust v. Rotorua District Council (1994) W61/94

Panekiri Tribal Trust v. Wairoa District Council W62/94

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

Waitutu Incorporation v. Southland District Council C68/94

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

Wellington International Airport Limited v. Air NZ [1991] 1 NZLR 671 (Court of Appeal)