

LEGAL OPINION

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Subject: Legal Advice on Resource Legislation Amendment Bill – **increased power for iwi**

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GENERAL EXPLANATION

1. You have asked for analysis and advice on this Bill to enable your members to understand its significance to them. Many of them have been affected by the Cultural Impact Assessment regime promulgated to take effect without warning as part of the Proposed Auckland Unitary Plan. It is also intended to explain to people unfamiliar with planning law how iwi privileges in relation to local government have evolved, and how their expansion in the RMA may affect our democracy conventions.
2. This advice reviews the following aspects of the Resource Legislation Amendment Bill (“**the Bill**”) which is currently before the House:
 - (a) The provisions for iwi participation arrangements (“**IPAs**”) directing iwi engagement in the planning process;
 - (b) A new requirement to consult with iwi authorities early on draft policy statements and plans;
 - (c) New requirements to take iwi interests into account in the proposed streamlined planning processes;
 - (d) A new requirement to consult with Tangata Whenua when appointing hearings commissioners; and
 - (e) New criteria for notification to iwi of resource consent applications.
3. We refer to these as the “**iwi provisions**” in this advice.
4. Together they represent a significant increase in the special privileges granted to Maori in resource management legislation. It would probably cement co-management and partnership obligations with Maori into local government. They confirm and reinforce a major constitutional change for local government and for New Zealand.
5. The Resource Management Act and the Local Government Act have long contained provisions obliging local government to give particular attention to ascertaining Maori views, and consulting with iwi representatives. These requirements sit on top of the general requirements to consult and engage with citizens. They have left both local government officers and elected councillors without guidance on the extent to which such arrangements should effectively give Maori more practical influence or control of the exercise of the delegated coercive powers of local government.
6. In that uncertainty it has been possible for courts (and New Zealanders generally) to avoid the question whether such provisions and arrangements were:
 - (a) Breaches of fundamental rule of law principles such as equality before the law;
 - (b) Contrary to essential features of democracy and inconsistent with democratic control of local government; and
 - (c) Racist in the sense proscribed by international conventions binding on New Zealand.

7. In our opinion those overdue questions are now answered unambiguously. The iwi provisions contravene fundamental rule of law principles, they are inconsistent with what our legal inheritance would consider to be essential features of democracy, and they are racist.

Uncertainty, bias and the tension at the heart of the RMA regime

8. The iwi provisions in the Bill also leave great legal uncertainty. They are constitutionally significant as much for what they fail to say or to exclude, as for what they do contain. But the direction is unequivocal. The likely practical effect of the change can be divined from the experience with a statutory version of an IPA in the structures implemented in Auckland and for the Hauraki Gulf.
9. The iwi provisions potentially confound and partially reverse the evolution of the RMA toward decision-making with more objectivity and less risk of bias, conflicts of interest and abuse of powers. That has involved reducing the unconfined role of elected councillors in decisions. For example, the increasing use of Hearing Commissioners has been promoted to reduce ‘political’ exercise of powers that should be impartial and judicial.
10. The iwi provisions are found in a Bill described as being to ‘simplify’ the operation of processes the RMA. But instead it adds complications. The iwi provisions are intended to increase partisan influence at critical stages. They could materially weaken property rights, including the rights of public bodies dealing with their property.
11. The RMA in 1991 confirmed and reinforced what had been a progressive taking without compensation of powers and rights that were previously essential parts of the bundle of rights that constitute ownership of property. It passed them to local authorities.¹ The taking was conventionally justified on the basis that “community” control of changes of property uses were necessary to protect the public and neighbours from the externalities (losses of views, amenity value etc.) associated with land use changes.
12. The RMA and its predecessor legislation defended owners (including public body owners of property) from some of the risks of expropriatory treatment. Courts applying administrative law principles tempered the potential influence of powerful neighbours and other objectors. Administrative law tools can protect against conflicts of interest, obvious bias or lack of objectivity in the decision-maker. Requirements of notice and obligations to hear all sides of a dispute, disclosure, and testing of reasonability of decision-making, and rights of appeal to neutral tribunals are all part of that protection.
13. The iwi provisions are largely silent on how such protections should apply to them. It is not clear whether IPAs can be drafted to sidestep such protections.
14. The protective mechanisms in planning law and process are already severely limited in practice. The costs, delay, and uncertainty in applying subjective planning criteria leave many property owners without an effective remedy against abuses of power. Abusive action may be by officials, or in the exercise of objection and appeal rights by third parties. The law has not found reliable ways to inject the public interest in permitting or promoting changes of use, against the vested interest of most neighbours in the status quo, and the

¹ Maori were disproportionately harmed by such “takings”. Their collectively owned land, often unimproved had been seen as more easy to take or use or affect with restrictions for public purposes.

political interest of councillors in being seen to be respectful to that status quo interest. Courts are properly reluctant to second guess the decisions of elected bodies.

15. The proposed injection of more iwi participation at what is effectively the 'political' level of planning processes exacerbates that existing structural problem. The RMA confers many wide and easily abused powers and discretions on councils. It assumed that councils can be obliged to act in the general public interest, and that the electoral process and Auditor-General oversight will mitigate the risk of direct self-dealing or preferential treatment. Those have not proven to be enough.
16. Amendments to the RMA, and court developed law have increasingly distinguished between political involvement in planning, and a more adjudicatory role in applying the plans. Local authority requirements to consult with their communities, including Maori in particular were seen as ameliorating the risk of political abuse of power.
17. It appears to us that with the Bill's iwi provisions the protective distinctions have been turned on their head. Now iwi are put at the heart of the procedures. They will become one of the potentially venal interests against which the system should guard.
18. Councils must balance the views of citizens (including Maori citizens) with the input of mandated Tangata Whenua and iwi authorities while at the same time exercising governance for the good of the district or region as a whole, with no statutory help in deciding what should prevail. Procedurally the Bill gives iwi the critical advantages recognised in many court decisions, of exclusive or prior notice, and direct input and discussion, with no balancing provisions to protect non-iwi citizens against abuse of such privileges.

Role of the Treaty

19. Until the current government took office the Crown had held to the position in Treaty negotiations, that the Treaty was a matter between the Crown and iwi, and that accordingly it was not a relationship that could detrimentally affect private property nor derogate from the political and legal equality of all citizens (as British subjects)
20. In our opinion the iwi provisions will enable material interference by iwi in the uses of private property, using the insider status intended under IPAs. The well publicised controversy over the Cultural Impact Assessment provisions of the Proposed Auckland Unitary Plan show the potential substantive impact on property owners of such nominally consultative involvement.
21. This is inconsistent with the plain words of the property rights assurance in Article 2 of the Treaty, and the equality principle in Article 3.

Summary of conclusions

22. The proposed iwi provisions are incompatible with the principle of equality of citizens in democratic control of the exercise of local government powers. In a vital sphere of local government, democratic exercise of collective authority may be put under the effective influence of racially inherited status. That power is given to organisations (iwi) whose boundaries need not relate to the communities concerned. Their accountability and succession mechanisms are not transparent. They are not required to be democratic.

23. The iwi provisions are race provisions². They embed in law privileges that depend on ethnic identity and ancestry.
24. They oblige Councils to allow unelected persons nominated by an exclusive racially decided group to direct (or share in the direction) the exercise of coercive power. They will materially affect the application of the law in practice. If the iwi provisions do not materially affect Councils' coercive authority, they offend against fundamental principles to no practical purpose. But the experience of operation of current arrangements to similar effect suggests that they will confer material power to iwi.
25. The iwi provisions parasitize the underlying environmental protection purpose of the RMA in section 5. Heath J commented on the meaning of section 5 in *Videbeck v Auckland City Council* as follows:³

*The purpose of the Act is to promote the sustainable management of natural and physical resources: s.5(1) of the Act. Section 5(2)(c) of the Act makes it clear that the term "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**, among other things, avoiding, **remedying, or mitigating any adverse effects of activities on the environment.** “ [emphasis ours]*

26. The iwi provisions pursue a political objective that has little or no demonstrated connection to better environmental health and sustainability. They do not enable all people and communities to provide for their wellbeing. They provide no guidance to Councils or the Courts on how to act when iwi representatives pursue objectives which might serve the wellbeing of iwi (or might not because no mechanism is required for testing the claims of representatives) but are adverse to the wellbeing of other people and communities.
27. The iwi provisions steer New Zealand away from a conception of democracy as a means of selecting and dismissing members of a council to respond to the wishes and needs of a majority, constrained by clear rights of individuals and minorities. Instead they serve a view of politics as the negotiated sharing of power and benefits between rival identity groups through their group delegates. The changes give a major role to some unelected people at the expense of those who elect their representatives three yearly in open elections.
28. The iwi provisions are poorly detailed. They contain few of the transparency and other safeguards on power and inside influence evolved from long constitutional experience. They ignore the painfully established rules and conventions to prevent local corruption and sale of privilege, patronage and consents.
29. The Regulatory Impact Statement on the Bill provides little evidence of consideration of the practical results. There is no assessment of the expertise, interest and cultural inheritance of iwi. There may be an assumption of innate iwi or Maori capacity for protecting or enhancing the environment. If so, it is racist. If there is no such assumption there is anything in the explanatory material to show any proper public purpose or benefit. The provisions entrench iwi representatives in power permanently, in a position to sidestep any

² International instruments make it clear that discrimination by ethnic inheritance and by race are the same and they are treated alike.

³ *Videbeck v Auckland City Council* [2002] 3 NZLR 842, Heath J at [60]

need to gain majority citizen voting support, and often able to trade swing votes for the benefit of iwi alone, or even for personal benefit.

30. There is no attempt to assess the likely quality of iwi inputs. There is no attempt to assess the costs of dealing with and responding to concerns that may have little or nothing to do with environmental quality and sustainability, and more to do with symbolic assertions of power and cultural or spiritual preference or prejudice.
31. The Regulatory Impact Statement mentions the costs of participating to iwi and local authorities. They attempt no estimation of the costs of iwi preferences to property owners or the general public. The Statement refers to “gains to society...from further Maori involvement in the planning processes”. It makes no mention of the anti-discrimination protections in the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 or the international treaties to which New Zealand is a party.
32. In practical effect, the iwi provisions could allow iwi to hold up socially valuable changes in property uses. Unfortunately, the least socially costly outcome could be the emergence of a reasonably standardised tariff for iwi consents (or absence of opposition). Citizens not connected with the ruling elements within iwi may regard that as bribery. But it could be a less bad outcome than frequent and active assertion of authority by iwi in a way that frustrates most property owners, because that is the only way left for iwi to derive benefit from their rights.
33. The new rights can be characterised as a poor consolation prize to iwi for not being restored to the full rights of ownership of their own property promised to them (and all New Zealanders) in Article 2 of the Treaty. Their property remains subject to interference by their neighbours and local government (as does all “private” property). Instead of their own property rights the Bill gives them negative rights to affect the property of others.
34. The iwi provisions breach New Zealand’s fundamental legal principle of equality of all citizens before the law.

RECOMMENDATIONS

35. In our opinion:
 - (a) All provisions on Iwi Participation Arrangements (IPAs) should be removed. They are not justified. They give statutory authority to processes with no safeguards on outcomes, and could be used in a way to harm other citizens. There is no prescribed content for the IPAs to prevent them from being used to better one group of citizens (the iwi representatives) to the detriment of others.
 - (b) Provisions requiring councils to consult early with iwi should be removed. They breach the fundamental rights to equality of all citizens. They will multiply situations seen with the Proposed Auckland Unitary Plan. It has affected up to 18,000 property owners by adding a new overlay for “Sites and Places of Value to Mana Whenua” with no prior warning or consultation to affected property owners and no evidence that the overlay was justified even on its purported criteria.⁴

⁴ Chris Hutching “Up to 18,000 properties affected by taniwha tax” in National Business Review, 15 April 2015 (available at <http://www.nbr.co.nz/article/18000-properties-affected-taniwha-tax-ch-171435>)

- (c) The proposed streamlined planning processes should not provide limited notification confined to iwi under any circumstance other than where they are affected (for example as neighbouring property owners) in the same way as non Maori citizens. Even if hardly ever used, they would allow iwi to be consulted on and to block plan changes while the concerns of other citizens are not known, or are ignored.
 - (d) Consultation requirements with iwi authorities over hearing commissioners should be qualified by requiring proposed iwi commissioners to meet expertise criteria and be accompanied by mechanisms to exclude prejudice from conflicts of interest.
36. We recommend that Democracy Action urge the removal of these proposed amendments from the Bill. Other changes to the Resource Management Act should authorise and instruct the Councils to restore equal treatment of all citizens under the RMA.

BACKGROUND TO BILL

37. The Bill was introduced on 26 November 2015 by the Hon Dr Nick Smith. It is reported to be a compromise between the National Party and the Maori Party. The latter are said to have acted on advice from the Iwi Leaders Group. National are reported to have the support of the Maori Party for the Bill through to the select committee stage.⁵
38. Submissions to the Local Government and Environment Committee close on 14 March 2016. The Bill is 180 pages long and has 40 proposals including a suite of amendments to the Resource Management Act 1991 (“**the RMA**”). The Bill proposes tighter timeframes, a streamlined track, and use of template plans. This advice does not consider these amendments. It only looks at the changes to iwi engagement and consultation.
39. Local authorities operate now under a number of statutes that require particular engagement with Maori or iwi⁶. The two main statutes are the Local Government Act 2002 (“**the LGA**”) and the RMA. Parliament has already given iwi under the RMA powers and influence denied to other members of the public.
40. That will be extended under the Bill. This section explores the extent to which this is contrary to New Zealand’s fundamental constitutional principles and conventions, including legal equality of citizens and respect for property rights.

Local Government Act 2002

41. The LGA requires iwi participation in decision-making processes (ss 4, 14, 77, 81 and Schedule 10). Section 81, for example, requires local authorities to facilitate contributions to decision making processes by iwi by:
- (a) Establishing and maintaining processes to provide opportunities by Maori to participate in decision-making processes;

⁵ National’s consultation document in 2013 on RMA reform involved changes to the purposes and principles of the RMA (ss 6-7). United Future and the Maori Party both opposed the proposal to give economic development the same importance as environmental protection.

⁶ We use the term “iwi” to refer to Maori, Tangata Whenua in this advice as that is the term used in the RMA.

- (b) Considering ways of fostering Maori capacity to contribute to decision-making processes; and
 - (c) Providing relevant information to Maori for these purposes.
42. It appears that these provisions were intended to address what was perceived as a problem of low involvement by Maori in local government and in resource management consultation, including plan development. It is not clear whether it was a problem, or if it was, whether it was associated causally with adverse outcomes for communities, or for Maori. We are not aware of any disciplined research to show whether opportunities for iwi leadership have resulted in more grass roots participation. We are not aware of any attempt to measure whether they have improved local government on its delivery of any of its purposes (other than the circular purpose of engaging with iwi). In particular we have found no record of research to determine whether they have improved outcomes for the environment, for iwi or iwi members, or other citizens in the local government area.
43. The Regulatory Impact Statement refers to the risk of litigation as a reason to have a more formal framework for consultation with iwi. We have not found evidence of disproportionate litigation against local authorities by iwi due to lack of consultation. Nor have we found anything to suggest that it would be justified, or based on anything other than the statutes under consideration in this opinion. In other words it seems to be a warning that there will be litigation based on existing or concurrent vague and contentious provisions, unless more vague and contentious provisions are added to appease the potential litigants.
44. A paper by Mike Reid for Local Government New Zealand in 2011 reported 69 councils out of 84 had a formal process for consulting with Maori, 79 had an informal process. 43 out of 84 councils had Iwi Management Plans.⁷
45. These figures may have changed since 2011. They show that on the whole, most councils already have arrangements with iwi authorities in their areas. There would presumably be some councils that have no need for this.
46. The Bill does not propose changes to the LGA.

Resource Management Act 1991

47. The RMA is the primary statute that governs the use and development of natural and physical resources. The overriding purposes in Part 2 of the RMA recognise what Parliament has decided is the special relationship Maori have with the environment. These sections require that persons exercising functions and powers under the RMA:
- (a) “shall recognise and provide for the following matters of national importance – The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” (section 6(e));
 - (b) “ shall have particular regard to Kaitiakitanga” (section 7(a)); and

⁷ Mike Reid, Local Government New Zealand, “Council-Maori Engagement: The Ongoing Story” (Paper delivered to the inaugural “Working with Iwi Conference 2011”, organised by Liquid Learning, Te Wharewaka o Poneke, Wellington, 14 June 2011)

- (c) “shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)” (section 8).
48. Unsurprisingly these deliberately uncertain purpose sections have been the subject of much litigation. The High Court has confirmed the requirement to consult with iwi on planning documents is “mandatory and unconditional”.⁸
49. Other provisions require councils to consult with iwi on proposed plans, make joint management arrangements and take into consideration iwi planning documents:
- (a) A consenting authority can delegate one or more of its functions and powers to an iwi authority under **section 33** (this is rarely used);
 - (b) **Section 35A** requires local authorities to maintain a record of iwi authorities for their region or district;
 - (c) Under **Schedule 1, clauses 3(1)(d) and 3b** local authorities are required to consult with the tangata whenua through iwi authorities during the preparation of a proposed policy statement or plan;
 - (d) **Section 36A** confirms there is no duty on an applicant or a consent authority to consult with any person on a resource consent application. Although consultation with iwi on applications is not mandatory, case law has found it to be “prudent” to consult with iwi where they will be affected by proposals due to the importance of Part 2;⁹ and
 - (e) Iwi can become a joint consenting authority with local authorities in relation to natural and physical resources under **sections 36B -36E** (this appears to be rarely used, a statutory example is found in the Waikato River Settlement Act, see below).
50. Under **section 61(2A)(a)** and **74(2A)** regional and territorial authorities must, when preparing or changing a regional policy or regional and district plans, take into account any relevant planning document “recognised by an iwi authority” which has been lodged with the council. These are generally referred to as “iwi management plans”. Unlike the proposed IPAs they are not statutory instruments. It is up to the relevant iwi to determine the content of these plans, but they generally:¹⁰
- (a) Say who to talk to - who has tangata whenua status in which area;
 - (b) Identify the natural resources that are of cultural significance to Maori and why;
 - (c) Identify and explain relevant concepts of Maori tikanga (Maori custom) as understood by the local Maori;
 - (d) Identify wahi tapu (sacred) sites and taonga (treasured gift/belonging) in the area);
 - (e) Identify sites of particular cultural significance; and

⁸ *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC) at [73], [90], [91] “The obligation to consult with the relevant iwi authority is mandatory and unconditional. All that is required is that the Tangata whenua be “affected” by the proposal”

⁹ *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau*, High Court, [2003] 2 NZLR 349 at [55]

¹⁰ Extrajudicial comment from Judge R G Whiting, *Te Ao Maori (The World of Maori) and the Resource Management Act* (seminar paper)

- (f) Identify the values and goals of iwi in environmental management.

THE RESOURCE LEGISLATION AMENDMENT BILL

- 51. The Bill introduces new requirements for:
 - (a) Iwi participation arrangements;
 - (b) early consultation;
 - (c) special treatment in the streamlined planning processes;
 - (d) special involvement by iwi in the appointment of hearing commissioners; and
 - (e) notification of consent applications.
- 52. Following is a brief explanation of these proposals. The pros and cons of these proposals are discussed below under “Themes”.

Iwi participation arrangements

- 53. The Bill would give statutory authority to formal arrangements between iwi authorities and local authorities in the form of “iwi participation arrangements” (IPAs). IPAs seem intended to be mandatory, though it is left unclear what happens if iwi decline an invitation to enter one. Local authorities would be required to follow them in certain circumstances. The legal status, potential content (not specified) and use of IPAs seem intended to go well beyond the iwi management plans mentioned above. The relevant clauses are:
 - (a) Clause 38 inserts a subpart heading “Iwi participation arrangements” with new sections 58K to 58P:
 - i. **New section 58K** states that the purpose of this subpart is to provide for local authorities and iwi authorities to discuss, agree, and record how tangata whenua, through iwi authorities, are to participate in the plan-making processes under Schedule 1;
 - ii. **New section 58L** requires local authorities to invite iwi authorities to enter into 1 or more iwi participation arrangements within a month of being elected. The iwi authority must notify its acceptance within 60 working days after the date the invitation was issued.;
 - iii. **New section 58M** sets out the required content of iwi participation arrangements, including IPAs:
 - (a) must be recorded in writing and identify the parties to the arrangement; and
 - (b) must record the parties’ agreements about—
 - (i) how an iwi authority party may participate in the preparation or change of a policy statement or plan; and
 - (ii) how the parties will give effect to the requirements of any provision of any iwi participation legislation, including any requirements of any agreements entered into under that legislation; and
 - (iii) whether any other arrangement agreed between the local authority and any 1 or more iwi authority parties that provides a role for those iwi

authority parties in the preparation or change of a policy statement or plan should be maintained or, if applicable, modified or cancelled; and
(iv) ways in which iwi authority parties can identify resource management issues of concern to them; and
(v) the process for monitoring and reviewing the arrangement; and

(c) may—

- (i) specify a process that the parties will use for resolving disputes about the implementation of the arrangement; and
- (ii) indicate whether an iwi authority party has delegated to any person or group of persons the role of participating in the preparation, change, or review of a policy statement or plan; and
- (iii) if there are 2 or more iwi authority parties or other parties, set out how those parties will work together collectively under the arrangement.

iv. The prescribed content of the IPAs is all procedural. New section 58M contains no constraint on the range of matters a council might subordinate to the agreement, or even the discretion of either participant. Nor does it contain anything to reserve or protect the over-riding authority of the Council party;

v. **New section 58N** sets out a 6-month time frame for concluding an iwi participation arrangement if the iwi authority accepts the invitation under section 58L. If the arrangement is not able to be concluded within the 6 months the local authority must invite the iwi authority to participate in mediation or some other form of alternative dispute resolution. There is no restriction on such arrangements giving binding authority over the council party. Subsection (3) which suggests that dispute resolution should not enable participation agreement disputes to delay planning processes, could imply that other planning matters could be affected by other features of IPAs;

vi. **New section 58O** provides for the Minister to provide assistance, on request, to the parties to enable them to conclude an iwi participation arrangement;

vii. **New section 58P** says that any IPA does not limit any relevant provision of any [other] iwi participation legislation or any agreement under that legislation;

(b) **New clause 1A of Schedule 1** of the RMA requires proposed policy statements or plans to be prepared in accordance with any applicable iwi participation arrangement; and

(c) **New Part 4 of Schedule 1** of the RMA sets out the procedural matters applying to the local authority's use of the collaborative planning process for a change to a policy statement or plan, including that the local authority must be satisfied that use of the process is not inconsistent with its obligations under any relevant iwi participation legislation or arrangement.

54. The IPAs will be the framework for iwi participation and consultation in planning processes. They will formalize consultation arrangements with iwi and make councils abide by them. Minister Smith says the purpose is “to provide better processes for iwi to be involved in council plan making”¹¹. Plans are a form of law-making – IPA’s seem intended to be a charter for Maori “involvement” in law-making outside any disciplines and democratic legitimacy requirement of our unconstitutional conventions.

¹¹ Nick Smith “Resource Management changes pass first reading” (press release, 3 December 2015)

Early consultation

55. The Bill requires local authorities to provide a relevant draft policy statement or plan to iwi authorities for early comment and advice. New **clause 4A of Schedule 1** requires local authorities to seek and “have particular regard to” iwi advice given on the draft proposed policy statement or plan before the draft proposed policy statement or plan is notified.
56. Courts have held that to “have particular regard to” advice does not make it binding but it creates strong pressure to consider the advice carefully. A Planning Tribunal decision *Marlborough District v Southern Ocean Seafoods Ltd* explains this¹²:

The duty to have particular regard to these matters has been described in one case as "a duty to be on enquiry" Gill and Others v Rotorua DC 2 NZPTD 1993 2 NZRMA 604. With respect in our view it goes further than the need to merely be on enquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

57. Potter J in the High Court decision *Unison Networks Ltd v Hastings District Council* considered the differences between the requirements commonly found in statutes for a decision-maker to “have regard to”, “take into account”, and “give effect to” specific matters and found:¹³
- (a) “*shall have regard to*” - means “the matters must be given genuine attention and thought, and such weight as is considered to be appropriate, but the decision maker is entitled to conclude that the matter is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function”
 - (b) “*give effect to*” –means “such matters for consideration may be rejected or accepted only in part, provided they are not rebuffed at outset by a closed mind so as to make the statutory process some idle exercise”
 - (c) “*shall take into account*” – means “all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable”
58. The phrase “shall have regard to” appears at the top of this hierarchy. The addition of “particular” to “have regard to” is likely to be seen by a Court as making it even more important for a decision-maker to consider the specified matters. The practical effect could be a Court holding that this duty is similar to an onus. That is, in the absence of compelling counter consideration, it should prevail.
59. **Clause 13** amends **section 32** by requiring evaluation reports of a proposed policy statement, plan or change to summarise advice received from iwi authorities

¹² *Marlborough District v Southern Ocean Seafoods Ltd* [1995] NZRMA 220

¹³ *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 Potter J, at [70]

Hearing commissioners

60. **Clause 16** inserts new **section 34A(1A)** to require local authorities to consult tangata whenua, through relevant iwi authorities, on the appointment of hearings commissioners. If the local authority considers that it is appropriate, the local authority must make at least 1 such appointment in consultation with the relevant iwi authorities.
61. Such a consultation requirement could be unobjectionable if there were more signs that it was needed to remedy a demonstrated information gap. Have those charged with selecting and appointing hearings commissioners overlooked the usefulness of the kind of knowledge and experience that would be recognised exclusively within iwi? The Bill is not accompanied by evidence of an inability within Councils to recognise and take into account the value of such contributions.
62. The section appears unconcerned about objective qualifications and experience. There is a risk that the office of Hearings Commissioner will be seen, by virtue of the section, as a kind of prize to be distributed politically. The purpose of taking the adjudication on applications from elected Councillors and giving it to Hearing Commissioners is compromised if the office is seen as a gift to a partisan and racially entitled group. There should at the least be an express requirement that a nominee be well qualified for that judicial function without partiality.

Consent applications

63. **Clause 125, new section 95B** sets out a process for consent authorities to determine whether to give limited notification of a consent application, if it is not publicly notified. Particular iwi interests give rise to an obligation to notify affected persons in terms of new **section 95E**.
64. Unless notification of the application to those persons is precluded—either by a rule or national environmental standard or because the proposed activity is a controlled activity (other than a subdivision of land) or a prescribed activity, affected persons will include:
 - (a) if the proposed activity is on or adjacent to, or may affect, land in respect of which a nohoanga, an overlay classification, or a vest and vesting back (as defined in new section 95B(11)) is granted in accordance with an Act listed in Schedule 3 of the Treaty of Waitangi Act 1975, the person to whom the nohoanga, overlay classification, or vest and vesting back is granted:
 - (b) if the proposed activity is on or adjacent to, or may affect, land that is the site of a wāhi tapu that is recognised in a plan or entered on the New Zealand Heritage List/Rārangi Kōrero maintained under section 65 of the Heritage New Zealand Pouhere Taonga Act 2014, the iwi to whom the site is wāhi tapu.
65. These provisions do not require that the activity applied for have any practical effect on the values presumably protected by the wahi tapu or noahanga status. Though the qualifying land may not be thought widespread, we see nothing to prevent the principle from being extended in an IPA, or by the discovery and recognition of many more sites.

66. The costs of shutting citizens out of decisions on activities in the public arena have been well considered by courts, under RMA law and other laws. Tipping J said in *O'Neill v Otago Area Health Board*:¹⁴

"I respectfully agree with the liberalising trend. It is appropriate in a modern parliamentary democracy under the rule of law. Citizens with honest concerns about the legality of activities reasonable in the public arena ... should not lightly be shut out from having their concerns considered by the Courts."

67. The Supreme Court considered the importance of having a public participatory process under the RMA in *Westfield (New Zealand) Ltd v North Shore City Council*:¹⁵

"The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decision-making."

68. It is well known that decision-makers, including those exercising judicial or semi-adjudicative functions, are heavily influenced by imbalances in the information available. Even decision-makers determined to be impartial suffer from biases created or magnified by social and workplace familiarity with participants, and by the perceived status or authority of those who supply information.
69. It will be more difficult for decision-makers to make quality decisions if they hear only from iwi in limited notification applications. The same concerns apply to the provisions that require councils to follow IPAs; to consult early with iwi authorities on draft policies and plans; and to notify iwi authorities on plans in the streamlined planning process.

Streamlined planning process

70. In **Schedule 1, new clause 5A**, councils will have the option to give limited notification of a proposed change to a policy statement or plan. As with new clause 4A, the local authority must provide a copy of the proposed change to "tangata whenua of the area, through iwi authorities" (**new clause 5A(8)(e)**).
71. Only those persons who have been given this limited notification may make submissions or further submissions on the proposed changes (**Schedule 1, new clause 6A(1)**). In effect this means iwi authorities may be able to make submissions on a proposed change while the rest of the public cannot.
72. The amendments in this respect conflict with principles that make Council meetings and Parliamentary sittings and committees and court hearings are open to the public. Fairness requires giving all sides, not just one side, an equal opportunity to present their case. Being open to the public helps engender truthfulness and confidence in that fairness. From what is observed of current processes for iwi input it will not necessarily be open or in open proceedings. Much of the approach to RMA matters is, or should be adjudicatory. As the

¹⁴ *O'Neill v Otago Area Health Board* (unreported, HC Dunedin CP.50/91 10 April 1992) - judicial review of licence issued under Contraception, Sterilisation, & Abortion Act 1977

¹⁵ *Westfield (New Zealand) Ltd v North Shore City Council* [2005] 2 NZLR 597 (at [46]):

most distinguished current writer on Rule of Law issues wrote: “a trial is not fair if the procedural dice are loaded in favour of one side or the other”¹⁶.

73. These streamlined planning processes cannot be inconsistent with obligations set out in any relevant iwi participation legislation (e.g. LGA) or IPA. This is extraordinary. It makes them subordinate to IPA arrangements that are virtually unlimited as to content and effect.
74. In **Schedule 1, new clause 74(b)(iv)** any application to the Minister for a direction to enter a streamlined planning process must set out “*the implications of the proposal for any relevant iwi participation legislation or iwi participation arrangement entered into under subpart 2 of Part 5 of the Act*”.

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Costs of proposed amendments

75. The Ministry’s Regulatory Impact Statement on the Bill refers to the costs for local authorities in implementing the proposals and costs (voluntary) for Maori of the greater participation but does not mention any costs to the public and property owners in general (apart from reciting a New Zealand Planning Institute paper on gains to society). It says:¹⁷

207. 83% of local authorities currently already have some form of structured arrangement with Māori. The arrangements vary between Memorandum of Understandings (MOUs), joint committees, advisory boards, and forums. However, implementing the proposal may incur additional costs. These costs will vary across different councils, and will depend on scale, scope and complexity of the arrangements. Costs will generally be short term (3-4 years), but for meaningful relationship building and outcomes, ongoing maintenance is required.

208. There may also be initial (voluntary) costs for Māori from greater participation in the resource management system. These costs may be greater for Māori with limited planning experience from investing in capacity and capability to engage effectively in the amended planning process. There would also be upfront costs for iwi authorities (eg, to execute the arrangement and fund administrative costs) but this could result improved efficiencies and potential cost sharing in the long term.

209. It is difficult to calculate the impacts of greater iwi participation in resource management issues due to a lack of robust data; however a study found benefits outweigh costs in all scenarios and for all components.⁶ Māori will have a stronger voice and Māori perspectives will be better reflected in council planning documents. Application of Treaty-based relationships to the local government arena would also benefit Māori over time. Moreover, the gain to society (as opposed to Māori specifically) from further Māori involvement in planning processes is estimated to be over four times greater than the costs.

*[6. NZIER, 2011 Maori participation in the RMA.
<http://tepuna.mfe.govt.nz/otc/cs.dll?func=ll&objaction=overview&objid=3720667>]*

¹⁶ Bingham T, *The Rule of Law* (Penguin Books, 2011)

¹⁷ Ministry for the Environment “Regulatory Impact Statement – Resource Legislation Amendment Bill 2015” paras 207-209

76. We note that despite the footnote reference to a NZIER work the link does not work and the methodology for such extraordinary conclusions is not explained.

Critique and recommendations

77. The Bill is silent on who pays for the process leading up to an IPA and the ongoing consultation with iwi once an IPA is in place. The Regulatory Impact Statement states:

“there would be upfront costs for iwi authorities (e.g. to execute the arrangement and fund administration costs)”

78. Local authorities, however, are obliged under clause 3B of Schedule 1 of the RMA to consult with iwi authorities. A local authority is treated as having consulted with iwi authorities if the local authority “enables those iwi authorities to identify resource management issues of concern to them”.
79. Auckland Council (and no doubt other councils) has interpreted this to mean the Council is required to fund iwi to enable them to engage with the Council. The Auckland Council allocated \$200,000 to engage with Auckland’s 19 Mana Whenua groups during the preparation of the proposed unitary plan (PAUP). The Council says that of the \$30 million projected costs for the Unitary Plan and Independent Hearings Panel, approximately one seventh of the costs were associated with preparing provisions which respond to the Treaty of Waitangi and associated consultation with Mana Whenua.¹⁸
80. From this example, and advice from Auckland Council, we expect some councils will consider they are obliged to allocate funding to enable iwi authorities to engage with them in preparing an IPA. No other groups will be funded in this way, putting iwi groups at a distinct advantage, at the cost of their unprivileged neighbours.
81. There is no consideration of costs to the general public in the Regulatory Impact Statement. These would be difficult to calculate as they would include opportunity costs (i.e. cost of not being able to make a submission to a draft plan or resource consent application) as well as costs of distorted outcomes of plan making and resource decisions under the IPAs.
82. Early consultation, for example, could result in prolonged processes remedying the results of distorting compromises in early plan development. We think it is reasonable in this regard to regard as relevant the Auckland Council experience of being obliged to defend, then backtrack on the categorisation of properties subject to the CIA provisions in the Proposed Auckland Unitary Plan (PAUP). The Independent Maori Statutory Board is reported to have demanded the overlay for “Sites and Places of Value to Mana Whenua” affecting up to 18,000 property owners shortly before publication. Although all members of the public have been invited to consultation on the PAUP, it is after the provisions came into effect. The baseless categorisation of many properties has cost submitters and the Council a substantial amount in time and professional costs.
83. We see no protection against an IPA including a co-management arrangement over a particular resource. This could have direct costs for affected property owners. Or if iwi are consulted on a draft plan change and are notified and consulted on it while other members

¹⁸ Answers to a LGOIMA request in a letter to Jordan Williams, Taxpayers Union, from Auckland Council (25 August 2014), at pages 1-2

of the public are not, this would allow them to influence the plan change in a way that may harm non-iwi property owners.

84. Democracy Action could invite the Select Committee to ask for proper regulatory impact statements to take into account the full costs of the Bill for all affected persons, including property owners.

Need for more consistency

85. The Regulatory Impact Statement justifies the IPAs on a practical need for more consistency and enhancement of Maori participation. It suggests that the changes are merely to formalise existing practices and make them more consistent. It says:¹⁹

There are many examples of iwi participating successfully in resource management processes. However, engagement is inconsistent across the country, and the effectiveness of existing relationships between iwi and councils varies. In some regions, poor working relationships have meant that Maori have not been engaged with resource management process. The lack of any requirement to establish effective working relationships with iwi often leads to increased disagreement (and litigation) later in the planning process.

86. It could seem logical and efficient to have more consistent arrangements between local authorities and iwi across New Zealand. But the iwi provisions contain nothing to ensure that the IPAs will be more consistent. Any increase in consistency could be misleading. It may be only in the existence of agreements, not in how they work, what powers they devolve, or the quality of the participants or the outcomes. The consistency argument does not sit well with a later statement in the regulatory impact statement that: “83% of local authorities currently already have some form of structured arrangement with Maori”.²⁰ There appears to have been no disciplined investigation to determine whether purposes of the RMA have been better or worse served in regions without structured arrangements (other than the circular purpose of having such relationships).

Critique and recommendations

87. The Bill’s Explanatory Note assumes virtue in national consistency. There is no consistency required on what they do.
88. The Regulatory Impact Statement says the proposals will “enhance Maori participation”. This is not balanced by the continuing uncertainty for local government as to how much of its democratic authority it must subordinate to unelected persons nominated to represent a racially and inheritance defined identity group.
89. As noted above, the paper by Reid for LGNZ also shows iwi are more likely than others to attend council meetings, and to consider it important to have a say in council decisions.²¹

¹⁹ Regulatory Impact Statement para 199

²⁰ Regulatory Impact Statement para 207

²¹ Mike Reid, Local Government New Zealand, “Council-Maori Engagement: The Ongoing Story” (Paper delivered to the inaugural “Working with Iwi Conference 2011”, organised by Liquid Learning, Te Wharewaka o Poneke, Wellington, 14 June 2011) - “Māori (87 per cent) are more likely than others (81 per cent) to consider it important to have a say in council decisions”; “On the most effective ways to influence

90. There are already provisions for local authorities to encourage participation by iwi in the planning and resource consent processes. Limited notification for both plan changes and consent applications would limit public participation while enhancing iwi participation. This is new.
91. The Regulatory Impact Statement says “it is likely that the majority of plan changes will still be publicly notified because any significant plan change will affect large parts of the community”²². Even if true, dubious law should not be justified on the likelihood it will never or seldom be used. The principle that allows iwi to be consulted while the general public are not remains problematic.
92. Increased requirements to consult with iwi could convert to de facto power and control if a council (council officers) are not given a clear direction that ultimate decision responsibility, and authority rest with the council. The Auckland experience with CIAs has shown how council officers respond when left to enforce and apply a ritual process which required no genuine link to proper environmental management. From the experiences of Democracy Action members and supporters, Auckland Council:
- (a) washed their hands of responsibility for assisting applicants to understand the potential impact;
 - (b) included in the PAUP provisions declaring that only iwi could be the judge of the matters that might constitute cultural impact, and thereby denied themselves capacity to question iwi statements;
 - (c) effectively acquiesced in improper demands by certain iwi representatives and rejected any role in mitigating the risks that the requirements could be misused to obtain ‘standover’ payments, or bribes; and
 - (d) were uninterested in the validity or otherwise of any claim to expertise by the iwi representatives.
93. It is unclear how council officers use or weigh cultural impact assessments. Auckland Council declined to release copies to us after LGOIMA requests.
94. The proposed IPAs seem designed to lead iwi to think they are taking joint power. From experience we can expect aspirational criteria and unqualified statements of objectives to develop trump status with officials. Indeed if IPA drafting includes vague and non-legalistic wording, it could confer on officials wider discretions in practice, than they would have under current law and sole council responsibility. Servants of two masters commonly find ways to play them off, and to pursue their own priorities. That could be largely to the detriment of property owners. There are no safeguards to prevent this from happening.
95. This is likely to lead to an increased risk of more judicial review litigation. There may also be increased hostility between iwi and property owners.
96. We recommend Democracy Action ask that:

councils, Māori were more likely than others to attend meetings run by the council (81 per cent to 68 per cent.)”

²² Regulatory Impact Statement para 147

- (a) the iwi provisions be removed;
- (b) a new Regulatory Impact Statement is for the Select Committee which considers costs and discrimination issues mentioned above; and
- (c) new amendments to the RMA to provide express protection of fundamental rights including the right to be treated equally under the RMA without racial discrimination. Controversy over such an express provision will be compelling evidence of how far this Bill and the RMA have departed from fundamental principles.

Contrary to the Rule of Law

97. The Rule of Law “is the most fundamental constitutional principle in the New Zealand law and incorporates a number of subsidiary principles”.²³ The first subsidiary principle of the Rule of Law cited by the Legislation Advisory Committee (LAC) is:²⁴

“Everybody is equal before the law and is subject to it”

98. Circumvention of Rule of Law principles will undermine public confidence in Parliament and local government. If there is any vagueness or uncertainty in the law, a court may use rule of law principles as interpretation tools. Essentially a legislative provision should reflect the Rule of Law. Once enacted legislation should be interpreted in a way that allows the law to fulfil its primary aim of serving the public interest (i.e. maintaining fundamental principles embodied in Rule of Law).

99. The two overriding components are that the government must abide by currently valid law and the government may only change law within the legal constraints of the law making power.²⁵ Other subsidiary Rule of Law principles are:

- (a) “Rules should be general both in statement and intent, and not be used to harm or benefit particular individuals or groups”.²⁶
- (b) “A rule should apply to everyone affected by it equally without making arbitrary distinctions among people”. “An exception to the principle of equality before the law is where objective differences justify differentiation”.²⁷
- (c) “Laws should be certain and predictable”.²⁸
- (d) “Public powers must be exercised fairly and in accordance with the law, and must never be exercised arbitrarily”.²⁹

²³ Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2014 edition* (October 2014), p 12. See also Chapters 2 and 3 the Guidelines which provide detailed guidance in relation to the application of the Rule of Law in the specific context of law-making in New Zealand.

²⁴ LAC, *Ibid*, 13

²⁵ Hon Justice Brian J Preston “The enduring importance of the Rule of Law in times of change” (2012) 86 ALJ 175, at 175.

²⁶ *Ibid*, Hon Justice Brian J Preston, 178-180

²⁷ *Ibid*, Hon Justice Brian J Preston 178-180

²⁸ *Ibid*, Hon Justice Brian J Preston 178-180

²⁹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2014 edition* (October 2014), p 13

100. Their principles do not prevent Parliament from legislating contrary to the Rule of Law. In the words of Lord Hoffman in *Ex parte Simms*³⁰:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights...The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

101. That statement applies equally or more strongly to Rule of Law principles.

Critique and recommendations

102. The Bill requires local authorities to consult early with iwi **and to comply with IPAs**. This makes it inevitable that the iwi will have a stronger voice than that of the general public in resource management matters. This goes against the two principles above – ‘law should not be used to harm or benefit a particular group’, and ‘rules [the RMA] should apply to everyone affected by it equally’.
103. We see no grounds for application of the exception - “where objective differences justify differentiation”. Sections 6 to 8 of the RMA (including the statutory requirement to recognise the Treaty principles) are not “objective differences”. They are largely vague aspirational objectives.
104. The potential requirement for local authorities to appoint Maori hearing commissioners could allow appointment of commissioner not based on merit and with conflicts of interests. To prevent this from happening we would recommend clause 16 (new section 34A(1A) be amended with set criteria for the appointments.
105. They might include some evidence of understanding of tikanga Maori. It would be wrong to require knowledge of perspectives of all local iwi. Those are aspects that should be provided as evidence, and be open to challenge and testing in a hearing. It is contrary to the purpose in establishing an impartial objective hearing process, to appoint Commissioners expected to inject their own preferences, assumptions and perspectives especially when parties are unlikely to get an opportunity to correct them.

Special status of Maori - Contrary to Treaty of Waitangi

106. The RMA presently requires substantive and procedural recognition of Maori customary values as reflected in sections 6 to 8 and the special requirements to consult in Schedule 1. This reflects the opinion of the Courts and Parliament that one of the Treaty principles is

³⁰ *Ex parte Simms* [1999] 4 All ER 400 (HL), at 412, Lord Hoffman.

active protection of iwi interests (including through consultation). Judicial and legislature views have differed on how far this “active protection” should extend.

107. The Treaty of Waitangi was a compact to establish the Rule of Law and to recognise and secure property rights. There are areas of disagreement between the English and Maori texts of the Treaty. A recent Human Rights Commission statement expresses the rights and responsibilities it was meant to protect as:³¹

- (a) the rights and responsibilities of the Crown to govern (Article 1 – kāwanatanga/governance);
- (b) the collective rights and responsibilities of Maori, as indigenous people, to live as Maori and to protect and develop their taonga (Article 2 – rangatiratanga/self-determination); and
- (c) the rights and responsibilities of equality and common citizenship for all New Zealanders (Article 3 – rite tahi/equality).

108. Despite the assertion that Article 2 was about self-determination, a more straightforward interpretation is that it reflects classical property rights. Arguably it promised no more than what the English regarded as due to any property owner.

109. Article 3 states a fundamental right to equality.

110. We record relevant statements of some politicians about the Treaty. This is because an unwritten constitution evolves. Some principles are what enough people in power say they are, until another powerful person, or group shows by action that the former principles no longer govern. It is possible that the New Zealand constitution may already have evolved to downgrade equality before the law and representative democracy and to elevate identity group negotiation of power as competing conventions. The fate of the iwi provisions in this Bill will be an indicator of where such principles now stand.

111. In a considered piece in 2002, the Hon Bill English said:³²

the Treaty created one sovereignty and so one common citizenship

the solution to the challenges that the Treaty presents to all New Zealanders, lies in a single standard of citizenship for all

112. The Hon Wayne Mapp summarised the main Treaty issues as:³³

The great constitutional debate in New Zealand is whether the Treaty of Waitangi confers upon Maori a special status. The debate goes well beyond interests that Maori have in their land and other resources. At its heart is the notion that Maori have a privileged constitutional status, with a greater say in government than other New Zealanders. This idea appears to run counter to the most fundamental principle of democracy - equality before the law. It is therefore a debate that has

³¹ Human Rights Commission “Human Rights In New Zealand: chapter 4. Human rights and the Treaty of Waitangi” (2010) available at: <https://www.hrc.co.nz/>

³² The Hon Bill English, MP, “The Treaty of Waitangi and New Zealand citizenship” [2002] NZLJ 254 at 254 and 261.

³³ The Hon Wayne Mapp, MP, “Time for constitutional clarity” [2003] NZLJ 148, at 148

far-reaching implications for the future of our constitution and our rights as citizens.

113. The Hon Mapp contended:³⁴

As citizens, we all have equal rights and so we all have the same rights to be consulted...

The Treaty does not confer more rights to consultation on Maori than on anyone else.

It seems to be either Maori as a people, or Maori as iwi or hapu, or Maori as a category of sub-sovereign entities, with extra rights of consultation beyond all other citizens. This is based on a belief that the residuary elements of sovereignty - captured by the concept of tino rangatiratanga - have been retained in Article 2 and give Maori special rights of consultation....

However, it does not seem that the Treaty really conferred the right of some residuary sovereignty as opposed to the protection of particular property rights. The sweeping forms of consultation superior to everyone else can only be justified by the mistaken belief that Maori have a residuary sovereignty...

If we follow this idea of partnership, consultation and subsidiary sovereignty, we then start to erode a fundamental value of being a unified nation

114. The Human Rights Commission seems to agree (at least on the idea of iwi having no special privileges):³⁵

*The Treaty does not, as it is sometimes claimed, confer 'special privileges' on Maori, nor does it take rights away from other New Zealanders. Rather, it affirms particular rights and responsibilities for Maori as Maori to protect and preserve **their** lands, forests, waters and other treasures for future generations. [emphasis ours]*

115. Regardless of what the Treaty principles are, the RMA does require local authorities to take Treaty principles into account through section 8.

116. Sir Geoffrey Palmer's review group that initiated the RMA in 1988 and 1989 clearly wanted the law to provide "active protection" of iwi interests in natural resources through encouraging their participation in the processes. Policy objectives included:³⁶

(a) "Government will honour the principles of the Treaty of Waitangi through exercising its powers of government reasonably and in good faith, so as to actively protect Maori interests specified in the Treaty"; and

(b) "Government will encourage Maori participation in the political processes".

³⁴ Mapp, Ibid, at 149-151.

³⁵ Human Rights Commission "Human Rights In New Zealand: chapter 4. Human rights and the Treaty of Waitangi" (2010) available at: <https://www.hrc.co.nz/>

³⁶ Ministry for the Environment "Resource Management Law Reform: Directions for change: A Discussion Paper" (August 1988) 14 (A.Pl Randerson, Chair of Review Group)

117. The Review Group considered the “principles of partnership” and “principle of active protection (implying a duty to consult)” to be Treaty principles. However, they also considered “principles of mutual benefit and reciprocal obligations” to be important principles. A 1990 Discussion Paper said:³⁷

The Treaty is a living document and accordingly the principles will develop and evolve over time. Sir Robin Cooke referred to this when he stated in the New Zealand Maori Council case: “The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas”. To date we can look at existing decisions and see a number of principles emerging such as the principles of partnership; the principle of reciprocal obligations; the principle of active protection (implying a duty to consult); the principle of mutual benefit; the principle of options; the principle of consent; etc. On a case by case basis some of these principles may apply and others may arise. However, those exercising functions can at least turn to existing principles for guidelines in order to meet the duty under clause 6.

118. In 1989 the Government announced the following principles would be used when dealing with issues arising from the Treaty of Waitangi:³⁸

(a) The principle of government or the kawanatanga principle:

(b) The principle of self-management (the rangatiratanga principle):

(c) The principle of equality:

(d) The principle of reasonable cooperation:

(e) The principle of redress:

119. The Principle of Equality was further described as follows:

(c) The principle of equality: Article 3 constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality, although human rights accepted under international law are also incorporated. Article 3 has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

120. There are no guidelines in the RMA as to how the Treaty of Waitangi principles in section 8 are to be applied or what constitutes the principles. The Environment Court stated in *Ngati Rangī Trust v Manawatu-Wanganui Regional Council*:³⁹

³⁷ Discussion Paper on the Resource Management Bill: Prepared by the Review Group (December 1990) 11.

³⁸ New Zealand Parliament, *The Crown & The Treaty of Waitangi: A Short Statement of the Principles on which the Crown Proposes to Act*. These are also in an appendix compiled by Dr Janine Hayward *The Principles of the Treaty of Waitangi*, available at <http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi/tribunals/waitangi-tribunal/documents/public/treaty-principles-appendix-99>

³⁹ *Ngati Rangī Trust v Manawatu-Wanganui Regional Council* A67/04 (EC) at [419]

Section 8 of the Act is to be read with the more specific imperatives contained in sections 6(e) and 7(a). Those provisions should not, in our view, be read with a limiting pedantry. Nor should they be bogged down in legal niceties, as for example – the precise meaning and manner of application of the Treaty principles. The imperatives ensure recognition of, but not exclusive recognition of, Maori cultural issues in the resource management processes.

121. Other decisions have required local authorities to take into account Treaty principles. In *Ngai Tahu Maori Trust Boards v Director-General of Conservation* it was held that Maori are to be given “a reasonable degree of preference” in matters concerning Maori land and coastal water use, and that consideration of the Treaty could not be restricted to “mere matters of procedure”.⁴⁰ Baragwanath J in *Ngati Maru Ki Hauraki Inc v Kruithof* found that injustice to non-Maori can infringe the principles of the Treaty as well as injustice to Maori.⁴¹
122. Sections 6-8 should also be consistent with the single overarching purpose of the RMA in s 5(1) which is to promote the sustainable management of natural and physical resources. Sustainable management is defined in s 5(2) as:

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.

123. The references to social, economic, and cultural wellbeing has allowed people claiming authority under the RMA to go a long way beyond what most lay people might have supported as universally desirable protection of plants, animals and the physical environment. Nevertheless Court decisions have made it clear that it applies for the benefit of the entire community, not just Maori. As the Environment Court said in *Living Earth Limited v Auckland Regional Council*⁴²:

The Court has to weigh all the relevant competing considerations and ultimately make a value judgement on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive, even if the subject matter is seen as involving Maori issues. Although the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative

⁴⁰ *Ngai Tahu Maori Trust Boards v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 561, 562.

⁴¹ *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) Baragwanath J at [52]: “Because the Treaty itself picked up the need to apply British justice in New Zealand it follows that any construction of the Resource Management Act that will work injustice to non-Maori is as likely to infringe the principles of the Treaty as injustice to Maori”

⁴² *Living Earth Ltd v Auckland Regional Council*, EC, A126/06 (4 October 2006) para 281

of New Zealand society as a whole decides, whether the subject matter has an adverse effect. In the end a balanced judgement has to be made.”

Critique and recommendations

124. Do the iwi provisions go beyond what is required under sections 6 to 8? In our opinion the Bill explanations establish no connection with the overriding purpose of sustainable management. Nor does it preserve the Treaty principles of equality and mutual benefit from the risks of misuse of new procedural and substantive privileges under IPAs.
125. IPAs, early consultation, limited notification and iwi hearing commissioners may “enhance” iwi participation in the planning and resource consent processes. Without safeguards against disadvantage of the general public they conflict with other Treaty principles. They do so without objective evidence that such an increase in discriminatory status is necessary.
126. The bill should get new provisions expressly recording that iwi provisions (including existing arrangements) must be subordinate to Rule of Law principles and the environmental purposes of the RMA.

Partnership required under Treaty of Waitangi?

127. The proposed amendments do not affect sections 33 or 36B to 36E of the RMA which provide for co-management. However, there is the risk the IPAs could be used to give statutory authority to the concept of local government and iwi being “partners”.
128. The statutory direction in section 8 of the RMA is to “take account” of the Treaty principles affecting the Crown. This has been judicially interpreted. A balancing approach allows for the question is whether “partnership” is a Treaty principle, and if so, what does it mean to be a partner?
129. The Environment Court and the Crown negotiators have consistently held that, while local authorities must take the Treaty principles into account in exercising RMA functions (under s 8), they are not subject to the Crown obligations of the Treaty.⁴³ This is because Treaty principles do not bind private individuals. Until now they have only affected local authorities to the extent expressly incorporated in legislation.
130. New Zealand courts generated use of the term “partnership” as a metaphorical and aspirational description of the qualities of the relationship between the Crown, and the signatory iwi. They did not assert a partnership between individuals, or collectives, or missionaries and traders and sealers and whalers and the people among whom they were living. Nor did the Treaty create anything that the law then, or now, would recognise as partnership in a legal sense. Partnership was (and still is) a well defined legal construct. For example:
 - (a) Partnerships enable their members to bind each other. Only the Crown can bind its Treaty “partners” and it does that with sovereignty, not ‘partnership rights’.

⁴³ *Seatow Limited v Auckland Regional Council* [1994] NZRMA 204 (EC); *Hanton v Auckland City Council* [1994] NZRMA 289 (EC).

(b) Partnerships may be dissolved unilaterally by any partner. Once again, the Crown might repudiate a Treaty, with its political consequences, but it has not been seriously suggested that the Treaty relationship could be dissolved by any iwi (or the Crown) simply choosing to withdraw.

131. There is no legal sense in which any Article of the Treaty contemplated partnership, in the Maori or English version. William Hobson's "one people" words immediately after signing the Treaty and the arguments among the chiefs show the improbability of actual legal partnership being in contemplation of the signatories. The simple terms of Articles 1 and 2 shows no expectation of 'partnership' or co-management among peoples. Indeed Article 2 goes out of its way to assure the signatories that they would have the classical English law protection against any assertion of Crown powers to determine how they managed their land. If 'partnership' had been in contemplation which exposed citizens' assets to 'co-management', the Crown would have been duplicitous at the signing.

132. In the 1987 Court of Appeal decision *New Zealand Maori Council v Attorney-General*, (the Lands case) the President of the Court of Appeal, Cooke P, referred to both treaty parties having the obligation of dealing with each other in good faith:⁴⁴

In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the SOE Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith..... No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi.

133. The 'partnership' of treaty parties described metaphorically by Cooke P is capable of sensible limitation in meaning, without violating constitutional principles, or the plain words of the Treaty protecting property rights.

134. Cooke P further explained the meaning as:⁴⁵

*the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties... the duty of the Crown is not merely passive but extends to active protection of Maori people in the **use of their lands and waters** to the fullest extent practicable] [emphasis ours]*

135. The Treaty made Maori subjects of the Crown. The Crown is now a symbolic and legal embodiment of the collective will of all citizens. As the holder of the coercive powers in a democracy it represents and gives effect to majority preferences, subject to Rule of Law reserved rights of minorities. There is an argument that literal partnership cannot be what the Treaty granted Maori because you cannot have a partnership without two separate parties. In our constitution – one putative party (iwi or Maori) are constituents of the other.

136. Whether or not that argument is compelling, there is no authority under the Treaty to side-step the carefully evolved:

(a) Protection of property rights;

⁴⁴ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) Bisson J, Casey J, Cooke P, Richardson J, Somers J at page 38

⁴⁵ *New Zealand Maori Council v Attorney-General* Ibid, page 37.

- (b) Secular nature of our state;
- (c) Overriding purpose of the RMA to achieve sustainable development for the whole community; and
- (d) Scheme of the Local Government Act, and its purposes (including the first purpose in section 10 “to enable democratic local decision-making and action by, and on behalf of, communities...”).

Critique and recommendations

- 137. Any move towards giving legal authority to partnerships between local authorities and iwi authorities should be treated as unconstitutional.
- 138. The IPAs could be used in combination with existing sections 33, 36B to 36E, to accelerate the number of co-management or co-governance arrangements. We consider this would be contrary to the principles of equality in the Rule of Law and Treaty principles as discussed above.
- 139. We recommend Democracy Action seek provisions clarifying what IPAs are not and cannot be. Co-management and partnerships under the RMA should be confined to resources owned by iwi and councils, or by iwi alone.

Contrary to New Zealand human rights legislation and International Treaties

New Zealand Bill of Rights Act 1990 and the Human Rights Act 1994

- 140. Treating one class of citizens differently from others with race or ethnic identify as the discriminator is also generally contrary to the Human Rights Act 1994 (“**the HR Act**”) and the New Zealand Bill of Rights Act 1990 (“**NZBORA**”). These statutes incorporate international treaties that protect the fundamental rights to equality.
- 141. Section 19(1) of the NZBORA affirms that everyone is entitled to be free from discrimination on the grounds set out in section 21 of the HR Act. One of these grounds is “race”. According to the LAC Guidelines:⁴⁶

Direct discrimination will occur when a provision in legislation expressly disadvantages a group. Disadvantage includes giving an advantage to another group.

- 142. The Court of Appeal in *Child Poverty Action Group Inc (CPAG) v Attorney-General* described a two-stage test for an analysis under section 19 of NZBORA as follows:⁴⁷

The first step is to ask “whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination”. The second question is whether the treatment “viewed in context, ... imposes a material disadvantage on the ... group differentiated against”.

⁴⁶ Legislation Advisory Committee Guidelines on Process and Content of Legislation (2014 ed) 24

⁴⁷ *Child Poverty Action Group Inc (CPAG) v Attorney-General (CA)* [2013] 3 NZLR 729, at [43]

143. Once these two steps are done the next step is to analyse whether the provision is a justified limit under section 5 of BORA following the test set out by Tipping J in *R v Hansen*, namely:⁴⁸

(a) does the limiting measure serve a purpose sufficiently important to justify [curtailing the right]?

(b) is the limiting measure rationally connected with its purpose?

(ii) does the limiting measure impair the right ... no more than is reasonably necessary for sufficient achievement of its purpose [minimal impairment]?

(iii) is the limit in due proportion to the importance of the objective [proportionality]?

144. The Child Poverty Action Group failed in their appeal of a High Court decision which affirmed a decision by the Human Rights Review Tribunal that exclusion of beneficiaries from Working for Families tax credit was justified limit on rights under s 5 of NZBORA.
145. Prima facie the proposed iwi provisions in the Bill will provide iwi with advantages over other groups through the IPAs. The lack of limiting prescription for them will likely be used to justify giving authority to decisions jointly reached under IPAs. Giving iwi these advantages disadvantages property owners, and the general public who are not iwi. These advantages are likely to be significant and therefore impose a “material disadvantage” to some non-iwi.
146. Section 7 of NZBORA requires the Attorney-General to bring to the attention of the House any provisions in a bill that appears to be inconsistent with any of the rights and freedoms in NZ BORA. This was not done as the Ministry of Justice advised the Attorney-General the Bill is consistent with these freedoms and rights.⁴⁹ The Ministry did consider the IPAs and decided: [our emphasis]

Section 19(1) – Freedom from discrimination

16. Section 19(1) of the Bill of Rights Act affirms the right of everyone to the freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. Those grounds include race.

*17. Arguably, the requirement for local authorities to extend an invitation to iwi to enter into an Iwi Participation Arrangement in clause 39 of the Bill draws a distinction on the basis of race. This is because it distinguishes between groups that are predominately Māori and those that include non-Māori. Nevertheless, in our view, **the provision does not give rise to discrimination because it does not create any substantive disadvantage.***

18. In reaching this view, we have noted that s 6(e) of the principal Act already requires all persons exercising functions and powers under the Act to recognise and provide for the relationship of Māori and their culture and traditions with

⁴⁸ Ibid, at [76]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

⁴⁹ Ministry of Justice advice to the Hon Christopher Finlayson QC, Attorney-General, on Resource Legislation Amendment Bill (14 October 2015) available at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/resource-legislation-amendment-bill>

their ancestral lands, water, sites, wāhi tapu, and other taonga. This provision needs to be read with s 7(a) and s 8 of the principal Act. Section 7(a) requires decision-makers to pay particular regard to Kaitiakitanga (Māori stewardship). Section 8 requires decision-makers to take into account the principles of the Treaty of Waitangi. The Courts have also placed considerable emphasis on the proper consideration of matters of importance to Māori in decision making under these three sections. [2]

*19. It is apparent, however, that the Bill **does not require decision makers to comply with Iwi Participation Arrangements** above all other considerations. While the interests of some groups will take priority over others in individual cases, this priority does not equate to a disadvantage for any particular group.*

20. We therefore conclude that the Bill appears to be consistent with the freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act.

147. In our opinion this advice is incorrect as:

- (a) New section 58M contains no constraint on the range of matters an IPA may include. Therefore, it may well include requirements that create a substantive disadvantage for non-Maori non-iwi groups in the community;
- (b) New clause 1A in Schedule 1 of the Bill requires IPAs to be complied with and states “A proposed policy statement or plan must be prepared in accordance with any applicable iwi participation arrangement.” The Ministry’s advice that the Bill does not require decision makers to comply with IPAs is incorrect;
- (c) Even if the Ministry’s statement was correct, it is not a proper characterisation of the threshold test. An action or scheme may be unlawfully discriminatory though the discriminatory purpose and outcomes remain subordinate to some greater purpose (such as profit making). The Ministry statement is so irrelevant as to seem almost wilfully misleading; and
- (d) Given the powers of general competence now held by local authorities (until 2002 they had only powers expressly given by statute) an IPA arrangement could result in practical discrimination in myriad ways. Because it appears to be ‘blessed’ by Parliament as a statutorily required instrument, even though its substantive content is not prescribed, it could legitimise vital preference to iwi interests, with no necessary connection to any prior disadvantage or other reason to justify such discrimination. The explanatory materials with the Bill do not bring the iwi provisions within any of the common exceptions to anti-discrimination law.

148. The Ministry’s advice only considers the Bill’s provisions on the IPAs and does not consider the other iwi provisions in relation to:

- (a) early consultation;
- (b) special treatment in the streamlined planning processes;
- (c) special appointment of hearing commissioners; and
- (d) notification of consent applications.

149. These other provisions provide special privileges to iwi and therefore draw a number of distinctions on the basis of race.
150. The test for whether or not these distinctions are justified is set out above. The overall purpose is to enhance Maori participation in resource management matters. Does that justify the prima facie discrimination posed by the iwi provisions? If so, do the measures do no more than is reasonably necessary to enhance the participation of Maori? Are the limitations in proportion to the importance of the objective?
151. We have seen no indication that those promoting these policies and these provisions even sought the information that would enable the application of those tests. The iwi provisions fail them. They are out of proportion to the problem (if there is actually a problem with Maori participation).

Universal Declaration of Human Rights

152. The Human Rights Act incorporates the Universal Declaration of Human Rights (UDHR). The UDHR affirms the right to equality.

International Covenant on Civil and Political Rights

153. The NZBORA incorporates the International Covenant on Civil and Political Rights (ICCPR)⁵⁰. The ICCPR protects the following rights:
- (a) “equal rights of men and women to the enjoyment of all civil and political rights” (article 3);
 - (b) “all persons shall be equal before the courts and tribunals” (article 14);
 - (c) “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” (article 17);
 - (d) “everyone shall have the right to freedom of expression” (article 19);
 - (e) “every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restriction: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (c) to have access, on general terms of equality, to public service in his country” (article 25); and
 - (f) “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (article 26).

Convention for the Elimination of all Forms of Racial Discrimination

154. New Zealand ratified the International Convention for the Elimination of all Forms of Racial Discrimination (CERD).⁵¹ CERD affirms the rights to equality and freedom from

⁵⁰ Ratified by NZ on 28 December 1978

⁵¹ Ratified by NZ on 22 November 1972

discrimination also contained in the ICCPR. It permits state action that is racially discriminatory only in extremely limited circumstances. Even then they must be time limited, to expire when the affirmative or redressing purpose has been achieved.

155. The iwi provisions are a blunt breach of the convention. They seem to be intended as a permanent feature and inherited privilege in our law. No redressing purpose has been articulated.
156. The provisions apply to all local authorities, without enquiry as to whether the relevant iwi suffer any disadvantage. There is no test, for example, of existing iwi voted representation. There are no protections against iwi provisions combining with local iwi voting power to completely marginalise majority voters.
157. International treaties may be used as aids in the interpretation of statutes.⁵² The proposed amendments should be consistent with international obligations. As the LAC Guidelines say:⁵³

New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand's international reputation at risk and exposes it to any applicable sanctions under the treaty.

Given the breadth of New Zealand's international obligations, proposed legislation will often affect, or have the potential to affect, one or more of New Zealand's international obligations. Care must be taken to ensure that any proposed legislation does not inadvertently cause New Zealand to breach any of its existing treaty obligations.

Declaration on the Rights of Indigenous Peoples

158. NZ has not ratified the UN Declaration on the Rights of Indigenous Peoples (2007) but has indicated its support for it⁵⁴. The Declaration:
 - (a) encourages cooperative relations based on principles of justice, democracy, respect for human rights, **non-discrimination** and good faith (Preamble, para 18) [emphasis ours];
 - (b) affirms Indigenous peoples' rights to the observance and enforcement of treaties (Article 37); and
 - (c) obliges states to take positive steps to "promote tolerance, understanding and good relations among Indigenous peoples and all other segments of society" (Article 15(2)).

⁵² Ashby v Minister of Immigration

⁵³ LAC Guidelines 2014 p 31

⁵⁴ 2010 Announcing New Zealand's reversed position at the UN Permanent Forum on Indigenous Issues in April 2010, the Minister of Maori Affairs noted that the Government also "reaffirmed the legal and constitutional frameworks that underpin New Zealand's legal system". See Hon Pita Sharples, Minister of Maori Affairs (2010), 'Supporting UN Declaration Restores New Zealand's Mana', 20 April. Accessed 14 June 2010 from <http://www.beehive.govt.nz/release/supporting+un+declaration+restores+NZ039s+mana>

Critique and recommendations

159. We have not seen any analysis in the Regulatory Impact Statement or elsewhere of how these proposed amendments comply with international obligations.
160. Generally any legislation which discriminates against a class of people based on race is contrary to the ICCPR and UDHR. It will depend on whether the discrimination is reasonable as to the level of non-compliance. In particular we consider:
- (a) The limited notification requirements in the Bill do not comply with articles 3, 17, 19, 25 and 26 of the ICCPR; and
 - (b) The IPAs could be used in a way that gives iwi a special status that is also non-compliant with the ICCPR.
161. The main concern is the Bill is negotiating away fundamental rights that should be the same for all New Zealanders.
162. These concerns are similar to the concerns mentioned above under Rule of Law, Treaty of Waitangi, and Partnership which have the same fundamental rights (i.e. the right to equality).

Property rights

163. The RMA is the keystone to property rights in New Zealand. Property rights are fundamental to the rules of law principles of liberty and equality as mentioned above. Therefore, any elevated status of one class of citizens gives them stronger property rights. Property rights was defined by William Blackstone in 1768 as:

The...absolute right inherent in every Englishman, is that of property: which consists in a free use, enjoyment and disposal of his acquisition, without any control or diminution, save only the laws of the land.

164. The common law right to not be deprived arbitrarily of your property by the Crown derives from the Magna Carta 1297, the English Common Law and the international treaties mentioned above. The Magna Carta states:

No person shall be ...disseised of his freehold....but ...by the law of the land

165. This fundamental doctrine was assimilated in articles 2 and 3 of the Treaty of Waitangi in 1840.
166. However, common law duties are not absolute duties. The Magna Carta and common law do not override legislation. Common law duties and rights are subject to express terms in statutes. Section 9(3) of the RMA, for example, prohibits any land use that contravenes a district rule unless the use is expressly allowed by a resource consent, or is an 'existing use' as defined in section 10 and 10A. If there is inconsistency between the plan provisions and the legislation then a court would use interpretative aides such the Magna Carta and common law.

Critique and recommendations

167. The proposed amendments, including the limited notification requirements and the IPAs, give iwi stronger property rights compared to the general public. The preferential rights to be consulted on and make submissions on draft policies and plans give iwi a stronger ability to influence council decisions. They could use this extra power to hold up plans, competing developments and so on. If iwi have any special sites or interests close to property which is the subject of a resource consent application with limited notification, they could use this to stop the application.
168. The iwi provisions are dangerous to property rights and should be removed from the Bill.
169. We note the proposed new section 7A for the RMA which was agreed to by Cabinet in 2013.⁵⁵ It would have required decision-makers to 'endeavour to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act'. It would mean that RMA decision-makers need to think about private property rights more explicitly than they have done in the past.

PRECEDENTS AND FUTURE STEPS

170. If these amendments are passed they will make it easier for more co-governance arrangements to be made. Freshwater Iwi Leaders Group spokesman Rahui Papa is reported as saying the new bill was "a positive first step in advancing our objectives of better environmental outcomes and improving Maori participation in resource management processes".⁵⁶ If passed it will be a "baseline model for iwi participation"⁵⁷.
171. Below are examples of co-management arrangements already in place. Other (older) examples are the co-management arrangements over the Whanganui River and The Urewera National Park.
172. Although there is already statutory authority for these arrangements under the RMA and in Treaty settlement legislation, they seem to be at odds with the principles of equality mentioned above under Rule of Law, international treaties and Treaty of Waitangi. Treaty settlements that include deals over governance arrangements in resources that do not belong to iwi conflict with fundamental Rule of Law principles.

Waikato River Authority

173. The co-governance and co-management arrangements for the Waikato River were an outcome of the Waikato-Tainui Raupatu Settlement Act 2010 and subsequent agreements with Ngati Tuwharetoa, Raukawa and Te Arawa. The co-management arrangements involve:
- (a) Individual joint management agreements between each river Iwi and their local authorities;

⁵⁵ As mentioned in the Regulatory Impact Assessment for the Bill, at para 129

⁵⁶ Vernon Small, "Freshwater group welcome iwi rights under proposed RMA law change" 26 November 2015 (on Stuff website <http://www.stuff.co.nz/national/politics/74454722/Freshwater-group-welcome-new-iwi-rights-under-proposed-RMA-law-change>)

⁵⁷ Ibid.

- (b) Integrated management plans;
- (c) Recognition of customary activities; and
- (d) Co-management agreements for managed lands and sites of significance.

174. The Waikato River Settlement has been described as evidence of an emerging trend that accords with the conception of the Treaty as a partnership requiring much wider joint management where Maori have an ethnically inherited entitlement.⁵⁸ A lawyer, Samuel Wevers, justified it by writing:⁵⁹

While the Crown might actively protect Maori in decision-making processes by having particular regard to their interests, it alone makes decisions. If Maori jointly make that decision, as in the WRA, active protection is evident in the decision itself (as Maori can protect their interests through governmental structures), not just in preliminary processes. However, it is because of the unequal nature of the Treaty partnership that active protection obligations akin to fiduciary duties rest on the Crown. Simultaneous provision for equal partnership (as on the WRA) and active protection must thus be justified by reference to a strong Maori interest and minimal impact on the national art 1 interest. Indeed, active protection of Maori relationships with the environment might be best recognised through Maori ability to jointly manage taonga.

However, outside of the RMA, joint management has rarely occurred. While the RMA can allow partnership, local government does not use those processes, and the regime thus might be a continuing and serious breach of Treaty obligations for its failure to deliver partnership and recognition of rangatiratanga.

175. This refers to “equal partnership”. There is no mention of how other property owners have been affected by the WRA.

Gisborne District Council co-governance with Ngati Porou

176. The Joint Management Agreement between Ngati Porou and Gisborne District Council was made under section 36B of the RMA and signed in January 2016. This agreement was instigated by a 2012 Treaty settlement. It will give the iwi joint control of water in the Waiapu Catchment with the Council.

177. Under this agreement, it appears that Ngati Porou will move from being a joint consenting authority to a full consenting authority, within five years, over the entire Gisborne region.

178. There are many legal and practical issues with this. Instead of seeking consents from a democratically elected local authority which is accountable to all its citizens equally and also the Office of the Auditor-General, a group of iwi will be issuing consents.

⁵⁸ Samuel George Wevers “Recognising Rangatiratanga through Co-management: The Waikato River Settlement [2013] New Zealand Law Review 689.

⁵⁹ Wevers at 707-708

Auckland Independent Maori Statutory Board

179. There is precedent under Auckland specific legislation.⁶⁰ An Independent Maori Statutory Board (IMSB) has membership on 14 out of the 18 council committees. Auckland Council must “take into account the board's advice on ensuring that the input of mana whenua groups and mataawaka of Tamaki Makaurau is reflected in the Council's strategies, policies, and plans” (s 88(1)(c) Local Government (Auckland Council) Act 2009).
180. Shortly before publication, the IMSB obliged Auckland Council to add a new overlay in the Proposed Auckland Unitary Plan (PAUP) for Sites and Places of Value to Mana Whenua (SPVMW). This added to the more carefully prepared overlay for Sites and Places of Significance for Mana Whenua (SPSMW).
181. The SPVMW included 3600 sites which were not evaluated before they were added to the PAUP on 30 September 2013. It is still a draft plan waiting to be finalised. Several years later affected property owners still have the purple circles in the PAUP maps either on their properties or next to them.
182. These overlays and the CIAs were given immediate effect despite the fact affected property owners were not consulted and Auckland Council did not verify the sites or that they protected historic heritage. The mandatory CIAs are arguably ultra vires section 36A of the RMA. It says no applicant for resource consent has a duty to consult any person about the application.
183. That IMSB action has damaged Auckland Council. The Council has backtracked over the Mana Whenua provisions in the PAUP (e.g. the mandatory requirement for a cultural impact assessment) and reduced the number of SPVMWs in its evidence before the Auckland Unitary Plan Independent Hearings Panel. Nevertheless they are still in force until the final unitary plan is approved.

Future - water

184. The IPAs together with existing RMA provisions (33 or 36B to 36E) for co-management could be used as a mechanism to allow iwi to control fresh water. If iwi are consulted early on draft policy plans, including water management plans, or the proposed changes have limited notification (meaning iwi but not public can submit) then this gives iwi an increased amount of control and voice. The changes could provide a new and accelerated pathway for iwi to become co-partners with local authorities in resource management, particularly for the control of water and other natural resources in their area.
185. The Freshwater Iwi Leaders Group late last year stated their goals and objectives are:⁶¹
 - (a) Ownership of all Crown owned river & lake beds and the water column;
 - (b) Title in freshwater consistent with Waitangi Tribunal rulings; and

⁶⁰ Local Government (Auckland Council) Act 2009

⁶¹ Freshwater Iwi Leaders Group (presentation for Regional Hui July/August 2015) available at <http://iwichairs.maori.nz/wp-content/uploads/2015/07/FINAL-DRAFT-Freshwater-Regional-Hui-Presentation-August-2015.pdf>

- (c) \$1b fund in to an Iwi approved entity to address capacity and capability including mechanisms to assist decision making, water quality and economic mechanisms.

186. Local Government NZ has already signed a memorandum of understanding with the Iwi Chairs Forum, where they “acknowledge the mana and kaitiakitanga of iwi over the nation’s land and natural resources”. As lawyers we can find no authoritative way to delimitate and interpret this statement. Did they have authority to do this? This is very important, especially when Maori treat these words as conferring rights normally seen as part of the bundle of rights that is property.
187. The Minister for the Environment, the Hon Dr Nick Smith, in a speech on 20 February 2016 on the next steps for freshwater said:⁶²

We have been cognisant of the Waitangi Tribunal deliberations and reports on freshwater, and do not think it is in New Zealand or Māori interests for this issue to go down the divisive litigation path that occurred with the foreshore and seabed. That is why we have worked hard with iwi leaders to find a pragmatic way forward.

There are three main proposals in this paper on this issue. Firstly, we are proposing to clarify the status of Te Mana o Te Wai in the National Policy Statement. This is a framework requiring that decisions on our rivers and lakes properly consider its overall well-being, the health of the water and environment as well as its economic values. This concept is as relevant to all New Zealanders as it is to Māori.

Secondly, we are going to require councils to talk to local iwi to identify the rivers and lakes they connect with and the values of importance to iwi. Iwi will be able to initiate agreements with councils on how they can participate in decision-making on freshwater, albeit councils still make the final decisions on plans and consenting.

The Government is also proposing to amend the Resource Management Act to require consultation with relevant iwi on water conservation orders and require one person nominated by relevant iwi to sit on special tribunals making decisions on water conservation orders.

These are not radical proposals. The vast majority of New Zealanders recognise that Māori have long historical links with our lakes and rivers and they should be included in decision-making. The provisions are very similar to proposals being used already by councils with iwi in water management, and contained in many Treaty settlements unanimously supported by Parliament.

188. The first proposal of having a National Policy Statement may be consistent with the principle that the law should apply equally to all citizens. However, the consultation document adds another requirement:⁶³

⁶² Hon Dr Nick Smith, Minister for the Environment “Next steps for freshwater” (20 February 2016, speech at 18th Bluegreens Forum)

⁶³ New Zealand Government “Next steps for fresh water: Consultation document” (February 2016) at page 27.

“for regional councils to reflect Te Mana o te Wai in their implementation of all relevant policies in the National Policy Statement for Freshwater Management”.

189. It continues :

when Te Mana o te Wai is given effect, the water body will sustain the full range of environmental, social, cultural and economic values held by iwi and the community.

190. If the proposed NPS includes this as a requirement courts will be constrained when interpreting the RMA by any policies in the NPS.⁶⁴ For example if a policy is that when considering a freshwater body’s wellbeing, a council is required to take into account values held by local iwi, then any decision that is contrary to these value could be challenged.

191. The second and third proposals which would require councils to talk to local iwi, have agreements with iwi on decision-making, and consult with relevant iwi on water conservation orders. These seem to be very similar to the iwi provisions although the second proposal says “albeit councils still make the final decisions on plans and consulting”.

192. We are not confident that the reassuring statement should be relied upon at face value. If a council agrees, for example not to make certain decisions without prior agreement with iwi under an IPA they will have ceded a veto power. Ambiguity may be deliberate. Obfuscation has accompanied some recent government announcements and explanations of dealings with iwi. The relatively clear provision of the Foreshore and Seabed Act were replaced by the deliberately more ambiguous terms of the Marine and Coastal Areas Act.

193. The water proposals are radical under any interpretation despite what the Minister says. They will make iwi a decision-maker on water conservation orders and give iwi influence over and above what any others have on other freshwater matters. The Consultation Paper proposes new “rohe (region or catchment)-based agreement between iwi and councils for natural resource management – a ‘mana whakahono o rohe’ agreement”. These will set out matters such as:

how iwi and council(s) work together in relation to plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities

194. The paper refers to the ‘iwi participation agreements’ in the Bill and says:

mana whakahono o rohe in this context is an alternative to an IPA. It differs from an IPA in that it can be initiated by iwi.

195. Democracy Action will be able to submit on this freshwater consultation document. We assume that the Bill will be amended to include these proposals, or alternatively a second bill will follow. Together these will represent a significant increase in the special privileges granted to Maori under the RMA.

⁶⁴ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; (2014) 17 ELRNZ 442 – the Supreme Court found the requirement in the the RMA to ‘give effect to’ NZCPS was intended to constrain decision-makers. In that case the Court found a plan change should not have been granted as it failed to give effect to policies in the New Zealand Coastal Policy Statement.

APPENDIX 1 – RELEVANT BILL PROPOSED AMENDMENTS

Part 1

Amendments to Resource Management Act 1991

...

Amendments to Part 4 of principal Act

...

13 Section 32 amended (Requirements for preparing and publishing evaluation reports)

(1) In section 32(3), after “statement,”, insert “national planning template,”.

(2) After section 32(4), insert:

(4A) If the proposal is a proposed policy statement, plan, or change prepared in accordance with any of the processes provided for in Schedule 1, the evaluation report must—

(a) summarise all advice concerning the proposal received from iwi authorities under the relevant provisions of Schedule 1; and **Resource Legislation Amendment Bill Part 1 cl 13**

(b) summarise the response to the advice, including any provisions of the proposal that are intended to give effect to the advice.

(3) In section 32(6), definition of proposal, after “statement,”, insert “national planning template,”.

...

16 Section 34A amended (Delegation of powers and functions to employees and other persons)

After section 34A(1), insert:

(1A) If a local authority is considering appointing 1 or more hearings commissioners to exercise a delegated power to conduct a hearing under Part 1 of Schedule 1,—

(a) the local authority must consult tangata whenua through relevant iwi authorities on whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū; and

(b) if the local authority considers it appropriate, it must appoint at least 1 commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū, in consultation with relevant iwi authorities.

Amendments to Part 5 of principal Act

...

38 New subpart 2 of Part 5 and new subpart 3 heading in Part 5 inserted

After section 58J (as inserted by section 37 of this Act), insert:

Subpart 2—Iwi participation arrangements

58K Purpose of iwi participation arrangements

The purpose of an iwi participation arrangement is to provide an opportunity for local authorities and iwi authorities to discuss, agree, and record ways in which tangata whenua may, through iwi authorities, participate in the preparation, change, or review of a policy statement or plan in accordance with the processes set out in Schedule 1.

58L Local authorities to invite iwi to enter into iwi participation arrangement

(1) The requirement for an invitation to be extended under this section applies when a triennial general election is held under section 10 of the Local Electoral Act 2001.

- (2) Not later than 30 working days after the date of a relevant event referred to in subsection (1), a participating local authority must invite iwi authorities representing tangata whenua to enter into 1 or more iwi participation arrangements.
- (3) However, the local authority need not extend the invitation to an iwi authority if it has already agreed to an iwi participation arrangement with that iwi authority.
- (4) If an iwi authority wants to enter into an iwi participation arrangement with a local authority, it must notify its acceptance of the invitation given under sub-section (2) to the local authority within 60 working days after the date on which the invitation is issued, but nothing in this section requires an iwi authority to respond to an invitation or enter into an iwi participation arrangement.
- (5) Nothing in this section prevents a local authority from preparing, changing, or reviewing a policy statement or plan in accordance with Schedule 1 while the local authority is waiting for a response from, or is negotiating an iwi participation arrangement with, 1 or more iwi authorities.

58M Content of iwi participation arrangements

An iwi participation arrangement—

- (a) must be recorded in writing and identify the parties to the arrangement; and
- (b) must record the parties' agreements about—
 - (i) how an iwi authority party may participate in the preparation or change of a policy statement or plan; and
 - (ii) how the parties will give effect to the requirements of any provision of any iwi participation legislation, including any requirements of any agreements entered into under that legislation; and
 - (iii) whether any other arrangement agreed between the local authority and any 1 or more iwi authority parties that provides a role for those iwi authority parties in the preparation or change of a policy statement or plan should be maintained or, if applicable, modified or cancelled; and
 - (iv) ways in which iwi authority parties can identify resource management issues of concern to them; and
 - (v) the process for monitoring and reviewing the arrangement; and
- (c) may—
 - (i) specify a process that the parties will use for resolving disputes about the implementation of the arrangement; and
 - (ii) indicate whether an iwi authority party has delegated to any person or group of persons the role of participating in the preparation, change, or review of a policy statement or plan; and
 - (iii) if there are 2 or more iwi authority parties or other parties, set out how those parties will work together collectively under the arrangement.

58N Time frame for concluding iwi participation arrangement

- (1) If an iwi authority accepts a local authority's invitation to enter into an iwi participation arrangement, the local authority and the iwi authority must use their best endeavours to conclude an arrangement within—
 - (a) 6 months after the date of the acceptance; or
 - (b) any other period agreed by all the parties.
- (2) If a local authority and an iwi authority are not able to conclude an iwi participation arrangement within the period that applies under subsection (1), the local authority must invite the iwi authority to participate in mediation or some other form of alternative dispute resolution for the purpose of concluding an arrangement.
- (3) No dispute resolution provisions in an iwi participation arrangement may require the local authority to suspend—
 - (a) the preparation, change, or review of a policy statement or plan; or
 - (b) any other part of a process provided for in Schedule 1.

58O Parties may seek assistance from Minister

- (1) This section applies if a local authority and an iwi authority that accepted an invitation to enter into an iwi participation arrangement—

- (a) have endeavoured, but have been unable, to conclude an arrangement within the time specified in section 58N(1); and
 - (b) in their endeavours to conclude an arrangement, have used mediation or some other form of alternative dispute resolution.
- (2) The local authority or iwi authority may apply to the Minister for assistance to conclude an iwi participation arrangement.
- (3) If the local authority and the iwi authority agree, the Minister may—
- (a) appoint a person to assist the local authority and the iwi authority to conclude an iwi participation arrangement; or
 - (b) direct them to use a particular alternative dispute resolution process for that purpose.

58P Relationship with iwi participation legislation

An iwi participation arrangement does not limit any relevant provision of any iwi participation legislation or any agreement under that legislation.

...

Schedule 1

Amendment to Schedule 1 of Resource Management Act 1991

New clause 1A and 1B

In Schedule 1, after clause 1, insert:

1A Iwi participation arrangements to be complied with

- (1) A proposed policy statement or plan must be prepared in accordance with any applicable iwi participation arrangement.
- (2) A local authority may comply with clause 3(1)(d) in any particular case by consulting relevant iwi authorities about a proposed policy statement or plan in accordance with an iwi participation arrangement.

1B Relationship with iwi participation legislation

Nothing in this schedule limits any relevant iwi participation legislation or agreement under that legislation.

New clause 4A

In Schedule 1, after clause 4, insert:

4A Further pre-notification requirements concerning iwi authorities

- (1) Before notifying a proposed policy statement or plan, a local authority must—
 - (a) provide a copy of the relevant draft proposed policy statement or plan to the iwi authorities consulted under clause 3(1)(d); and
 - (b) have particular regard to any advice received on a draft proposed policy statement or plan from those iwi authorities.
- (2) When a local authority provides a copy of the relevant draft proposed policy statement or lan in accordance with subclause (1), it must allow adequate time and opportunity for the iwi authorities to consider the draft and provide advice on it.

New clause 5A

In Schedule 1, after clause 5, insert:

5A Option to give limited notification of proposed change

- (1) This clause applies to a proposed change to a policy statement or plan.

- (2) The local authority may give limited notification, but only if it is able to identify all the persons directly affected by the proposed change.
- (3) The local authority must serve limited notification on all persons identified as being directly affected by the proposed change.
- (4) A notice given under this clause must state—
 - (a) where the proposed change may be inspected; and
 - (b) that only the persons given limited notification under this clause may make a submission on the proposed change; and
 - (c) the process for participating in the consideration of the proposed change; and
 - (d) the closing date for submissions; and
 - (e) the address for service of the local authority.
- (5) The local authority may provide any further information relating to a proposed change that it thinks fit.
- (6) The closing date for submissions must be at least 20 working days after limited notification is given under this clause.
- (7) If limited notification is given, the consent authority may adopt, as an earlier closing date, the last day on which the consent authority receives, from all the directly affected persons, a submission, or written notice that no submission is to be made.
- (8) The local authority must provide a copy of the proposed change, without charge, to—
 - (a) the Minister for the Environment; and
 - (b) for a change to a regional coastal plan, the Minister of Conservation and the Director-General of Conservation; and
 - (c) for a change to a district plan, the regional council and adjacent local authorities; and
 - (d) for a change to a policy statement or regional plan, the constituent territorial authorities and adjacent regional councils; and
 - (e) tangata whenua of the area, through iwi authorities.
- (9) If limited notification is given in relation to a proposed change under this clause, the local authority must make the change publicly available in the central public library of the relevant district or region, and may also make it available in any other place considered appropriate.
- (10) The obligations on the local authority under subclause (4) are in addition to those under section 35 (which relates to the keeping of records).

...

In Schedule 1, after clause 35, insert:

Part 4

Collaborative planning process

36 Interpretation

In this Part,—

appointer means the local authority that appoints a review panel for the purposes of this Part

collaborative group means a group of persons appointed by a local authority under clause 40 for the purpose of assisting the local authority to prepare or change a proposed policy statement or plan that relates to its functions under section 30 or 31, as the case may be

proposed policy statement or plan, if prepared under the collaborative planning process,—

- (a) means a proposed policy statement or plan that relates to the local authority's functions under section 30 or 31, as the case may be; and
- (b) includes a combined document described in section 80

review panel and **panel** mean a panel established under clause 63.

Choice of collaborative planning process

37 Considerations relevant to decision on choice of process

- (1) A local authority may use the collaborative planning process to prepare or change a policy statement or plan.
- (2) In determining whether the collaborative planning process is to be used to prepare or change a policy statement or plan, a local authority must consider—
 - (a) whether the resource management issues to be dealt with in the policy statement or plan would benefit from the use of the collaborative planning process, having regard to the scale and significance of the relevant resource management issues; and
 - (b) the views and preferences expressed by persons who are likely to be affected by those resource management issues or who have an interest in them; and (c) whether the local authority has the capacity to support the collaborative planning process, having regard to the financial and other costs of the process; and
 - (d) whether there are people in the community able and willing to participate effectively in the collaborative planning process as members of a collaborative group; and
 - (e) whether any matters of national significance are likely to arise and, if so, whether these could be dealt within the collaborative planning process; and
 - (f) whether the relevant provisions of any iwi participation legislation that applies in an area could be accommodated within the collaborative planning process, as required by this Part.
- (3) Before determining to use the collaborative planning process, a local authority must be satisfied that use of the process is not inconsistent with the local authority's obligations under any relevant iwi participation legislation or iwi participation arrangement.

...

46 Advice from iwi authorities

- (1) Before notifying a proposed policy statement or plan prepared or changed under clause 45, a local authority must—
 - (a) provide a copy of the relevant draft proposed policy statement or draft plan to tangata whenua of the relevant area through the relevant iwi authorities, ensuring that the iwi authorities have adequate time and opportunity
 - (b) have particular regard to any advice received on the draft policy statement or draft plan from the iwi authorities if, and to the extent that, the advice is not inconsistent with the consensus position.
- (2) This section applies only if the local authority does not have an iwi participation arrangement with any relevant iwi authority.

47 Evaluation report

- (1) Before a local authority may notify a proposed policy statement or plan prepared or changed under clause 45, it must prepare an evaluation report under section 32 for the proposed policy statement or plan or the changing of a policy statement or plan.
- (2) The evaluation report must state the extent (if any) to which the proposed policy statement, plan, or change does not give effect to the consensus position, and the reasons for that.
- (3) The local authority must have particular regard to the evaluation report before deciding whether to notify a proposed policy statement or plan or change.

...

74 Contents of application for directions

An application to a Minister for a direction under section 80C to enter the streamlined planning process must—

- (a) be in writing; and
- (b) set out the following matters:
 - (i) a description of the planning issue for which a planning instrument is required, with an explanation as to how the proposal meets any of the criteria set out in section 80C(2); and
 - (ii) an explanation of why use of the streamlined planning process is appropriate as an alternative to using the process under Part 1 of this schedule; and
 - (iii) a description of the process that the local authority wishes to use and the time frames that it proposes for the steps in that process, having regard to the relevant criteria under section 80C(2); and
 - (iv) the persons that the local authority considers are likely to be affected by the proposed planning instrument; and (v) a summary of any consultation undertaken by the local authority, or intended to be undertaken, including consultation with iwi authorities under clauses 1A to 3C; and
 - (vi) the implications of the proposal for any relevant iwi participation legislation or iwi participation arrangement entered into under subpart 2 of Part 5 of this Act.

95B Limited notification of consent applications

- (1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to give limited notification of an application for a resource consent, if the application is not publicly notified under section 95A.

Step 1: certain affected persons must be notified

- (2) Determine whether there are any—
- (a) affected protected customary rights groups; or
 - (b) affected customary marine title groups (in the case of an application for a resource consent for an accommodated activity).
- (3) Determine—
- (a) whether the proposed activity is on or adjacent to, or may affect, land that is the subject of a statutory acknowledgement made in accordance with an Act specified in Schedule 11; and
 - (b) whether the person to whom the statutory acknowledgement is made is an affected person under section 95E.
- (4) Notify the application to each group identified under subsection (2) and each affected person identified under subsection (3), and specify in the notice the adverse effects that the consent authority considers to be relevant for the purpose of section 95E, 95F, or 95G (as applicable).

Step 2: notification of other affected persons precluded in certain circumstances

- (5) Determine whether the application meets either of the criteria set out in subsection (6) and,—
- (a) if the answer is yes, go to step 4 (step 3 does not apply); and
 - (b) if the answer is no, go to step 3.
- (6) The criteria for step 2 are as follows:
- (a) a rule or national environmental standard precludes limited notification of the application;
 - (b) the application is for a resource consent for either or both of the following, but no other, activities:
 - (i) a controlled activity other than a subdivision of land;
 - (ii) a prescribed activity (see section 360G(1)(a)(ii)).

Step 3: if not precluded by step 2, certain other affected persons must be notified

- (7) Determine—
- (a) whether the proposed activity is on or adjacent to, or may affect,—
 - (i) land in respect of which a nohoanga, an overlay classification, or a vest and vesting back is granted in accordance with an Act listed in Schedule 3 of the Treaty of Waitangi Act 1975; or
 - (ii) land that is the site of a wāhi tapu that is recognised in a plan or entered on the New Zealand Heritage List/Rārangi Kōrero maintained under section 65 of the Heritage New Zealand Pouhere Taonga Act 2014; and 15
 - (b) whether the person to whom the nohoanga, overlay classification, or vest and vesting back is granted, or the iwi to whom the site is wāhi tapu, is an affected person under section 95E.

- (8) Determine—
- (a) which other persons are eligible under section 95DA to be considered affected persons in relation to the application (eligible persons); and
 - (b) which of the other persons are affected persons under section 95E.

- (9) Notify each affected person identified under subsections (7) and (8) of the application, and specify in the notice the adverse effects that the consent authority considers to be relevant for the purpose of section 95E.

Step 4: further notification in special circumstances

- (10) Determine whether special circumstances exist in relation to the application that warrant notification of the application to any other persons and,—
- (a) if the answer is yes, notify those persons and specify in the notice the special circumstances that warrant their being notified of the application; and
 - (b) if the answer is no, do not notify anyone else.

Meaning of nohoanga, overlay classification, and vest and vesting back

- (11) In subsection (7),—

nohoanga means an instrument, whether known as a nohoanga or by another name, that provides for the grant of an entitlement to occupy 1 or more specified sites for the purpose of undertaking customary fishing and the gathering of natural resources

overlay classification means an instrument, whether known as an overlay classification or by another name, that declares 1 or more specified areas to be subject to the Crown’s acknowledgement of particular values in relation to the site and the agreement by the Crown and the governance entity of the relevant iwi of certain protection principles that are directed at avoiding harm to, or avoiding the diminishing of, the values of the site

vest and vesting back means an instrument, whether known as a vest and vesting back or by another name, that provides for the Crown to vest the fee simple estate in a specified area of land in an entity on a specified date, and for the fee simple estate in that land to vest back in the Crown on a specified date.

95E Affected persons for purpose of limited notification under section 95B

- (1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an affected person if the consent authority decides that the activity’s adverse effects on the person are minor or more than minor (but are not less than minor).
- (2) The consent authority, in assessing an activity’s adverse effects on a person for the purpose of this section,—
- (a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and
 - (b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and
 - (c) may disregard an adverse effect of the activity if the adverse effect, considered in the context of the relevant plan or proposed plan, is already taken into account by the objectives and policies of that plan; and
 - (d) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.
- (3) A consent authority must record the adverse effects that are the basis for any decision that a person is an affected person.
- (4) A person is not an affected person in relation to an application for a resource consent for an activity if—
- (a) the person has given, and not withdrawn, written approval for the proposed activity; or
 - (b) the consent authority is satisfied that it is unreasonable in the circumstances for the applicant to seek the person’s written approval.
- (5) Subsection (4) prevails over subsection (1)

APPENDIX 2 – RELEVANT RMA PROVISIONS

6 Matters of national importance

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

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
- [(f) the protection of historic heritage from inappropriate subdivision, use, and development.]
- [(g) the protection of protected customary rights.]

7 Other matters

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

- (a) Kaitiakitanga:
 - [(aa) The ethic of stewardship:]
- (b) The efficient use and development of natural and physical resources:
 - [(ba) the efficiency of the end use of energy:]
- (c) The maintenance and enhancement of amenity values:
- (d) Intrinsic values of ecosystems:
- (e) Repealed.
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources:
- (h) The protection of the habitat of trout and salmon:
 - [(i) the effects of climate change:]
 - [(j) the benefits to be derived from the use and development of renewable energy.]

8 Treaty of Waitangi

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

33 Transfer of powers

- [(1) A local authority may transfer any one or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.]
- [(2) For the purposes of this section, public authority includes—
 - (a) a local authority; and
 - (b) an iwi authority; and
 - (c) Repealed.
 - (d) a government department; and

- (e) a statutory authority; and
- (f) a joint committee set up for the purposes of section 80; and
- (g) a local board]
- (3) Repealed.
- (4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—
 - [(a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and]
 - (b) Before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and
 - (c) Both authorities agree that the transfer is desirable on all of the following grounds:
 - (i) The authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:
 - (ii) Efficiency;
 - (iii) Technical or special capability or expertise.
- (5) Repealed.
- (6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.
- (7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.
- (8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.
- (9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

[35A Duty to keep records about iwi and hapu

- (1) For the purposes of this Act [[or regulations under this Act]], a local authority must keep and maintain, for each iwi and hapu within its region or district, a record of—
 - (a) the contact details of each iwi authority within the region or district and any groups within the region or district that represent hapu for the purposes of this Act [[or regulations under this Act]]; and
 - (b) the planning documents that are recognised by each iwi authority and lodged with the local authority; and
 - (c) any area of the region or district over which 1 or more iwi or hapu exercise kaitiakitanga.
- (2) For the purposes of subsection (1)(a) and (c),—
 - (a) the Crown must provide to each local authority information on—
 - (i) the iwi authorities within the region or district of that local authority and the areas over which 1 or more iwi exercise kaitiakitanga within that region or district; and
 - (ii) any groups that represent hapu for the purposes of this Act [[or regulations under this Act]] within the region or district of that local authority and the areas over which 1 or more hapu exercise kaitiakitanga within that region or district; and
 - (iii) the matters provided for in subparagraphs (i) and (ii) that the local authority has advised to the Crown; and
 - (b) the local authority must include in its records all the information provided to it by the Crown under paragraph (a).
- (3) In addition to any information provided by a local authority under subsection (2)(a)(iii), the local authority may also keep a record of information relevant to its region or district, as the case may be,—
 - (a) on iwi, obtained directly from the relevant iwi authority; and

- (b) on hapu, obtained directly from the relevant group representing the hapu for the purposes of this Act [[or regulations under this Act]].
- (4) In this section, the requirement under subsection (1) to keep and maintain a record does not apply in relation to hapu unless a hapu, through the group that represents it for the purposes of this Act [[or regulations under this Act]], requests the Crown or the relevant local authority (or both) to include the required information for that hapu in the record.
- (5) If information recorded under subsection (1) conflicts with a provision of another enactment, advice given under the other enactment, or a determination made under the other enactment, as the case may be,—
 - (a) the provision of the other enactment prevails; or
 - (b) the advice given under the other enactment prevails; or
 - (c) the determination made under the other enactment prevails.
- (6) Information kept and maintained by a local authority under this section must not be used by the local authority except for the purposes of this Act [[or regulations under this Act]].
- [[(7) Information required to be provided under this section must be provided in accordance with any prescribed requirements.]]

Schedule 1

Preparation, change, and review of policy statements and plans

3 Consultation

- (1) During the preparation of a proposed policy statement or plan, the local authority concerned shall consult—
 - (a) The Minister for the Environment; and
 - (b) Those other Ministers of the Crown who may be affected by the policy statement or plan; and
 - (c) Local authorities who may be so affected; and
 - (d) The tangata whenua of the area who may be so affected, through iwi authorities ...[; and]
 - (e) any customary marine title group in the area.]

[3B Consultation with iwi authorities

For the purposes of clause 3(1)(d), a local authority is to be treated as having consulted with iwi authorities in relation to those whose details are entered in the record kept under section 35A, if the local authority—

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

[Duties of local authorities and applicants

[36A No duty under this Act to consult about resource consent applications and notices of requirement

- (1) The following apply to an applicant for a resource consent and the local authority:
 - (a) neither has a duty under this Act to consult any person about the application; and
 - (b) each must comply with a duty under any other enactment to consult any person about the application; and
 - (c) each may consult any person about the application.
- (2) This section applies to a notice of requirement issued under any of sections 168, 168A, 189, and 189A by a requiring authority or a heritage protection authority, as if—
 - (a) the notice were an application for a resource consent; and
 - (b) the authority were an applicant.]

[Powers and duties of local authorities and other public authorities

[36B Power to make joint management agreement

- (1) A local authority that wants to make a joint management agreement must—
 - (a) notify the Minister that it wants to do so; and
 - (b) satisfy itself—
 - (i) that each public authority, iwi authority, and group that represents hapu for the purposes of this Act that, in each case, is a party to the joint management agreement—
 - (A) represents the relevant community of interest; and
 - (B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and
 - (ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and
 - (c) include in the joint management agreement details of—
 - (i) the resources that will be required for the administration of the agreement; and
 - (ii) how the administrative costs of the joint management agreement will be met.
- (2) A local authority that complies with subsection (1) may make a joint management agreement.]

[36C Local authority may act by itself under joint management agreement

- (1) This section applies when a joint management agreement requires the parties to it to perform or exercise a specified function, power, or duty together.
- (2) The local authority may perform or exercise the function, power, or duty by itself if a decision is required before the parties to the joint management agreement can perform or exercise the function, power, or duty and the joint management agreement does not provide a method for making a decision of that kind.]

[36D Effect of joint management agreement

A decision made under a joint management agreement has [[legal]] effect as a decision of the local authority.]

[36E Termination of joint management agreement

Any party to a joint management agreement may terminate that agreement by giving the other parties 20 working days' notice.]

61 Matters to be considered by regional council [(policy statements)]

- [(2A) When a regional council is preparing or changing a regional policy statement, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:
- (a) the council must take into account any relevant planning document recognised by an iwi authority; and
 - (b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—
 - (i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and
 - (ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.]

74 Matters to be considered by territorial authority

[(2A) A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district.]

APPENDIX 3 – RELEVANT LGA PROVISIONS

4 Treaty of Waitangi

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

14 Principles relating to local authorities

- (1) In performing its role, a local authority must act in accordance with the following principles:
- (a) a local authority should—
 - (i) conduct its business in an open, transparent, and democratically accountable manner; and
 - (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner;
 - (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
 - (c) when making a decision, a local authority should take account of—
 - (i) the diversity of the community, and the community's interests, within its district or region; and
 - (ii) the interests of future as well as current communities; and
 - [(iii) the likely impact of any decision on the interests referred to in subparagraphs (i) and (ii);]
 - (d) a local authority should provide opportunities for Maori to contribute to its decision-making processes:
 - [(e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and]
 - (f) a local authority should undertake any commercial transactions in accordance with sound business practices; and [(fa) a local authority should periodically—
 - (i) assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and
 - (ii) satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and]
 - [(g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and]
 - (h) in taking a sustainable development approach, a local authority should take into account—
 - (i) the social, economic, and cultural [interests] of people and communities; and
 - (ii) the need to maintain and enhance the quality of the environment; and
 - (iii) the reasonably foreseeable needs of future generations.
- (2) If any of these principles ... conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection (1)(a)(i).

77 Requirements in relation to decisions

- (1) A local authority must, in the course of the decision-making process,—
- (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
 - [(b) assess the options in terms of their advantages and disadvantages; and]
 - (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.
- (2) This section is subject to section 79.

81 Contributions to decision-making processes by Maori

- (1) A local authority must—
 - (a) establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and
 - (b) consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes of the local authority; and
 - (c) provide relevant information to Maori for the purposes of paragraphs (a) and (b).
- (2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, must have regard to—
 - (a) the role of the local authority, as set out in section 11; and
 - (b) such other matters as the local authority considers on reasonable grounds to be relevant to those judgments.