

PROPOSED GUIDELINES
FOR
LOCAL AUTHORITY CONSULTATION
WITH
TANGATA WHENUA

June 1992

Office of the
Parliamentary Commissioner for the Environment
TE KAITIAKI TAIAO A TE WHARE PĀREMATA

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Preface

Consultation with Maori by public authorities has not always taken place in the past, and when it did, was not found to be particularly successful for either group. However, under the Resource Management Act consultation is now required. Further, the Act now requires councils to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, waterways, and other taonga, have regard to kaitiakitanga, and take into account the principles of the Treaty of Waitangi. This should lead to a greater understanding of how to achieve sustainable management of those resources guaranteed protection under the Treaty.

From the perspective of the average New Zealander, the requirement to address Maori concerns, to learn about the Treaty, to recognise the Maori language, has all been very recent and sudden. To many it has not been a welcome requirement, partly due to a lack of understanding.

My investigations have found generally that local government feels pressured by multiple community demands and statutory time constraints, and is uncertain about the practical local implications of the principles of the Treaty and the requirements for consultation. Tangata whenua we have spoken to for the most part believe that even when consultation does take place, tribal concerns, cultural differences, and rights under the Treaty are not taken seriously by either local or central government.

My Office's review of consultation taking place between regional councils and tangata whenua merely documents the initiatives taken, the reaction of tangata whenua to those initiatives and the difficulties both have experienced. Those experiences and suggested guidelines for consultation are put forward in the hope that both local government and iwi can and will develop better and more effective procedures.

The Resource Management Act is a complex new statute. It will take time for both iwi and councillors to become familiar with the new requirements. There will be a necessary learning curve. The expectation is that understanding will continue to evolve and that the Crown and local government will discharge their responsibilities under new legislation in a spirit of cooperation and utmost good faith.

Helen R. Hughes
Parliamentary Commissioner for the Environment

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1 Introduction

1.1 Background to study

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. The intent of this Act is to ensure that, in the management of natural and physical resources, full and balanced account is taken of the intrinsic values of ecosystems, values placed by people on the quality of the environment, *the principles of the Treaty of Waitangi*, the sustainability of resources, and the needs of future generations (Long Title to the Act). Section 17 of that Act also requires the Commissioner to have regard to the *heritage of the tangata whenua* in performing her functions.

In 1988 the Commissioner published a report entitled *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988*. The Commissioner found that the Crown's action had been less than satisfactory, and made recommendations to improve legislation, regarding Crown redress for grievances under the Treaty, and Treaty education for the general public and resource managers. Since that time some progress has been made in Treaty education, and through the passage of the Resource Management Act, but much remains to be done.

Findings of a number of the Commissioner's investigations over the years have indicated inconsistencies and poor methods in consultation with tangata whenua by central and local government. Two frequent complaints by tangata whenua were inadequate consideration of their spiritual and cultural values at both the planning and consent granting stages of a proposed activity, and council inexperience or ignorance in consulting with Maori. Discussions by the Commissioner with local authority staff and councillors suggested that there was a lack of adequate guidance for local government in this regard.

Accordingly, a study was undertaken under sections 16(1)(b) and 16(1)(f) of the Environment Act 1986 with the following terms of reference:

1. Identify principles and practices used by Regional Councils and other relevant authorities that provide for tangata whenua participation in environmental planning and resource management in New Zealand.
2. Identify principles and practices employed by iwi in interaction with Regional Councils.
3. Identify the degree of acceptance by both local authorities and iwi of planning and management procedures that have been proposed and undertaken.
4. Disseminate information and advice on remedial action where required to local government and iwi authorities.

1.2 Defining Consultation

The study was restricted to regional councils because of limited resources in the Commissioner's Office, recognising however that many of the findings would be applicable to all levels of government.

With the passage of the Resource Management Act 1991, territorial and regional councils have a clear obligation to recognise and provide for matters of significance to Maori and to take into account the principles of the Treaty of Waitangi. These matters cannot be provided for and taken into account in good faith unless adequate advice and information is obtained. Consultation with tangata whenua is a means to obtain that necessary information and an understanding of how the principles of the Treaty can be implemented in the local context.

In a recent High Court case, Mr Justice McGechan used the following definition of consultation:

*"Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done."*¹

Mr Justice McGechan noted that consultation should be a reality, not a charade. Although there were no universal legal requirements as to form, he found that essential elements of genuine consultation should include:

- **sufficient information** provided to the consulted party, so that they can make intelligent and informed decisions;
- **sufficient time** for both the participation of the consulted party and the consideration of the advice given; and,
- **genuine consideration** of that advice, including an open mind and a willingness to change.²

The Ministry for the Environment in their September 1991 document *Consultation with Tangata Whenua*³ described the following as the essential ingredients of good consultation: honesty of intention; certainty of purpose; clarity of information; statement of what is required; and provision of resources.

Consultation does not just encompass the gathering of information. One must also consider *why* the information is being gathered, *how* the information will be used, and the *status* that information will have in the decision-making process.

¹ *Air New Zealand Ltd v Wellington International Airport Ltd*, High Court Wellington Registry, CP No. 403/91, McGechan J, 6 January 1992, p.8. (This definition was taken from *West Coast United Council v Prebble* (1988) 12NZTPA 399, at 405.) This case concerned consultation in a commercial setting, but discussed the concept of consultation generally.

² *Ibid*, pp.7-8.

³ Ministry for the Environment 1991, pp.11-12.

The Royal Commission on Social Policy in its extensive consultation on marae around the country in 1987-88 found great dissatisfaction amongst Maori concerning government consultation:

"The process by which decisions are made and policies formed alienates many Maori people ... there was a high degree of scepticism about the value of making submissions and the likelihood of fundamental changes ever being made to the position of Maori.

"... Consultation fatigue, analysis paralysis and submission depression were terms frequently used to convey a sense of weariness and futility in the face of 'yet another' inquiry." ⁴

This study has encountered the same sentiments.⁵ In an endeavour to improve the situation, the Commissioner has sought to clarify guidelines for consultation for use by both government authorities and private proponents. These are presented in Chapter 3.

A distinction needs to be made between the success of consultation in the eyes of those in control of the process, and the satisfaction of the participants. Whether participants are satisfied or not will influence their willingness to support decision-makers and participate in future. If a productive and harmonious working relationship is to be developed over the long term, both parties must be satisfied with the process and the outcome. This does not mean that both parties will necessarily agree, although consensus should be sought.⁶ It does mean those in control of the process must seriously take to heart not only their own objectives and priorities, but those of all stakeholders involved. In addition, where the principles of the Treaty of Waitangi are concerned, the requirement to act reasonably and in utmost good faith has been made clear by the Court of Appeal.⁷

Mr Justice McGechan has commented that the statutory requirement to consult acts as a constraint on monopoly power.⁸ Maori are a minority of the population, and even if they were represented in proportion to their population size they could always be outvoted by the majority. Those in power should consult to obtain the information to carry out their obligations, and deal in utmost good faith with tangata whenua in the spirit of the Treaty of Waitangi. As the original longstanding inhabitants and kaitiaki of this land, tangata whenua have unique rights under the Treaty to continue playing a significant part in resource management. Consultation is an essential part of the relationship between local government and tangata whenua, to determine how they will work together to give effect to the principles of the Treaty, to enhance tino rangatiratanga and to develop and maintain fair and equitable government.

⁴ Royal Commission on Social Policy, *The April Report*, 1988, Vol. I, pp. 272-273.

⁵ It should be noted that such concerns have also been commonly expressed to the Commissioner by non-Maori residents and environmental groups.

⁶ Judge McGechan in *Air New Zealand v Wellington International Airport Ltd*, p. 8.

⁷ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (pages cited from printed version of CA54/87); Cooke P, p. 44; Richardson J, pp. 34, 39; Casey J, p. 17.

⁸ *Ibid*, p. 9.

1.3

Legal framework

The Resource Management Act 1991

The Resource Management Act 1991 redefined Crown and local authority responsibility for the management of natural and physical resources and set it in a sustainable resource management framework. How the powers under the Act are used to give effect to the purpose and principles of the Act is up to the individual local and regional councils.

The Act requires those exercising functions and powers under it (territorial and regional councils, Ministers of the Crown, and their departments) to *recognise and provide for* the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (section 6), to *have particular regard to* kaitiakitanga (section 7), and to *take into account* the principles of the Treaty of Waitangi (section 8). **This is a strong signal to decision-makers that tangata whenua have a special status and are not to be considered just another interest group.** It also means that care needs to be taken in the preparation of district and regional plans to ensure that activities which are contrary to the spirit of sections 6(e), 7(a) and 8 are not allowed unless tangata whenua have been consulted.

In their regional policy statements, regional councils must clearly state any matters of resource management significance to iwi authorities. When preparing regional policy statements, regional plans and district plans, territorial and regional authorities are required to have regard to any relevant planning document recognised by an iwi authority affected by the proposed plan. The Act also allows for transfer of certain powers to iwi authorities and delegation of certain powers to Maori committees set up by council (sections 33 and 34) and gives general guidance in terms of requirements for consultation with tangata whenua (First Schedule, Part I, Clause 3(1)(d)).

A summary of sections of the Act referring to the Treaty, Maori, and iwi authorities is provided for reference in Appendix A.

The Principles of the Treaty of Waitangi

The Treaty of Waitangi (Te Tiriti O Waitangi) is considered by many as the founding document of Aotearoa/New Zealand. Although the rights guaranteed by the Treaty are only legally enforceable in New Zealand where statute imports the Treaty, it has been recognised by the Courts as part of the fabric of New Zealand society. Even where not clearly mentioned in statute the Treaty may be used as an aid to statutory interpretation.⁹

In recent years, legislation has been enacted that refers to the principles of the Treaty rather than to the Treaty itself.¹⁰ This approach has been delib-

⁹ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (the 'Chilwell Decision'); also applied by Planning tribunal in the Wanganui River Minimum Flow Appeal (1990) and upheld by the High Court on appeal.

¹⁰ E.g. Treaty of Waitangi Act 1975 (Preamble); Environment Act 1986 (Long Title); State-Owned Enterprises Act 1986 (s.9); Conservation Act 1987 (s.4); Resource Management Act 1991 (s.8); Crown Minerals Act 1991 (s.4).

erate, recognising the differences between the Maori and English texts of the Treaty (see Figure 1), the lack of detailed guidance in the brief Treaty text, and historical developments (wherein the Article II of the Treaty has been honoured more in the breach than otherwise, and Maori have become a minority of the population).¹¹ However, many Maori have expressed concern that in referring to the principles rather than the Treaty itself, the Crown and its agents may unilaterally redefine the Treaty.

Principles of the Treaty of Waitangi have to date been defined by the Waitangi Tribunal and the Courts based on individual claims and cases that have come before them. Although the Courts are final arbiter of the principles of the Treaty where they have been imported into statute, the Courts have recognised the Tribunal's statutory role in defining principles and acknowledged their value to the Courts. The Courts and Tribunal have emphasised the *evolving nature* of Treaty interpretation, and new legal cases may further clarify interpretation.

The Crown has also defined the principles of the Treaty.¹² These were decided on unilaterally without consulting Maori as the other Treaty partner, and rather than serve as legal interpretations of the Treaty, indicate instead the degree to which Ministers and the Government are prepared to act.

Two strong themes have emerged in these expression of Treaty principles; *partnership*, and *active protection* of resources of importance to Maori in accord with Maori cultural and spiritual values. In order to obtain the information necessary for these principles to be fulfilled, genuine *consultation* is required. Thus consultation is an essential component of giving effect to the principles of the Treaty rather than an accepted principle of the Treaty itself.

Another key principle which has been stressed is the need to exercise *utmost good faith* in the development and exercise of partnership between tangata whenua and the Crown and its agents such as government departments and local authorities.¹³ Patience, generosity of spirit, and a desire to cooperate will be required by all parties concerned.

Under Articles I and II of the Treaty of Waitangi (Figure 1), the right to exercise *kawanatanga* ('government' - which is exercised by the Crown, government departments and local government) was ceded by Maori in exchange for the guarantee that tangata whenua retain (or have restored to them if taken without consent) *tino rangatiratanga* (full tribal authority) over resources and other taonga of value to the tribe concerned. The Waitangi Tribunal has noted that under the Treaty, Maori exercise of *tino rangatiratanga* is to be subject to reasonable controls of *kawanatanga* for matters of major importance such as sustainability of fisheries, public health and safety, or law

¹¹ E.g. Court of Appeal 1987; Heron J, p. 646; Waitangi Tribunal 1991, p. 222.

¹² Representations to the Court of Appeal (1987); Department of Justice 1989, The Crown and the Treaty of Waitangi (3 July 1989).

¹³ E.g. Court of Appeal 1987; Cooke P, pp. 35-36, 44; Richardson J, pp. 14-15.

and order.¹⁴ For practical restoration of tino rangatiratanga, the Tribunal has recommended that tangata whenua be directly involved in agency management and decision-making on resources.¹⁵

In order to give practical effect to section 8 of the Resource Management Act, local authorities must have a working understanding of the principles of the Treaty. However, given the evolving nature of relationships between the Crown and Maori and of Treaty interpretation and the lack of a national consensus between the Treaty partners on what the principles of the Treaty are, there is a need to expect and tolerate a certain amount of ambiguity and fluidity at this time.

In the interim, local government will need to accept the principles that have been stated to date by Tribunals and the Courts,¹⁶ and consult with tangata whenua groups in their own area as to practical means of local implementation.

¹⁴ E.g. Waitangi Tribunal - Manukau Report (1985)90; Muriwhenua Report (1988)195; Mangonui Report (1988)60; Ngai Tahu Report (1991)236.

¹⁵ E.g. management of public reserves in Orakei jointly with the Auckland City Council (Orakei Report 1987, p. 196); joint management of waahi tapu on Department of Conservation land (Te Roroa Report 1992, p. 294).

¹⁶ E.g. Court of Appeal 1987; Waitangi Tribunal 1991 (pp. 215-247); Parliamentary Commissioner for the Environment 1988 (pp. 17-23, Appendix J, K); and forthcoming report by the Ministry for the Environment.

Figure 1 : The Treaty of Waitangi

The Text in English

(Source: Treaty of Waitangi Act 1975, First Schedule)

Article The First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation **all the rights and powers of Sovereignty** which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof **the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession**; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British subjects.

The Text in Maori

(with English translation)

(Source: Schedule to the Treaty of Waitangi Amendment Act 1985. English translation adapted from: Royal Commission on Social Policy, 1988, *The April Report*, Vol III part 1, pp. 211-212.)

Ko Te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ke te Kuini o Ingarani ake tonu atu **te Kawanatanga katoa o o ratou wenua.** *[The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England forever the complete government over their land.]*

Ko Te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani **te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.** Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona. *[The Queen of England agrees to protect the Chiefs, the sub-tribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand, the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being appointed by the Queen as her purchase agent).]*

Ko Te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani. *[For this agreed arrangement therefore, concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.]*

2 Findings

2.1 Regional council initiatives

In February 1991 all regional councils (and Gisborne District Council acting as a unitary authority) were asked about their policies and practices with regard to tangata whenua concerns. Six months after the enactment of the Resource Management Act, council staff responsible at that time for iwi consultation were contacted for a comment on progress.

Findings are not meant to represent the full range of council actions (or omissions) with regard to tangata whenua or in fulfilment of their obligations under the Resource Management Act, but rather to offer guidelines to councils for improving their relationship with the tangata whenua in their area based on recent regional council experience.

The types of initiatives the councils reported included;

- Reference to the Treaty of Waitangi and/or tangata whenua in council policy documents
- Establishment of Maori consultative committees
- Provision of iwi liaison officers
- Contracts with tangata whenua
- Early consultation in policy development
- Notification to iwi authorities of resource consent applications
- Resourcing of iwi planning documents
- Recognising iwi planning document in council policy documents
- Sponsoring of working parties, hui, seminars and workshops.

Three case study areas were selected for more detailed investigation. They were:

- Auckland Regional Council
- Hawkes Bay Regional Council
- West Coast Regional Council.

A summary of findings for these councils is presented in Table 2.1, including details on the Maori consultative committee which each had established. A summary of the advantages and disadvantages of the Maori consultative committee model is presented in Table 2.3.

As will be shown in the following section (2.2), tangata whenua believe that council actions to date do not adequately fulfil council obligations under the Treaty or the Resource Management Act. However, compared to practices in previous years, councils have made good progress in beginning to implement their responsibilities to tangata whenua of their area.

Councils are still adjusting their policies and practices to better reflect their more explicit obligations under the Resource Management Act, and monitoring by the Ministry for the Environment will be required to ensure that the concerns of tangata whenua are adequately dealt with by administrators of that Act.

Table 2.1: Summary of case study findings — regional council initiatives in iwi consultation

	AUCKLAND REGIONAL COUNCIL	HAWKES BAY REGIONAL COUNCIL	WEST COAST REGIONAL COUNCIL
Policy statements	<p><i>"The authority's operations in general shall be operated in a way which gives practical effect to the Treaty of Waitangi".</i> (Minutes 18/4/88)</p> <p>Maori participation in Council matters to be based on following guidelines: consulting with appropriate people, early consultation, on their own territory, Maori decision-making, the Treaty of Waitangi. (Minutes 8/1/89)</p> <p>Recognition of relationship between Maori and their ancestral land, protection of sites of Maori significance, provision for marae development. (Regional Plan, Ch.9)</p>	<p>Goals include: <i>"to ensure that the Principles of the Treaty of Waitangi are recognised and addressed in the management of the Hawkes bay natural and physical resources".</i></p> <p>Performance measures include: <i>"to recognise the specific needs of tangata whenua and to take regard of the Principles of the Treaty of Waitangi as they affect the council"</i> (91/92 Annual Plan)</p>	<p>Goals include: <i>"To recognise the Treaty of Waitangi as the basis for the New Zealand government system and respond to the responsibilities of the Regional Council as an element of the Crown party to the Treaty."</i> (1991/92 Corporate plan)</p>
Maori consultative committee	<p>Puna Manawa Korero Standing committee of Council Established in February 1990 (process began 1988)</p>	<p>Maori Standing Committee Standing committee of Council Established August 1990 (process began 1988)</p>	<p>Komiti Rangapu o Te Tai Poutini Standing committee of Council Established July 1991 (process began 1988)</p>
Membership	<p>10 members: 4 iwi reps (2 Ngati Whatua, 2 Tainui), 2 Maori ward councillors, 2 other councillors (1 Maori, one not), Council Chairperson, Deputy Chairperson</p>	<p>15 members; 12 iwi representatives and 3 elected councillors. Iwi representation is equal for the 4 taiwhenua of the Runanganui.</p>	<p>10 members: 5 from iwi Runanganui, 5 regional councillors (the Runanganui covers the 3 main tangata whenua groups as well as 2 taura here groups)</p>
Function	<p>Providing advice to Council on matters of concern to tangata whenua and Maori generally.</p>	<p>To make recommendations to Council on matters before it or of general concern which affect the Maori people of the region, and fulfil Maori consultative undertakings in the Corporate Plan.</p> <p>The Committee is the principal form of Council consultation with Maori.</p>	<p>Facilitate Treaty partnership at regional level. Understanding and mutual consideration of kawanatanga and tino rangatiratanga. Forum for discussing iwi concerns.</p> <p>Main form of Council consultation with iwi.</p>

Table 2.1: (continued)

	AUCKLAND REGIONAL COUNCIL	HAWKES BAY REGIONAL COUNCIL	WEST COAST REGIONAL COUNCIL
Meeting frequency	Monthly	Monthly	Planned for 6 per year, but has been more frequent
Reports to	Full Council, committees with delegated statutory decision-making powers, council staff.	Full Council	Full Council
Decision-making powers	Unlike other standing committees, no delegated decision-making powers. Can make recommendations, but has a policy not to do so where a matter should involve direct tangata whenua consent.	Recommendations only	Delegated decision-making rights based on the Treaty principle of partnership. Issues are resolved by consensus where possible. The ability of full Council to override committee decisions has not been tested. Council has agreed to refer back for further consideration any Komiti recommendation the Council feels unable to adopt.
Role of Council staff	Committee served by a qualified Maori Planner, who is authorised to allocate 60% of time to committee duties (actual time required far in excess of this).	Personnel and Industrial Officer allocated approximately 30% of time to service Committee (actual time required far in excess of this). This officer has been involved since the beginning of the process.	Komiti serviced by one Council officer, also responsible for liaising with iwi and keeping informed of iwi developments. Council departments assess implications of issues for tangata whenua prior to presentation of the issue to the Komiti.
Other initiatives	Direct notification of water permit applications to tangata whenua. Direct iwi participation in working parties. Contracting tangata whenua consultants for reports on relevant issues.	Annual Plan identifies intent to prepare a Ngati Kahungunu Resource Management Strategy with the assistance of iwi representatives.	Public education seminars on Treaty issues, March 1991 (convened by the West Coast Regional Council and Anglican Provincial Bicultural Unit).

2.2 Tangata whenua views

During the course of this investigation a set of proposed 'principles for consultation', devised with the assistance of consultants, was provided to 54 Maori trust boards, runanga and incorporated societies to elicit comment. Of these, 18 responses were received. Two of these groups plus an additional ten were involved in the case studies, for a total response rate of 28 out of 54, or 54%.

The iwi authority comments on the draft 'principles' of consultation, the principles of the Treaty of Waitangi, the Resource Management Act, and the recent High Court rulings on consultation were together analysed by the Commissioner's staff and advisors to produce the draft guidelines for local authority consultation with tangata whenua. These are presented in Chapter 3.

The views on 'consultation' expressed by tangata whenua representatives varied in part according to previous iwi and hapu experiences with the Crown and its agencies and present relationships with regional councils. Their comments in many cases reflect their experience dealing with all Crown agents, not just the regional council in the case study context.

At one end of the spectrum tangata whenua refused to directly address the issue of consultation unless consultation was part of a greater process to recognise Treaty rights, particularly *tino rangatiratanga*. A number of these groups had previously attempted to participate in the resource management system only to find their views consistently ignored in the final decision. Not surprisingly, they were sceptical about the ability of the Crown or its agents to accept their values and to actively protect their taonga.

Other tribal representatives noted that while 'consultation' as an issue required due consideration by the iwi, there were other social and economic issues with more immediate effect which by necessity took precedence. Limited resources meant that these groups relied on the regional councils to provide assistance in terms of education and resources to enable their participation.

The major themes which emerged from discussions with iwi authorities in the course of this investigation were:

- *Tino rangatiratanga* and power-sharing
- Recognition of tangata whenua
- Attitudes of decision-makers
- Adequacy of resources
- Tangible action on advice
- Allowing sufficient time
- Requirements for better information
- Tangata whenua identification of important issues
- Silence does not mean approval.

In the three regional council case study areas, Auckland, Hawkes Bay, and the West Coast, tangata whenua representatives were interviewed. A

summary of the findings with regard to tangata whenua views in the case study areas is presented in Table 2.2.

Not all hapu in the case study regions could be contacted or visited, and in some areas tangata whenua status is disputed between several groups. The naming or omission of any group should not be taken as ratification or denial of the status of those iwi.

Table 2.2 : Summary of case study findings — tangata whenua views

Tribal names in bold type are the larger iwi groupings to which the named tangata whenua authorities belong.

AUCKLAND REGION	
<p>Ngati Whatua Ngati Whatua o Orakei¹</p>	<p>Crown not honouring the Treaty. Despite Treaty entitlements, Maori can always be outvoted in current system. Have found the ARC Maori Planner very helpful and Puna Manawa Korero a strong advocate, but to meet Maori concerns the system needs to be changed.</p>
<p>Ngati Whatua Maori Trust Board²</p>	<p>Insufficient resources to participate in resource management. As agents of the Crown the regional council should provide sufficient resources. In order to participate iwi need to be informed; councils as resource management agents for the Crown responsible to inform them fully. ARC Maori Planner a necessary resource, but needs more staff for work load. Traditional iwi decision-making structures should not be compromised to accommodate council time frames. The right for iwi to consult appropriately should be recognised. Decisions on issues of importance to Maori are made by unqualified people in the council. Legislation required to give tangata whenua more say in resource management decisions.</p>
<p>Tainui Ngati Te Ata³</p>	<p>Insufficient resources; stems from confiscation of lands last century. Experience is that participation in the planning system results in little benefit for Maori. Part of the problem is the inability of Pakeha decision-makers to fully understand and provide for Maori concerns and cultural and spiritual relationship with the environment. 1835 Declaration of Independence established them as a sovereign people in their own rohe, and they have not relinquished this authority. They wish to manage their own resources according to traditional institutions. 1991 tribal document Nga Tikanga a Ngaati Te Ata sets out policies and views in detail.</p>
<p>Ngati Paoa⁴</p>	<p>Insufficient resources to participate in the planning system. Experience has shown them that their views not important to final decision-makers (e.g.: water rights which have been granted regardless of their expressed views). Poor notification of consent applications of concern to them (late or no notice). Consent granting process too rigid to accommodate more direct participation by iwi. Major long-term objective is to establish an economic base for the tribe; insufficient resources a major obstacle to iwi development.</p>

Table 2.2 : (continued)

AUCKLAND REGION	
Kawerau a Maki⁵	<p>Insufficient resources to participate in the planning system. Lack of recognition by council of their rights as tangata whenua in their rohe. Consultation consists of copies of water permit applications only and they would prefer more direct contact on matters of concern to them in their rohe. Representation on a council committee would not be considered direct contact.</p> <p>The tribe has had little formal input into resource management issues in the last century, and needs to re-establish and refine traditional decision-making structures.</p>
Huakina Development Trust⁶	<p>Tangata whenua issues should be discussed directly with the iwi group concerned, not with advisory committee including council officers and other iwi representatives. Council Maori consultative committees at best merely allow some influence on outcome; iwi should be allowed to determine outcome concerning their own taonga. Committees have a "buffer effect". Prefer "intimate participation"; iwi taking concerns directly to decision-makers. Issues should be addressed to the appropriate decision-making structure within the tribe.</p>
Ngati Wai⁷	<p>Insufficient resources to cope effectively with issues that affect the iwi. Submission deadlines are often not met due to insufficient time for consensus decisions and insufficient resources. More lead time and resources are required. Without assistance a longer term tribal strategy for environmental planning cannot be formulated. Councils need to keep them informed, sustain consultation once begun, support their aspirations as an iwi, and recognise that Trust Boards can be an appropriate channel for information but that decisions need to be made at an iwi and hapu level. Both councillors and council staff must be informed on Maori issues. An advocate within the council for Maori concerns necessary for effective participation. Issues of major concern include health, education, social services, unemployment, housing, conservation, environment and fisheries. Specific issue response is based on tino rangatiratanga.</p>

Unless otherwise noted, indicates summary of discussions held with:

- ¹ The Trust Board at their meeting of October 1991.
- ² Trust Board Chairperson Hahi Walker and Naida Pou, October 1991.
- ³ Nganeko Minhinnick, October 1991.
- ⁴ Charlotte Peka, Executive Officer of the Runanga o Ngati Paoa, October 1991.
- ⁵ Te Warena Taua, representative of Kawerau a Maki, October 1991.
- ⁶ Summary of correspondence received from Carmen Kirkwood, October 1991. Huakina Development Trust Board is the official representative of the Tainui Maori Trust Board on resource management issues; Tainui hapu make day-to-day decisions within their own rohe, and Huakina articulates overall policy.
- ⁷ Lucy Palmer, Executive Officer of the Ngati Wai Trust Board, January 1992. Ngati Wai rohe in the Auckland region includes offshore islands; majority of rohe covered by Northland Regional Council.

Table 2.2 : (continued)

HAWKES BAY REGION⁸	
<p>Ngati Kahungunu</p> <p>Te Runanganui o Ngati Kahungunu⁹</p>	<p>Insufficient resources to participate fully on issues of concern. Government should make resources available for iwi to participate under Resource Management Act.</p> <p>More information should be given to iwi, including info on planning system and legislation. Lack of understanding of system meant iwi often sought to participate when it was too late and damage had already occurred. Maori Standing Committee not seen as an effective reflection of their Treaty rights, but it is accepted as an improvement with potential to develop improved consultation and participation.</p> <p>The Runanganui consider the functions of the committee include facilitating meaningful dialogue between the runanganui and the council, advising the council on how to give practical effect to the Treaty of Waitangi, and acting as a transitional mechanism to assist return of tino rangatiratanga (however, these functions of the committee have not been formally agreed to by the council).</p> <p>Despite iwi concerns being made known to council, environmental damage of concern to iwi continues (e.g. effluent to harbours and rivers).</p> <p>Council disregarding the advice of kaumatua on the consultative committee trampled the mana of those tribal elders.</p> <p>Research required on status of iwi, their needs, and how best Runanga can serve them.</p>
<p>Whanganui a Rotu Taiwhenua¹⁰</p>	<p>Insufficient resources (finances, representatives) to address issues that arise or establish taiwhenua information base. Resources need to be provided (by council or the Crown).</p> <p>Tangata whenua need more information on legislation and planning processes.</p> <p>Maori values and views of environmental management are not accepted as valid in the planning system and this needs to change. Maori decision-making structures and values need to be combined with the Pakeha system.</p> <p>Maori Standing Committee seen as only viable alternative given resources of iwi and council, but Maori have no voting rights, and iwi representatives cannot act as advocates when issues of concern to Maori are taken to full council. Council should not assume that the Committee has the sole right to articulate iwi and hapu opinion; the council should still consult directly with those concerned.</p> <p>The consultation process needs to be outcomes oriented and monitored for effectiveness. Central government should also ensure the system they have set in place is effective.</p>

⁸ The other Taiwhenua covered by the Runanganui are in the Wellington and Manawatu-Whanganui regional council areas. At the time of consultation, Whakatohea was still considered covered by the Runanganui; establishment of a separate iwi authority has since begun.

⁹ The Runanganui at their meeting of March 1992.

¹⁰ Toro Waaka, Chairperson of the Taiwhenua, February 1992.

Table 2.2 : (continued)

WEST COAST REGION	
<p>Poutini Kai Tahu (Ngai Tahu)</p> <p>Te Runanga o Tuhuru¹¹</p>	<p>Insufficient resources (experienced people, finances, equipment) to participate fully in planning system.</p> <p>Council and iwi representatives need to be approachable and work on achieving common goals. Council needs to act in the interests of iwi on information from consultation. Current committee structure an interim step; in the long run iwi should have direct 50% participation and right to protect taonga no longer in their possession.</p> <p>Major issues are employment, education for children, other social welfare issues, safeguarding their traditional resources and return of ownership or control of their taonga.</p> <p>Balance required between traditional conservation ethics and need for economic sustenance.</p>
<p>Te Runanga o Katiwaewae¹²</p>	<p>Council an agent of the Crown; Crown ultimately responsible for council actions and education of the councillors on Treaty issues.</p> <p>Based on the Treaty, iwi should have 50% say in all resource management decisions. The Komiti Rangapu does not reflect this nor the full aspirations of tangata whenua. Thus Katiwaewae declines to join the Komiti, but expects to be kept informed and choose how and when to participate. All decisions regarding iwi resources should be made by them within their own organisations. Iwi wish to retain tribal mana and regain control over tribal resources.</p>
<p>Kati Mamoe (Ngati Mamoe)</p> <p>Te Runanga o Te Koeti Turanga¹³</p>	<p>Lack of adequate resources to participate in consultation and decision-making on consent (shortage of experienced representatives, major travel expenses, loss of income when time taken off work).</p> <p>Rely on council to be proactive and involve them in decisions of importance to them. Satisfied to date, but Komiti Rangapu as yet untested on complex major issues where settled agreement harder to achieve.</p> <p>Major priority for them is to establish a tribal economic base (only 10% of traditional resource base remains accessible).</p> <p>Resource management needs to be balanced against socio-economic issues.</p>

¹¹ Ned Tauwhare, September 1991.

¹² Upoko James Mason Russell, September 1991.

¹³ Upoko Bob Wilson and Helen Rasmussen, September 1991.

Table 2.3 : Summary of major advantages and disadvantages of the Maori consultative committee model

ADVANTAGES	DISADVANTAGES
<p>Forum for discussion on Maori issues</p> <p>Can provide a formal forum to discuss and educate elected councillors on Maori issues.</p> <p>Acceptable to some iwi as means to participate, considering the limited choice of mutually acceptable formats and their desire to act in the spirit of cooperation.</p> <p>Can bring together all Maori groups in a region (tangata whenua and taura here).</p> <p>Committee can be a strong voice for Maori concerns within the council structure.</p> <p>Seen as tangible action</p> <p>Council can show that it has acted and some progress being made.</p> <p>Seen as cost-effective</p> <p>Direct consultation seen as more expensive (however if committee members are adequately resourced to participate and report back to their iwi this may not in fact be the case).</p> <p>Iwi do not have resources to develop alternative options at this stage.</p> <p>Convenient to integrate into existing structure</p> <p>Does not require major change to council decision-making structure or timetable.</p> <p>Potential transition mechanism</p> <p>Can facilitate a direct relationship between council and tangata whenua, particularly if committee has policy to not make decisions on tangata whenua behalf unless authorised to do so.</p> <p>Potential exists to utilise committee to transfer resources to iwi for full participation in decision-making process.</p>	<p>Advisory only</p> <p>Acts as a 'buffer' or 'gate-keeper', vetting issues rather than having them presented directly to decision-makers. Seen by iwi as a 'rubber stamping' rather than decision-making process.</p> <p>Does not implement Treaty rights to tino rangatiratanga (self-determination and tangata whenua decisions on taonga important to them) or Treaty principle of partnership, as decision-making power retained by the non-Maori Treaty partner. Seen by many iwi as an interim solution only, and inadequate unless moving toward direct participation by iwi in decision-making.</p> <p>Concern that in seeking to cooperate with council, iwi representatives may be ineffectual in representing iwi concerns.</p> <p>Advocates of Maori issues with voting rights in full council are usually non-Maori councillors.</p> <p>Taxing on iwi resources</p> <p>Limited number of experienced people available to represent iwi on committee.</p> <p>Additional time required to report back to iwi not resourced by council. Multiple commitments of iwi representatives detract from their ability to act as conduit of information to iwi.</p> <p>Not on tangata whenua ground</p> <p>Alien venue and methods not conducive to open and effective discussion of issues.</p> <p>May exclude some tangata whenua</p> <p>Council desire to restrict committee size may exclude some valid tangata whenua groups, and groups which do not accept the committee approach may refuse to participate.</p> <p>Local hapu concerns can be outvoted by majority, or by other hapu that are not tangata whenua for the area of concern.</p>

3 Proposed Guidelines for Local Government Consultation with Tangata Whenua

Over the last decade there has been increasing understanding in New Zealand of the concerns of tangata whenua and the obligations this generation inherits from our nation's founding document, the Treaty of Waitangi.

Most recently under the Resource Management Act, territorial and regional councils, Ministers of the Crown, and their departments, are required to consider the values of tangata whenua and the principles of the Treaty of Waitangi in their policy and decisions on resource management.

It is important to recognise that this is an evolutionary process, and like all social change will take time. While tangata whenua have been seeking change for well over a century, Government and the general public have only recently begun to understand the need for change, and the form this change may take. New attitudes and new structures are required to respond adequately to the Resource Management Act requirements. Decision-makers must be ready to institute the changes that are necessary.

In order to be informed and so be able to fulfil their obligations under the Resource Management Act, regional and territorial authorities will need to actively seek the views and participation of tangata whenua. To assist councils in effectively exercising these obligations, this chapter presents proposed guidelines for consultation with tangata whenua. These guidelines have been written so as to be consistent (insofar as possible) with the Commissioner's findings, the Resource Management Act, the principles of the Treaty of Waitangi as expressed by the courts and the Waitangi Tribunal, and recent High Court rulings on consultation. They are not meant to be definitive.

Over time relationships between Crown agents and tangata whenua under the Treaty, and understanding of the practical implications of the Treaty, will continue to develop. Accordingly, **the Commissioner welcomes on an ongoing basis comments on these guidelines, and information on the success of new partnership approaches and structures.**

Principles of the Treaty of Waitangi

Clarify the principles

Direct role for tangata whenua in local government

- 1 **Recognise that by law those exercising authority under the Resource Management Act must have regard to the principles of the Treaty of Waitangi (section 8):**
 - (a) **seek clarification on the principles of the Treaty from statements and findings of the Courts and the Waitangi Tribunal;¹⁷**
 - (b) **consult with tangata whenua on the best means to give them effect in the local context; and,**
 - (c) **seek agreement with tangata whenua on a set of principles that will have practical effect within the local area.**

- 2 **Recognise that local government exercises kawanatanga (government) delegated from the Crown, which under the principles of the Treaty should be exercised so as to accommodate tribal rights of tino rangatiratanga (full tribal authority) in managing resources and taonga of the tribe, which means the right of tangata whenua to have a direct and meaningful decision-making role.**

Local authorities exercise kawanatanga (government). The right to exercise kawanatanga was established by the Treaty of Waitangi, and therefore its exercise must be balanced with tino rangatiratanga (full tribal authority). Tino rangatiratanga includes management according to tribal cultural and spiritual preferences : these concerns must therefore be accommodated by local government.

Status of Tangata Whenua

Recognise and provide for tangata whenua relationship with land and taonga

- 3 **Recognise that tangata whenua are not 'just another interest group' but have special status by virtue of their long-standing prior inhabitation of the area, the Treaty of Waitangi, and the principles of the Treaty, and as provided for in the Resource Management Act and other legislation.**

- 4 **Recognise that the Resource Management Act requires that the relationship between tangata whenua and their ancestral lands and taonga be recognised and provided for, which implies a commitment to act in a manner that is acceptable to the tangata whenua, including their cultural and spiritual values.**

Tangata whenua find that they are often treated by decision-makers as just another minority group and that decision-making structures and practices do not give effect to the principles of the Treaty. Iwi feel that their greatest

¹⁷ E.g. Court of Appeal 1987; Waitangi Tribunal 1991, pp. 215-247; Parliamentary Commissioner for the Environment 1988, pp. 17-23, Appendix J,K; and forthcoming report by the Ministry for the Environment.

problems arise where councillors do not accept their Treaty rights and cultural and spiritual values as a valid consideration in the decision-making process.

However, a major implication of sections 6(e) and 8 of the Resource Management Act is that tangata whenua should NOT be treated as 'just another interest group' in the community and that tangata whenua cultural and spiritual values relating to resourcement management must be taken seriously. They are indeed as individuals part of the general community with equal rights as citizens under Article III of the Treaty, but in addition members of a tribe as a group have particular rights guaranteed by Article II of the Treaty, for the area where they are traditional tangata whenua.

A common misunderstanding exists in the general community that Maori demanding their rights under the Treaty are somehow seeking special privileges they are not entitled to. The distinction must be made between *individual* Maori, who have guaranteed to them under Article III *equal rights* as citizens, regardless of race; and Maori *tribes*, which have guaranteed to them under Article II the right to retain (and have restored to them if taken without consent) tribal resources and taonga, and the right to manage them according to their cultural preferences. This tribal right is not by virtue of race, but by virtue of longstanding use and guardianship of the land, predating Pakeha immigration by many hundreds of years. These are 'home country' rights, not to be confused with the rights of a minority culture.

Section 6(e) of the Resource Management Act requires those exercising functions under the Act to *recognise and provide for* the relationship between tangata whenua and local resources and taonga of traditional value to them. This relationship must be recognised and provided for *whether or not* it is currently recognised by the 'mainstream' system through award of legal title or management authority.

One of the accepted principles of the Treaty (which must be taken into account under section 8 of the Resource Management Act) is *active protection* of valued traditional tribal resources and management according to Maori cultural and spiritual values. An authority's commitment to its relationship with tangata whenua and its consultation process will be measured by the manner in which the council incorporates information acquired from tangata whenua and by the *tangible result* of management decisions. Councils which fail to give practical effect to the requirement to take Treaty principles into account will be open to legal challenge under the Act.

Councils need to realise that tangata whenua, as traditional kaitiaki or guardians of the natural environment (including the spiritual component), carry with them an ancestral obligation to ensure that the treasures they have inherited are managed wisely and passed on in good health to the next generation. They have also inherited sustainable resource management methods, developed after an early trial and error period and proven over hundreds of years to be effective in the New Zealand environment. The kaitiaki obligation is not taken lightly by the tribes, nor should it be taken lightly by councils, who are now required by law to pursue sustainable resource management.

Developing a Relationship with Tangata Whenua

5 Consult with the traditional tangata whenua for the area or their appointed representatives.

Just as local community groups should be the first to be consulted about proposed activities in their neighbourhood, so tangata whenua (the local hapu and iwi or their chosen representatives, not a regional or national Maori authority) should be the primary focus of council consultation on local resource management decisions.

All parts of New Zealand have tangata whenua (see map, Appendix C), and can trace their mana whenua (customary authority) and occupation back through whakapapa (genealogy). Ensure that those consulted have the authority and mandate from the appropriate hapu and iwi. Councils need to ensure they contact *designated representatives* of tangata whenua hapu and iwi, and not be tempted to contact others who may be more easily available at the time. Maori Community organisations such as the local District Maori Council, Maori Women's Welfare League and government agencies such as Te Puni Kokiri may be able to assist establishing consultation processes but are not substitutes for the iwi voice.

This raises two issues which have been commented on by iwi and regional councils: exactly who are the tangata whenua to be consulted; the necessity for tangata whenua to make known their spokesperson/s or organisation with which to consult or preferred channel of contact; and the necessity for regional councils to ensure that they are consulting with the appropriate representatives. In this regard the council should be proactive but should not seek to resolve inter-iwi disputes which are for iwi to resolve themselves in their own way. If there is debate going on between iwi groups for tangata whenua status over the same area, the council could in the interim, if agreed by both groups, accord them both equal status until the matter has been resolved by iwi themselves.

Councils need to be aware of the distinction between Maori resident in their area who are members of the iwi who are tangata whenua, and those who claim their tangata whenua status elsewhere (taura here). Taura here groups should not be accorded equal status with tangata whenua groups. In terms of the Treaty, taura here have the same rights as the general public locally, and can only claim rights to participate in tino rangatiratanga in their own tribal area elsewhere. Similarly, *individual* tangata whenua Maori have equal rights as citizens under the Treaty, and only have particular rights connected with tino rangatiratanga locally if they are associated with and are guided by the hapu and iwi which can claim tangata whenua status.

Although taura here groups and individual Maori not associated with tangata whenua do not have local tangata whenua status, their needs are still valid as those of local residents, and if council does not already maintain contact with them some means should be established. Tangata whenua can be asked whether they wish to consult with these groups in their rohe and provide an overall Maori perspective.

- 6 (a) Ask tangata whenua themselves what form of consultation and participation in resource management they feel is appropriate for them, which resources and issues they consider themselves kaitiaki for and which are seen as most important for council action, and how they feel tino rangatiratanga should be reconciled with kawanatanga in the local context; and,**
- (b) be prepared to assist tangata whenua financially and technically where they wish to compile reference documents on these matters.**

*Ask tangata whenua
what role they wish
to play*

*Give financial and
technical assistance*

Means should be found to recognise the special status of tangata whenua and to effect a better balance between *kawanatanga* (government) and *tino rangatiratanga* (tribal control) in the local context. Consultation is a means to establish the appropriate role for tangata whenua in resource management, not an end in itself.

Under the Resource Management Act councils are to have regard under section 6(e) to matters of importance to tangata whenua and regional councils are to have regard to iwi resource management plans when preparing or changing their regional policy statements and regional coastal plan. Councils should not presume to know what issues affect tangata whenua and in what way. Only tangata whenua themselves can identify what these matters are, and they may or may not have the desire and/or resources to spell them out in iwi planning documents.

Consultation can be a resource-intensive activity, particularly where detailed discussions, tribal consensus, or research is required. Tangata whenua representatives consistently said that they do not have sufficient resources to fully participate in the system. This is in large part attributed to the historical loss of their original resource base and the heavy demands on their time seeking to make ends meet and re-establish an economic base for their people. They are currently forced into a reactive mode, on an issue-by-issue basis.

With adequate resourcing, tangata whenua could instead (if they chose) develop statements of tribal resource management policy and aspirations for management of resources of importance to the tribe, thus creating documents for ongoing reference in all relevant planning and consent granting, by resource management authorities. Resourcing tangata whenua to develop their own policy and resource management plans would be cost-effective for both tangata whenua and council in the long-term.

As demonstrated by Waitangi Tribunal findings, it is often been through the actions and omissions of the Crown that tangata whenua have been left with a much reduced economic base. The Crown, either directly or through delegation to national, regional and district authorities, therefore has an obligation to assist in resourcing tangata whenua to participate fully. The Ministry for the Environment has identified 'provision of resources' as an essential element of consultation with tangata whenua, and has provided some assistance in developing iwi resource management plans.

It is important for councils to realise that although they require information that may be presented in tribal planning documents and may therefore help resource the process, they should not attempt to tell tangata whenua how to write them. Nor should they expect tangata whenua to necessarily divulge the exact information they wish to obtain. For example, the precise location of waahi tapu may be withheld to prevent interference and desecration of sites of important spiritual significance to the tribe.

Establish an agreed charter with each tangata whenua group

- 7 Establish with each tangata whenua group a jointly agreed charter which sets out:**
- (a) issues and areas of interest and concern to the tangata whenua, prioritised where possible;**
 - (b) ground rules for a relationship with tangata whenua;**
 - (c) respective responsibilities of tangata whenua and the consent authority; and,**
 - (d) appropriate cases where powers may be transferred to iwi authorities or delegated to Maori consultative committees under sections 33 and 34 of the Resource Management Act.**

Tangata whenua have expressed a preference for consultation to be direct between iwi representatives and council decision-makers. They seek greater input into council decisions that affect their Treaty rights, more than an advisory role as preparer of submissions or member of council advisory committees.

There is no point seeking tangata whenua involvement unless the short-term and long-term goals are made clear, and the process is monitored and improved so as to meet those goals. In the Treaty principle of partnership, these goals should be set together with tangata whenua. It is important for the council to work out such a charter with each tangata whenua group, and not insist that all groups agree on one charter (see guideline 15). In due course all such charters may be consistent, but it should not be assumed from the outset that they will be.

Under the Resource Management Act councils may transfer certain powers under section 33 to iwi authorities and under section 34 delegate certain powers to Maori consultative committees. However, if functions are to be delegated or transferred, it is important to ensure that the necessary resources to do the job are also made available.

A number of models have been proposed to create relationships between government (kawanatanga) and tribal authorities (tino rangatiratanga) more in keeping with the principles of the Treaty of Waitangi. Some of these models are presented for reference in Appendix B.

The Consultation Process

- 8** **Accept that consultation requires genuine consideration of the advice so received, with an open mind and the willingness to change.**

This is an essential principle of consultation as expressed by Mr Justice McGechan in the High Court in 1992. This is also consistent with the necessity for the Treaty partners to operate with *utmost good faith*, as stated by the Court of Appeal in 1987.

- 9** **Consult with tangata whenua on an ongoing basis, explain technical data and statutory requirements to their satisfaction, and if at any stage their advice is not heeded, give clear reasons why.**

*Ongoing
consultation,
clear answers*

An important principle of any decision-making system is the adequacy of information upon which decision-makers and affected parties base their decisions, and sufficient information is one of the principles of consultation expressed by Mr Justice McGechan. Representatives of both tangata whenua and councils need to understand the information they have and the implications for their respective organisations.

Iwi groups often have difficulty interpreting statutory requirements and technical resource management data in terms of its potential effect on them, and have requested that iwi liaison or planning officers be resourced to clarify this information so that they can more effectively participate in decision-making. Tangata whenua representatives have also expressed the desire to be kept informed of council activities as an ongoing process, both at a formal and informal level.

An important principle of the Treaty is the requirement to act in utmost good faith. This includes establishing clear two-way communication between parties, and providing a clear explanation if one Treaty partner chooses not to heed the advice of the other.

- 10** **Focus on tangible issues and clearly stated objectives and outcomes.**

*Focus on
tangible issues*

Maori tribal government was and still is practically oriented. Both tribal and council resources are limited, and need to be carefully expended. For maximum benefit for both parties, a clear and common-sense focus is recommended.

- 11** **Coordinate requests of tangata whenua for consultation and information with requests from other Crown agents (local government and government departments), as well as between the different divisions of your own agency.**

*Coordinate requests
of tangata whenua
with other agencies*

Much of the 'consultation overload' taxing limited iwi resources can be avoided through better coordination. Keeping all previous submissions and information from tangata whenua together in the same place (and maintaining staff awareness of their contents) prevents duplication of effort by tangata whenua and assists staff in predicting which issues need to be raised early with them.

*Resource staff
in-house*

12 Design council procedures to facilitate early warning of significant issues before council which will be of concern to tangata whenua.

An early warning system for matters coming before Council which are of significance under sections 6(e), 7(a) and 8 of the Act would be of benefit to both parties. This requires adequate resourcing for a 'Maori secretariat' or 'Treaty auditing unit' within the council.

*Silence does not
mean approval*

13 Recognise that silence by tangata whenua does not constitute approval.

Tangata whenua groups may not respond to requests for comment or submissions for many reasons, only one of which may be lack of concern about the issue. Other factors working against response include insufficient time to canvass tribal views by the deadline set, competing demands on very limited tribal resources, and past experience with the system's inability to understand and provide for tribal concerns leading to a cynicism about the value of expending effort to make their views known.

Consult early

14 Consult with tangata whenua *as early as possible*:

- (a) to involve them in procedure and policy setting as well as resource consent decisions; and,
- (b) to allow them sufficient time to consider the issues and respond in a culturally appropriate manner.

Iwi decision-making structures differ from those of local and Central Government. Traditionally issues are decided on by consensus. The value of oral discussion and the time that this takes must be recognised. Mr Justice McGechan stated that sufficient time for both the participation of the consulted party and the consideration of their advice is essential for good consultation.

In the past, tangata whenua have often only been aware of a problem once physical damage had become apparent and the opportunity to influence decisions has passed. Tribal involvement at the early stages ensures their voice will be heard *before* decisions are made. Ideally agency policy will accommodate their concerns, thus guiding appropriate decisions.

*Consult on tangata
whenua territory*

15 Arrange for consultation to take place in a forum and format that is conducive to discussion and where tangata whenua feel most at ease.

In adopting a proactive stance toward tangata whenua consultation, councils may find it necessary to discuss or explain such issues in a place where the tribal decision-making body (i.e. iwi, hapu and whanau) may have a chance to query or make comment directly to decision-makers, whether this is on a marae or in a Trust Board meeting room.

16 Recognise that values and preferences on issues may differ from iwi to iwi.

*Values differ
from iwi to iwi*

Just as councils expect different community groups to have different ideas, so too must they recognise the tangata whenua right to hold their own opinion. Iwi opinion from each rohe should be respected in its own right, and no attempt made to play the values of one iwi off against another. Individual tangata whenua groups may prefer differing methods of liaison and consultation with councils, and have differing views on the best way to locally give effect to the principles of the Treaty.

17 Recognise that iwi consultative committees can serve as conduits of information and resources between agencies and tangata whenua, and an interim means to move toward improved balance of tino rangatiratanga and kawanatanga, and that tangata whenua will often cooperate with such committees only as a first step toward a more direct say in decisions on resources and taonga of importance to them.

*Iwi
Consultative
Committees*

18 If an iwi consultative committee is to be set up:

- (a) establish the function and ground rules for the committee in a charter agreed to jointly by Council and tangata whenua representatives, including a statement on powers that may be delegated to the committee;**
- (b) monitor and review the committee regularly (with both Council and tangata whenua views canvassed) to insure its functions are being adequately fulfilled; and**
- (c) for those issues the committee has advised on, report back on Council decisions, giving reasons if iwi advice was rejected.**

*Establish a jointly
agreed charter,*

monitor regularly,

report back

An iwi consultative committee structure was a common feature of the three regional case studies. This has presented advantages and disadvantages. Although not seen by any of the tangata whenua concerned as a full reflection of their entitlements under the Treaty, it was generally accepted as an evolutionary step toward more direct tangata whenua involvement in decision-making. Such committees may also have a useful longer term function where tangata whenua and councils so agree.

The Treaty of Waitangi framework model used to set up the Komiti Rangapu consultative committee on the West Coast is shown in Appendix B.

Consultation on Resource Consents

*Delay notification to
obtain information*

*Invite tangata
whenua to pre-
hearing meetings*

*Provide clear
information for
decision-makers*

*Give tangata whenua
chance to speak*

Publicise decisions

- 19 In regard to resource consent applications concerning resources identified as *taonga* by tangata whenua:**
- (a) ask tangata whenua whether the proponent has adequately consulted with them and whether their concerns have been accommodated in the consent application, and if not delay the notification of resource consent applications under section 92 of the Resource Management Act for applicants to consult and provide details of any mitigation measures which could accommodate the concerns of the hapu involved;**
 - (b) invite tangata whenua to participate in a pre-hearing meeting under section 99 of the Act (whether or not they have lodged a submission); and**
 - (c) when the decision is to be taken on the consent application:
 - (i) ensure that decision-makers have before them clear information, specific to the area potentially affected by the proposed activity, on the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, the concept of kaitiakitanga, and the principles of the Treaty of Waitangi (sections 6(e), 7(a), 8 and 104(4)(g));**
 - (ii) ensure that tangata whenua have had an opportunity to appear before decision-makers and speak on relevant matters of concern; and**
 - (iii) make decisions, and the reasons for them, public.****

Comments from Council staff have focused on the time constraints in the Resource Management Act, but there are in fact powers for delaying 'starting the clock' until sufficient information from tangata whenua is available for the Council to be able to fulfil its obligations under Part II of the Act. The Act also provides for discussion between the proponent and affected parties to resolve the differences, and for both this and Part II related information to be taken into account in making decisions on resource consents.

20 Establish an ongoing education programme for decision-makers, staff, clients, and ratepayers/taxpayers on agency obligations with regard to tangata whenua and the Treaty of Waitangi.

21 Ensure that decision-makers and staff are informed on an ongoing basis about major concerns which the tangata whenua have expressed with regard to resources covered by council jurisdiction.

*Tangata whenua
concerns*

The strongest message received from tangata whenua was the need for decision-makers to understand and respect Maori values. Most decision-makers are non-Maori and have had little opportunity to learn of these values or why local tribes have special status as tangata whenua by virtue of the Treaty of Waitangi. Education efforts need to be ongoing, to ensure that new information can be incorporated, and that institutional understanding of these matters is not diminished as staff and councillors change over time.

Glossary of Maori Terms

hapu	<i>band, subtribe</i>
iwi	<i>tribe, people: an iwi authority can refer to any group which legitimately represents Maori tribal interests.</i>
kaitiaki	<i>guardian, steward: the meaning of kaitiaki in practical application may vary between different hapu and iwi, and councils are advised to consult with tangata whenua directly for more detail.</i>
kaitiakitanga	<i>stewardship, guardianship: as defined in section 2(1) of the Resource Management Act in relation to a resource, "includes the ethic of stewardship based on the nature of the resource itself".</i>
kawanatanga	<i>governorship, government</i>
mana whenua	<i>customary authority: over land and other taonga within the tribal rohe.</i>
rohe	<i>territory, boundary: defines area within which a tangata whenua group claims traditional association and mana whenua.</i>
runanga	<i>assembly, council</i>
tangata whenua	<i>people of the land: the Maori iwi or hapu which has mana whenua over a particular area.</i> <i>"The meaning of 'tangata whenua' has often been misinterpreted as just meaning 'people of the land'. However, it is much more than this. Tangata whenua refers to a concept which connects the land to the people through whakapapa or ancestral ties which go back into the mists of time. It establishes the person/people as the guardian or 'Kaitiaki' of their sacred lands, mountains, rivers and seas." ¹⁸</i>

Sources include *Williams Dictionary of Maori Language* (1985), *Ryans Revised Dictionary of Modern Maori* (1983), and *Waitangi Tribunal Te Roroa report* (1992), pp. 373-376.

¹⁸ Te Runanganui o Taranaki Whanui ki te Upoko o Te Ika a Maui, 1991, *Redevelopment of State Highway 2, Te Marua to Kaitoke, Environmental Impact Addendum Report*, p. 3.

- taonga** *treasure, property*: taonga are prized and protected as sacred possessions of the tribe, not merely as temporal property in the Western sense. The term carries a deep spiritual meaning, and taonga may be things that cannot be seen or touched. Included for example are te reo (the Maori language), waahi tapu, waterways, fishing grounds, and mountains.
- taura here** *the ropes that bind* : Maori who maintain links to and claim tangata whenua status in an area other than the one they are living in.
- waahi tapu** *sacred site*: these are defined locally by the hapu and iwi which are kaitiaki for the waahi tapu. Typically includes burial grounds and sites of historical importance to the tribe. In order to protect particular sites from interference and desecration, some tribes will refuse to disclose the exact location to outsiders.
- whakapapa** *genealogy, genealogical table, cultural identity*.
- tino rangatiratanga** *chiefly authority, chieftainship, full authority* : combined in this report as 'full tribal authority'. According to the Waitangi Tribunal, tino rangatiratanga;

*"...refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government... rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner.... [it] necessarily carried with it.... all the incidents of tribal communalism and paramountcy."*¹⁹

This right to manage according to cultural preferences also includes spiritual matters:

*"... for example the discharge of animal wastes to the waters of the fishery is as offensive as a physical disruption that reduces the quantity and quality of the catch ... there must be regard for the cultural values of the possessor."*²⁰

¹⁹ Waitangi Tribunal, 1991 (Ngai Tahu Report) pp. 230-233.

²⁰ Waitangi Tribunal, 1985 (Manukau Report) p. 95.

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In general, the reader is referred to offices and publications of the **Ministry for the Environment** for more guidance on action under the Resource Management Act. Forthcoming publications include the following:

- *Kia matiratira: a guide for Maori on the Resource Management Act* (due out 30 June 1992)
- a guide to the principles of the Treaty of Waitangi (title not finalised yet) (due out later in 1992)

Appendix A

Sections of the Resource Management Act 1991 relating specifically to Maori

Part I

Section 2(1) definitions including Kaitiakitanga, Iwi authority, Maataitai, Mana whenua, Tangata whenua, Taonga raranga, Tauranga waka, Tikanga Maori.

Part II

Section 6(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga in a matter of national importance.

Section 7(a) requirement to have particular regard to Kaitiakitanga.

Section 8 requirement to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)

Part III

Section 11(1)(c) references to Maori Affairs Act 1953 re subdivisions and
11(2) State-Owned Enterprises Act 1986 s.27 D.

Section 14(3)(c) reference to geothermal water and tikanga Maori.

Part IV

Section 33 (1)and(2) provision for transfer of functions, powers or duties to another "public authority" which includes to an iwi authority.

Section 39(2)(b) recognition of tikanga Maori and receiving evidence in Maori.

Section 42(1)(a) protection of information to avoid serious offence to tikanga Maori and disclosure of the location of waahi tapu.

Part V

Section 45(2)(h) reference back to section 8 (Treaty of Waitangi) in the context of statements of government policy.

Section 58(b) refers to protection of waahi tapu, tauranga waka, mahinga maataitai and taonga raranga in New Zealand coastal policy statements.

Section 61(2)(a)(ii)	In preparing regional policy statements, regional councils to have regard to relevant planning documents which are recognised by an iwi authority and to any regulations relating taiapure fisheries.
Section 62(1)(b)	regional policy statements to state matters of resource management significance to iwi authorities.
Section 65(3)(e)	regional council to consider preparing a regional plan where tangata whenua have concerns about their cultural heritage in relation to natural and physical resources.
Section 66(2)(c)(ii) and (iii)	in preparing regional plans, a regional council shall have regard to any planning document recognised by an iwi authority, and to any regulations in relation to taiapure fisheries.
Section 74(2)(b)(ii) and (iii)	in preparing district plans, territorial authorities shall have regard to any planning document recognised by an iwi authority, and any regulation in relation to taiapure.
Part VI	
Section 93(1)(f)	notification of iwi authorities re resource consent applications.
Section 104(4)(g)	when considering a resource consent application, consent authorities are to have regard to Part II.
Section 140(2)(h)	Section 8 (Treaty) reference for Minister's power of call-in.
Part VIII	
Section 171(1)(e)	when considering a requirement for a designation, a territorial authority shall have regard to Part II.
Section 187(a)(ii),(b)	Minister of Maori Affairs or local authority may act as heritage protection authority. Either may act on own motion or own iwi authority recommendation.
Section 189(1)(a)	notice may be given to a territorial authority for the protection of an area of significance to tangata whenua.
Part IX	
Section 199(2)(c)	refers to protection of water body considered to be significant in accordance with tikanga Maori.
Section 204(1)(c)(iv)	iwi authorities to be notified of application to special tribunal, for water conservation order.

Part X

- Section 249(2) reference to Maori Land Court Judge eligible as alternate Planning Judge.
- Section 250(1) Minister of Maori Affairs to be consulted on the appointment of Planning Judge or alternate Planning Judge.
- Section 253(e) Planning Tribunal members to have a mix of knowledge and experience which includes Treaty of Waitangi and kaupapa Maori.
- Section 254(1) Minister of Maori Affairs may support appointment of Planning Commissioner.
- Section 269(3) Planning Tribunal to recognise tikanga Maori where appropriate.
- Section 276(3) The Planning Tribunal may receive evidence in Maori and the Maori Language Act 1987 applies to the Tribunal's proceedings.

Part XIII

(This Part not yet in force)

- Section 345(3) Hazards Control Commission to give effect to the special relationship between the Crown and te iwi Maori as embodied in the Treaty.

Part XIV

- Section 353 notices and consents re Maori land.

First Schedule

- Part I Clause 3(1)(d) Requires local authorities preparing policy statements or plans to consult the tangata whenua through iwi authorities and tribal runanga.

- Clause 5(4)(f) Local authority to provide copy of proposed policy statement or plan to tangata whenua through iwi authorities and tribal runanga.

Second Schedule

- Part I Clause 4(c) Matters to be provided for in regional policy statements and plans include provision re waahi tapu.
- Part II Clause (2)(c) Matters to be provided for in district plans provisions re waahi tapu.

Appendix B

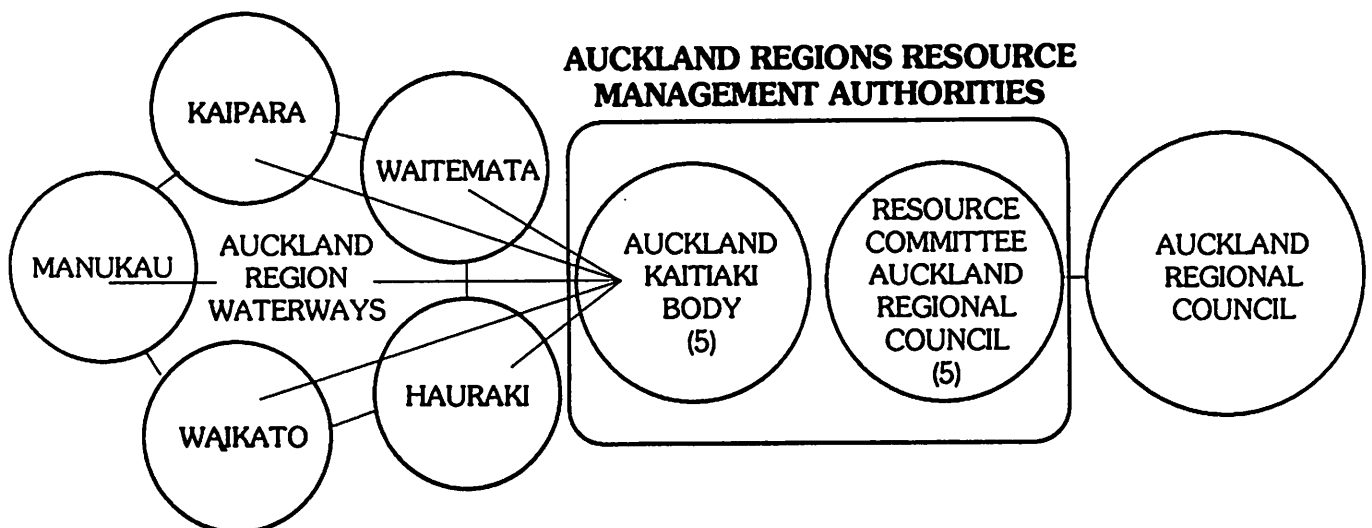
Examples of consultation and decision-making structures which have been proposed to better reflect the principles of the Treaty of Waitangi

B1: Representational Equity – Power of Veto

This model has been developed using the example of the Auckland region in which Auckland Regional Authority/Auckland Regional Water Board is responsible for the management of the natural and physical resources in the Auckland region. This option proposes that there be an Auckland Region Resource Management Authority comprising:

- (i) a body of tribal kaitiaki and
- (ii) a resource committee of the Auckland Regional Council.

There would be equal numbers of kaitiaki and committee members on the Resource Management Authority with the Chairperson being drawn from the kaitiaki. All members would have full voting rights. The Chairperson would have the casting vote. (See diagram below)



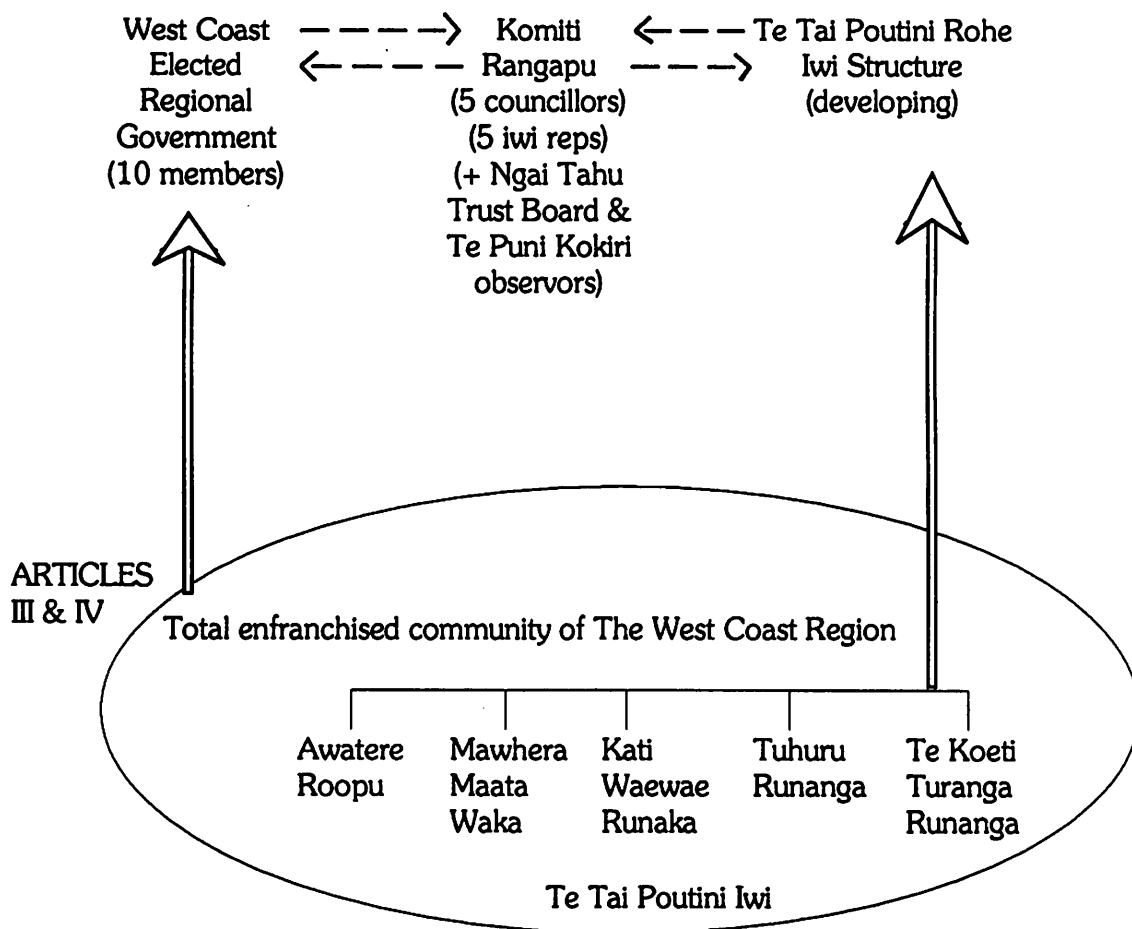
Source: Minhinnick, Nganeko Kaihau, 1989, *Establishing Kaitiaki*. Copyright by the author (contact: C/- Awaroa ki Manuka, Ngati te Ata, PO Box 250, Waiuku).

B2: The West Coast-Te Tai Poutini Model of Community Partnership under the Treaty of Waitangi

TIRITI O WAITANGI

**ARTICLE I
KAWANATANGA**

**ARTICLE II
TINO RANGATIRATANGA**



Source: Komiti Rangapu, West Coast Regional Council