
PRINCIPLES OF CONSULTATION WITH MAORI: A CASELAW PERSPECTIVE

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The article discusses the principles of consultation with Maori from a statutory and case law perspective. Consultation is often a basis for adequate Environmental Effects Assessment (EEA) under the Resource Management Act (RMA). Because of the historic importance of Treaty based issues in New Zealand society and the incorporation of the Treaty in the RMA, it is important to examine how consultation with Maori can or should occur in Resource Management processes, and under what basis.

An individual or community affected by a project or application for consent can influence its success or failure in a number of ways.

- It can oppose and, in general, is more likely to do so if not adequately consulted.
- Its statute based interests may be affected, and the project could hang in balance unless it is known to what

extent a project management can avoid, remedy, or mitigate those effects on those interests.

- Those that are consulted often hold vital information on processes or resource characteristics.
- The individual or community may contribute to a better designed or implemented project.

Guidance on matters that should be considered in an RMA consent

application and who should be consulted is contained in the Fourth Schedule of the Act.

Amongst the concerns listed are effects on neighbourhoods and the biophysical environment including cultural, spiritual, physical and biological matters.

Because of their special relationship to land and water in Aotearoa New Zealand, Maori are particularly affected by changes to land and water. They have a different legal status from other potentially affected parties in New Zealand's resource law through the Treaty. Because of this, they can play a more significant role in consultation on resource issues than other parties.

The Maori role as Treaty partner to the Crown places general obligations on those who consult or negotiate with Maori, primarily because of the manner in which the Treaty and its expressed interpretation are incorporated in New Zealand's statute and case law. Putting consultation with Maori within a legal context is therefore an important part of developing adequate effect assessments.

Case law and statute appears to define three different categories of obligation to engage in consultation, or to consider matters affecting Maori in a way that incorporates a Maori perspective:

1. that between the Crown and its agencies and Maori;
2. that between local authorities and Maori;
3. that between the individual or enterprise and Maori.

THE CROWN AND MAORI

The 1987 case of *The NZ Maori Council v The Attorney General* changed historic legal perspectives on the Crown's responsibility to Maori. The prevailing legal view had been that the Treaty was a legal nullity and that any mention of it in legislation was a superficial recognition of Maori ceremonial status rather than a full acknowledgment of Maori as a Treaty partner. This was despite the existence of the Waitangi Tribunal (which has only recommendatory capability). The New Zealand Appeal Court held in this case that the Crown had an administrative and constitutional duty to consult and negotiate with Maori to

the extent that it

1. was a Treaty partner, and
2. had bound itself by incorporating the Treaty of Waitangi within specific legislation.

The issue centred around inclusion of the Treaty in clauses relevant to Maori Treaty interests in the State Owned Enterprises Act 1986 (SOE Act). It was accepted by the New Zealand Government that the Crown (the source of constitutional authority and legitimacy) had a responsibility to accept and interpret its Treaty-based relationship to Maori in the SOE Act and subsequent legislation incorporating the Treaty.

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The case was to prove a watershed in Maori-Government relationships, not because this was the first Act to include mention of the Treaty as there were several previously but the case provided a clear statement of how the Crown was bound by stated intentions in its legislation. The Labour Government responsible for passing the SOE Act had passed the Treaty-related clauses without fully recognising their constitutional implications.

The case was a catalyst for changing perspectives. It also acknowledged real changes in how NZ society needed to

respond to Maori issues.

1. It gave recognition to the 'living' nature of the Treaty, that is, its provisions and their fulfilment implications for contemporary society.

2. It extended case law interpretation on the boundaries of Crown and Government responsibilities to fulfil statutory responsibilities.

3. It caused a general reappraisal of the relationship between Maori and the resource Taonga (treasures) contained in the environment. Previous Planning Tribunal cases heard under the Town and Country Planning Act established a general assumption in relation to section 3(g) that Maori traditional relationships were important but the extent of that relationship to the Treaty was not defined.

4. It established a general principle that consultation applied between parties to an agreement embedded in contemporary and subsequent legislation, such as the SOE Act, 1986, the Conservation Act 1987, the Environment Act 1986, the Resource Management Act 1991.

Following the 1987 decision, the boundaries of consultation and responsibility had to be further defined to be made workable on a day to day basis. This has occurred through three avenues:

1. Legislation
2. Case Law
3. Direct negotiation with the Crown.

The first two, legislation and case law, have the greatest applicability to resource use issues which affect the matters listed in Article 2 of the Treaty in which 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 and Fisheries and other Properties which they may collectively or individually possess so long as it is their wish and desire to remain the same in their possession, but the Chiefs yield to Her Majesty the exclusive right of Presumption 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.

The nature of subsequent confiscation, purchase, land privatisation and indefeasibility of title under the Torrens system (guaranteed title upon registration subject to notations on the title) has meant that much of the direct negotiation between Crown and Maori as Treaty partners has related to compensation rather than restitution. The Waitangi Tribunal, comprising Maori and Pakeha members, has been the quasi-judicial avenue through which the validity of each claim is assessed. Subsequent appeal cases in the Courts have also extended the legal definition of taonga. For example, the 1993 *NZ Maori Council v Attorney General* case before the Privy Council established that the preservation of the Maori language is properly a matter to be negotiated between Treaty partners. Note that all matters heard before New Zealand courts may be heard in Maori with English translation.

CONSULTATION UNDER THE RMA

Matters concerning resource use as opposed to ownership have in practice been taken from direct Crown oversight by the Resource Management Act which delegates responsibility for resource use administration to Territorial and utility resource management authorities. Because subordinate authorities are, unlike the Crown, not parties to the Treaty, they are in a totally different position regarding their responsibilities to consult with Maori, (*Hanton v Auckland City Council* (p.20) A010/943 NZPTD 240. However, being public statutory bodies subject to judicial review, they do have a general duty to adopt 'good' consultation practices when negotiating with or dealing with an issue relevant to Maori. The essence of good practice consists of six elements set out in some detail in 1991 High Court and 1992 Appeal Court judgements in *Air New Zealand and Others v Wellington International Airport Ltd and Others*. The airport cases provide an explicit statement about current legal thinking on consultation. The six elements apply to all public authority consultation and are founded on fundamental principles of fairness and reasonableness which

have an extensive set of precedents defining what is fair and reasonable in negotiation. The six elements are as follows:

1. being prepared to participate in discussion;
2. being prepared to listen to other parties;
3. remaining open-minded although working from a previously formulated plan or policy;
4. allowing sufficient time for discussion to occur;
5. obtaining sufficient information to allow all parties to have an informed discussion;
6. being prepared to change stance during consultation.

In matters having to do with consultation and negotiation, it is the test of the actions of the parties combined with a specific statutory duty to consult or consider a matter that will determine whether adequate consultation has occurred. Under the RMA regime, planning and consent authorities are not required to consult with Maori as such, but they are required to consider matters relating to the Treaty and to relevant Maori interests set out in the Act. For example, the purpose of the RMA is to "promote sustainable management of natural and physical resources" s5(i).

Matters that have the potential to affect the "cultural wellbeing" of Maori are therefore matters to be taken into consideration

In carrying out that purpose, a planning and consent authority should ensure that management enables people and communities to provide for "cultural wellbeing" among other things.

Matters that have the potential to affect the "cultural wellbeing" of Maori are therefore matters to be taken into consideration in formulating plans or granting consents. Circumstances may

also require an authority to actively consult Maori to determine how to 'avoid' 'remedy', or 'mitigate'. What is 'reasonable' in the circumstances will determine how consultation proceeds.

Matters of national importance in section 6 include (e) "The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu (sacred or restricted places) and other taonga. "Those are the matters listed in Article Two of the Treaty, but again the role of a Council or authority is not that of a Treaty partner, merely an agent that must give recognition to these matters in its practices when interpreting whether a plan or consent meets the test of section 5.

Various Planning Tribunal and Court judgements have established rules for interpreting whether an issue is relevant and consultation necessary. The rules provide for some flexibility. For example, Maori land is ancestral land but not necessarily owned by Maori at any one point in time. The relationship will be determined in each case (*Royal Forest and Bird Protection Society v Habgood* 1987 12 NZTPA76). Maori land is also not free from normal planning rules (*Royal Forest and Bird Protection Society v Clutha County Council* 1985 12 NZTPA449).

Establishing that Maori land is similar to other land may lead to a process of negotiating and consultation sufficient to balance the significance of Maori Treaty based interests against that of planning practices or other relevant matters of national importance.

Involvement of Maori in monitoring a consent may also be indicated in the circumstances because of a proven traditional attachment to a resource. Section 7 establishes the principle of Kaitiakitanga (guardianship or stewardship) for maintaining sustainable management. This should involve the exercise of authority necessitating some ihi (power) in exercising stewardship *Hanton v Auckland Regional Council and Auckland City Council* A077/932 NZP10 1994.

Whether that power is inherent in Section 7(a) or delegated by a planning and consent authority is perhaps a matter to be determined in future case law.

Section 8 establishes the relationship of Treaty matters to Resource legislation.

In achieving the purpose of this Act, all persons exercising functions and power 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).

Guidance on the principles mentioned in section 8 is provided in three appeal cases (NZ Maori Council v A G 1987 NZLR 641, *Tainui Trust Board v AS* 1989 2 NZLR 513 and *A G v NZ Maori Council* 1991 2 NZLR 129). The principles relating to consultation on the Treaty principles have been further developed in Planning Tribunal case law, for example "Taking account involves constraints on the discretion of a decisionmaker". (*Haddon v Auckland Regional Council*, AO 77/93 2 NZPTD).

The council or authority is therefore in a position of deciding who will be affected by a change or application and what information will be required to make an adequate assessment

An authority, however, is not obliged in all cases to consult Maori, but iwi (tribes) should be notified in a consent process under s. 93 if it considers it appropriate. The council or authority is therefore in a position of deciding who will be affected by a change or application and what information will be required to make an adequate assessment (*Ngatiwai Trust Board v Whangarei District Council* A007/94 3 NZPTD 197).

Again, the statutory onus is that of an administration required to consult to the extent of its statutory duty, which is to administer its plan.

Where reasonable evidence exists of a

relationship between a resource and Maori, a planning authority would be remiss in not consulting or taking the principles into account in its decision. (*Hanton v Auckland City Council* (P21) A010/94 3 NZPTD 240).

OTHER PARTIES

There is no such onus on an applicant or other group in the community. (*Quarantine Waste NZ Ltd v Waste Resources Ltd and Manukau City Council* C.P. 306/93 H.C. 943/NZPTD 2052). But a resource application may fail if it does not take account of the principles of the Treaty where such principles are relevant. The onus is therefore of environmental and probably financial credibility.

CONSULTATION AND MAORI

What are the obligations on Maori? Firstly, obligations of fairness and reasonableness apply to all parties. For example, if any party, including Maori, withdraw from consultation without giving reasons, the consultation would be ended unilaterally and the defaulting party could not later complain. (*Rural Management Ltd and Others v Banks Peninsula* WO35/94 3 NZPTD 442). If Maori withdraw their consent they cannot also appeal a decision they have agreed to after the submission and appeal period has elapsed. (*Ngati Kahu Trust Board v Northland Regional Council and Lewis Lands Ltd* 19048/94).

Secondly, an interest should be communicated to the consent authority or relevant authority within a reasonable time. (*Panekiri Tribal Trust v Wairoa District Council and Bay Kayaks Ltd* WO62/94). There is also a presumption in the above decision that, where there is no Iwi Authority or several conflicting groups, then consultation may be more difficult than it otherwise would be, and a greater onus is placed on Maori to apply the first of the six elements of good consultation, namely, being prepared to participate. It must be mentioned that decision making with Maoridom frequently depends on consensus. The time and resources required to gain that consensus and to consult the council may not easily fit into the time constraints of the resource consent process. Consent authorities do

however have discretionary power under section 37 to withdraw a consent until sufficient information is obtained. Some iwi have written statements on policies and resource use practice that facilitate discussion (*Te Whakatau Kaupapa: The Ngai Tahu Resource Management Plan*). The obligation is on a consent authority to consider whether a delay would facilitate the purpose of the Act, which is sustainable management. If they fail to allow sufficient time or resources they may also have breached the requirements of adequate consultation.

But again, there is a general onus to act in good faith and pursue adequate consultation in order to achieve the legislative purpose(s).

SUMMARY

Consultation between Maori and others is complicated by the different levels of Treaty obligation placed on different parties. The Crown as full Treaty partner has imposed on itself an obligation to interpret the Treaty in legislation. Case Law has extended the Crown's onus to consult and negotiate in good faith and so express the 6 elements of 'good' consultation.

The onus on delegated authorities is one based on their function as provided for in statute. Their obligation is merely to fulfil the purposes of the statutes the authorities administer or are empowered by.

But again, there is a general onus to act in good faith and pursue adequate consultation in order to achieve the legislative purpose(s).

Private citizens and interests groups, by contrast have no statutory obligation to consult Maori. The need to provide an adequate assessment of effects of resource use may however suggest that consultation is a necessary part of the resource consent process, a process that

would otherwise fail or meet expensive obstacles.

Obligations on Maori in law are simply that of any Treaty or contractual partner, to act in good faith and to be prepared to consult to the extent of their resources, to provide sufficient information, to remain open minded, to listen to other parties and to consult within statutory guidelines.

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The requirements by other parties to consult Maori in environmental matters while not required is significant in the sense of good management practice and will continue to shape the changing definition of sustainable management because of the legislative and historical importance of the Treaty based nature of Maori interest in New Zealand society.

Additional reading

The Principles of the Treaty of Waitangi,
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