
BEFORE THE HEARINGS COMMITTEE

IN THE MATTER

of hearings on submissions
concerning the proposed One Plan
notified by the Manawatu-
Wanganui Regional Council

**SECTION 42A REPORT BY JOHN MAASSEN
FOR HORIZONS REGIONAL COUNCIL
REGARDING CHAPTER 4 - RPS**

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

From Barry Lopez – *Arctic Dreams* (1986) at page 313 cited with approval in the now celebrated decision of Hammond J concerning section 6(e) RMA - *TV3 Network Services Ltd v. Waikato District Council* [1997] NZRMA 539 at page 548

Introduction

1. My name is John Maassen. I am a resource management lawyer. I have 20 years legal experience. I am a partner of the Manawatu and Central Region law firm Cooper Rapley. In the last decade I have undertaken work for at least six local authorities in the lower North Island and top of the South Island. I also regularly act as a commissioner having completed the *Making Good Decisions* Program which I co-presented on behalf of the Ministry for the Environment in the lower North Island.
2. This report provides a legal overview relating to Chapter 4 of the RPS (Part1 POP): Te Ao Māori – Resource Management Issues of Significance to Hapu and Iwi – Te Ao Māori – Ngā Take Whakahaere Rauemi – Māori.

Māori and the RPS

3. For the purpose of this memorandum the term Māori is used for convenience. It's use should not distract one from the fact that the RMA has an iwi and hapu focus since there is no all embracing Māoritanga. The physical cultural and ancestral relationships of Māori with natural and physical resources is related to tribal identity and whakapapa and therefore the views of iwi and hapu need to be considered in fulfilling the statutory direction concerning the recognition of matters relevant to Māori¹ in regional planning documents.
4. The RPS is a key document that must give concrete expression to the statutory directions regarding recognition of Māori concerns relating to the management of natural and physical resources within the region. While there is the possibility higher instruments such as national policy statements will express objectives or policies informed by Māori perspectives, the RPS provides the greatest opportunity for detailed expression of Māori resource management preferences and their importance in regional and territorial planning. In recognition of this, section 62(1)(b) RMA provides that:

"[62 Contents of regional policy statements

- (1) A regional policy statement must state ...

...[(b) the resource management issues of significance to—

- (i) iwi authorities in the region; and
- (ii) the board of a foreshore and seabed reserve, to the extent that those issues relate to that reserve; and]]"

¹ Marsden M, "God, Man and Universe: A Māori View" in King M. (ed), *Te Ao Hurihuri Aspects of Māoritanga* (1992) 134 and U Klein "Belief – Views on Nature – Western Environmental Ethics and Maori World Views vol. 4 NZJEL 81

5. To fulfill the obligation in section 62(1)(b) a regional council must consult with Māori in the region. The statutory obligation of consultation is contained within Schedule 1 RMA. The following clauses are relevant:

"2 Preparation of proposed policy statement or plan

- (1) The preparation of a policy statement or plan shall be commenced by the preparation by the local authority concerned, of a proposed policy statement or plan.
- [(2) A proposed regional coastal plan must be prepared by the regional council concerned in consultation with—
- (a) the Minister of Conservation; and
 - (b) iwi authorities of the region; and
 - (c) the board of any foreshore and seabed reserve in the region.]

3 Consultation

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

6. An RPS must identify matters of significance to iwi authorities and this is achieved through consultation with and through iwi authorities. An Iwi authority is defined as:

"Iwi Authority means the authority which represents an iwi and which is recognized by that iwi as having authority to do so."

7. These provisions are deliberate. They provide tangible expression of the mana of iwi authorities as the voice of tangata whenua. The Act accords with the reality that matters dealt with in Part 2 directly relevant to Māori such as section 6(e) and kaitiakitanga in section 7(a) are intrinsically related to the status of groups as tangata whenua .
8. Chapter 4 of the RPS is a separate chapter explaining the Māori world view and its relevance to the management of natural and physical resources in the region. The quote at the beginning of this paper is apt. The overarching purpose of the Act is sustainable management and contained within it is matters related to cultural wellbeing as well as biophysical baselines. The 'conversation' as to the meaning of sustainable management in a particular region must take into account and (where

necessary) provide for the Māori world view and preferences in relation to the management of natural and physical resources. Chapter 4 as a discrete part of the RPS is intended to do precisely that.

9. The structure of Chapter 4 is:
 - (a) recognition that it is fulfilling the function of section 62(1)(b) (section 4.1 POP);
 - (b) identifies the regions iwi and hapu (section 4.1.1);
 - (c) summarises the environmental concerns (section 4.1.4)
 - (d) recognizes through an overarching objective the need for decision making to reflect Te Ao Maori (objection 4-1) and then specific policies for particular resources including water bodies and waahi tapu;
 - (e) tabulates the issues and the links to objectives policies and rules in the regional plans (table 4.1).

Part 2 RMA

10. The purpose of a RPS is to achieve the Acts purpose of sustainable management by identifying the issues relating to the management of natural and physical resources of significance including those of significance to iwi and stating in respect of those identified issues the action steps (in the form of objectives and policies) to achieve sustainable management.
11. A short review of the key provisions of Part 2 is set out below:
12. Section 5 states:

“(2) In this Act, ‘sustainable management’ means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing ...” [emphasis added].

The purpose of the RMA is ‘sustainable management’. In the context of Māori and the RMA this can be interpreted as enabling iwi/hapu to provide for their cultural wellbeing. When making decisions under the RMA, it needs to be recognized that the Māori world view informs perceptions of cultural wellbeing.”

13. Section 6 states:

“In achieving the purpose of the Act, all persons exercising functions and powers under it ... shall **recognize and provide for** the following matter of national importance: [emphasis added]

- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga
- (f) the protection of historic heritage from inappropriate subdivision, use and development
- (g) the protection of recognized customary activities.”

The relationship of Māori to the natural world (Te Ao Māori) and the customary practices that support these transcend matters of ownership. The relationships referenced in section 6(e) are relevant even where tangata whenua are not the legal owners (*Royal Forest and Bird Protection Soc v. Habgood* (1987) 12 NZTPA 76(HC)).

The inclusion of historic heritage as a matter of national importance explicitly recognizes the tangible elements of those relationships. Historic heritage is defined in the RMA to include natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures. Historic heritage includes:

- historic sites, structures, places and areas
- archaeological sites
- sites of significance to Māori including waahi tapu
- the surrounding associated with natural and physical resources.

A recognized customary activity is defined in the RMA as an activity, use, or practice carried on, exercised, or followed under a customary rights order. Customary rights orders recognize ongoing rights to carry on or exercise customary activities in a specified area of the public foreshore and seabed under the Resource Management (Foreshore and Seabed) Amendment Act 2004.

14. Section 7 states:

"In achieving the purpose of the Act, all persons exercising functions and powers under it ... shall **have particular regard** to: [emphasis added] (a) kaitiakitanga."

The RMA defines kaitiakitanga as "exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship". Kaitiakitanga defines the processes tangata whenua use to provide for cultural wellbeing, to protect the mauri of natural and physical resources, and therefore the people of themselves. The requirement to give particular regard to kaitiakitanga provides opportunities for tangata whenua to give practical expression of their kaitiaki roles and responsibilities. That is, to be involved in managing the use, development and protection of their ancestral taonga.

15. Section 8 states:

"In achieving the purpose of the Act, all persons exercising functions and powers under it...shall **take into account** the principles of the Treaty of Waitangi (Te Tiriti O Waitangi). [emphasis added]."

The principles of the Treaty interpret the spirit and intent of the Treaty. The principles continue to evolve with society so they can be applied to present-day and local circumstances.

The principles are continually defined by the Courts through case law and by the Waitangi Tribunal. The Court of Appeal *New Zealand Māori Council*

*v. Attorney General*² judgment provides a useful discussion of the principles of the Treaty of Waitangi. The Court emphasized two core principles: partnership and active protection. Since this judgment subsequent decisions have confirmed these core principles and elaborated on what these entail. These are also referred to as 'principles' and include the:

- duty to act in good faith
- duty to make informed decision through consultation
- principle of redress and a duty not to create new grievances
- principle of reciprocity
- principle of mutual benefit

The Treaty principles are generally fulfilled by the faithful compliance with the specific provisions of the RMA that:

- (a) require decisions that take account of and provide for matters of relevance to Maori;
- (b) provide for effective participation in resource management process by Maori.

Specific provisions relating to Māori not in Part 2

16. There are a number of provisions in the Act that provide for full participation of Maori in RMA processes including preparation of an RPS and regional plans. These have been refined by the 2005 Amendment Act in recognition of the self evident truth of the statement of judge Kenderdine in *Director General of Conservation v. Marlborough District Council*³ that:

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

A summary of the relevant provisions is set out in the table below:

Obligation to keep and maintain records of iwi and hapu groups within the region or district and planning documents that are recognized by each iwi authority and lodged with the local authority	Section 35A
Opportunity to enter into joint management agreements with public authorities, including iwi authorities and groups representing hapu	Section 36B
Obligation, in conducting hearings to avoid unnecessary formality recognize tikanga Māori where appropriate, and	Section 39

² *Māori Council v. Attorney General* [1987] 1 NZLR 641

³ [1994] NZRMA 289 at pg 301

receive evidence written or spoken in Māori	
Obligation to limit the disclosure of sensitive information at hearings in order to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of waahi tapu	Section 42
Obligation to take into account iwi management plans in preparing regional policy statements, regional plans and district plans	Sections 60, 66 and 74
Obligation to consider the preparation of regional plans to address any significant concerns of tangata whenua for their cultural heritage	Section 62
Obligation, in preparing policy statements and plans to consult with tangata whenua through iwi authorities	Schedule 1
Opportunity to demonstrate appropriate consultation with iwi authorities (on policy statements and plans) by considering how the capacity of those authorities to participate in consultation can be fostered, and how the concerns of those authorities could be addressed.	Schedule 1

Decisional verbs in the RMA

17. In the array of sections identified above there are a range of decisional verbs such as:

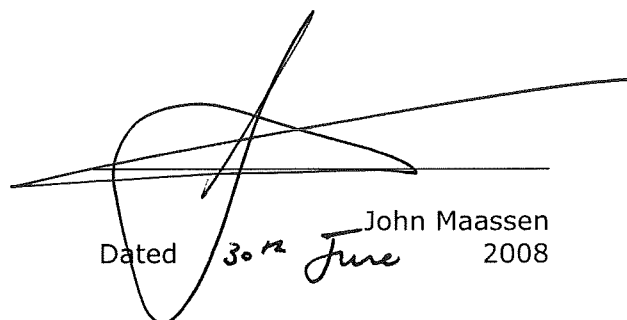
The RPS must give effect to...

Persons exercising functions must have regard to and provide for ...

Shall take into account ...

Shall pay particular regard to ...

18. The variations in strength of these decisional verbs is deliberate and recognizes the relative importance of these matters in informing the overarching purpose of sustainable management. The strongest directions are the requirement to 'give effect to' and 'to have regard and provide for'⁴.


 Dated 30th June 2008

⁴ See *Environmental Defense Society v. Maungani County Council* [1989] 3NZLR 257 and Sir Kenneth Keith "The Treaty of Waitangi in the Courts" 14 NZULR 37