Contestability in the Resource Consent Process under the Resource Management Act 1991.
A study of opportunities for Maori within a contestable consent process.

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Table of Contents

List of Tables

List of Abbreviations

CA	Court of Appeal
DOC	Department of Conservation
DP	District Plan
IMP	Iwi Management Plan
LGNZ	Local Government New Zealand
MAF	Ministry of Agriculture and Fisheries
MfE	Ministry for the Environment
MoC	Ministry of Commerce
NCPS	National Coastal Policy Statement
NZBRT	New Zealand Business Roundtable
PCE	Parliamentary Commissioner for the Environment
RC	Regional Council
RMA	Resource Management Act
RMLR	Resource Management Law Reform
RPS	Regional Policy Statement
TCPA	Town and Country Planning Act
TLA	Territorial Local Authority
TPK	Te Puni Kokiri
UA	Unitary Authority

Glossary

hapu	family or district groups, communities
hui	gatherings, discussions, meetings usually on marae
iwi	tribal groups
kaimoana	food from the sea
kaitiaki	iwi, hapu or whanau group with the responsibilities of kaitiakitanga
kaitiakitanga	the responsibilities and kaupapa, passed down from the ancestors, for tangata whenua to take care of the places, natural resources and other taonga in their rohe, and the mauri of those places, resources and taonga
kaumatua	elders, decision-makers for the iwi or hapu
kaupapa	plan, strategy, tactics, methods, fundamental principles
kawanatanga	government, the right of the Crown under the Treaty of Waitangi to govern and make laws
koiwi	human remains, bones
mahinga kai	places where food and other resources are traditionally gathered, and the gathering and management of those resources
mana	respect, dignity, status, influence, power
mana whenua	traditional status, rights and responsibilities of hapu as residents in their rohe
marae	local community and its meeting-places and buildings
matauranga	traditional knowledge
mauri	essential life force, the spiritual power and distinctiveness that enables each thing to exist as itself
mokopuna	grandchidren
pa	occupation site, often in a strategic location such as a hilltop

rangatiratanga	rights of autonomous self-regulation, the authority of the iwi or hapu to make decisions and control resources
rohe	geographical territory of an iwi or hapu
ropu	organisation, group, team
runanga	committee of senior decision-makers of an iwi or hapu
tangata whenua	people of the land
taonga	valued resources, assets, prized possessions both material and non-material
tapu	sacredness, spiritual power or protective force
tikanga	customary way of doing things, traditions
tupuna	ancestors
turangawaewae	domicile, home, hometurf
wahi tapu	special and sacred places
wairua	spirit, soul
wananga	place of education
whakapapa	genealogy, ancestry, identify with place, hapu and iwi
whanau	family groups

Chapter One
Introduction

1.1. Introduction

This thesis examines Maori participation under the existing resource consent process of the Resource Management Act (RMA) 1991 and speculates on how the proposal to introduce contestability in the consent process could create opportunities for Maori participation. The purpose of this chapter is to provide background information about New Zealand's environmental management regime leading up to the Resource Management Amendment Bill 1999. The chapter commences with a brief discussion of the concept underlying Maori environmental management – tino rangatiratanga – and how Maori interests in the environment are incorporated into environmental legislation. Following on from this is an outline of Maori interests in resource management legislation including the RMA. The chapter concludes by introducing the contestable consent aspect of the amendment to the RMA, states the questions and aims of research, and outlines the structure of following chapters.

1.1.1. Tino Rangatiratanga

Indigenous peoples have long asserted their right to self-determination because their survival as distinct societies is contingent on native control of social and economic development (Fleras and Elliot, 1992). Self determination is seen as essential in breaking the cycle of deprivation, dependency, and underachievement, but it is also about positive development as it permits indigenous people to conduct various internal and sometimes external affairs set to their own priorities and values (ibid.). Central to this goal of self-determination is the conviction that indigenous peoples constitute a social collectivity with an inalienable duty as custodians to bequeath land and culture to future generations (Dacks, 1990).

For Maori, self-determination is linked with the concept of tino rangatiratanga, a concept encapsulated in the Treaty of Waitangi. There are wide debates about what

exactly constitutes tino rangatiratanga, which are far from unanimous. Simon Poata-Smith argues that tino rangatiratanga can be simultaneously defined with Maori capitalism, Maori political power, cultural nationalism or revolutionary activity (Poata-Smith, 1996). Poata-Smith situates tino rangatiratanga alongside the new right ideologues of Treasury, the New Zealand Business Roundtable (NZBRT), and successive governments since 1984. Accordingly a number of tribal executives and "corporate warriors" have argued that the welfare system has held Maori back; real self-determination and liberation for Maori can only be achieved under unrestrained free-market capitalism (ibid.). Others argue that capitalism and individualism do little to promote Maori interests (Cheyne et al, 1997). Moreover, it is argued that Maori participation in the market reforms or Treaty claim settlements in the current environment can compromise Maori interests. According to Cheyne et al (1997: 159), "Maori attempts to re-establish cultural and environmental continuity between the past and future based on spiritual concerns can only be threatened by placing taonga in the market-place".

These disparities aside, one thing is certain self-determination is about the advancement of Maori people, affirming a Maori identity, and protecting the environment for future generations. For Maori as kaitiaki of the environment this means accountability to whanau, hapu or iwi. Transfer of ownership of a resource away from tribal ownership does not release tangata whenua from exercising a protective role over the environment (Durie, 1998: 23). Notwithstanding this ongoing obligation Nganeko Minhinnick believes that influences such as the Treaty of Waitangi and ongoing monocultural legislation have weakened the strength of the traditional tribal systems in environmental protection (Minhinnick, 1989).

1.1.2. Maori interests in resource management legislation

Maori people have always sought the right to be consulted in matters of environmental management and have struggled for a long time to overcome monocultural legislation that has excluded them from participating in environmental issues (Nuttall and Ritchie, 1995). Under the Town and Country Planning Act (TCPA) 1977, Maori participation

was limited to s 3 (1)(g) of the Act. In the preparation and administration of schemes and administration of Part II of the TCPA "the relationship of the Maori people and their culture and traditions with their ancestral land" shall be recognised and provided for. Not until the economic and social reforms of the mid to late 1980s which included a review of the management of the environment and natural resources, were Maori interests and the Treaty of Waitangi recognised substantially in environmental law. The first environmental statutes to address Maori interests and values in the environment were the Environment Act 1986 and the Conservation Act 1987. Both these Acts include references to the principles of the Treaty of Waitangi, but not to the articles of the Treaty.

Maori interests were also encompassed in the Resource Management Law Reform (RMLR) process that began in 1988. This monumental reform process involved a review of over 40 resource and planning statutes including the TCPA. The objective of the RMLR was to devolve resource management responsibilities from the central level to the local level as part of the Government's devolution policy (see Memon, 1993; Buhrs and Bartlett, 1993; Kelsey, 1993). Other reforms coinciding with the RMLR were the reform of local government, principally the Local Government Act 1974, and the devolution of Maori Affairs under the Runanga Iwi Act 1990 (repealed under the National Government 1991).

At the time of the RMLR the Treaty of Waitangi was expected to be a central issue for the Crown (Memon, 1993). The Crown's intention to devolve resource management responsibilities to regional and local government became intertwined with issues of resource ownership (Memon, 1993). This was largely due to Maori claims of ownership of natural resources under the Treaty of Waitangi having implications for the expected changes of resources and the granting of consents (Memon, 1993). For Maori, the focus of the RMLR was not Treaty principles or partnership, but the Treaty and rangatiratanga, as defined in Article II of the Maori text on the Treaty of Waitangi:

> *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* (Nuttall and Ritchie, 1995b: 33).
>
> *The Queen of England agrees to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures* (english translation by Sir Hugh Kawharu. 1989: 319).

In this instance, Maori retain in perpetuity te tino rangatiratanga in respect of their lands, villages and all their treasures (Orange, 1993). This meant self-determination: tribal authority and power over management, allocation, and use of resources (Kelsey, 1990).

However, the Treaty was not the driving force behind the RMLR. Behind the process was a need for an economically, administratively, and environmentally efficient system which met the needs of the nation as a whole (Kelsey, 1990: 187). In keeping with the philosophical agenda of "less government in business and more business in government" (Buhrs and Bartlett, 1993), the Labour Government's move towards a market-led environmental policy was aimed at reducing the role of the state in the allocation and management of resources, whether for social, economic, or environmental purposes (Buhrs and Bartlett, 1993). Within the political climate the Maori call for full authority of control over their lands, fisheries, and taonga for the good of the present generation and of those to come became increasingly marginalised. The battle for control between the markets and regulation took over to the exclusion of Maori requests for self-determination of their own resources (Kelsey, 1990).

When the Resource Management Act (RMA) was enacted in 1991, it was intended by the Act's architects that devolution of central government's responsibility for resource management to the local level (*viz.* regional councils and territorial local authorities), would encourage participation and decision-making carried out at the local community level. This is a radical departure from the RMA's predecessor, the TCPA. The TCPA defined a regime that was more prescriptive alongside considerable government

intervention. In response, the RMA provides a clear structure of planning instruments and processes through a hierarchy of plans and policy statements with little prescription beyond this (Memon, 1993). The RMA favours individual property rights and permits all land use unless prohibited by a rule in a plan, in which case, a development proposal (resource consent) is specifically required. These procedures for granting resource consents are aimed at facilitating private development with the inclusion of two (non-) notification provisions (ss 93 and 94)[1] that decide how a consent application will be processed.

1.1.3. Introducing contestability as an aspect of the RMA

Eight years after the passing of the Act, there is the perception by some resource users that land-use controls are just as extensive as they were under the TCPA (MfE, 1998). Critics of the RMA argue there are problems that will not be cured by improved practice alone and that the current Act as drafted, authorises such extensive restrictions on land use that it has defeated its intention (MfE, 1998: 4). Coupled with these criticisms, and with business concerns about regulatory controls under the RMA, the 1996 National and New Zealand First Coalition Agreement included a commitment to review the effects-based outcomes of the RMA as well as the decision-making processes. In addition, the Minister for the Environment Hon. Simon Upton announced his intention to re-open some of the debates on deregulation that had not been exposed as the RMA progressed through Parliament in 1991 (Upton, 1998: 2).

In late 1997, Upton considered the criticisms should be explored further and established a series of review procedures, commencing with a commissioned report *Land Use Controls under the RMA* (1998) from one of the Act's critics, Owen McShane. The McShane paper targeted local authority administration over land-use controls and particularly local authority administration of the resource consent process. In keeping with the market-led framework of the RMA, McShane considered that the non-contestable process as it currently stood was giving local authorities too much control

[1] Sections 93 and 94 of the RMA are outlined in discussion further in this chapter and in more detail in Chapter Two and Appendix Four.

over the decisions of resource consent applications. This type of monopolistic behavior slowed the processing time and created added costs for the applicant (McShane, 1998). According to McShane, the resource consent process needed to be opened up to competition where the private sector could contest the processing of resource consent applications. The McShane paper was intended to be a provocative challenge to the status quo, and to generate debate. Submissions were received and a ministerial reference group was appointed to analyse these submissions and produce a set of proposed recommendations for the RMA review.

The proposal by the Ministerial Reference Group to introduce a contestable resource consent process in the RMA is the focus of this thesis. The aim of contestability is to break the monopoly of local authorities acting as resource consent processors by empowering the applicant to choose a processor from either the council or a private consultant. In return, it was considered that contestability would reduce the time and costs associated with processing resource consent applications, and increase accountability to the applicant. A contestable resource consent process is contentious because of the shift in resource management power resource from local authorities to the private sector (Palmer, 1998). Contestability is perceived as differing from the current practice of contracting out local government services because it provides an element of consumer choice (MfE, 1998d). Contracting out of services, on the other hand, usually results in private agencies processing applications for resource consents which not be considered as a contestable regime as the council monopoly remains either totally or substantially intact (ibid.).

The analysis of submissions to the McShane report concluded that a majority of submissions were opposed to the proposed contestable consent process. These submissions were mainly from interest and environmental groups, and some from local authorities. Support for contestability came from the business sector. Only a small number of tangata whenua submissions were received. The small number meant that it was difficult to gauge whether tangata whenua supported or opposed contestability.

This thesis deals, in particular, with Maori participation in the resource consent process. Compared to the TCPA, the RMA affords Maori greater opportunities to participate in the decision-making process affecting resource management. One specific area where this occurs is in the resource consent process. Sections 93 and 94 of the RMA, the (non-) notification of a consent application determines the level of Maori participation. Under s 93, application for consents must be publicly notified, providing an opportunity for the public to make submission on the application. Public submissions can be made by iwi/hapu or individuals affected by a resource application. Some areas fall outside the notification parameters. Non-complying, restricted discretionary, discretionary and controlled activities fall under s 94. Written consent must be obtained from any recognised adversely affected parties and environmental effects must be deemed as being minor before an application can proceed.

Integral to these provisions, s 8 of the RMA recognises the obligation of local authorities to take into account the principles of the Treaty of Waitangi, specifically the principle of partnership that defines the duty of consultation. Under a non-contestable consent process, local authorities have the discretion to decide how consultation is carried out with Maori. Introducing contestability in the consent process would devolve the consent processing role and responsibilities to the private sector including the obligation to take into account s 8 of the RMA.

1.2. Research questions and aims

The purpose of the thesis is to identify whether a contestable consent process will enhance Maori participation in resource management and asks what are the positive opportunities for Maori participation in any move to a contestable consent process? Among Maori there has been widespread debate about devolving environmental and resource management roles to iwi authorities (Durie, 1998). How do Maori perceive the current consent process in terms of their own aims and aspirations: what is the Maori worldview on resource management and the consent process? In addition, this thesis attempts to answer the following questions: Does the monopoly in the current resource consent process fail to deliver positive opportunities for Maori participation? What are the implications for s 8 of the RMA in a contestable consent process?

The specific aim of this thesis is to explore whether a contestable consent process can work alongside Maori aspirations by investigating breakdowns in the current consent process, assessing whether these barriers will be present under a contestable regime and by identifying what and where the positive opportunities are for Maori with regard to any move to contestability. Other aims of the thesis include: to examine whether the expressed policy intentions of local authorities match up to their practices in promoting Maori participation in the resource consent process, and to carry out research that is positive and provides a platform for future research to be carried out by Maori.

1.3. Organisation of the Thesis

The thesis is divided into six chapters. Chapter Two sets the scene for the thesis research in the context of the RMA 1998 review situating ramifications for Maori participation within this context. The chapter begins with an overview of the concept of contestability. It then moves into the 1998 RMA review by exploring in detail the contributing factors leading up to the review and the proposal for contestability, as introduced in Chapter One. A discussion on the lobbying behind the review reveals the discontent within the business community concerning the administration processes and monopolistic position councils have in the resource consent process. The chapter moves onto a discussion detailing the two main provisions in the resource consent process with a focus on s 94; a provision considered controversial as it empowers the council as consent authority to notify or not to notify an application. Research revealing the implications for Maori participation under s 94 is also discussed. These arguments move onto the debates surrounding the consultation obligation councils have in relation to Maori participation and the Treaty of Waitangi under the current consent regime; legal and non-legal opinions are reviewed.

Chapter Three covers the research design of this thesis, beginning with a discussion on the debates surrounding cross-cultural research specifically research by a non-Maori researcher on Maori perspectives. This includes a discussion of the political and ethical issues integral to these debates. Finally, I shall detail the design, methods, and ethical issues relating to the research that places an emphasis on qualitative research.

Chapter Four presents the findings of the first phase in the data collection strategy, the documentary analysis. The findings from available iwi plans and selected council planning documents are examined under a series of themes that have been developed out of the literature reviewed in Chapter Two. These findings aim to identify the aims and aspirations of Maori participation in resource management as well as ambiguities contained within policies prepared by local authorities concerning tangata whenua participation in resource consent processes.

Chapter Five presents, analyses, and discusses the findings from phase two of the data collection; a survey administered to Iwi Liaison officers or council officers involved with tangata whenua in resource management processes. The survey aimed to solicit views and opinions on the opportunities for tangata whenua involvement in resource management decision-making under contestability. Information for this chapter also draws on the literature and documents reviewed in Chapters One and Two, and data from Chapter Four.

Chapter Six concludes the thesis by reflecting on key research findings. It revisits the research problem in light of the findings made and comments and reflects on the choice of research design. Chapter Six also incorporates a discussion on policy recommendations, good practice guidelines. Finally arising from this study and its findings, suggestions are given on areas for future research.

Chapter Two
Literature Review

2.1. Introduction

Chapter One provided a rationale for the thesis and laid out the structure of the following chapters. Chapter Two reviews the literature and policy documents pertinent to the research. The review begins with an overview of the concept of contestability, introducing it as an issue for the resource consent process. Linking in with this is a discussion of the origins of the 1998 RMA review, in particular the factors contributing to the decision of the review, business concerns and perceptions of the current consent process. Following this is a discussion of the resource consent process; objectives and provisions are explored in detail. Discussion concerning the role Maori play in the consent process forms a significant part of Chapter Two. Primary research on Maori participation identifies important problems associated with the consultation procedures implemented by local authorities. Finally, literature on consultation with Maori is explored.

Current literature examining and interpreting Maori participation and the resource consent process has been dominated by research from the Ministry for the Environment (MfE) and the Parliamentary Commissioner for the Environment (PCE). The monitoring and auditing of the RMA come under the duties of these agencies. The publications by the PCE are primarily concentrated in the areas of Maori participation in resource and environmental management. The works of the MfE are primarily concentrated on the processing stages of resource consents and Maori interaction with local government in resource management. Because these works are policy documents, they will be also included in the data analysis in Chapter Six.

2.2. Overview of Contestability

Currently, the processing of, and the decision-making about, resource consent applications are functions of local government agencies. Until the passage of the

Building Act 1991, the position had been the same in relation to the issues of building permits/consents. The Building Act, however, introduced contestability to the consent process, where building certifiers could be used as an alternative to council building inspectors. The objective of a contestable building consent process was to make the process of inspection and certification of building work, simpler, faster, and more cost-effective (Department of Internal Affairs, 1994: 6). To date the benefits or costs for Maori from contestability in relation to building consents are not recorded. One explanation for this could be because consent applications under the Building Act address the actual building whereas land-use consent for the building comes under the RMA (Department of Internal Affairs, 1994). Despite not knowing the full consequences of a contestable consents regime, commentators (for example Owen McShane in his 1998 *Think-Piece* report), have proposed the introduction of a similar regime in the resource management context.

In the context of the RMA consent process contestability requires the delegation of processing powers from local authorities to the private sector. The aim of contestability, as an alternative to the current system, is to sharpen the processing of consents and reduce costs to the applicant (McShane, 1998; MfE, 1998d). This is because contestability introduces competitive elements into the resource consent process by providing consumers with a choice of processors from the private and public sectors (MfE, 1998d).

2.2.1. Forms of contestability

The approach to introduce a contestable resource consent process was a difficult task because of the forms contestability could take. Contesting both the processing and decision-making role was not the preferred option for the Minister of the Environment Simon Upton (Upton, 1998: 3). Upton considered the decision-making role in the consent process to be an important process for the public to participate and that any amendments to the decision-making process could undermine public confidence in the RMA:

> *...I do not support any move to allow applicants to choose their decision-maker. Such an approach would undermine public confidence in the resource management system* (Upton, 1998: 3).

The option to contest the processing role in the consent process was promoted by the Ministerial appointed Reference Group[1] on the RMA 1998 review, as the preferred option. The Reference Group believed it was essential that the concept of contestability was viewed as a 'dual entity', "...the resource consent process involves two clearly separate and relatively unrelated roles or functions" (http://www.arcadia.govt.nz). Contestability in this instance would refer to only the mechanical tasks of the consent process:

> *The receiving of an application together with its preliminary view to determining the desirability or otherwise of further information requests and/or public notification, its assessment and setting down for hearing are all...mechanical tasks when compared to the high degree of judgment...in terms of grant or refusal of applications* (ibid).

The Reference Group maintained that if a contestable regime were to be established in the processing of applications, no internal contradiction would arise because the role in determining the applications would be left with the local authority. Upton also downplayed the significance of contesting the processing role of the consent process and viewed it as being:

> *...a straightforward amendment to s 34 of the Act to require councils to transfer the functions set out in ss 88 to 98 to any person able to demonstrate...appropriate experience and expertise in resource management* (ibid: 3).

[1] The Ministerial Reference Group Report (1998) can be located on the Minster for the Environment site http://www.arcadia.govt.nz or Ministry for the Environment web site: http://www.mfe.govt.nz

Not all commentators agree with Upton's definition. Law academic Kenneth Palmer (1998: 182) believed that the option of contesting the processing of applications would represent a "...significant shift of power and responsibility from local authorities to the extent that the consent processor will make the important decision as to the notification or non-notification of the application". The provisions for the processing and decision-making relating to resource consents can be found under Part VI of the RMA. Sections 88 to 98 contain the functions and duties involved in the processing of a resource consent application up to, but excluding, the final decision-making of an application. Under s 34 of the RMA, a local authority can delegate powers, roles, or functions to a public committee, council officer, or community board (RMA, 1991).

What also needed to be taken into consideration by policy-makers was the extent to which consents would be contested, that is, what type of consents would be contested and at what level. The Ministerial Reference Group recommended two options on this point: to either limit contestability to certain types of consents, or limit contestability by reference to the category of consent (http://www.arcadia.govt.nz). The latter option was considered similar to the Building Act 1991 where contestability is confined to the issue of a Certificate of Compliance (ibid.). In addition, business developer CDL Lands suggested the option of contesting the processing of permitted activities and consent applications for controlled and limited discretionary activities whereas, applications for changes to land should remain with the local authority (MfE, 1998b: 47). The proposal suggested by Simon Upton[2] was for a relatively simple form of contesting the processing of resource consent applications (http://www.arcadia.govt.nz). Upton's proposal provides the applicant with the choice of processor from either the local authority or a private processor, although a local authority retains most of the control over the registration and appointment of the private processor. Similar to contracting services, the private processor will act as an agent of the local authority. However, private processors will have the power to make notification decisions involving ss 93 and 94, before the application is referred back to the local authority (ibid.).

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[2] See Homepage of Hon.S.Upton http://www.arcadia.govt.nz for a list of discussion documents prepared by the Minister and the Ministry for the Environment on the proposed RMA amendment.

2.3. Origins of the 1998 RMA review

Discontent with the resource consent process under the RMA has not been a recent development. The NZBRT has advocated for a reform of the consent process ever since the Act's inception in 1991. The NZBRT submission on the RMLR (Supplementary Order Paper 22, 1990) lobbied for a consent process framework that would encourage rapid, flexible and cost-effective decision-making. The NZBRT argued:

> *Deregulation would ensure such environmental outcomes are accompanied by enhanced economic growth opportunities, and environmental and developmental trade-offs are made transparent*
> (ibid.: ii).

The concern by the NZBRT regarding the consent process was also expressed in the commissioned report *The Resource Management Act 1991. The transition and business* (Dormer, 1994), which discussed the relationship between the RMA, deregulation, and business. Dormer identified a number of problems affecting business development one of which was the notification provisions (ss 93 and 94) in the processing of resource consents. He claimed the problem with the consent process of the RMA was the delays inherent in the approval process that mirrored the previous regime under the TCPA.

Memon's (1993) work on New Zealand's environmental reforms compares the earlier regime of the TCPA with the current regime of the RMA 1991. Memon describes the TCPA as being a prescriptive regime where developers and businesses complained of the inflexible planning schemes, too liberal public participation provisions, and the delaying tactics employed by some community groups. According to Memon, many businesses had perceived planning as an unwarranted intervention in the market place. Upton expressed similar sentiments in the third reading of the RM Bill in Parliament:

> *...the current law allows for almost limitless intervention for a host of environmental and socio-economic reasons that has resulted in a plethora of rules and other ad hoc interventions that are intended to*

> *achieve multiple and often conflicting objectives, ...in many instances, they achieve few clear objectives, but they impose enormous costs on developments of any kind* (Hansard, 1991. Vol 516: 3018).

Five years after the RMA was enacted it had undergone three amendments, with no review of its performance. Upton claims that the 1998 RMA review was largely part of the National and New Zealand First Coalition Government's Agreement (Upton, 1998). Incorporated into the Coalition Agreement's environmental policy was a review of the RMA for "clarity and action in the decision-making processes"(The Coalition Agreement, 1997: 27). In addition, there was also to be a review of the effects based intent of the RMA "to ensure they are appropriate" (ibid.). The Coalition government considered these two "key initiatives for policy" as being part of a wider plan to, amongst other aims, enhance sustainability of the natural environment (ibid).

Integral to the Coalition Government's environmental policy on the RMA was deregulation. Deregulation formed part of a fundamental principle under the Coalition Agreement which was to:

> *Maintain an open, internationally competitive economy...particularly by managing cost structures downwards and continuing deregulation and policies to stimulate private sector and individual performance* (The Coalition Agreement, 1997: 6).

Additional factors contributed to the 1998 RMA review. Upton claims that the initial stages of the review led to the revelation of growing discontent amongst a percentage of stakeholders on the administration of the RMA (Upton, 1998). Businesses, particularly small businesses, and individuals were the main concern for Upton:

> *...the complaints that hit home didn't come from big businesses...it was the small operators whose complaints really worried me – the people for whom even a serious threat of protracted opposition could spell disaster* (Upton, 1998: 1).

2.3.1. Business concerns

Before Upton's review of the RMA and because of the concerns of business, the Ministry of Commerce (MoC) carried out a survey (Ernst and Young, 1997) of the impact of the RMA on business. The study revealed a number of areas where the Act had a negative impact on business. A large proportion of businesses interviewed believed the Act had diminished their profitability (ibid: 22). The report identified three problem areas for businesses: a lack of accountability and experience in consent authorities; an excessively cautious approach by consent authorities; and obstructive or unreasonable conduct by parties being consulted (Ernst and Young, 1997).

In response to the findings of the Ernst and Young survey, the MoC prepared a set of proposals that it believed would address the problems currently experienced. One of the proposals was to introduce contestability in the consent process to improve the balance between applicant and processor (Daya-Winterbottom, 1998). Applications would be submitted to a council or to a licensed professional who would be responsible for deciding whether an application should be publicly notified, receive any submissions about the application, hold a hearing and make a decision on the application (ibid.). On their part the MoC believed that contestability would lead to an increase in accountability to applicants. Consent authorities taking excessive time, overcharging, or giving unsatisfactory service could run the risk of having their business and reputation eroded (Daya-Winterbottom, 1998: 2).

McShane (1998) also proposed contestability as an option to the current consent process. In response to the findings from the Ernst and Young report, Upton commissioned Owen McShane to write a report with the intention of creating a 'stimulating' report aimed at addressing past debates not exposed before (Upton, 1998: 2). The report is perhaps one of the more renowned documents on the 1998 RMA review because of the radical recommendations proposed. McShane (1998) dealt with a broad-based range of issues advocating numerous changes to the Act. One of the proposals was for the introduction of competition in the consent process aimed at

breaking the monopoly of power which McShane perceived as being presently held by councils in their decision-making capacity.

McShane believed the current consent process is being administered in such a manner that it has serious implications for future business investment and development (McShane, 1998: 28). Because local authorities retain the power to process and decide on consent applications McShane insists this monopoly of power must be broken before any reform to the RMA can eventuate:

> *Councils have been given great power and their record to date demonstrates that many, especially the largest ones who impact on the largest population have chosen to abuse that power* (McShane, 1998: 69).

In support of McShane's report the Wellington Chamber of Commerce (1998) expressed similar sentiments:

> *...business frustrations with the consent and permit process usually lay with the councils concerned, rather than the Act itself...difficulties include the way local authorities interpreted the Act in their district plans. It is evident that some [planners] have difficulty getting their minds around the 'effects' focus of the RMA and try and sneak zoning and similar TCP restrictions into their plans* (Dominion, 9 April, 1998).

2.3.2. Comments on the review

As part of Upton's formula to create a 'stimulating debate' and to complement the McShane report, three invited commentaries by Bob Nixon, Ken Tremaine, and Guy Salmon were made on the McShane report (Upton as cited in McShane, 1998). The written commentaries provide alternative perspectives to those of McShane. In unison, Nixon, Tremaine, and Salmon agreed that radical changes may not necessarily alleviate the problems outlined by McShane (in McShane, 1998). Nixon states: "...poorly thought out and rushed amendments have the nasty habit of being open to quite the opposite interpretation of what was originally intended" (McShane, 1998). Tremaine

points out that any 'radical' amendments to law and changes in practice must undergo a cost-benefit analysis (ibid.). Salmon is convinced that not only is a good grasp of economic theory needed in promoting reform, but also:

> *...a commitment to exploring and understanding the conditions, experience, and expectations of the society in which the reformed law is intended to work, [which] appears to be lacking in the McShane report* (McShane, 1998)

Each of the three commentaries however had different perspectives on the proposed recommendation for a contestable consent process. Nixon's argument centres on pro-business market ideas:

> *McShane consistently advocates the concept of competitive regime for resource consent processing...all arguments I have seen in support of competitive processing relates to the* ***cost*** *and* ***efficiency*** *of the service that may be provided as a result. It has not...been promoted as a means of ensuring that* ***different kinds of decisions*** *are made* (McShane, 1998).

Nixon also points out that the possibilities for consent processors to favour developers, which could bring the whole system into disrepute (ibid.).

Tremaine's argument on contestability is also based on a market framework. Tremaine supports the notion of the proposal noting that contestable consent processing does have its advantages. He suggests the integration of building and planning statutes similar to that adopted in New South Wales, Australia: "the recently integrated building and planning laws into one statute with contestable consents being permitted for all complying uses" (ibid.). However, Tremaine stresses the need for vigilance in the area of resource management practice improvement:

> *In New Zealand's devolved plan and implementation framework, special effort needs to be applied in the area of policy consistency, the*

> *appropriate level of regulation and administrative integrity in relation to plan administration* (McShane, 1998).

Under a different framework, Salmon (in McShane, 1998) argues against the introduction of any type of contestable consent process, foreseeing problems in achieving accountability to elected representatives, and quality control. Removing a council's power to decide on consent applications "...would seriously increase the risk of non-achievement of legitimate objectives". McShane's proposal has also received criticism from within the legal profession as lacking any level of substantive analysis as to how introducing competition into consent processing would improve the efficiency and consistency of the present decision-making process (Janissen and Ghaemaghamy, 1998:1).

2.3.3. Tangata whenua perspective

Missing from the 1998 RMA review has been a tangata whenua perspective. The body of literature written on the RMA 1998 review has reflected business and applicant concerns to the exclusion of Maori issues. The commentaries of Nixon, Tremaine and Salmon also did not include a discussion about the implications for tangata whenua involvement in resource management. McShane specifically did not address questions of tangata whenua consultation or participation in environmental management even when assessing the heritage provisions of the Act. The PCE (1998) commented on the McShane report's failure to recognise Maori issues:

> *The* [McShane] *paper did not demonstrate any understanding of the values or perspectives of tangata whenua, or of any close interconnections between the biophysical environment and the cultural and heritage values of natural taonga* (PCE, 1998: 5).

McShane's report also did not acknowledge the statutory requirements regarding Maori relationships with taonga in s 6(e), kaitiakitanga in s 7(a), and the principles of the

Treaty of Waitangi in s 8; or the requirements to consult with tangata whenua (ibid.: 5). The report stated that a number of development proposals have been:

> *...characterised by lengthy and costly delays, brought about by protracted debate and/or litigation in respect of tangata whenua concerns, aspirations, mandate to represent iwi and issues relating to the scale and timing of consultation (ibid.).*

However, the Ministerial Reference Group believed that iwi consultation was an issue that required further attention (http://www.arcadia.govt.nz). The Reference Group discussed a number of options. Some amongst others were: the removal of ss 6(e), 7(a) and (aa), and 8 from the RMA; or to define better the scope of s 8. The group did not reach a final recommendation but stated clearly that iwi consultation was an issue that required further consideration by the Crown as Treaty partner.

2.3.4. The RMA Amendment Bill 1999

The amendment to the RMA was designed to improve the implementation of the Act. The proposed changes to the RMA were intended to "reduce duplication, uncertainty and costs of compliance, and to improve the practice and procedures of the Act" (Upton cited in http://www.arcadia.govt.nz). In terms of the contestability proposal, it was designed to expose councils to the "possibility of competition...to create incentives for continued efficiency of processing within the best performing councils and improved efficiency within the poorer performers" (ibid). Some of the important changes included in the contestability proposal give a consent authority the power to decline the granting of a resource consent in situations where the consent application could have been notified. A local authority would have to "approve any person who applies to that local authority for appointment as a consent processor and who the local authority considers is suitable to be a consent processor" (Upton cited in http://www.arcadia.co.nz). These changes amongst others are considered by the Ministry for the Environment as "improvements to the RMA which should not compromise environmental outcomes or reduce the opportunities of public participation" (ibid.).

2.3.5. The resource consent process: the (non-) notification provisions

The resource consent process is an important context where the public are exposed to the RMA as applicants, affected parties, or public submitters. The process was designed around a regulatory regime that allowed a council to process small insignificant applications on a non-notified basis under s 94 of the RMA. Section 94 is aimed at saving time and costs for the applicant seeking a resource consent, on the proviso that there are minimal effects to the environment, and/or other parties.

Section 94 of the RMA also provides consent authorities with a substantial degree of discretion in determining whether to notify applications for resource consent (MfE, 1996). According to the MfE, when the Act was drafted it was anticipated that local authorities would take a cautious approach in ensuring that the relevant tests of s 94 had been met. However, there is the misconception that s 94 is the starting point in the processing of consent applications; when in fact it is s 93 (MfE, 1997: 5). Section 93 presumes that local authorities shall ensure that all resource consent applications will be notified particularly, for discretionary and non-complying activities.

Section 94 is considered a controversial provision because it enables consent authorities to exercise their discretion not to notify an application where certain exceptions are met (see Chapter One) (MfE, 1997: 11). Brabant (1997: 73) compares s 94 to equivalent provisions under section 65 of the TCPA which required applications under that part of the Act to be made with notice in accordance with regulations in force under the Act, "unless the district scheme provides, in accordance with s 36(7) of this act, that the application maybe made without notice". In contrast, s 94 of the RMA provides the consent authority with the discretion to determine whether an application may be dealt with on a non-notified basis (Brabant, 1997: 73).

Certain sectors perceive s 94 as an advantage because of the large number of consent applications processed through the non-notification facility (Palmer, 1996). The findings from the MfE (1996a) report revealed a turnaround in the number of complaints regarding local authorities notification practices since 1994 (MfE, 1994:

23). An additional study (MfE, 1996b) carried out of local authority practices identified disparities in councils' application of ss 93 and 94 in assessing consent applications. For example, in 1995/96 the total number of notified processed consents were 3255 compared with 40,590 non-notified processed consents (MfE, 1996b: 28). Between 1996-1998, the number of non-notified consents have increased: in the 1996/97 year approximately 55,000 of the total consents processed were non-notified (MfE, 1998). Similar figures were recorded in the 1997/98 year (MfE, 1999).

2.4. Research on Maori participation in the consent process

Research on Maori participation and consultation in the consent processes of the RMA has been carried out by the Ministry for the Environment (1996, 1998) and the Parliamentary Commissioner for the Environment (1992, 1996a, 1996b, 1998). Little research looking at Maori perspectives and experiences of the resource consent process has been carried out by iwi organisations. Although Nuttall and Ritchie's (1995) work assessed Maori participation in the planning and policy-making processes, it did not discuss participation in the consent process. Matunga's (1994, 1998) work discusses Maori participation in the RMA but only touches on Maori participation in the resource consent process.

The MfE (1996: 11) defines the consent process as "...providing opportunities for ensuring Maori environmental outcomes are achieved, and that adverse effects on the environment are avoided, remedied, or mitigated". The first part of this chapter revealed the main problems facing consent authorities applying the non-notification provision. This is also a problem that affects iwi groups due to the resource consent process being one of the main contacts for Maori with the RMA.

A report prepared by MfE and Te Puni Kokiri (TPK) (1996) *The Duty to Consult*, explored the number of iwi responding to resource consent notifications, and how local authorities recognised their input. MfE and TPK (1996: 9) acknowledged this objective proved difficult due to a small number of iwi active in the consent process at the time. MfE and TPK described the resource consent process as being a significant issue for consultation between iwi and councils noting that the consent process is "...a process

which requires particular attention, as it is an important and ongoing point of contact between councils, iwi authorities, and other parties" (ibid.). When the iwi surveyed were asked about the effectiveness of the consent process in terms of participation, many believed the consent process was "...often protracted and resource consuming, and had the potential for costs to escalate" (ibid.:9).

Similarly, the MfE report *He Tohu Whakamarama* (1998a) was able to identify interactions between local government and Maori organisations in resource management processes. Several issues concerning the relationship between local councils and Maori in the assessment of consent applications were scoped such as the level of notification, adequacy of information, timeframes for response, and funding. Just over half the respondents surveyed by the MfE believed they were inadequately notified on resource consents that impacted on them, but the report neglected to expand on the contributing factors or causes to this problem (MfE, 1998: 15).

When compared with the former report prepared by the MfE and TPK (1996), these findings in the MfE (1998) report identified an increase in the number of iwi groups participating in the consent process across all local authorities as well as an increase in the number of consents affecting iwi organisations. However, the Ministry noted that an inconsistent level of consultation was being carried out with iwi in the various resource management decision-making processes including the resource consent process (MfE, 1998a).

Advocating for more recognition in tangata whenua participation, the Parliamentary Commissioner for the Environment has undertaken several studies (PCE, 1992, 1996, 1998) in response to tangata whenua concerns. One of the more comprehensive studies on tangata whenua participation in the resource consent process *Kaitiakitanga and Local Government: tangata whenua participation in environmental management* (PCE, 1998), signifies the importance of the decision-making ability local authorities have regarding consent applications.

The PCE emphasised the importance of local authorities using their discretion wisely when consulting with tangata whenua if there are significant values at stake:

> *...a council's decision to notify an application for resource consent or not, is important as that decision determines whether there will be an opportunity for tangata whenua involvement* (ibid.: 20).

Using several case studies, the PCE was able to gain insight into the working relationship between Maori and councils. Maori respondents surveyed expressed their annoyance at the measures taken by councils to process the consents on a non-notified basis. The PCE listed a number of incidences where non-notified applications affected Maori. These included dwellings, and other constructions, roads and paths, forestry and farm projects, subdivisions impacting on environmental heritage and values important to Maori (ibid.:95). There were also concerns by respondents about the environmental effects of activities that are classed as permitted activities. The PCE noted:

> *There is concern that regular maintenance programmes such as weed-spraying or gravel clearance can have significant environmental effects... such work, [which has] not been managed through any resource consent process, is not subject to consultation or opportunity for tangata whenua... to provide their views* (ibid).

2.4.1. Consultation

Integral to the preceding discussion on participation is consultation. How consultation is implemented, defined and interpreted by a local authority determines the type and level of consultation with Maori in the resource consent process. Best's (1999) article on the consultation obligations of public administrators describes consultation as:

> *providing a measure of protection to the rights, interests and/or liabilities of those likely to be affected by administrative decision-making. If effective, it improves the likelihood that decision-makers will act*

> *reasonably, fairly, and according to law and should ensure that higher quality decisions are made* (Best, 1999: 192).

Best believes that consultation is dependent on a number of factors: the duty to consult as has happened in past practices; a promise that there will be consultation; or from a statutory requirement to consult (ibid.:193). Best's discussion does not specifically address consultation with Maori, however Best maintains that the requirements for consultation are the same between groups no matter the circumstances.

Consultation with Maori in conservation management formed a large part of a report published by the Department of Conservation (DOC) on public participation in conservation management (1998). DOC identified Maori views of consultation as being similar to non-Maori, that is, "...consultation is a two-way process that occurs up to the decision-making stage" (DOC, 1998: 28). On the other hand, DOC considered partnership as being different from consultation because the department would have to "involve iwi in decision-making, implementation, and evaluation phases" (ibid.). According to interviews carried out, there was a general opinion that consultation processes with iwi in the past were considered as being "ineffective as a whole, although there have been some good consultation experiences and...overall improvement" (DOC, 1998: 29). The problems have largely been attributed to DOC structures, policies, practices, and resources as well as outstanding Treaty claims (ibid.).

Liaison and consultation with Maori by local government has been described by Local Government New Zealand (LGNZ) in its recent report *Liaison and Consultation with Tangata Whenua* (1997), as being "complex and fluid" (LGNZ, 1997: 15). LGNZ maintains that local authority interest in and responsibility towards tangata whenua consultation has "...increased since the RMA became law". However, LGNZ also adds that Maori are becoming frustrated with the current consultative processes under the Act because of a "...lack of formal protocols concerning implementation and practice" (ibid.). LGNZ identified a number of consultation strategies that were currently employed by local councils. These ranged from formal (plans and charters), to

informal (unwritten understandings between councils and Maori). In an earlier report, the MfE and TPK (1996: 8) suggested that councils choose consultation mechanisms that reflect their perception of what a desirable relationship with iwi should be. However, LGNZ (1997) also mentioned that the uses of wide-ranging consultation mechanisms by local authorities are considered by some iwi as showing a lack of consistency in consultation procedures.

There is also a need for public administrators not to over-consult with user groups. Best stresses the need for public administrators to be aware of the limits of their consultation obligations so that "... their day-to-day operations are not unduly hampered by concession to excessive consultation demands" (Best, 1999: 192). However, in the case of local authority consultation with tangata whenua in resource management, Ombler (1998) argues that local authorities are not giving enough time to consult with iwi on resource management issues. A comment made in Ombler's article succinctly states iwi's perspective on consultation with local authorities "...to have good consultation you need to devote time" (Reisterer quoted in Ombler, 1998: 12).

2.5. The principles of the Treaty of Waitangi

The principles of the Treaty of Waitangi were first referred to in legislation by the passage of the Treaty of Waitangi Act 1975. In the Act's long title, it states it is an Act:

> *...to provide for the observance and confirmation of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.*

The principles of the Treaty were intended to overcome the problem associated with inconsistent translations of the English and Maori texts of the Treaty so that the spirit rather than the literal words would be applied when interpreting it (Crengle, 1993). Crengle points out that the choice of Parliament to express the principles rather than the Treaty reflects that the English and Maori texts are not translations one of the other and

do not convey precisely the same meaning" (ibid.: 8). Similarly, Durie (1998: 29) states that the decision to use the principles of the Treaty of Waitangi was because the Treaty provisions were not sufficiently explicit in either the English or Maori text. Durie adds that there was also the added complication with the differences between the two texts, which meant that the provisions could not be determined with any precision (ibid.).

The Waitangi Tribunal initially interpreted the principles as they progressed through the first four reports on the claims for Motunui, Kaituna, Manukau, and Te Reo Maori. However, Renwick (1990) argues that although the Waitangi Tribunal stated the principles of the Treaty in relation to claims it has heard, the Tribunal's interpretations were confined only to its jurisdiction. The New Zealand Maori Council identified ten principles of the Treaty, however, it is the first legal interpretation of the principles by the Court of Appeal (*NZ Maori Council v Attorney General* 1987, CA 54/87), that is identified by Durie (1998: 29) and Crengle (1993:8-16), as important when considering the interpretation of the RMA.
These are:

- **The essential bargain** (the cession by Maori of sovereignty to the Crown was in exchange for Crown recognition of Maori rangatiratanga. The right of the Crown to make laws in exchange for the obligation to protect Maori interests). For local authorities acting under the RMA, Crengle considers the powers and functions of local government are exercises of kawanatanga (ibid.). Article I of the Treaty conferred on the Crown the right to make laws to protect the public interest. Under the RMA, the Crown devolved some of its law making and regulatory responsibilities in the management of natural resources to local government. Regional and territorial authorities are charged with producing policy statements and district plans that "have the force of regulation....determining the conditions for use and access to resources" (ibid.:10).

- **Exclusive possession and Rangatiratanga** (Maori were to retain chieftainship/ rangatiratanga over their resources, taonga, and full rights of citizenship. The

crown has an obligation to recognise tribal rangatiratanga). Article II guaranteed the continued right of hapu to manage and control their resources in accordance with their customs and having regard to their cultural references. According to Crengle (1993: 11), the ability to exercise rangatiratanga over tribal resources "goes to the heart of the mana of the iwi". Rangatiratanga is expressed in decisions that reflect Maori priorities and values, and is given practical effect in the application of customary regulatory practices and control. Crengle believes that local authorities are able to provide significant opportunities for the expression of rangatiratanga: s 33 of the RMA provides a local authority the transfer of powers and functions to an iwi authority. Crengle (1993), and Nuttall and Ritchie (1995) consider s 33 to be an opportunity for the expression of rangatiratanga.

- **Partnership** (the Treaty requires a partnership and the duty to act reasonably and in good faith). The principle of partnership is arguably (PCE, 1988) the most important principle. Inherent in it is the notion of reciprocity: "the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other possessions" (Crengle, 1993: 13). The courtesy of early consultation is an example of partnership responsibility.

- **Active protection** (the duty extends to active protection of Maori people in the use of their resources and other guaranteed taonga to the fullest extent possible). The duty of active protection extends to those interests that are guaranteed to Maori by the Treaty, primarily the continued authority to exercise rangatiratanga over natural and cultural resources. Conservation of and the right of how to use natural resources are two of the rights guaranteed under this principle (Crengle, 1993).

The Court of Appeal principles were based on the principles developed by the Waitangi Tribunal but according to Kelsey (1989: 128) were "in direct conflict with those of the Tribunal". This was because the Court of Appeal had given the principles a totally new meaning as to how they were to be understood, therefore watering down the interpretation given by the Waitangi Tribunal (ibid.).

In the context of the RMA, Crengle considers it important for decision-makers acting under the RMA both to give consideration to the principles of the Treaty that have been defined by the Waitangi Tribunal or the Court of Appeal (1993: 10). This is because there is a legal requirement by decision-makers under s 8 of the RMA to take into account the principles of the Treaty of Waitangi. In terms of priority, the principles of the Treaty are located in Part II of the RMA. Beverley (1997) however, claims that s 8 is not the sole consideration in Part II and is subject to the overriding purpose of the Act as identified in s 5, which is: "to promote the sustainable management of natural and physical resources".

2.6. Section 8 and consultation

The provision for recognition of the principles of the Treaty of Waitangi is found in s 8 of the RMA, which states:

> *8. In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

Beverley (1997: 126) notes: "on the surface, s 8 appears to be drafted in plain terms and is not difficult to understand. A closer scrutiny reveals that the wording employed is subject to a degree of inherent and inevitable uncertainty". Chen and Palmer (1999) claim that the phrase 'to take into account' (s 8) is not as strong as the phrases such as 'have particular regard to' (s 7), and to 'recognise and provide for' (s 6) of the RMA. However, Chen and Palmer (1999: 70) maintain that the wording of s 8 of the RMA does not compare to s 9 of the State Owned Enterprises Act (SOE Act) 1986. Durie (1998) also believes that s 9 of the SOE Act is arguably stronger as it states that: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

In support of the wording in s 8 of the RMA, Crengle (1993: 21) contends that the duty to take into account is stronger than the duty 'to have regard to' used in the Crown

Minerals Act 1991. Crengle argues that: "in terms of s 8, the use of 'take into account' indicates that in every case the principles of the Treaty must be considered and weighed against other factors in making a decision" (ibid: 21). The effect of the s 8 duty is to emphasise further the value of local authorities seeking to inform themselves as to the meaning and application of the principles of the Treaty to the facts of the particular case. In doing so, local authorities will normally include a consultation process with tangata whenua to check the cultural significance of the resource as well as the opinions and objectives of tangata whenua on a particular resource. Indeed, without such evidence of consultation, Crengle believes that local authorities may find it difficult to demonstrate their compliance with the duty set out in s 8 of the RMA.

Section 8 incorporates the duty to consult as part of the Treaty principle of partnership. In the resource consent context there are differences in interpretation judicial and general as to who should be consulting with tangata whenua. The following discussion highlights these differences which are derived from pertinent case law on tangata whenua consultation in the resource consent process.

2.6.1. Judicial opinion on Section 8

Section 8 has been the subject of judicial consideration over the past six years. One of the recent non-judicial contributions comes from Chen and Palmer (1999: 69). The authors claim there is a clear statutory obligation for local authorities to consult with tangata whenua in the preparation of polices and plans; however, "there remains the question as to how the duty is fulfilled and whether local government has an obligation to consult [tangata whenua] in other contexts, particularly with respect to resource consents". One of the principles of the Treaty is the duty of consultation with Maori. Randerson (1997: 89) believes that in practice, the duty to consult will mean that Maori are to be involved in the process which leads to the making of decisions under the Act as well as having their interests taken into account. Randerson points out that the duty to consult with tangata whenua is "particularly important in relation to the policy-making and planning stages but also in respect of individual applications for resource consent" (ibid.: 89). Further emphasis on consultation with tangata whenua in the resource consent process is given by the requirement that an assessment of

environmental effects shall accompany applications for resource consents. According to the MfE (1998a), it is expected that those exercising responsibility under the RMA will consult with Maori in resource management processes. Clause 3(1)(d) of the First Schedule of the RMA places an express obligation on local authorities to consult with tangata whenua when preparing a policy statement or plan. In the resource consent context, there is also a requirement under the Fourth Schedule of the RMA for consultation with tangata whenua if they are identified as an affected part in the consideration of applications for non-notified resource consents (MfE, 1998a).

The Fourth Schedule states that an applicant should include in their assessment of environmental effects:

> *(1)(h). An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted.*

However, the requirement to consult has not been clearly defined. Chen and Palmer (1999: 72) claim that the duty to consult has been amplified by the fact that judges are struggling with the issue as to whether the consultation with tangata whenua in the resource consent process should be carried out by the consent authority, the applicant or a council officer.

Beverley (1997) refers to the broad approach taken in *Gill v Rotorua District Council.* [1993] 2NZRMA 513 (Planning Tribunal)[3] where the Tribunal considered an appeal against a decision by the Rotorua District Council to grant a resource consent allowing a residential development in a rural zoning. The Planning Tribunal noted that the council did not actively consult with tangata whenua over the proposal. Although the council had notified, tangata whenua of the application Judge Kenderdine considered that "This [notification] is not what the legislation requires. The council's actions appear to have been merely passive". Beverly (1997: 127) argues that the *Gill* case raises the issue that s 8 imposes a duty of consultation on the council.

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[3] In 1996, the Planning Tribunal changed its name to the Environment Court.

The *Gill* case was endorsed by the High Court in *Quarantine Waste (NZ) Ltd. v Waste Resources Ltd.* [1994] NZRMA 529. While Judge Blanchard found that the applicant had consulted with tangata whenua it was also noted that the consultation obligation falls on the council officers, not the resource consent applicant:

> *...second-hand consultation, with a local authority leaving it to an applicant to consult with Maori interest raises the potential for distortion by an applicant of their views is obvious...it should be emphasised that the statutory and Treaty obligation of consultation is the consent authority - as the local government agency - not that of the applicant.*

Chen and Palmer (1999) argue that where the duty arises from s8, it is the responsibility of the consent authority and not the applicant for resource consent to consult. This is due to the risk of distortion of Maori views if conveyed to the consent authority by the applicant.

2.6.1.1. Consultation by the consent authority or council officer

The *Gill* case raised the question whether consent authorities or council officers should undertake consultation. However, Beverley (1997), and Chen and Palmer (1999) claim that subsequent decisions have rejected the implication of the consent authorities' obligation to consult with tangata whenua. In *Rural Management Ltd. v Banks Peninsula District Council* [1994] NZRMA 412-424, the Planning Tribunal dismissed the opinion that the consent authority was under an obligation to consult with Maori prior to hearing an application. Judge Treadwell stated that consent authorities should not consult unilaterally with parties to the proceedings.

However, in *Whakarewarewa Village Charitable Trust v Rotorua District Council* [1994] W 61/94 (Planning Tribunal) the Tribunal sought to define that the duty identified in *Gill* was not vested in the consent authority but in the officers of the council. Beverley (1997: 134) notes it is the council officer who is "vested with a consultative obligation under s 8 of the RMA". From a different perspective, Chen and Palmer (1999: 73) argue that an essential element of consultation is the obligation to

listen with an open-mind, which infers that the listener is able to control the outcome of the decision. The authors continue to state that:

> *This element cannot accrue to council officers in the context of resource consent applications, as council officers do not make the final consent decisions. Council officers making these decisions would compromise the consent authority quasi-judicial function and violate principles of natural justice* (ibid.: 73).

2.6.1.2. Consultation by a consent applicant

As previously discussed the Fourth Schedule of the RMA states that the applicant should include in their assessment of environmental affects some identification of consultation undertaken with affected parties. Beverley (1997: 157) notes that a problem with the council officer relying upon applicant consultation is the fact that consultation by an applicant is not mandatory under the RMA because the Fourth Schedule sets out matters that *should* be included. Beverley claims that this consultation by an applicant for resource consent appears to be discretionary rather than mandatory (ibid.: 158). Section 88 (6)(a) of the RMA states that the assessment shall be in such detail as corresponds with the scale and significance of the potential effects of the environment.

According to Beverly this clause indicates that the more complex the application, the more likely it is that an applicant should conduct consultation because a consent authority may require explanation of consultation undertaken by an applicant (ibid.). In *Aqua King Ltd. v Marlborough District Council* [1995] W 19/95, it was noted that the consent authority could in fact require an applicant to carry out further consultation if it was not satisfied with that which had occurred. The Planning Tribunal stated that: "for consultation to be meaningful requires more than sending out information to the various iwi about an application" (ibid. 3). A council officer does have a range of means of ensuring that an applicant conducts consultation with tangata whenua. Beverley believes that an applicant who fails to consult with tangata whenua runs the risk of having the notification or determination of the application delayed (1997: 159).

The scope of the duty of consultation and the circumstances in which it will arise is, according to Chen and Palmer, an issue that remains unsettled at law (Chen and Palmer, 1999). This means that consultation should aim to give tangata whenua effective input into the resource management processes by recognising their special status within the RMA (ibid.).

2.7. Conclusion

The aim of the 1998 RMA review was to address issues that were not raised at the drafting of the RM Bill in 1988 and to address the discontent amongst the business community concerning the way in which local authorities administer the RMA. Concern over the plans prepared under the RMA centered on the regulatory controls mirroring those of the previous TCPA regime particularly controls over the processing of resource consent applications. The RMA 1998 review by McShane (1998) identified a number of options to solve the perceived local councils' monopoly in the consent process. The contestable proposal opted for opening the process up to competition where private processors could compete against local councils. The objective was to achieve greater accountability and a more cost efficient consent process.

The resource consent process was designed to increase the efficient processing of applications with the inclusion of a non-notification provision where minor applications could be processed without the need for a public submission process. Pressure for councils to resort to extensive use of this provision has affected the ability of Maori to participate as an important stakeholder and as a Treaty partner.

The chapter has revealed that one of the difficulties associated with Maori participation is the type and level of consultation implemented and practiced by local authorities. Consultation can take a variety of forms. Local authorities, moreover, determine how and when Maori participate in resource management decisions affecting them. Section 8 of the RMA requires that local authorities must take into account the principles of the Treaty of Waitangi in decisions on resource management. This includes a requirement for local authorities to consult with tangata whenua as part of the principle of partnership. However, in terms of the tangata whenua consultation in the resource

consent process, there is a divergence in judicial opinion as to who should be consulting with tangata whenua. This difference of interpretation has hampered the ability of Maori to participate as a Treaty partner in resource management. The question explored in this thesis is whether contestability would create opportunities for Maori participation in the consent process. The following chapter will discuss the methodology, and choice of focus of the research undertaken to answer this question.

Chapter Three
Research Design

3.1. Introduction

This chapter discusses the methods used for gathering and analysing information relevant to this thesis. It begins with a discussion on the debates surrounding cross-cultural research specifically research by a non-Maori researcher on Maori perspectives. Issues such as accountability, cultural sensitivity, and the role of the individual researcher, arising in these debates shape the research design of this study. Integral to these debates are a number of political and ethical issues. Following this is a discussion of the empirical phase of the research. This sets out the rationale for the documentary analysis and survey research, and details the procedures used in both phases. The discussion then focuses on the methods used in analysing the information necessary for answering the research question. The final part of the chapter covers the ethical issues involved in the survey research.

3.2. Cross-cultural research

Cross-cultural research concerns the study of one ethnic group by another ethnic group. In this instance, it involves Maori and non-Maori. Cross-cultural research differs from earlier colonising forms of research on Maori society carried out by non-Maori because these forms are considered to have categorised, romanticised and added to the colonisation of Maori communities. This thesis is cross-cultural research because I am not of Maori descent and wish to research Maori. Therefore the debates on cross-cultural research have developed and shaped the choice of focus of this thesis, the research design, and the incorporation of a Maori perspective.

Research is about satisfying the need to know, and the need to extend the boundaries of the existing knowledge through the process of systematic inquiry (Smith, 1985). Knowledge in the Western tradition is conceptualised, recorded and validated. The way in which research is carried out has enabled knowledge to be produced and articulated in a scientific and mono-cultural way (Smith, 1985: 47). Marsden (1988) describes the

western scientific way as producing 'know how' but this is nothing without the 'know why'. Maori knowledge is philosophical and metaphysical, "it is the reach of thought beyond the foreground of life situations, it is the attempt to understand all time and existence" (ibid.: 5).

Historically for Maori , European conceptions of knowledge and research have meant that, while being considered primitive, Maori society has provided fertile ground for research (Smith, 1998). The question as to whose knowledge was being extended by such research was, according to Smith, of little consequence as these researchers described, explained and recorded their accounts of various aspects of Maori society. It may be that this type of research was validated by science but it did very little to extend the knowledge of Maori people. Instead it left a "foundation of logically laden data about Maori society, which has distorted notions of what it means to be Maori" (ibid.).

Merata Mita (1989) describes research on the Maori world-view as like being placed under a microscope and dissected by Pakeha scientists. Mita states:

> *We have a history of people putting the Maori under a microscope in the same way a scientist looks at an insect. The ones doing the looking are giving themselves the power to define and describe* (Mita, 1989: 30).

Te Awekotuku (1991) maintains the view that in order to avoid the cultural imperialism of past research practices and researchers, research itself should be responsive to those Maori needs which have been expressed from within the community and not needs perceived by those outside. Te Awekotuku believes that the knowledge gained from the research should benefit the community, the activity should have value, and be relevant to the people studied (ibid.).

Bishop (1996: 145) contributes to this argument adding that:

> *Researchers in Aotearoa/New Zealand have developed a tradition of research that has perpetuated colonial values, ...there has developed a*

social pathology research approach in Aotearoa/New Zealand that has implied, in all phases of the research process, the inability of Maori culture to cope with human problems, and proposed that Maori culture was, and is, inferior to that of the colonisers.

3.2.1. Who should do the research?

Cross-cultural research involving Maori should be able to identify and make available knowledge of the Maori world, Maori perspectives and perceptions, cultural values and attitudes in areas which are seen as significant in Maori terms (Stokes, 1985: 6). The recent reassertion of Maori aspirations and cultural practice has shown a will by Maori to uphold the validity and legitimacy of matauranga (traditional knowledge) Maori.

Culturally sensitive research must take into account the problems and issues that concern the people involved in the research. It should inform the researched about these problems and issues in a way that respects and protects their mana. Cultural sensitivity needs to be infused throughout the research project; from the conceptualisation of the research question, to its design, its delivery and its final presentation (Smith, 1989: 53, and 1998). Central to this is the argument concerning the attributes of the researcher: who should be doing the research in the field Maori, or non-Maori? Perspectives on this argument are polarised. On the one hand, Stokes (1985) argues that the racial or biological origin of the researcher is not important. To Stokes what matters and is essential, is that the researcher can operate comfortably in both cultures, and preferably bilingual. On the other hand, Walker (1990) firmly believes that only people of Maori descent should undertake research with Maori in the research field. Walker (1990) queries the methods of information collected by non-Maori researchers, noting a frequent lack of consultation or trust building in the initial stages of the project and that there is an obvious need for more sensitivity on the part of the researchers. Weighing up these opposed views, I consider that the overriding requirement is that the researcher, Maori or non-Maori, be sensitive to needs of the research group and the wider community it represents. This research has attempted to

reflect this requirement through its design and choice of methods, which are discussed in the remaining sections of this chapter.

3.3. Ethical and Political Issues

Initially, the intention of this thesis was to carry out research on iwi and hapu involvement in the RMA consent process. In the early stage of the research design, I sought an opinion from a member of a local hapu about the implications of doing cross-cultural research on the proposed topic of Maori participation in the RMA. A strain on hapu resources (financial and technical) was raised as an overriding problem for iwi and hapu who participate in resource management processes (pers.com., 1999). Similarly, the PCE (1998) also identified inadequate resourcing as an issue affecting the ability for tangata whenua to participate in resource management consultation. In some cases, councils have contributed towards funding tangata whenua consultation in resource management processes but these have been described by the PCE (1998) as being unreliable and inconsistent.

Presently there are problems experienced by tangata whenua with regard to the consultation methods employed by some local authorities. TPK and MFE (1996) commented that the consultation directive contained in legislation or carried out as a Treaty obligation has resulted in situations where a single iwi may be involved in consultation with several local authorities and government agencies at one time. They note that for some iwi authorities this situation has caused 'consultation fatigue' and frustrated attempts to register Maori concerns where needed. The Department of Conservation (DOC) (1998) also identified this issue as a concern for iwi. Iwi often consult with a number of local authorities on district and regional plans and policy statements, DOC agencies on conservation plans, and Ministry of Agriculture and Fisheries (MAF) on coastal policies, all at the same time (TPK and MfE, 1996: 11). While agencies place demands on iwi to respond in consultation exercises, insufficient financial resourcing has also accompanied these demands (ibid).

In light of this, it was decided that to approach iwi and hapu directly might place further demands on these groups, and raise ethical questions concerning cross-cultural research.

Instead, the data for this study was collected via a survey of iwi liaison officers and through an analysis of already existing documents which reveal the perspectives and experiences of Maori in relation to resource consent processing.

3.4. Empirical research

Data was collected by two phases of information gathering: documentary analysis and a survey. The use of both quantitative and qualitative research strategies provided an opportunity to understand some of the processes that contributed to the decisions people make in their personal and professional lives. Berg (1998: 7) describes qualitative research as "properly seeking answers to questions by examining various social settings and the individuals who inhabit these settings".

3.4.1. Phase One: Documentary analysis

Secondary data collection has a rich tradition in the social sciences, Frankfort-Nachmias and Nachmias (1996: 305) claim that:

> *...social scientists are increasingly using data collected by other investigators and institutions for research purposes that differ from the original reasons for collecting data.*

Berg (1998) defines the use of secondary data analysis as an unobtrusive method in that it does not require an intrusion into the lives of the subjects. This was an important issue because it enabled data to be gathered for this thesis without intruding on the often hectic schedules of iwi/hapu representatives participating in resource management issues.

3.4.1.1. Document Selection

There were several factors involved in the choice of documents for the analysis. Using documents available in the public domain addressed the access and availability issues. But it was also unrealistic to obtain documents that would be difficult to access given

the timeframe of the research. It was important that the documents related to the topic and aims of the research (outlined in Chapter One) and contained the necessary information on tangata whenua participation in the resource consent process. Other factors included: the time and costs involved in accessing information from groups or individuals through interviews or a survey over a wide geographic areas were large compared to accessing documents.

3.4.1.2. Regional Policy Statements and District Plans

Policy statements prepared by regional councils (RCs) and unitary authorities (UAs) and district plans prepared by territorial local authorities (TLAs) were selected for analysis. These documents identified the council policies, objectives and aims in resource management processes under the RMA. The significance of these documents is that policy statements and plans contain policies on tangata whenua participation in resource management processes. The RMA directs regional councils under s 62(b) to state in their Regional Policy Statements matters of resource management significance to iwi. However, while the Act does not explicitly direct TLAs how to carry out this direction they do have an obligation as a local authority, under clause three of the First Schedule, to consult with iwi when preparing plans. These consultation processes used when preparing plans and policies set the ground-rules for consultation in the resource consent process under the current regime and under the proposed contestable consent regime.

The number of policies and plans analysed for this study differed according to the number of councils. For example, there are 72 TLAs, compared to 12 RCs and 4 UAs. All regional policy statements were analysed (16), and a sample (17) of TLA district plans were studied which were purposely selected from three regions. These are:

- Manawatu-Wanganui region, selected for ease of accessibility has seven TLAs;
- Hawkes Bay region, selected because of accessibility and evidence of a proactive working relationship being established between iwi and some councils has four TLAs; and

- Southland region, selected because of the Kai Tahu Claims Settlement and the effect this could have on contestability has three TLAs.

3.4.1.3. Iwi Management Plans

Iwi management plans identify iwi resource and environmental aims and aspirations amongst other matters. Because of a lack of resources, some iwi and hapu have not prepared iwi management plans or do not have copies of their iwi plans available in the public arena. The intention was to select a sample of plans from the regions under the study. As the research progressed, only six plans from inside and outside these regions were available and these were used for the study.

Various methods were employed to source the iwi management plans, including library access at Massey University and Palmerston North City Library, data-base checks, inter-loan requests from other university libraries, written requests to local councils and iwi organisations. Iwi management plans were identified from previous studies, regional policy statements, and district plans. Several of the iwi plans were no longer available (out of circulation) or were kept within the iwi.

3.4.1.4. Data collection

Data was collected through content analysis of information in the selected documents. It was intended to use only the chapters or the relevant section on tangata whenua issues, however, not all documents were formatted in this way. Initial scans of the documents revealed that several plans and statements had incorporated tangata whenua policies throughout the document. Iwi management plans varied in size, scope, and availability. All the information contained within each document was scanned. The contents of policy statements and district plans were examined under a set of themes: contestability, contracts, section 33 of the RMA, section 34 of the RMA, and iwi management plans. These were developed from the literature review. The contents of iwi management plans were analysed under the following themes: matters of national

importance, kaitiakitanga, Treaty of Waitangi, consultation, delegation and transfer of powers. Chapter Four discusses these themes in further detail.

3.4.2. Phase Two: Survey questionnaire

The information collected in phase one provided some information about the content of the policies but did not indicate whether these policies were reflected in actual practice. Phase two of the research involved a survey to collect perceptions on the current consent process and to identify possible opportunities for Maori participation under a contestable consent process. In contrast to the method used in phase one, the survey is a relatively conspicuous and obtrusive method of data collection (Warwick and Lininger, 1975). However, in order to supplement the documentary analysis, and to gather information on the implementation of stated polices, it was considered necessary to obtain responses through a survey of Iwi Liaison Officers.

3.4.2.1. Selection of participants

It was essential that a Maori perspective be incorporated into the thesis. To achieve this the decision was made to obtain this Maori perspective by a collecting data from local authority officers who liaise and work with tangata whenua in resource management issues, that is, Iwi Liaison Officers.

3.4.2.2. Selection of local authorities

The sample for the survey was the same used in phase one of the research: Manawatu-Wanganui region, Hawkes Bay region, and Southland region. Each region consists of a regional council and a number of TLAs.

3.4.2.3. Data collection

The structure of the questionnaire was a combination of qualitative and quantitative questions, with an emphasis on qualitative. The preference for using qualitative over

the quantitative questions was based on the need to gather data on the participants' views on contestability in the consent process. Questions were grouped into two sections; the first consisted of attitudinal responses to contestability and the second section referred to the current practices under the consent process. The majority of the qualitative questions asked were in the latter section. Both qualitative and quantitative responses are presented in detail in Chapter Five.

3.5. Data Analysis

The analysis phase is critical to the thesis as it is where the accumulated information becomes meaningful. Sarantakos (1998: 315) and Patton (1990) describe qualitative analysis as a cyclical approach that goes from data reduction, to data organisation, to interpretation of data back to collection, reduction. This process involves data transformation from the raw state to a form that allows the data to be analysed. The documentary data and the survey data were analysed by a statistical analysis of quantitative data and content thematic analysis of qualitative data.

3.6. Ethical Issues

Before the survey research could be carried out, ethical approval from the Human Ethics Committee, Massey University was required to protect the participants' rights. The key ethical issues associated with cross-cultural research were discussed earlier in this chapter. The final part of this discussion focuses on the ethical issues concerning the participants involved in the survey.

The participants I had selected for the questionnaire were readily identifiable through the organisational/ corporate profile of the regional councils and TLAs as publicised by the councils. Their identification was required for accessibility reasons; as I had to know if these councils employed officers who held an iwi liaison position, or worked with iwi on resource management issues. Because of this, anonymity was not possible and this point was made clear in the information sheet attached to the questionnaire (Appendix One).

3.7. Conclusion

This chapter has discussed certain debates surrounding cross-cultural research which impact on the research design and methods of this thesis. The decision to interview local authority officers who liaise with iwi and hapu representatives and incorporate documentary analysis reflected the desire to avoid placing further strain on limited hapu and iwi resources given that it had been made clear by Maori that research and consultation can be a drain on limited resources. In Chapter Four and Five, I shall analyse the data from the documentary analysis and the survey of local authority officers respectively. Later in Chapter Six, conclusions will be drawn from this research.

Chapter Four
Analysis of Local Authority Plans and Policy Statements

4.1. Introduction

This chapter presents the findings from phase one of the data collection: documentary analysis of policy statements, district plans, and iwi management plans. These documents include amongst other things council policies on tangata whenua issues as well as iwi polices on resource management. The examination of local authority policies is an important part of the research as the type and level of consultation carried out in the plan and policy preparation stages between council and tangata whenua significantly influences the level of tangata whenua participation in the resource consent process, and in other resource management procedures.

Chapter Three discussed the rationale behind the choice of methods, selection of documents, and sample used for this analysis. In this chapter I shall explain the rationale behind the application of themes used for recording the data, discuss the background to the documents used in the analysis and conclude with a summary of the recorded data and analysis. As explained in Chapter Three all data from the groups have been analysed under pertinent themes.

4.2. Regional Policy Statements

The statutory purpose of the Regional Policy Statement (RPS) outlined under s 59 of the RMA, is to achieve the sustainable management of natural and physical resources by providing:

- An overview of the resource management issues of the region; and
- policies and methods to achieve integrated resource management.

Part II of the Second Schedule of the RMA requires the RPS to focus on significant

concerns or issues dealing with most aspects of the natural and physical environment and community interactions with the environment. Section 62 of the RMA also directs regional councils to state in their RPS matters of resource management significance to iwi authorities. A total of 16 RPSs were analysed: 12 were prepared by Regional Councils (RC), and 4 by Unitary Authorities (UA).

The terms 'Regional Policy Statement' (RPS) or 'Policy Statement' are used here to represent all policy statements, draft, proposed and approved, available at the time of the documentary analysis, early 1999. The dates of the RPSs varied with the earliest plan being the Taranaki Regional Policy Statement (1994) to more recent publications in 1998 (see bibliography for further detail on RPS publications used).

In Chapter Three it was noted the intention of the research was to look at the sections of the RPS that discussed tangata whenua participation issues. Because some of the regional councils incorporated tangata whenua issues throughout their statements, it was decided that all information in the RPSs would be analysed. In order to evaluate the information, themes were developed from the literature review and research questions and aims.

Themes are:

- **Recognition of contestability** - Do councils recognise contestability as a mechanism in processing consent applications and is there reference to tangata whenua involvement in resource consent processing.

- **Contracting out of some/all regulatory services** - This differs from contestability as it may result in a private agencies processing applications for consents but with the council monopoly remaining either totally or substantially intact. From the MfE survey of local authority practice in processing resource consents, about one-third of local authorities currently contract out the processing of some or all of their applications for resource consents (MfE, 1998). Whether this practice is referred to

in policy statements and plans was canvassed.

- **Recognition of section 33 of the RMA** - This section allows a local authority to transfer powers to an iwi authority and is a practical means to enable Maori real access to participating in resource management including the processing of resource consents.

- **Recognition of section 34 of the RMA** - This section allows a local authority to delegate powers to council staff, community board, hearings commissioner, council officer/s to grant amongst other things resource consents in accordance with s 93.

- **Recognition and inclusion of individual iwi management plans** - Recognition by RCs of s 61(2)(c)(ii) of the RMA; or for TLAs s 74(2). Iwi management plans are a useful mechanism for the articulation and clarification of the values, objectives, and strategies of iwi authorities in relation to resource consent process and resource management and related economic and cultural issues.

4.3. Findings from the Regional Councils

Table 4.1. Findings from Regional Council Policy Statements

Regional Council	Contestability	Contract out services	Section 33	Section 34	Iwi plans
Environment Waikato	no	unclear	yes	yes	yes
Auckland	unclear	no	yes	no	yes
Hawkes Bay	no	yes	yes	yes	yes
horizons.mw	no	no	yes	no	yes
Canterbury	no	no	yes	no	yes
Otago	no	no	unclear	yes	yes
Environment Bay of Plenty	no	no	yes	no	yes
Northland	no	no	unclear	yes	yes
Southland	no	no	yes	yes	yes
West Coast	no	no	yes	yes	yes
Taranaki	no	no	yes	yes	yes
Wellington	no	no	yes	no	yes
Total "yes" n=12	0	1	10	7	12

Table 4.1. provides a summary of the findings from regional councils. The term 'unclear' is used where it is difficult to assess whether statements refer to tangata whenua. "Yes" means the statements did refer to tangata whenua under each topic area, and "no" means it did not.

4.4. Discussion of the Regional Council Policy Statements

Contestability and contract out of services

One of the 12 RCs discussed contestability. The Auckland RC had a provision for contesting only in relation to landscape assessment work concerning heritage issues. There was no indication as to whether this involved tangata whenua. These findings give little suggestion as to whether contestability is a common practice, and indicate only that is not recognised by the majority of regional councils as an option for consultation. An assumption made is that the push for law reform came from elsewhere.

Under the second theme, do councils contract out services, this was discussed by two of 12 RCs. Environment Waikato stated that in some circumstances "the council may enter into negotiated funding arrangements with iwi authorities". Hawkes Bay RC acknowledged that the success of Maori participation relies on *tangibles* such as *resourcing*. An option to address this was "contracting tangata whenua and/or constituent hapu to carry out specific projects for the council". The small number of councils that have recognised this mechanism in their policy statements does not however, necessarily indicate that councils do not contract out services to tangata whenua.

Section 33

Each of the 12 RCs discussed s 33 but not all were related to tangata whenua issues. For example, Northland RC discussed s 33 in reference to the relationship between the

regional and district councils: "The council will utilise the provisions in section 33 of the Act in relation to the transfer of functions where appropriate (regional and district)". Similarly, Otago RC referred to 'another organisation' being used for transferring powers: "transferring the responsibility for certain actions and decisions to another organisation by way of transfer of powers and delegation of functions".

Two RCs recognised the importance of s 33 as a practical form for Maori to express tino rangatiratanga: Hawkes Bay RC and Southland RC. The Hawkes Bay RC stated that the council recognises s 33 as a practical way that the council can give effect to tino rangatiratanga, and will be undertaken "where appropriate and possible".

The Southland RC stated that:

> *The transfer of functions from councils to iwi authorities, provided for in the Act, offers one of the best opportunities for applying the powers conferred by kawanatanga to support and enhance the practical expression of tino rangatiratanga.*

It is possible the Southland RC policy has been influenced by the Kai Tahu Claims Settlement Act 1998 and the iwi's interests in managing natural resources significant to the tribe. The Settlement Act includes a new instrument called a Statutory Acknowledgement which recognises Kai Tahu's special relationship with sites and areas in the South Island. The statutory acknowledgement provisions impact on the RMA processes concerning these areas. For example, under s 208 of the Ngai Tahu Claims Settlement Act: "local authorities are to have regard to statutory area in forming an opinion pursuant to s 93 (1)(e) of the RMA, whether Kai Tahu is a person likely to be affected by a consent application that may impact on the statutory area"; and "in forming an opinion pursuant to s 94 (3)(c) whether Kai Tahu is a person deemed adversely affected by granting the consent for activities within, adjacent to, or impacting on the statutory area".

Most RCs acknowledgement of s 33 were accompanied by phrases such as *where appropriate* or *will be considered.* For example, Taranaki RC stated it would consider using s 33 provided iwi meet the required conditions of representing the community interests, efficiency and use of expertise. The Wellington RC stated it would:

> *...recognise and promote the role and importance of kaitiakitanga that will be implemented by appointing tangata whenua as kaitiaki by a transfer of powers where appropriate.*

One of the methods used by the West Coast RC when taking into account the principles of the Treaty of Waitangi is to consider the opportunities for a transfer of resource management powers, functions to iwi authorities under s 33 of the RMA. Environment Waikato RC stated that the council would "investigate the delegation/ or transfer of functions, powers, and duties to iwi for the administration of heritage resources, where appropriate".

Section 34

Seven of the 12 RCs referred to s 34 either in conjunction with s 33 or as a separate policy objective. Environment Bay of Plenty RC did not include a discussion on s 34. The Canterbury RPS contains an autonomous iwi policy prepared by 'Nga Upoko' and 'Nga Runanga' that refers to ss 33 and 34 as provisions for tangata whenua input into the decision-making process: "Sections 33 and 34 of the RM Act refer to the functions and delegation of local authorities as mechanism to fulfil the principles of rangatiratanga and kawanatanga". However, there is no mention of s 34 in any discussion prepared by the Canterbury RC.

In contrast, the Southland RC stated that: "on some occasions it may be appropriate, under sections 33 and 34 of the Act, to delegate responsibility or transfer power to an iwi authority". An example given in Southland's RPS concerns activities in close

proximity to the Titi (Muttonbird) islands, which were part of the Kai Tahu Treaty claim settlement.

The majority of RPSs used similar terminology to s 33. For example, Taranaki RC stated: "...it would consider opportunities for the delegation of powers or functions to Te Putahitanga O Taranaki (iwi committee) as appropriate". Even Southland RC stated that on some occasions it *may be appropriate* to use ss 33 and 34 (see preceding discussion). Northland RC stated: "...it would promote the transfer and/or delegation of functions as appropriate".

Iwi management plans

Each of the 12 RCs discussed iwi planning documents to some degree. All councils acknowledged the importance of recognising iwi plans in RPSs and resource consents. For example, the Canterbury RC stated that it would "encourage the preparation of iwi resource management policies and plans". Similarly, horizons.mw[1] RC recognised the importance of resourcing iwi plans, and funding is included in the council's annual planning process. In horizons.mw's 1998/99 annual report, partial funding was approved to assist "Ngati Rangi Trust Board based around Ohakune to prepare an iwi management plan".

The Otago RC considered iwi management plans as "a major tool for a council/iwi interface on most resource management issues". Northland RC perceived iwi management plans as being a "valuable guide to potential developers and councils, and may reduce the burden of consultation". Only three of the RCs had made specific iwi management plans prepared by local iwi authorities. These were: Hawkes Bay, Environment BoP, and Southland. Environment Bay of Plenty RC recognised the importance of *Tawharau O Nga Hapu O Whakatohea-Whakatohea Resource Management Plan (1993)* by including a summary of the main issues as an appendix in

[1] horizons.mw is the trading name of the Manawatu-Wanganui Regional Council

the RPS. Hawkes Bay RC regarded the importance of the iwi management plans in the preparation of the RPS:

> *...the preparation of this Statement reflects and has had regard to Kaitiakitanga Mo Nga Taonga Tuku Iho whcih has been prepared by Te Runanaganui O Ngato Kahungunu Inc (December 1992).*

In addition, Hawkes Bay RC also indicated that it had paid regard for the *Draft Nga Tikanga O Te Whanau O Rongomaiwahine Policy Statement (October 1992).*

Similarly, the Southland RC stated:

> *...the council aims to recognise Te Whakatau O Murihiku (1997) as a Kai Tahu resource management reference planning document for the region...this document will be a response to the changing emphasis of environmental and local government legislation where greater opportunities are offered for Maori involvement and responsibility in resource management issues.*

RCs that did not directly recognise or refer to iwi plans that are in existence in respective regions are: Auckland, Environment Waikato, horizons.mw, Canterbury, and Otago. Although these RCs did not include specific reference to iwi plans this does not suggest they do not formally acknowledge them. For example, the Otago RC has published a brochure on iwi consultation in the resource consent process with reference to the local iwi resource management plan 'Kai Tahu Ki Otago-Resource Management Strategy'. Both the RC's regional offices and its head office hold a copy of the plan for public reference. The recognition and development of iwi management plans are perhaps one of the most effective ways of ensuring Maori participation in the resource consent process. Not only do they state the aims and aspirations of tangata whenua, but they are also a practical consultation tool that can be used in the processing and

decision-making of resource consent applications.

4.5. Findings from the Unitary Authorities

Table 4.2. Findings from Unitary Authority Regional Policy Statements

Unitary Authority	Contestability	Contract out services	Section 33	Section 34	Iwi plans
Nelson	no	no	yes	yes	yes
Tasman	unclear	no	yes	unclear	yes
Marlborough	no	no	no	no	yes
Gisborne	no	no	yes	unclear	yes
Total "yes" n=4	0	0	3	1	4

Table 4.2. provides a summary of the findings from Unitary Authorities (UA). A unitary authority is an amalgamation of regional council and TLA functions, duties, and roles. Currently there are four UAs: Nelson, Tasman, Marlborough and Gisborne.

4.6. Discussion of the Unitary Authority Regional Policy Statements

Contestability and contracting out of services

One of the four UAs (Tasman) discussed contestability. This was in reference to "where there may be incidences where contesting of council's jurisdiction in relation to issues affecting fisheries or other coastal marine organisms may occur". However, the statement does not indicate when these incidences may occur, nor does it provide criteria for contesting. Although there is no evidence in the RPS to suggest why fisheries are recognised, one reason could be the interest of the local iwi, as a key stakeholder, in the local fishing industry.

No discussion was found in any of the RPSs on contracting out services. The findings on contracts does not suggest that UAs do not use this mechanism, but as a matter of policy contracting as a consultation mechanism has not been included in the RPSs.

Section 33

Three of the four UAs referred to s 33. The Nelson RPS made a reference to:

> *...transferring functions and powers over to an iwi authority which may include plan preparation (but not plan approval) and hearing of resource consents relating to sites of significance to tangata whenua.*

Accompanying the statements of intent were phrases such as *may be considered*, or *where appropriate*. For example, Tasman's RPS stated that it would "establish in consultation with iwi, the appropriate potential for iwi representation, or delegation or transfer to iwi, concerning resource management responsibilities". Gisborne's RPS stated that it would *explore opportunities* for transferring powers. It is unclear why there is no elaboration on circumstances where councils apply s 33, but one reason may be that they have not wanted to be more explicit about appropriate circumstances or to be more proactive in this area.

Section 34

The same three UAs discussed s 34. Both the Gisborne and Tasman RCs discussed s 34 in conjunction with s 33. Although there was no specific reference made to tangata whenua participation, Tasman believed that the use of delegations and transfer was one of the ways that good consents management could be undertaken:

> *Where appropriate delegations from council to committee, and from council to staff for the making of the many procedural decisions as well as decisions on applications themselves.*

Similar to s 33, phrases such as, *may be considered, will consider*, and *where appropriate* accompany councils' statements. For example, Nelson's RPS stated:

> *...consider, where appropriate, the delegation or transfer of functions, powers, and duties to relevant iwi, in relation to the management of specific matters or sites of cultural significance to tangata whenua.*

Nelson also indicated that it would *consider* transferring or delegating powers to iwi the management of cultural sites.

Iwi management plans

Each of the UAs discussed iwi management plans on a generic basis. For instance, Nelson's RPS stated that it would "have regard to any environmental plans prepared by iwi authorities". The Nelson RPS also included a resource management statement prepared by iwi as an appendix. Tasman's RPS mentioned that in preparing the policy statement "the council must have regard to any planning document recognised by an iwi authority". Gisborne's RPS stated that the council "would encourage and support the preparation of iwi resource management policies and plans, and have particular regard to such plans". Marlborough's RPS briefly discussed the link with iwi management plans in preparing the RPS:

> *In preparing or changing a regional policy statement, section 61(2) of the Act requires that the Council must have regard to relevant planning documents recognised by an iwi authority affected by this Regional Policy Statement.*

4.7. District Plans

Under s 73 of the RMA, TLAs are required to have a district plan prepared at all times by the TLA. A district plan is a statement of how sustainable management of the natural and physical resources is to be promoted in the district or urban area. The plan is also used to assist councils with making decisions on resource consent applications,

as well as to help councils administer the provisions of the Act in a consistent and reasonable manner. The terms 'District Plan' (DP) or 'Plans' are used to represent all plans drafted, proposed or approved available at the time of the documentary analysis in early 1999.

Fourteen DPs were analysed to gather information on councils' objectives and policies in relation to tangata whenua. The sample was taken from three regions: seven came from TLAs in the Manawatu-Wanganui region; four came from TLAs in the Hawkes Bay Region; and three came from TLAs in the Southland Region. The publication dates of the plans varied with the earliest publication being the Southland DP (1994) to the more recent publication of the Tararua DP (1998). The majority of plans were published between 1997 and 1998 (see bibliography).

As with the RPSs, all information in the DPs was analysed where these plans were available. In some instances it was necessary to request a copy of the pertinent information directly from the council. While the majority of these councils provided the research with the necessary sections of the plan, a problem occurred with Napier City Council when it provided a list of tangata whenua objectives, which the council claimed are contained in the DP's two sub-plans. Although the Napier information was analysed in the same way as the other plans, it proved difficult to draw similar conclusions to the other plans. However, the information was used in the analysis. The themes used in the RPS analysis are also used for the DPs and the findings are presented under the three regions with an overall discussion of data following.

4.8. Findings from the District Plans

Manawatu-Wanganui Region

Table 4.3. Findings from Manawatu-Wanganui Territorial Local Authority District Plans

Territorial Local Authority	Contestability	Contract out services	Section 33	Section 34	Iwi plans
Manawatu	no	no	no	unclear	no
Tararua	no	no	yes	no	yes
Rangitikei	no	no	no	yes	yes
Wanganui	no	no	no	no	yes
Palmerston North	no	no	no	no	yes
Ruapehu	no	no	yes	unclear	yes
Horowhenua	no	no	yes	no	yes
Total "yes" n=7	0	0	3	1	6

Table 4.3. is a summary of the findings from the seven district plans of Territorial Local Authorities in the Manawatu-Wanganui region: Manawatu District Council, Palmerston North City Council, Tararua District Council, Horowhenua District Council, Wanganui District Council, Ruapehu District Council, and Rangitikei District Council.

Hawkes Bay Region

Table 4.4. Findings from the Hawkes Bay Territorial Local Authority District Plans

Territorial Local Authority	Contestability	Contract out services	Section 33	Section 34	Iwi plans
Wairoa	no	no	yes	yes	yes
Hastings	no	no	no	no	yes
Central Hawkes Bay	no	no	no	no	no
Napier	no	no	no	no	yes
Total "yes" n=4	0	0	1	1	3

Table 4.4. is a summary of the findings from the district plans of the four Territorial Local Authorities in the Hawkes Bay region: Wairoa District Council, Napier City

Council, Hastings District Council, and Central Hawkes Bay District Council.

Southland Region

Table 4.5. Findings From Southland Territorial Local Authority District Plans

Territorial Local Authority	Contestability	Contract out services	Section 33	Section 34	Iwi plans
Invercargill	no	no	no	no	yes
Southand	no	no	yes	no	yes
Gore	no	no	no	no	yes
Total "yes" n=3	0	0	1	0	3

Table 4.5. provides a summary of findings from the district plans of the three TLAs from the Southland region: Invercargill City Council, Southland District Council, and Gore District Council.

4.9. Discussion of District Plans

Contestability and contracting out of services

None of the 14 TLAs referred to contestability or contracting out services. This does not necessarily mean that councils in this sample do not contest or contract out services. However, as with the policy statements, the reason for this may be that neither mechanism is currently provided for in the RMA.

Section 33

Five of the 14 TLAs (less than half) discussed s 33. Three were from the Manawatu-Wanganui region and one each from Southland and the Hawkes Bay regions. Wairoa TLA considered s 33 as "part of the council's statutory duty to include this provision". Tararua TLA recognised s 33 as a means to "acknowledge the need to integrate the Maori perspective of resource management into the planning and decision-making process".

As with the RPSs phrases such as *may consider*, *where appropriate*, and *to give full effect* accompany statements. For example, Ruapehu TLA stated: :where appropriate the council will explore the transfer of functions to nga iwi in accordance with s 33". Horowhenua TLA mistakenly discussed *delegating* (instead of the *transferring*) powers in its statement on s 33:

> *The council may consider requests to delegate pursuant to s 33, to Tangata Whenua, the management of defined areas or resources where this is necessary to give full effect to kaitiakitanga.*

Section 33 of the RMA provides for the *transfer* of powers, functions, or duties to a public authority including an iwi authority, whereas s 34 provides for the *delegation* of functions etc. to any committee of the local authority, community board, hearings commissioner, or council officer. Both provisions have been used in conjunction by some local authorities in the policies and plans. However, the use of the delegation term instead of the transferral term suggests that the Horowhenua TLA could be unfamiliar with the differences in meaning of these two provisions.

Section 34

Excluding the confusing reference made in the Horowhenua DP, three of the 14 TLAs discussed s 34. Two were from the Manawatu-Wanganui region, and one from Hawkes Bay region. Wairoa TLA provided a comprehensive discussion on s34:

> *The council recognises s 34(1) in conjunction with the Local Government Act (1974) s 114Q(5), 114R(4),(6), and (7) providing for the delegation of powers over to members of a local authority appointed to a committee or sub-committee....Where the council considers it appropriate, these provisions will be used to appoint one or more tangata whenua representative to a committee considering proposals which could affect*

tangata whenua.

The Wairoa TLA has consistently been proactive in its approach to tangata whenua issues. A number of factors has meant that the local authority has endeavoured to be responsive. Some of the factors include, over 50% of the free-hold land in the Wairoa district is Maori owned (locally), the Wairoa district has a large Maori based population with strong tribal links (for example, Rongomaiwahine and hapu of Ngati Kahungunu) residing in the district, and key figures such as the Mayor Derek Fox play an influential role.

Both the Manawatu and Ruapehu DPs included a discussion on s 34 directly and indirectly respectively. The Manawatu TLA stated that the delegation of responsibility for plan administration would be to "put management in the hands of one authority". There was no elaboration on whether the delegation to an authority would be an iwi authority or a local authority. There is no direct reference to s 34 by Ruapehu TLA, however, the council acknowledged tangata whenua requests for ongoing consultation. One recommendation by Ruapehu was to "invite a representative or representatives of iwi to sit as a hearings commissioner on matters affecting iwi or to act as an advisor to hearings bodies".

Iwi management plans

Twelve of the 14 TLAs discussed iwi management plans as part of the council's statutory obligation with only one of the sub-plans for Napier City including a discussion on iwi plans. Only two of the TLAs specifically referred to plans prepared by local iwi, these were Southland and Invercargill. The Southland TLA referred to *Te Whakatau Kaupapa o Murihiku* as a Kai Tahu resource management reference planning document for the district. Invercargill TLA stated that it *recognises Te Whakatau Kaupapa o Murihiku (published February 1997) as the relevant iwi resource management document.* The Rangitikei District plan did not recognise the policy

statement *Kaupapa Taiao* by Ngati Hauiti; Wairoa DP does not specifically refer to *Ngaa Tikanga O Te Whanau O Rongomaiwahine*.

Other mechanisms employed by councils instead of iwi management plans are the formal agreements made between some councils and iwi organisations. For example, Horowhenua TLA has drafted a 'memorandum of understanding' with the majority of iwi residing in their district and has referred to it in the district plan. Similarly, Ruapehu TLA includes a summary of the tangata whenua planning document in its DP. Although these are recognised as planning documents, they have been developed in conjunction with council.

4.10 Iwi Management Plans

Iwi management plans are developed around tribal goals and objectives as well as alternative strategies, management and decision-making processes to that of local councils. These plans assert Maori aspirations and values on resource and environmental management discussed in Chapter Three.

Chapter Three also discussed the problems associated with accessibility and availability of iwi management plans. Six plans were analysed for information reflecting iwi aspirations in resource management. Due to the differences in the content of the plans and in order to make some sense of the information, themes were developed from the relevant literature on tangata whenua involvement in resource management (Durie, 1998; MfE, 1998a; PCE, 1992, 1998; LGNZ, 1997; Nuttall and Ritchie, 1995), and from important provisions for iwi under the RMA.

Themes are:

- **Matters of national importance** - the requirement of s 6(e) of the RMA is to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, sites, waahi tapu, and other taonga as a matter of national importance.

- **Kaitiakitanga** - the requirement of s 7(a) of the RMA is for councils to have particular regard to kaitiakitanga.

- **Treaty of Waitangi** – s 8 of the RMA states that all persons exercising functions and powers under the RMA shall take into account the principles of the Treaty of Waitangi (Te Tiriti O Waitangi).

- **Consultation** - this is regarded as an important mechanism for Maori to participate in resource management decision-making processes. Consultation is expected to be carried out by local authorities in the preparation of policies and plans as well as the resource consent process (PCE, 1998; LGNZ, 1997).

- **Transfer and delegation of powers** – ss 33 and 34 are mechanisms where iwi authorities can request a transfer of powers, functions or duties, or a delegation of powers function or duties as a committee to a local authority. These provisions may also hold the key to empowering Maori involvement in environmental decision-making on resource management issues affecting iwi.

4.11 Findings from the Iwi Management Plans

***Te Whakatau Kaupapa: Resource Management Strategy for Canterbury* (1992) Kai (Ngai) Tahu Runanga**

The strategy was published in response to the enactment of the RMA. The aim of the plan is to assist planners, resource managers and politicians at the local level, and in the preparation of plans they are required to take into account Kai Tahu's then pending Treaty claim[2]

Matters of national importance

Kai Tahu claim that all natural resources in their rohe are taonga, which are regarded as important to the iwi. For Kai Tahu, the term taonga embraces the concept of a resource:

> *That water, fisheries and mahinga kai resources are Ngai Tahu taonga, as are their cultural and spiritual values. As these resources have never been alienated by Ngai Tahu, they remain Tribal property.*

Kai Tahu maintains that taonga demands respect for the past aspects of the environment which merit preservation for their historical value. Kai Tahu also claim that the concept of taonga also incorporates "the wise use of resources and the maintenance of the health of a resource".

Kaitiakitanga

Although the term kaitiakitanga is not directly referred to in this plan, indirectly, the plan describes and explains Kai Tahu's relationship with the land: "Ngai Tahu also have rights in land which is no longer in their direct ownership...in respect of which Maori have ancestral connections". Kaitiakitanga also includes "the right to contribute to resource allocation and management decisions where these impact on Tribal resources".

Treaty of Waitangi

The Treaty of Waitangi and its principles are asserted throughout the document. Emphasis is given to the 'essential bargain' principle where Kai Tahu contend that: "the Crown's right to govern as gifted in Article the First of the Treaty, is totally

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[2] The Treaty Claim has subsequently been settled under the Kai Tahu Claims Settlement Act 1998.

dependent on the honoring of Article the Second". That is, the recognition and protection of the tribe's resource ownership and authority rights (tino rangatiratanga). Kai Tahu maintain that: "the Crown cannot evade its Treaty obligations by conferring authority on some other body". The iwi views the Canterbury RC as: "possessing powers delegated by the Crown, is responsible for the applications of the Treaty principles and guarantees".

Consultation

Consultation is referred to throughout the plan. For example, with regard to the tribe's mining policy, "mining licences should not be granted...unless the mining company has the assent of the tangata whenua". Another example is provided in the marae policy: "new marae must have the consent of those with turangawaewae in the relevant area". The appointment of an iwi liaison officer was also perceived as a vehicle for consultation regarding the iwi's water policy as well as consultation with RCs and TLAs on watercatchment plans: "that Maori Advisory Committees at both Regional and District levels should be consulted before any Catchment Management Plan is adopted".

Transfer and delegation of powers

Kai Tahu does not discuss the transfer or delegation of functions to iwi. It is unclear why Kai Tahu has not recognised these provisions. One reason could be that the first edition of this iwi plan was published when the RMLR was in process. The iwi plan has on occasion referred to the previous TCPA: "the general form of this document is different from plans, which have been prepared in the past under the provisions of the Town and Country Planning Act".

***Ngaa Tikanaga O Te Whanau O Rongomaiwahine Policy Statement* (1992) Te Whanau O Rongomaiwahine Trust**

The four main purposes of this policy statement are to lay down the kaupapa, to define procedures for negotiation between Te Whanau O Rongomaiwahine and external agencies, to articulate tribal policy, and to identify obligations of external agencies to the tribe. The iwi prepared this policy statement as a result of "disparaging experiences the iwi has had with crown agencies and local government". This policy statement is the iwi's action of "breaking away from controlling state bodies to define its preferences and lay down the ground rules for interaction between itself and others".

Matters of national importance

The statement maintains that all resource management agencies shall:

> *recognise that only the tribe has the right to determine the nature of the relationship between its culture and traditions and its ancestral lands, waters, sites, waahi tapu, and other taonga.*

Kaitiakitanga

The statement discusses kaitiakitanga in the context of the RMA specifying that all resource management agencies shall recognise that:

> *Only Rongomaiwahine has manawhenua within its tribal territories can and be kaitiaki over its tribal lands, waters and other taonga. That as manawhenua only they can determine what the principles of kaitiaki are and how they shall be implemented* (p. 28).

Treaty of Waitangi

The Treaty policy of the statement asserts the iwi's legitimate authority to "determine the principles of the Treaty of Waitangi in respect of management of natural and physical resources within its tribal territories". Once determined "such agencies shall give effect to these principles".

Consultation

The statement discusses consultation in terms of the preparation of polices and plans: "the relevant local authority shall consult with the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga".

Transfer and delegation of powers

The statement discusses the transferral of power provision under s 33 of the RMA. A transfer would "enable iwi as kaitiaki to carry out its responsibilities over its natural and physical resources, and other taonga, and to maintain its territorial integrity over such resources and taonga".

Kawerau A Maki Trust Resource Management Statement **(1995) Te Kawerau A Maki**

The trust designed this statement primarily to be used by resource consent applicants, TLAs, and the Department of Conservation. The statement is recognised as an iwi authority planning document under ss 66(c) and 74(b) of the RMA.

Matters of national importance

Te Kawerau discusses a number of matters that need to be taken into account in resource management processes: social, cultural and economic well-being; heritage and

design, koiwi and artefacts, natural resources such as water, coastal marine, land, flora and fauna; and environmental effects.

Kaitiakitanga

The statement describes this concept as fundamental to Te Kawerau's view of resource management. The statement defines and describes the concept and the primary responsibilities of the kaitiaki. Te Kawerau's objective is to meet in full its responsibilities as kaitiaki. The statement also includes the following policies which are designed to achieve this: incorporating active participation in the environment, ensuring all agencies involved in resource management within the tribal rohe recognise Te Kawerau's role as kaitiaki; and ensuring wananga and other programmes are held to educate iwi members on issues regarding resource management and Te Kawerau tikanga.

Treaty of Waitangi

The statement has no specific discussion on the Treaty, although there are direct and indirect references to be found. For example, with regard to wastewater management, Te Kawerau maintains that one way for the iwi to give effect to its role as kaitiaki in the management and conservation of water is:

> *By ensuring that councils recognise and give effect to their Treaty of Waitangi responsibilities when entering into agreements with Watercare Services Ltd regarding the management of bulk water.*

Consultation

Te Kawerau state: "if tribal taonga are affected by a consent application, the iwi will outline the consultation process appropriate to the situation". Emphasis is given to the time and costs involved in assessing applications. Consultation is also discussed

concerning policy and plan development:

> *The trust expects to be involved at an early stage in all statutory planning an in the development of policies by relevant statutory bodies which impact upon objectives and policies identified in this document.*

Transfer and delegation of powers

The statement does not discuss the delegation and transfer provisions found in the RMA.

***Kai Tahu ki Otago: Natural Resource Management Plan* (1995) Kai Tahu ki Otago**

This plan was developed to provide "basic information on natural resource issues and a framework to assist resource users and managers to develop consultation and partnership processes". The plan represents the principal planning document from which a number of further policy and planning documents will be developed.

Matters of national importance

Kai Tahu describe taonga as an embodiment of both tangible and intangible values that: *transcend the generations, distinguish the indigenous culture and are values to pass onto future generations.* Several issues affecting taonga are of concern for Kai Tahu. Some of these include the degradation and loss of taonga, which has an adverse effect on associated customs and the transfer of knowledge. Also with regard to artefacts Kai Tahu state: "Artefacts and taonga provenanced from the Otago region have been expropriated by collectors". Kai Tahu has established a set of objectives and guidelines to reverse these issues.

Kaitiakitanga

Kai Tahu maintain that legislative definition of kaitiakitanga outlined in s 7(a) has not always reflected traditional understanding of them. Kai Tahu believe that the practical exercise of kaitiakitanga currently, is limited in its extent:

> *In the past, whanau were passed down knowledge of these concepts and very quietly continued to practise their kaitiakitanga amongst their own whanau.*

Treaty of Waitangi

The strategy contains a comprehensive section on the Treaty of Waitangi, Kai Tahu's perspective, and the principles of the Treaty. Kai Tahu maintain that the Treaty is not only for Maori:

> *The Treaty should not therefore be viewed as only guaranteeing rights to iwi Maori, for it is from this document that the Crown derives its right to govern in New Zealand* (p.15).

Consultation

Kai Tahu views consultation as: "an important stage in the process of developing partnership". The strategy incorporates a comprehensive discussion on consultation including a breakdown of the preferred consultation mechanisms by Kai Tahu. For example, Kai Tahu defines the key requisites for consultation as including: Kanohi ki te kanohi (face to face contact), early consultation, quality information, sufficient time, openness of intent, responsiveness, and avoidance of Treaty claims. Following on, are the methods of consultation that include: iwi resource management plans, memorandums of understanding, identify matters where consultation is required. Kai

Tahu has also developed participation models some of which are: iwi liaison personnel, consultation contracts, hui, and Maori consultative committees.

Transfer and delegation of powers

Kai Tahu state that the transferral provisions under s 33 "could be an important tool in furthering the active involvement of iwi in planning decisions and processes and in monitoring". There is no discussion on the delegation provisions under s 34 of the RMA.

***Kaupapa Taiao Environmental Policy Statement* (1996) Ngati Hauiti**

This statement was prepared by Ngati Hauiti to be used primarily by the Runanga and its constituent whanau and hapu. Ngati Hauiti see the production of this policy statement as "a major step towards achieving Ngati Hauiti Iwi resource management plans".

Matters of national importance

Ngati Hauiti have developed policies for the management of the iwi's taonga, which includes: the waterways, fisheries, land management, flora and fauna, and heritage in the Rangitikei district.

Kaitiakitanga

Ngati Hauiti maintain that kaitiakitanga involves exercising responsibilities in the management of natural and physical resources based on a set of principles underpinning Maori resource management: "take only what you need, share the rest, respect the limits, protect the basis of the wealth, pass onto mokopuna (grandchildren) a world at least as good as we received" (quoted by Te Arikinui Dame Te Atairangikahu)[3]. Ngati Hauiti

[3] Opening speech, Planning and Development Conference, Te Rapa, November 1993.

also maintain that kaitiakitanga is a practical way of expressing rangatiratanga:

> *Under the Treaty of Waitangi, hapu agreed to the establishment of the Kawanatanga by the Crown in exchange for ...the protection by the*
>
> *Crown of tribal authority (Tino Rangatiratanga) and resources of value (taonga) to the tribes. Kaitiaki give practical expression to Rangatiratanga.*

Treaty of Waitangi

As an expression of the Treaty principles, three key themes are contained in the statement: partnership, co-operation, and active protection of resources important to Maori. Ngati Hauiti states that "consultation between public authorities and Ngati Hauiti is an essential part of defining the principles of the Treaty of Waitangi in particular situations".

Consultation

Ngati Hauiti state that "consultation in respect of consents lodged under the RMA 1991 is a high priority". Consultation with Ngati Hauiti by private sector applicants is also considered "as an essential part of assessing environmental effects".

Transfer and delegation of powers

There is no discussion on ss 33 and 34 in the Policy Statement. While there is no evidence to suggest why these provisions are not included, one reason could be that the Policy Statement is a platform for the development of comprehensive iwi management plans in the future, which may include discussions on these provisions. Ngati Hauiti

also stated that in terms of policies contained in this statement: "...we [Ngati Hauiti] expect to monitor the effectiveness of the statement and to revise and strengthen it on a regular basis".

***Waikato Iwi Management Plan: Manuka* (1996) Huakina Development Trust and Tainui Maori Trust Board**

Waikato/Tainui (Waikato iwi from Tainui waka) prepared the iwi plan as a policy document for the region of responsibility given to the Huakina Development Trust. The plan is one of a series of resource strategies for the tribal areas.

Matters of national importance

Waikato/Tainui maintain that all natural resources in their rohe are taonga. They include: ancestral lands, waters, fisheries, waahi tapu, and "all things special to our people". Waikato/Tainui are connected to their taonga by their whakapapa. For Waikato/Tainui, the Manuka and its catchment are ancestral land, water, sites, waahi tapu and taonga.

Kaitiakitanga

Waikato/Tainui maintain that although s 7(a) introduces a new matter to which external agencies must give particular regard, "the definition of kaitiakitanga is new and not that of our people". In order to have regard to kaitiakitanga, external agencies must work closely alongside Waikato and work in partnership for the sustainable management of the Manuka.

Treaty of Waitangi

The plan discusses the principles of the Treaty in accordance with s 8 of the RMA. Waikato/Tainui maintain that these are principles defined by the Court of Appeal and

not the iwi: "what is clear about the principles is that the Treaty was clear about the partnership. A partnership based on utmost good faith".

Consultation

Waikato/Tainui stresses that the plan must to be used as a consultation tool and not a substitute for consultation. For example the title page states: "This Waikato Iwi Management Plan is NOT a substitute for consultation". The iwi plan also provides a list of a number of external agencies that Waikato/Tainui consider relevant to the management of the Manuka. The iwi plan states that in order for sustainable management of the natural resources to be come a reality "...it is imperative that we establish durable, on-going partnerships with all those agencies...". Amongst the external agencies are: local authorities, Department of Conservation, and Ministry for the Environment; and educational institutions.

Transfer and delegation of powers

The iwi plan refers to the transfer and delegation of power provisions of ss 33 and 34 of the RMA concerning the New Zealand Coastal Policy Statement (NZCPS). The Minister of Conservation is responsible for the NZCPS, which is mandatory under s 57 of the RMA. The NZCPS requires that an identification and protection of characteristics of special value to tangata whenua be carried out according to tikanga Maori, which Waikato/Tainui maintain includes "the transfer of powers under ss 33 and 34 of the RMA". The iwi plan also states that the success of partnership not only involves good, clear and ongoing communication, but also involves "the transfer of certain functions, powers and duties from external agencies to the iwi authority".

***Te Whakatau Kaupapa o Murihiku: Resource Management Strategy for Southland* (1997) Kai Tahu**

The purpose of this strategy is to assist planning authorities by spelling out both general

and particular attitudes, beliefs, and polices that Kai Tahu have regarding natural resources.

Matters of national importance

Kai Tahu maintain that they did not alienate their resources or taonga by signing the Treaty of Waitangi.

> *As the Crown has not formally acquired the ownership of the Tribe's waters, fishery, and mahinga kai these taonga still belong to them: all natural [in their rohe] resources are taonga to them [Kai Tahu].*

Sustainability and the need to preserve options for future generations is incorporated into the taonga definition: "taonga demands a respect for the past-aspects of the environment which merit preservation for their historical value[4]" (p. 19).

Kaitiakitanga

The concept of kaitiakitanga and the role of kaitiaki are discussed in a contemporary context. Kaitiakitanga is the equivalent to:

> *...a management plan based around the philosophy that all vegetation, fish, and birds must reproduce to provide future sustainability of all the resources for the survival of the people.*

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[4] quoted in *The Treaty of Waitangi and its significance to the Reform of Resource Management Law* the Kai Tahu submission to the RMLR (1988).

Treaty of Waitangi

Kai Tahu discussess the Treaty and its principles throughout the strategy. Kai Tahu maintain that the values that require the Treaty partners to act towards each other reasonably and with utmost good faith are "the values of integrity, respect, and honour, both towards their people and their property". The principle of partnership is fundamental to Kai Tahu. The iwi emphasises the importance of being recognised as a partner, an equal and not just another interest group.

Consultation

Consultation is referred to throughout the strategy in terms of resources, land, tourism, and community development. Kai Tahu has provided a developed and practical approach to consultation. For example, emerging tangata whenua structures for consultation are included in the strategy so that effective consultation can be carried out with other resource users such as consent applicants. Consultation processes are also outlined. These include guidelines about who to consult with and how to consult with tangata whenua. These processes are aimed as a guide for local authorities in the Southland region.

Transfer and delegation of powers

Both transfer and delegation provisions are discussed in the strategy because of their role in Kai Tahu's Treaty claim. At the time the strategy was prepared, a number of important natural resources were expected to go back to the iwi and the strategy made provisions for this. For instance, Kai Tahu states it may seek from local authorities "the transfer of power under s 33 to the Titi islands".

4.12 Discussion of Iwi Management Plans

The purpose of analysing the iwi management plans was to gather some impression of

Maori aspirations in resource management. Maori aspirations differ from most western ideals of resource management as to their aspirations and values for resource management which are holistic incorporating a cultural, spiritual and physical dimension. Overall, the analysis of the iwi management plans revealed that plans each had distinct purposes and aims reflecting individual tribal policies on resource management. For example, Waikto/Tainui prepared their iwi plan as part of their kaitiaki responsibilities of the Manuka Harbour and catchments referring to the natural resources of these areas only. Some of the differences may relate to the time at which each plan was written. For instance, the plans prepared in 1992 differed in aspirations to those prepared in 1995. One reason could be that over time, as case law and policy guidance from the MfE, and PCE etc. emerge, there is an influence on iwi aspirations. In pulling these differences together, a conclusion can be made that there is no pan-Maori view, and that definitions of concepts such as kaitiakitanga are iwi specific. Because these plans are very different from each other, it was not feasible to compare these documents.

Well prepared iwi plans can assist the consent process in a number of ways. These include identification of consultation procedures with mandated iwi representatives, identification of resource management issues of concern to iwi, clarifying the aspirations of iwi as Treaty partners in environmental management. The primary purpose of Ngati Hauiti's *Kaupapa Taiao* policy statement (1996) is for it: to be used as a tool for the iwi to assert their rangatiratanga, strengthen their connection with one another and with Papatuanuku and Ranginui, affirm tikanga, acknowledge taonga; and clarify their responsibilities as kaitiaki over their taonga.

Nuttall and Ritchie (1995: 104) maintain that iwi plans fully recognised and provided for by local authorities are "potentially one of the most practical means that proactive partnership can be achieved under the provisions of the RMA". The key to more effective involvement of iwi authorities in any type of consent process lies with local authorities recognising these plans as a valuable consultation tool. Because of the

number of private processors who are likely to be unfamiliar with local iwi issues under contestability, it is equally, if not even more important for the development of iwi plans.

4.13 Conclusion

This chapter investigated the tangata whenua policies of local authorities in the context of the RMA resource consent process as well as iwi management plans. The first part of this investigation determined whether councils recognise and provide for contestability of resource consent applications. Council policies on other consultation mechanisms, contracting out of services to tangata whenua, and reference to ss 33 and 34 of the RMA, were also investigated. These are important mechanisms in determining the type and level of participation councils are prepared to carry out with tangata whenua. In addition, information found in iwi management plans were scanned and data was collected under themes identified by the literature review as being important for tangata whenua participation in the resource consent process.

A description of the planning documents was given as well as a record and analysis of the data found in the documents. The investigation revealed the cautious approach taken by local authorities in terms of their tangata whenua polices and objectives. However, the analysis discussed local authority policies only. Phase two surveyed through questionnaire local authority practices with regard to the consent process. The questionnaire responses also identified perceptions of possible opportunities for tangata whenua participation in the consent process in any move to contestability. Chapter Five analyses the empirical data gathered from the survey.

Chapter Five
Perceptions on contestability: findings from the survey research

5.1. Introduction

This chapter presents, analyses and discusses the findings gathered from a survey of local authorities in three regions. In Chapter Four it was concluded that additional data on the planning practices would be a useful adjunct to the documentary analysis. In addition, it was considered that the perspectives of local authorities on the opportunities for tangata whenua involvement in the consent process from the introduction of contestability were needed. These perspectives would come from Iwi Liaison Officers or other officers who work with local iwi/ hapu on resource management issues.

The analysis comprises two parts. The first part analyses the perceptions of contestability from data collected in the questionnaires. The key themes around which the questionnaire items were focused were: functions and roles, education, opportunities fom contestability, and potential negative aspects of contestability. The second part of the analysis compares the policies and practices of local authorities and compares this with the survey findings. Information for this chapter also draws on the literature and documents reviewed in Chapters One and Two, other documentary data, and relevant case law and data from Chapter Four.

In Chapter Three, I discussed my reasons for the choice of participants in this phase of the research. The following section discusses the selection of participants and the format of the questionnaire.

5.2. The Survey

A questionnaire was sent to a sample of local authorities in early September 1999. Almost all councils had either an iwi liaison officer or council officer, with two

councils sharing the same iwi liaison officer. One liaison position had been recently terminated in the Hawkes Bay Regional Council due to the establishment of an iwi based resource management unit[1]. Questionnaires were posted to 16 officers and twelve (75%) responded. Broken down into the three regions the response rates were: Manawatu-Wanganui region, five out of eight (62%) officers responded; Hawkes Bay region, three out of four (75%) responded; and the Southland Region, four out of four (100%) responded.

Attached to the questionnaire a letter outlined the contestability proposal and informed participants of the 'RMA Amendment Bill 1999' proposal (Appendix Two). This was to ensure that respondents were familiar with the proposal although there had been widespread debate surrounding it during the months before the survey.

The questionnaire comprised two sections:

- The first section solicited data on the officers' perspectives on the contestability proposal and opportunities this could have for Maori participation. This section consisted of closed-ended choices that explored a range of functions and roles affecting Maori participation in deciding how a consent would be heard: notification of decisions, information sharing, consultation, funding iwi, establishing procedures for participation, skills, and knowledge of internal and external consent processors. Following on from this were several questions used to explore the officers' opinions on areas where contestability could have positive and/or negative consequences for Maori participation in the consent process. Respondents comments were presented verbatim under headings developed from the questionnaire (see Appendix Two).

- The second section sought information about the current council practice in the resource consent process. Officers were asked a number of mainly closed-ended questions on whether their council currently practiced contestability, contracted out

[1] In 1999, the Hawkes Bay Regional Council and Ngati Kahungunu established the Ngati Kahungunu Resource Management Unit. The purpose of the unit is to assist in the resource management needs of whanau/hapu.

services to iwi organisations, received and carried out requests from iwi with regard to ss 33 and 34. The final question explored further opinions on the contestability proposal or on other issues raised in the questionnaire (see Appendix Two). Discussion of this question appears at the end of the first section in the following discussion because of its link with contestability.

5.3. Part 1: Local Authority Officers' Perceptions of Contestability

5.3.1. Awareness of the contestability proposal

All but one of respondents indicated that they were aware of the contestability proposal. Only one gave no indication either way. Contestability has been considered a contentious issue by the Minister for the Environment (1998, 1999) and has received a great deal of attention in the public consultation on the proposed RMA amendment. It was therefore not surprising that most participants were aware of this proposal. This enhanced the response to this study, as most of those surveyed were able to comment on the proposal in detail.

5.3.2. Functions and Roles

This question consisted of a closed-ended list of functions and roles affecting tangata whenua participation under a contestable consent regime. Respondents were asked to choose which functions and roles they considered were most likely or less likely to improve (refer Appendix Two for further details).

Notification Decisions

Table 5.1. Local Authority Functions and Roles: Notification decisions under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	1	-	-	1
Less likely to improve	2	2	-	4
Remain the same	2	-	2	4
Don't know	-	1	2	3

The role of determining whether a consent application is notified under s 93 or non-notified under s 94 is currently left to the consent authority's (council staff) discretion. Respondents were asked to speculate on this role under contestability. One of the twelve respondents considered the notification of decisions would be more likely to improve under a contestable regime. Four considered the function would be less likely to improve, four considered the function would remain the same, and three did not know. In Chapter Two it was revealed that s 94 of the RMA is the only vehicle for consent applications that do not fall under the conditions set out in s 93. These provisions give a consent authority the discretion to decide on the notification of applications.

Under the proposal to introduce contestability, external processors will also have the discretion to decide whether the application is processed under s 93 as a notified application or s 94 as a non-notified application. The additional power private processors will have has concerned many iwi authorities, local authorities and public interest groups due to the added potential for applicants and developers to use sympathetic consent processors (PCE, 1998). Presently tangata whenua have difficulty in persuading local authorities to consult with them on consent applications. For example, in *Worldwide Leisure* v *Symphony Group Ltd.* [1994] M.112/94 (High Court) a problem arose where an application was made for a certificate of compliance under s 139 of the RMA for an environmentally significant and highly controversial development. The High Court held that the council had failed to take into account

relevant considerations because tangata whenua were not consulted regarding notification of the application under s 94 of the RMA. The High Court held it was necessary for the district council to obtain written consent from tangata whenua or to notify publicly the application.

A similar situation arose in *Ngatiwai Trust Board* v *Whangarei District Council* [1994] NZRMA 269. This involved an appeal against consent given to subdivide land beside a reserve pending a Treaty claim by the tangata whenua. Neither the Whangarei District Council, nor the Northland Regional Council had consulted with either the Ngatiwai Trust Board or the Wharanaki Trust Board. The Planning Tribunal held that active consultation based on s 8 was required stating that either respondent was under a duty to consult with tangata whenua before proceeding to hear applicants and representatives of the iwi groups. The Tribunal stated that:

> *...in all cases where Maori are known to reside in the vicinity of a site the subject of a resource consent application, or otherwise where local Maori community interests have registered some viewpoint or concern about the application, the council to whom the application is addressed must first consult with those involved or their representatives, before proceeding to hear and determine the matter.*

Type and level of information shared by council

Table 5.2. Local Authority Functions and Roles:
Type and level of information shared under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	-	-
Less likely to improve	2	1	1	4
Remain the same	3	-	2	5
Don't know	-	1	1	2

Information shared by council with tangata whenua concerning applications enables iwi/hapu to seek consultation as an affected party under s 94 or go through the public submission processes under s 93. Four local authority officers considered that the type and level of information shared by councils would be less likely to improve under a contestable regime. Five considered this function would remain the same, and two did not know.

The kaitiakitanga responsibility is considered by the PCE (1998: 84) as a "powerful imperative" for protecting the spiritually significant dimensions of the environment. Information is valued as a taonga. Its use can result in fundamental conflicts between the two different systems of, on the one hand, the bureaucracy of local government, and, on the other, tikanga and matauranga Maori (ibid.). The protection of waahi tapu sites and other sensitive information are oftenheld on silent files, where varying levels of information and specificity are provided into council processes, and are a concern for tangata whenua if contestability is enacted. This is because many iwi have built up a position of trust with their local authority and have devolved to the local authority in trust, information of which the iwi consider they retain ownership. One comment made in the Kai Tahu submission on the RMA Amendment proposals was:

> *Under this [contestability] proposal, the council may have to devolve information to a private processor. How will iwi be assured that the information will be treated appropriately and with respect* (cited in MFE, 1999b).

There is extreme caution amongst tangata whenua about the supply of sensitive information. In the past, many iwi and hapu have been negatively affected by the way information has been extracted and used. Smith (1998: 175), referring to the way colonisation of Maori culture has threatened the maintenance and transmission of knowledge that is specifically Maori, observes:

> *the dominance of western culture and the history that underpins the relationship between...Maori and...non-Maori have made it difficult for Maori forms of knowledge and learning to be accepted as legitmate.*

It is therefore a fundamental principle for iwi and hapu that they retain control of their information and not the consent processor or local authority.

Pre-application consultation

Table 5.3. Local Authority Functions and Roles:
Pre-application consultation under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	-	-
Less likely to improve	3	1	1	5
Remain the same	2	-	2	4
Don't know	-	1	1	2

Pre-application consultation is not a statutory requirement though it is a function that identifies affected parties and environmental issues that may affect a consent application. Currently while some local authorities encourage the applicant to consult with tangata whenua, other local authorities actively seek consultation with iwi/hapu or act on behalf of (sometimes unwilling) applicants. Five local authority officers considered pre-application consultation would be less likely to improve under a contestable regime. Four considered this role would remain the same, and two did not know.

The main problem identified with pre-application consultation is exactly who should be carrying out the consultation (PCE, 1996, 1998). Local authorities have been identified by the PCE (1996) as agreeing that pre-application consultation by applicants reduces delays in processing the consent application as well as conflict later in the consent process. Applicants have also acknowledged pre-application consultation as a benefit to helping the applicant identify problems at an early stage.

Procedures identifying affected parties

Table 5.4. Local Authority Functions and Roles:
Procedures identifying affected parties under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	1	-	-	1
Less likely to improve	1	2	1	4
Remain the same	3	-	2	5
Don't know	-	1	1	2

The RMA does not provide a definition of an affected party leaving it to the discretion of the consent authority to decide who is affected. Five local authority officers considered that the procedures identifying affected parties would remain the same under a contestable regime. One considered that the procedures would most likely improve, four considered the procedures would be less likely to improve, and two did not know.

Under the present non-contestable consent regime, local authorities have the discretion to decide who is an affected party or individual. This discretion has been queried by tangata whenua groups who have expressed dissatisfaction with the way local authorities have identified affected parties (PCE, 1998). The PCE observed that:

> *There was a concern [by tangata whenua] at the lack of clarity... and precision in councils' identification of who should be consulted, and which groups or individuals have an interest and authority to speak in response to particular proposals* (PCE, 1998: 95).

Procedures regarding the checking of environmental effects

Table 5.5. Local Authority Functions and Roles:
Procedures checking environmental effects under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	-	-
Less likely to improve	1	1	1	3
Remain the same	4	-	-	4
Don't know	-	1	2	3

The assessment of environmental effects as part of the overall decision on the processing of the consent is integral to determining affected parties under ss 93 or 94. Presently the applicant carries out the assessment of environmental effects of a consent application. This assessment is most likely to remain the same under contestability, however, there is concern in relation to the preservation of heritage and waahi tapu sites. For example, problems with site desecration have been associated with council operations and approval of consent application. The Hawkes Bay and Auckland regions have seen old pa sites disturbed or destroyed as a result of subdivisions and roading developments (PCE, 1998). The PCE (1996) report on Heritage Management recorded that in the Auckland metropolitan area over 50% of pa sites have been "extensively modified or destroyed since city development began" (PCE, 1996: 29). Another example given by the PCE is Te Taiwhenua o Heretaunga's objections to the Auckland Regional Council's plans to use the old Pakowhai marae site as a dumping site for concrete (PCE, 1998: 106).

The consent authority has the discretion to decide whether or not the assessment has been thoroughly carried out. Four local authority officers considered that the procedures for checking environmental effects would remain the same under a contestable regime. Three respondents considered the procedures would be less likely to improve and two did not know.

The different values and expectations between Maori and non-Maori where important resources of Maori are not recognised or appreciated for their worth, is currently affecting the preservation of these sites. Some iwi consider that a contestable environment may increase the number of private processors inexperienced in tikanga Maori and less sensitive to their needs:

> ... *concern that rich developers can purchase consultants to advocate the benefits of the development while possibly down-playing potential adverse effects* (Tuwharetoa Maori Trust Board, Turangi – Action for the Community report, 1999).

Cost recovery to tangata whenua

Table 5.6. Local Authority Functions and Roles:
Cost recovery to tangata whenua under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	2	-	-	2
Less likely to improve	1	2	1	4
Remain the same	2	-	1	3
Don't know	-	1	1	2

Presently there is no statutory requirement for local authorities or applicants to reimburse tangata whenua who participate in consultation, however, many councils do provide assistance of some sort to iwi to participate in resource management processes (MfE, 1999a). Four local authority officers considered cost recovery would be less likely to improve under a contestable regime. Two considered cost recovery would be most likely to improve and three considered the function would remain the same, and two did not know.

According to the research on Maori involvement in the resource consent process (TPK and MFE, 1996; LGNZ, 1997; PCE, 1998) one of the current difficulties for tangata whenua is recovering consultation costs from applicants and local authorities. The

emphasis on statutory consultation by local authorities has strained tangata whenua resources (PCE, 1998). TPK and MfE (1996: 12) report that some local authorities do not support the idea of iwi charging councils for their services. One reason given for this lack of support was concerns by some local authorities about whether iwi authorities could ensure efficiency and accountability once an agreement was made (ibid.: 12). It is unclear at this stage whether cost recovery will improve under contestability. However, arguably tangata whenua expertise and knowledge should be recognised by consent processors and reimbursed in a way that is similar to information obtained from other consultants.

Accountability to tangata whenua

Table 5.7. Local Authority Functions and Roles:
Accountability to tangata whenua under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	-	-
Less likely to improve	3	2	-	5
Remain the same	2	-	1	3
Don't know	-	1	2	3

Several decisions are made during the processing of applications that are currently the responsibility of the consent authority. Under a contestable consent regime, these responsibilities would devolve to private processors. Five local authority officers considered that accountability to tangata whenua would be less likely to improve under a contestable regime. Three considered accountability would remain the same, and three did not know. Currently the decisions made regarding how a consent application will be processed (notified or non-notified) are the responsibility of the consent authority. Under contestability, the devolution of these decision-making powers to private processors changes those responsibilities.

Funding tangata whenua consultation

Table 5.8. Local Authority Functions and Roles:
Funding tangata whenua consultation under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	-	-
Less likely to improve	2	2	-	4
Remain the same	3	-	3	6
Don't know	-	1	1	2

Funding is one of the main factors affecting the ability of tangata whenua to be able to participate in consultation processes. Successful consultation depends on the ability of tangata whenua to participate. It is also dependent on the resources available to tangata whenua and this issue is highlighted in several of the iwi management plans. For example, in *Kawerau A Maki Trust* (1995:3) the iwi states:

> *The Trust undertakes to provide the information, which we deem appropriate in an efficient and timely manner within the constraints of the resources available to us.*

The *Kai Tahu Ki Otago* strategy (1995: 28) states:

> *Current legislation has failed to provide for the human and resource needs of iwi in present-day consultation... Regional and district councils and local government agencies have failed to utilise the provisions of the legislation (such as s 42A of the Resource Management Act 1991) which provide opportunities to resource iwi.*

Under s 42A of the RMA, a local authority officer, consultant, or other person can be employed for the purpose of providing a local authority with a report on any matter

outlined in s 39. This includes tikanga Maori, resource consent applications and conditions.

Currently there is no statutory responsibility under the RMA for local authorities to fund or resource tangata whenua to participate in resource management. At the time of the drafting of the RMA, the Labour Government was proposing to introduce a central agency for funding iwi participation under the Runanga Iwi Act 1990. A change of government later in the year resulted in the Act being repealed and the funding issue remained unresolved. The PCE (1998) has suggested that the current iwi funding issues could have resulted from the abolition of the Runanga Iwi Act. Although the PCE does not elaborate on this in any detail, it could be that funding Maori participation in the RMA was designed around the Runanga Iwi Act's funding structures and when the Act was repealed the RMA remained unchanged and iwi funding was not resolved.

Four local authority officers considered funding for consultation would be less likely to improve under a contestable regime. Six considered funding would remain the same, and two did not know (see Table 5.8.). The procedures for funding iwi are perceived by the majority of survey participants as remaining the same or as less likely to improve. This suggests that tangata whenua participation in a contestable environment could be hindered by the lack of funds available to them.

Application of s 8 in consent decisions

Table 5.9. Local Authority Functions and Roles:
Application of s 8 in consent decisions under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	-	-	1	1
Less likely to improve	1	2	-	3
Remain the same	4	-	1	5
Don't know	-	1	1	2

Section 8 of the RMA requires the principles of the Treaty of Waitangi to be taken into account by those exercisng powers and functions under this Act in relation to the management, development, and protection of natural and physical resources. The use of the term 'take into account' implies that in every case the principles of the Treaty must be considered and weighed against other factors when making a decision. In *Haddon v Auckland Regional Council* [1994] NZRMA 49, the case involved an appeal against a recommendation by the Auckland Regional Council (ARC) to the Minister of Conservation that the Auckland City Council (ACC) be permitted to extract sand from off-shore Pakiri Beach. The Planning Tribunal held that that the parties had not taken into account the principles of being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed. The Tribunal stated that under s 8 of the RMA:

> *...the ACC as applicant preparing a function, the ARC as a recommending authority exercising a function, and [the Ministry of Conservation] as the licensing authority exercising a power, have a mandatory duty to take into account the principles of the Treaty of Waitangi.*

In *Wellington Rugby Football Union Incorporated v Wellington City Council* [1993] W 84/93, the Planning Tribunal held that s 8 imposes a duty of consultation with tangata whenua on the local authority, where issues of importance to Maori are at stake. The Tribunal stated:

> *It is only if the council officers carry out research or consultation and are seen to do so by virtue of the material that they pull before the council, that it can avoid being in breach of the Treaty provision of the Act [RMA]. The council itself in making its decision then has a duty to take into account any relevant principles ... in weighing its decisions.*

However, the extent to which private processors will apply s 8 in consent decisions if they only need to 'take into account' the principles needs to be considered. Five of the

local authority officers considered the application of s 8 would remain the same under a contestable regime. One considered the application of s 8 would most likely improve, two considered this function would be less likely to improve, and two did not know (see Table 5.9).

In some cases, competition may improve the operations of both council and private processors in order to develop a good reputation. The RMA Amendment 1999 Bill has proposed that councils maintain the authority to set the standards under which private processors must operate. Those councils that are firm in their requirements that the Treaty principles be taken actively into account will ensure private processors follow suit.

Policy and Plan development

Table 5.10. Local Authority Functions and Roles:
Policy and plan developments under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	1	-	-	1
Less likely to improve	1	2	-	3
Remain the same	3	-	3	6
Don't know	-	1	1	2

The transparency of plans and policies is dependent on the planner developing objectives and aims that reflect the intent of the statements. Six of the local authority officers considered policy and plan development would remain the same under a contestable regime. Three considered this function would be less likely to improve, one considered this function would be most to likely improve, and two did not know.

Chapter Two highlighted that one of the Minister for the Environment's objectives in the 1998 RMA review was to ensure that an improved consent process would improve the policy and plan development carried out by councils. The discussion in Chapter

Two revealed that the perceptions of many in the business community are that plans under the RMA reflect those under the old TCPA regime, that is, they are highly prescriptive. The Minister for the Environment (1998) argues that the introduction of contestability in the resource consent process would allow planners and policy-makers to concentrate on developing less ambiguous plans.

Upton stated:

> *The other major benefit [of contestability] arises from the incentive that is placed on plan makers who seek to achieve particular outcomes to write clear and unambiguous documents. Consistent administration of plans in a world of multiple processors will be dependent on clear plans. There will be no room for vague or ill-defined provisions* (1998: 4).

Private processors will arguably demand clear and concise plans and policies from local authorities simply because of the possibility that inconsistent processing could occur through inadequately drafted plans (MfE, 1999b). Contestable processors could be valuable submitters to proposed plans since they have a vested interest in ensuring that plans are clear and easy to understand (ibid.).

Nuttall and Ritchie (1995) advocated the importance for having transparent plans and policies:

> *In the terms of a Maori dimension, it essential that policy statements and plans are transparent in their identification of issues, goals, methods and desired outcomes* (ibid.: 110).

This is important in the sense that policies involving tangata whenua participation should become clearer in their purpose if contestability is enacted. Regional Policy Statements and District Plans are planning documents that set the framework for consultation processes in resource consent applications. The amount of consultation and participation carried out in the preparation of plans and statements determine the

extent to which Maori are able to participate in the consent process (Nuttall and Ritchie, 1995).

Interpretation and application of plan and policy provisions

Table 5.11. Local Authority Functions and Roles:Interpretation and application of plan and policy provisions under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Most likely to improve	1	-	-	1
Less likely to improve	1	2	2	5
Remain the same	3	-		3
Don't know	-	1	1	2

Integral to the development of plans is how the provisions are interpreted and applied. Good processing requires transparency in policy and plan provisions. Five of the local authority officers considered that the interpretation of policy and plan provisions would be less likely to improve under a contestable regime. Three considered this function would remain the same. One considered it would be most likely to improve, and two did not know.

The interpretation of policy and plans depends on the consent processor and the wording of local authority plans and policies. If a plan or policy does not contain a comprehensive and thorough set of objectives and polices on tangata whenua participation in resource management there is a chance that processors will misinterpret provisions especially if there is a degree of unfamiliarity with the structure of council plans and policies.

There is also a possibility that competition will encourage business-focused private processors to cut corners in processing applications as a means of cutting costs for the applicant. Alternatively, competition may create a demand by private processors for councils to develop structured and transparent plans and policies.

5.3.3. Education: skills and knowledge in iwi/Treaty issues

External (private) processors skilled in iwi/Treaty issues

Table 5.12. Skills of external processors under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Increase in skills	1	-	1	2
Decrease in skills	-	2	1	3
No difference	3	-	1	4
Don't know	1	1	1	3

Local authority officers were asked what the impact of contestability would have on the type and level of iwi/Treaty skills for external processors under contestability. The survey responses were mixed: three of the local authority officers considered there would be a decrease in the level of iwi/Treaty skills of external processors under a contestable regime. Four considered there would be no difference, two considered there would be an increase, and three did not know.

Internal (local authority) processors skilled in iwi/Treaty issues

Table 5.13. Skills of internal processors under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Increase in skills	-	1	-	1
Decrease in skills	1	2	-	3
No difference	3	-	4	7
Don't know	1	-	-	1

Respondents were also asked what the impact of contestability would have on the type and level of internal processors skilled in iwi and/or Treaty issues. Seven of the local authority officers considered there would be no difference with the level of skills of internal processors under a contestable regime. Three considered the level would decrease, one considered it would increase, and one did not know.

It is impossible to determine what levels of knowledge potential processors have on iwi/Treaty issues. It could well be that private processors might have a higher standard than some local authorities. In most cases, it has taken local authorities over eight years and some steep learning curves to become educated on these issues at the current level. Even then, research has indicated that there is a greater need for cultural awareness amongst local authorities including council officers and councillors (MfE, 1998a; PCE, 1998).

The MfE (1998a: 24) has suggested that the approach taken by councils in interactions with tangata whenua is likely to reflect the level of understanding they have in relation to relevant Maori issues. This is important under contestability if inexperienced processors are used for making decisions on consent applications. One response by a local authority officer was that iwi/hapu would probably have more confidence in private processors if they are able to demonstrate a level of iwi/Treaty skills: "Iwi/hapu would probably be more confident of fair outcomes if they knew that external processors had skills relating to iwi/hapu, Treaty issues etc".

5.3.4. Opportunities

Table 5.14. Opportunities under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	1	-	3	4
No	4	2	-	6

Local authority officers were asked to judge whether contestability would be likely to create positive opportunities for tangata whenua participation in resource consent processes. Six of the local authority officers considered contestability would not create positive opportunities and four local authority officers considered contestability would create positive opportunities.

A common comment by respondents was that iwi would be able to register as a consent processor. For example, "...[there] could be opportunities for councils to approve tangata whenua as a consent processor". Similarly, another commented that:

> *Currently, iwi are probably under-resourced to apply to Council to act as consent processor...contestability seems to provide iwi with some opportunities in this regard.*

The responses from the Hawkes Bay region referred to local developments where the regional council is the underwriter of the Ngati Kahunugunu Resource Management Unit: "Ngati Kahungunu is presently developing a Resource Management Unit... may eventually become resource consent processor". The purpose of the resource management unit is to provide advice, assistance, and support, and advocate for the resource management needs of hapu. The unit aims to become self-funding within two years from a number of funding options, one of which is to register as a consent processor and provide contestable consent processing services (Tahitanga, 1999).

The Southland situation, that is of one iwi residing in the region, underpinned one respondent's comment: "only a single iwi to deal with through a proven structure funded by the four local authorities". The opportunity for tangata whenua to become a consent processor was also mentioned: "...[there] could be opportunities for councils to approve tangata whenua as a consent processor"

Positive opportunities also depend on the processor and their perspectives on tangata whenua participation. As one participant stated: "...a lot may depend on the views of the processors and how well consultation is managed". Another participant thought that there would be positive opportunities, but this was dependent on the processor:

There would be some positive opportunities, however, on the other hand, there may be none due to the processors and the knowledge on iwi issues.

5.3.5. Potential negative aspects of contestability

Table 5.15. Potential negative aspects under contestability of resource consent processing

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	4	2	3	9
No	1	-	1	2

Nine of the local authority officers considered contestability would have negative aspects on tangata whenua participation in the resource consent process and two officers considered it would not.

Comments centered on the negative aspects of private sector processors:

The down side [to contestability] could be if private sector non-iwi consent processors are appointed, who are less sensitive to iwi concerns/ issues than current Council processors.

Contestability, the mechanisms, needs to be worked through carefully especially in regard to due diligence in regard to the statutory implication through resource consent processing.

Some common themes were also reflected in respondents' comments. These are discussed below.

5.3.5.1. Common Themes

Competition

The majority of respondents who considered contestability would have negative consequences stated the competition levels involved in gaining consent work was a potential problem, that is, that profit-driven motives of private processors would by-pass tangata whenua interests in consent applications. One comment summed up several of the respondents' sentiments:

> *...this [competition] would bring about a potential lack of consistent consent decision-making/ reasoning, inability to develop lasting working relations with TW [tangata whenua], limited understanding of any pragmatic approaches to applying s 6, s 7, s 8 provisions of the RMA.*

Not only was this perceived by survey respondents as being a potential problem under contestability, other stakeholders including business and rural landowners have also expressed their concern about the lack of consistency in decision-making across the country under the current system (MfE, 1999b).

Insufficient knowledge

Private processors less familiar with the area and local issues compared with internal processors were a concern for the Southland region. One response concerned familiarity with iwi issues particularly the Kai Tahu Deed of Settlement and Statutory Acknowledgement areas. The Kai Tahu Claims Settlement Act 1998 covers the Southland region. The Act includes a Statutory Acknowledgement by the Crown of Kai Tahu's relationship with certain sites and areas of significance to the iwi. The Statutory Acknowledgment aims to improve the implementation of the RMA processes by requiring consent authorities to have regard to Statutory Acknowledgments when making decisions on the identification of affected parties.

The Statutory Acknowledgement does not of itself prove the association for the purpose of consent proceedings but may be taken into account by decision-makers. Several respondents commented on the possibility of private processors lacking in knowledge to deal with the dynamic nature of Maoridom:

> *Maori are all too often being lumped into a single category, this diversity of realities and situations needs to be recognised in the participation in RMA issues. The expectations of consultation and levels of feedback need to be adjusted according to the issue/situation. Iwi are at different stages of development.*

> *Maoridom i.e. Hapu representatives are an integral part of the consent process. External processing is repugnant to tribal lore.*

Relationship development

Working relationships were also a concern for several respondents. There is the perception amongst several local authority officers that an increase in the number of processors would make it difficult for tangata whenua to develop good working relationships with private processors because of the extra time and resources required:

> *The opportunity to develop these relationships under contestability of [the] consent process will be reduced because of the increased number of "players".*

A reduction in direct contact between iwi and council was seen as a negative outcome in the Southland region due to the strong co-management working relationship between the four runanga and local authorities in the region:

> *... perhaps some reduction in direct contact between iwi and Council officers; a contractor or agent may not know to what level consultation should occur with iwi.*

One respondent commented that contestability would weaken the relationship between council and iwi that has taken time to build up, "contestability runs the risk of weakening the link between Council and Iwi". The relationships between local and regional councils, iwi, hapu and other iwi are considered complex (Tahitanga, 1999). Increasing the numbers of individuals and groups that tangata whenua have to communicate with could marginalise them further withh regard to participating in resource management processes.

Another respondent commented on the performance of private processors:

> *Consultant processors will focus on doing the least amount of work possible, including the least amount possible of tangata whenua consultation and involvement.*

Consultation fatigue

Respondents commented on the likelihood of tangata whenua experiencing 'consultation overload' because of more processors. One local authority officer commented that iwi were already experiencing consultation fatigue and further agencies involvement in consultation would add to this:

> *Tangata whenua have to deal with several different councils and many other agencies. It takes time to build these relationships. Contestability will add to the range of contacts.*

Consultation overload was one factor considered by another respondent as already weakening tangata whenua participation:

> *There still remains little recognition of this [consultation overload] and/or any support for TW [tangata whenua] to take a meaningful part in RMA processes.*

Consultation fatigue was identified as a problem as far back as 1996, "...causing situations for some iwi authorities to become frustrated at attempts to register their concerns in policy statements, plans and the resource consent process" (TPK and MfE, 1996: 10). A lack of staff and time constraints were seen as the main factors contributing to these frustrations.

The list of consultation requirements is likely to grow under contestability. Tangata whenua will not only be required to consult with internal and external processors on consent applications, and in the preparation of policies and plans, but they also have to consult with other government agencies requesting information regarding the environment, conservation, and natural resource strategies. Crown agencies such as the Department of Conservation have a statutory obligation to consult with tangata whenua in the preparation of conservation management strategies under the Conservation Act 1987.

With a forecasted increase in consultation predicted, several respondents commented on the funding issue which is likely to remain the same under contestability.

One respondent summed up the current situation for tangata whenua:

> *Maori are all too often lumped into single categories, the diversity of realities and situations needs to be recognised in the articulation of RMA issues. The expectations of consultation and levels of feedback need to be adjusted according to the issue/ situation. Iwi are at different stages of development...this relationship with local government is only eight years young/old after being shut out for 130 years it is not easy without human and financial resources to suddenly become all things to all participants, councils, Govt. agencies etc. Legislatively the commitment exists, in reality that commitment has not presented itself in practical everyday situations through devolution of Central Govt. responsibilities to local Govt.*

Treaty partnership

Consultation is also an avenue for iwi to express their status as both tangata whenua and Treaty partner. The current management or ownership of natural resources issues has often been interpreted by iwi as deriving from this status (TPK and MfE, 1996).

Contestability has been identified as having ramifications for the Crown and Maori partnership under the Treaty of Waitangi. Presently a problem exists where local government considers itself divorced from the responsibilities the Crown has towards tangata whenua under the Treaty (see Chapter Two). Councils' role in satisfying obligations and expectations to both iwi and Crown is likely to remain uncertain (LGNZ, 1997). The LGNZ (1997) report *Liaison and Consultation with Tangata Whenua* claims that local government's obligations to consult rests with the prior fact of the Crown's Treaty partnership with Maori (ibid.:16). Local government may be an autonomous entity but it derives its power and functions from central government through legislation and as such can be seen as an agent of the Crown. Therefore, from this perspective its obligations to the Crown, "...require that tangata whenua be consulted" (ibid.). Whether Maori are willing to accept private processors as agents of the Crown and a Treaty partner could be contentious:

> *... the final decision on how a consent application should be heard should remain with local authorities and not applicants or their agents.*

One local authority officer commented that contestability would result in the following losses for tangata whenua: "...the loss of self-empowerment, rangatiratanga and ownership values, and principles". Other comments suggested that private processors would be less likely to recognise Treaty obligations and would refrain from the obligation to consult with iwi/ hapu, and would most likely be "less sensitive to iwi/ Treaty issues than councils".

Maori chiefs signed the Treaty with the Crown and obligations deriving from that flow follow through to local government: "...Maori did not sign the Treaty with the private sector" (as quoted in MfE, 1999b). It is important to acknowledge that the area surrounding the Crown/Treaty relationship is large, and falls outside the scope of this thesis. This thesis touches only upon the Crown/Treaty relationship.

5.4. Part 2: Current consent provisions: comparing policy to practice

The second section of the questionnaire asked respondents about current council practices in the resource consent process. These responses are compared with the policies and plans used in the documentary analysis in Chapter Four.

5.4.1. Contestability in the processing of consent applications

Table 5.16. Current practices: contesting the processing of consents

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	1	1	-	2
No	4	2	3	9
Don't Know	-	-	-	-

A key finding in the review of the fourteen district plans prepared by territorial local authorities and sixteen regional policy statements prepared by regional councils and unitary authorities (see Chapter Four), revealed that only one policy statement alluded to contestability. The questionnaire asked local authority officers whether their council presently contested the processing of resource consent applications. Two of the twelve local authority officers indicated their council presently contested application processing, and nine said their councils did not (see Table 5.16).

5.4.2. Contracting-out the processing of consent applications

Table 5.17 Current practices: contracting out the processing of consents

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	4	-	-	4
No	1	3	2	6
Don't Know	-	-	-	-

The content of plans and policy statements were also analysed to identify council policies on contracting-out consent processing. Contracting-out has similarities with the contestability proposal with the exception that, under contestability, the applicant has a choice of processor (see Chapter One). A discussion on the use of contracting-out was found in one policy statement, but none of the district plans analysed discussed this mechanism. The Hawkes Bay regional policy statement saw contracts as an option to fund tangata whenua participation in resource management (see Chapter Four).

Local authority officers were asked whether their council presently contracted out the processing of consent applications. Nine of the local authority officers stated that their councils did not contract out services to iwi; while three said their council did. Contracting-out of resource consent processing using a consultant was considered by one respondent as means to filling resource (staff) gaps within consent sections of councils or where councils themselves had a conflict of interest. The MfE annual survey identified 29 (35%) of local authorities (out of 82 responses) contracted out some or all of consent applications for processing, to iwi consultants (MfE, 1998b: 67). These findings suggest that there are some variations between councils' policies and practices.

Several iwi authorities also consider the use of contracts as a method to fund their involvement in resource management processes. For instance, Te Whanau O Rongomaiwahine uses its own iwi consultants and contracts as a means to funding participation in resource management processes. Kai Tahu Ki Otago see contracts as

providing the iwi with the opportunity to adopt methods of internal consultation most suited to achieving outcomes that reflect cultural values. Kai Tahu Ki Otago view consultation contracts as0 a means to "achieving iwi participation and input into policy/plan development and consent processes" (Kai Tahu Ki Otago, 1995: 30).

5.4.3. Transfer of power provisions

Table 5.18. Current practices: use of transfer of power provisions

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	1	1	1	3
No	4	-	3	7
Don't Know	-	2	-	2

Planning documents were examined for reference to the transferral provision set out in s 33 of the RMA. Where the provision was included in planning documents, it was associated with terminology such as *where appropriate* and *may be considered.* For example, Environment Waikato states it will "investigate the transfer of power to iwi in the administration of heritage resources and where appropriate undertake such a transfer". The Taranaki Regional Council states it will consider the opportunities for transferring powers provided the required conditions of representing the community of interest, efficiency, and expertise, and accountability are met.

The survey respondents were asked several questions on the application and use of s 33 of the RMA: Were respondents aware of any requests from an iwi authority to use the transfer of powers, functions or duties and if so when have these provisions been used and in what situations? Seven of the local authority officers said their councils had not received requests from iwi authorities for the transfer of powers (see Table 5.18). Three stated there had been requests but these were declined. One respondent commented that requests made by iwi were declined because "iwi did not meet the specific and conjunctive tests in s 33 of the Act".

The findings indicate a small number of iwi authorities (three) in the sample requesting the transfer provisions. It is not clear why this is so but the exclusion of transfer provisions in some planning documents could be a factor influencing reasons for the low number. One respondent suggested the lack of resources for iwi as a possible reason. Another reason could be the liability clauses in s 33 of the RMA in that the transferring authority retains responsibility for the activity (see Appendix Three). Comments from several local authority officers support this:

> *Council has received requests but declined due to the present liability clauses in s 33.*
>
> *Liability issue in present s 33 may also be a constraint that may be remedied by Amendment.*
>
> *Only if the RMA is changed to transfer responsibility.*

Currently, under s 33(3) of the RMA, responsibility remains with the local authority to carry out the transfer and not the transferee:

> S 33(3) of the RMA states: *Where a local authority that transfers any function, power, or duty under this section shall continue to be responsible for the exercise thereof.*

If local authorities were reluctant to meet requests for a s 33 transfer because of the current liability clauses, I would argue that this should be stated in plans and policy statements. Local authorities need to be clear about their intentions in their statements and plans and not be guided by the use of terminology such as *may*, *maybe*, *as appropriate*, or *the appropriate potential.* The inclusion of such terminology indicates a degree of caution on the part of local authorities over the transfer provisions. The PCE describes the sentiments of tangata whenua over this cautionary approach as:

> *...falling into the 'too-hard' basket and does not provide opportunities for tangata whenua to express kaitiakitanga particularly in resource consent decisions affecting iwi or hapu* (PCE, 1998: 70).

The use of qualifying phrases such as *where appropriate, exploring,* and *investigating* could be indirectly denying Maori the opportunities to practice environmental management under a Maori kaupapa. While a number of local authorities have stated that they will *consider, investigate,* or *explore* these options, to date there has been no transfers of powers to iwi identified in research (Nuttall and Ritchie, 1995; PCE, 1998, MfE, 1998a, 1998c). The transfer provisions under s 33 of the RMA involve an issue of power. The inclusion of terms such as *maybe* does not necessarily involve local authorities handing over power to tangata whenua.

The transfer of power provision is considered by tangata whenua as a practical way of giving effect to tino rangatiratanga. Te Whanau O Rongomaiwahine's resource strategy states that provisions contained under s 33 would:

> *...enable Te Whanau O Rongomaiwahine to carry out its kaitiaki responsibilities over its natural and physical resources and other taonga, and to maintain its territorial integrity over such resources and taonga* (Te Whanau O Ronogomaiwahine,1992: 29).

Kai Tahu O Murihiku expressed similar aspirations:

> *Legislative change is very possible to give effect to the obligations and principles to the Treaty of Waitangi... Kai Tahu may seek from the Southland Councils the transfer of power, under section 33 of the Resource Management Act, to certain areas that are important to Ngai Tahu* (Te Whakatau Kaupapa O Murihiku, 1997: 73).

5.4.4. Delegation of power provisions

Table 5.19. Current practices: use of delegation of power provisions

	Manawatu-Wanganui n=5	Hawkes Bay n=3	Southland n=4	Total n=12
Yes	1	-	-	1
No	4	3	4	11
Don't Know	-	-	-	-

Respondents were also asked if their council has received requests from iwi to use the delegation of powers, function or duties in s 34 and if so, whether the provisions had been used and in what situations would council consider any requests. Eleven of the local authority officers said their councils had not received requests from iwi authorities. One respondent said their council had frequently made use of this provision by delegating council-approved Maori commissioners for consent hearings. Another respondent indicated that their council may use this provision in the future with the establishment of a local iwi authority resource management unit and that, "section 34 may well be used down the track".

When asked in what situation would their councils consider using this provision one response made was "possibly within areas of Statutory Acknowledgements under Ngai [Kai] Tahu Claims Settlement Act". Only a small number of local authorities (six) were identified by the MfE (1998c) as having used the delegation provisions under s 34 to delegate to another local authority. It appears there is a general reluctance by councils to include these provisions in their plans and policies or to follow through with the requests from iwi in their operations.

The current powers of delegation under s 34(4) of the RMA are seen as being analogous to the concept of contestability (Daya-Winterbottom, 1998). Effectively the contestability proposal would result in the delegation of a council's function, powers,

and duties in relation to granting resource consents to council staff or licensed professional consent authorities (ibid.)

5.5. Conclusion

This chapter has analysed the primary data gathered from the survey research carried out with iwi liaison and local authority officers from the regions of Manawatu-Wanganui, Hawkes Bay and Southland. The investigation has provided insight from participants on the impact of the contestability proposal on tangata whenua participation in resource consent processes. The analysis also indicated that few opportunities would be created under a contestable consent regime. Contestability may encourage iwi authorities to register as resource consent processors. There may also be improvements in the development of policy and plans as well as with regard to the interpretation of provisions because of the demand from private processors for clearer plans and less ambiguity.

A number of negative aspects are also likely to arise from contestability as a result of an increase in private processors. Consultation fatigue and a lack of funding were identified as being the two main negative aspects. Finally, the analysis indicated that there is likely to be little improvement in the Crown's Treaty obligations devolved as they are to local government under the RMA. In the final chapter I shall bring together the various threads of this thesis, discuss the implications of these findings, and suggest how future research might further develop what has begun in this research.

Chapter Six
Conclusions and Recommendations

6.1. Introduction

This thesis has focused on identifying opportunities for Maori participation in the resource consent process under a contestable consent process as proposed in the RMA Amendment 1999. The research explored how a contestable consent process could work alongside Maori resource management aspirations compared to the current consent process. This was carried out in two phases: the first phase entailed a documentary analysis of council plans and policies to ascertain the intent of councils, and an analysis of iwi management plans to establish an Iwi perspective on resource management and the consent process. The second phase encompassed survey research to collect information on the practices of councils and perceptions of the contestability proposal. This chapter discusses the key findings, recommendations, reflects on the research design and methodology, and suggests areas for future research.

6.2. Key findings

Central to the discussion of the key findings is the fact that barriers to Maori participation to resource management exist and may well continue to prevail, regardless of proposed changes to planning and resource use legislation. As this thesis reveals, addressing Maori participation involves significantly more than developing mechanisms and guidelines. Addressing Maori participation involves the interplay of many forces: regard for Maori aspirations, perceptions of Maori as the Treaty partner, proper implementation of the Treaty, resources, the planning process, and the political decision-making process.

This thesis has found that two resource consent processing provisions, ss 93 and 94, determine how local authorities carry out consultation over a consent application. Section 93 requires the notification of an application that must proceed through a public submission process, whereas s 94 enables an application to be processed as a non-

notified consent on the proviso that adverse effects are avoided remedied or mitigated. Although this provision includes obtaining consent from parties deemed affected, it excludes a public submission process. Up to the present date, local authorities have had the discretion to determine how a hearing of an application will proceed and who the affected parties are. This discretion has been identified in this thesis as holding a monopolistic position in the consent process. The way this discretion is used affects tangata whenua ability to participate in resource management decisions.

The research identified that council policies on tangata whenua participation differed considerably to Maori aspirations set out in iwi management plans. Iwi management plans are a useful mechanism for iwi authorities to articulate and clarify their values, objectives, and strategies in relation to resource management and related economic and cultural issues. Some local authorities do not give adequate weight to iwi plans: this is evident in the exclusion of specific iwi plans in councils' planning documents.

Consistent with Nuttall and Ritchie (1995), the thesis findings also suggest that across the board, council policies and plans lacked clarity of intent in their tangata whenua objectives, aims, and statements, that is, all words and no action, nebulous and vague. This was indicated in the inconsistent nature of the plans and polices, and in the use of qualifying phrases such as *where appropriate*, *may be considered and investigated* accompanying statements. The most obvious examples where these phrases were found were in the transferal and delegation provisions such as ss 33 and 34. These two provisions are ways for tangata whenua to exercise kaitiakitanga. It was also found that statutory provisions such as ss 33 and 34 were more often recognised in plans and policies but, in practice, were less likely to be implemented. One suggestion, as proposed in Chapter Five, was that the present liability clauses found in ss 33 and 34 suggest a reason for councils' reluctance to use these provisions.

The research identified a number of alternative provisions and mechanisms to contestability. The delegation and transfer provisions along with mechanisms like

contracts do not appear to have been widely scoped by the Ministerial Reference Group during the 1998 RMA review process.

6.2.1. Contestability, a way forward for Maori participation

The key finding of the survey research suggests that contestability would create few positive opportunities for Maori participation. One positive opportunity identified was the possibility for iwi authorities to become a consent processor. This was recognised by one iwi resource management unit in the Hawkes Bay as a means of funding the operation of the unit.

When it came to improving procedures for processing consent applications, the survey research found that the majority of functions and roles either would remain the same or would be less likely to improve under contestability. These functions and roles were: the notification of a decision, information shared by council, pre-application consultation, procedures identifying affected parties and checking environmental effects, cost recovery, accountability funding, s 8, policy and plan development, and interpretation of policy and plans.

Several functions that may improve under contestability were highlighted under the research. These included planning and policy development, and the interpretation of plans and policies. The development of clear plans and policies is essential for processors to carry out good processing of applications. Plans and policies set the ground rules for consultation in the consent process. Competition would arguably create a demand for planners to produce clearer and less ambiguous plans and policies.

There was also an indication that a number of negative consequences were likely to emerge under contestability. Survey responses identified consultation, developing new working relationships, funding, Treaty obligations, and inadequate skills of the processors, as being potential negative aspects of contestability. These are issues affecting Maori participation under the current regime, and are likely to intensify

adversely under contestability. The predicted increase in private processors places an emphasis on the need to consult with tangata whenua simply because there will be more agents for iwi to deal with. The data indicated that tangata whenua presently experience consultation overload in environmental decision-making. Therefore, this is likely to exacerbate an already problematic area.

Establishing new relationships was identified as a possible problem because of the length of time it already takes to develop and maintain working relationships with local authorities. Tangata whenua will not only have to work on keeping the relationship with council but also need to set about establishing new relationships with private processors. Processors less sensitive to iwi needs and issues may present a barrier to developing effective working relationships. Funding tangata whenua consultation was also identified as an issue that would likely remain the same under contestability. An increase in consultation with tangata whenua will require funding, which needs to be sourced from somewhere. Many iwi/hapu do not have the financial base that councils and private organisations have. Presently, funding provided by local authorities is inconsistent and often inadequate, constraining their ability to consult. Contesting as a consent processor could be a cost-effective option for iwi to alleviate their financial burden.

6.2.2. Treaty of Waitangi obligations

The research has confirmed, as in findings of other studies (Chen and Palmer, 1999; PCE, 1998: LGNZ, 1997), that one of the central issues affecting tangata whenua participation is local authorities' application of section 8 of the RMA and consultation in the consent process. There is a statutory obligation on local authorities to consult with iwi in the planning stages, but the consent process remains under a cloud with the courts unable to define clearly, with which the obligations lie[1].

[1] Chapters Two and Five explain this in detail with reference to relevant case law.

Consultation with tangata whenua on consent applications has been inconsistent amongst local authorities. Either it is left to the applicant, or to the local authority if the applicant is unwilling, and in some instances the consent processor (PCE, 1998).

With the consent process possibly moving to a contestable environment, it remains unclear what the Treaty obligations are for consent processors in the private sector. Maori chiefs and the Crown signed the Treaty, and the obligations of the Crown have subsequently been passed on to local authorities. Contestability opens the process to the private sector that has no direct treaty with Maori and may be less likely to be sensitive to iwi/Treaty issues. There is an urgent need for this issue to be addressed sooner than later.

6.3. Recommendations for Policy and Practice

Based on these findings a number of recommendations can be made about the design of a regime of contestability and implementation.

6.3.1. Policy

Compulsory funding for tangata whenua participation in the consent process

Two options are recommended: One option involves funding at the local level by taking a percentage of consent application fees from the private processor or local authority, or to include a funding strategy in local authorities annual plans as some councils are presently doing. Similar to other private consultants, tangata whenua should be paid for their expertise at the market or negotiated rate. Another option could be funding at the national level by improving access for Maori to funds through central government agencies. One method would be to administer funding from government agencies' Maori units.

Review of the Crown/Treaty obligations in local government and resource management legislation

Immediate action should be taken on a broader political scale to address the devolution of Crown Treaty obligations to local government and the private sector under contestability. Integral to this is the urgent need to review the Local Government Act 1974 to clearly define local government's Treaty obligations as recommended in the 1989 review but not taken up (Chen and Palmer, 1999 address this debate in detail). Concerning the RMA, a review of the legal recognition of the requirement to consult with tangata whenua in the processing of applications or in the resource consent process is required.

6.3.2. Practice

Compulsory Treaty and tikanga Maori practice guidelines

Good practice guidelines for all processors must be prepared in partnership with iwi groups. A recommendation proposed by the Ministry for the Environment in regards to iwi consultation under a contestable consent process suggests that processors should have "sufficient knowledge in Treaty and iwi issues". This needs to be clearly defined to avoid misinterpretation. What does sufficient knowledge entail? Private processors must also be able to demonstrate that they are sensitive to Maori resource management values, and have a sound knowledge of Treaty and iwi issues as part of the requirements for registration as a processor.

6.3.3. Alternatives to contestability

Review existing RMA mechanisms as alternatives to contestability

Several existing mechanisms under the RMA have been identified by the research as possible alternatives to contestability. These mechanisms include the delegation and transfer provisions under ss 33 and 34. As was reported in Chapter Five where the survey responses were discussed, these provisions have not been used to their potential

because of current liability clauses. Further investigation is warranted to ascertain the potential of these provisions compared with contestability. Waikato University researchers with the support of the MfE Sustainable Management Fund are presently carrying out a research project on the provisions under s 33. If the liability clauses set out in ss 33 are revoked as was proposed in the RMA Amendment Bill 1999, this would provide an incentive for local authorities to use this provision when requested.

6.4. Reflections on the research

The findings from the data in this thesis have some limitations. First, the survey findings reflected the perceptions of council officers and not those iwi or hapu. It was an appropriate perspective to take given the political and ethical circumstances involving Maori research. It was also necessary to take into account the wider issues impinging on Maori participation in resource management as discussed in Chapter Three, and balance the needs of the researcher and those of the researched.

Second, the inconsistent nature of plans and polices made them difficult to analyse. A number of plans and polices incorporated their tangata whenua section throughout the plan, and others had specific sections. Access to iwi management plans also proved difficult. There are iwi management plans available that have not been included into this research. At the time the documentary analysis was carried out, only the plans currently available were used. Third, the choice of close-ended questions in parts of the questionnaire restricted the responses of local authority officers. In some cases responses would have benefited from more detailed explanations by respondents. These points indicate the possibility of future research in this area.

Finally, a more comprehensive sample of local authorities might generate somewhat different information than this study which purposely selected certain local authorities. Ideally, all Territorial Local Authorities and Regional Councils should be surveyed.

6.5. Future research

The following are suggested areas for future research:

1. What are Maori perceptions of the contestable proposal? Similar research incorporating the perspective of Maori participants in resource consent processes would be beneficial. Part of the research aims defined in Chapter One was to set a platform for further research to be carried out by iwi/hapu at an appropriate time.

2. The research exposed implications for the implementation of the Treaty of Waitangi under a contestable environment. Further research is required to ascertain what are the implications for the Crown and Maori relationship under a contestable consent process.

3. Follow up research over a broader geographic area if contestability is enacted to ascertain whether perceptions and experiences of contestability differ. Such research would consider whether there are any likely hidden opportunities, positive and negative, that were not considered in this thesis.

4. Research on the use of alternatives to a contestable regime as discussed in the recommendations. Evidence suggests provisions under s 33 and 34 are not being used to their potential. Alternatives to ss 33 and 34 may be superior to the current legislation provisions. There may be benefits arising from the use of other mechanisms such as contracting out regulatory services.

6.6. Conclusion

The key findings drawn from the research suggests that contestability would create few positive opportunities for Maori participation in the resource consent process. The perception of various resource user groups that contestability would improve the consent process in terms of time delays and costs will not improve tangata whenua participation unless other issues such as funding consultation and the Treaty of Waitangi are addressed. For a long time Maori have struggled to overcome mono-cultural legislation that has excluded them from participating in resource management issues. The proposal to introduce contestability has neglected to acknowledge Maori interests in resource management and their rights to tino rangatiratanga under the

Treaty of Waitangi. The Crown must take into account further careful consideration of its Treaty obligations which includes addressing Maori interests in resource management. Unless these interests are recognised, the wealth of knowledge and expertise that Maori, as kaitiaki, hold will remain undervalued to the detriment of Aotearoa/New Zealand's environment.

List of Appendices

Appendix One
Information Sheet

INFORMATION SHEET

The Reseacher

My name is Catherine Dowman. I am a post-graduate student in the School of Social Policy and Social Work at Massey University. My research supervisors are Dr. Christine Cheyne and Ms. Wendy Parker. Dr. Cheyne can be contacted at the School of Social Policy and Social Work, Massey University. Telephone: (06) 350-4300.

The Study

The Resource Management Act is currently undergoing its fourth review since the Act's introduction in 1991. One of the proposed 1999 statutory amendments is the focus of this study; contestability in the resource consent process or opening the consent process to competition. The purpose of the study is to gather information identifying ramifications for Maori under a contestable consent process. In addition to a review of policy statements, district plans, and iwi management plans, I am seeking information through a questionnaire to Iwi Liaison Officers or equivalents, at selected local authorities. The questionnaire aims to gather information from the perspective of council personnel liasing with iwi and hapu groups on resource management issues.

Your Participation

Three regions have been selected for this study; Manawatu-Wanganui, Hawkes Bay, and Southland; your local authority is located in one of them. You have been identified from your organisation's public profile as a local authority officer involved in iwi liaison, and by your professional position as Iwi Liaison Officer or council officer involved with iwi and hapu resource management issues.

Your participation in this study is voluntary. Should you agree to take part, I would ask that you fill in the attached questionnaire which should take approximately 15-20 minutes to complete. The questionnaire will be kept secure, and at the successful conclusion of the research it will be destroyed.

Anonymity and Confidentiality

You can expect that any information you provide will be treated with full sensitivity. Data will be reported in an aggregated form and generally will not identify individual participant's. However, because of the small size of the sample it is possible that participants' will be able to be identified although only professional titles will be used.

It is my intention that the thesis findings will be made available to groups/ individuals with an interest in this field of research. Information may also be used in any future academic publications.

Your Rights

Your participation in the study is optional. **Please note that by answering the questionnaire you are giving your consent to take part in this study**. Should you take part, you have the right to:

- Decline to answer any particular questions;
- Decline to take part at any time;
- Withdraw from the study at any time;
- Ask questions about the study at any time;
- Request that you be given a summary of findings of the research at its conclusion.

Thank you

Catherine Dowman

Appendix Two
Questionnaire

Contestability in the consent process under the Resource Management Act 1991.

Outline of the contestability proposal.

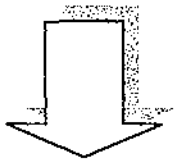
You may already know of the current Resource Management Amendment 1999 Bill before Parliament proposing a number of statutory amendments to the Act. One of the proposals is for a contestable process of resource consent applications. In broad terms, the proposed contestability model would give the applicant the choice to have their consent application processed within the local authority (internal processor) or from outside the local authority (external processor). However, councils will maintain considerable control over the appointment and conduct of all processors, whether internal or external. Processors would act as agents of the council which mirrors the current practice where external processors (when used) are contracted to the client council. On the subject of notification decisions, the proposal would also give the external processor the right to make notification decisions before being referred back to the consent authority.

Questionnaire Objective.

The objective of the questionnaire is to identify *ramifications for tangata whenua participation in a move to a contestable consent process.*

Please turn the page

Please start here:



Instructions:

The questionnaire is essentially about the contestability proposal although some questions ask for information on the current resource consent process.

Please

- read the accompanying information sheet before answering the questionnaire;
- tick boxes as instructed or write legibly in the spaces provided.

The initial section of the questionnaire is to gather information identifying ramifications of the contestable proposal for tangata whenua participation in the consent process.

1. **Before reading this letter were you aware of the proposed RMA amendment for a contestable consent process?** Please tick <u>one</u> box.

Yes ☐ **No** ☐

Please turn the page

2. **Which of the following functions and roles affecting tangata whenua participation, do you think is most likely to improve, less likely to improve, or remain the same under the proposed contestable consent process.** Please tick as many functions/roles as you wish.

Functions/roles affecting tangata whenua	Most likely to improve	Less likely to improve	Remain the same	Don't know
Notification decisions	☐	☐	☐	☐
Type and level of information shared by council	☐	☐	☐	☐
Pre-application consultation	☐	☐	☐	☐
Procedures identifying affected parties	☐	☐	☐	☐
Procedures checking environmental effects	☐	☐	☐	☐
Cost recovery to tangata whenua	☐	☐	☐	☐
Accountability to tangata whenua	☐	☐	☐	☐
Funding tangata whenua consultation	☐	☐	☐	☐
Application of S.8 in consent decisions	☐	☐	☐	☐
Policy and plan development	☐	☐	☐	☐
Interpretation and application of plan and policy provisions	☐	☐	☐	☐
Other (please specify)	_____			

Please turn the page

3. **In your professional opinion, what would the impact of contestability be on the typeand level of external processors skilled in iwi and/or Treaty issues?** Please tick one box.

Increase in type and level of skills ☐

Decrease in type and level of skills ☐

No difference ☐

Don't know ☐

4. **What would the impact of contestability be on the type and level of internal processors skilled in iwi and/or Treaty issues?** Please tick one.

Increase in type and level of skills ☐

Decrease in type and level of skills ☐

No difference ☐

Don't know ☐

Please turn the page

5. **As far as you can judge, is contestability likely to create positive opportunities for tangata whenua participation in the consent process?**

Yes ☐ **No** ☐

Please explain your answer.

_____

_____

_____

6. **As far as you can judge, do you anticipate that contestability will create any negative opportunities for tangata whenua participation in the consent process?**

Yes ☐ **No** ☐

Please explain your answer.

_____

_____

_____

Please turn the page

The remainder of this questionnaire asks for information on current council practice in the resource consent process. The objective of this section is to identify the consultation mechanisms used by your council when consulting with tangata whenua.

7. **Does your council presently contest the processing of resource consent applications?** Please tick one box.

Yes ☐ **No** ☐ **Don't know** ☐

8. **Does your council contract out the processing of resource consent applications to iwi groups/ or individuals?** Please tick one.

Yes ☐

No ☐

Don't know ☐

If yes, please state in what situations this has occurred.

(For example, issues involving tangata whenua)

_____

_____

_____

Please turn the page

9. **Under s 33 of the RMA, a local authority may transfer its powers, functions or duties over to another public authority including an iwi authority. Has your council received requests from iwi to use the transfer of powers, functions, or duties in s 33?**

Yes ☐ **No** ☐ **Don't know** ☐
(Go to Q.11)

If yes, have the transfer of powers provisions been used?

(please specify reasons)

10. **In what situations, if any, would your council consider using the section 33 mechanism?**

11. **Has your council received any requests from iwi to use the delegation of powers, functions or duties in s 34 of the RMA?**

Yes ☐ **No** ☐ **Don't know** ☐
(Go to Q.13)

If yes, have the delegation of powers provisions been used?

(please specify reasons)

Please turn the page

12. In what situations, if any, would your council consider using the section 34 mechanism?

13. Do you have any further comments about the proposal for contestability in the consent process or any other issues raised in this questionnaire?

Thank you for your participation, I appreciate you taking the time out from your schedule to answer my questions. The data from questionnaires will be used in my thesis in an aggregated way. Names and other sensitive data will be kept confidential.

Catherine Dowman.

Please post the questionnaire back using the Prepaid envelope supplied.

Appendix Three
Sections 33 and 34 from the Resource Management Act 1991

Section 33

"33 Transfer of powers –

(1) A local authority that has functions, powers, or duties under this Act may transfer any one or more of those functions, powers, or duties to another public authority in accordance with this section, except that it may not transfer any of the following:

(a) The approval of a policy statement or plan or any changes to a policy statement or plan:

(b) The issuing of, or the making of a recommendation on, a requirement for a designation or a heritage order under Part VIII:

(c) This power of transfer.

(2) For the purposes of this section, "public authority" includes any local authority, iwi authority, Government department, statutory authority, and joint committee set up for the purposes of section 80.

(3) A local authority that transfers any function, power, or duty under this section shall continue to be responsible for the exercise thereof.

(4) A local authority shall not transfer any of its functions powers, or duties under this section unless-

(a) It has used the special consultative procedure specified in section 716A of the Local Government Act 1974; and

(b) Before using the special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and

(c) Both authorities agree that the function is desirable on all of the following grounds:

(i)The authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:

(ii) Efficiency

(iii) Technical or special capability or expertise.

(5) Paragraphs (a) and (b) of subsection (1) shall not prevent a local authority transferring to another public authority, power to do anything prior to any final decision or recommendation on a matter referred to in those paragraphs.

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority, which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section may relinquish the transfer in accordance with the transfer agreement".

Section 34

"34. Delegation of functions, etc., by local authorities –

(1) A local authority may delegate to any committee of the local authority established in accordance with the Local Government Act 1974 any of its functions, powers, or duties under this Act.

(2) A territorial authority may delegate to any community board established in accordance with the Local Government Act 1974 any of its functions, powers, or duties under this Act in respect of any matter of significance to that community, other than the approval of a plan or any change to a plan.

(3) A local authority may delegate to any hearings commissioner or commissioners appointed by the local authority for this purpose, who may or may not be a member of the local authority, any of its functions, powers, or duties under this Act, other than-

(a) The approval of a policy statement or plan or any change to a policy statement or plan:

(b) This power of delegation.

(4) A local authority may delegate to any of its officers any of its functions, powers, or duties under this Act, other than-

(a) The approval of a policy statement or plan or any change to a policy statement or plan:

(b) The making of a recommendation on a requirement for a designation or a heritage order under Part VIII:

(c) The granting of a resource consent for anon-complying activity in respect of any application which is notified in accordance with section 93:

(d) This power of delegation.

(5) No delegation under subsection (4) shall be made except through the local authority's chief executive officer or group of senior executive officers in accordance with the Local Government Act 1974.

(6) Nothing in subsections (2), (3), and (4) shall prevent a local authority delegating to a hearings commissioner or commissioners or community board, or officer, power to do anything prior to any final decision on a matter referred to in those subsections.

(7) Any delegation under this section may be made on such terms and conditions as the local authority thinks fit, and may be revoked at any time by notice to the delegate.

(8) Except as provided in the instrument of delegation, every person to whom any function, power, or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, or duty in like manner and with the same effect as the local authority could itself have exercised or performed it.

(9) Every person authorised to act under a delegation under this section is presumed to be acting in accordance with its terms in the absence of proof to the contrary.

(10) A delegation under this section does not affect the performance or exercise of any function, power, or duty by the local authority.

Appendix Four
Sections 93 and 94 from the Resource Management Act 1991

Section 93

"93 Notification of applications -

(1) Once a consent authority is satisfied that it has received adequate information it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is-

(a) Served on every person (other then the applicant) who is known by the authority to be an owner or occupier of any land to which the application relates; and

(b) Served on the Minister of Conservation if the application relates to land which adjoins any coastal marine area; and

(c) Served on the New Zealand Historic Places Trust if the application-

(i) Relates to land that is subject to a heritage order or a requirement for a heritage order or is otherwise identified in the plan as having heritage value; or

(ii) Affects any historic place, historic area, waahi tapu area registered under the Historic Places Act 1993; and

(d) Served on the Minister of Fisheries if the application relates to marine farming within the meaning of the Marine Farming Act 1971, or the Fisheries Act 1983, or to a fish farm within the meaning of the Freshwater Fish Farming Regulations 1983; and

(e) Served on such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate; and

(f) Served on such local authorities, iwi authorities, and other persons or authorities as it considers appropriate; and

(g) Publicly notified; and

(h) Affixed in a conspicuous place on or adjacent to the site to which the application relates, unless it is impracticable or unreasonable to do so; and

(i) Given in such other manner as it considers appropriate- unless the application does not need to be notified in terms of section 94.

(2) A notice under subsection (1) shall be in the prescribed form and shall-

(a) Where it is to be served inaccordance with paragraphs (a) to (e) of subsection(1),

contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her; and

(b) Where it is to be published in accordance with paragraphs (f) to (h) of subsection (1), contain a description of the application including the location (as it is commonly known) of the proposed activity; and

(c) State that submissions on the application may be made in writing by any person; and

(d) State the closing date for the receipt of submissions by the consent authority under section 97; and

(e) State that a copy of every submission must be served on the applicant; and

(f) State the place where the application and accompanying information may be viewed and the addresses for service of the consent authority and the applicant."

Section 94

" 94 Applications not requiring notification -

(1) An application for -

(a) A subdivision consent need not be notified in accordance with section 93, if the subdivision is a controlled activity:

(b) A resource consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:

(c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if

(i) The activity to which the application relates is a controlled activity; and

(ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

(1A) An application for a resource consent need not be notified in accordance with section 93 if -

(a) The activity to which the application relates is a discretionary activity over which

the consent authority has restricted the exercise of its discretion and
(b) The plan expressly permits consideration of the application without the need to obtain the written approval of affected person.

(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and-
(a) the consent authority is satisfied that the adverse effect on the environment of the activity for which the consent is sought will be minor; and
(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it unreasonable in the circumstances to require the obtaining of every approval.

(3) An application for a resource consent need not be notified in accordance with section 93, if the application is for a resource consent to do something that would otherwise contravene any of sections 12(1), 13, 14(1), or 15(1) and -
(a) There is no relevant plan or proposed plan; and
(b) The consent authority is satisfied that the adverse effect on the environment of the activity for which the consent is sought will be minor; and
(c) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purpose of subsection (2)(a) or subsection (3)(b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2)(b) or subsection (3)(c).

(5) Notwithstanding subsections (1) to (3), if a consent authority considers special circumstances exist in relation to any such application, it may require the application to be notified in accordance with section 93, even if a relevant plan expressly provided that it need not be so notified."

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