RMA Amendment Act and tribal power

The Mana Whakahono a Rohe (MWR) provisions were among controversial law changes that delayed process of the Resource Legislation Amendment Bill. They give Maori tribes rights to demand more say in planning, monitoring and possibly consenting under the Resource Management Act 1991. The MWR provisions are now in force. **Stephen Franks** and **Pam McMillan** from Franks Ogilvie answer 15 question on what it could mean for councils.

What exactly is a 'Mana Whakahono a Rohe'?

MWRs are agreements made between a local authority, and iwi (Maori tribes) or hapu (sub-tribes) in an area (called "participating authorities") on how iwi or hapu participate in resource management and decision-making under the RMA. A MWR can be between multiple local authorities and multiple iwi/hapu, or there could be multiple MWRs within one local authority area.

An iwi authority can initiate a MWR with a local authority. A local authority can initiate a MWR with an iwi authority or with hapu. Once initiated eventual 'agreement' is compulsory (asking how that works is a fair question). Though MWRs with hapu could multiply the number of MWRs, confining the initiation of hapu agreements to a local authority mitigates this risk.

Are they new?

The statutory obligation to have MWR type arrangements is new and so are the stipulations for what they must contain. Some local authorities have existing similar arrangements. If iwi agree, a local authority may treat them as MWRs. The law doesn't say whether an existing arrangement must be amended to add the new mandatory requirements.

Existing arrangements under other statutes are preserved and not limited.

How far can MWRs go to authorising partnership governance of RMA matters? Could a MWR provide for iwi reps to sit with councillors?

The MWR provisions go further than the Iwi Participation proposal in the Bill as introduced and what was proposed in the *Next Steps for Freshwater* reform. The Select Committee report explained that MWRs have a "broader scope that includes consenting and monitoring". The drafting is permissive. Some scope issues may be resolved only with lawyer time (and litigation).

General rule of law principles may narrow the apparent scope, but joint committees are already permitted. MWRs can probably agree for the delegation of particular decision powers to such committees or to iwi participation authorities directly. MWRs may not authorise iwi reps to sit as members of governing bodies (s 41 Local Government Act 2002 is clear). But they could provide for iwi rep membership of council committees, and for attendance, and speaking and information rights at governing body meetings.

Do councils have to agree to MWRs?

Yes, a local authority must agree a MWR within 18 months after an iwi asks for one. If agreement is not reached the parties must accept binding or non-binding dispute resolution, covering their own costs. If non-binding dispute resolution is unsuccessful the Minister of Local Government can appoint a Crown facilitator or direct the participating authorities to use a dispute resolution process (binding if the Minister directs).

What can a MWR be about?

The legislation does not specify MWRs. It describes them. A MWR **"must"** include some things and **"may"** include others.

A MWR must specify (s 58R(1)(i) – (iv)):

- how an iwi authority may participate in the preparation or change of a policy statement or plan;
- how the participating authorities will undertake consultation requirements;
- how the participating authorities will work together to develop and agree on methods for monitoring; and
- how the participating authorities will give effect to the requirements of any relevant iwi participation legislation.

A MWR may specify (s 58R(4)(a)-(c)):

- how a local authority is to consult or notify an iwi authority on resource consent matters;
- the circumstances in which an iwi authority may be given limited notification as an affected party; and
- any arrangement relating to other functions, duties or powers under the RMA.

The "may include" section is arguably exclusive, but the last paragraph above (s 58R(4)(c)) is an imprecise 'catch all'

clause. Remarkably there appears to be nothing to prevent the transfer of practical exercise of any power, function or duty under the RMA (but not the LGA) to an iwi authority or hapu. This includes any RMA function or power of regional councils (under s 30) and territorial authorities (under s 31). Theoretically, it could extend even to the power to set charges under s 36(1) of the RMA.

A local authority must use its "best endeavours" to comply with a MWR when preparing a proposed policy statement or plan. The model in the drafters' minds may have been a MWR that automatically has iwi authority joining a new collaborative planning process.

What about resource consents?

A MWR may specify when and how a local authority is to notify iwi authorities or hapu about new resource consent applications or consult with them on applications. A MWR may also describe circumstances (eg, what constitutes an "adverse effect") for when an iwi authority or hapu is given limited notification as an affected party.

There could be tension with s 36A of the RMA that says local authorities and applicants have no duty to consult with any person about an application. If s 36A is respected a MWR will not be able to impose indirect iwi consultation obligations on applicants.

Who pays for the new arrangements?

This isn't clear. A so called "guiding principle" in s 58N is that participating authorities must use their best endeavours to collaborate including by the "coordination" of resources required to undertake the obligations and responsibilities under a MWR.

MWR funding provisions will likely specify for iwi or hapu to be remunerated and/or reimbursed for their costs in carrying out MWR functions. Some guidance might be taken from the funding agreement between the Independent Maori Statutory Board (IMSB) and the Auckland Council. The first annual funding agreement emerged from settlement of a litigation threat on terms favourable to the IMSB. Auckland councillors

justifiably complained about serious uncertainty in the law establishing their funding obligation. That uncertainty seems to have suited the government, because this new law is no clearer.

The new law changes provisions governing council charges for RMA processes (s 360E). They are still confined to meeting council costs, but if MWRs provide for councils to meet iwi costs (for example for new monitoring powers), many of those amounts will become council costs that may be recovered by council charges.

What about conflicts of interest or disputes?

A MWR must record, under s 58R, a process for identifying and managing conflicts of interests. It is not clear what that should mean in practice. Conflict of interest arrangements can extend from simple advice of a conflict (to enable others around the table to take it into account) with no other disqualification or consequence, up to complete disqualification from participation. The "weak form" conflict provision in the Hawke's Bay Regional Planning Committee Act 2015 could be headed "Conflicts Disregarded".

Strong form conflict provisions could frustrate the new law's intention. For example, when a proposed plan or resource consent application directly affects iwi or hapu land they would reasonably expect the MWR to give them direct and sustained input. That may be contrary to normal probity protocols for local government, but the Treaty arguments for the MWR regime would support the restoration to iwi of more control of their own properties. A MWR must also record the process for resolving disputes under a MWR. These processes are not prescribed. A dispute cannot cause a local authority to suspend any process under the RMA (s 58R(3)), presumably to prevent the use of disputes as de facto veto mechanisms.

Could councils be liable for losses caused by MWR processes? What financial oversight will there be?

The new law does not provide for MWR party oversight by the Auditor General, but judicial review will not be excluded. A council could be liable for wrongful conduct of iwi representatives exercising delegated powers if that should have been obvious to the council. Suitable wording in a MWR could mitigate but not eliminate such risks.

Could a council be liable for allowing too much iwi influence?

These provisions enter novel constitutional ground. They contemplate delegation of coercive powers that are usually confined to persons who are clearly appointed and supervised and subject to disciplines and prescriptions designed to limit room for whim and abuse. RMA consent and monitoring powers are wielded by people for whom councils have clear responsibility/liability, even where those individuals benefit from limitations on personal liability.

The new provisions contain no express safeguards for citizens. The Select Committee requirement that agreements contain 'conflict of interest' provisions do not provide for Auditor General protections against corruption, for example. There are no qualification, supervision or training requirements for iwi participants.

The powers exercised nevertheless remain those of the council so a court may be able to extend the common law and LGA liabilities of local authorities and members (ss 43-47) to ensure that citizens do not lose the remedies they would have had, if the powers had not been delegated to persons outside the normal appointment and accountability regime. Councils, for example, will likely be found liable if they do not show adequate precaution against abuses of authority, or against decisions made without reasonable foundation.

Could a council be liable if iwi representatives abuse their privileges, for example misuse or leak confidential information under a MWR?

Possibly, if it can be established that the council should have seen the risk and took inadequate steps to guard against the loss. But this will come down to circumstances including whether the iwi authority is acting within a delegation from the council at the time or is 'on a frolic of its own'.

"The MWR provisions go further than the Iwi Participation proposal in the Bill as introduced and what was proposed in the *Next Steps for Freshwater* reform."

Can the council change or cancel a MWR?

Once agreed to a MWR cannot be changed or terminated without the agreement of all parties (iwi authorities, hapu and local authorities).

Will it reduce the uncertainty about who councils must consult or engage with?

In practice the MWRs could work to reduce uncertainty. They are expected to result in identification of "participating authorities" (s 58R(1)(b)).

However, the existing RMA provisions giving special rights to iwi have been supplemented, not replaced by these changes. A council, for example, will still need to consult with "the tangata whenua of the area who may be so affected, through iwi authorities" during the preparation of a proposed policy statement or plan (clause 3(1)(d), Schedule 1 RMA). The existence of an MWR does not eliminate the scope for contesting claims over the rohe affected and who is entitled to be involved.

There may be increased dispute where some iwi are without MWRs or where there are internal or inter group disputes about authority and mandate or rohe.

The changes do not require iwi or whanau (tribal members) to be authorised by their members before initiating a MWR. This is a little surprising. The Marine and Coastal Area (Takutai Moana) Act 2011 has resulted in the Ministry of Justice developing procedures for iwi, hapu or whanau to send public notices to their members.

Can a council decide which side to agree with in a divided iwi?

The new law does not address this problem. Section 58S on the "resolution of disputes that arise in the course of negotiating Mana Whakahono A Rohe" applies to disputes that arise among "participating authorities" (ie, the iwi authority or local authority) and not within them.

The prudent course for a council will probably be, as now, to try to deal with all factions without appearing to prejudge the outcome of internal wrangling until that becomes impractical. A council should ask the right questions about the scope of the rohe, and the authority of individuals claiming or purporting to represent iwi.

Can a council agree that iwi are experts on their tikanga (Maori custom) so as not to get caught in the middle of arguments about things like whether a taniwha (mythological water monster) exists or must be respected?

Such an approach may appear to lower the risk of becoming embroiled in arguments which a council is not equipped to resolve. The Auckland Council's Unitary Plan has a policy that: "recognises Mana Whenua as specialists in the tikanga of their hapuū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, wahi tapu and other taonga" (RPS B6.2.6.(e)).

However, we think courts will find that the council remains the decision maker on plans, policies and resource consent applications under the RMA. It will need adequate evidence and will not be entitled to accept untested claims.

The Marine and Coastal Area (Takutai Moana) Act 2011 invites courts to refer to the Maori Appellate Court or pukenga for an opinion or advice on tikanga. MWR agreements could stipulate a process for investigating and deciding on such matters. **WNZ**

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