Proposed Marlborough Environment Plan

Topic 2: Marlborough's Tangata Whenua Iwi

Hearing dates:	20 – 21 November 2017
S42A Report Writer:	Rachel Anderson
Conflicts of Interest:	None
Interim decision:	None

(Note: A list of conflicts of interest which arose during the process are available to view on the Marlborough District Council Website)

List of Abbreviations

IMP	Iwi management plan
IWG	Iwi working group
MDC	Marlborough District Council
NZCPS	New Zealand Coastal Policy Statement
PMEP	Proposed Marlborough Environment Plan
RMA	Resource Management Act 1991
RPS	Regional Policy Statement

Submitter abbreviations

AQNZ	Aquaculture New Zealand
FNHTB	Friends of Nelson Haven and Tasman Bay Incorporated
HNZPT	Heritage New Zealand Pouhere Taonga
Hort NZ	Horticulture New Zealand
MFA	Marine Farming Association
Ngāti Kōata	
Ngāti Kuia	Te Rūnanga o Ngāti Kuia
Ngāti Rārua	Te Rūnanga o Ngāti Rārua
Ngāti Toa	Te Rūnanga o Toa Rangatira
Ngāi Tahu	Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu
Rangitāne	Te Rūnanga a Rangitāne o Wairau
Te Ātiawa	Te Ātiawa o Te Waka-a-Maui
PMNZ	Port Marlborough New Zealand Limited

Structure of Decisions

1. It is important that the topic decision is read as a whole together with the tracked change version of the Plan. The decision on each topic contains the reasons for the Panel's decisions. These comprise either adoption of the reasoning and recommendations of the original Section 42A Report or the replies to evidence, or a specific reasoning by the Panel[1].

2. The tracked change version of the relevant PMEP provisions forms an integral part of the decision. The source of the change in terms of the topic that the subject matter was dealt with is clearly identified in the track changes version of the plan. This records all amendments (additions and deletions) to the notified PMEP provisions made by the Panel.

3. Where the PMEP provisions **remain as notified**, it is because:

    (a) The Panel has decided to retain the provision as notified for reasons set out in this decision; or

    (b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to retain the provision as notified as recommended in the Reply to Evidence; or

    (c) The Panel adopted the reasoning and recommendation of the Section 42A Report to retain the provision as notified in the original Section 42A report.

4. Where there is a **change to a provision** within the plan it is because:

    (a) The Panel has amended a provision for reasons set out in this decision in response to a submission point which the Section 42A report writer(s) does not recommend in their reports; or

    (b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the Reply to Evidence; or

    (c) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the original Section 42A report; or

[1] (The only exception to that approach relates to the Noise section of the Nuisance topic where the reasoning and recommendations in the responses to Minutes 54 and 59 may have been adopted, rather than the reasoning and recommendations in the Section 42A Report or the Reply to Evidence report. The reasons for that difference in that topic are dealt with in detail at the commencement of the Noise section of the Nuisance topic decision. In respect of that topic the approach to understanding of the individual submission point decisions addressed in paragraphs 13.3 to 13.5 below should be adjusted accordingly to apply references to the Section 42A Report and/or Reply to Evidence in those paragraphs as being references to the responses to Minutes 54 & 59 for that Nuisance topic.)

(d) A consequential change has been necessary following on from a decision in either a), b) or c).

5. Where there is a **different recommendation** between the Section 42A Report and the Reply to Evidence (i.e., the recommendation by the Section 42A report writer(s) has changed as a result of hearing the evidence of submitters), unless the Panel decision specifically adopts the original report's reasoning and recommendations, the reasoning and recommendations in the (later) reply to evidence has been adopted and it must be taken to prevail.

6. There are limited circumstances where the Panel has taken the opportunity to give effect to national policy statements or implement national environmental standards. Where this occurs the relevant decision clearly sets out the nature of the change and the reason for the change.

7. Finally, there are limited circumstances where the Panel has decided that **alternative relief** is more appropriate than that requested by the submitters, but still within the scope of the relief sought. This is recorded in the Panel's decision.

Marlborough's Tangata Whenua Iwi

Background to Chapter 3: Marlborough's tangata whenua iwi and the RMA

8. Section 62(1)(b) RMA requires that 'A regional policy statement must state … 'The resource management issues of significance to iwi authorities in the region'.

9. Between 10 March 2007 and 10 December 2013 MDC held 27 hui with Marlborough's tangata whenua iwi working group (IWG) comprising the eight iwi that MDC has formal relationships with - Ngāti Apa, Ngāti Kōata, Ngāti Kuia, Ngāti Rārua, Ngāti Toa, Ngāi Tahu, Rangitāne and Te Ātiawa.[2]

10. Chapter 3, Volume 1, finally emanated from the hui as the IWG sought specifically a standalone, single chapter to represent their interests rather than integrated objectives and policies throughout the document. In particular, Chapter 3 identifies issues of significance to Marlborough's tangata whenua iwi. We are advised in the Section 42A Report that the objectives and policies development in the PMEP respond to the directions from the IWG.

11. The settlement statutes of 2014 post-dating the hui required the Crown's 'Statutory Acknowledgements' to be attached to the plan. These acknowledgements encompassed broad-brush descriptive areas of significant interest to the different iwi which often overlap.

12. Now, several years later, six of the eight Marlborough tangata whenua iwi provide a number of grounds for identifying omissions, adjustments and general concerns about their future roles as identified in the PMEP. The post-settlement era has given iwi renewed confidence to address their interests as a Treaty partner and as kaitiaki iwi involved with the resources and processes administered by the MDC and encompassed within the Plan.

13. As part of our consideration the Panel queried whether a standalone Chapter 3 met the s 6 and s 7 RMA obligations to Marlborough's tangata whenua iwi as identified in those sections. We concluded, based on the general submissions and evidence provided by iwi, that 'the higher order provisions in the RPS' should, as far as possible, be 'woven throughout the rest of the plan to ensure a cohesive approach is taken by its users so that the issues identified in Chapter 3 are not read in isolation. This is the concept of the ki uta ki tai – the management of resources from the mountains to the sea.'[3]

[2] Volume 1 Chapter 3 Marlborough's Tangata Whenua Iwi, Introduction, page 3-1.
[3] Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu (Ngāi Tahu) (1189) Legal Submissions dated 13 November 2017, paragraph 38.

Deeds of Settlement[4]

14. Marlborough's tangata whenua iwi have all signed Deeds of Settlement with the Crown to address breaches of the Treaty of Waitangi/Te Tiriti o Waitangi. The historic claims of each of Marlborough's tangata whenua iwi have been settled as follows:

    - *Ngāi Tahu were settled in the 1990s, culminating in the Ngāi Tahu Claims Settlement Act 1998.*
    - *The settlements for Ngāti Apa, Ngāti Kuia, and Rangitāne are set out in the Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014.*
    - *The settlements for Ngāti Kōata, Ngāti Rārua, and Te Ātiawa o Te Waka-a-Māui are set out in the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.*
    - *The settlement for Ngāti Toa is set out in the Ngāti Toa Rangatira Claims Settlement Act 2014.*

15. In the Deeds of Settlement and associated legislation, the Crown acknowledges that it acted in repeated breach of the principles of Te Tiriti in its dealings with the respective iwi and it apologises for the hardship and suffering that this has caused. These documents also set out the means of redress for each iwi, including cultural redress. The Crown's acknowledgments and apologies are based on historical accounts as described in the applicable legislation/deed.

16. Included within each deed forming part of the respective Te Tau Ihu Claims Settlement Acts is provision for the establishment of a River and Freshwater Advisory Committee. The Advisory Committee is intended to provide a foundation for the participation of iwi with interests in Te Tau Ihu in the management of rivers and freshwater in Marlborough, Tasman and Nelson. The Advisory Committee is intended to work in a collaborative manner with the common purpose of promoting the health and wellbeing of the rivers and freshwater within the jurisdiction of the relevant councils. In undertaking its work, the Advisory Committee is required to be respectful and operate in a manner that recognises that while some resource management issues will be of generic interest to all iwi with interests in Te Tau Ihu, other issues may be of interest primarily to particular iwi.

17. As recorded in the relevant Deed and legislation, Ngāti Tama ki Te Tau Ihu have Statutory Acknowledgements within Marlborough. Prior to the Settlement, the Council understood that the rohe of Ngāti Tama ki Te Tau Ihu was fully within the Nelson/Tasman region. It is

[4] The following information is taken directly from the PMEP Introduction pages 3-2 and -3-3.

acknowledged that Ngāti Tama ki Te Tau Ihu is not referred to in Chapter 3 of the PMEP as that iwi has not been part of the consultation process. However, it is recognised that Ngāti Tama ki Te Tau Ihu is one of the Te Tau Ihu iwi by virtue of the statutory acknowledgements and therefore will be part of the Council - Te Tau Ihu iwi relationship in the future.

18. The tangata whenua iwi who identified the settlements provisions in evidence before the Panel were:

    - Te Ātiawa: who asserted the Crown's apology has opened a new and unprecedented post-settlement era of relationships between Māori iwi and central and local government[5] which are ongoing.
    - Ngāi Tahu: the Ngāi Tahu relationship with parts of the Marlborough district is acknowledged in the Ngāi Tahu Claims Settlement Act (NTCSA) which includes statutory acknowledgement areas, Tōpuni, dual place names and nohoanga sites. As area of crown land at Te Parinui o Whiti was vested in Te Rūnanga o Ngāi Tahu in fee simple as part of the transfer of mahinga kai properties under the NTCSA.[6]
    - Ngāti Kuia: The Whakatau/Ngāti Kuia Deed of Settlement incorporates the cultural values of take ahi kaa roa. It is a core part of its cultural identity. Ngāti Kuia are identified as tangata whenua within the entire Te Tau Ihu region. Ngāti Kuia tupuna has considerable knowledge of places for gathering kai and other taonga, ways in which to use the resources of the awa and whenua, and tikanga for the proper and sustainable utilisation of resources.[7]

River and Freshwater Advisory Committee

19. Ngāti Toa seeks to include a provision in the PMEP referring to the River and Freshwater Advisory Committee requesting provisions within the Plan to meet its legal obligations. It asserts that there is no reference to the committee in the PMEP, and that it is the responsibility of the three Te Tau Ihu councils to establish the committee as set out in the deeds. [8]

Section 42A Report

20. It is clear from the Section 42A Report that in the deeds and associated legislation it is provided that the advisory committee is to be established by the Te Tau Ihu iwi, not the MDC. The members of the committee are drawn solely from the eight relevant iwi, and the three councils

[5] Te Ātiawa, Ian Shapcott Evidence, paragraphs 20-22.
[6] Ngāi Tahu (1189), Tanya Jane Stevens Evidence, paragraph 22.
[7] Ngāti Kuia (166.4) Raymond Smith Evidence, paragraph 5.
[8] Section 42A Report. River and Freshwater Advisory Committee page 15.

are to attend meetings at the request of the committee. The responsibility for establishing the River and Freshwater Advisory Committee does not lie with the three Te Tau Ihu councils.

Decision

21. The Panel accepts the Section 42A report writer's recommendation which is to reject Ngāti Toa's submission point relating to the River and Freshwater Advisory Committee.[9] This is on the grounds that the committee is to be established by Te Tau Ihu iwi, not the MDC.

Cook Strait Forum

22. Ngāti Toa sought the following changes to Method 3.M.2:

    a) the addition of an appendix of all statutory acknowledgments.

    b) that any iwi in that appendix must be considered as an affected party on consent applications.

    This issue is addressed later in the decision. However, in the process of discussing those submission points at the hearing the Panel agreed with the submitter that acknowledgment of the existence of the Cook Strait Forum would be helpful in the Plan in ensuring an important relevant aspect of the statutory acknowledgements was recorded.

23. The Cook Strait Forum was created as part of the cultural redress for Ngāti Toa. The Forum, jointly chaired by Marlborough District Council and Wellington Regional Council, brings together local and central government, iwi and other entities with interests in Cook Strait to discuss issues of concern about Cook Strait coastal marine area and to share information.

24. As other councils are involved beyond the Marlborough District the provisions of the PMEP can only recognise the Cook Strait Forum by way of a background acknowledgement in Chapter 3.

Decision

25. The request by Ngāti Toa is accepted to the extent that a background statement is included in the Deeds of Settlement section in Chapter 3 at paragraph 3, as follows:

    … will be of generic interest to all iwi with interest in Te Tau Ihu, other issues may be of interest primarily to particular iwi.

    The Cook Strait Forum was created as part of the cultural redress for Ngāti Toa. The Forum, jointly chaired by Marlborough District Council and Wellington Regional Council, brings together local and central government, iwi and other entities with interests in Cook Strait to discuss issues of concern about Cook Strait coastal marine area and to share information.

[9] Section 42A Report, page 15.

Spiritual and cultural issues[10]

26. The issues identified in the PMEP include the principles of the Treaty of Waitangi/Te Tiriti o Waitangi (Issue 3A), kaitiakitanga (Issue 3B), cultural heritage threats (Issue 3C), the mauri of natural resources (Issue 3D), accessing and using cultural resources in traditional ways (Issue 3E), provision of papakāinga (Issue 3F), the importance of consulting iwi (Issue 3H).[11]

27. These issues are seen by Marlborough's tangata whenua iwi as being of fundamental importance concerning their connection to and use of natural and physical resources.

Issue 3A

The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are not taken into account.

28. The MDC is required to take into account and give effect to the principles of the Treaty of Waitangi/Te Tiriti o Waitangi in the exercise of its powers and functions under s 8 of the RMA.[12]

29. Principles of the Treaty, while not stated in the RMA, have been developed through case law and Waitangi Tribunal reports. The provisions provided in this decision are not the beginning and end of the requirement to take into account Treaty principles but are intended to assist in meeting the statutory obligations under the RMA.[13]

Decision

30. The issues identified here are to be reflected in other relevant chapters in the PMEP.

Objective 3.1

The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are taken into account in the exercise of the functions and powers under the Resource Management Act 1991.

31. The objective identifies that Marlborough's tangata whenua iwi had developed a management system that is still increasingly practised today and is required to be taken into account within the principles of the Treaty of Waitangi/Te Tiriti o Waitangi. The principles are guidelines to govern the relationship between Marlborough's tangata whenua iwi and the MDC. (The guidelines emanate from the findings of the principles set out in case law from the Courts and reports from the Waitangi Tribunal.)

32. Marlborough's tangata whenua iwi nevertheless are concerned that past decision-making processes under the RMA did not sufficiently reflect the principles. Accordingly, iwi seek mechanisms whereby they can more fundamentally address the failings of the past and develop a more effective relationship with the Council.

[10] Section 42A Report, Volume 1 Chapter 3 page 3.
[11] See PMEP Volume 1 Chapter 3 pages 3-8-3-12.
[12] PMEP Volume 1 Chapter 3 page 3-8.
[13] Ngāi Tahu, T Stevens Evidence, page 11.

33. Ngāti Toa[14], the submitter to this objective, seeks in part an amendment to the PMEP to make explicit what Treaty principles are implicit throughout the document. The iwi's specific concern relates to Chapter 3 where the principles of the Treaty are mentioned but no definitions are provided. Ngāti Toa did not include any added wording for the Panel to consider which may have assisted us in altering the wording of the explanation to Issue 3A or Objective 3.1.

34. Ngāi Tahu supports Objective 3.1 acknowledging that the Treaty principles have been overtly covered in Issue 3A, Objective 3.1 and Policy 3.1.1, but reflects that this identification [should] not be the end of the matter. Ngāi Tahu's drafting throughout Chapter 3 is therefore intended to assist the Council in meeting its statutory obligations in relation to these principles. For as the iwi's representative observes '[the] council's role under the Treaty is to "*give effect to the Treaty vision in the manner expressed in the Resource Management Act*."'[15]

35. In the opening pages of Chapter 3, the Council's position is set out as seen by Marlborough's tangata whenua iwi as partner to the Treaty/Te Tiriti, acknowledging that its position stems from the delegation of functions to local government to manage natural and physical resources of the region under the auspices of the RMA, as well as conferring Treaty obligations.

36. Ngāi Tahu/Ngāti Toa submitted/stated in evidence 'It is the position of Marlborough's tangata whenua iwi that the Council is a partner to Te Tiriti. This position stems from the delegation of functions for managing natural and physical resources to local government through the RMA.'[16] The iwi consider that this obligation also confers Te Tiriti obligations.

37. It is the Council's position, however, that the Crown alone is partner to the Treaty of Waitangi/Te Tiriti o Waitangi. The Council emphasises nevertheless it has its own obligations to Marlborough's tangata whenua iwi.[17] This results in it providing resources relating to the provisions of the RMA to support particular cultural concerns (s 5, 6, 7 and 8) and with these, developing a consultative relationship in carrying out the Council's management functions.

38. In establishing some understanding of the Treaty principles, MDC at the outset of the chapter identifies six principles that have emerged from the Courts and the Waitangi Tribunal processes that apply to its functions under the RMA:

    - *the obligation to act reasonably and in good faith*

[14] Ngāti Toa (166.1).
[15] Ngāi Tahu Legal Submissions, paragraph 42 citing *Ngāti Maru Ki Hauraki Inc v Kruithof and Thames-Coromandel District Council* HC Hamilton CIV 2004-485-330, 11 June 2004 at [57].
[16] PMEP, Chapter 3, page 3-1
[17] PMEP, Chapter 3, page 3-2

- *[recognition of] rangatiratanga*
- *a duty to consult*
- *active protection*
- *partnership*
- *mutual benefit.*

39. The Plan has thus been prepared in the spirit of Te Tiriti and its principles.[18] The point is also made that the list above is not definitive. The principles are constantly evolving as the Treaty is applied to existing and new situations. Nor are specific principles always directly applicable to the range of circumstances that might arise under the RMA.[19] Both it and Marlborough's tangata whenua iwi need to continue to consult and negotiate with each other as to how the principles of Treaty of Waitangi/Te Tiriti o Waitangi should apply to continuing resource management in the region.

Decision

40. The Panel acknowledges that the identification of the Treaty of Waitangi/Te Tiriti o Waitangi at the outset of Chapter 3, provides a cloak of principles under which the MDC expects to operate in its ongoing partnership relationships with Marlborough's tangata whenua iwi. Objective 3.1 directly reflects the requirement as set out in s 8 of the RMA and is supported with no change to its provisions.

Kaitiakitanga

Issue 3B

Regard is not given to kaitiakitanga and the ability of Marlborough's tangata whenua iwi to exercise kaitiakitanga is not enabled.

41. 'Kaitiakitanga' is defined in s 2 of the RMA as:

> *'the exercise of guardianship by tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.'*

42. Under s 6(e) RMA the MDC has a duty to recognise the relationship iwi have with, inter alia, their ancestral lands and waters while under s 7(a) the MDC is required to have particular regard to kaitiakitanga.

[18] PMEP Volume 1 Chapter 3 page 3-2.
[19] Ibid pages 3-1-3.2.

43. Under the heading 'Integrated management of the Marlborough environment' the PMEP puts 'kaitiakitanga' to the forefront of the promotion of the integrated management of the region.

> *'Kaitiakitanga, the environmental guardianship practiced by Marlborough's tangata whenua iwi, has its foundation in the world view that all life and elements within the natural world that support life are connected. As a community we also recognise the existence and importance of these connections. Integrated management attempts to acknowledge and provide for the interconnectedness of natural and physical resources within our environment.'*[20]

44. Marlborough's tangata whenua iwi have developed an environmental ethic and management system for the sustainable management of natural resources which is embodied in kaitiakitanga.

45. The responsibility of kaitiaki is seen by iwi as twofold: the ultimate aim is to protect the mauri (life force) of the environment, and with this there is a duty to pass the environment to future generations in the same or better condition than its current state.

46. This decision document outlines the Panels approach to considering and/or adopting the use of kaitiakitanga within existing and new plan provisions, based on the submissions of Marlborough's tangata whenua iwi and the broader community.

Objective 3.2

Natural and physical resources are managed in a manner that takes into account the spiritual and cultural values of Marlborough's tangata whenua iwi and respects and accommodates tikanga Māori.

47. This objective attracted five submissions. HNZPT, FNHTB, PMNZ and Trustpower,[21] all of which seek retention of the provision as notified. The fifth submission from Ngāi Tahu[22] seeks retention of the provision, but with an amendment. This amendment by Ngāi Tahu addresses s 7 of the RMA.

48. The amendments sought to the wording of the objective are as follows:

- *Rather than taking into account spiritual and cultural values of iwi, particular regard is had to them.*
- *Explicit reference be made to Marlborough's tangata whenua iwi as being kaitiaki.*
- *Rather than accommodating tikanga, tikanga is enabled.*

[20] PMEP Volume 1, page 2-2.
[21] HNZPT (768.6), FNHTB (716.16), Trustpower (1201.6).
[22] Ngāi Tahu (1189.14).

49. Ngāi Tahu considers these three amendments are better aligned with ss 7(a) and s 58 of the RMA and that their inclusion will strengthen the objective.

Section 42A Report

50. We support the Section 42A Report where it acknowledges confidence with parts of the amendments as there are references to the 'ethic' and exercise of 'kaitiakitanga' in the explanation to the objective. Further, an alignment with the directive '*shall have particular regard to*' in s 7 is appropriate given the matters to which regard shall be given include kaitiakitanga (s 7(a)) and the ethic of stewardship (s 7(aa)). We consider, too, that the amendment seeking to formally acknowledge Marlborough tangata whenua iwi as kaitiaki is appropriate as this description is clear throughout Chapter 3.

51. The report writer is not so confident, however, about the further amendment to the change 'accommodate tikanga Māori' to '*enables'* tikanga Māori*.* For the PMEP as a whole generally uses the word 'enable' as a signal that there are Permitted Activity provisions giving effect to such references – resulting in potential confusion for users. The word 'accommodate' has a less active intent and does not necessarily signal action would be taken to facilitate something. 'Section 7 RMA requires the Council to manage the use, development of natural resources having particular regard to kaitiakitanga – does this *enable* tikanga?'[23]

Consideration

52. We agree that the word 'accommodate' in Objective 3.2 should not be replaced by 'enables', for the reasons referred to in the Section 42A Report, but also for slightly different reasons.

53. The phrase 'tikanga Māori' relates to 'Māori customs and practices'.[24] Ms Hariata Kahu for Ngāi Tahu provided a careful explanation of one of these cultural customs and practices. In her brief of evidence she shares her understanding of several cultural values that apply to realms of cultural and natural resource management.[25] That understanding includes kaitiakitanga which embodies for Ngāti Kuri the responsible management of resources. Ms Kahu shares her knowledge as follows:

> *'Although it is a responsibility for all Māori to practice kaitiakitanga, the role of kaitiaki (authorised guardian) is often placed upon appointed mātauranga/tohunga trained individuals and is handed down from one generation to the next. Kaitiaki are the monitors of resource health and wellbeing. Kaitiaki are entrusted with the mātauranga*

[23] Section 42A Report, page 9.
[24] Section 2 RMA Interpretation.
[25] Ngāi Tahu Summary Statement, PMEP Hearings 20 November 2017. Ms Kahu is Chairperson of Te Runanga Kaikōura Inc which represents the interests of Ngāti Kuri. Ms Kahu has direct links to significant Ngāi Tahu.

which enables them to interpret signs in the environment, such as environmental indicator species or natural events that can be utilised to understand the changing ecology. Kaitiakitanga in the resource management context means maintaining and enhancing the integrity of life -sustaining the resources we all depend on to survive. While the role of kaitiaki has evolved ***to accommodate contemporary resource management processes, we are still guided and remain true to our cultural foundations based on mauri and mātauranga****.'* [Our emphasis]

54. With reference to Ngāi Tahu's suggested amendment, there is a fine line between 'accommodates' and 'enables'. Both kaitiakitanga and the exercise of tikanga Māori are living, existing iwi cultural concepts. They endure/exist in the environment as positive cultural forces. The MDC is required to pay them particular regard through the relevant s 7 RMA provisions in its management of the region's natural and physical resources – either by reconciling differences or adapting them to suit the cultural purpose relating to the resource.

55. 'Accommodate' requires adaptation, harmonization, reconciliation. 'Enables' provides someone with the means or authority to do something.[26] It can mean promote or assist.

56. The manner of MDC's management of the region's resources should not 'enable' tikanga Māori, for it suggests a measure of control to be switched on and off by the Council to grant the tangata whenua iwi the means or authority to exercise kaitiakitanga (even if that is not meant), after giving the position particular regard. On the other hand, the word 'accommodates' implies a consistent recognised existence of guardianship of Marlborough's tangata whenua iwi absorbed into the Council's process of managing Marlborough's resources.

57. It is important to tangata whenua iwi that in sustainably managing Marlborough's natural and physical resources, appropriate recognition is given to tikanga Māori when having regard to the spiritual and cultural values of iwi. This is important to iwi as observing tikanga is part of the ethic and exercise of kaitiakitanga.

Decision

58. Objective 3.2 is amended to read:

Natural and physical resources are managed in a manner that <u>has particular regard to</u> ~~takes into account~~ the spiritual and cultural values of Marlborough's tangata whenua iwi <u>as kaitiaki</u> and respects and ~~accommodates~~ <u>enables</u> tikanga Māori.

[26] New Zealand Pocket Oxford Dictionary *The Future of New Zealand English* Fourth Edition, pages 7, 371.

It is important to iwi that in sustainably managing Marlborough's natural and physical resources, ~~when taking into account the spiritual and cultural values of iwi that,~~ appropriate recognition is given to tikanga Māori w<u>hen having regard to the spiritual and cultural values of iwi.</u> This is important for iwi as observing tikanga is part of the ethic and exercise of kaitiakitanga.

[New] Objective 3.2

59. Natural and physical resources are managed in a manner that takes into account the spiritual and cultural values of Marlborough's tangata whenua iwi and respects and accommodates tikanga Māori.

60. In response to the hearing and evidence presented, the report writer considered that adding specific provisions at potentially all levels to provide for/recognise kaitiakitanga could be provided.[27] Ngāti Toa[28] seeks a new objective for that purpose to include kaitiakitanga. Policy 3.1.3 provides for kaitiakitanga at a policy level with regard to resource consents. The Section 42A Report recommends that this be rejected as it is iwi who practise kaitiakitanga and the value does not need to be included in policies, methods, rules. Ngāi Tahu[29] in response considers that s 7(a) of the RMA supports a planning approach whereby kaitiakitanga is enabled throughout a plan. Kaitiaki cannot care for the environment if their views, issues or concerns do not form part of the process. A specific objective would facilitate this. Ngāi Tahu proposes the following:

> *'Objective XX - A strong and enduring relationship between the Council and Marlborough's tangata whenua iwi: the delivery of resource management outcomes that enables iwi to exercise kaitiakitanga.'*

61. The Panel reviewed the issue of kaitiakitanga again in the light of iwi concerns that kaitiakitanga is not reflected throughout the plan as they would like. The Panel accepts the relief sought by Ngāi Tahu. A new Objective 3.2 places emphasis on the development and maintenance of the relationship between the Council and iwi authorities.

62. A positive relationship between the Council and Marlborough's tangata whenua iwi in the delivery of resource management outcomes is a different issue.

Decision

63. The Panel considered all these issues and took up the iwi suggestions to provide an extra objective to address concerns relating to the management of natural and physical resources in

[27] Section 42A Report, Consideration of Evidence Received for Marlborough's Tangata Whenua Iwi Hearing 12 November 2018, page 1.
[28] Ngāti Toa (166.4).
[29] Ngāi Tahu Tanya Jane Stevens Evidence, paragraphs 67-70.

the context of Māori spiritual and cultural values. The new objective is to be included at Objective 3.2 and is to read as follows:

Objective 3.2 – A strong relationship between the Council and Marlborough's tangata whenua iwi in the delivery of outcomes that accommodate iwi to exercise kaitiakitanga.

Marlborough's tangata whenua iwi believe that the exercise of kaitiakitanga is essential to protecting the mauri of natural resources and to fulfilling a duty to ensure the environment is left in the same or better condition than the current state for future generations. This objective recognises the role of the Council in enabling opportunities for Marlborough's tangata whenua iwi to exercise kaitiakitanga. The nature of the opportunities is identified in other provisions of this Chapter. However, all policies and methods require a strong, positive relationship between the Council and the iwi authorities in order for the provisions to be implemented successfully and meaningfully. The objective therefore places emphasis on the development and maintenance of that relationship.

Issue 3D

The impact of resource use on the mauri of natural resources.

64. The opening paragraph of Issue 3D identifies that *mauri* is the life force existing in all things in the natural world, comprising both physical and spiritual qualities. Iwi consider mauri within *all* natural resources must be protected and sustained if the environment is to flourish. As identified, under Issue 3B the responsibility of kaitiaki is twofold. The first is to protect mauri, and secondly there is a duty to pass the environment in a sound state to future generations.[30]

65. The explanation to Issue 3D refers to the importance of 'water bodies' as being particularly significant to Marlborough's tangata whenua iwi. Te Ātiawa in its submission seeks to amend the term by replacing it with 'coastal waters' as they assert 'coastal waterbodies' is defined in the RMA as only including 'fresh water'. The iwi is unclear as a result whether the term 'fresh water' extends to 'natural resources' and that, as it stands, the use of 'fresh water' limits any reference to 'coastal water' which is an integral part of Te Ātiawa's guardianship.

66. The report writer considers referencing *coastal waterbodies* as suggested is confusing as a waterbody under the RMA is only freshwater. The Section 42A Report indicates why Issue 3D as notified should be retained:

[30] PMEP Volume 1 Chapter 3 Matter 2 Issue 3D.

- *If the definition of 'waterbody' in the RMA is relied on then so should the term 'natural resources' which refers to all water without limitation, that is, as including coastal water.*
- *There are two further references in the Section 42A Report to 'any discharge of contaminants into fresh or coastal waters' and discharge of human sewage and stock effluent to 'water' without limitation to 'fresh water'.*

67. It is recommended that Te Ātiawa's submission should be rejected on the grounds that these references in the issue are enough to draw attention to the fact that coastal waters are part of the iwi's natural resources. In its written evidence, Te Ātiawa offered no further specific wording to amend the reference.

68. Te Ātiawa submitted specific wording change in its evidence at the hearing which clarified its position in favour of a change to Issue 3D.[31] It now agrees to an amendment in the first sentence of the explanation by the inclusion of '*both fresh and coastal'* waters.

Consideration

69. The word 'water' has an extended meaning in s 2 of the RMA and identifies at s 2(b) 'fresh water, coastal water', as well as 'geothermal water'. Te Ātiawa has statutory authority as a kaitiaki of part of the Queen Charlotte Sound's water resources (both fresh and coastal) with which it therefore has a special relationship. Marlborough's other tangata whenua iwi are also keen to see that references to iwi issues are scattered throughout the document to provide a stronger integrated resource management system of the region's natural resources in which they are involved. While iwi realise coastal issues in which they have an interest are dealt with in Chapter 13 of the notified plan, they want to approach the RPS in a holistic way.[32]

70. We concluded that the definition in s 2 RMA is more appropriate given Te Ātiawa's strong relationship with coastal waters and the coast. The PMEP also identifies the importance of the coast to iwi at the outset of Chapter 3 instead of being just specifically referred to in Chapter 13.

71. Moreover, the Panel considers that Te Ātiawa's amending evidence causes some confusion, as is pointed out by the report writer. To amend the wording in the explanation to this Issue, a straightforward solution requires only a small adjustment by supplanting the current wording with '*Freshwater bodies and coastal waters'.*

Decision

[31] Te Ātiawa (1186.37), Ian Shapcott Evidence dated 6.11.17.
[32] Later iwi submissions to the PMEP suggest bringing up coastal issues into the RPS and then throughout the document.

72. Te Ātiawa's submission and evidence amending the explanation to Issue 3D is accepted to the extent as further amended by the report writer after the Panel hearing on 6 November 2017. Paragraph two now begins:

> *Freshwater bodies and coastal waters* ~~*Water bodies*~~ *are particularly significant to Marlborough's tangata whenua iwi. …*

Issue 3F

The provision of papakāinga

73. Issue 3F received two submissions in support, from Ngāi Tahu[33] and FNHTB[34]. Ngāti Toa sought for papakāinga to not be limited to Māori land only[35].

Consideration

74. MDC's earlier Section 32 Report states that Objective 3.5 (see above) provides a clear directive from the IWG to address a resource management issue of significance under the PMEP, especially Issue F which relates to papakāinga.[36] The definition of 'papakāinga development' is contained in the New Zealand Coastal Policy Statement 2010 (NZCPS), as 'Development of communal land on ancestral land owned by Māori'.

75. In Marlborough particular iwi and/or whanau retain culturally some limited but significant parcels of Māori land, particularly in the Marlborough Sounds and the vicinity of Wairau Pa. It is land held in multiple ownership and in most cases is not developed, or is developed in a minimal way by its owners. The issue identifies that enabling development of Māori land is directly connected with marae and papakāinga. Māori have a special spiritual and cultural attachment to this land described as 'Māori land'. Te Ture Whenua Act 1993 defines what constitutes 'Māori land' as land that is regarded as Māori land in terms of that legislation including multiply-owned Māori land and customary land.

76. There is a strong desire among Marlborough's tangata whenua iwi to provide papakāinga. Some land was returned to iwi through settlement processes and is freehold. Freehold title is regarded by Marlborough's tangata whenua iwi as Māori owned land. There are aspirations to exercise rangatiratanga over this land for the betterment of whanau or iwi members. The intention is to develop a small number of houses through to small settlements providing for kaumatua housing, cottage industries, te reo learning facilities. Reference is made to the fact that iwi recognise that

[33] Ngāi Tahu (1189.3).
[34] FNHTB (716.5).
[35] (166.15)
[36] PMEP Volume 1 Chapter 3 pages 3-11-12.

their developments need to be mindful of the effects of papakāinga on the surrounding environment such as provisions for water supply and sewage disposal.

Decision

77. The first sentence of the explanation is amended to read as follows:

In Marlborough, particular iwi and/or whānau retain culturally significant tracts of land, for example in the Marlborough Sounds and in the vicinity of Wairau Pā.

Objective 3.4

Opportunities for development on Māori land that meet the needs of landowners and respects the relationship of Marlborough's tangata whenua iwi with lands, water, significant sites and waahi tapu

78. This objective attracted four submissions. HNZPT and FNHTB[37] seek retention of the provision as notified but with an amendment. The reasons given for their positions include acknowledgement of the right of iwi to develop their ancestral lands within the opportunities provided by ss 6(e), 7(a) and s 8 of the RMA. Ngāti Toa also supports the objective, but with an amendment that seeks the development of papakāinga not to be limited to Māori land only.[38]

79. Ngāti Kuia through Te Whakatu[39] queries what is 'Māori land' in an appearance in support at the hearing. Through the 2014 settlement the iwi received 'cultural redress and commercial properties that are suitable for papakāinga including location, facilities and resources'. The MDC is urged to allow the development on all settlement land, Māori land, whānau whenua and some general land (with customary/cultural history) (for example Anakoha) in order to achieve the potential of the land for the cultural, social, environmental and economic wellbeing of Marlborough's tangata whenua iwi. Limiting the land and activities to which the permitted activity status applies does not achieve Objective 3.4. Ngāti Kuia did not specifically refer to that in their submission.

Section 42A Report

80. Marlborough's tangata whenua iwi consider that planning policies and rules within former resource management plans have limited how they are able to use their own land.[40]

81. Objective 3.4 is seen by the Council, however, as aiming to strengthen the traditional relationship of Marlborough's tangata whenua iwi with land, water and significant sites by

[37] HNZPT (768.8), FNHTB (716.18), Ngāi Tahu (1189.16).
[38] Ngāti Toa (166.15).
[39] Te Rūnanga o Ngāti Kuia, Raymond Smith, Evidence, page 2. 'Te Whakatu' is the name of Ngāti Kuia kerēma that have resulted in partial redress of the grievances of Ngāti Kuia in the settlements and has provided some opportunities moving into the 'post settlement world'.
[40] Section 42A Report. Matter 4 Opportunities for development on Māori land, page 18.

accommodating activities to occur on ***their*** land including papakāinga, marae, cultural activities, cultural use. [Emphasis added.] This will assist in social, cultural and economic development.

82. The Section 42A Report identifies that Objective 3.4 is more appropriate for achieving the purpose of the RMA than an objective seeking development of papakāinga that is not limited to Māori land. Further, any change to Objective 3.4 as suggested by Ngāti Toa would also result in it being inconsistent with Policy 3.1.6 (see below). The report writer considers if the development of papakāinga as a permitted activity is not limited to Māori land, then not only could that activity occur anywhere but it could be done by any person irrespective of whether they were tangata whenua. This has the potential to have significant adverse effects on the environment. In her view, the notified wording of Objective 3.4 is more appropriate for achieving the purpose of the RMA.

Consideration

83. Matters relating to papakāinga and marae and cultural activities are further addressed in Policy 3.1.6. The Panel accepts the report writer's recommendation on this issue. There is no change to the objective.

Decision

84. Objective 3.4 remains as notified.

Objective 3.5

Resource management decision making processes that give particular consideration to the cultural and spiritual values of Marlborough's tangata whenua iwi

85. Objective 3.5 attracted three submissions.[41] HNZPT and FNHTB seek retention of the provision, as notified, with Ngāi Tahu supporting the provision subject to amendments. These particular amendments sought are:

> *Resource management decision making processes that involve Marlborough's tangata whenua iwi, and recognise and reflect the cultural and spiritual values of Marlborough's tangata whenua iwi, and their relationship to lands, water, waahi tapu and waahi taonga.*

86. The reasons given for the amendments are that, based on the explanation to the objective, they provide greater clarity to plan users and the outcome sought through this objective. And, that the wording 'involve Marlborough's tangata whenua iwi' has been proposed because as without iwi involvement, it will be difficult to give consideration to/recognise and reflect their cultural values. And finally, the wording as to their relationship with lands and water waahi tapu and

[41] HNZPT (768.9), FNHTB (716.19), Ngāi Tahu (1189.17).

waahi toanga is also included as many key decisions will relate to s 6(e) RMA matters which will require the insight, views and guidance of iwi.

87. Ngāi Tahu's submission received two submissions in opposition. Federated Farmers sought clarity in the PMEP regarding what iwi involvement in resource management looks like in practice, and, that it be transparent and justified. PMNZ supports the addition of the words 'and their relationship to lands, water, waahi tapu and waahi taonga' as better reflecting s 6 RMA. The company otherwise opposes the word 'reflect' in the amendments as it does not import the wording of s 6 of the RMA.

Section 42A Report

88. The report writer supports the addition of the words 'and their relationship to lands, water, waahi tapu and waahi taonga' as it reflects similar wording in other objectives. The addition of the words 'involve Marlborough's tangata whenua iwi' however creates an issue:

- *The objective would change from considering iwi values in the decision-making process to having iwi involved in making it.*
- *The explanation to the objective includes discussion on iwi involvement at a plan writing level in the implementation monitoring of the Plan, and it also references ongoing involvement in decision-making processes; this suggests iwi would be involved in all decision-making processes following such a high-level directive.*
- *The explanation to the objective is seen by the report writer as somewhat ambiguous, and she considered the wording of (related) Policy 3.1.3. That sets out the matters decision makers must consider – that is, if the application is likely to affect the relationship of iwi and their culture and traditions.*
- *This process then triggers the provisional involvement that is provided for in Method 3.M.7 Decision making processes - which states, depending on the circumstances, a commissioner with expertise in tikanga Māori will be appointed to a committee charged with hearing and deciding an application. The Council will support iwi members to be certified commissioners and provide opportunities for the tangata whenua to become involved.*

89. The report writer is not convinced about that part of the Ngāi Tahu amendment seeking reference to certified commissioners charged with hearing applications is appropriate. It may establish an objective that gives iwi greater involvement in decision-making than intended. She is also concerned with the proposed change in wording from '*give particular consideration*' to

'*recognise and reflect*'. The existing wording of the current objective seeks a consideration of values which leaves room for a determination that there may be none. It seems to be a move away from an objective with discretion (see also Policy 3.1.3) to one that is more absolute.

90. The report writer's advice is to amend Objective 3.5 as follows:

> *Resource management decision making processes that give particular consideration to the cultural and spiritual values of Marlborough's tangata whenua iwi, and their relationship to lands, water, waahi tapu and waahi taonga.*

Consideration

91. We support the submission that particular consideration of the cultural and spiritual values of Marlborough's tangata whenua iwi is an essential part of MDC's decision-making process but agree with PMNZ that 'reflection' is not a necessary part of the process. This may or may not happen in the assessment of the effects of a proposal. If 'particular' consideration is not given, Objective 3.5 as it stands is somewhat of a hollow vessel, but 'reflection' is a step too far and is not part of the language of the RMA.

92. No submissions suggested change to the explanation to Objective 3.5. We note by leaving it intact, it encompasses a number of other processes that have come to the fore in recent years to assist Marlborough's tangata whenua iwi in MDC's decision-making processes. These may be identified in information to come in future Iwi Management Plans (IMP), the information already available in Statutory Acknowledgements, and the mandatory process now in place to advise tangata whenua iwi of all resource consent applications that come before Council, and finally the application of Method 3.M.5 (Cultural Indicators) to be identified in the future.

93. In addition the new RMA provision for Mana Whakahono ā Rohe agreements needs acknowledgment in the explanation to this objective.

Decision

94. The Ngāi Tahu submission is accepted in part as is that of PMNZ[42] with the deletion of the word 'reflect'. HNZPT and the FNHTB submissions are also accepted in part to the extent that parts of the objective not amended are retained as notified.

95. Objective 3.5 is amended as follows:

[42] PMNZ (433).

Objective 3.5 - Resource management decision making processes that give particular consideration to the cultural and spiritual values of Marlborough's tangata whenua iwi and their relationship to lands, water, waahi tapu and waahi taonga.

96. Add a new sentence to the end of the explanatory statement to Objective 3.5 as follows:

This can be achieved through Mana Whakahono ā Rohe agreements.

Policy 3.1.1

Management of natural and physical resources in Marlborough will be carried out in a manner that: [(a)-(e)]

97. This policy reflects how management of resources will be carried out in relation to Marlborough's tangata whenua iwi.

98. Submitters to this policy included FNHTB,[43] Ngāi Tahu[44] and Ngāti Toa[45] in part, Federated Farmers,[46] Trustpower Ltd[47] and the Fishing Industry.[48] FNHTB seek retention of the provision Policy 3.1.1 as notified. Ngāi Tahu[49] seeks minor wording changes that in its view correct the drafting of Policy 3.1.1 which it believes reads more like an objective. Federated Farmers also support the policy in part and seek amendments.[50]

99. Ngāti Toa seeks the addition of a new part (f) to Policy 3.1.1 which recognises that the principle of consultation requires both parties to have the time and resources to consult appropriately.

100. Federated Farmers seek also to delete part (d) from Policy 3.1.1 which relates to recognition of the rights of tangata whenua and the status of iwi as distinct from that of interest groups and members of the public. The organisation also considers that (d) is a duplicate of (a) that relates to taking Te Tiriti into account. And in any case the submitter has doubts that iwi do have a higher status than any other party under the RMA.

101. Trustpower initially sought to delete part (e) from Policy 3.1.1 - the right of iwi to define their own preference for sustainable management of natural and physical resources where their preference is not inconsistent with the RMA. The company considers that (e), as it stands infers that iwi will define what constitutes management of natural and physical resources when that is actually the role for decision-makers on resource consent applications and statutory planning

[43] FNHTB (716.20).
[44] Ngāi Tahu (1189.18).
[45] Ngāti Toa (166.1).
[46] Federated Farmers (425.3).
[47] Trustpower (1201.1)
[48] This is the name under which a large number of interests are gathered.
[49] Ngāi Tahu (1189.18).
[50] Federated Farmers (425.3).

documents. Further, it says the policy incorrectly suggests that the sustainable management of natural and physical resources will be achieved where activities are 'not consistent' with the RMA.

102. The Fishing Industry seeks a new subclause (f) to the policy as follows: 'recognises the fishing rights allocated and protected under the Māori Fisheries Settlement and avoids, remedies or mitigates any adverse effects on the exercise of those rights caused by activities under the RMA'. But fisheries-related resource consent issues at the time of hearing are on appeal to the Court of Appeal by the Attorney-General and are therefore not for discussion here.

103. In essence the iwi submissions call in aid the Treaty principles and recognition of those in a practical sense relating to management of natural and physical resources and how decision making will be carried out in the Plan.

Section 42A Report

104. The report writer identifies that the current wording of the policy provides a better link to the objectives. There is not sufficient gain to warrant accepting the amendments.

105. The report writer also considered it is inappropriate to amend Policy 3.1.1 in the way suggested and that the issues raised would be better addressed in new Methods of implementation if the existing provisions of the policy are lacking. Ngāi Tahu initially did not provide any specific wording to address its concerns so no further assessment could be made of either its amendment to the policy or the methods.

106. At the hearing Ngāi Tahu offered two new methods in its evidence – raising and promoting the awareness of Te Tiriti for decision-makers, and with regard to IMP, recognising the right of iwi to state their preferences in relation to environmental management. The first suggestion is for the MDC to develop a training course for all councillors and decision-makers; the second is for the Council to work with iwi in developing management plans to better enable iwi to participate in RMA processes. Ngāi Tahu recognises that there will be costs associated with both methods to be borne by Council. While these do not need to be unreasonable they are said to be necessary to the Council's particular obligation to iwi.[51]

107. The Section 42A Report indicates that the method Ngāi Tahu offered around raising awareness of Te Tiriti is already covered through the Making Good Decisions course that all decision-makers undertake. As to the issue around IMP, the matters are already covered in Policy 3.1.4 and Method 3.M.3.

[51] Ngāi Tahu, Tanya Jane Stevens Evidence, paragraphs 71-78.

108. With regard to the issues raised by Ngāti Toa as to time and resources to consult appropriately, the Section 42A Report indicates these are linked to the partnerships to be developed between iwi and the Council (Method 3.M.1). This method also contains scope to consider time and resources when expressing how partnerships will manifest themselves, while Method 3.M.4 references cultural impact assessments and cultural value reports, which under 3.M.6 are the responsibility of applicants in terms of costs. Through the IWG process Council already provides resourcing in the Long Term Plan and Annual Plan. The report writer acknowledges that while time and resourcing for iwi is generally recognised as being an issue that needs to be addressed, it is not appropriate to reference funding in the manner sought. It may be interpreted that Council itself will fund consultation and implies it is promising something that may not be able to be delivered.

109. The report writer considered Trustpower's submission as follows:

> *I am comfortable with some of the amended text offered, that which related to plans/documents, however I disagree with the deletion of the part of (e) referring to the RMA. It appeared that the submitter was confused by the language. To understand the full meaning of part (e), it needs to be read in context of the whole policy, i.e. "Management of natural and physical resources in Marlborough will be carried out in a manner that … recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the RMA". So, if the preferences of an iwi are not consistent with the RMA, then management of a natural or physical resource would not be carried in the way preferred by the iwi concerned.*

110. At the hearing Trustpower no longer sought deletion of part (e) but offered amended wording to clarify, and addressed the matter raised about the interpretation of how the reference to not be inconsistent with the Resource Management Act 1991 is to be interpreted. The report writer recommends that the amended text for Policy 3.1.1(e) be accepted in part with (e) amended as follows:

> *(e) recognises the right of each iwi to define their own preferences, <u>through management plans and other documents</u>, for the sustainable management of natural and physical resources, where this is not inconsistent with the Resource Management Act 1991.*

Consideration

111. We revisited Ngāi Tahu's original submission suggesting minor amendments to Policy 3.1.1(a)-(e) to make it more directive/clearer, and particularly to incorporate the amendment sought by Ngāti Toa in italics which the report writer recommends. We agree with these amendments, as set out below. In addition, Trustpower's amendment is a practical addition to Policy 3.1.1(e) and we accept its qualifying statement as assisting general understanding of how the management of resources by iwi may be identified. We also consider that the reference to the RMA in the policy is essential in order also to understand the bounds of iwi preferences.

112. As to Federated Farmers' challenge to the status of iwi under the RMA, Ngāi Tahu are of the opinion that (d) is consistent with s 8 RMA. We are very clear that the references to the Treaty in ss 6, 7 and 8 together with the numerous provisions relating to the Statutory Acknowledgements provide iwi with a status in keeping with the undertakings made by the Crown when it signed the Treaty of Waitangi in 1840 and Article Two of that Treaty. The Council is required to take these into account in its decision-making management.[52]

113. The Panel are also cognisant of recent amendments to the RMA which provide for the inclusion Mana Whakahono ā Rohe agreements at the request of iwi authorities which must be responded to by local authorities. That reality needs to be identified in issue 3G by addition at the end of the explanatory statement of an acknowledgement of the right of iwi authorities to now seek Mana Whakahono ā Rohe agreements. A similar recognition needs to be inserted as an addition to the explanatory statement in Objective 3.5 and as an additional policy in 3.1.1.

Decision

114. The submission of FNHTB is accepted in part to the extent that parts of the policy not amended below are retained as notified.

115. Ngāi Tahu's and Ngāti Toa's minor amendments to Policy 3.1.1(a)-(e) are accepted as set out below, as is Trustpower's clarification to Policy 3.1.1(e). The policy now reads:

Policy 3.1.1 – Management of natural and physical resources in Marlborough will be carried out ~~in a manner that~~ by:

(a) ~~takes~~ taking into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi, including kāwanatanga, rangatiratanga, partnership, active protection of natural resources and spiritual recognition;

(b) ~~recognises~~ recognising that the way in which the principles of the Treaty of Waitangi/Te Tiriti o Waitangi will be applied will continue to evolve;

[52] Marlborough Environment Plan, Chapter 3, pages 3.1-2.

(c) ~~promotes~~ promoting awareness and understanding of the Marlborough District Council's obligations under the Resource Management Act 1991 regarding the principles of the Treaty of Waitangi/Te Tiriti o Waitangi among Council decision makers, staff and the community;

(d) ~~recognises~~ recognising that tangata whenua have rights protected by the Treaty of Waitangi/Te Tiriti o Waitangi and that consequently the Resource Management Act 1991 accords iwi a status distinct from that of interest groups and members of the public; and

(e) ~~recognises~~ recognising the right of each iwi to define their own preferences through management plans and other documents for the sustainable management of natural and physical resources, where this is not inconsistent with the Resource Management Act 1991.

(f) recognising the right of iwi to invite the Council to enter into mana whakahono ā rohe agreements.

116. Add two new sentences to the last paragraph of the explanatory statement to Issue 3G as follows:

… They therefore welcome the opportunity to explore ways of improving their participation in resource management decision making processes as a practical expression of kaitiakitanga. This could be expressed through mana whakahono ā rohe agreements. Iwi authorities can invite the Council to enter into an agreement in order to record ways in which Marlborough's tangata whenua iwi can participate in resource management and decision making processes.

117. Add a new paragraph to the end of the explanatory statement to Policy 3.1.1:

A recent amendment to the RMA has created the opportunity for iwi authorities to invite local authorities to enter into mana whakahono ā rohe agreements in order to build on the Treaty relationship between local authorities and iwi authorities.

Policy 3.1.2

An applicant will be expected to consult early in the development of a proposal (for a resource consent or plan change) so that cultural values of Marlborough's tangata whenua iwi can be taken into account.

118. Consultation with tangata whenua iwi over issues arising under Part 2 RMA have proved a vexed question for applicants, councils and iwi alike since the legislation was implemented. The issue arises again in the PMEP.

119. Marlborough's tangata whenua iwi have the detailed knowledge of their ancestral lands, water, knowledge of their customs, their sacred places, their taonga. The significance of consultation in that regard is that the MDC acknowledges it has obligations to Māori as a result of the provisions of the RMA, especially through ss 6, 7 and 8. This includes applying one of the principles of the Treaty of Waitangi/Te Tiriti o Waitangi – the importance of early consultation.[53]

120. The word 'expects' in Policy 3.1.2 generated a number of submissions from Ngāi Tahu and Ngāti Toa for iwi, Friends for the Community, and the remainder from industry and the primary sector.

121. Ngāi Tahu,[54] FNHTB,[55] and KiwiRail[56] seek the retention of the policy as notified. KiwiRail also seeks the retention of Method 3.M.4 Consultation as notified. PMNZ, Trustpower, Ravensdown Ltd, Hort NZ, and the Oil Companies,[57] with the exception of Federated Farmers, all support an amended policy with some differing variations/amendments. Parts of the Ngāi Tahu and Oil Companies' submissions seek new policies.

122. Ngāi Tahu considers that the policy to consult early with iwi is an appropriate expectation consistent with best practice. It observed, however, that the policy is directed only at applicants, whereas they assert the MDC have a partnership relationship (implying the need for consultation) arising from the Treaty principles extant in s 8 RMA and its duties generally under Part 2 matters. The iwi seek a separate policy to make this clear ('the Council will consult') as consultation is currently only implicit in the framework of objectives and policies in the plan.

123. Ngāti Toa[58] seeks new rules/methods and a new appendix and overlay that includes site areas and habitats that are culturally significant. The purpose of this is to ensure timely engagement between stakeholders and the Council. This document would contain a caveat that not all information is disclosed by iwi and that the overlay is only a starting point for full consideration of and consultation with Māori.

124. Federated Farmers consider Policy 3.1.2 is overly onerous, inefficient, and imposes significant costs and uncertainty on applications with no clear benefits. It seeks that Policy 3.1.2 and Policy

[53] PMEP Volume 1 Chapter 3, Policy 3.1.2, page 3-15.
[54] Ngāi Tahu (1189.19).
[55] FNHTB (716.21).
[56] KiwiRail (873.2).
[57] Ravensdown Ltd (1090.2), Trustpower (1201.2), Hort NZ (769.4), Oil Companies (1004.1), Federated Farmers (425.5).
[58] Ngāti Toa (166.1).

3.1.4 are merged, but with the outcome in the report writer's opinion, that the combination of the two policies effectively removes all reference to consultation with iwi altogether.[59]

125. The Oil Companies seek amendments to Policy 3.1.2 to substitute the word 'encourage' for 'expect' for applicants to consult early in the development of a proposal. They also seek either via a new policy or method a process whereby: it can be determined with certainty what is likely to be of significance to iwi; who should be consulted; and some considerations are established as to engagement expectations relating to such matters as contact and response times, information sharing protocols and cost recovery by iwi.

126. Ravensdown Ltd seeks that Policy 3.1.2 is amended so that it applies only to plan changes. Its reason is that the RMA does not require consultation with any party requiring a resource consent application and there may be occasions when consultation is not necessary or possible. Federated Farmers submitted in support of this approach as it also underpins consistency with the way in which the RMA is constructed.

127. Hort NZ also seeks the substitution of the word 'expect' early consultation by 'encourage'. But it also seeks to replace the remainder of the policy with the words where 'the scale and significance of the impact will affect cultural values'. The latter approach is problematic because the new wording suggested appears to represent a contractual agreement between the applicant and iwi. And in reality it is the Council and iwi to establish the circumstances in which a proposal may affect them. As currently worded in this submission it appears as though iwi are the decision-maker about the appropriate scale and significance of a project.

128. PMNZ has a number of general concerns regarding the practicalities of the consultation provisions in the PMEP. In particular, it seeks a resolution of the two opposites:

(a) submitters who seek the inclusion of general 'requirements' that applicants and/or the Council be required to consult with mana whenua in relation to applications for consent; and

(b) submitters who seek that, while consultation with iwi should be encouraged where appropriate, it should not be mandated in all situations.

129. The company reinforces its early submission that the wording of Policy 3.1.2 should 'encourage' and not 'require' consultation.

130. Trustpower supports Policy 3.1.2 in part, seeking an amendment also requesting that 'expected' be amended to 'encouraged'. This is because the MDC has no authority to require a

[59] Section 42A Report Consideration of Evidence Received for Marlborough's Tangata Whenua Iwi Hearing.

resource consent applicant to consult with any party and it is unclear how the PMEP anticipates that the expectation for consultation will manifest itself. While there is no obligation for a consent applicant to consult under the RMA, however, it is carried out as 'best practice' (supporting Ngāi Tahu's approach).

131. In another submission point,[60] Ngāi Tahu seek a new policy as follows: '*The Council will consult with tangata whenua iwi on applications that may have an impact on the relationship with land, water, wahi tapu or wahi taonga, or otherwise on their cultural values.'*

Section 42A Report

132. In the opinion of the report writer the concerns of Ngāi Tahu are addressed through Methods 3.M.4 Consultation, 3.M.3 Consideration of iwi management plans (IMP); and through the requirements under Method 3.4.2 Recognising statutory acknowledgements. These better require a summary of all resource consent applications lodged with Council to be provided to iwi prior to a s 95 RMA decision as to whether to notify an application being made under the PMEP. Ngāi Tahu's draft policy is recommended to be rejected.

133. We have already observed that MDC had been supportive of the inclusion of sites of significance to iwi and initially sought that those be identified and mapped throughout the lengthy IWG process in time for implementation into the PMEP. This identification and mapping, however, did not eventuate because some iwi did not wish to have sites identified in the PMEP – a matter recognised by Ngāti Toa and other iwi at the hearing.

134. In that vacuum the report writer identifies that Ngāti Toa's concerns are also addressed through Method 3.M.2 as Statutory Acknowledgements recognise the particular cultural, spiritual, historical and traditional association of an iwi with an identified site/area. As noted earlier, her recommendation is that sites of significance should be added to the PMEP but by way of a variation or plan change as it will require consultation with all iwi and landowners. Marlborough's tangata whenua iwi, including Ngāti Kuia, support this approach.

135. In the absence of any specific new provisions from the Oil Companies to assess, the report writer reiterates that Methods 3.M.2 Recognising statutory acknowledgements, 3.M.3 Consideration of management plans, 3.M.4 Consultation and 3.M.6 Cultural impact assessment and cultural value reports, all provide PMEP users with guidance as to the various ways in which they can ascertain 'what is likely to be of significance to iwi' together with the relevant iwi to approach for consultation. The report suggests it would not be appropriate for the PMEP to have provisions regarding engagement expectations, such as contact and response times, information

[60] Ngāi Tahu (1189.20).

sharing protocols and cost recovery by iwi, as those expectations would be a matter between the relevant iwi and the applicant for a particular proposal.

136. In closing off this section of the report, the report writer identifies that the wording of Policy 3.1.2 'expects' early consultation is deliberate, reflecting the fact that the policy in the RMA does not 'require' consultation - an 'expectation' is not the same as a 'requirement'. 'Requirement' provides something akin to a threshold that had to be met for an application to proceed. 'Expectation', on the other hand, leaves the door open to there being, in some circumstances for good reason, no consultation.

Issues arising

- Legal requirements
- Expect/encourage?
- Finding relevant information
- Statutory Acknowledgements

Legal requirements

137. Section 36A(1)(a)(b)(c) RMA states as follows:

> **36A No duty under this Act to consult about resource consent applications and notices of requirement**
>
> **(1) The following apply to an applicant for a resource consent and the local authority:**
>
> **(a) neither has a duty under this Act to consult any person about the application; and**
> **(b) each must comply with a duty under any other enactment to consult any person about the application; and**
> **(c) each may consult any person about the application.**

138. Thus, while there is no duty under the RMA for applicants or local authorities to consult any person about an application for a resource consent and requirements (s 36A(1)(a)), the section also applies to a notice of requirement issued under ss 168, 168A, 189 and 189A. If other legislation outside the RMA requires consultation then applicants and local authorities must abide by that duty to consult (s 36A(1)(b)) around issues arising under that legislation.[61]

139. Irrespective of s 36A(1)(a), the legislation provides that applicants and authorities *may consult* any person about the application (s 36A(1)(c)). This provides the parties with a discretion to consult Marlborough's tangata whenua iwi (or otherwise) about an application for a resource consent or private plan change.

[61] Local Government Act 2002.

140. Section 95E(1) RMA requires the consent authority to decide if a person is affected in relation to an activity, if the activity effects are minor or more than minor. (This appears to the Panel to contemplate that a council may need to consult to identify who or what organisation is an 'affected person'.) Section 95E(2)(c) requires that consent authorities must have regard to every relevant statutory acknowledgement made in accordance with an Act identified in Schedule 11 RMA. This schedule includes the various settlement deeds relating to Marlborough's tangata whenua iwi and its significance is further referred to elsewhere.

141. In Schedule 4 RMA, clause 6(1)(c) as to 'Information required in application for resource consent' directs that information for resource consents must include a mandatory assessment of the actual and potential effects on the environment. Schedule 4, clause 6(1)(f) requires the identification of the persons affected by the activity, any consultation and any response to their views.

142. Schedule 4, clause 6(3)(a), however, identifies that reporting the persons affected by a proposal does not oblige an applicant to *'consult any person'* or '*create any ground for expecting an applicant will consult'.* This appears to relate back to the fact that there is no duty for applicants to consult under s 36A(1). But it does not exclude s 36A(1)(c), leaving it open for applicants to consult if they consider it is appropriate.

143. Schedule 4 7(1)(a) requires a mandatory assessment of effects on those in the neighbourhood and, where relevant, the wider community – including cultural effects. And Schedule 4 7(1)(d) requires an assessment of any effect on natural and physical resources having spiritual or cultural value. Both these provisions identify the need for the relevant iwi to be involved in consultation by the applicant.

Resolution of expect/encourage

144. Under s 36A(1)(a) RMA there is no 'duty' for an applicant to consult with anyone on resource consent applications. Under Schedule 4 clause 6(3)(a) reporting that someone is affected by a proposal does not create a duty or obligation for an applicant for a resource consent to consult any person. 'Obligate' is defined as a limit on 'a person legally or morally', and 'obligation' is defined as [the] 'constraining power of law, *duty*, contract'.[62] Thus 'duty' and 'obligation' are interchangeable and is one reason why we do not consider Ngāi Tahu's suggested policy of an obligation on council to consult, has traction.

145. We have concluded the word 'expects' sets up the *probability* of consultation. It sets up just as high a threshold as 'requirement'; but with the application of Section 36A(1)(a) and Schedule 4

[62] New Zealand Pocket Concise Oxford Dictionary *The Future of New Zealand English* Fourth Edition, p 776.

clause 6(3)(a) as to resource consent applications and plan changes, no person is *obliged* to consult or give any grounds for doing so.

146. We conclude that 'expected' to consult should be amended to 'encouraged' and the policy be amended also to state that this is 'best practice'.

Where to find relevant information

147. This opens up the question of where an applicant (who *does* want to engage with tangata whenua iwi under s 36A(1)(c) RMA) is to find relevant guidance. Even with some knowledge publicly available, tangata whenua iwi assured us that much relevant cultural information is still held privately by the iwi in the areas identified in the statutory authorities. There may be 'hidden files'.

148. The MDC's long-held administrative policy has been to circulate the tangata whenua iwi with all applications for resource consents. The Panel was informed that to date these lists are rarely responded to. Post-settlement that may well change, particularly as the Statutory Acknowledgements now broadly identify so many iwi areas of cultural significance and the MDC is now required to address those Acknowledgements as a matter of law.

149. This process is now encapsulated in s 95 RMA providing steps for the MDC to assess whether applications should be notified or non-notified. Recent RMA amendments to the resource consent limited notification provisions were introduced as part of the Resource Legislation Amendment Act 2017 (s 95B RMA). In identifying which parties should be notified as part of the new step-by-step analysis, Step 1 involves determining whether there are any affected protected customary rights groups or Customary Marine Title groups, or whether the proposed activity is on or adjacent to any land subject to Statutory Acknowledgement. Where there are no affected groups, the analysis then shifts to Step 2 (identifying whether limited notification is precluded). Where iwi groups are not affected, consultation is not required.

Statutory Acknowledgements

150. A great deal of spatial information is set out in the MDC's Statutory Acknowledgements and the associated maps may be accessed on the Council website: https://www.marlborough.govt.nz/your-council/tangata-whenua/te-tau-ihu-iwi-statutory-acknowledgements and as concluded from the material supplied from the Section 42A Report, we also support Methods 3.M.2 Recognising statutory acknowledgements and 3.M.3 Consideration of iwi management plans. Ngāi Tahu had one of the first (very extensive) IMPs that is now referred to by consent authorities in the Canterbury region. IMPs may be considered

significant repositories of information if addressed as Method 3.M.3 suggests (see further at Policy 3.1.4).

Considerations for consultation

151. As described above, Marlborough's tangata whenua iwi were reluctant to divulge any further information as to places, waters, land and cultural issues until they had the opportunity to further liaise with MDC and consider a plan change to the PMEP as to what would be considered relevant information and to consult with landowners.

152. PMNZ's counsel helpfully proposed a list of requirements that might be considered for any anticipated meetings of iwi, landowners and Council to overcome some of the uncertainties we experienced with the suggestions in the submissions identified above. We record them here to avoid further delays and costs to the parties.

(a) The areas in which applications will be subject to those requirements.

(b) Which activities within those areas require consultation.

(c) Which iwi must be consulted in relation to each of those areas.

(d) What the cultural values for Marlborough are and how they are to be recognised and provided for.

(e) Engagement expectations, including matters such as response times, information sharing and cost recovery by iwi.[63]

[63] PMNZ Legal Counsel Submission, paragraph 34.

Consideration

153. After reading and hearing submissions, assessing the information in the Section 42A Report and addressing legal questions, we determined that Policy 3.1.2 requires amendment to the phrase 'an applicant will be 'expected' to consult early. The word 'encouraged' is to be substituted instead, with the addition of the phrase 'best practice'. This will provide applicants with a more realistic impetus to independently consult iwi (even outside of the Statutory Acknowledgements process).

154. We also concluded that early consultation with Marlborough's tangata whenua iwi is to be encouraged as it will ensure that relevant cultural considerations are adequately identified and taken into account prior to the advanced development of proposals or plan changes. This will also mitigate any potential disruption that can arise from consultation occurring at a late stage of development.

Decision

155. Policy 3.1.2 is amended as follows:

Policy 3.1.2

An applicant will be ~~expected~~ encouraged, as best practice, to consult early in the development of a proposal (for resource consent or plan change) so that cultural values of Marlborough's tangata whenua iwi can be taken into account.

Only Marlborough's tangata whenua iwi can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga This means that iwi are in the best position to determine whether a proposal will affect areas of significance for iwi. Consultation undertaken ~~It is therefore important that consultation with iwi occurs~~ early in the process of planning ~~of~~ a development (either by resource consent or plan change) ~~to ensure impacts are~~ allows the effects on the cultural values to be appropriately identified and addressed. Early consultation with Marlborough's tangata whenua iwi is therefore considered to be best practice when preparing an assessment of effects on cultural values.

Policy 3.1.3

Where an application for resource consent or plan change is likely to affect the relationship of Marlborough's tangata whenua iwi and their culture and traditions, decision makers shall ensure: [(a)-(e)]

156. This policy attracted six submissions. FNHTB seeks retention of the provision as notified.[64] Three others – Ngāi Tahu, HNZPT and PMNZ[65] – support the provision with amendments, and two oppose in part – Transpower and Fulton Hogan.[66]

157. Transpower seeks to amend (a) and (b) of the policy to reword it in part to provide that (a) *particular regard is had to the ability* for tangata whenua to exercise kaitiakitanga with the deletion of the words '*is maintained*'. In Trustpower's opinion this wording is supported because it better reflects s 7 RMA. Further, the exercise of kaitiakitanga is only a matter to have particular regard to – there is no statutory requirement to strictly provide for or maintain the ability of iwi to undertake it.

158. Trustpower's reasons for amendments to (b) are that it understands that the vitality of the mauri of a waterbody can change depending on its quality and flows. As such, there can be a direct relationship between monitoring the mauri of a river and monitoring its existing flow or water quality. This approach could conflict with other objectives of the PMEP such as Chapter 5. (Objective 5.3 seeks to enable access to reliable supplies of freshwater for primary production, commercial and industrial purposes to ensure access to reliable supplies to support Marlborough's social and economic vitality.) The company considers that the policy should focus on avoiding, remedying or mitigating adverse effects on the overall integrity of mauri and recognise that its maintenance does not equate to maintaining the water flows, water quality or biophysical values of a waterbody in their existing state. Trustpower also seeks the provision of explanatory material in the PMEP that provides greater direction as to the elements that contribute to determining whether the integrity of the mauri of fresh or coastal waters, land and air is being maintained.

159. Fulton Hogan seeks the following amendment to the opening sentence of Policy 3.1.3: (b) mauri *as described in the relevant iwi management plan* is maintained… This submitter considers that while Policy 3.1.3 requires decision makers to ensure mauri is maintained and improved where degraded, Policy 3.1.4 requires iwi to provide guidance through IMP. Without that guidance there is a lack of certainty for consent applicants as to what level or management or mitigation will satisfy Policy 3.1.3.

[64] FNHTB (716.22).
[65] Ngāi Tahu (1189.21), HNZPT (768.10), PMNZ (433.2).
[66] Trustpower (1201.3), Fulton Hogan (717.8).

160. Ngāi Tahu submits that while consultation and notification of resource consents is implicit in the policy, making it explicit provides greater direction in understanding how the policy is to be implemented. Therefore it considers that an amendment requiring decision makers shall '*consult with, and notify resource consent applications to iwi, and ensure that* …

161. Ngāi Tahu's submission is challenged by both Federated Farmers and PMNZ. In the Farmers' opinion it is unclear how the amendment would relate to small resource consents that might be required for farming activities. They say amendment should be limited to large-scale resource consents or plan change applications. PMNZ also considers in relation to subclause (d) of Policy 3.1.3 that it is unclear how the physical health of waterbodies will be considered and how in fact compliance with the provision would be demonstrated. It says the PMEP already contains robust provisions for the protection of waterbodies and (d) duplicates a number of these. PMNZ also considers some aspects of the policy go beyond cultural matters and some requirements are unduly restrictive of proposals for use and development within the Port and Marina Zones. PMNZ's submission is supported by a further submission by MFA and AQNZ but the reasons given by the latter suggest that it only refers to amendments to the rule applying to the Coastal Marine Zone.

162. HNZPT seeks amendment to Policy 3.1.3 subclause (e) by deleting 'how' and replacing it with '*that* traditional and *cultural* Māori uses and practices relating to natural and physical resources such as mahinga maataitai, waahi tapu, papakainga and taonga raranga *will* be recognised and provided for'. The reasoning advanced is that the use of the word 'traditional' in subclause (e) is too limited as it lacks the linkage of particular uses and practices to a particular time and does not provide for their ongoing evolution and change. The word 'cultural' is also said to be informed by the language of the RMA.

163. The other amendments sought are for grammatical reasons.

Section 42A Report

164. The RMA requires resource management issues of significance to be identified as they have been in Issues 3A-3J. Policy 3.1.3 provisions are developed to respond to these.

165. A recommended amendment to (a) moves the policy away from issues identified by tangata whenua iwi particularly Issue 3B that concerns the lack of accommodation for iwi to exercise kaitiakitanga; thus 'ensure … the ability to exercise kaitiakitanga is maintained' is a much stronger response.

166. The report writer responds also to other suggestions by disputing concerns about the conflict with other provisions. Objective 5.3 has policies that give effect to and only enable water to be

taken if it will have little or no adverse effects on water resources (that could affect mauri) or a minimum flow and allocation limit for the source is established in the PMEP, while Policy 5.2.4 states that environmental flows will be set to protect mauri of a waterbody. The report writer also considers the amendments Trustpower seeks to (b) do not respond to Issues 3A-3J better than the existing wording.

167. The report observes that in the absence of any new provisions in its submission from Trustpower to assess, Methods 3.M.2 Recognising statutory acknowledgements, 3.M.4 Consultation and 3.M.6 Cultural assessments reports and cultural value reports provide Plan users with various ways in which they can gather a greater understanding to ensure mauri values are maintained or improved when degraded.

168. The report writer identifies that Policy 3.1.4 does not require iwi to develop IMPs and neither does the RMA. While IMPs are important they do not replace the need for consultation between parties where appropriate. The encouragement[67] set out in Policy 3.1.2 that applicants will consult early in the development of a proposal should assist in providing the certainty referred to in Fulton Hogan's submission.

Consideration

169. Issues arising:

- Is the word 'ensure' in the third sentence to the opening paragraph too directive?
- And if so, what should it be replaced with?
- Should Policy 3.1.3(d) be deleted because it is too detailed for an RPS?
- Might Policy 3.1.3 subclauses (a), (b) and (c) be a block to development?
- Are the amendments by HNZPT acceptable?

170. The Section 42A Report identifies the words 'shall ensure' in the opening paragraph are 'too high a bar' for the local authorities to achieve. It leaves no room for solutions which, despite the benefits of an activity, are unable to be fully achieved. Further, it goes beyond the wording set out in s 56 RMA 'to recognise and provide for' and s 7 'have particular regard to'.

171. The Panel considered this, and came to the conclusion the word 'ensure' should be replaced with 'consider' because it is for the front-line decision-makers to assess whether an application for a resource consent or plan change is likely to affect Marlborough's tangata whenua iwi and how this may occur. And by interposing the word 'how' in front of subclauses (a), (b) and (c) of

[67] See amended to 'encourage' consultation, page 27 above.

Policy 3.1.3 it sets MDC officers on inquiry as to 'how' the iwi are likely to be affected and 'how' the special relationship with the iwi will be recognised and provided for. This word precedes the requirements in (a), (b) and (c) and is already operating.

172. As to a better Policy 3.1.3(d), this generally relates to values which are generally addressed in the PMEP. This is particularly so in Chapter 15 of the PMEP (including water quality). We consider these provisions should be deleted as they are also too detailed for an RPS.

173. Finally, the provisions HNZPT seeks to be included make the policy clearer and bring the use of the word 'traditional' more up to date by deleting 'how' and replacing it with 'that' and by including the word 'cultural' as well.

Decision

174. Policy 3.1.3 is amended as follows:

Policy 3.1.3 - Where an application for resource consent or plan change is likely to affect the relationship of Marlborough's tangata whenua iwi and their culture and traditions, decision makers shall ~~ensure~~ consider how:

(a) the ability for tangata whenua to exercise kaitiakitanga is maintained;

(b) mauri is maintained or improved where degraded, particularly in relation to fresh and coastal waters, land and air;

(c) mahinga kai and natural resources used for customary purposes are maintained or enhanced and that these resources are healthy and accessible to tangata whenua;

(d) the special relationship between tangata whenua and nga wai will be recognised and provided for. ~~for waterbodies, the elements of physical health to be assessed are:~~

~~i. aesthetic and sensory qualities, e.g. clarity, colour, natural character, smell and sustenance for indigenous flora and fauna;~~

~~ii. life supporting capacity, ecosystem robustness and habitat richness;~~

~~iii. depth and velocity of flow (reflecting the life force of the river through its changing character, flows and fluctuations);~~

~~iv. continuity of flow from the sources of a river to its mouth at the sea;~~

~~v. wilderness and natural character;~~

~~vi. productive capacity; and~~

~~vii. fitness to support human use, including cultural uses~~.

(e) ~~how~~ traditional and cultural Māori uses and practices relating to natural and physical resources such as mahinga maataitai, waahi tapu, papakāinga and taonga raranga are ~~to be~~ recognised and provided for.

Policy 3.1.4

Encourage iwi to develop management plans that contain:

(a) specific requirements to address the management of coastal waters, land and air resources, including mauri, and in relation to Sections 6(e), 7(a) and 8 of the Resource Management Act 1991;
(b) protocols to give effect to their role of kaitiaki of water and land resources;
(c) sites of cultural significance;
(d) descriptions of how the document is to be used, monitored and reviewed; and
(e) the outcomes expected from implementing the management plan.

175. Three submissions from FNHTB, Ngāi Tahu and Fulton Hogan[68] seek retention of the policy as notified. Four - Federated Farmers, Irrigation NZ, HNZPT and Ngāti Toa – either oppose or support Policy 3.1.4 subject to amendment.[69]

176. Ngāi Tahu's observation in respect of this policy is that IMP are essential tools giving as an example the Kaikōura Management Plan described as comprehensive, providing insight and detail to inform resource management processes. Ngāi Tahu considers the policy is an indication of the expression of kaitiakitanga as provided for by s 7(a) RMA, and this would be made clearer if kaitiakitanga is referenced after the provision.

177. Fulton Hogan seeks retention of Policy 3.1.4 as notified, inferring, however, that IMP are 'required' through this policy in order to provide certainty for resource consent applicants (with reference back to Policy 3.1.3). The matter of IMPs being 'required' as opposed to 'encouraged' is raised. Nevertheless the report writer notes that relief sought (encourages) is quite explicit that the policy be retained as notified.

178. Federated Farmers seeks amendment to Policy 3.1.4 through the addition of a new part amendment limiting it to (f) 'background information for large-scale resource consent and plan change applicants so that Marlborough's tangata whenua iwi can be taken into account in the preparation of an application'. While the organisation identifies its support for the development of IMP it is of the opinion that Policies 3.1.2 and 3.1.4 should be combined.

179. Irrigation NZ seeks amendment to the opening statement of Policy 3.1.4 to also 'Require iwi to develop iwi management plans that contain…'. Irrigation NZ's reason for agreeing with Ngāi

[68] FNHTB (716.23), Ngāi Tahu (1189.22), Fulton Hogan (717.9).
[69] Federated Farmers (425.5), Irrigation NZ (778.1), HNZPT (768.11), Ngāti Toa (166.14).

Tahu's recognition of the significance of IMP is that they are important tools that can assist and provide more certainty for applicants and protect iwi values.

180. HNZPT seeks amendment to Policy 3.1.4 point (c) as follows:

> *'(c) sites, places, areas and landscapes of cultural or historic significance;'*

its reason being that IMP are an important means of identifying a range of historic resources of significance and this should be encouraged.

181. Ngāti Toa seeks to amend Policy 3.1.4 in the opening statement to support iwi management plans instead of encouraging them. Iwi make the point that iwi authorities are under-resourced and require capacity to fulfil their duties and the amendment sought will allow iwi to build capability and capacity in this space. It will also help MDC in meeting its obligations, and so it should have a resource specifically dedicated to the response.

Section 42A Report

182. The Section 42A Report identifies that in combining the two policies and amending the outcome, Federated Farmers in effect seek first the deletion of the policy requiring early consultation by the applicant (Policy 3.1.2), and secondly, replacing it with an additional matter in Policy 3.1.4 for IMP to provide background information for applicants. The two policies seek to achieve different outcomes and involve different parties – one between iwi and applicants and one about the relationship between iwi and MDC. Subsequently the evidence provided at the hearing by Federated Farmers suggests a change in its opinion - the organisation is no longer seeking an amendment to Policy 3.1.4.[70]

183. In response to Irrigation NZ's submission that the RMA does not 'require' iwi to develop IMPs, the report identifies these plans may also include matters unrelated to resource management. There is no statutory requirement for the plans to be anything other than iwi want them to be.

184. On the HNZPT submission, ('*sites, places, areas and landscapes of historic or cultural significance*') those are relevant in the context of Policy 3.1.4(c), and this amendment is recommended. Iwi should be encouraged to identify the range of resources of historic and cultural significance that are referenced throughout the PMEP.

185. In reply to Ngāti Toa's submission seeking MDC's support for developing IMP, the report writer originally believed that the proposed amendment is likely to set up an expectation by iwi that could not be met with regard to funding and resourcing issues. The provision of resourcing would either likely be a staffing matter and a Long Term Plan/Annual Plan matter – both issues

[70] Federated Farmers Evidence Kim Louise Reilly paragraphs 20-22.

beyond the scope of the PMEP. 'Encouraging' or 'supporting' IMP sets up a doubt of whether the use of the word 'support' would set up an expectation of financial or resource support from MDC. But having had it pointed out that MDC's support was historically offered in the past to develop their IMPs, the report writer recalls that Ngāti Kuia ultimately lodged their Pakohe IMP with the Council as a result of this type of support (and similar support is given from Nelson City and Tasman District Councils).

Consideration

186. The Panel considers the policy as notified, but including reference in Method 3.M.9 to partnership, also allows the nature of support for the development of iwi management plans to be discussed between the Council and iwi authorities.

187. With respect to Policy 3.1.4, the Panel accepts HNZPT's suggested amendment to Policy 3.1.4(c) making explicit what may be incorporated into IMPs by way of the identification of areas of historic significance as well as cultural.

188. The definition of 'historic heritage' in s 2 RMA means those natural and physical resources that contribute to an understanding of New Zealand's *history* and cultures deriving from all the qualities identified in s 2(b)(i)-(iv). As HNZPT points out, Policy 3.1.4 is an encouragement policy and iwi should be encouraged to identify the range of **heritage** resources of historic or cultural significance.[71]

189. The overall finding results in a positive expression of support for the development of iwi management plans firstly with the word "*support* iwi management plans' which we endorse. Further, the word 'kaitiakitanga' is to be inserted into Policy 3.1.4(a) and minor amendments with the word '*assist'* inserted throughout the explanation to the policy.

Decision

Policy 3.1.4 is amended as follows:

Policy 3.1.4 - Encourage iwi to develop iwi management plans that ~~contain~~ may include:

(a) specific requirements to address the management of coastal waters, land and air resources, including mauri, and in relation to Sections 6(e), 7(a) (kaitiakitanga) and 8 of the Resource Management Act 1991;

(b) protocols to give effect to their role as ~~of~~ kaitiaki of water and land resources;

(c) sites, places, areas and landscapes of historic and/or cultural significance;

(d) descriptions of how the document is to be used, monitored and reviewed; and

[71] See also Ngāti Kuia, Julia Eason Evidence.

(e) the outcomes expected from implementing the management plan.

Encouraging Marlborough's tangata whenua iwi to develop and implement iwi management plans will ~~help~~ assist to achieve two significant outcomes. Ultimately, it will ~~help~~ assist the Council to meet its requirements relating to Māori in the resource management planning process, especially when preparing new resource management policy and plans. Secondly, because the plans belong to the iwi that prepared them, they will ~~help~~ assist those iwi ~~themselves~~ to identify and express the values and relationships they have with their resources and how they ought to be protected, maintained or enhanced. Iwi management plans can provide a framework for consultation both for plan review and resource consent processes. Including the matters identified within (a) to (e) of the policy and implementing an iwi management plan will build and strengthen partnerships between iwi and the Council, and build trust and good relationships.

Policy 3.1.5

Ensure iwi management plans are taken into account in resource management decision making processes.

190. FNHTB seek retention of the policy as notified. Trustpower Limited also seeks retention, identifying it is consistent with ss 60 and 74 of the RMA as its reason.

191. Ngāi Tahu seeks to amend Policy 3.1.5 with an amendment to 'ensure management plans are *given particular regard to* in resource management decision-making processes'. The proposed amendment recognises that an IMP is an expression of kaitiakitanga as provided for by s 7 RMA. Trustpower opposes Ngāi Tahu's submission on the basis that the submitter's amendment to Policy 3.1.5 as s 104 of the RMA requires 'regard' to other matters not 'particular regard'.

192. Federated Farmers seeks an amendment to 'ensure that IMPs are taken into account in resource management decision-making processes *with regard to the preparation of a regional policy statement or regional or district plans.'* The policy is not seen as clear whether it applies to decision-making or resource consents.

Section 42A Report

193. In respect of Trustpower's opposition to Ngāi Tahu's amendment to Policy 3.1.5, the report writer does not agree with Trustpower Limited's interpretation that the context of the submission from Ngāi Tahu (iwi management plans) links directly to s 7 of the RMA, rather than "Other Matters" in s 104(2)(c). With regard to resource consents, s 104 of the RMA states "…the consent authority must, subject to Part 2, have regard to…". Section 7 of the RMA lists the matters (a) to (j) to have "*particular regard to*". Consideration of an application under s 104 is subject to this, and has to have "*regard*" to the matters listed in s 104(a) to (c).

Consideration

194. The Section 42A Report points out that the explanation to Policy 3.1.5 makes it clear that IMPs are considered by the Council as an "Other Matter" under s 104(1)(c) rather than a matter to be given particular regard to relative to s 7(a) RMA. This is on the basis that the policy, including its explanation, is a meaningful outcome of consultation through the IWG process and accurately reflects the Council's view of IMPs.

195. As to the amendments sought by Ngāi Tahu and Federated Farmers for Policy 3.1.5, the wording requested is already in the policy.

196. The Panel is of the view that the role of IMPs is strengthened in Method 3.M.1 Developing partnerships by inserting the sentence after the words 'the principles of the Treaty of Waitangi/Te Tiriti o Waitangi' '*this may include the Council facilitating and practically assisting iwi to develop iwi management plans as a means of expressing kaitiakitanga*' after referring to the principles.

197. The Ngāi Tahu submission received support from Te Ātiawa and PMNZ, the latter because the relief sought will assist in providing certainty to economic users.

198. As to mapping, the report writer notes that the inclusion of sites of significance to iwi in the maps of the PMEP was an issue throughout the IWG process but did not eventuate, with some iwi not wishing to pursue the issue. The suggestion of the report writer is that such mapping occurs as a variation or plan change that would involve interested parties. The report writer notes that this approach appears to be supported by Ngāti Kuia (that is, change should be by consensus such as with IWG and Te Ātiawa).

Decision

199. Policy 3.1.5 and its explanation are retained as notified.

200. Method 3.M.1 is amended by adding a new sentence as follows:

'Developing effective partnerships with Marlborough's tangata whenua iwi will be important in promoting resource management and taking into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi. <u>This may include the Council facilitating and practically assisting iwi to develop iwi management plans as a means of expressing kaitiakitanga</u>. How the partnerships will be expressed on an ongoing basis may be in the form of protocols, memorandums of understanding, strategies or the like. Regardless of what form the partnerships are expressed in, a fundamental component will be simple good faith.'

Policy 3.1.7

Foster a principle of partnership between Marlborough's tangata whenua iwi, the Marlborough District Council and statutory management agencies on an ongoing basis to give effect to Policies 3.1.1 to 3.1.6

201. The intent of the policy underpins other policies and methods in the chapter supporting a partnership between Marlborough tangata whenua iwi, the MDC and statutory agencies such as the Department of Conservation. Method 3.M.4 Developing partnerships identifies that effective partnerships may be developed in the favour of protocols, memoranda of understanding to facilitate IMP.[72]

202. Two submitters – Ngāi Tahu and FNHTB[73] – seek the retention of the policy as notified and are supported by further submissions from Te Ātiawa. Federated Farmers[74] in the first part of its opposing submission, seeks an amendment to the explanation to the policy. No specific or general wording for such a suggestion was identified. The organisation's submissions, however, suggest:

- *The policy may lead to co-governance, an approach that is asserted to be inconsistent with the RMA or only appropriate for low level planning.*
- *The creation of policies similar to Policy 3.1.7 to include the development of partnerships with other groups such as Federated Farmers and the MDC.*
- *The second part of the Federated Farmers submission seeks to have policies similar to Policy 3.1.7 included in the PMEP relating to the development of partnerships with other groups, such as between farmers and the Council.*

Section 42A Report

203. The report writer has not assessed the Federated Farmers submission as it would not be appropriate to add policies of that nature to the Marlborough's tangata whenua iwi Plan chapter as Federated Farmers does not appear to seek the inclusion of iwi in the partnerships they seek through these additional policies.

204. As to the other issues, the Section 42A Report identifies that Policy 3.1.7 and its explanation are not ambiguous. The policy does not discuss co-governance and in any event that approach is not consistent with the intention of the RMA (sustainable management) nor appropriate for lower level planning. To the contrary, this is a high level RPS policy that clearly sets out the importance of partnerships to give effect to all the policies in Chapter 3 and is supported by a specific method by which to develop partnerships (Method 3.M.1). It is not a policy about

[72] Methods of Implementation 3.M.1, page 3-17
[73] Ngāi Tahu (1189.25), FNHTB (716.26).
[74] Federated Farmers (425.7).

decision-making.[75] The explanation to the method reflects the lack of prescription around how a partnership may be developed. This is appropriate and the effective arrangements should not be unnecessarily constrained by boundaries being established in the policy.

205. The report writer recommends that the Ngāi Tahu and Friends submissions are accepted and that Federated Farmers' submission be declined.

Consideration

206. We consider from other supporting policies that one day Marlborough's tangata whenua iwi and Council will form partnerships and the evidence throughout the hearing indicates this may well be the case in relation to Statutory Acknowledgements and Mana Whakahono ā Rohe agreements. Method 3.4.1 'Developing Partnerships' provides plenty of scope for this to happen. It identifies protocols, memoranda of understanding, strategies and possibly IMP, while the PMEP is aspirational when it indicates '*Regardless of what form the partnership are expressed in, a fundamental component will be simple good faith'*.[76]

Decision

207. The Ngāi Tahu and FNHTB submissions are accepted. Policy 3.1.7 is retained as notified. Federated Farmers' submission is rejected.

Method 3.M.2

Recognising statutory acknowledgements

208. These acknowledgements, to be attached to the final PMEP, relate to the hundreds of cultural, heritage and spiritual sites associated with Marlborough's tangata whenua iwi. They will have great value for applications for resource consents and plan changes relating to iwi, and are rich in its cultural history.

209. These are actioned by the statutory provisions provided. The considerations required by s 95B(3) and s 95(2)(c) RMA are sufficient for identification purposes. Section 95E requires a consent authority to decide if a person is an affected person.

210. This Method 3.M.2 attracted submissions from PMNZ and Ngāti Toa. Both support the Method but seek amendments. At the time of the hearing the Panel was advised that PMNZ is no longer seeking a change in the Method so for PMNZ it is no longer in issue.

211. Ngāti Toa submitted on three aspects of Method 3.M.2.

212. The first amendment sought by Ngāti Toa is to the first sentence of the method to read: '*The relevant trustees for an iwi **authority** must be provided with a summary of resource consent*

[75] PMEP Chapter 3, page 3-17.
[76] PMEP Methods of implementation 3.1.1 page 3-17.

applications …' The reason given for this amendment is that the current wording is incorrect and clarity is sought as to what is meant by '*an iwi*'.

213. That the second sentence be amended to '*The Council must have regard to the Statutory Acknowledgement relating to the statutory area.* ***Iwi must be consulted*** *to identify whether* ***they are an affected party*** *in relation to an activity …*' [77]

214. The second sentence to the method currently reads: '*The Council must also have regard to the Statutory Acknowledgement relating to a statutory area when deciding whether the relevant trustees are affected persons in relation to an activity within, adjacent to, or directly affecting the statutory area and for which an application for a resource consent is made'*. [78]

215. The reason given for the amendment is that the sentence of the original provision implies that it is the Council that decides whether iwi are an affected party and this should not be the process. The submitter observes that the Statutory Acknowledgements are in fact the trigger for applicants and the Council to consult.

216. The third amendment Ngāti Toa seeks is an appendix of all Statutory Acknowledgements as the Council is required to record all such information within its resource management documentation.

Consideration

217. Statutory Acknowledgements, by statutory directions, are part of Method 3.M.2 and they are part of the existing plans.

218. In relation to Ngāti Toa's final submission, the current wording of the method directly reflects the legislation that sets out the settlements for Te Tau Ihu iwi. The Section 42A Report identified s 27(1) of the Ngāti Toa Rangatira Claims Settlement Act 2014 as the reference point.

219. The current wording of the Method mirrors that legislation in that it states '… a relevant consent authority must have regard to the statutory authority **in deciding** … whether the trustee of the Toa Rangatira Trust **is an affected person** in relation to an activity'. [Emphasis added]

220. In the report writer's opinion, it is not appropriate to deviate from the requirements set out in the (current forms) of settlement legislation, an opinion we share.

221. When describing Method 3.M.2 further, the concerns of Ngāti Toa regarding consultation and the identification of affected parties are set out in Method 3.M.4. This includes the requirement under Statutory Acknowledgements for a summary of all resource consent applications lodged

[77] Section 42A Report page 14.
[78] Partnerships are identified in Policy 3.1.7 and kaitiakitanga. Section 42A Report page 13.

with the Council to be provided to iwi prior to the s 95 RMA decision whether to notify an application made. The considerations required by s 95B(3) and s 95(2)(e) RMA are sufficient for identifiable purposes. Section 95E lays down what a consent authority must consider in deciding if a person is an affected person. Section 95E(2)(c) states:

> *A consent authority must have regard to every relevant statutory acknowledgement made in accordance with the Act specified in Schedule 1.*

222. Ngāti Toa's second submission relates to the fact that Method 3.M.2 referred to 'the relevant trustees for an iwi' as being those who must be provided with a summary of resource consent applications. Ngāti Toa sought clarity regarding the meaning of 'trustees for an iwi' and preferred the phrase 'iwi authority'. The Panel considers this change is appropriate.

223. The submission requesting an appendix of Statutory Acknowledgements is a recognised way for identifying them. The Council does this for the Wairau/Awatere and Marlborough Sounds Resource Management Plans and will also do so for the PMEP. This is a requirement of the new legislation surrounding the Te Tau Ihu Treaty settlements but was not known at the time the PMEP was notified.

224. The third of Ngāti Toa's submissions is accepted as to Method 3.M.2 as sought with the substitution of the word 'trustees' with 'iwi authority', and 'the relevant trustees' with '*the relevant <u>iwi authority</u>*'

Decision

225. Method 3.M.2 is amended as follows:

The relevant ~~trustees for an~~ iwi <u>authority</u> must be provided with a summary of a resource consent application for an activity within, adjacent to, or directly affecting a statutory area. The Council must also have regard to the Statutory Acknowledgement relating to a statutory area when deciding whether the relevant ~~trustees~~ <u>iwi authority</u> are affected persons in relation to an activity within, adjacent to, or directly affecting the statutory area and for which an application for resource consent is made. In some cases this will involve more than one iwi. The Council is also required to include information recording the statutory acknowledgements within its resource management documents

Method 3.M.3

Consideration of iwi management plans

226. Method 3.M.3, which refers to Policy 3.1.4 and the 'Consideration of iwi management plans', attracted two submissions – Irrigation NZ and HNZPT.

227. HNZPT supports the Method subject to amendment - that the following bullet point be added to Method 3.M.3: '*assist the identification of heritage resources for inclusion in the Marlborough Environment Plan and Council maps',* the reason being that its submission in respect of 3.M.3 is as for Policy 3.1.4(b). HNZPT's reason is the same as for Policy 3.1.4(c) and the amendment suggested there.

Consideration

228. Currently the Plan does not provide a separate rule framework for protecting sites of significance to Māori; rather, it is combined with other historic heritage rules.

229. On the recommendation of the report writer at this stage, however, if mapping of the sites of iwi significance is to be added to the PMEP, this should be done as a variation or plan change to incorporate consultation with iwi and landowners.

Decision

230. The HNZPT submission is accepted in part with the addition of a new the fourth bullet point to Method 3.M.3 as follows:

- *Assist the identification of heritage resources*

Method 3.M.4

Consultation

231. Some of Ngāti Toa's concerns are addressed to some extent through Method 3.M.2 Recognising Statutory Acknowledgements as they recognise iwi values with identified site areas.[79] Method 3.M.4 clearly states consultation with iwi by the *Council* **may** result in a cultural impact assessment being required; the Method does not compel an applicant to obtain one as suggested by Trustpower. In the report writer's opinion, it is entirely appropriate for a Council officer to engage in consultation with iwi to better understand the effects of an application if there is an indication that this would be beneficial. It is likely that consultation of this nature would assist the Council in determining if an iwi authority was an affected party in relation to statutory acknowledgments and is therefore consistent with Method 3.M.2.

232. While the report recommends there is no change to Method 3.M.4 we have already outlined above reasons why the Panel prefers the concept of encouragement of early consultation.

Decision

[79] Ngāti Toa also seek the addition of a rule in Volume 2 to cement some of the issues identified. It is the Report writer's opinion that the suggested text stating *'consult with iwi in certain areas'* creates uncertainty in the context of such a rule due to its lack of specificity.

233. Following on from an earlier amendment to the PMEP, we consider that an amendment to the first paragraph of Method 3.M.4 is appropriate to encourage rather than expect early consultation. It now reads:

'… an applicant is ~~expected~~ encouraged to consult early in the development process…'.

Method 3.M.5

Cultural Indicators

234. This Method records that Marlborough's tangata whenua iwi would like cultural indicators based upon human sensory perceptions and spiritual associations, to be used alongside existing environmental indicators in state of the environmental monitoring. This provision did not receive any submissions for or against.[80] The report writer identified, however, that there are some submission points not specifically connected to Method 3.M.5 which may need consideration.

235. Ngāti Rarua's submission[81] contains text that relates to cultural indicators specifically because of the lack of provisions that address the matter. The decision sought is *formal engagement with iwi and the removal of the 'offending clauses' from the plan.*

236. The submission request for a presence and explanation of cultural indicators in the plan indicates there is a lack of them, so now address the term 'formal engagement'. The Method discusses the development of indicators as being within the non-regulatory work space of the Council, developed in partnership with iwi. This is reflected at the Issue level in the last paragraph of Issue 3D which discusses the importance to iwi of developing cultural indicators to complement environmental indicators in state of environment reporting. The matter was an important one at the IWG hui.

237. Ngāti Toa identifies there are three parts to Chapter 3, one of them being 'develop a tangata whenua programme monitoring support, information, guidelines. This could include cultural health monitoring to measure the success of Policy 3.1.[1]'. We support the report writer's opinion that Ngāti Toa may be seeking a method of implementation around cultural indicators but that Method 3.M.5 in fact addresses this concern.

238. The provisions around cultural indicators in Chapter 3 reflect the outcome of that formal consultation process. In a discussion at the hearing the Panel was advised that the methodology

[80] Other submitters were Te Ātiawa (not on point), PMNZ (not on point) Federated Farmers (lacks specificity).
[81] (1188.1)

surrounding cultural indicators was not yet in place. But the MDC is committed to making it a priority. It will be a significant body of work.[82]

Decision

239. Method 3.M.5 remains as notified.

Method 3.M.6

Cultural impact assessment reports and cultural value reports

240. Trustpower seeks deletion of Method 3.M.6 (Cultural impact assessment reports and cultural value reports) because it does not actively specify a method of implementation. The Section 42A Report identifies while this method may be less directive and more explanatory in nature, in her view it is not disconnected from the objectives and policies. A cultural impact assessment may be a method in which an applicant and iwi respond to Policy 3.1.2, and a cultural impact assessment may be included in an application to assist decision makers in considering the matters set out in Policy 3.1.3. Cultural impact assessments are also referenced in Method 3.M.4, which also links back to Policy 3.1.2. These policies and methods assist in achieving, in particular, Objectives 3.2 and 3.3.

Decision

241. Method 3.M.6 remains as notified.

Definitions

242. In an addendum to the Section 42A Report dated 18 October 2017 the report writer identified that following the completion of that report, two additional submissions should have been included but were overlooked. The two submissions were from Te Ātiawa and relate to the definitions of 'Papakāinga Unit" and 'Marae Activity' notified in the PMEP Volume 2 Chapter 25.

243. The wording of the definition for Papakāinga Unit was discussed by the IWG and in the report writer's observation great care was taken to try and find the right balance between a definition that gives clear guidance as to the activity anticipated to occur when operating under the Permitted Activity Rules for Papakāinga, and a definition that will be too limiting due to its prescriptiveness.

244. The issues that arose included:

- *What is a definition of papakāinga?*
- *What is a definition of marae activities?*

[82] Section 42A Report: Marlborough's Tangata Whenua Iwi pages 7-8.

- *Can marae activity as a permitted activity also be applied to Rural Living and Coastal Living Zones?*

Papakāinga Unit

245. Permitted Activity Rules for papakāinga are identified in Chapters 3, 4, 5, 7 and 8 and Volume 2 PMEP. Any non-compliance with these rules and standards would require a resource consent that would allow Council assessment of the proposal against the objectives and policies in the Plan.

246. In the rules for the Coastal Zone, Rule 4.1.48 provides for papakāinga as a permitted activity without the need for a resource consent.

247. The relevant Standard 4.3.45 provides for a maximum of five papakāinga units on a Computer Register (4.3.45.1) with a minimum land area of 80 m^2 to be provided for each papakāinga unit (4.3.45.2). Setbacks are to the external boundary of the property and do not apply between units on the site.

248. Chapters 3, 4, 5, 8 and 8 Volume 2 all have the same rules and associated standards for papakāinga and papakāinga units**.** One of the standards limits the number of papakāinga units to five per Computer Register. Each chapter has been the subject of a submission in opposition by Te Ātiawa and it seeks also to delete the relevant standards. The reasons behind this approach is because Te Ātiawa considers there is no flexibility within the five unit rule to provide for increasing numbers of aging members.

249. But as the report writer points out, while there is no provision for expansion beyond five papakāinga units to provide for aging members, there is no barrier in the PMEP to iwi seeking a resource consent.

What is the definition of papakāinga?

250. No definition is provided in the PMEP for 'papakāinga' although the explanation to Issue 3F provides a lengthy description. A definition of 'papakāinga' is contained in the NZCPS Definitions,83 as 'Development of communal land on ancestral land owned by Māori'. While Te Ture Whenua Act 1993 defines what is 'Māori land' as including multiply-owned land and customary land, it does not provide a definition for 'papakāinga'.

251. The notified definition in the PMEP of '*Papakāinga Unit*' is as follows: 'means a traditional Māori settlement area on Māori land and includes activities associated with residential living.'

[83] NZCPS (2010) Definitions page 27.

252. Te Ātiawa seek the following replacement of the definition of '*Papakāinga Unit*' with: 'a self-contained residential unit, used or intended to be used for a permanent residential activity, associated with a marae or tribal housing for kaumātua.'

253. The reason given for the requested replacement of the notified definition is that Te Ātiawa considers it is '*ambiguous, archaic and incorrect'.*

254. Ngāti Kuia query what is 'Māori land'. It identifies through the settlement of 2014 the iwi received 'cultural redress and commercial properties that are suitable for papakāinga including location, facilities and resources. As noted earlier, the MDC is urged by Ngāti Kuia to allow the development on all settlement land, Māori land, whānau whenua and some general land (with customary/cultural history) (for example Anakoha) in order to achieve the potential of the land for the cultural, social, environmental and economic wellbeing of Marlborough's residential iwi'. Limiting the land and activities to which the permitted activity status applies is asserted to not achieve Objective 3.4. 84

Section 42A Report

255. In the Section 42A Report Addendum, the definition sought by the submitter is considered more limiting than that notified as it specifies the units would be for permanent residential activity, and only for kaumātua. However, if this is more correct and less ambiguous, and given no other iwi oppose the change sought, the report writer had no concerns from a planning perspective in accepting these changes to the definition. Other wording changes, with the exception of one discussed below, are also acceptable.

256. The one change the report writer does not support is the omission of the words '*on Māori land'* in Te Ātiawa's proposed definition.

257. As discussed in the Section 42A Report, with regard to the submission of Ngāti Toa, Objective 3.4 provides a clear directive from the IWG to address a resource management issue of significance, especially Issue 3F, which is about the provision of papakāinga. This issue is very clear that the enablement of papakāinga is connected specifically to *Māori land,* with references to Te Ture Whenua Act 1993 to clarify what constitutes this land.

Consideration

258. In the Panel's view the permitted status provided to papakāinga by the PMEP arises because of the obligations under Part 2 of the RMA to give practical effect to the significance to Māori of being able to provide for their cultural communal living customs on their own land. If that was to be applied to general titles then the necessary controls that flow from the linkages to

[84] Ngāti Kuia, Raymond Smith Evidence, page 2.

customary land would not exist. Issue 3F and its explanation make those linkages to Māori land express in the Plan.

259. The definition of 'Māori land' in Te Ture Whenua Act confines papakāinga to be built on this land which includes multiply owned Māori land and customary land. Issue 3F is very clear on this point, as is Policy 3.1.6 which recognises that papakāinga (and marae) development provides Marlborough's tangata whenua iwi with a range of cultural functions including living, working, cultural activities and recreational where it is of a scale, extent and intensity that is defined by the physical characteristics of the site. Cultural uses are specifically provided for in that way, not excluded as Te Ātiawa argued.

260. We find that Te Ātiawa's objective is too restrictive in that it specifies 'permanent residential activity' confined to 'kaumātua'. And from our consideration of the notified definition of 'papakāinga unit' in the PMEP we are comfortable that cultural use of the facilities is not excluded from the definition in the phrase as it 'includes activities associated with residential living'.

261. However, during its consideration of these issues the Panel concluded that it would be helpful to have a specific definition of 'papakāinga' in the Plan. It also formed the view that the notified definition of 'papakāinga unit' was actually more apposite for the purpose of defining a 'papakāinga', because the notified definition referred to an area rather than a building, and activities associated with residential living, rather than units used for residential activity.

262. The Panel decided that a new definition of 'papakāinga unit' could then be inserted in the Plan based on the proposed wording sought by Te Ātiawa, but without the limitation to permanent residential activity for kaumātua only.

263. As a result of including 'Māori land' within the definition of 'papakāinga' it is necessary to also include a definition of Maori land in the Plan. Māori land is helpfully already defined in Section 4 of Te Ture Whenua Māori Act 1993. The Panel adopts this definition.

Decision

264. Insert new definitions for Papakāinga, Maori land and replace the definition of Papakāinga unit in in Chapter 25 Volume 2, as follows:

Papakāinga *means a traditional Māori settlement area on Māori land and includes activities associated with residential living.*

Papakāinga unit *means a ~~traditional Māori settlement area on Māori land and includes activities associated with residential living~~ self-contained residential unit or units, used or*

intended to be used for residential activity, located on Māori land and associated with a marae or tribal housing.

***Māori land** means Māori customary land and Māori freehold land, as defined in Section 4 of Te Ture Whenua Maori Act 1993*

Marae Activity

What is the definition of Marae Activity?

265. The Te Ātiawa submission on 'Marae Activity' proposed an amendment as follows:

> *'means a specific area of land where the primary purpose is the provision of a focal point for social, cultural, and economic activity for iwi, hapū or whānau. A marae may include wharenui and hui activities; kaumātua housing, hostels and wharekai; hangi; papakāinga; whare wairua; Kokiri training and tuition activities; educational facilities and activities and whare wananga; kōhanga Reo, childcare facilities and activities; recreational activities; tangihanga; urupā and burial activities; health facilities; Māori commercial offices; the retail sale of goods manufactured or grown within the Marae property; and tourist visitor services and operations.*[85]

266. The reasons given for the requested amendment are that Te Ātiawa is not clear on what is intended by the reference to economic activity in the definition. Te Ātiawa views the reference as narrow/restrictive, and showing a lack of understanding of the breadth of Māori commercial interests. The submission is supported by Elkington Whānau but lacks specificity.

Section 42A Report

267. The report writer identified that the wording of the definition for 'Marae Activity' was also discussed by the IWG and again it is her observation that great care was taken to try and find the right balance between a definition that gives clear guidance as to the activity anticipated to occur when operating under the Permitted Activity rules for Marae Activity, and a definition that will be too limiting due to its prescriptiveness.

268. This is demonstrated by the phrase '*A marae **may** include …'* (emphasis added) in the wording of the definition. This tries to capture the essence of marae activity so that Plan users have a sense of what activities could be anticipated on a marae, and part of this is about scale. References such as '*ancillary to the Marae activity*' and '*goods manufactured or grown within the Marae property'* provide a sense of scale, in that there will be key activities that are inherent on marae, and others that should only occur when there is a connection with the marae.

[85] PMEP Chapter 25 page 13.

269. In the report writer's opinion there is nothing in the definition that particularly would prevent a commercial office being on a marae, and when the definition is addressed, there are many instances of activities that could potentially have a commercial component, such as educational facilities, childcare facilities, recreation activities, the retail sale of goods, and tourist visitor services and operations.

270. The report concluded that the spirit of the definition nevertheless is that commercial activities not particularly connected to marae activities are not included, as it is not intended that they be enabled through Permitted Activity rules for marae activity.

Consideration

Permitted Activity provisions for Marae Activity

271. Volume 2 of the PMEP contains the permitted activity rules, and associated standards, for marae activity and papakāinga that give effect to or implement the provisions of Chapter 3, in particular Objective 3.4 and Policy 3.1.6. Policy 3.1.6 gives effect to Objective 3.4 and sets up the direction for the permitted activity rules. These enable marae activity in Chapters 3 and 5 of Volume 2, which are specific to properties that are currently or proposed to be marae.

272. No submissions (other than Waikawa Marae) were received on the marae activity rules or associated standards in Chapters 3 and 4.

273. The inclusive definition of marae activities provides for a number of 'economic activities' but all will be circumscribed by relevant standards. The amendment to 'Māori Commercial Offices' sought by Te Ātiawa relates to Te Ātiawa being engaged in commerce, trading, business – a much wider activity than envisaged in the Permitted Activities rules.

274. The phrase suggested by Te Ātiawa therefore brings another dimension to the activities already identified for marae activities and implies a much larger scale of activity which had earlier been discounted by the IWG. We respect that intent and are comfortable with the existing phrase in the definition of marae activity which is '*administration offices ancillary to the marae activity'.*

Decision

275. The Panel accepts the recommendation of the report writer that the Te Ātiawa submissions on new rules are not added at this time to further enable marae activity.

276. Te Ātiawa's submission on 'Marae Activity' is rejected.

Customary harvest

277. Ngāi Tahu seek the addition of a new permitted rule as a general rule to apply everywhere with standards for customary harvest. The two standards proposed are that customary harvest must be undertaken in accordance with tikanga and where the material or resource is located on private property, landowner permission must be sought.

278. Customary harvest is described by Ngāi Tahu as the 'sustainable harvest of customary materials or resources for the purpose of wearing or for consumption. It occurs within a framework of tikanga.'

279. Te Ātiawa supports the provision as does Federated Farmers as long as the requirement to get landowner permission is sought.

280. The Section 42A Report is not in favour of these provisions unless the activity is very explicitly defined. The report writer is not sure it could be (or should be). It is likely that, given the examples provided by the submitter, many of the harvest activities may not require any regulation at all, so potentially an explicit permitted activity may lead to unintended restrictions depending how the provision was established. For some matters, such as those controlled by s 14 RMA, there may be confusion as to whether the customary harvest rule applies if water is considered a customary resource, or if the rules established for the taking and use of water would apply. Potentially the same confusion could arise around vegetation clearance rules.

281. With regard to the first standard sought should the rule be added to the PMEP, it is not clear how the Council would establish whether the harvest was undertaken in accordance with tikanga. As to the second standard relating to landowner permission, any person going on to private property has to have appropriate permissions and the enablement of activities in the PMEP does not circumvent this requirement. An explicit standard of this nature on one rule may cause confusion for PMEP users as it may imply landowner permission is not required in cases where it is not stipulated in standards.

282. The report writer's recommendation is to decline the submission.

283. A similar submission was made by Ngāi Tahu in evidence in Topic 6: Indigenous Biodiversity. The Panel has considered the matter of customary harvest in the context of both topics and has decided that it is essential that there is recognition of the importance of customary harvest in the PMEP provisions. This reflects Issue 3E. However the Panel believes the appropriate recognition is provided in both Chapter 3 Marlborough's tangata whenua iwi and Chapter 8 Indigenous Biodiversity. Ngāi Tahu provided a memorandum to the Panel post hearing on Topic

6 seeking an explicit policy to be included in Chapter 8. The Panel agrees with Ngāi Tahu's recommended wording being inserted in both chapters as described above.

Decision

284. A new policy is added as follows:

Policy 3.X.X - Enable customary harvesting in accordance with tikanga.

Customary harvesting is required in enabling Marlborough's tangata whenua iwi to exercise kaitiakitanga and to provide for their relationship with their culture, lands, water and other taonga. Cultural harvest may be for different reasons, including but not limited to, medicinal uses, ceremonial uses, weaving or for consumption. It is important that taonga and other species can be accesses by iwi throughout the District, including from sites and areas that retain significant indigenous biodiversity value. Where particular resources are available on private land, access agreements or case by case permissions from the landowner are essential before entry onto the property is allowed

Definition of 'Cultural values'

285. Given that the term cultural values is used repetitively in the Plan and was sought to be included by many submissions in various provisions. As Te Ātiawa sought the inclusion of a definition they were asked by the Panel to propose a definition. The response provided two alternatives for the opening wording, one utilising the word resource and the other utilising the word attribute. Their response invited the Panel to select the word attribute. The Panel believes that both concepts have value as being listed as follows:

> *any natural attribute, resource, area, place or thing (tangible or intangible) which is of physical, economic, social, cultural, historic and/or spiritual significance to tangata whenua iwi.*

286. The Panel have considered the definition and agree with it.

Decision

287. The definition of cultural values above is included in the definitions section of Volume 2.

Māori Cultural values *mean any natural attribute, area, place or thing (tangible or intangible) which is of physical, economic, social, cultural, historic and/or spiritual significance to tangata whenua iwi.*

Waikawa Marae

288. Waikawa Marae Incorporated submitted on Rule 5.1.3 which enables marae activity in the Urban Residential 1 and 2 zones, seeking an amendment to the appellations within the rule to

delete 'Sec 47 Blk XIII Linkwater SD' and 'Waikawa West 6 & 7 ML 6923'. No reason is given but it was identified that the appellations in the PMEP were provided by iwi through the IWG.

289. The submission of Waikawa Marae Committee is supported by Te Ātiawa (who had originally submitted to retain the appellations the marae sought to have removed). Te Ātiawa's further submission is supported by Elkington whanau.

290. The report writer acknowledges, as do the Panel, that the iwi are in the best position to advise what specific properties should be added or removed. Consequential changes to the heading for the standards associated with Rule 5.1.3 are also appropriate.

Decision

291. The Panel agrees with the following recommendations:

5.1.3 Marae activity on:

(a) Sec 23, 40, 43 and 46 Blk III Taylor Pass SD and Sec 3 SO 6922;

(b) Lot 1 & 2 DP 11713 and Sec 1 SO 426964 ~~Waikawa West 6 & 7 ML 6923 and Sec 47 Blk XII Linkwater SD~~.

and

5.3.2 Marae activity on:

(a) Sec 23, 40, 43 and 46 Blk III Taylor Pass SD and Sec 3 SO 6922;

(b) Lot 1 & 2 DP 11713 and Sec 1 SO 426964 ~~Waikawa West 6 & 7 ML 6923 and Sec 47 Blk XII Linkwater SD~~.

Rural and Coastal Living Zones

Can marae activity be permitted in Rural Living and Coastal Zones?

292. Te Ātiawa seek the provision of marae activity as a permitted activity also be applied to the Rural Living and Coastal Living Zones. But marae activity rules in the PMEP are specific to properties stated in the rules, as advised by iwi through the IWG. In the absence of specific appellations where marae activity is occurring, or is anticipated to occur, the Section 42A Report identifies the addition of a generic rule to these zones would be inappropriate.

293. The report considers the proposed rules as submitted would create uncertainty within the Rural Living and Coastal Living Zones as to where marae activity may take place. There is also a permitted activity rule regarding the taking and using of water for marae activities, which is included in the Plan on the basis of being utilised for the sites of activity specified in the document. Given the full or over-allocated nature of many of the region's water resources, to

potentially provide a provision enabling marae activities to take place anywhere within the Rural Living or Coastal Living Zones could be inconsistent with the sustainable management of those resources. The Council intends to undertake regular plan change updates to the PMEP once operative so there would be the opportunity to add rules of this nature in the future, but specific as to detail and the land involved.

Decision

294. The submission seeking permitted activity status for marae on Rural and Coastal Living Zones is rejected.

Pouwhenua

295. The PMEP discusses facilitating the identification of sites/areas of cultural significance to the different tribes of Marlborough. Te Ātiawa seeks the inclusion of a permitted rule within all zones of the PMEP whereby a pou or other structure/carving/sign can be erected to identify an area of Māori significance.

296. Following from that, Te Ātiawa seeks that the following permitted activity standard be added to the Permitted Activities listings in Volume 2 Chapters 17, 18, 19 and 20 of the PMEP.[86] Similar submission points came up in Topic 15.

297. The relevant zone rules already contain standards to manage the potential adverse effects of structures on adjoining properties and on amenity values. The Panel considers that the same standards are applicable to managing potential adverse effects of pouwhenua. Therefore in deciding to include a new permitted activity rule in all zones, the Panel has also required compliance with these same standards.

Decision

298. Include a new permitted activity rule in 2.34 as follows:

2.34.x Pouwhenua

2.36.x: The pouwhenua must comply with the permitted activity standards for constructing or siting a building or structure with respect to height and proximity to property boundaries applicable for the zone within which the pouwhenua is to be erected.

299. Add a new definition for 'pouwhenua' to Chapter 25, as follows:

Carved wooden posts, or other structures, used by Maori to mark territorial boundaries, or places of cultural or spiritual significance.

[86] The reference to Permitted Activity Standards and Rules Volume 2 around pouwhenua is introduced by Te Ātiawa, Shapcott Evidence, Volume 1 Chapter 7 Public Access and Open Space, pages 8 and 9.

Maps

300. In drafting the Plan the decision was made to list the appellations of marae sites in the Permitted Activity Rules instead of mapping them as an overlay. Te Ātiawa seek to have the sites mapped on Zone Maps 40 and 42.

301. The Section 42A Report does not recommend mapping the sites as requested. This is in order to retain the consistency with the approach for all marae.[87] The final submissions of Te Ātiawa responded positively to this conclusion.

Decision

302. The submission is rejected.

[87] Section 42A Report page 20.