

How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice

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Case Study: Environmental Protection Authority (EPA)

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Purpose and approach

1. This case study reviews the approach to and results achieved by the EPA in incorporating the principles of the Treaty of Waitangi into the EPA's decision making. The purpose of the case study is to distil lessons for other regulators to help them improve their performance against the Treaty principles. To this end the case study is not an audit – it does not seek to hold the EPA to account for its performance. That said, the EPA has asked that any possible issues for improvement be identified and brought to its attention. This is a healthy attitude from any regulator, and an attempt has been made to deliver on this outcome.
2. In preparing the case study, the key processes and approaches used by the EPA to identify and incorporate key Maori values, interest and ways of doing things into its decision making were identified. This necessarily included looking at the origin of the EPA's processes and approach in its predecessor, the Environmental Risk Management Authority (ERMA). Finally, the views of EPA applicants, Maori interests and finally the EPA itself were sought on the processes and approach.

Introducing the EPA and its predecessor, ERMA

3. The EPA was established on 1 July 2011 by the Environmental Protection Authority Act 2011 as a Crown Agent. While the EPA is a relatively new body, at its core are the responsibilities carried forward from ERMA. To these have been added new responsibilities such as regulating activities in the EEZ.
4. The EPA is a quasi-judicial body of 6–8 people appointed by the Minister for the Environment who are selected to represent a 'balanced mix of knowledge and experience' in the appropriate areas. The Authority is supported by the staff and infrastructure of the government Agency and together the Authority and the Agency form the EPA – the Environmental Protection Authority.
5. With respect to incorporating the principles of the Treaty of Waitangi into its decision making, ERMA had a strong culture of identifying, understanding and incorporating as appropriate Maori views into its processes (according to the views of stakeholders spoken to).
6. This had not always been the case. In 2001, the Royal Commission into Genetically Modified Organisms found many Maori believed they were disenfranchised from ERMA's processes. Specifically, the Commission found "Maori concerns that consultation is being carried out too late, is too brief and that, on occasion, isolated individuals have been expected to respond on behalf

of one or more hapu or iwi, and even on a national basis.”¹ It was not only Maori who were dissatisfied with the process. Views were heard from applicants that it was difficult to know who they should be consulting with and there were complaints of the cost of doing so. The EPA commented on the risks to having problems identified and corrected from outside ERMA, although on this occasion the solutions adopted were to this point broadly appropriate for the EPA and its stakeholders.

7. In response to the Commission’s findings, the government agreed to Nga Kaihautu (the Maori Advisory Committee), established by ERMA to advise it on issues relating to Maori in 1998, being given statutory backing. Further, in 2003 ERMA established Te Herenga (a national network of Maori representatives). Both bodies were carried forward into the EPA, although only Nga Kaihautu has statutory backing.
8. Today, the EPA must undertake functions under the EPA Act and environmental Acts in a way that “contributes to the efficient, effective and transparent management of Zealand’s environment and natural and physical resources; and enables New Zealand to meet its international obligations.”
9. The EPA has responsibility for implementing the regulatory provisions and subordinate instruments relating to the following Acts of Parliament:
 - Hazardous Substances and New Organisms Act 1996
 - Resource Management Act 1991
 - Climate Change Response Act 2002
 - Ozone Layer Protection Act 1996
 - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
 - Imports and Exports (Restrictions) Act 1988
10. This involves, among other things, administering applications for major infrastructure projects of national significance, and regulating new organisms (plants, animals, Genetically Modified (GM) organisms) and hazardous substances and chemicals. The EPA also administers the Emissions Trading Scheme and the New Zealand Emission Unit Register, and manages the environmental impact of activities in the Exclusive Economic Zone (EEZ), including prospecting for petroleum and minerals, seismic surveying and scientific research.
11. When the EPA was created in 2011, it brought together a number of regulatory functions previously undertaken by other agencies, as well as new functions.

¹ Royal Commission into Genetic Modification, 2001.

The good ...

12. The amalgamation of functions within the body was almost universally supported by stakeholders spoken to. Maori stakeholders spoke of amalgamation better accommodating the “big picture” perspective they favoured, in preference to having to navigate the different bureaucracies needed to settle issues that stretched across multiple agencies. Interestingly, the EPA has also “gone the extra mile” by facilitating Maori access to other regulators by, for example, inviting relevant regulators to hui and helping to build Maori capacity for engaging with those regulators.
13. Further, some stakeholders positively noted:
 - the ERMA approach for engaging with Maori had been successfully rolled out across the other regulatory functions (through, for example, its strong leadership);
 - the EPA had ensured continuity between ERMA and the EPA (through, for example, continuity of Committee membership and guidance material carried forward); and
 - the “baggage” attached to other regulators had been successfully discarded with the transfer of functions to the EPA. For example, with respect to the RMA, one stakeholder favourably commented on her experience of the recent performance of the EPA compared to the performance of local government over the previous twenty years when working on the same issues.

Risks and thoughts ...

14. One stakeholder identified a risk that as some of the EPA’s new functions become more prominent (for example, the EEZ work), the current culture could come under threat. Going forward, this might require monitoring and leadership to manage. The EPA acknowledged this risk.

The EPA’s generic approach to decision making

15. Unlike most overseas jurisdictions, the EPA’s decision making is bound by an assessment of expected benefits and costs (public welfare), that is, if the expected benefits of an application are expected to outweigh the expected costs, the application is approved (refer Section 9 of the Hazardous Substances and New Organisms Act 1996, for an example). In many overseas jurisdictions, the quantum of risk is the primary consideration (with little regard for benefits). In accordance with HASNO Order 1998, among things, the following must be considered when assessing costs and benefits:

- The safeguarding of the life-supporting capacity of air, water, soil and ecosystems
- The maintenance and enhancement of the capacity of people and communities to provide for:
 - Their own economic, social and cultural wellbeing
 - Reasonably foreseeable needs of future generations
- The sustainability of all native and valued introduced flora and fauna
- The intrinsic value of ecosystems
- Public health
- The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu (special places), valued flora and fauna, and other taonga (important spiritual and material values)
- The economic and related benefits
- New Zealand's international obligations
- The ability of the organism to establish an undesirable self-sustaining population anywhere in New Zealand, and the ease with which it could be eradicated.

The good ...

16. A balanced and even-handed approach to stakeholders and their interests was commented on by most stakeholders. This is enabled by the cost benefit approach of the EPA's legislation.
17. Perhaps more interestingly, the EPA does not simply limit its role to ensuring applicants comply with the regulatory standards required before an application is approved. EPA staff are able to assist applicants in preparing their applications. The conflicts of interest that would normally arise in this situation are minimal as, for example, "the Authority acts autonomously, advised (but not instructed) by the agency, with input from experts if required."²² Its independence allows the Authority to better resist activist and other political influences that might affect the decision-making process. Conflicts or perceptions of bias are further minimised as the EPA also assists those impacted by applications, including Maori, to engage in the decision-making relating to those applications.
18. Further, the relevant legislation requires the application and evaluation process be open, transparent and public, features which promote accountability and better performance by the regulator. The pre-application stage involves

²² R Hill, D Campbell, L Hayes, S Corin and S Fowler, Why the New Zealand Regulatory System for Introducing New Biological Control Agents Works, Session 2 Emerging Issues in Regulation of Biological Control, XIII International Symposium of Biological Control of Weeds – 2011.

applicants identifying all significant impacts and issues, and engaging with affected parties. During the application phase, the application is open to public submissions to ensure concerns have been adequately addressed. A public hearing may be called for, and if it is, must be held.

19. It seems likely a more hands-on, balanced and transparent approach by the regulator promotes trust in the process by stakeholders, and related benefits. Hill, Campbell, Hayes, Corin and Fowler comment, "... in recent cases involving control agents for weeds there has been sufficient trust by the public in both the applicants and the regulatory process that the level of public participation has actually declined"

Risks and thoughts ...

20. In a word of warning, Hill, Campbell, Hayes, Corin and Fowler comment that in an effort to reduce barriers to applicants, the resulting simplification of the process and guidance material could see reduced consistency, less public information, and an erosion of public trust. Among other things, this concern was tested with key stakeholders and was found not to be an issue at this point.
21. Further, the EPA noted that litigation and the resulting court decisions could put at risk the way the EPA was applying its welfare maximising/cost benefit approach to decision making.

The EPA's legislation

22. In undertaking its work, the EPA's Act provides that "in order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi, a Maori Advisory Committee will advise it on policy, process and decisions (s4a) and the EPA and any person acting on behalf of the EPA must comply with the requirements of an environment Act in relation to the Treaty, when exercising powers or functions under the Act (s4b)".
23. Further, a number of the Acts listed above contain provisions relating to the Treaty of Waitangi principles and the interests of Maori. The key provisions are outlined in appendix two. Notably, the Treaty principles are made to operate by the EPA within the parameters provided by public welfare decision making criteria (an assessment of expected costs and benefits – see paragraph 15 above).
24. The EPA noted that applicants tended to attach "negative baggage" to explicit Treaty based arguments, but were much more accepting of those same

arguments when presented within a public welfare/purpose of the legislation framework. The EPA would open with public welfare reasons, and only as a last resort rely on its Treaty clauses to persuade applicants of what they needed to do. In contrast, Maori often led with Treaty (rights based) arguments, which could sometimes be interpreted as going beyond or being otherwise inconsistent with the public welfare based approach.

The good ...

25. Stakeholders were universally supportive of the way the EPA was discharging its Treaty responsibilities under its legislation, with some even pointing to the statute as simply codifying what was the best approach for the EPA. And others pointed to the value of the Treaty clauses in cutting across what they viewed as unhelpful debate from stakeholders resisting incorporating Maori interests into the process, and the authority it gave to the Treaty partner. The EPA identified Treaty clauses as helping to protect against threats to the EPA's culture of incorporating Treaty principles into its decision making. Such threats included changes in senior leadership and political pressure.

Risks and thoughts ...

26. The EPA commented that there remained uncertainty with respect to the precise meaning and implications of the legislation the EPA worked with, in particular with respect to the newer regimes such as the EEZ. Over time, the legislation will be clarified, and hopefully in a way sympathetic to the EPA's current, and widely supported approach.
27. Also, some Maori stakeholders thought Nga Kaihautu, because of legal challenge from applicants for example, might in the future be wrongly treated as the Treaty partner by the EPA, to the detriment of Maori interests. This concern at least in part arises from the view that the "narrow" Treaty clause used in the EPA Act (although most of the legislation administered by the EPA also contain general Treaty clauses – see Appendix two), could result in a minimalistic interpretation of the EPA's responsibilities. It is noted, for example, that while Nga Kaihautu has statutory backing, the widely supported Te Heranga does not.
28. While some Maori stakeholders have been able to point to risk with respect to the Treaty clauses, to this point without exception those risks do not appear to have eventuated, in no small part due to the factors listed above, factors enabled by the EPA's investment in establishing and maintaining good relationships with its stakeholders (discussed further below).

29. While legislation can be an important catalyst for change, legislation is an imprecise tool and cannot account for every eventuality. Regulatory success is highly dependent upon the motivation, incentives and capability of those who work within it. It also depends on goodwill, trust and a shared commitment to making it work. To maintain these healthy attitudes requires careful planning and investment.
30. To the extent problems with the Treaty clauses were identified, they were risks to be managed going forward. To this point the EPA has managed these risks. However, legislative amendment might be considered at some future point if, for example, the integrity of the current approach appears under threat.

Nga Kaihautu (the Maori advisory committee)

31. Nga Kaihautu is provided for by section 4 of the EPA Act. The EPA, in consultation with Nga Kaihautu, sets Nga Kaihautu's Terms of reference and work programme. It advises all of the EPA's committees except the audit committee.
32. The Nga Kaihautu members spoken to see their role as primarily that of "process guardians", that is, to ensure Maori have adequate opportunity to contribute their views into the EPA decision making process. In addition, Nga Kaihautu also contributes its own views in a "safety valve" role, in particular if it considers the decision makers have not accessed the information they need through the consultation process. The Nga Kaihautu members spoken to were very clear that, while they do offer a Maori perspective, they do not represent the views of Maori.

The good ...

33. Maori stakeholders spoken to valued the role played by Nga Kaihautu, in particular its oversight role within the process which was building trust, and the contribution it made through its own submissions. Applicants also valued, for example, the role it played in placing into context and promoting their understanding of submissions by Maori stakeholders on applications.
34. Competition for places on Nga Kaihautu was reported to be strong. Nga Kaihautu members commented that, in spite of low remuneration, this was because Nga Kaihautu was a credible body viewed as making a positive difference and offering a strong opportunity for members to contribute to the Maori community.

Risks and thoughts ...

35. As commented above, some Maori stakeholders thought Nga Kaihautu, because of legal challenge from applicants for example, might in the future be wrongly treated as the Treaty partner by the EPA, to the detriment of Maori interests.

Te Herenga (Maori National Network)

36. Te Herenga is made up of Maori resource and environmental managers, practitioners and experts who represent their iwi, hapu or Maori organisation. It includes those whose values and interests are directly affected by EPA decisions.
37. Its purpose was originally to improve the participation of Maori in HSNO Act decision making. With its transfer to the EPA, (absent the statutory backing given to Nga Kaihautu), its area of responsibility was extended to match EPA's wider responsibilities.
38. The EPA administers the membership database, coordinates activities consistent with its work programme, covers reasonable travel and related costs, facilitates meetings and organises minutes and information exchange. Smaller groupings of Te Herenga may be facilitated to work on specific projects.

The good ...

39. On its establishment, there was an identified risk that Te Herenga might become a liability, for example, that it might:
 - be captured and discredited by a few dominant personalities;
 - see its role as combative; or
 - not be accepted by other stakeholders or even Maori more widely.
40. These risks have not materialised. Of the mechanisms identified as driving EPA's success, none were spoken of more highly than Te Herenga, in particular from the Maori perspective.
41. Te Herenga was reported to have provided the face-to-face relationship needed across all levels of policy development and implementation. That it is a permanent and formal structure has meant it has been easier to build capability and trust, and realise the associated benefits. For example, a growing trust of Maori in Te Herenga was driving savings on the Maori side as Te Herenga has increasingly been relied on to accurately and effectively bring Maori views to the table on their behalf.

42. That it is more hapu than iwi based, consistent with Maori organisational structures, was also a strong positive for a number of people spoken to. The protocols around how it operates and the involvement of Kahui Kaumatua were believed to have worked to moderate extremes, promote consistency across the network and manage risks more generally.
43. From applicants' perspective, Te Herenga has provided a useful filter for views on their applications and has promoted the right information getting to the right people, thereby reducing risks and costs to applicants.
44. From a system wide perspective, it was noted Te Herenga and Maori more widely were sometimes the only submitters on some applications, and that their involvement in these cases was necessary for the integrity of the system and promoting robust decision making.
45. Te Herenga was identified as a positive force for identifying problems and driving improvements. For example, in response to questioning, some stakeholders acknowledged the possibility that if some Maori were found to have acted fraudulently or simply had opportunistically sought payment well beyond the value of services provided, it would harm the trust and credibility underpinning the current system, thereby placing it at risk. Some thought existing mechanisms, in particular the Kaitiaki role of people on Te Herenga, would sufficiently manage this risk. Others felt a more active role by EPA in helping applicants access the correct people was needed. Irrespective of any specific measure that might be considered, however, the strong buy in to the EPA's systems and processes by stakeholders suggested all understood the importance of protecting the system from such threats.

Risks and thoughts ...

46. It was acknowledged by some stakeholders spoken to that Te Herenga, due to its strong cultural and environmental foundations, might not be sufficiently representative of Maori commercial interests. Also, some stakeholders spoke sceptically of the likely commercial benefits of applications. One stakeholder noted many Māori were cynical of applications, believing Maori often had to meet the cultural and environmental costs, while not participating in the commercial benefits.
47. However, this may be to overstate the possible bias. Those spoken too were clearly thinking deeply about the social benefits expected to accrue, and weighing these against the risks of an application. More formally, Maori stakeholders spoken to tended to focus on the social benefits to consumers (the demand side) of an application, in preference to thinking about the

commercial benefits to producers (the supply side). To include both would be to double count the resulting benefits of an application, so perhaps the perceived bias against commercial interests is more imagined than real. However, it is an area that might benefit from additional investigation.

48. As commented already, Te Herenga does not have a legislative foundation. Were it to, this might go some way to allaying the concerns of some Maori stakeholders that at some point in the future its role could become token. No stakeholders presented this as an option, however.
49. A challenge identified by the EPA for Te Herenga and Maori more widely was that, in submitting on applications, Maori submitters tended to put their views into the application process from a “mainstream” perspective (for example, arguing the science), rather than from a Maori cultural perspective, ie, what the application would mean for their relationship with the environment.
50. Finally, some stakeholders spoke of the importance of adequately resourcing Maori to participate in consultation on applications. Some reimbursement of direct costs is made available to Maori stakeholders. However, some Maori thought obtaining Maori cultural information should be funded on a similar basis to contracting experts reviewing, for example, the impact of an application on the biota of a region. This is a difficult issue. The two situations are not directly comparable. A contractor is directly accountable to the funder for the product provided, and their services will be discontinued if the funder does not consider their advice is adding value. Maori stakeholders would not find these restrictions acceptable.
51. It should be acknowledged that Maori have additional steps and costs to incur when developing submissions, which need to be accommodated. At least to a point, the EPA appears to have done this. It is simply suggested here that regulators need to monitor these expenses carefully, having regard to the capability of respective stakeholders and the importance of their perspectives, and ensure funding appropriate to gaining those perspectives is provided.

Guidance

52. In addition to the institutional structures used by the EPA to incorporate the principles of the Treaty into its decision making, it has also produced guides, tools, case studies, and other information to help applicants and other stakeholders. As commented already, that guidance has in recent years been simplified and made more principles based. In the event the guidance is inadequate or stakeholders encounter difficulties applying the guidance, they are able to contact and work with EPA staff directly.

53. Of particular note are the published protocols on incorporating Maori perspectives into decision making³. The key purpose of the protocols is to aid decision makers⁴ in producing consistent, high-quality decisions appropriately incorporating Maori perspectives.

The good ...

54. The protocols are accessible to other stakeholders⁵, giving these stakeholders greater certainty over both the process leading up to final decisions, and a steer as to the factors to be taken into account in making those decisions.
55. The protocols were developed through consultation and active engagement with the EPA's stakeholders. A number of the stakeholders spoken to in the development of the case study were able to point positively to their involvement in their development, and appreciated the "living nature" of the document, which is updated to accommodate learnings.
56. The contractor has reviewed the quality of a number of guidance documents across the public sector. The quality of the EPA's documents is with the best reviewed, being well balanced, comprehensive, accessible, focussed on best practice rather than legalistic, using practical examples, relevant, and providing good links to additional information, including EPA contacts.

Risks and thoughts ...

57. Consistent with the other Treaty guidance reviewed, the Treaty section appears a little forced. It is unclear what it adds to the rest of the document. Rather than as a separate section, the Treaty might instead have been presented as the foundation within which the guidance is provided. Alternatively, it could be used to communicate directly with applicants the EPA's expectations of the standards applications would need to meet to comply with the Treaty principles.

The EPA's Maori Policy Group

58. The EPA's Maori Policy Group:
- Contributes to decision making that meets the legislative requirements of the EPA Act and the Environmental Acts for which the EPA is responsible;

³ Incorporating Maori perspectives into decision making (protocol), December 2013, Nga Kaihautu Tikanga Taiao, the statutory Maori Advisory Committee of the EPA, December 2013.

⁴ The EPA Board, the Hazardous Substances and New Organisms committee, the Exclusive Economic Zone committee, Nga Kaihautu and relevant EPA staff.

⁵ Mainly applicants and Maori groups.

- Leads the development and management of relationships with Maori to enable their full and informed participation in the decision making and other activities of the EPA;
 - Provides support to Nga Kaihautu;
 - Supports the development of Maori cultural and Treaty of Waitangi capability internally for decision makers and staff.
59. More widely, the EPA commits to working proactively with applicants, applicant organisations and Maori to provide advice and support in any engagement activity. This includes:
- Being able to direct applicants to an up to date database of relevant Maori contact information;
 - Providing a range of tools and information on the EPA website for both applicants and Maori involved in engagement activities;
 - Maintaining a programme of hui and information exchange through which applicants and Maori can communicate and share information readily; and
 - Maintaining internal process guidelines and checklists that ensure the EPA implements the provisions of this policy appropriately.
60. In addition, the EPA monitors engagement to ensure the appropriateness and effectiveness of the policy provisions. On the specific issue of monitoring and incorporating Treaty principles into its decision making, the EPA identified:
- Regular and project specific customer (stakeholder) satisfactions surveys;
 - The absence of legal challenge; and
 - Monitoring feedback from its customers.
61. At this point, having a separate Maori policy group (to the rest of the agency), is regarded by the EPA as a superior model to using those resources to build Maori capability and capacity within the other policy units (integration). However, a number of stakeholders spoken to thought that full integration would be the natural end point.
62. It is notable that the responsible manager has General Manager status. This means she will have a good overview of all the EPA's activities and be in a good position to promote those activities taking appropriate account of Maori interests.

The good ...

63. All stakeholders spoke very highly of the EPA staff, and in particular of the Maori Policy Group. In particular, their open and timely communication,

accessibility, balanced approach, proactive work, capability and credibility were commented on. Less tangibly, but importantly, it was commented their approach was promoting a necessary culture of respect and understanding between parties, and a shared desire to protect a system which stakeholders believed was serving their interests well. “Good relationships”, and “trust” were emphasised by nearly all stakeholders spoken to, and must to a large extent be credited to the work and attitude of EPA staff. The EPA’s staff are the common ingredient across all the EPA’s systems and processes used to build the Treaty principles into the EPA’s decision making.

64. The EPA explained they had a culture of acknowledging and working hard to correct mistakes. EPA staff spoken to commented on the tremendous value to the performance of the organisation from having capable stakeholders able to effectively identify and communicate the EPA’s mistakes back to them. This is consistent with views of Albert Hirschman on the important role consumer “voice” can have on the performance of producers, in his book “Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States”, (1970).
65. Further, EPA staff have avoided a legal and minimalist approach, favouring instead an approach that facilitates achievement of its regulatory standards. This involves working closely and positively with all stakeholders.

Risks and thoughts ...

66. Over time the role of guidance has declined and the role of staff has increased. This makes it even more important that the EPA have access to the best staff. The obvious risk for the EPA to manage going forward is retention, motivation and training of its staff. Also, in the absence of more detailed guidance, care needs to be taken to ensure high quality and consistent decisions continue if strong buy-in to the system by all stakeholders is to be retained.
67. In addition, the EPA identified a number of challenges to the culture and capability built up by the EPA, including:
 - Staff turnover: for example, in recent years “pockets of supportive staff” in different parts of the EPA had been lost, requiring resources to build up that support again;
 - Consistent with comments from stakeholders, litigation (from applicants and, impacted parties) could force the EPA to a much more legalistic, minimalistic and prescriptive approach. This is consistent with the

extensive literature on the risks to a principle based regulatory approach posed by excessive litigation⁶).

- Ensuring cultural values were given appropriate weighting by decision makers. The EPA noted that even if decision makers are able to identify cultural impacts, those impacts might not be given sufficient weight due to, for example, their more intangible nature relative to environmental and financial impacts, for example.

Concluding thoughts

68. All stakeholders spoken to identified the EPA as the standards setter with respect to incorporating the Treaty principles into its decision making, with a number commenting they believed this was also more widely acknowledged by their respective stakeholder groups.
69. The institutional structures and processes used by the EPA have clearly worked for them in achieving their regulatory functions and meeting the diverse range of interests of their stakeholders. There are likely to be features of these arrangements that would prove useful for other regulators.
70. However, the arrangements should not be blindly copied. Rather, it should be acknowledged that the arrangements are a model which has brought the EPA positive change and today enjoys much support from its stakeholders.
71. In designing their own arrangements to build the Treaty principles into their decision making, regulators should focus on their own regulatory responsibilities and functions, and the capabilities, capacity and incentives of their stakeholders. To do this successfully is a significant challenge, with significant risks and costs, in particular in the early years as robust relationships and trust are established. But for many regulators, retaining the status quo is also a risky and costly strategy, and one which will likely be seen as unsustainable as more examples such as the EPA emerge.
72. Looking to the EPA example, perhaps the most important lesson for other regulators is the importance of investing in the development good relationships. For the EPA, that investment has been in the form of:
- The cost of establishing and supporting Te Herenga and Nga Kaihautu;
 - The holding of Hui;
 - Developing and promulgating high quality guidance;

⁶ See for example “Forms and paradoxes of principles-based regulation”, Julia Black, in *Capital Markets Law Journal*, Vol. 4, No. 3, 2008.

- Ensuring the EPA is accessible to enquiries where the guidance by itself is insufficient;
 - The cost of EPA's Maori policy team, and integrating their work with the rest of the EPA;
 - Promoting information exchange, and training opportunities.
73. Beyond this, and perhaps as at least as importantly, the EPA has actively developed a culture that promotes within its relationships; respect, openness, honesty, fair dealing and dignity for all parties. And for its part the EPA has valued the input of stakeholders as a valuable mechanism for driving better performance, and has sought to be open about its mistakes and actively worked in good faith to correct them. In turn, this has produced a strong dividend in the form of trust, a word emphasised by most stakeholders spoken to.
74. Stakeholders believe this investment has been reducing the cost on all parties involved in the application process (for example, litigation, ongoing scrutiny, targeting all applications and all aspects of those applications), while improving the quality of engagement and the resulting decisions. It has also brought buy-in to the success of the EPA approach and a shared commitment to making it work. Further, when decisions go against stakeholders, those decisions are now more readily accepted and are less likely to be contested or breed unhelpful cynicism. These dividends are expected to continue accruing over time, although a few risks were identified by stakeholders that may require active management. In particular, litigation from stakeholders (applicants and impacted parties) was a risk that could ultimately destroy the trust and stakeholder commitment in the system upon which its success depends. Encouragingly, the anecdotal trend appears towards less litigation risk.
75. Finally, the EPA appears to have successfully built the Treaty framework into its broader decision making framework, which is strongly grounded in public welfare, or maximising expected benefits relative to expected costs. In the consultants view, too frequently the Treaty and public policy frameworks (for example, Treasury's welfare maximising Regulatory Impact Assessment Framework) are treated as competing rather than complementary and reinforcing paradigms. Encouragingly, these tensions were not found here.

Appendix 1

Stakeholder Meetings Summary

Introduction and stakeholder views on EPA performance

To get the views of stakeholders on the performance of the EPA with respect to it incorporating the Treaty of Waitangi principles into its decision making, the consultant met with members of Te Herenga (the national Maori network established by the EPA), Nga Kaihautu (the Maori Advisory Committee provided for by the EPA's Act, and applicants seeking approvals from the EPA. The following is a summary of those meeting. All stakeholders met with have had a long association with the EPA, and before that, ERMA. The shortest association was approximately ten years. Also, they all had at least reasonable experience with other government regulators. One had considerable experience with the equivalent EPA regulators in overseas jurisdictions.

EPA's performance

Without exception, all stakeholders held the view that ERMA's performance had improved significantly since its establishment, and that improvement had continued under EPA. This is particularly notable as the establishment of EPA was accompanied by some discontinuity (for example, staff), and the distraction of taking on additional functions and staff, the meshing of several pieces of legislation, the development of new processes, and the establishment of a new entity culture. In a pre-meeting, EPA staff had voiced the view that these distractions may be reflected in stakeholder views that the agency had taken a step backwards from the ERMA days. This perception was tested, and found to be false.

All stakeholders were asked for their views on the performance of the EPA relative to other agencies. Again, without exception, EPA was identified as the standard setter. A strong example here was the favourable comparison of EPA's performance on RMA applications (of national significance) with that of local government. One stakeholder with considerable international experience was able to offer the informed view that the EPA's overall approach was the international standard setter.

Of course, the stakeholders were able to point to possible areas for improvement, for example, additional hui and the inclusion of more regulators at those hui. However, for the most part, there was confidence that these suggested improvements could be raised with the EPA and progress would be forthcoming.

However, there were some risks identified that are at least to a point external to the EPA's influence. One is the legislation it operates under (discussed below), and the other is available resourcing (a common criticism that will surface in discussions with stakeholders with respect to most government agency reviews). But first, the drivers of good performance, in the view of its stakeholders, are discussed below.

Drivers of good performance

The single most important factor driving the performance of the EPA is its considerable investment in developing good relationships. That investment is in the form of:

- The cost of establishing and supporting Te Herenga and Nga Kaihautu;
- The holding of Hui;
- Developing and promulgating high quality guidance;
- Ensuring the EPA is accessible to enquiries where the guidance by itself is insufficient;
- The cost of EPA's Maori policy team, and integrating their work with the rest of the EPA;
- Promoting information exchange, and training opportunities.

Beyond this, and perhaps as at least as importantly, the EPA has actively developed a culture that promotes within its relationships; respect, openness, honesty, fair dealing and dignity for all parties. In turn, this has produced a strong dividend in the form of trust, a word emphasised by most stakeholders spoken to.

Stakeholders believe this investment has been reducing the cost on all parties involved in the application process (for example, litigation, ongoing scrutiny, targeting all applications and all aspects of those applications), while improving the quality of engagement and the resulting decisions. Further, when decisions go against stakeholders, those decisions are now more readily accepted and are less likely to be contested or breed unhelpful cynicism. These dividends are expected to continue accruing over time, although a few risks were identified by stakeholders that may require active management.

Risks

A few stakeholders voiced the opinion that the EPA's own Treaty clause was a source of risk to the current EPA model. While its value as a driver for and a protection of Maori interests was universally acknowledged, its narrowness was heavily criticised by some. It was felt pressures (for example, legal action by

applicants) could see the EPA take “the easy way out” by pulling back from its Treaty obligations and simply relying on a marginalised Nga Kaihautu to satisfy its Treaty responsibilities as provided for by Part 2 of the EPA Act.

Another risk identified by stakeholders (including Maori) was the possibility that some Maori might opportunistically take advantage of the Maori specific mechanisms and funding available. Were a scandal of this nature to arise, it would put at risk existing trust which is such an important foundation for the model. While some suggested existing mechanisms, for example, Te Herenga and its protocols were managing this risk, others felt the EPA itself could be more active in ensuring applicants had access to the right Maori groups, for example.

Summary and conclusion

The stakeholders spoken to were universally supportive of the overall approach being taken by the EPA, and were strong advocates for it being adopted more widely across government. At its heart, that approach was believed to have been successful at engendering the positive relationships between stakeholders that is needed to drive ongoing improvements in performance, to the advantage of all.

Environmental Protection Authority: Maori legislative requirements

Environmental Protection Authority Act 2011	
Purpose	The Act establishes the Environmental Protection Authority and provides for its functions and operation
Relevance to Maori	There are a number of provisions in the Environmental Protection Authority Act that recognise Maori Environmental interests. The Act also establishes a Maori Advisory Committee to advise the EPA Board.
Provisions	<p>Section 4: In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi (a) section 18 establishes the Maori Advisory Committee to advise the EPA on policy, process, and decisions of the EPA under an environment Act; and (b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act.</p> <p>Section 19(1): The function of the Maori Advisory Committee is to provide advice and assistance to the EPA on matters relating to policy, process and decisions of the EPA under an environmental Act of this Act. (2): The advice and assistance must be given from the Maori perspective and come within the terms of reference of the committee as set by the EPA under section 20.</p> <p>Sections 20 and 21: provide for the setting of terms of reference for the Maori Advisory Committee and its remuneration.</p>

Resource Management Act 1991	
Purpose	To promote the sustainable management of natural and physical resources. The RMA also regulates the effects of human activities on the environment.
Relevance to Maori	There are several provisions in the RMA that recognise Maori environmental interests. RMA provisions encourage Maori participation in the Management of natural and physical resources and require the consideration of Maori values, culture and tradition in resource management decision making.
Provisions	Section 6: In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing resources, shall recognise and provide for the following matters of national importance ...

	<p>(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.</p> <p>Section 7: In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to (a) kaitiaktanga ...</p> <p>Section 8: In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).</p>
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Hazardous Substances and New Organisms Act 1996	
Purpose	To Protect the environment and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.
Relevance to Maori	Although its application is generic across all cultures the general principles are especially relevant to Maori as kaitiaki. The principles of the Act state that its principle purposes are the safeguarding of the life-supporting capacity of air, water, soil and ecosystems. Additionally, the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs of future generations.
Provisions	<p>Section 6: All persons exercising functions, powers and duties under this Act shall, to achieve the purpose of this Act, take into account the following matters: (d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga.</p> <p>Section 8: All persons exercising powers and functions under this Act shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).</p> <p>Section 24A: Gives effect to the establishment of Nga Kaihautu Tikanga Taiao. (This section was repealed and included without modification in the EPA Act in 2011).</p>

Climate Change Response Act 2002	
Purpose	To enable New Zealand to meet its international obligations under the United Nations Framework

	Convention on Climate Change and the Kyoto Protocol. These include to retire the number of units equal to the number of Tonnes of carbon dioxide emitted as well as to provide for the implementation, operation and administration of a greenhouse gas emissions trading scheme.
Relevance to Maori	The Maori economy is heavily reliant on fishing, farming and forestry, all of which are affected by the ETS scheme.
Provisions	Section 3A: In order to recognise and respect the Crown's obligation to give effect to the principles of the Treaty of Waitangi, - <ul style="list-style-type: none"> (a) ... the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Maori that appear to the Minister or chief executive likely to have an interest in the order. (b) ... the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Maori that appear to the Minister or chief executive likely to have an interest in the pre-1990 forest land allocation plan. (c) ... the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Maori that appear to the Minister or chief executive likely to have an interest in the fishing allocation plan. (h) ... before recommending the making of a regulation under section 164, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Maori that appear to the Minister or chief executive likely to have an interest in the regulation.

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	
Purpose	To promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.
Relevance to Maori	Indirectly, the Act will allow a wealth of research to be undertaken in this area, where very little is currently known. This information, along with current knowledge, could contribute to robust environmental impact reporting as well as identifying appropriate mitigation measures.
Provisions	Section 12: In order to recognise the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act, - <ul style="list-style-type: none"> (a) Section 18: provides for the Maori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act

	<p>may be informed by a Maori perspective;</p> <p>(b) Section 32: requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations;</p> <p>(c) Sections 33 and 59: require the Minister and the Environmental Protection Authority to take into account the effects of activities on existing interests;</p> <p>(d) Section 45: requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.</p> <p>Section 18: Notes that the Maori Advisory Committee may provide advice to the EPA in accordance with sections 19 and 20 of the Environmental Protection Authority Act 2011.</p>
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