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TE ARAWA PARTNERSHIP MODEL

Introduction and summary

1. This memorandum discusses the legal implications of the proposed Te Arawa Partnership Model ("**TAPM**") and the Rotorua District Council's ("**RDC**") actions in relation to it.
2. In summary, we consider there is a real issue in terms of the TAPM's compliance with the Local Government Act 2002 ("**LGA**") and the RDC's actions under that statute and under administrative law, which could lead to a successful judicial review of RDC actions under the TAPM. Specifically, there is a good argument to be made that:
 - (a) the TAPM constrains the RDC's powers to appoint committees in a manner inconsistent with the LGA's provisions;
 - (b) the TAPM is not consistent with the provisions of the LGA and the Resource Management Act 1991 ("**RMA**") relating to the Treaty of Waitangi ("**ToW**") and Māori involvement in local governance; and
 - (c) the TAPM is not consistent with the LGA's purposes relating to democratic local governance.

Summary of the TAPM

3. By way of summary, the TAPM proposes to:
 - (a) establish a board separate from the RDC to represent Te Arawa interests, whose members are elected by the Te Arawa community ("**Board**");
 - (b) allow the Board to nominate, for the RDC's acceptance (which acceptance should typically be given), representatives to be appointed to RDC committees,¹ RMA consent hearing committees (as a commissioner), and strategic working groups ("**candidates**"); and
 - (c) allow the candidates to have full voting rights on some of the RDC committees.²

¹ The Strategy, Policy and Finance Committee (two candidates), Operations and Monitoring Committee (two candidates), and CEO Performance Committee (one candidate).

² The Strategy, Policy and Finance Committee and the Operations and Monitoring Committee.

Compliance with the RDC's powers to appoint committees under the LGA

4. As a local authority, the RDC has the power under the LGA to appoint committees, subcommittees, and other subordinate decision-making bodies,³ and the members of such a committee.⁴ The RDC may appoint a person who is not an elected member of the RDC, if, in its opinion, that person has the "skills, attributes, or knowledge that will assist the work of the committee".⁵ Nothing in the LGA prevents committee members from voting by sole reason of not being elected members of the local authority.⁶
5. The TAPM's nomination process risks constraining the RDC's discretionary power to appoint committee members as defined in the LGA. There is a good argument that the TAPM could cause the RDC to abdicate its discretionary power or take into account irrelevant considerations (abuse its discretionary power), which, if the TAPM were implemented, could lead to judicial review of RDC actions on the ground of illegality.

Abdicating discretionary power

6. A public authority must not disable itself from exercising its statutory discretion in individual cases. Each case must be considered on its merits by the authority itself, and, unless the statute allows, the authority must not adopt a fixed policy, act under the dictation of another, or sub-delegate its powers.⁷ Abdicating discretionary power in this way is sufficient for the Court to invalidate an authority's decision in judicial review.
7. The TAPM allows the Board to nominate candidates for appointment to RDC committees. These candidates need not be elected members of the RDC. The RDC has a duty to consider whether such non-elected persons have the skills, attributes, or knowledge that will assist the work of the committee, before appointing them. Under the TAPM the RDC may well feel obliged to accept the Board's recommendations as to candidates, and thereby accept the Board's reasoning around skills, attributes and knowledge.
8. The TAPM nomination process poses a real risk of leading the RDC to consider the recommendations and reasoning of the Board, in lieu of considering the skills, attributes or knowledge of each candidate, when it makes its appointment decision under the LGA. This could cause the RDC routinely to fail to consider whether a potential committee member's skills, attributes or knowledge might assist the work of that committee, as required by the LGA. Rather, the RDC could effectively rely on the Board to have taken into account these considerations before making the recommendation.

³ LGA, cl 30(1)(a) of Sch 7.

⁴ LGA, cl 31(1) of Sch 7.

⁵ LGA, cl 31(3) of Sch 7.

⁶ When local authorities delegate decision-making powers to committees, the voting procedure for the local authority (under LGA, cl 24(1) of Sch 7) applies to committee members, as if they were local authority members (confirmed in LGA, cl 32(4) of Sch 7: "A committee... to which... powers, or duties are delegated may...exercise or perform them **in the like manner...** as the local authority could itself have exercised or performed them").

⁷ Adopting a fixed policy: *Hopman v Complaints Assessment Committee* HC Wellington CV-2005-485-1032, 14 February 2007 at [27]; acting under the dictation of another: *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 548; sub-delegating powers: *Hawke's Bay Raw Milk Producers' Co-operative Co Ltd v NZ Milk Board* [1961] NZLR 218 (CA).

9. Further, in enabling the Board to present a select number of candidates in that way, the TAPM hands over to the Board a significant part of the discretionary appointment power that belongs solely to the RDC. This could see the Board encroach on the RDC's appointment power under the LGA, by limiting the pool of potential committee members considered by the RDC to the Board's candidates. This could exclude from the RDC's consideration non-elected persons whose skills, attributes and knowledge may better assist the committee's work than that of the non-elected candidates recommended by the Board.

Irrelevant considerations

10. When exercising a statutory discretion, if a public authority relies on a consideration not provided for or contemplated in the statutory provision, it is deemed to have abused that discretion, and the Court can vitiate the ultimate decision in judicial review.⁸
11. The TAPM nomination process could lead the RDC to take into account considerations that are irrelevant to appointing non-elected members to the specified committees. Under the LGA the RDC may appoint non-elected members only if it considers their skills, attributes and knowledge will assist the committee's work. The provision does not allow for any other considerations to be taken into account. However, the TAPM nomination process could see the RDC take into account any other considerations, which might be posited by the Board in its recommendation, and which may be irrelevant in respect of the statutory discretion. Such other considerations could include the candidate's status and credibility within the Te Arawa community, and the candidate's ability to act as a representative of Te Arawa.

Consistency with LGA provisions on the ToW and Māori involvement

12. The LGA refers to the ToW in the following terms:⁹

In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.

13. Specific provisions within Parts 2 and 6 (and other parts of the LGA) make it clear that the local authority's role of engaging with Māori is limited to providing opportunities for Māori to contribute to its decision-making processes, primarily through consultation. We set out the relevant provisions in full in **Appendix 1**. These provisions set the margins for what a local authority *may* do when undertaking its role of engaging with Māori. Acting beyond that provided in the LGA would expose the local authority to judicial review.
14. The RMA obliges local authorities to recognise and provide for certain matters of national importance, which include the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other

⁸ For example, *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA): Minister decided not to grant licence on grounds irrelevant to the statutory criteria. See also *Wahlrich v Bate* [1990] 3 NZLR 97 (HC); and *McNally v AG* [2011] 2 NZLR 137 at [34]-[37].

⁹ LGA, s 4.

taonga.¹⁰ It also obliges local authorities to take into account the principles of the ToW in achieving the RMA's purposes.¹¹ Other more specific obligations in this regard relate to such matters as keeping records about iwi and hapu.¹² The RMA does not, therefore, extend the margins set in the LGA vis-à-vis local authorities' engagement with Māori.

15. We consider that, under the TAPM, the RDC could be held to be exceeding its mandate as provided in LGA and RMA provisions on the ToW and Māori involvement in local governance. We set out our reasons below.

The ToW is not expressly incorporated in either the LGA or the RMA

16. The TAPM seeks to implement a partnership between the RDC and Te Arawa, which it justifies as part of the RDC's "obligation to recognise the ToW".¹³ We do not consider that either the LGA or the RMA contain provisions obliging the RDC to *recognise* the ToW. The LGA instead obliges the RDC to "recognise and respect the Crown's responsibility" to take account of ToW principles. If Parliament had intended to impose on local authorities, in particular, more specific legal duties to implement ToW principles (which may include partnership with Māori), it would have done so expressly. The relevant LGA and RMA provisions do not, in our view, implicitly or explicitly provide for such duties.

Provisions refer to consultation and not partnership

17. The TAPM creates a partnership in which some Te Arawa nominated and Council appointed committee members are given information, speaking rights and voting rights in respect of specific functions and powers of the RDC. Consistent with the concept of partnership, the TAPM seeks to give such Te Arawa representatives in particular the same level of influence as other RDC committee members. This partnership model is materially different from the concept of consultation. The LGA limits the RDC's actions in respect of iwi engagement to facilitating *consultation*, and the concept of partnership falls outside the scope of these provisions. In pursuing partnership, the RDC would under the TAPM risk acting beyond its statutorily permissible powers.

Provisions refer to contributions to decision-making process and not decision-making power

18. When defining local authorities' role in engaging with iwi, the LGA refers exclusively to "decision-making *processes*", as opposed to decision-making powers. The TAPM, by contrast, grants some Te Arawa committee members voting powers. The LGA expressly provides for the delegation of statutory powers belonging to the local authority, to subordinate bodies including committees.¹⁴ Individuals with voting powers in such committees are not therefore simply participating in a decision-making process, such as a consultation: they are shaping the outcome of that process and contributing substantively to the ultimate actions of the local authority. By allowing this in respect of Te Arawa members, the TAPM could see the RDC act beyond its functions in respect of iwi engagement, as defined in the LGA.

¹⁰ RMA, s 6(e).

¹¹ RMA, s 8.

¹² RMA, s 35A.

¹³ Statement of Proposal, TAPM (February 2015) at 8.

¹⁴ LGA, cll 30(3) and 32(1) of Sch 7.

The TAPM focuses on one particular iwi

19. The TAPM focuses on engagement with one particular iwi: Te Arawa. This is justified by reference to Te Arawa's status as mana whenua, its historic standing in the RDC area, and its past and future potential contribution to the economy of the Rotorua region.¹⁵ The LGA's provisions relating to iwi engagement do not provide for a local authority to favour particular iwi with a larger historic or economic presence. There is therefore a risk that the RDC will not take sufficient account of other iwi, to the standard required by the LGA. The TAPM could lead the RDC to avoid its responsibility to consider how it might seek to engage with Māori in the region, by implementing and relying solely on the TAPM.

The need to improve iwi consultation

20. The Environment Court's decision in *Ngati Pikiao Environmental Society* highlighted the need for the RDC to improve consultation with iwi.¹⁶ While this decision may influence the RDC in how it engages with Rotorua iwi, it does not give the RDC the authority to operate beyond its mandate as defined in the LGA and the RMA. These two statutes are conclusive on how the RDC may act in order to improve iwi engagement.

Consistency with LGA purposes of democratic local governance

21. The concept of democratic local governance is integral to the LGA's express purposes. This encompasses principles of accountability, transparency, proportionate representation of all communities, and representation of all interests, included future interests. We set out the relevant provisions in full in **Appendix 2**. The RDC's actions must not be inconsistent with these provisions. If they are, they could be exposed to successful judicial review.

Conclusion

22. A summary of our advice is set out at paragraph 2 above. We trust this advice has been of assistance. Please do not hesitate to contact us should you wish to discuss any matter further.

Yours faithfully
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¹⁵ Statement of Proposal, TAPM (February 2015) at 8.

¹⁶ *Ngati Pikiao Environmental Society Incorporated et al v Bay of Plenty Regional Council and Rotorua District Council* [2013] NZEnvC 116 at [89] to [94].

Appendix 1

Provisions of the LGA which delimit the role of local authorities in engaging with Māori:

14 Principles relating to local authorities

(1) In performing its role, a local authority must act in accordance with the following principles:

- ...
(d) a local authority *should provide opportunities for Māori to contribute to its decision-making processes*

77 Requirements in relation to decisions

(1) A local authority *must, in the course of the decision-making process,—*

- (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
(b) assess the options in terms of their advantages and disadvantages; and
(c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, *take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.*

81 Contributions to decision-making processes by Māori

(1) A local authority must—

- (a) *establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes* of the local authority; and
(b) *consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes* of the local authority; and
(c) provide relevant information to Māori for the purposes of paragraphs (a) and (b).

(2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, *must have regard to—*

- (a) the role of the local authority, as set out in section 11; and
(b) such other matters as the local authority considers on reasonable grounds to be relevant to those judgments.

82 Principles of consultation

(2) A local authority must ensure that it *has in place processes for consulting with Māori in accordance* with subsection (1) [relating to principles applicable to consultation generally].

Schedule 10 Long-term plans, annual plans, and annual reports

8 Development of Māori capacity to contribute to decision-making processes

A long-term plan must set out any steps that the local authority intends to take, having undertaken the consideration required by section 81(1)(b), to *foster the development of Māori capacity to contribute to the decision-making processes* of the local authority over the period covered by that plan.

Appendix 2

Provisions of the LGA which relate to democratic local governance:

3 Purpose

The purpose of this Act is to provide for *democratic and effective local government* that recognises the diversity of New Zealand communities; and, to that end, this Act—

...

- (c) promotes the *accountability of local authorities* to their communities; and

...

10 Purpose of local government

- (1) The purpose of local government is—

- (a) to enable *democratic local decision-making and action by, and on behalf of, communities*; and
- (b) to *meet the current and future needs of communities* for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

...

11 Role of local authority

The role of a local authority is to—

- (a) *give effect*, in relation to its district or region, *to the purpose of local government stated in section 10*; and

...

14 Principles relating to local authorities

- (1) In performing its role, a local authority must act in accordance with the following principles:

- (a) a local authority should—
 - (i) conduct its business in an *open, transparent, and democratically accountable manner*; and

...

- (b) a local authority should *make itself aware of, and should have regard to, the views of all of its communities*; and

- (c) when making a decision, a local authority should take account of—

- (i) the diversity of the community, and the *community's interests*, within its district or region; and
- (ii) the *interests of future as well as current communities*; and
- (iii) the *likely impact of any decision on the interests* referred to in subparagraphs (i) and (ii);

...

