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Chief Executive
Rotorua Lakes Council
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ROTORUA

For: **Geoff Williams**
Email: **geoff.williams@rdc.govt.nz**

Dear Geoff

Te Arawa Partnership Model

Introduction

1. Rotorua Lakes Council ('Council') has sought advice on the legality of the proposed Te Arawa Partnership Model ('TAPM'), in particular whether the TAPM:
 - (a) constrains Council's powers to appoint committees in a manner inconsistent with Local Government Act 2002 ('LGA') provisions;
 - (b) is inconsistent with the provisions of the LGA and Resource Management Act 1991 ('RMA') relating to the Treaty of Waitangi ('ToW') and Maori involvement in local governance; and
 - (c) is inconsistent with the LGA's purposes relating to democratic local governance.

Summary of advice

2. We confirm that the TAPM is lawful and compliant with Council's obligations under relevant legislation. In particular the TAPM:
 - (a) does not constrain Council's powers to approve committees in a manner inconsistent with the LGA;
 - (b) is not inconsistent with the provisions of the LGA and RMA relating to the ToW and Maori involvement in local governance;
 - (c) is consistent with the LGA's purposes relating to democratic governance.

Background

3. Before turning to an analysis of Council's statutory obligations concerning how it engages with Maori, it is relevant to examine its existing relationship with Maori.
4. Te Arawa is a confederation of 13 iwi and over 60 hapu located in the Rotorua and Bay of Plenty region. The Te Arawa people number 42,000, comprising 6.5% of New Zealand's total Maori population, and 34% of people residing in Rotorua district.
5. Between 1993 and 2013 Council had constituted the Te Arawa Standing Committee ('TASC') which is operated as its principal vehicle for engagement with Maori. It is a widely held view amongst representatives of Te Arawa and Council that this model did not serve the parties particularly well and had in part, contributed to an unsatisfactory relationship. The relationship between Council and Te Arawa reached its low point during the 2013 hearing of an Environment Court appeal bought by Ngati Pikiao Environmental Society Incorporated and others¹. In that decision, the Environment Court held that Council had misled the Court and deliberately misled iwi in respect of cultural impacts and consultation matters². The judgment concludes by stating:

[102] What does concern us is that the District Council has on this occasion been proven to have misled both the parties and the Court on several important matters. Given the reported lack of use of the Maori consultative committee for the District Council, there may be deeper questions which require investigation in other fora. That is not a matter for the Court to explore on this occasion. Nevertheless, this is among the most serious breaches of Council's obligations brought to this division's attention.

6. Against this background, Council took the appropriate step of reviewing its relationship with Te Arawa and its processes for engagement with Maori. The result was the collaborative development of the TAPM between Council and Te Arawa.

The TAPM

7. The TAPM is set out as Appendix A to this report³. In summary, under the TAPM, an independent Board, elected by the Te Arawa community, is to be established in collaboration with Council. This Board will nominate, for Council's consideration, various representatives to be members of a range of Council committees, some of which will have delegated decision-making powers. It is intended that any Te Arawa representatives which are established by Council as committee members, will have voting rights on those committees.

Statutory framework

8. Council's purpose, role, function, duties and powers are set out in the LGA, which is the key statute regulating Council's activities.
9. The LGA makes specific provision for the ToW in section 4 which provides:

4 Treaty of Waitangi

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

¹ *Ngati Pikiao Environmental Society Inc & Ors v Bay of Plenty Regional Council* (cost decision) [2013] NZ EnvC116.

² *Ibid* para 91.

³ This text is taken from the publicly notified statement of proposal dated February 2015.

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.

10. This statement of intent recognises the Crown's role in respect of the ToW and how, through the LGA, Maori contributions to local government decision making are to be facilitated.
11. Within Part 2 of the LGA which sets out the purpose of local government and the role and powers of local authorities, section 14 establishes a set of principles which Council must observe, in performing its role. Relevantly, section 14 provides:

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

12. Within Part 6 of the LGA which sets out the framework and requirements for Council's decision making, section 81 specifically addresses Council's obligations to Maori. It provides:

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.

13. The obligations set out in section 81(1) are clear. However, the LGA does not prescribe how these obligations must be met. That is a matter for each Council to determine, having regard to its role as a local authority, and such other matters it considers on reasonable grounds to be relevant to those judgments⁴.
14. In terms of this broad discretion afforded to local authorities, each Council must make its own assessment of how it shall provide opportunities for Maori to contribute to its decision making processes.

⁴ Section 81(2).

15. There are a range of responses which are lawful and reasonable, depending upon the circumstances of each individual Council. As set out in Associate Professor of Law Dr Kenneth Palmer's text "Local Authorities in New Zealand" at paragraph 1.6.2:

This provision (section 81) may require interpretation in a factual context. There is an element of uncertainty or ambiguity in relation to the nature of the contribution to the decision making processes of the local authority. A first interpretation is the section should be construed to require active consultation with Maori and to invite submissions on relevant matters. A second view is that the obligation requires local authorities to either specifically appoint Maori as representatives on some or all committees to ensure that in every significant decision-making process there is a specific Maori contribution to the decision itself. Alternatively, that latter process could be satisfied by establishing an all Maori membership standing or ad hoc committee to consider matters of particular concern to Maori, and to report back to the governing body or other committee, thereby contributing to the decision-making process.

16. As can be seen from the above extract, Council's discretion on how it gives effect to its obligations under section 81 is very wide. Its discretion is not, however, without limits. Council can only act in a manner which is consistent with its functions and powers prescribed in the LGA, or other relevant legislation such as the RMA⁵.

Council committees

17. It is relevant at this point to examine Council's powers in respect of the establishment of its committees.
18. The LGA enables Council to establish committees and subcommittees of Council, and to delegate its functions to these committees and subcommittees, including its decision making functions⁶.
19. Every committee is subject in all things to the control of the local authority. A committee may appoint a subcommittee unless prohibited from doing so by the local authority. Where so appointed, the subcommittee is subject in all things to the control of the committee that appointed it, and must carry out all general and special directions of the committee⁷.
20. Unless expressly provided otherwise in an enactment, a local authority may discharge or reconstitute a committee or subcommittee, and a committee may discharge or reconstitute a subcommittee that it appointed. The power to discharge a committee or subcommittee does not amend or rescind a decision lawfully made by the committee under a delegation⁸.
21. The membership of a committee or subcommittee is controlled by the local authority constituting the body. In respect of a subcommittee constituted by a committee, the membership may be determined by the committee unless the local authority directs otherwise. The minimum number of members of a committee is three, and the minimum number of members for a subcommittee is two. At least one member of a committee must be an elected member of a local authority. An employee of the local

⁵ These obligations to establish and maintain processes to provide opportunities for Maori to contribute to the Council decision making processes are further reinforced in other parts of the LGA; see section 82 principles of consultation, clause 8 Schedule 10 relating to Council's LTP, and in other legislation including Resource Management Act 1991.

⁶ LGA, Schedule 7, clauses 30-32.

⁷ LGA, Schedule 7, clause 30(1)-(4).

⁸ LGA, Schedule 7, clause 30(6).

authority may not be a member of a committee, unless the committee is a subcommittee⁹.

22. Of particular note for present purposes is clause 31(3) of Schedule 7 to the LGA which provides:

31 Membership of committees and subcommittees

- (3) The members of a committee or subcommittee may, but need not be, elected members of the local authority, and a local authority or committee may appoint to a committee or subcommittee a person who is not a member of the local authority or committee if, in the opinion of the local authority, that person has the skills, attributes, or knowledge that will assist the work of the committee or subcommittee.

23. This clause gives Council the direct statutory power to appoint unelected individuals to its committees or subcommittees, provided the criteria set out in the clause is met.

Delegations

24. The power to establish a committee or subcommittee of Council works hand in hand with Council's power to delegate its powers and functions to these subordinate bodies.
25. The general power of a local authority to delegate a function to a committee, and the powers of sub-delegation, are set out in the LGA at Schedule 7, clause 32. Pursuant to clause 32(1), apart from a number of powers which are expressly provided for, for the purposes of efficiency and effectiveness in the conduct of a local authority's business, a local authority may delegate to a committee or other subordinate decision making body any of its responsibilities, duties or powers¹⁰.

Consideration of TAPM in light of the statutory framework

26. The TAPM has the following important characteristics:
- It maintains Council's existing committee structure and delegations to those committees but preserves Council's right to discharge or reconstitute a committee or amend the delegated authority of a committee.
 - It establishes a mechanism, via the Te Arawa Board process, whereby Te Arawa identifies and nominates suitable candidates to become unelected members of Council's committees.
 - Council retains all decision making rights in terms of which nominated individuals, if any, become committee members.
 - Committee members, including unelected members, having voting rights in respect of committee decisions.
27. Accepting that the existing committee structure and delegations are lawful, and that the appointment of unelected members to Council's committees is also lawful, there are two issues which warrant closer consideration. First, the Board nomination and appointment process, and second, voting rights.

⁹ LGA, Schedule 7, clause 31.

¹⁰ For the exclusions, see clause 32(1)(a)-(h).

Board nomination and appointment process

28. Concern has been raised about whether the Board nomination and appointment process may place Council at risk of abdicating its discretionary power of appointment, and taking into account irrelevant considerations.
29. While it is acknowledged that these risks exist, they can be readily avoided. In terms of the risk of abdicating its discretionary powers, it must be emphasised that regardless of the Board's nominations, Council has reserved its right to make the final decision on who should be on its committees. That decision will be made taking into account the statutory criteria; whether the nominee has the skills, attributes or knowledge that will assist the work of the committee¹¹.
30. The Board nomination process can act as a "first filter" in terms of identifying candidates, with ultimate decision making power of appointment remaining with Councils.
31. Further risks have been identified regarding the potential for the Board to take into account irrelevant considerations within its own process, and for this to then influence its nominations, and therefore Council's ultimate decision. This concern can be addressed. Council's decision making criteria is extremely broad; skills, attributes and knowledge. With suitable guidelines and education, only in the rarest of circumstances will a Board consideration fall outside this very broad criteria. If it does, the risk is mitigated once again by Council conducting its final decision making with a clear understanding of the statutory criteria.
32. Finally on this issue, concern has been raised that by channelling possible committee candidates through the Board process, Council hands over a significant part of its discretionary appointment powers and limits the pool of potential candidates. For the reasons explained above, Council is not handing over its discretionary appointment powers. It is, however, acknowledging that in order to identify suitable candidates with a Maori perspective, Council should rely on Te Arawa to identify, as a first stage in the process, suitable individuals. This is efficient. However, if Council identifies an individual, outside of this Board nomination process, who meets the statutory criteria for an unelected committee member, it has reserved its power to appoint that person to any committee, quite apart from any appointments made via the TAPM. Those statutory rights remain.

Voting

33. Voting rights for unelected members is a contentious issue. Concern has been raised that by affording unelected members voting rights on committees, Council could be going beyond its obligation to provide opportunities for Maori to contribute to decision making processes.
34. The concern is that rather than simply participating in a decision making process, the TAPM allows Maori to shape the outcome of that process and contribute substantively to the ultimate actions of the local authority. This is correct. This is indeed an outcome of the TAPM. This outcome is lawful and does not overstep the bounds of what Council can do to give effect to its obligations under section 81 of the LGA.
35. The obligation to provide opportunities for Maori to contribute to the decision making processes of Council is not limited to that part of the process leading up to the decision

¹¹ LGA, Schedule 7, clause 31(3).

making. If Parliament had intended to limit the contribution in this manner, it would have expressly done so.

36. Without this limitation, section 81 must be given its plain meaning. The decision making process includes making the decision. That includes voting on a decision and unelected members can participate in committee voting. In this regard, the TAPM is lawful. Whether this model is politically acceptable is a separate issue.

Further issues

ToW

37. Concern has been raised that the TAPM seeks to implement a partnership between Council and Te Arawa as part of its obligations to recognise the ToW.
38. Council is required to recognise the ToW. This does not mean that Council must assume the Crown responsibility as treaty partner. Instead, it must observe certain obligations to Maori that are required of it by Parliament, pursuant to the LGA, RMA and other enactments. For example, the RMA specifically requires Council, when performing its functions under that Act, to take into account the principles of the ToW¹².
39. The relationship between Council and Te Arawa has been correctly described as a partnership. It is not correct, as has been suggested, that the LGA limits Council's actions in respect of any engagement with Maori to only facilitating consultation, and that the concept of partnership falls outside the scope of those provisions.
40. To limit Council's relationship with iwi to consultation alone is to ignore the plain meaning of sections 4, 14(d) and 81 of the LGA. Simply put, contributing to Council's decision making processes is not limited to consultation alone. If Parliament had intended this narrow outcome, it would have said so. Instead, the statutory language is deliberately broad, with guidance on how Council should interpret the obligations set out in section 81(2) of the LGA.

TAPM focusses on one particular iwi

41. It is correct to say that the TAPM focusses on one particular iwi. There is good reason for this. Council recognises Te Arawa as mana whenua. However, it is acknowledged that Council's obligations are in respect of all Maori within its district.
42. Council will need to ensure it has processes in place, beyond TAPM, to ensure its obligations to all Maori are met. Work should be done to ensure Council achieves a "catch all" approach, such that Council's strategies for engagement with Maori do not end solely with TAPM.

Conclusion

43. We confirm that the TAPM is lawful and compliant with Council's obligations under relevant legislation. In particular the TAPM:
 - (a) does not constrain Council's powers to approve committees in a manner inconsistent with the LGA;

¹² RMA, section 8.

(b) is not inconsistent with the provisions of the LGA and RMA relating to the ToW and Maori involvement in local governance;

(c) is consistent with the LGA's purposes relating to democratic governance.

44. Please contact me if you would like to discuss matters further.

Yours faithfully

TOMPKINS WAKE

A handwritten signature in blue ink, appearing to read 'L F Muldowney', with a long horizontal flourish extending to the right.

L F Muldowney
Partner

APPENDIX A

PROPOSED TE ARAWA PARTNERSHIP MODEL

1. Rotorua Lakes Council ('Council') proposes to enable representatives nominated by Te Arawa to actively participate in Council decision-making by appointing:
 - Two representatives of Te Arawa as full voting members of its Strategy, Policy and Finance Committee; and
 - Two representatives of Te Arawa as full voting members of its Operations and Monitoring Committee; and
 - One representative of Te Arawa as a non-voting member of its CEO Performance Committee; and
 - One suitably qualified representative nominated by Te Arawa as commissioner to all statutory hearing committees (typically comprising three commissioners) determining notified resource consent applications under the Resource Management Act 1991; and
 - Ad hoc non-voting representatives nominated by Te Arawa on strategic working groups as and when required by Council; e.g. strategy portfolio steering committee.
2. An independent board, elected by the Te Arawa community, will be established in collaboration with Council ('Board'). The Board will be elected by way of an "at large" Te Arawa election, and it will represent different sectors of the wider Te Arawa community (e.g. Rangatahi 2 seats; Pūkenga Kōeke/Kaumātua 1 seat; Ngāti Whakaue 2 seats; other Te Arawa iwi 6 seats; land trusts and incorporations 2 seats; Pan Te Arawa entitles 1 seat) to a maximum of 14 members. In the future an additional seat may be made available for mātāwaka / taura here (Māori from other Iwi resident in Rotorua).
3. The Board will nominate, for Council's consideration, representatives to be members of the various committees.
4. While the composition of its committees is a matter for Council to determine, Council will accept the Board's nominations provided it is satisfied that the nominees have the necessary skills, attributes and knowledge to assist the work of the respective committee.

