

State of Play -

# Māori Engagement in Infrastructure

Te Pāhekoheko a ngā Māori ki ngā mahi  
Hanganga

What does the literature say?  
He aha tā ngā mātātuhī?







**Mā te rongo, ka mōhio;**

From listening comes knowledge;



**Mā te mōhio, ka mārama;**

from knowledge comes understanding;



**Mā te mārama, ka mātau;**

from understanding comes wisdom;



**Mā te mātau, ka ora.**

from wisdom comes well-being.



# Te Waihangā | New Zealand Infrastructure Commission

New Zealand’s infrastructure is the roads we use to get to work or move goods to market, the power connections that heat our homes, the schools where our children learn, the hospitals that heal us.

It’s a system, supporting almost everything we do, and this means the decisions we make about it affect us all. Because of the long life and size of our infrastructure, these decisions can also have an impact for decades, even centuries, and involve millions or billions of dollars.

Te Waihangā helps government and others to shape this system, to grow wellbeing and drive a strong economy. We look to the long term, identifying issues and the actions New Zealand can take to improve. We developed New Zealand’s first Infrastructure Strategy, using research, evidence and the views of New Zealanders to set out the issues we face, and the changes needed over the next thirty years to build a better Aotearoa. Following its release, we’re working to help track progress against this Strategy and be catalyst for its success. We continue to share critical insights into issues that impact our infrastructure, carrying out our own investigations and engagement, shining a light on further opportunities for change.

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# Summary

## The purpose of this work and this document

This document is part of the work being undertaken by Te Waihanga to give effect to the recommendation in Rautaki Hanganga o Aotearoa | the New Zealand Infrastructure Strategy (Te Rautaki) to “[u]ndertake a ‘State of Play’ of current Māori engagement activity for infrastructure to help inform and educate readers on how infrastructure providers can engage and work with Māori in a way that works for Māori and infrastructure providers.”

It provides an overview of previously published work relating to Māori engagement in infrastructure (including articles published in academic journals, conference papers, theses, research, and reports published by government entities and other organisations, and published opinion pieces). In Appendix B, it also includes an overview of previously published work relating to engagement in infrastructure by Indigenous peoples in the United States of America, Canada, and Australia. In Appendix C it identifies many, but not all, of the current statutory and other legal requirements relevant to infrastructure providers’ engagement with Māori groups at different stages of projects.

We are currently in the process of undertaking our own research into Māori engagement in infrastructure, including research aimed at addressing some of the gaps identified in the existing literature. We will look for opportunities to release the findings of our research in stages. We are currently aiming to release all our findings by March 2024. Our reports will indicate areas where we consider that further research is necessary.

## Māori engagement on infrastructure proposals initiated by others

The feedback received during the development of Te Rautaki shows that there is division of opinion within the wider New Zealand community as to the need to increase collaboration with Māori in relation to infrastructure or increase Māori participation and leadership across the infrastructure system.

There are common themes in the literature regarding Māori engagement on infrastructure proposals initiated by others.

- Building relationships (including having regular contact) with a Māori group is a key driver of good engagement and doing this takes time and effort.
- It is recognised that there is a need to be adaptable or flexible in how government engages to meet a particular Māori group’s needs and aspirations, but also concerns that there should be greater co-ordination and less inefficiency in how engagement occurs.
- It is important to understand the history, tikanga, and aspirations of a Māori group you engage with.

The literature has identified the following challenges Māori groups face when seeking to engage on infrastructure proposals initiated by others:

- capacity and costs issues
- challenges (around matters such as mandate) that particularly arise when Māori groups are engaged in co-development or co-design
- tensions between the role of iwi and the role of hapū



- lack of clarity regarding if, when or how to engage with mātāwaka (people who identify as Māori/part Māori who live outside the rohe i takiwā of their iwi/hapū or do not know who their iwi or hapū is)
- issues relating to changing leadership within Māori groups
- deficits in Māori groups' digital and data infrastructure hampering efforts by Māori groups to understand the needs and aspirations of their members.

There are many published guidelines and think pieces on engaging with Māori and many factors in common across those documents. One area where there are differences is on the issue of the extent to which/how organisations should use Te Ao Māori facilitators or guides when engaging with Māori groups.

The published guidelines are generally (although not entirely), pitched at a high-level rather than providing advice on how in practice to undertake engagement. None of the literature identified evaluated how application of the various guidelines has worked in practice.

As shown in Appendix C to this report there are numerous statutory and other legal requirements relevant to infrastructure providers' engagement with Māori groups at different stages of projects. For some types of infrastructure, such as State highways, there are multiple requirements to engage with Māori at different stages in a project (from funding through to legalisation) under a number of different statutes. For other types of infrastructure, there is no specific statutory obligation to engage with Māori.

The legislation uses multiple different models for engaging with Māori, with a range of governance and consultation mechanisms and a range of methods for identifying or appointing the individuals or groups to be engaged with.

The legislation also uses multiple different formulations of the basis on which Māori groups are being engaged with, for example:

- to not act inconsistently with, or take into account, the principles of the Treaty of Waitangi
- to enable consideration of Māori historical, cultural, or spiritual interests
- to provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori
- to give effect to Te Tiriti o Waitangi
- to recognise that whenua Māori is taonga tuku iho of special significance to Māori.

## Wider Māori involvement in infrastructure

By wider Māori involvement in infrastructure we mean ownership of or investment in infrastructure, direct participation by individuals and businesses in the infrastructure workforce and other direct participation in the development or ongoing management of infrastructure.

There is general acknowledgement in the literature that Māori are playing a more active and leading development role and that this is particularly evident with post-Te Tiriti settlement groups. There is also recognition that the asset base of Māori employees, self-employed Māori, and Māori employers is likely to be much larger than the Māori assets owned collectively, and that Māori group's statistical needs may be evolving.

There are limitations in the data currently available on the Māori economy (including Māori businesses). There is also limited published research on current Māori ownership of, or investment in, infrastructure. The research we

are currently undertaking, while not entirely filling that gap, will add materially to the information available.

The feedback on the Te Rautaki consultation document shows that there is currently a range of views across the wider New Zealand community on the desirability of greater Māori investment in infrastructure.

There is some existing research on barriers to the provision of infrastructure as part of papakāinga developments. Those barriers include:

- lack of reticulated services and local authorities not having planned to provide infrastructure to the areas where papakāinga sites are located
- geological, hydrogeological, and other physical issues at papakāinga sites
- restrictions on the permitted density of papakāinga housing increasing infrastructure costs/reducing the economic viability of providing infrastructure
- the cost of development contributions for infrastructure under the Local Government Act 2002
- difficulties in obtaining loans to finance development
- the need to provide communal infrastructure (such as communal laundries) to reduce infrastructure costs.

Challenges relevant to increased Māori investment in infrastructure more generally identified in the literature include:

- being able to invest at the scale required
- finding out about investment opportunities early enough
- potentially needing to grant rights for future acquisition of whenua Māori by third parties and otherwise wanting to protect assets that a Māori group does not want to put at risk
- access to some necessary skill sets and capabilities
- tension between achieving a successful investment and a Māori group's values and long-term aspirations and the potential need to make trade-offs.

# He Whakarāpopotanga

## Ko te kaupapa o tēnei mahi me tēnei tuhinga

He wāhanga o ngā mahi tēnei tuhinga e mahia ana e Te Waihanga ki te whakamana i te tūtohunga i roto i te Rautaki Hanganga o Aotearoa (arā, Te Rautaki) kia “mahia he arotake o te Tūāhua o te Wā’ o ngā mahi pāhekoheko ki a Ngāi Māori mō ngā mahi hanganga hei āwhina ki te whakamōhio me te whakaako hoki ki ngā kaipānui ki te āhua e taea ai e ngā kaiwhakarato hanganga te whai wāhi me te mahi tahi me te iwi Māori i runga i tētahi huarahi e whai hua ana mō te iwi Māori me ngā kaiwhakarato hanganga hoki”.

Kei roto he tirohanga whānui mō ngā mahi kua tāngia noatia atu e pā ana ki te whai wāhi mai a te Māori ki ngā hanganga (tae atu ki ngā tuhinga i tāngia ki roto i ngā hautaka mātauranga, pepa hui, tuhinga whakapae, rangahau me ngā pūrongo i tāngia e ngā hinonga kāwanatanga me ētahi atu whakahaere, me ngā tuhinga whakaaro kua tāngia). Kei te Āpitihanga B, ka raua atu he tirohanga whānui o ngā mahi kua tāngia noatia ake e pā ana ki te whai wāhitanga a ngā iwi taketake o Amerika, Kānata, me Amerika ki ngā hanganga. Kei te Āpitihanga C e whakaaturia ana te maha, engari ehara i te katoa, o ngā whakaritenga ā-ture o nāianei me ētahi atu āhuatanga ā-ture e pā ana ki te pāhekohekotanga a ngā kaiwhakarato hanganga ki ngā rōpū Māori i ngā kōeke rerekē o ngā kaupapa.

I tēnei wā kei te mahi mātou i ā mātou ake rangahau mō te whai wāhi atu a te Māori ki ngā hanganga, tae atu hoki ki ngā rangahau e whai ana ki te whakatika i ētahi o ngā āputa kua tautohua i roto i ngā tuhinga o te wā nei. Ka rapu mātou i ngā āheinga ki te whakaputa harangotengote i ngā kitenga o ā mātou rangahau. I tēnei wā e whai ana mātou ki te tuku i ā mātou kitenga katoa hei te Maehe 2024. Ka tautohua e tā mātou pūrongo ngā wāhi e whakaarohia ana e tika ana kia rangahau anō.

### Ko te whai wāhi a ngāi Māori ki ngā marohi hanganga nā ētahi atu i tīmata

Ko ngā whakahoki kōrero i tae mai i te wā o te whakawhanaketanga o Te Rautaki e whakaatu ana tērā he wehewehenga whakaaro mō te hiahia kia nui ake te mahi tahi ki ngā iwi Māori, ki te whakapiki ake rānei o te whai wāhi a ngāi Māori me tōna ārahitanga huri noa i te pūnaha hanganga i roto i te hapori whānui o Aotearoa .

Ērā ētahi kaupapa e kaha kitea ana kei roto i ngā mātātuhi e pā ana ki te whai wāhi a ngāi Māori ki ngā marohi hanganga nā ētahi atu i tīmata.

- He mea nui, he mea whakahirahira anō hoki te whakawhanaungatanga atu (tae atu ki te whakapā honohono tonu atu) ki tētahi rōpū Māori tētahi, ā, e kore tēnei e eke i te wā poto.
- E mōhio whānuitia ana me urutau, me ngāwari hoki ki te āhua o te huarahi pāhekoheko a te kāwanatanga ki te whakatutuki i ngā hiahia me ngā wawata o tētahi rōpū Māori, engari ērā anō hoki he māharahara e tika ana kia nui ake te ruruku, ā, me iti iho te whāomokoretanga o te āhua e whakatinanatia ai ngā mahi pāhekoheko.
- He mea nui kia mōhio koe ki te hītori, ki ngā tikanga, me ngā wawata o ngā hapori Māori e pāhekoheko ana koe.

Kua tautohua e ngā mātātuhi ngā wero e heipū ana ki ngā rōpū Māori ina tahuri rātou ki te whai wāhi ki ngā marohi hanganga nā ētahi atu i tīmata:

- ngā take raukaha me te utu
- ngā wero (e pā ana ki ngā take pēnei i te mana kōkiri) ka ara ake i te wā e pāhekoheko ana ngā rōpū Māori ki te whakawhanake takirua, ki te hoahoa takirua rānei.
- ngā kukumetanga mō te tūranga o te iwi me te hapū



- te kore mōhio mō te āhua o te pāhekoheko ki ngā matawaka (arā, ngā uri Māori e kī ana he Māori rātou engari ka noho rātou ki waho i te rohe | takiwā o tō rātou iwi/hapū, ka kore rānei e mōhio ko wai ō rātou iwi, ō rātou hapū rānei)
- ngā take e pā ana ki te panonitanga o ngā kaiārahi i roto i ngā rōpū Māori
- ngā takarepa o ngā hanganga matihiko me te raraunga a ngā rōpū Māori, me te aha, e whakakōroiroingia ana ngā mahi a ngā rōpū Māori ki te mōhio ki ngā matea me ngā wawata o ō rātou mema.

He maha ngā aratohu kua tāngia me ngā kōrero ā-tuhi tātari whakaaro mō te pāhekoheko ki te iwi Māori, ā, he maha ngā āhuatanga e kitea noatia ana i roto i aua tuhinga. Ko tētahi wāhanga e rerekē ana, ko te take o te whānuitanga/me pēhea ngā whakahaere e whakamahi ai i ngā kaitakawaenga, i ngā kaitohutohu rānei o Te Ao Māori ina pāhekoheko atu ki ngā rōpū Māori.

I te nuinga o te wā (engari, ehara i te mea i ngā wā katoa), ka popoto kē ngā aratohu kua tāngia, kāore e tuku tohutohu raungāwari mō te whakahaere pāhekohekotanga. Karekau tētahi o ngā mātātuhī kua tautuhia i arotake i te āhua o te whakatinanatanga o ngā aratohu i roto i ngā mahi.

E whakaatu ana i te Āpitihanga C i tēnei rīpoata he maha ngā whakaritenga ā-ture me ētahi atu āhuatanga ā-ture e pā ana ki te pāhekohekotanga a ngā kaiwhakarato hanganga ki ngā rōpū Māori i ngā kōeke rerekē o ngā kaupapa. Mō ētahi momo hanganga, pērā i ngā huarahi matua, he maha ngā whakaritenga ki te pāhekoheko atu ki te iwi Māori i ngā kōeke rerekē o te kaupapa (mai i te whakawhiwhi pūtea tae noa atu ki te whakaturetanga) i raro i te huhua o ngā ture rerekē. Mō ētahi atu momo hanganga, karekau he takohanga ā-ture ki te pāhekoheko ki ngā iwi Māori.

Ka whakamahia e te ture: ngā tauira huhua mō te pāhekoheko atu ki te iwi Māori, me te nuinga atu o ngā tikanga kāwananga me ngā tikanga pāhekoheko, me te nuinga atu o ngā tikanga mō te tautohu, te kōpou rānei i ngā tāngata takitahi, rōpū rānei kia pāhekohekotia.

Ka whakamahia hoki e te ture ngā āta whakatakotoranga maha rerekē mō te kaupapa e pāhekohekotia ana ngā rōpū Māori, hei tauira:

- kia kaua e mahi hārakiraki, kia kaua e whakaaro ki ngā mātāpono o te Tiriti o Waitangi
- kia whakaaheitia te whai whakaaro ki ngā pānga ā-whakapapa, ā-ahurea, ā-wairua rānei o ngā iwi Māori
- kia whakaratohia ki ngā tāngata Māori te āheinga ki te whakamahi i te mana whakatau mō ngā take whakahirahira ki te iwi Māori
- kia whakamanatia te Tiriti o Waitangi
- kia whakamihia he taonga tuku iho ngā whenua Māori, ā, he whakahirahira hoki ki ngā iwi Māori

## Te whai wāhi a te iwi Māori whānui ki te hanganga

Ko te tikanga o te whai wāhi a te iwi Māori whānui ki roto i ngā mahi hanganga, e kōrero ana matou mō te rangatiratanga, te haumi pūtea rānei ki ngā hanganga, waihoki, te whai wāhi arorangi a ngā tāngata takitahi me ngā kamupene ki te rāngai mahi hanganga me ētahi atu huarahi arorangi ki te whai wāhi ki te whakawhanaketanga, i te haere tonu o te whakahaerenga o ngā hanganga.

I ngā mātātuhī e whakamihī noatia ana e kaha ake ana, e hohe ake ana anō hoki te kōkiri whakamua a te iwi Māori ki te whakawhanaketanga, ā, ka tāpua tēnei āhuatanga i ngā rōpū kua whakatau kē ā rātou kerēme Tiriti. E āhukahukatia ana anō hoki he tīnga ake ka nui noa ake te tahua huarawa o ngā kaimahi Māori, ngā Māori mahi ā-kiri, me ngā kaituku mahi Māori i ngā huarawa tōpū a te iwi Māori, ā, kei te whanake haere tonu ngā matea ā-tatauranga o ngā rōpū Māori.

Ērā ngā whāititanga kei roto i ngā raraunga e wātea ana mō te ōhanga Māori (tae atu anō hoki ki ngā pakihi Māori). He whāiti hoki ngā rangahau kua tāngia e pā ana ki te rangatiratanga ā-Māori, ki te haumi pūtea ā-Māori rānei ki ngā hanganga o te wā nei. Ko ngā rangahau e mahia ana e mātou i tēnei wā, ahakoa e kore e whakakī katoa i te āputa, ka takoha tonu atu ki ngā pārongo e wātea ana.

I tēnei wā e whakaatu ana ngā urupare ki te tuhinga pāhekoheko Te Rautaki he maha ngā whakaaro puta noa i te hāpori whānui o Aotearoa mō te hiahia kia nui ake te haumi pūtea a te Māori ki ngā hanganga.

Ērā ngā rangahau o te wā e pā ana ki ngā taupā ki te whakarato hanganga hei wāhanga o ngā whanaketanga papakāinga. Ko ēnei taupā ko:

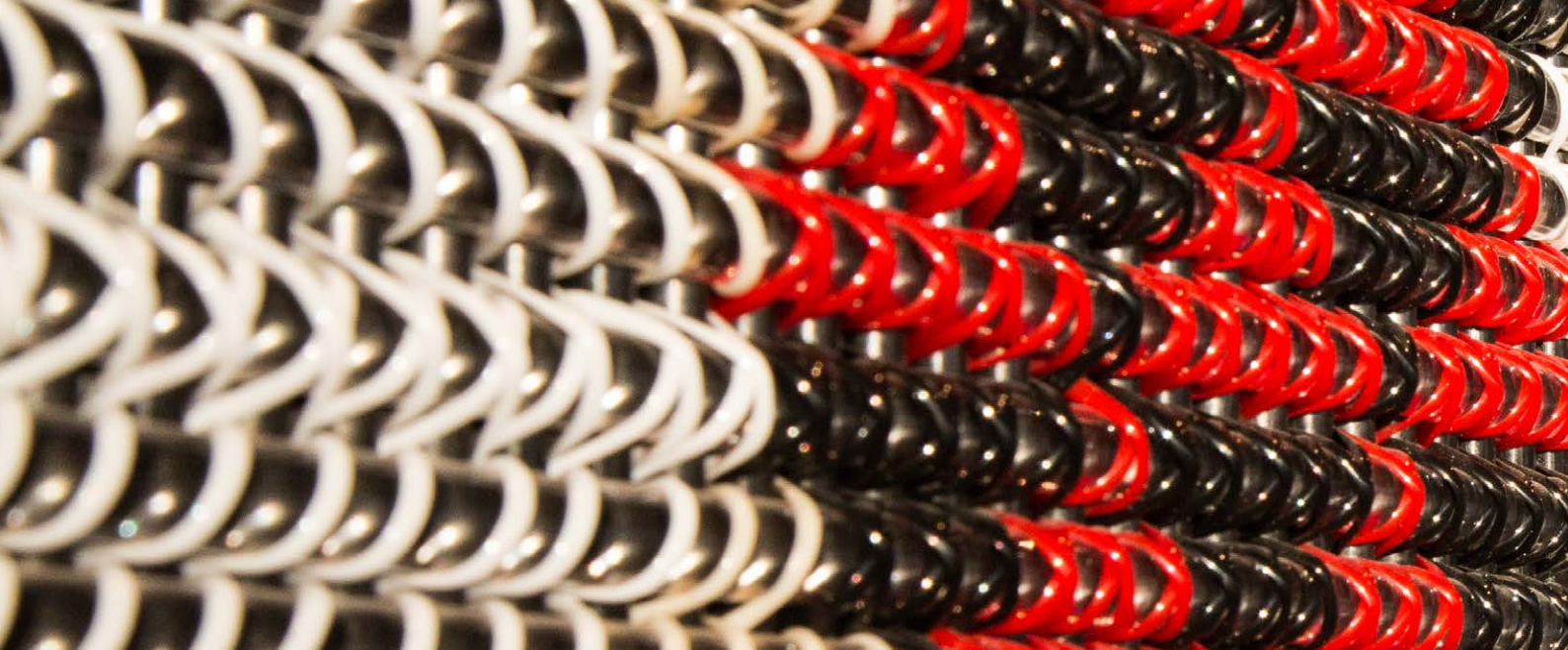
- te hapanga o ngā ratonga ukiuki, ā, kāore ngā mana ā-ture o te rohe kia whakamahere ki te whakarato hanganga ki ngā wāhi e tū ana ngā papakāinga
- ngā take ā-aronuku, ā-aronuku wai me ētahi atu take ā-ōkiko i ngā pae papakāinga
- ngā tikanga here mō te apiapi papakāinga e whakaaetia ana e whakapiki ana i ngā utu hanganga/e whakaheke ana i te kaha ā-oahoā ki te whakarato hanganga.
- te utu mō ngā takoha whanaketanga mō ngā hanganga i raro i te Ture Kāwanatanga-a-rohe 2002
- ngā toimahatanga ki te whiwhi pūtea taurewa ki te whāngai pūtea ki ngā mahi whakawhanake
- te matea ki te whakarato i ngā hanganga ā-hāpori (pēnei i ngā whare horoi kākahu ā-hāpori) hei whakaheke i ngā utu hanganga.

Kua kitea ake i ngā mātātuhi ngā wero e hāngai ana ki te pikinga ake o te haumitanga a ngā tāngata Māori ki ngā hanganga ko:

- te kaha ki te haumi pūtea i te taumata e hiahia ana
- te ako tōmua i ngā āheinga ā-haumi pūtea
- te tuku pea i ngā mōtika e taea ai e ngā kiritoru te kaitaonga whenua Māori, me te hiahia tonu ki te tiaki i ngā huarawa kāore tētahi rōpū Māori e hiahia ki te whakaraerae.
- te āhei ki ētahi huinga pūkenga me ngā pūkenga e tika ana
- te kukumetanga i waenga i te whakatutuki i tētahi haumi pūtea angitu me ngā uara me ngā wawata o tētahi rōpū Māori me ngā koronga pae tawhiti, me te matea pitomata ki te whakarite āhuatanga tuku.







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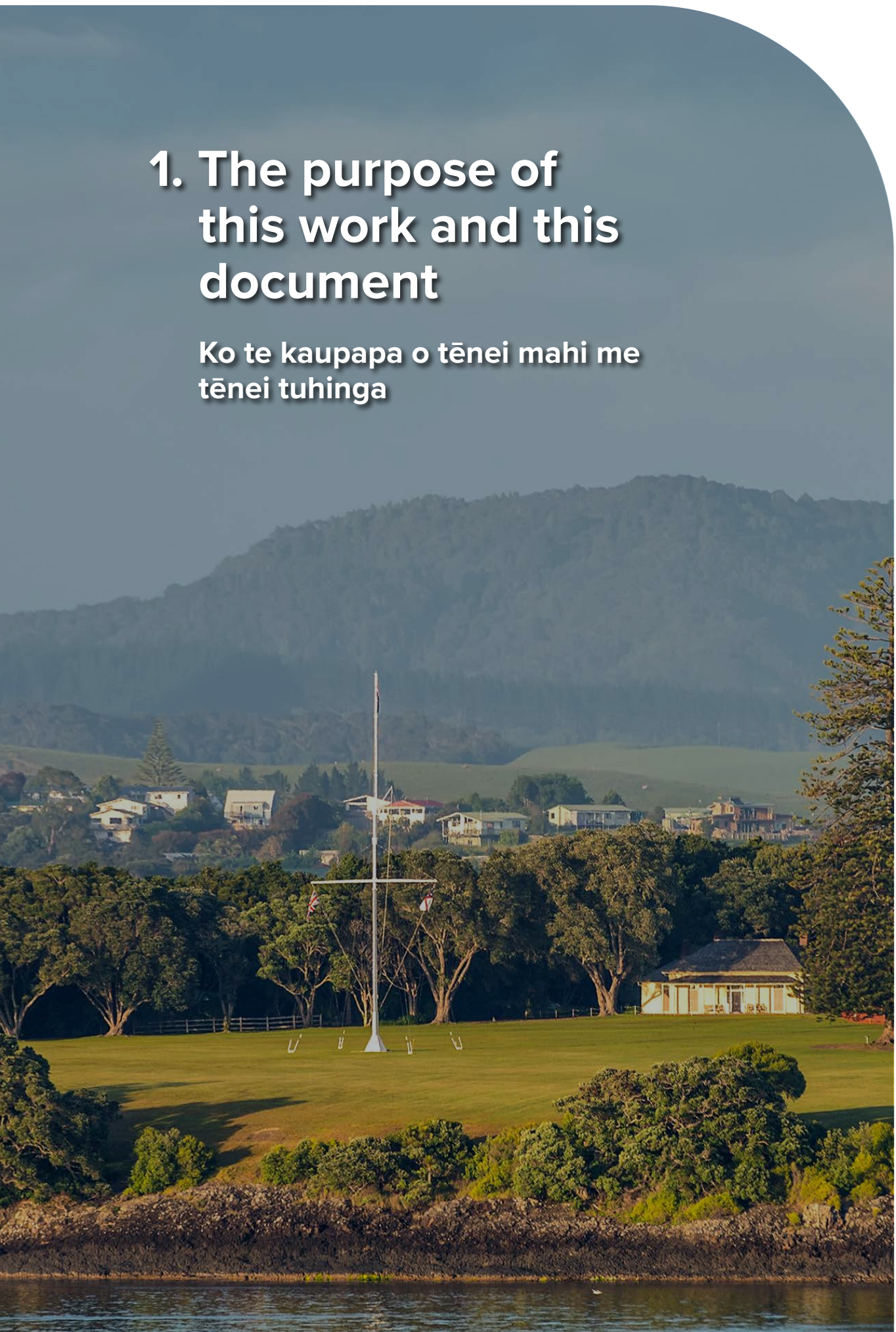
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# 1. The purpose of this work and this document

Ko te kaupapa o tēnei mahi me tēnei tuhinga





## 1.1. The context and purpose of this work

One of Te Waihanga's functions is, at least every five years, to provide the Minister for Infrastructure with a strategy report which, among other things, identifies the priorities for infrastructure for the next 30 years (section 13(1)(b), New Zealand Infrastructure Commission/Te Waihanga Act).

The first of these strategies, Rautaki Hanganga o Aotearoa | the New Zealand Infrastructure Strategy 2022-2052 (New Zealand Infrastructure Commission, 2022) (Te Rautaki) was released in 2022. Te Rautaki acknowledges that to achieve a thriving New Zealand, and lift the performance of our infrastructure system, we need to:

- “strengthen partnerships with and unlock opportunities for Māori” (2022, p. 10)
- “recognise and respect Te Tiriti o Waitangi and look for opportunities to build strong, meaningful and enduring relationships with Māori” (2022, p. 39).

Te Rautaki prioritises three action areas in relation to these matters (2022, p. 42):

- “Creating stronger partnerships with Māori across infrastructure planning and delivery.”
- “Unlocking opportunities for Māori across the infrastructure system.”
- “Incorporating mātauranga Māori into infrastructure design, planning and delivery.”

It contains three recommendations regarding how to achieve these things (each with sub-recommendations). The first sub-recommendation (1 a.) is:

*“Undertake a ‘State of Play’ of current Māori engagement activity for infrastructure to help inform and educate readers on how infrastructure providers can engage and work with Māori in a way that works for Māori and infrastructure providers.”*

In September 2022 the Government released its response to Te Rautaki (New Zealand Government, 2022). In relation to the recommendations around strengthening partnerships with and opportunities for Māori, the Government (New Zealand Government, 2022, pp. 9–11):

- supported the proposal to undertake the State of Play work
- noted that it supported other recommendations in principle and would consider implementing them (in several cases following the completion of the State of Play).

In May 2023 the Government released He Whakakaupapa mō Te Hanganga o Aotearoa | the Infrastructure Action Plan which sets out “what the Government is doing, and will do, to address the challenges and opportunities” set out in Te Rautaki (New Zealand Government, 2023, p. 2). In relation to this State of Play work, the Action Plan states (2023, p. 11):

*“Te Waihanga will build a State of Play of the ways the government engages with iwi and Māori on infrastructure projects. This will enable better transparency and coordination across the system so we can take a more strategic approach. Te Waihanga plans to release this State of Play in 2024.”*

## 1.2. Te Tiriti o Waitangi and the principle of Partnership

Other than brief contact between a Māori group and the Dutch in 1642, contact between Māori and Europeans was established when an English ship, captained by James Cook, landed near Gisborne in 1769. Until 1825 the number of non-Māori who lived in New Zealand was very low. From the late 1820s the numbers began to rise – to approximately 2,000 in 1839 (Phillips, n.d.).

On 28 October 1835 a gathering of 34 northern Māori rangatira signed He Whakaputanga o Rangatiratanga o Nu Tireni | the Declaration of Independence of the United Tribes of New Zealand. Under the Declaration the tribes of New Zealand to the north of Thames declared the authority and leadership of their country under the title Te Wakaminenga o ngā Hapū o Nu Tireni | the Confederation of Tribes of New Zealand. They stated that sovereignty/kingship and the mana from the land of that Confederation belonged solely to the true leaders of that gathering and they would not allow any other group to frame laws or establish governorship on the lands in the Confederation unless they were people appointed by them to carry out laws they had enacted in assembly. By 1839 there were 18 further signatories to the Declaration, including rangatira from Hawke's Bay and the Waikato (Te Rua Mahara o te Kawanatanga | Archives New Zealand, 2022).

On 30 January 1840 Captain William Hobson of the British Royal Navy published a proclamation in the church in Kororāreka which announced that the Queen of Great Britain had issued documents extending the boundaries of the Colony of New South Wales to include any part of New Zealand which the Crown might acquire sovereignty of. On 5 February 1840 Captain Hobson met with a large number rangatira at Waitangi. At that hui English and Te Reo Māori versions of a proposed treaty were read aloud and a number of rangatira spoke. On the following day the rangatira asked to meet Captain Hobson (New Zealand Gazette and Wellington Spectator, 1840, p. 3) and at that meeting over 40 of the rangatira present signed Te Tiriti (Te Puni Kokiri, 2001). Similar gatherings were held elsewhere in New Zealand over the following seven months and in total the Māori text was signed by over 500 rangatira (although

some chiefs refused to sign and some were never reached) (Te Puni Kokiri, 2001).

A 1989 English translation of the Te Reo Māori version of Te Tiriti, by Sir Hugh Kawharu, records Te Tiriti as providing that (Waitangi Tribunal, 2016):

- the chiefs of the Confederation and all the chiefs who had not joined the Confederation gave absolutely to the Queen of England for ever the complete government over their land (Article One)
- the Queen agreed to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship (over their lands, villages and all their treasures) (Article Two)<sup>1</sup>
- concerning the Government of the Queen, the Queen would protect all the ordinary people of New Zealand and give them the same rights and duties of citizenship as the people of England (Article Three).

The New Zealand Cabinet Manual refers to Te Tiriti as a founding document of government in New Zealand and one of the major sources of the New Zealand constitution. It states (Cabinet Office, 2023, p. 2):

*“The Treaty of Waitangi, ... may indicate limits in our polity on majority decision-making. The law sometimes accords a special recognition to Māori rights and interests, particularly those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi, of two parties negotiating and agreeing with one another, is appropriate. Policy and procedure in this area continues to evolve.”*

Differences between the English and Te Reo Māori texts and the need to apply Te Tiriti to contemporary circumstances has led to a number of pieces of legislation referring to the “principles of” Te Tiriti (Te Puni Kokiri, 2001). A number of decisions of Courts and the Waitangi Tribunal have elaborated on what the principles of Te Tiriti are.

The principles of Te Tiriti identified by the Courts include the principle of partnership, which includes a duty to act reasonably, honourably and in good faith. The Government's stated intent is that engagement with Māori and the Māori Crown relationship will be guided by identified values, including the value of 'partnership' (Te Arawhiti, n.d.).

### 1.3. What this Literature Review does and does not do

This Literature Review is the first published output from the State of Play work Te Waihanga is undertaking.

It provides an overview of previously published work relating to Māori engagement in infrastructure (including articles published in academic journals, conference papers, theses, research, and reports published by government entities and other organisations, and published opinion pieces).

In Appendix B, it also includes an overview of previously published work relating to engagement in infrastructure by Indigenous peoples in the United States of America, Canada, and Australia. In Appendix C it identifies many, but not all, of the current statutory and other legal requirements relevant to infrastructure providers' engagement with Māori groups at different stages of projects.

This Literature Review describes the opinions set out in those published documents. This means that:

- those opinions should not be taken to be the opinions of Te Waihanga or the New Zealand Government
- we are not consulting on the information contained in this document - although we are happy to receive any thoughts or feedback.

The literature referenced in the review also reflects the point in time at which it was written and (where relevant) the point at time at which any research was undertaken. The situation in relation to the issues discussed may be different in 2023 than when the literature was researched or written. The situation may be significantly different again within the next few years, particularly as more Te Tiriti settlements occur, relatively new post-settlement Māori groups

become more established in how they operate and what they want to achieve, and new statutory mechanisms begin to operate.

### 1.4. Te Ao Māori Perspectives and Te Reo Māori terms

This literature review does not analyse literature on Te Ao Māori perspectives, including mātauranga Māori, relevant to Māori engagement in infrastructure. There is an increasing body of literature on those perspectives. A potentially useful place to start relevant to infrastructure is the Rout et al. article on a Māori approach to environmental economics (2021).

Appendix A includes some English translations of Te Reo Māori terms. We acknowledge that:

- providing an English translation of a Te Reo Māori term cannot capture the full depth of meaning of that term
- different Māori groups may use some terms in different ways and there are differences in Te Reo Māori across different parts of New Zealand.

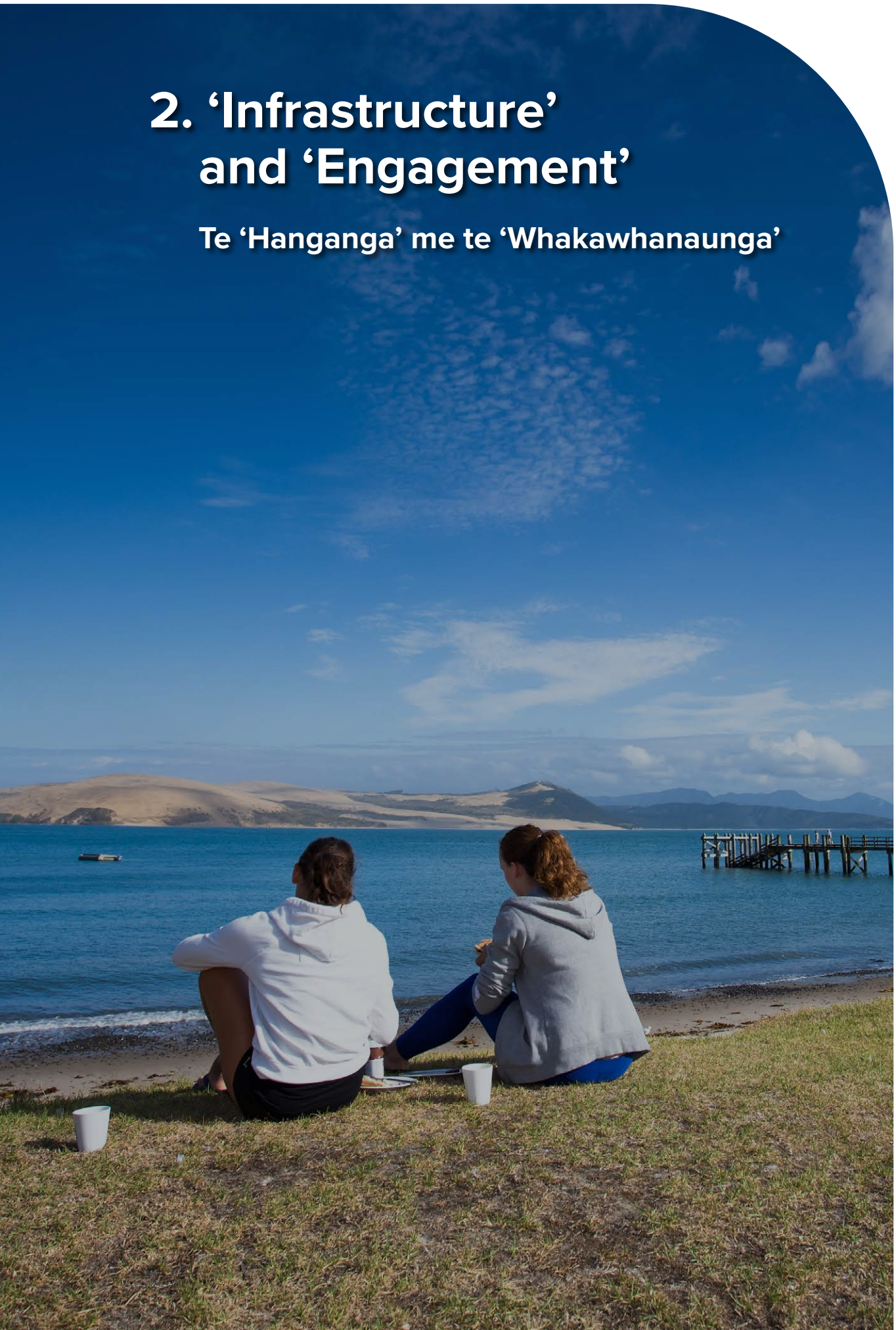
### 1.5. What will happen next?

We are currently in the process of undertaking our own research into Māori engagement in infrastructure, including research aimed at addressing some of the gaps identified in the existing literature. We will also look for opportunities to release the findings of our research in stages. We are aiming to release all our findings by March 2024. Our reports will indicate areas where we consider that further research is necessary.



## 2. 'Infrastructure' and 'Engagement'

Te 'Hanganga' me te 'Whakawhanaunga'



## 2.1. What is ‘infrastructure’?

‘Infrastructure’ is often used to mean built physical structures - horizontal physical networks (such as roads, rail, pipelines, power lines, and telecommunications networks) and buildings (for example, hospitals, schools, and prisons).<sup>2</sup> ‘Infrastructure’ can also be described as the systems and services that a country or organisation uses in order to work effectively (Cambridge Advanced Learners’ Dictionary and Thesaurus, 2023).

There is increasing recognition of the need to think more broadly in relation to infrastructure - including the adoption of concepts such as ‘non-built solutions’ and ‘green infrastructure’ which look to use the natural environment’s functions in infrastructure (Natuhara, 2018).<sup>3</sup>

Indigenous peoples may view infrastructure holistically as including:

- both natural and built elements – a river into which stormwater flows being an integral part of a stormwater system (personal communication, 1 May 2023)
- ways of knowing aligned to local ecosystems (Morgan et al., 2022)
- relations between people and non-human things (Barney, 2021).

There is increasing acknowledgement of the benefits of learning from traditional, regional knowledge and practices (including Indigenous knowledge and practices) in the planning and development of infrastructure (Natuhara, 2018).

New Zealand can be described as a ‘settler nation’ – a country with a relatively recent history of significant numbers of foreigners permanently settling land on which Indigenous communities were living. In settler nations the development of physical infrastructure was an instrument of the colonisation that occurred. For example, in promoting the development of the New Zealand rail network in the 1870s the Colonial Treasurer, Julius Vogel, argued that the works would open-up previously closed or isolated, often Māori-owned, land for settlement and provide employment for new immigrants (Cleaver & Sarich, 2008).

As discussed below, one of the themes in the literature is that an infrastructure provider needs to seek to understand and acknowledge the historic experiences of infrastructure of a Māori group they are seeking to engage with, many of which may be negative. However, there is recognition in the literature that investing in infrastructure (including built infrastructure) in the right ways may be instrumental in transitioning to a positive de-colonised future (LaDuke & Cowen, 2020; Quinn, 2017).

## 2.2. What is ‘engagement’?

There are two aspects to ‘engagement’ as used in this research:

- Māori engagement on infrastructure proposals initiated by others
- wider involvement of Māori in infrastructure.

Appendix B discusses Indigenous peoples’ engagement in infrastructure in both senses in three other ‘settler nations’:

- the United States of America
- Canada
- Australia..

### ‘Engagement’ in the context of Māori engagement on infrastructure proposals initiated by others

By ‘infrastructure proposals’ we mean not only proposals for the development of new infrastructure assets but proposals relating to the upgrading, alteration, adaptation and re-consenting of existing infrastructure assets and proposals to adopt non-built or partially non-built solutions

In 2018 Te Arawhiti | the Office for Māori Crown Relations, developed a framework for Crown engagement with Māori (Te Arawhiti, 2018a). The guidelines supporting that framework describe ‘engagement’ as “the range of methods and activities that are used to interact with Māori” (Te Arawhiti, 2018b, p. 6).

Te Arawhiti's engagement framework identifies different levels of engagement from 'inform' to 'empower'. Te Arawhiti describes that spectrum of engagement methods in the following way (Te Arawhiti, 2018b):

- **Inform** – “The Crown will keep Māori informed about what is happening. Māori will be provided with balanced and objective information to assist them to understand the problem, alternatives, opportunities and/or solutions.”
- **Consult** – “The Crown will seek Māori feedback on drafts and proposals. The Crown will ultimately decide. The Crown will keep Māori informed, listen, and acknowledge concerns and aspirations, and provide feedback on how their input influenced the decision.”
- **Collaborate** – “The Crown and Māori will work together to determine the issues/problems and develop solutions together that are reflected in proposals. Each party retains its own decision-making ability.”
- **Partner/Co-design** – “The Crown and Māori will partner to determine the issue/problem, to design the process and develop solutions. The Crown and Māori will make joint decisions.”
- **Empower** – “Māori decide and the Crown assists in implementing the decision made by Māori.”

This spectrum aligns with other engagement frameworks, including the International Association for Public Participation IAP2 Spectrum of Public Participation (International Association for Public Participation, n.d.).

The Courts have found that (Te Puni Kokiri, 2001):

- it is inherent in the Crown's obligation to act in good faith as a Te Tiriti partner that it is obliged to make informed decisions on matters affecting the interests of Māori
- this obligation will in some circumstances require the Crown to consult with Māori, depending on the importance of the issue in question but the onus on the Crown to be sufficiently informed in its decision-making on matters affecting its Te Tiriti partner does not extend to an absolute duty to consult.

There are numerous statutory and other legal requirements relevant to infrastructure providers' engagement with Māori groups at different stages of projects. Many of these are described in Appendix C. As shown in Appendix C that legislation uses multiple different models for engaging with Māori, with a range of governance

and consultation mechanisms and a range of methods for identifying or appointing the individuals or groups to be engaged with. The legislation also uses multiple different formulations of the basis on which Māori groups are being engaged with, for example:

- to not act inconsistently with, or take into account, the principles of Te Tiriti o Waitangi
- to enable consideration of Māori historical, cultural, or spiritual interests
- to provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori
- to give effect to Te Tiriti o Waitangi
- to recognise that whenua Māori is taonga tuku iho of special significance to Māori.

*(Appendix C does not address the different arrangements for iwi participation under Te Tiriti o Waitangi settlement legislation. A discussion of that legislation is currently intended to be included in a later State of Play report. It also does not discuss obligations entities which are infrastructure providers may have to engage with Māori groups when they are acting in other capacities, for example local authorities obligations to engage with Māori groups when exercising their functions and powers as planning or consent authorities or enforcement agencies.)*

For some types of infrastructure, such as State highways, there are multiple requirements to engage with Māori at different stages in a project (from funding through to legalisation) under a number of different statutes. For other types of infrastructure, such as the National Grid, there is no specific statutory obligation to engage with Māori (although that does not mean that Transpower New Zealand Limited, the owner and manager of the National Grid, does not engage with Māori in planning and developing projects).

## What is required when someone 'consults'?

Several of the statutory requirements are obligations to “consult” with particular groups.

The New Zealand Courts have made several decisions regarding what an obligation to 'consult' does and does not require.<sup>4</sup>

- for consultation to be meaningful the person consulted with must have sufficient information to enable them to make intelligent and useful responses



- the person undertaking the consultation must not have already finally made up their mind about what they are going to do (although they can have a currently preferred option in mind)
- the person undertaking the consultation must:
  - provide a meaningful opportunity to the people they are consulting with to identify and advocate those people's arguments in relation to the proposal
  - genuinely listen to, and consider, what those people are saying
- 'consultation' does not require agreement to be reached or even require negotiation towards an agreement to have taken place.

Therefore, there are significant limits on what is needed for someone to meet a requirement to 'consult'.

## What does 'co-design' involve?

As noted above, Te Arawhiti describes 'co-design' as partnering to determine what the issue/problem is, to design the process and develop solutions.

A proposed definition of Indigenous 'co-design' developed in the context of water infrastructure is (Bradford et al., 2018; Vogel, 2018):

*"a process where local Indigenous people, their social, cultural, spiritual, and other values associated with water, and engineers and their values associated with water come together in respectful, reflexive, and equally represented ways to co-create and implement a shared process to design, test, and build infrastructure that sustains local environments, holistic health, communities, and cosmologies."*

Other terms equivalent to 'co-design' used in the literature are 'co-production' and 'collaborative planning'.

## What could 'empowerment' look like?

The New Zealand health sector is any area in which active consideration is being given to an empowerment-type approach.

Te Aka Whai Ora (Department of Prime Minister and Cabinet, 2022, p. 16) has stated that best practice for health infrastructure projects would include:

*"A system that supports and encourages innovative iwi-led infrastructure solutions that build towards a future where Māori*

*increasingly lead and deliver their whānau, hapū and iwi aspirations in their communities and regions."*

## Māori principles of engagement

New Zealand academics Tyron Love (Te Atiawa, Ngāti Ruanui and Taranaki) and Elspeth Tilley (2014) have argued that Māori principles of engagement and the communication, negotiation and relationship-building techniques that Māori have developed over time should contribute to wider thinking about what public engagement is. They identify a series of core normative values for Māori approaches to engagement, which can be summarised as (Love & Tilley, 2014):

- all interested groups are considered and approached as sovereign entities
- all interested groups are involved in co-negotiating the terms of, objectives for, and measures of the proposed engagement
- practical turn-taking and spatial mechanisms ensure equal share of voice and freedom of expression
- engagement is conceptualised as a set of reciprocal relationship obligations alike to kinship, in which the good of the collective has priority above individual (personal or organisational) agendas.

## Wider Māori involvement in infrastructure

Wider Māori involvement in infrastructure includes:

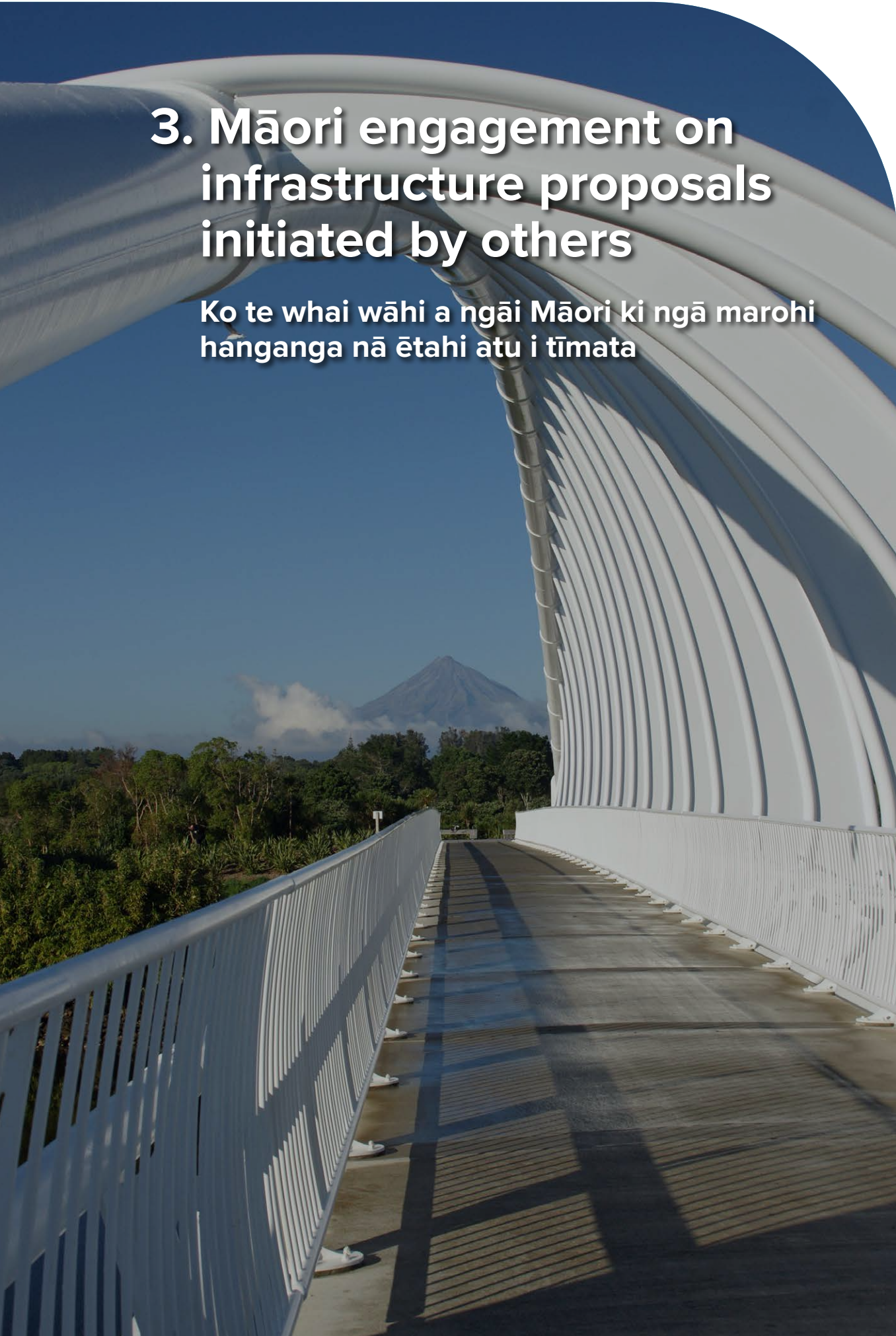
- ownership (of the land on which infrastructure is located, the infrastructure itself or shares or other rights in infrastructure providers)
- other investment in infrastructure (including funding and financing)
- direct participation by individuals and businesses in the infrastructure workforce
- other direct participation in the development or ongoing management of infrastructure either solely by a Māori group or in collaboration with other entities.

The final State of Play report will draw on research currently being undertaken relating to Māori businesses and individuals in the infrastructure sector (as well as including the outcomes of Te Waihanga research into the extent of Māori ownership of and investment in infrastructure).



### 3. Māori engagement on infrastructure proposals initiated by others

Ko te whai wāhi a ngāi Māori ki ngā marohi  
hānganga nā ētahi atu i tīmata



The literature relevant to Māori engagement on infrastructure projects initiated by others falls into three broad categories:

- the outcomes of recent research relating to Māori engagement on government initiatives
- recent discussions relevant to the challenges Māori face in seeking to engage on infrastructure proposals initiated by others
- guidelines for, and published think pieces on, engaging with Māori.

### 3.1. Outcomes of research relating to Māori engagement on government initiatives

There has been a range of recent research relating to Māori engagement on government initiatives.

The feedback received during the development of Te Rautaki shows that there is division of opinion within the wider New Zealand community as to the need to increase:

- collaboration with Māori in relation to infrastructure
- increase Māori participation and leadership across the infrastructure system.

There are some findings that were common to two or more of the pieces of research.

- Building relationships (including having regular contact) with a Māori group is a key driver of good engagement and doing this takes time and effort.
- There is variability in the engagement between government and Māori that is currently occurring. In practice there is a need for government officials to be adaptable or flexible in how they engage to meet a particular Māori group's needs and aspirations but also concerns that there should be greater co-ordination and less inefficiency in how government engagement occurs.
- It is important to understand the history, tikanga and aspirations of a Māori group you engage with.

#### 3.1.1. Feedback from the development of Rautaki Hanganga o Aotearoa | the New Zealand Infrastructure Strategy

As part of the development of Te Rautaki, Te Waihangā published, and sought submissions on, a strategy consultation document. Under the consultation process people could either provide individual written submissions or complete an online submission form. Copies of the submissions and a link to a summary of the online submission form responses are available at <https://www.tewaihang.govt.nz/strategy/how-we-developed-the-strategy/>.

Research and engagement consultancy, PublicVoice Limited, prepared a report summarising all submissions received (Bothwell et al., 2021).

The strategy consultation document included three questions focused on Māori participation in infrastructure. Two of those questions were:

- Q15 - What steps can be taken to improve collaboration with Māori through the process of planning, designing, and delivering infrastructure?
- Q17 - What actions should be taken to increase the participation and leadership of Māori across the infrastructure system?

*(The submissions received on the other question relating to Māori participation in infrastructure, Q16, are discussed in the section of this literature review relating to wider Māori participation in infrastructure.)*

The frequency of different types of comments received in response to Q15 and Q17 as categorised by PublicVoice Limited (Bothwell et al., 2021) are shown in Figures 1 and 2 below respectively.

In relation to Q15:

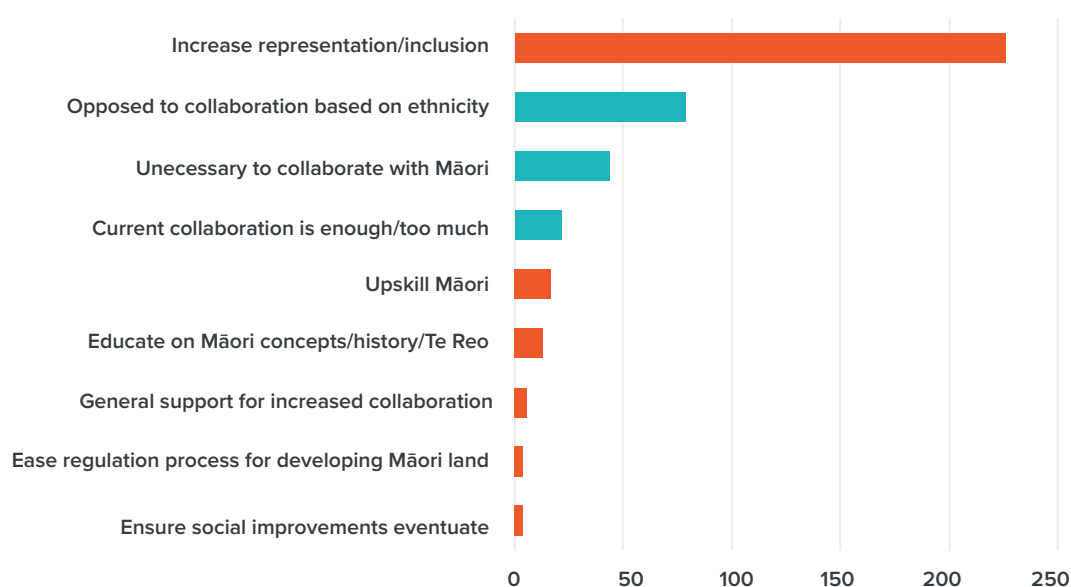
- two hundred and seventy four submitter comments indicated the need for more representation and/or inclusion of Māori in the planning, design, and delivery of infrastructure or mentioned steps to improve collaboration
- one hundred and forty-nine submitter comments expressed opposition to increasing collaboration with Māori

- PublicVoice Limited categorised 79 of the comments expressing opposition to increased collaboration as not being in favour of collaboration based on ethnicity.

PublicVoice Limited broke the comments seeking increased representation/inclusion of Māori down into subcategories as follows:

- more meaningful consultation/partnership with Māori (nsc=85)
- co-governance planning with Māori (nsc=62)
- steer governance culture towards inclusivity/a Māori worldview (nsc=30)
- give more control/representation to Māori (nsc=14)
- align decision-making with Te Tiriti o Waitangi (nsc=11)
- incentivise/remunerate Māori for participation (nsc=10)
- improved/accessible communication (nsc=5)
- ensure the process is efficient and cost-effective (nsc=4)
- consult on marae (nsc=4).

**Figure 1:** Frequency of types of comment on Q15 in the New Zealand Infrastructure Strategy Consultation Document

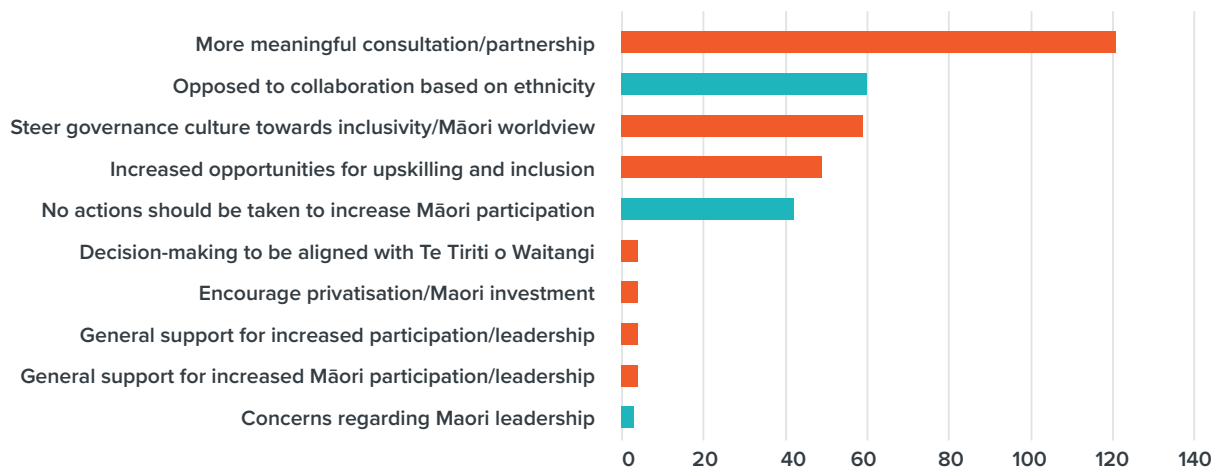


Submitter comments supportive of improved collaboration are shown **orange**, comments opposed are shown **blue**.

In relation to Q17:

- One hundred and five submitter comments opposed action being taken to increase Māori participation and leadership across the infrastructure system – PublicVoice Limited categorised 60 of those as opposing participation or leadership based on ethnicity
- Two hundred and forty four submitter comments supported increasing Māori participation/ leadership. Of those one hundred and twenty-one submitter comments sought more meaningful consultation/partnership with Māori – with 32 of those seeking for Māori to be incentivised/ remunerated for their advice and participation – and fifty-nine submissions sought for governance culture to be steered towards inclusivity/a Māori world view – with 26 of those seeking co-governance/planning with Māori.

**Figure 2:** Frequency of types of comment on Q17 in the New Zealand Infrastructure Strategy consultation document



Submitter comments supporting increased Māori participation/leadership are shown **orange**, comments opposed are shown **blue**.

### 3.1.2. Statistics New Zealand 2015 research

In 2015, as part of its review of the statistical standard for iwi, Statistics New Zealand interviewed 13 government agencies about their engagement with Māori entities. It found that (Statistics New Zealand, 2015):

- there was “vast variability” in the engagement that was occurring and a “vast spectrum” of Māori entities being engaged with (Statistics New Zealand, 2015, p. 5)
- government agencies were flexible about the type of Māori entities they engaged with and pragmatic in their approach to Māori engagement, reflecting a need to be practical and adaptable in their many and varied engagements with Māori entities
- in deciding who to engage with government agencies took into account which entities “are more influential and can, therefore, best help deliver the results or objectives being pursued by the agency” (Statistics New Zealand, 2015, p. 5)
- a more coordinated approach to engagement was needed to ensure consistency across agencies of both the methods of engagement and messaging.

Statistics New Zealand noted that (2015, p. 9):

- there were concerns with how the collection of iwi statistics had affected Māori, particularly around how the classification may be seen as determining who is, and who is not, an iwi
- concerns had also been raised as to whether iwi were still the most appropriate and suitable grouping/entity for classification and engagement.

While some agencies mentioned urban Māori authorities as an important stakeholder, none of the people interviewed said that they engaged with urban Māori authorities.

In relation to engagement approaches taken by Māori entities Statistics New Zealand found the following.

- There was a move from adversarial to stronger working relationships between government and Māori entities focused on mutual benefit and this was especially evident with settled Māori claimant groups that had established formal relationships with Ministers and agencies.
- There was a trend for Māori entities to consolidate and amalgamate (in relation to business matters) and collaborate with other Māori entities (for example, amalgamation into collectives for the purposes of Te Tiriti settlements) and this allowed those entities to realise efficiencies and add influence.
- Māori entities were undertaking more direct engagement with senior government officials and Ministers, and this was providing them with more political influence.
- The Iwi Chairs Forum, and iwi leaders groups established through that forum, were becoming increasingly significant and prevalent stakeholders in engagement between the Crown and Māori and were seen by government officials as a good forum for initial high-level engagement on policy proposals (although not a replacement for broader engagement).

A number of the agencies spoken to commented on “the need to increase Māori capability to use and understand statistical information” (Statistics New Zealand, 2015, p. 7).



### 3.1.3. Research on Waka Kotahi relationship with Māori

There have been two recent pieces of research relating to engagement by Waka Kotahi | the New Zealand Transport Agency with Māori.

- In 2021 Tonkin + Taylor undertook research into Māori aspirations for the transport sector which included interviews with Waka Kotahi representatives (Sweeney et al., 2022).<sup>5</sup>
- In 2022 Maarama Consulting undertook research on the relationship Waka Kotahi has with Māori (Maarama Consulting, 2022).

#### Tonkin + Taylor research - 2021

In the literature review section of their report Tonkin + Taylor note that undertaking inclusive transport planning with Māori involves “not assuming what Māori want, or providing a single solution for all Māori” (Sweeney et al., 2022, p. 26).

Staff interviewed during the Tonkin + Taylor research observed that there was an increasing number of examples of Waka Kotahi projects where Māori participated in, or engaged or partnered on, the project. However (Sweeney et al., 2022, p. 28):<sup>6</sup>

*“... it was noted that these successes were heavily reliant on certain individuals, who were able to negotiate and navigate their way around institutional constraints to be able to ‘make things happen’. Respondents reflected that if institutional constraints across the sector were interrogated and improved, these types of successes may be more common, and more consistently applied, for example, through better integration between business management processes, and policy and projects, to establish clear pathways for consideration of funding and investment requirements as early as possible.”*

Respondents commented that investment (in terms of people-time and funding) to build relationships at the early stages of a project were often under-estimated in preparing business cases. Building relationships early in a project was seen as requiring significant effort (particularly when working with project uncertainty or commercially sensitive issues) but that upfront investment established a solid working relationship which endured over the project and made tough conversations easier.

Respondents saw the next step up from this ‘partnership’ approach as being co-governance, involving Māori at the project governance level.

The Waka Kotahi representatives noted that the relationships between different government agencies which engaged with Māori were not well understood by either Māori or non-Māori.

They referred to a trend of Māori aspirations in relation to Waka Kotahi projects moving from an environmental focus to a focus on leveraging those projects to facilitate longer-term economic interests, for example upskilling Māori group members so they could fill transport project roles. One respondent noted that Māori are becoming increasingly aware of the economic value of their knowledge, oral histories, and traditions and wish to protect the intellectual property that that knowledge represents.

They noted the value of educating Waka Kotahi staff on matters such as pronunciation, relevant kupu and Māori history. One respondent considered that that education should also address contemporary Māori interests, such as building capability.

All respondents noted issues with Māori internal resourcing and funding to engage (particularly when there were competing initiatives such as health initiatives that a Māori group was being asked to engage on). Some iwi and hapū organisations were formed comparatively recently and, therefore, were being asked to engage on a project when their aspirations and priorities were still being developed. Many iwi representatives have full time jobs outside their Māori organisation commitments.

Respondents referred to issues in knowing who to engage with, particularly in areas where there were multiple iwi and hapū groups with overlapping and sometimes competing interests, and mandated and non-mandated groups speaking on behalf of iwi (Sweeney et al., 2022, pp. 31–32).

*“When engaging, respondents noted that questions often arose along the lines of: ‘Is this the right iwi? Is the representative representing all hapū and whānau? What other iwi groups are missing?’*

...

*It was noted that a partnership relationship was not appropriate or necessary in every instance; ... where mana whenua status of an area was challenged, partnership expectations were greater.”*

All respondents identified that engagement with Māori groups was constantly underpinned by mistrust from those groups due to past dealings with Crown agencies, with Māori groups not distinguishing between different Crown agencies in that respect.

## Maarama Consulting research - 2022

Maarama Consulting's 2022 research found that the key drivers to a trusted enduring partnership between Waka Kotahi and Māori were Waka Kotahi personnel:

- being genuine in their intent
- acting with integrity
- being consistent in how they engaged with Māori
- delivering what they said they would
- engaging early, being proactive, and being open and transparent
- being flexible in their approach
- solving problems and issues quickly when they arose
- learning from their experiences
- being committed to a long-term relationship
- working in an inclusive and collaborative manner
- being culturally aware and competent
- looking to understand and meet people's needs as Māori
- seeing Māori as an equal partner
- providing sufficient time, funding, and resource to help foster the relationship
- delivering effective outcomes for Māori.

Māori saw all these factors as important but, when asked, were most likely to say that the most important was for Waka Kotahi to see Māori as an equal partner.

The research found that there was a positive correlation between a Māori group's perceived strength of its relationship with Waka Kotahi and:

- Waka Kotahi having last had contact with the respondent in the last 12 months
- Waka Kotahi dealing with the respondent monthly or more often
- the respondent being satisfied that the level of contact with Waka Kotahi was about right.

## 3.1.4. Analysis as part of a deep dive into the Mental Health Infrastructure Programme

In 2022 Te Waihangā commissioned independent experts to undertake a deep dive review into each of the 16 projects on the New Zealand Mental Health Infrastructure Programme.

As part of that project Te Aka Whai Ora | the Māori Health Authority assessed reporting by the project teams on Māori involvement in those projects "and found a variable level of partnership and engagement across projects and a lack of social procurement adopted for projects" (Department of Prime Minister and Cabinet, 2022, Appendix B, page 4).

Most projects reported that Māori were active members of the project governance structures, such as project steering boards and project control groups, as well as being members of user groups. However, Te Aka Whai Ora identified that there were advisory and decision-making inconsistencies. There was also a lack of clarity as to why Māori were members of those groups. Was it representation, partnership or supporting mana motuhake? Also, there was no assessment of what the impact that Māori membership had.

The majority of projects reported that Māori had been engaged in the design process and building the cultural narrative for the project. One project noted that they had agreed a collaborative decision-making framework with mana whenua for cultural narrative work.

Te Aka Whai Ora commented that engagement was possibly more focused when there were existing groups or people already engaged and ready to contribute – but the impact of engagement fatigue and hearing similar voices through the processes was unclear. Te Aka Whai Ora also identified that there might be some duplication or inefficiency in how engagement was undertaken.

## 3.1.5. Office of Te Tumuaki o te Mana Arotake | Controller and Auditor-General research on Māori perspectives on public accountability

Also in 2022, the Office of Te Tumuaki o te Mana Arotake commissioned Haemata Tapui Limited to undertake research into Māori perspectives on public accountability (Haemata Limited, 2022).

Research participants expressed the following views in relation to government engagement with Māori.

- Māori want to engage with people in the public sector rather than engaging with a system/organization.
- If the Crown utilized tikanga and Māori values to guide engagement and build relationships, trust and confidence would improve. Tikanga concepts referred to included (Haemata Limited, 2022; Te Aka Māori Dictionary, n.d.):
  - tika – truth, correctness, directness, justice, fairness, righteousness, right
  - pono – truth, validity
  - aroha – affection, sympathy, charity, compassion, love, empathy
  - mana - prestige, authority, control, power, influence, status, spiritual power
  - whanaungatanga – relationship, kinship, sense of family connection – a relationship through shared experiences and working together which provides people with a sense of belonging
  - kotahitanga – unity, togetherness, solidarity, collective action
  - manaakitanga – hospitality, kindness, generosity, support – the process of showing respect, generosity, and care for others.
- It is important that the Crown does its ‘homework’ before engaging with Māori to understand the history and context within which any engagement is taking place. Too often, public servants seek to engage with Māori (as individuals or as a collective) in ignorance of tikanga, history, iwi authority, mana whenua, and connections that may impact on the development of a relationship. In a tikanga-based trust-enhancing relationship these things are ‘givens’. “Ultimately, trust is lost when the public sector engages with Māori without acknowledging the history and lived-experience that has impacted on where we are today – a person’s whānau, hapū, iwi and any previous challenging relationships with the Crown” (Haemata Limited, 2022, p. 14).
- Te Arawhiti has been purposefully named to depict the relationship between Māori and the Crown as a bridge. The name recognises the need for the public sector to build its capability to step onto the bridge in order to build a relationship with Māori. What that requires is a

deep understanding that Māori are already on the bridge and each time they seek to engage with the public sector they have crossed over that bridge. In general, public agencies have yet to develop their collective capability as a sector to step on to the bridge. This type of understanding, along with a commitment to address the current imbalance of power, is needed if engaging with public entities is to become easier for Māori.

In relation to Māori who had roles in the public sector, the participants identified that multiple accountabilities - accountability to their whānau, hapū and iwi versus accountability to their employer - were an ongoing challenge.

### 3.2. Recent discussion relevant to the challenges Māori face in seeking to engage on infrastructure proposals initiated by others

The literature has identified the following challenges Māori group’s face when seeking to engage on infrastructure proposals initiated by others:

- capacity and costs issues
- challenges (around matters such as mandate) that particularly arise when Māori groups are engaged in co-development or co-design
- tensions between the role of iwi and the role of hapū
- lack of clarity regarding if, when or how to engage with mātāwaka (people who identify as Māori/part Māori who live outside the rohe I takiwā of their iwi/hapū or do not know who their iwi or hapū is )
- issues relating to changing leadership within Māori groups
- deficits in Māori groups’ digital and data infrastructure hampering efforts by Māori groups to understand the needs and aspirations of their members.

### 3.2.1. Capacity and cost issues

Sinner and Harmsworth (Te Arawa, Ngāti Tūwharetoa, Ngāti Raukawa) have stated (2015, p. 9):

*“Within every region and catchment in New Zealand, iwi and hapū are contending with a large number of overlapping issues ranging from biodiversity strategies and freshwater management plans to coastal development and management of Māori commercial enterprises. [...] There will be times when iwi and hapū are not ready to engage with councils or participate in collaborative planning because of these other conflicting issues. Capacity and capability issues also arise for iwi and hapū—there is a limit to how many issues and processes to which they can contribute at any one time.”*

In his doctoral thesis Te Whata (Ngāti Rangī, Ngāti Moerewa, Ngāti Pākehā) (2020) examined the experiences of the several interconnected hapū of the Tautoro valley in Northland in seeking to exercise their role as kaitiaki of land and water. He quotes Wipari Hewood, the Chairman of a combined hapū group, as saying:

*“... as whānau, hapū, kaitiaki our financial capacities to set up our futures are extremely limited, its basic survival for the most part. They [whānau] want quality lives and the relationships with their taonga [wai/whenua] to be recognised by government on equal terms. It's hard to keep up on all the things going in our area when you've got full time employment ... things like resource consents that have real impacts for our mana whenua. It's a difficult situation to be in when the rug was pulled out from under us in the past so it's even more difficult to gain some control in the situation when there's rapid transformations coming from industry rushing in for water and applying to council for extraction in places Tautoro. Right now, we're constantly on the back foot but that doesn't mean we give up and say to councils or the companies go for it.”*

In its Stage 2 Report on the National Freshwater and Geothermal Resource Claim, the Waitangi Tribunal commented that lack of resources has inhibited Māori participation in planning and project consenting processes under the soon to be repealed Resource Management Act 1991 (RMA) in several ways (2019, p. 95).

- It has made their participation less effective because they lack the capacity to employ technical advisors and legal counsel.
- It has placed an enormous burden on iwi resource management units (where they exist) or unpaid volunteers.
- It has often forced Māori to ‘piggy-back’ on the appeals or submissions of better-resourced NGOs or community groups, whose interests were sometimes aligned with theirs but who do not and cannot represent the full range of Māori values and interests.
- It has prevented fully effective participation in joint planning committees and other participation arrangements.
- It has created a barrier to transfers of functions and powers from local authorities to Māori groups and joint management agreements.
- It has sometimes reduced the quality and effectiveness of management plans prepared by iwi.
- It has sometimes prevented Māori from participating in RMA processes at all.

The Tribunal noted a suggestion made to the Ministry for the Environment | Manatū Mō Te Taiao that central and local government should provide greater resources to allow Māori organisations to participate effectively (perhaps through direct resourcing or shared funding with local authorities). It noted that guidance developed by central Government officials and an iwi advisory group when the Resource Legislation Amendment Act was passed in 2017 recommended that iwi and local authorities could consider agreeing on a funding arrangement such as local authorities paying iwi for the time spent on assessing consent applications. At that time of the Waitangi Tribunal's report, 42% of local authorities had a budgetary commitment to assist Māori participation in RMA consenting processes.

The Tribunal noted that while the Environmental Legal Assistance Fund is available to assist funding for RMA appeals claimant counsel had described its contribution to Māori for litigation as “pitiful” and evidence suggested that it was mostly pro bono (uncharged for) legal work which enabled Māori to pursue Environment Court appeals (2019, p. 340).



In 2022 KPMG released Māui Rau a report regarding the evolution of post Te Tiriti settlement governance entities (PSGEs). Māui Rau was informed by discussion with almost 30 current and former tribal governors and managers, as well as the insights of authors described as having “more than 20 years of lived experience working, serving and living within Māori communities” (KPMG New Zealand, 2022, p. 5). That report states (2022, p. 17):

*“... what has happened is that the majority of the time, effort and energy has gone into the short-term needs of the people (as expressed directly by them or their marae or hapū representatives) and facing the government to either protect rights and interests, lobby and advocate for their people or respond to various multiple government agencies who also have their own agendas. This creates competition and pressure on PSGE resources as their agencies work to meet government Te Tiriti o Waitangi partner obligations.*

*In all cases, demand has exceeded the capacity to deliver. Responding to the needs of the people and those of the government tends to be reactive, short-term and resource intensive. This leaves minimal capacity, resources, and energy to focus on those things that make the most enduring and transformational positive change in the lives of whānau.”*

The KPMG report also notes the risk of burnout of key staff at Māori organisations.

### 3.2.2. Challenges that particularly arise when Māori groups are engaged in co-development or co-design

In June 2023 the Powerdigm collective released a report on the outcomes of research supported by the JR McKenzie Trust and The Tindall Foundation. The focus of the report was on how the public sector could work better with communities. The report recorded views expressed by research participants regarding how co-developing solutions with tangata whenua and being guided by mātauranga Māori can lead to responses that focus on collective wellbeing, intergenerational change, and more holistic nature-centred solutions (Morris, 2023). Powerdigm propose that this change should be

“Te Ao Māori-led,” which they describe as being achieved through “collaborating, co-governance arrangements, changing policy settings and applying indigenous and systems thinking” (2023, p. 23).

McKenzie et al. identify that (2008):

- co-production requires a high level of active engagement by all partners in time, resources, and energy and, therefore, may not suit everyone and has the potential to be seen as a burden rather than a benefit
- for co-production to work representatives of all organisations need to turn up and have the power to make decisions and speak for the organisations they represent
- Māori groups must be able to confirm that any government funding has been effectively and prudently spent, and government agencies must be able to demonstrate the transparency and accountability required for any expenditure of taxpayer funds.

Sinner and Harmsworth (2015) note that when undertaking collaborative planning with tangata whenua groups:

- the Māori groups represented in a group may have both overlapping jurisdictions and different types of mandate
- it may not be feasible for all affected hapū and marae to be members of a collaborative group and ensuring that there is a ready two-way flow of information between group members and wider tangata whenua can be a significant exercise
- as group participants explore values, knowledge, options and opinions, the distinction between individual and constituency views and perspectives is often blurred
- while this is generally not an issue, clarity of representation is needed when decisions are being made, so that all participants know who is agreeing to what
- tangata whenua representatives on collaborative groups can feel strong pressure to compromise - particularly if Māori values and perspectives are not well understood, and their desired policy outcomes are difficult to translate to planning language.

They note that issues can arise if a Māori group switches to undertaking direct negotiations with a government entity and consequently withdraws

from a collaborative group. This is particularly problematic if there are differences between what that group wants and what the remaining collaborative group members want.

### 3.2.3. Tensions between the role of iwi and the role of hapū and lack of clarity as to if, when or how to engage with mātāwaka

Iwi are extended kinship groups which are sometimes described as ‘tribes’. Hapū are smaller kinship groups which are sometimes described as ‘clans’ or ‘sub-tribes’. ‘Mātāwaka’ has come to be used as a term to describe Māori who are living in an area but are not a member of a mana whenua group in relation to that area. Where mātāwaka live in an urban area they are sometimes referred to as ‘urban Māori’.

KPMG note that in many cases, most tribal members reside outside the tribal rohe, yet current government engagement models favour the voice of the ahi kā (KPMG New Zealand, 2022).

Ryks et al. note that Te Tiriti settlements have created new challenges, or brought existing challenges into the open. In particular, settlement processes have (Ryks et al., 2014, p. 8):

*“... had the effect of ‘freezing’ (in the legal sense) Māori social structures. Legislation required the settlement process to be between the government and iwi, and within the tribal boundaries at the time of the signing of the Treaty in 1840. In contemporary New Zealand cities, however, a significant part of the Māori population has migrated to urban areas from other parts of the country. These mātāwaka Maori, many long-standing residents, have been excluded from Treaty settlements in the city they live in, as well as from the resulting relational, economic, and cultural benefits settlements have brought.”*

Te Whata discusses the impact of ‘iwification’. He cites a number of academic writers as arguing that (2020, pp. 201–202):

- traditionally, iwi were invoked when needed as kin-organised collective of hapū
- the New Zealand Government’s policy of conducting Te Tiriti settlement negotiations with large natural groupings—iwi or consolidated hapū—undermined the rangatira interests of hapū.

Te Whata comments that hapū preparing cultural impact or values statements in relation to consent applications is “a step towards rescaling the political power” for those hapū (2020, p. 212).

Pan-tribal urban Māori authorities have been established to represent the interests of mātāwaka. Ryks et al. comment that those authorities “are associated with the emergence of a new set of ‘urban citizens’ whose collective association does not primarily rely on kinship ties but also include ties of location, cultural association and socio-economic status” (2014, p. 7).

Ryks et al. comment that (2014, pp. 11–12):

*“For mana whenua, the people who are ancestrally and spiritually connected to the lands cities are built upon and the natural environments they affect, [their Tiriti partner] role includes reclaiming their mana and being empowered and participating in decision-making ... . For mātāwaka, that role and place is still being defined, but will have to be taken into account for the future. Processes that include all urban Māori in decision-making will need to be developed to avoid legal, moral, or other challenges to the validity of urban plans.”*

Auckland Council suggests that mātāwaka should be engaged with as a key stakeholder during the design phase of a project (Auckland Council, 2016).

### 3.2.4. Issues relating to changing leadership within Māori groups

Te Whata comments that when a developer is proposing a development which means that they would have “long-term residence” within a hapū’s rohe there is a need for leadership within the mana whenua community which is able to build trust and relationships to enable an ongoing, inter-generational partnership (Te Whata, 2020, pp. 252–253). He notes that:

- many rural marae communities are facing (among other things) crises of customary, marae-based successive leadership
- there is a danger of community leadership groups becoming too dependent upon individuals when there may be leadership changes and membership turnover.

KPMG notes that one of the factors that inhibits PSGEs from focusing on the things that make the most enduring and transformational positive change in the lives of whānau is (2022, p. 17):

*“... the short-term political cycles of both government and iwi where elected representatives want to see immediate results within their term, even though there is broad acceptance that such a short-term approach hinders progress toward our longer-term whānau and taiao goals.”*

As noted above, KPMG also identify that key staff at Māori organisations can suffer burnout.

### 3.2.5. Deficits in digital and data infrastructure

KPMG identify that (2022) limited digital channels and data capture processes and mechanisms and the high cost of establishing and maintaining data and digital infrastructure hamper efforts by Māori authorities to understand the needs and aspirations of tribal membership (and effectively lobby and advocate for them).

They comment that collaboration between iwi might enable investment in standard digital and data infrastructure to support the collective.

Te Kahui Rarauanga and the National Iwi Chairs Forum also note that many iwi and hapū “cannot afford to build the human and technological capacities to access, hold and use their data to generate the full benefits from it” (Campbell-Kamariera et al., 2023, p. 23). They refer to initiatives like the Te Whata website<sup>7</sup> which contains data aggregated at an iwi level and

allows iwi information managers to customise the data to align with their strategies and goals.

Among other things, Te Kahui Rarauanga and the National Iwi Chairs Forum recommend that the government supports and resources a system of distributed decentralised Māori-controlled mana motuhake data infrastructure and that:

- some data currently held by government agencies should be transferred to (or as an interim step shared with) that mana motuhake data infrastructure
- if government agencies wished to use data held in that infrastructure for a specific purpose, they could request temporary access to that data which might be granted, under certain conditions, for certain uses.

They suggest that, where iwi, hapū and Māori organisations do not have established capacities, this data infrastructure could be managed by an independent organisation (outside of government) which was directed by hapū, iwi or Māori organisations with rights and interests in the data.

## 3.3. Published guidelines and published think pieces on engaging with Māori

There are many published guidelines and think pieces on engaging with Māori and many factors in common across those documents. One area where there are differences is on the issue of the extent to which/how organisations should use Te Ao Māori facilitators or guides when engaging with Māori groups.

The published guidelines are, generally but not entirely, pitched at a higher level rather than providing advice on how in practice to undertake engagement. None of the literature identified evaluated how application of the various guidelines has worked in practice.

### 3.3.1. Published guidelines and think pieces on engaging with Māori

As noted above, in 2018 Te Arawhiti developed a framework for Crown engagement with Māori (2018a).

Te Arawhiti Director, Mere-Hani Simcock-Rēweti, referred to engagement by public servants with



Māori as being, in many cases, a step outside their comfort zones and stated that Te Arawhiti's engagement framework is intended to provide public servants with support to do that (Simmons-Donaldson, 2020).

Prior to 2018 other government agencies had developed guidelines or toolkits for engaging with Māori, including:

- a 2001 Department of Conservation | Te Papa Atawhai draft toolkit for partnership with tangata whenua (2001)
- 2005 Manaaki Whenua | Landcare Research practice guidelines for working with tangata whenua and Māori organisations (Harmsworth, 2005)
- a 2006 Te Puni Kōkiri 'Fact Sheet' on building relationships for effective engagement with Māori (2006)
- a statement of principles for consultation processes between government and Māori contained in New Zealand's sixth periodic report on implementation of the United Nations Covenant on Civil and Political Rights (New Zealand Government, 2015)
- a 2016 document produced by Auckland Council entitled Lessons for successful Mana Whenua engagement – Tips for people who don't know where to start (2016).

Te Arawhiti provides workshops to for Crown agency staff based around the Te Arawhiti engagement framework and guidelines.

Following the release of the Te Arawhiti guidelines there have been further guidelines released:

- a Waka Kotahi adaptation of the Te Arawhiti framework tailored to the transport context (Waka Kotahi NZ Transport Agency, n.d.)
- guidance on engaging with Māori prior to making an application to the Environmental Protection Authority | Te Mana Rauhi Taiao (EPA) (Environmental Protection Authority, n.d.).

There have also been several recent think pieces on how to engage with Māori including:

- Love and Tilley's article on Crown/Māori engagement (2014)
- strategic policy advisor, Atawhai Tibble's, post of his 5 Wai's (not why's) of Māori engagement (2015)
- an interview with the late Ivan Kwok ONZM, the former Treasury Solicitor, published in the Māori Law Review (Hagan, 2016)
- a "template" for how interaction between a potential developer and mana whenua could proceed contained in Te Whata's thesis (2020)
- an article regarding engagement with Māori on both the development of a New Plymouth airport terminal and Watercare Services' update to the Pukekohe Wastewater Treatment Plant - published by Engineering New Zealand (Philp, 2021)
- an article on working with iwi in ways that enhance capability published in the journal of IPANZ - the New Zealand Institute of Public Administration (Billington, 2022)
- comments in the Paradigm Collective's report on how the public sector can better work with communities (Morris, 2023).

The factors that facilitate good engagement with Māori identified in those guidelines and think pieces are summarised in Table 1 below.

**Table 1:** Factors that facilitate good engagement with Māori identified in the guidelines and think pieces

Factor	Sources	Comments
Clarity about what issues you want to engage on and why you want to engage with the Māori group on those issues	Te Arawhiti Tibble	<i>Tibble recommends that project staff ask, “who in your organisation has created the need to engage and, most importantly, why?” He suggests that once that is established an organisation can clarify what success looks like for it and identify any possible tensions.</i>
Considering the potential benefits for Māori groups in engaging in the process	Auckland Council Tibble	<i>Tibble recommends asking what is the benefit of this meeting or arrangement for Māori? What does the Māori group you are looking to meet with want and need?’</i>
Taking steps to understand key Māori cultural values and concepts	Te Arawhiti Department of Conservation Te Whata Paradigm	<i>Te Whata refers in particular to the concepts of whakapapa, mana, ahi kā, whanaungatanga, utu and tuku and manaakitanga and kaitiakitanga.</i>
Ensuring that you speak to the right Māori groups and the right people within Māori groups	Te Arawhiti Department of Conservation Auckland Council Tibble Paradigm	<p><i>Te Arawhiti and Waka Kotahi both note that the overarching principle is that those who will be affected are entitled to be involved in the process.</i></p> <p><i>Te Arawhiti notes that Te Tiriti settlement commitments or statutory requirements may require engagement with particular people or groups. It refers to the Te Kāhui Māngai database (<a href="http://www.tkm.govt.nz">www.tkm.govt.nz</a>) as one useful resource available to help find relevant contacts and suggests that organisations can also contact Te Puni Kōkiri or the Māori Crown Relations Unit at Te Arawhiti.</i></p> <p><i>Both the Department of Conservation and Waka Kotahi recommend seeking guidance about who to engage with from internal Māori engagement staff or other staff at the organisation who have previously engaged with Māori in the relevant area.</i></p> <p><i>Waka Kotahi also suggests contacting any external Māori advisors and the relevant district and regional council iwi liaison officers and identifying the local marae near the project area and establishing their hapū and iwi affiliations.</i></p> <p><i>Waka Kotahi notes that it is not for the organisation to determine which group(s) have mana whenua in a project area “[i]t is for iwi to self-identify their interests in an area and explain their interests to other iwi” (Waka Kotahi NZ Transport Agency, n.d., p. 13).</i></p> <p><i>Tibble recommends considering whether to talk to Māori community representatives on peak or expert bodies.</i></p> <p><i>Auckland Council suggests engaging with all mana whenua groups with an historical connection to the project area and that mātāwaka should be engaged with as a key stakeholder during the design phase.</i></p> <p><i>Under the Natural and Built Environment Act 2023 (NBEA) each local authority is required to keep and maintain records, for each iwi and any groups that represent hapū and Māori within its jurisdiction, of the contact details of:</i></p> <ul style="list-style-type: none"> <li><i>• each iwi authority and any group that represents hapū and Māori groups with interests for the purposes of the Act or regulations under it</i></li> <li><i>• any area of their jurisdiction over which one or more iwi or hapū exercise kaitiakitanga.</i></li> </ul> <p><i>This obligation continues under the NBEA 2023 (section 755). In addition in the NBEA requires local authorities to keep records of other Māori groups with interests for the purposes of that legislation within the relevant district or region.</i></p>

Factor	Sources	Comments
Considering where, along the spectrum of different engagement approaches, to pitch your engagement	Te Arawhiti Department of Conservation Waka Kotahi	<p>The Te Arawhiti guidelines state that where on the engagement spectrum a particular engagement exercise should sit should be determined by reference to the significance of the issue for Māori and how Māori will be affected by a proposal.</p> <p>The Department of Conservation states that where on the spectrum an engagement should sit should be informed by:</p> <ul style="list-style-type: none"> <li>• <i>who has a claim to the land/resources in question</i></li> <li>• <i>the capacity (time, resources etc.) of the relevant Māori group to engage</i></li> <li>• <i>the organisation's own capacity to service an engagement arrangement</i></li> <li>• <i>whether a Māori group's concerns are likely to be specific or general</i></li> <li>• <i>the level of interest in a particular site by other parties</i></li> <li>• <i>the importance of a site or activity to the organisation</i></li> <li>• <i>the relevant statutory obligations</i></li> <li>• <i>the significance of the particular site to a Māori group</i></li> <li>• <i>what is unsatisfactory about the current situation for either a Māori group or the organisation.</i></li> </ul>
Don't make assumptions about what is significant to Māori	Waka Kotahi Te Whata Paradigm	<p>Waka Kotahi states that "[i]t is important that care is taken not to assume what may or may not be significant to Māori", ultimately Māori will determine what is significant to them and what the impacts are and it is an organisation's responsibility to listen to that advice and allow it to shape its engagement approach (Waka Kotahi NZ Transport Agency, n.d., p. 15).</p> <p>Māori interests encompass a broad range of ecological, social and economic values that are shared by many non-Māori (Sinner &amp; Harmsworth, 2015).</p> <p>While hapū and whānau do have a spiritual, cultural and historical association with surface and subsurface wai Māori and desire its health and well-being protected for ngā uri whakatupu, they also seek to participate in the economic benefit of water meet the aspirations for local micro economy developments and thus nourish their communities (Te Whata, 2020, p. 55).</p>
Collaborating with Māori about the approach that will be taken to engagement	Te Puni Kōkiri Auckland Council Waka Kotahi Love and Tilley	<p>Te Puni Kōkiri recommends working to agree the outcomes of the engagement and planning aspects of the engagement strategy, for example timeframes, with the Māori groups an organisation seeks to engage with.</p> <p>Auckland Council recommends being clear early on in engagement about non-negotiables in relation to the project (budget, core objectives, time frames) but outside of those non-negotiables empowering Māori groups to propose the scope and extent of their involvement.</p> <p>Love and Tilley state that a basic premise of successful engagement between Māori and the Crown needs to be acknowledgement of the levels of power imbalance between the parties which includes divesting the Crown of absolute control over engagement processes themselves.</p>
Including Māori as project decision-makers	Auckland Council Waka Kotahi	<p>Auckland Council suggests inviting mana whenua to participate in the formalized governance of a project or setting up regular meeting where key project decisions are brought to mana whenua representatives.</p> <p>Waka Kotahi engagement framework promotes using a co-design approach and "where practicable and appropriate" working through decision making processes with Māori groups.</p>
Preparing an engagement strategy	Te Arawhiti Waka Kotahi	<p>Waka Kotahi recommends that engagement strategies are authored, endorsed, and owned by the project lead to ensure that the responsibility for meeting those strategies sits at the appropriate leadership level.</p>



Factor	Sources	Comments
Engaging with Māori as early as practicable	<p>Te Arawhiti</p> <p>Landcare Research</p> <p>Auckland Council</p> <p>Waka Kotahi</p> <p>Hagan</p> <p>Paradigm</p>	<p><i>Auckland Council comments that ideally engagement with Māori groups would begin at the concept or planning stage for a project and (if that is not possible) as early in the design stage of a project as possible.</i></p> <p><i>In his interview for the Māori Law Review Kwok emphasised that engaging with Māori early gives the Crown the opportunity to hear and consider different ways of doing things which can lead to better outcomes.</i></p>
When 'consulting', providing good information and allowing enough time for Māori groups to consider that information and provide feedback	<p>Te Arawhiti</p> <p>Department of Conservation</p> <p>Billington</p>	<p><i>In her interview for the IPANZ article Dr Maria Bargh notes that government is often looking to engage with iwi or hapū within government timeframes without consideration of the fact that iwi are not resourced to respond.</i></p> <p><i>Te Arawhiti comments that, when establishing timeframes, officials need to consider the capacity of their audience to participate in their engagement process and that the timeframes should remain as flexible as possible to allow for unexpected situations. It also recommends considering what other activities might be occurring within Māori communities that may impact on engagement.</i></p>
Providing Māori groups with information about the problem, issues and options/alternatives	<p>Te Arawhiti</p> <p>Department of Conservation</p> <p>Waka Kotahi</p>	
Understanding what existing relationships with Māori/fora for engaging with Māori already exist within your organisation	<p>Te Arawhiti</p> <p>Waka Kotahi</p>	
Understanding how other government agencies are engaging with Māori groups you are seeking to engage with	<p>Te Arawhiti</p> <p>Billington</p>	
Explicitly acknowledging a Māori group's rangatiratanga and status as a Te Tiriti partner, that the Māori group will make an important contribution to problem-solving and that some matters affect Māori disproportionately and, therefore, Māori are better placed to develop solutions	<p>Te Arawhiti</p> <p>Paradigm</p>	

Factor	Sources	Comments
Taking steps to understand the history, politics, social and economic context, personnel, and priorities and key areas of interest of the Māori group you are engaging with	Department of Conservation Auckland Council Waka Kotahi Tibble Billington Paradigm	<p>To find this information Auckland Council recommends looking at a Māori group's website, the relevant Te Tiriti Settlement summary (if they have settled) and the group's iwi management or iwi engagement plan if they have one.</p> <p>Waka Kotahi stresses that different Māori groups may have different expectations and requirements in relation to engagement. Iwi who have settled their Te Tiriti claims "tend to have the capacity to shift their focus from addressing historical grievances, to opportunities" (Waka Kotahi NZ Transport Agency, n.d., p. 11). Therefore, it is useful to understand where the iwi or hapū a Māori group relates to is at in the Te Tiriti settlement process and to understand the history of their Te Tiriti claims.</p> <p>Tibble recommends looking at a Māori groups' strategic plan, using Google and LinkedIn, looking at news reports and, if the group is an iwi, looking at its iwi profile on the Stats NZ's website.</p> <p>In her interview for the IPANZ article, Dr Maria Bargh commented that if officials undertook sufficient research into what is already known about an iwi or hapū group's key issues of interest and social, economic, and political context that might indicate that a meeting with the group is not required because the necessary information has already been provided (for example to another government agency).</p>
Taking steps to understand the appropriate tikanga and kawa for each Māori group	Department of Conservation Auckland Council Waka Kotahi Tibble Billington	<p>Waka Kotahi notes that each iwi and hapū has their own particular kawa and the best way to find out what that is to ask the people at the marae an organisation will be visiting.</p> <p>Waka Kotahi also notes that koha should always be provided at a formal meeting with a Māori group (whether or not it is held on a marae and whether or not a formal welcome (pōwhiri or mihi whakatau) is given.</p>
Using in-person engagement where possible	New Zealand Government Waka Kotahi Te Whata	<p>The Sixth Periodic Report refers to the importance of the use <i>kanohi ki te kanohi</i>   face to face engagement where possible.</p> <p>Waka Kotahi notes that while an initial meeting should be face-to-face it is appropriate for initial contact to be made by a phone call or email to discuss with a Māori group how best to engage with them.</p> <p>Te Whata recommends having marae-based <i>kōrero</i> between <i>tangata whenua</i> and external parties at the outset of any proposed venture.</p>
Listening respectfully to what Māori groups say and seeking to understand their values and aspirations	Waka Kotahi Auckland Council Te Whata Hagan Philp Billington Paradigm	<p>Auckland Council recommends holding an initial project engagement <i>hui</i> focused on developing mutual understanding and respect and discussing the parties' values and aspirations.</p> <p>In his interview for the Māori Law Review, Kwok stated:</p> <p>"Genuinely listening and understanding each other is critically important. That's where the Treaty partners can each make the most gains in helping each other help themselves. It's not rocket science but it's something that parts of the Crown can be slow to appreciate as to why it is so important to do it and do it well. I don't just mean the importance of the Crown consulting its Treaty partner as it's required to do. Listening and understanding each other should be the way that the Crown works regionally and nationally over and above any legal obligations. ... Listening and understanding should be seen not only as an investment in the Crown-Māori relationship but also an investment in better outcomes for New Zealand."</p> <p>During her interview for the IPANZ article Marina Hetaraka commented:</p> <p>"Go sit and listen. Hear [Māori groups'] aspirations for the project, for their <i>rohe</i>. Go humbly. Show respect to the <i>kaumātua</i> and <i>kuia</i> who are acting as <i>kaitiaki</i> for their people and making their time available to you. Don't go with all the answers or solutions – and be prepared to change your approach based on what you hear."</p>

Factor	Sources	Comments
Providing refreshments (koha kai)/eating with the Māori group after a hui	Auckland Council Tibble	
Enabling local Māori groups to build a project team's understanding of the history of proposed project site	Te Whata Philp	
Establishing ongoing relationships with Māori groups	Te Arawhiti Department of Conservation Landcare Research Te Puni Kōkiri Waka Kotahi EPA Philp Paradigm	<p><i>Both the Department of Conservation and Landcare Research state that an organisation should hold meetings with Māori groups on a regular basis, at agreed venues and times, not just when there is a particular issue on which the organisation needs their input.</i></p> <p><i>Te Puni Kōkiri comments "the most effective way to engage with Māori is by investing in relationships with Māori – rather than by making the task of engagement the focus of the investment" (Te Puni Kōkiri, 2006, p. 1).</i></p> <p><i>The EPA states "[s]uccessful engagement is about developing relationships with iwi – and building and maintaining these long term. After the decision is made, the relevant Māori groups will expect you to maintain an on-going relationship with them" (Environmental Protection Authority, n.d.).</i></p> <p><i>Philp cites advice from Hone Hurihanganui, the founding director of a consultancy which runs engaging effectively with Māori programmes, that when it initiates a relationship with a Māori group an organisation should make it clear that it would like to undertake any further projects in a way that upholds that group's mana.</i></p>
Developing agreements or memoranda of understanding with Māori groups	Department of Conservation Landcare Research New Zealand Government	<i>The Department of Conservation notes that written partnership agreements are useful for identifying respective roles and responsibilities and the parties' areas of interest and helpful in establishing agreed processes for input into decision-making and dispute resolution processes and can facilitate training opportunities. They caution that partnership agreements need to accommodate growing and changing relationship and not restrict that relationship.</i>
Helping build capacity within, and providing resources for, Māori groups	Landcare Research New Zealand Government Auckland Council Waka Kotahi Paradigm	<p><i>Landcare Research states that co-operative management arrangements should involve reciprocity – either payment 'in kind' in terms of mutual support and response or in dollar terms.</i></p> <p><i>Auckland Council recommends having funding to cover the costs of mana whenua expertise – either a defined pool of money which mana whenua can charge for their ongoing involvement or a budget to cover a pre-specified time commitment.</i></p> <p><i>Waka Kotahi refers to the payment of 'cultural fees'.</i></p> <p><i>Paradigm recommends that the public sector "[i]nvest in the conditions required to adequately support Māori to work in your team and/or pay for Māori expenses as and when required. Plan for this early in budgets and timeframes."</i></p>
Providing feedback to Māori on how their input influenced the decisions made	Te Arawhiti Tibble	
Undertaking a review of how the engagement went	Te Arawhiti	



### 3.3.2. Differences regarding the extent to which/how organisations should use Te Ao Māori facilitators or guides

There are some differences across the engagement guidelines and think pieces about the extent to which and how organisations should use Te Ao Māori facilitators or guides when seeking to engage with Māori groups.

- Auckland Council recommends that organisations find a ‘guide’, a person who may be Māori or non-Māori but has experience in working with Māori and navigating Te Ao Māori – with such guides potentially available within the relevant agency (someone in the same group or a specialist Māori engagement role) or through other networks. They state that such a guide can help understand who the project team should talk to, provide guidance on tikanga, and support the project team to establish a relationship with mana whenua.
- The EPA’s guidance states:

*“We can direct you to the right people for your particular application - people who will help you navigate the Māori world and also walk the path with you. We’re connected to a range of Māori groups and specialists, who have skills and wisdom that will be invaluable to your journey.”*

- Tibble recommends obtaining advice on which Māori groups to engage with from someone who is an expert in engaging with Māori (an ‘expert Māori navigator’) who could be someone in the organisation or, more often, a local person or someone well known in the subject matter area who is a ‘connector’. He also recommends using such a person to speak for the organisation during the engagement or lead the organisation’s engagement.
- Waka Kotahi refers to its internal staff, called ‘pou ārahi’, whose role is to support the organisation’s engagement with Māori. It also states that for formal meetings (whether on a marae or not) a person who can speak in Te Reo Māori and knows how to make the appropriate speeches and response (kaikōrero) should attend and if that is not possible in a particular instance (for example, due to unavailability) the hosts should be told in advance so that the hosts know that responses will likely be given in Māori.

- However, Waka Kotahi notes that the principle of ‘rangatira ki te rangatira’ or chief to chief is important to Māori (Waka Kotahi NZ Transport Agency, n.d., p. 4).

*“Māori prefer to meet with decision makers and project leaders and not liaison or advisory type positions (or consultants).*

*It is important that project managers and project leads show their face when engaging with Māori. This is important when establishing first contact with Māori as this will set the scene for the ongoing relationship throughout the project as kanohi ki te kanohi (face-to-face).*

*... bringing in external Māori consultants is helpful, but they cannot replace or carry out the duties of the project manager or senior manager when working with Māori. It’s also important to recognise that most Māori consultants are generally well-known people within Māori communities but are not representatives of Waka Kotahi. For this reason, it is important that our project managers maintain their own relationship with Māori to uphold the mana of Waka Kotahi.”*

- Landcare Research’s good practice guidelines state that to establish a relationship between a government agency and an iwi or hapū the initial meeting needs to be at senior level, at an appropriate venue that gives mana to the iwi or hapū members.

### 3.3.3. Advice generally pitched at a high level and no evaluations identified

The documents contain practical advice in relation to some areas, for example suggesting sources of information to use to identify affected Māori groups. In other areas they are pitched at a higher level. For example, some of the guidance recommends considering the potential benefits for Māori groups in engaging in the process but the literature does not identify different types of benefits there might be for Māori groups to engage on particular types of issues.

None of the literature identified evaluated how application of the various guidelines has worked in practice.

## 4. Wider Māori involvement in infrastructure

Te whai wāhi a te iwi Māori whānui ki te hanganga





## 4.1 Overview

There is general acknowledgement in the literature that Māori are playing a more active and leading development role and that this is particularly evident with post-settlement groups who are “continuing to build their capability to plan, execute and progress plans to achieve their own aspirations” (Statistics New Zealand, 2015, p. 9). There is also recognition that the asset base of Māori employees, self-employed Māori, and Māori employers is likely to be much larger than the Māori assets owned collectively (Statistics New Zealand, 2015). Statistics New Zealand notes that this suggests that Māori’s “own statistical needs may be evolving as they seek to become more active leaders and developers” (2015, p. 10).

There are limitations on the data available on Indigenous economies (including Indigenous businesses) (Mika et al., 2019). Consistent with this, currently there is published data on Māori involvement in industries such as engineering and construction but not data on the extent to which, for example, Māori individuals or businesses involved in construction are involved in the construction of infrastructure (as opposed to private residential or commercial developments). There is some information on the involvement of Māori businesses in the mental health infrastructure programme.

There is also limited published research on current Māori ownership of, or investment in, infrastructure.

- The feedback on the Te Rautaki consultation document shows that there is currently a range of views across the wider New Zealand community on the desirability of greater Māori investment in infrastructure.
- There is some published research on Māori ownership of or investment in energy infrastructure.

There is some existing research on barriers to the provision of infrastructure as part of papakāinga developments. Those barriers include:

- lack of reticulated services and local authorities not having planned to provide infrastructure to the areas where papakāinga sites are located
- geological, hydrogeological, and other physical issues at papakāinga sites
- restrictions on the permitted density of papakāinga housing increasing infrastructure costs/reducing the economic viability of providing infrastructure
- the cost of development contributions for infrastructure under the Local Government Act 2002
- difficulties in obtaining loans to finance development
- the need to provide communal infrastructure (such as communal laundries) to reduce infrastructure costs.

Challenges relevant to increased Māori investment in infrastructure more generally identified in the literature include:

- being able to invest at the scale required
- finding out about investment opportunities early enough
- potentially needing to grant rights for future acquisition of whenua Māori by third parties and otherwise wanting to protect assets that a Māori group does not want to put at risk
- access to some necessary skill sets and capabilities
- tension between achieving a successful investment and a Māori group’s values and long-term aspirations and the potential need to make trade-offs.



## 4.2. Existing research into Māori participation in the infrastructure sector as workers or contractors

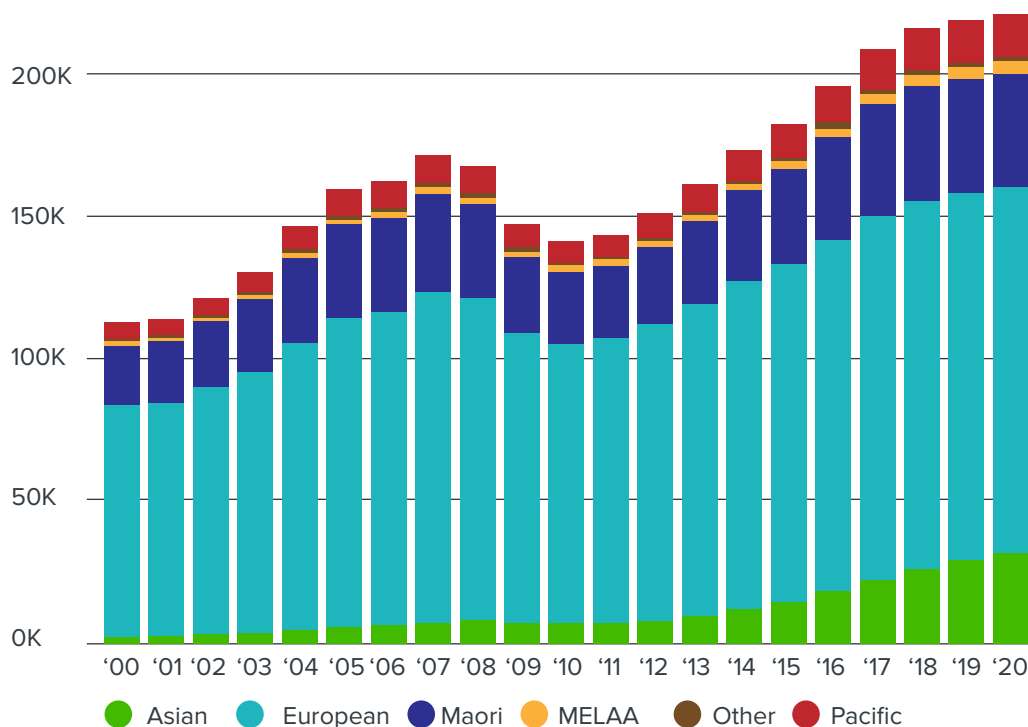
### 4.2.1. Māori participation in the infrastructure workforce

#### Construction workforce demographics

Sweet Analytics has undertaken analysis of construction workforce demographics from 2000 to 2020 (Sweet Analytics, n.d.).

Figure 3: below (generated on Sweet Analytics' website on 19 May 2023), shows construction sector employees and by ethnicity<sup>8</sup> over that period.

#### Construction & infrastructure Employees over time by ethnicity



#### Deloitte research into the engineering workforce

Deloitte research (commissioned by Hanga-Aro-Rau | the Manufacturing, Engineering and Logistics Workforce Development Council) has found the following.

- In 2022 Māori made up 7.6% of the engineering workforce.
- While overall engineering sector employment in March 2022 exceeded pre-COVID 19 levels, employment of Māori (and Pacific Peoples) had not rebounded to pre-COVID 19 levels. Employment in engineering among Māori was still 25% below pre-COVID levels.
- In engineering, 2,600 more level 1 Māori employees would be needed to reach parity with other ethnic groups by 2028. Level 1 is the highest skill level.
- "COVID-19 disproportionately affected the Māori and Pacific workforce, which are populations that are more likely to: face underlying health conditions, to be classed as 'essential workers', have lower

vaccination rates, live in larger extended family groups, and face an economic imperative to keep working to support whānau. While there was a lift in vocational education and training enrolments during COVID-19, this was most noticeable in non-Māori/Pacific groups” (Deloitte, 2022, p. 12).

- Overall, since 2012, Māori and Pacific Peoples’ participation in manufacturing and engineering tertiary education had increased at a much faster rate than other ethnic groups. However, Māori and Pacific Peoples still predominantly made up the highest proportion of the workforce with the lowest skills mix.
- Between 2012 and 2021, the proportion of highly skilled Māori workers in the engineering sector fell slightly from 20% to 18% but this was offset by a large increase for level 2 skills from 13% to 38%.
- Among manufacturing and engineering graduates, other ethnic groups transition into employment at higher rates than Māori and Pacific Peoples. The proportion of learners who went into employment was roughly 10% less for Māori and Pacific graduates compared to other ethnic groups, regardless of the number of years post-graduation.

## Changes in workforce aspirations

Tonkin + Taylor’s research on Waka Kotahi experience of Māori aspirations for transport noted “a notable shift” to Māori focusing on what might be achievable in the longer term, particularly upskilling iwi, hapū and whānau to fill roles across the full suite of an infrastructure project. It states “[i]t was highlighted that one high paying job within an iwi could have a far greater positive impact on a whānau, hapū and iwi than many lower paid jobs” (Sweeney et al., 2022, pp. 29–30).

### 4.2.2. Involvement of Māori enterprises in industries relevant to infrastructure

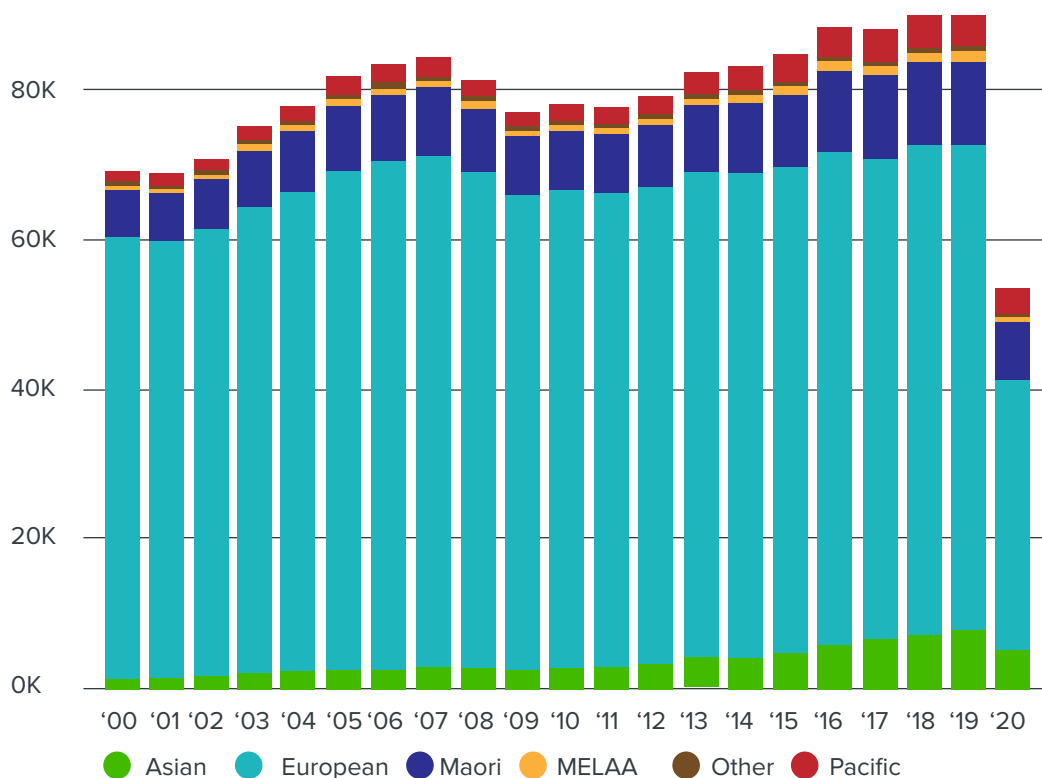
Figures 4 below (generated on Sweet Analytics’ website on 19 May 2023), shows construction sector employers by ethnicity over the period from 2000 to 2020.

Stats NZ has released statistics on Māori businesses which distinguish between (Stats NZ Tatauranga Aotearoa, 2022):

- ‘Māori authorities’ - businesses involved in the collective management of assets held by Māori

Figure 4: Construction Sector Employers by ethnicity 2000 to 2020

### Construction & infrastructure Employers over time by ethnicity



- ‘other Māori enterprises’ – businesses that have Māori ownership, have self-identified the business as a Māori business and are not Māori authorities
- ‘Māori tourism’- which may be either Māori authorities or other Māori enterprises.

The figures for Māori authorities are only broken down by the following industry classifications – agriculture, other primary industries, non-residential property operators, and all other industries. The figures for other Māori enterprises are broken down to more industry types.

From Stats NZ’s figures in 2021:

- Six ‘other Māori enterprises’ were involved in electricity, gas, water, and waste services
- 84 other Māori enterprises were involved in construction
- 36 other Māori enterprises were involved in the transport, postal or warehousing sectors
- 30 other Māori enterprises were involved in information media or telecommunications
- 114 other Māori enterprises were involved in professional, scientific, or technical services
- Six other Māori enterprises were involved in public administration and safety.

### 4.2.3. Procurement of mental health infrastructure project services from Māori businesses

As part of a 2022 review of the 16 projects in the New Zealand Mental Health Infrastructure Programme, Te Aka Whai Ora assessed reporting by the project teams on iwi-Māori involvement. It found “a lack of social procurement adopted for projects” (Department of Prime Minister and Cabinet, 2022, Appendix B, page 4). The majority of those projects did not report procuring services from Māori businesses. On the two projects where services were procured from Māori businesses it was for Māori artists and a design firm, not construction.

Several Mental Health Infrastructure Programme project teams noted they expected they would struggle to procure services from Māori given the size of the market in the project locality. There were also concerns about the potential impacts of social procurement on project time and cost.



## 4.3. Māori ownership of, or other investment in, infrastructure

### 4.3.1. Views on the desirability of greater Māori investment in infrastructure

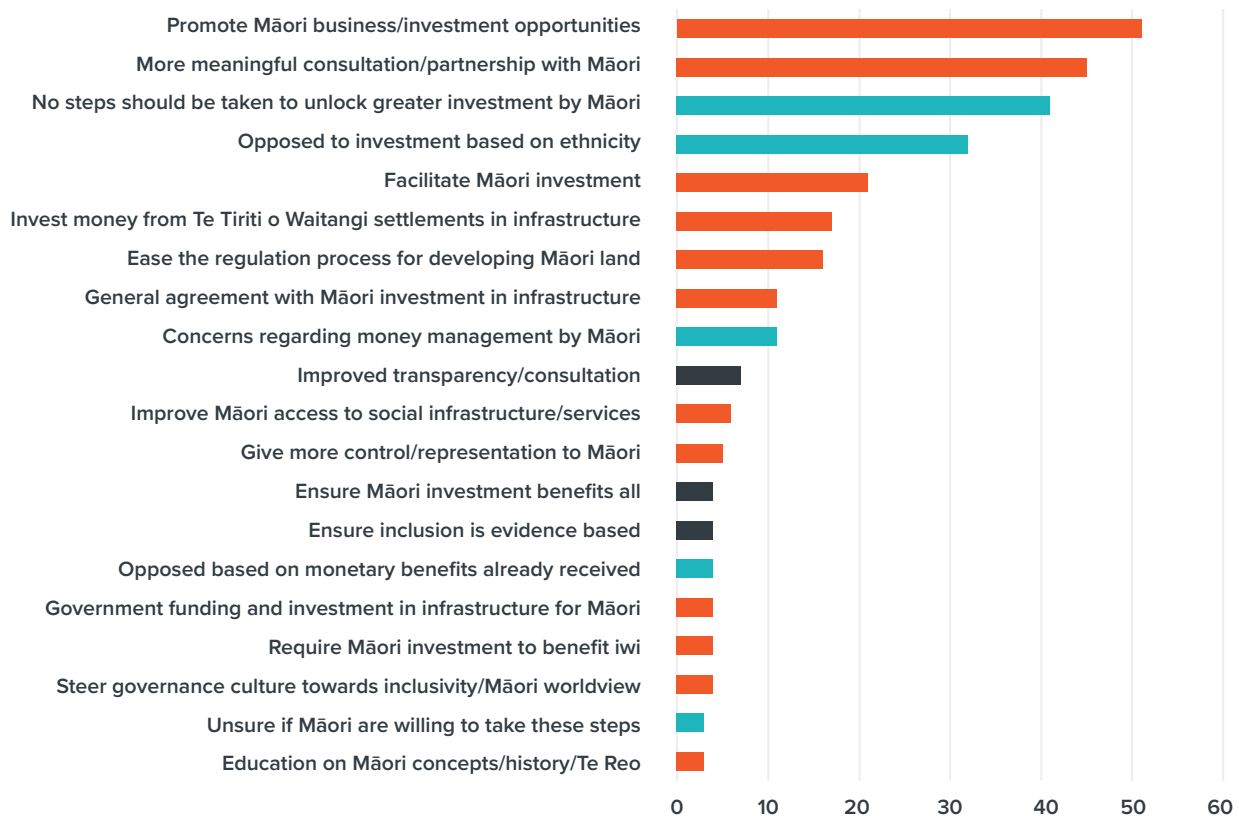
The feedback on the Te Rautaki consultation document shows that there is currently a range of views across the wider New Zealand community on the desirability of greater Māori investment in infrastructure.

One of the questions in that consultation document was:

Q16 – What steps could be taken to unlock greater infrastructure investment by Māori?

The frequency of different types of comments received in response to Q16 (as categorised by PublicVoice Limited) is shown in Figure 5 below (Bothwell et al., 2021).

**Figure 5:** Frequency of types of comment on Q16 in the New Zealand Infrastructure Strategy consultation document



Submitter comments supporting greater investment are shown **orange**, comments opposing are shown **blue**, and comments raising concerns/requirements for success are shown **black**.

One hundred and eighty-six submitter comments mentioned steps to unlock greater Māori infrastructure investment. Of those PublicVoice Limited categorised eight as seeing a need to “upskill Māori” and three as seeing a need to “de-risk investment for Māori”. In addition eleven comments generally agreed with Māori investment in infrastructure.

Ninety-five submitter comments indicated opposition to Q16. PublicVoice Limited categorised 41 of those submitter comments as expressing the view that no further steps are needed to unlock greater infrastructure investment by Māori.

### 4.3.2. Research on current Māori investment in energy infrastructure

In 2018 McArthur and Matthewson found that 9% of the community energy initiatives in New Zealand had significant (more than 50%) iwi ownership (MacArthur & Matthewman, 2018). Particular energy infrastructure initiatives McArthur and Matthewson refer to are:

- Ngāti Tūwharetoa Geothermal Assets Limited (a company formed by the Ngāti Tūwharetoa (BOP) Settlement Trust) which supplies geothermal direct heat energy for industrial applications
- the Mōkai geothermal plant (which is a joint venture between the Tuaropakai Trust and Mercury Energy)
- the Ngā Awa Purua geothermal station (35% owned by the Tauhara North No. 2 Trust and 65% owned by Mercury Energy)
- the Rotokawa geothermal station (for which the Tauhara North No. 2 Trust receives a ground lease and a royalty payment for the supply of fuel).

Berka et al.'s analysis of local and community energy initiatives in New Zealand identifies two types of Māori indigenous organisations involved in those initiatives—settlement trusts and charitable trusts/ community development organisations (Berka et al., 2020)—with all of those organisations owned by either iwi, hapū or rūnanga.

Berka et al. found that settlement trusts were involved in energy generation initiatives and charitable trusts/community development organisations were involved in both energy generation and energy efficiency initiatives. The energy generation activities undertaken by Māori groups identified were either:

- geothermal generation connected to the National Grid
- geothermal heat and steam supply for local industry
- two off-grid microgrids
- some microgeneration projects powering individual marae.

The microgrid projects were at the feasibility stage supported by grant funded projects in partnership with universities. They were embedded in community development strategies aimed at generating local socio-economic opportunities and motivated by a desire for self-sufficiency.

The Māori-owned geothermal enterprises:

- were largely corporately run with community involvement limited to voting rights
- arose from Te Tiriti settlements which acknowledged the Māori group's historic connection to the geothermal fields.

Berka et al. noted that:

- the Kawerau geothermal power station owned by the Ngāti Tūwharetoa (BOP) Settlement Trust was the only energy generation project which was 100% owned by a Māori group
- through the Trust 1500 registered beneficiaries are entitled to a range of benefits from scholarships to study geothermal engineering and other fields at university to living subsidies for those aged over 65
- all registered adult beneficiaries were eligible to vote for seven trustees – two of whom sat on the board of the asset company.

They cite a community energy practitioner as saying that the Trust is working with a community engagement officer to understand the needs of the trust beneficiaries, create “identity and pride in the land and potentially some jobs in the area” without trying “to become everything for their people” and “stepping into the breach of the Crown” (Berka et al., 2020, p. 174).

Quinn (2017) noted that some members of the Māori community at Parihaka<sup>9</sup> he undertook research within saw community-level renewable generation developments as a step towards moving away from social engineering forces which put pressure on them to work for businesses and live in urban centres. Community members also identified development of a renewable energy project as an opportunity to:

- increase awareness of and involvement in sustainable practice
- move back to collective ways of thinking
- reinvigorate Parihaka's role as an inspirational community.

Quinn identified a number of barriers facing community-owned renewable energy source projects (2017).

Economic barriers identified included:

- while members of a Māori group might, in theory, be willing to pay slightly more for energy generated from renewable sources they might in practice not be able to afford to
- the development costs for community owned projects were generally higher than for commercial projects due to:
  - community projects requiring negotiations and legal contracts with various organisations and stakeholders
  - communities probably having to pay for external planning and financial analysis expertise
  - the additional project time required for the open and democratic processes usually involved in community projects
  - communities not having access to the same ‘bulk-buying’ prices from suppliers as commercial operators
- concern about financial risk particularly when Māori group members do not reside at the site of a proposed development.

Social and cultural barriers included:

- concerns about equity and fairness – i.e., a concern that some community members might use more energy than others and some members might do more work than others in planning and implementing a project
- cultural concerns and differences in views regarding cultural appropriateness.

Quinn noted that some people involved in the papakāinga development at Parihaka felt that a wind turbine had “the potential to eat into the landscape” whereas others felt that wind turbines being visible at Parihaka would be an opportunity to generate discussion on the use of that infrastructure that could “start to shift mind-sets” about use of the technology (Quinn, 2017, p. 62).

Institutional barriers included barriers for new or smaller players to obtain a power purchase agreement to supply power to a major retailer or obtain access to the National Grid.

Conversely, Quinn noted research that indicated that small scale renewable energy projects do not tend to meet as many barriers (or delays) in obtaining consent under the RMA as larger scale developments.

### 4.3.3. Provision of infrastructure for papakāinga development

Some literature has discussed barriers relating to the provision of infrastructure for or at papakāinga developments. These barriers include:

- lack of reticulated services at the boundary of rural papakāinga development sites (Doherty-Ramsay, 2021; Palmer, 2016)
- geological, hydrogeological, and other physical issues at papakāinga sites affecting the ability to provide onsite infrastructure – such as very high groundwater levels making on site stormwater disposal difficult (Doherty-Ramsay, 2021)
- the fact that papakāinga development may occur in an area in which other residential development is not occurring so local authorities have not planned to provide infrastructure and cannot plan to roll out infrastructure in stages (Doherty-Ramsay, 2021)
- restrictions on the permitted density of papakāinga housing increasing infrastructure costs/reducing the economic viability of providing infrastructure (Palmer, 2016)
- the cost of development contributions for infrastructure under the Local Government Act 2002 (Doherty-Ramsay, 2021)
- difficulties in obtaining loans to finance development due to whenua Māori being in multiple-ownership and not easily sold (Quinn, 2017)
- the need to provide communal infrastructure (such as communal laundries) to reduce infrastructure costs (Quinn, 2017).

The literature notes that Te Puni Kōkiri has programmes which provide support to the development of small-scale papakāinga, including contributing to the costs of infrastructure on whenua Māori but noted that it was unclear to Māori groups whether developments on general land (as opposed to Māori freehold land) were eligible for that funding (Doherty-Ramsay, 2021).



#### 4.3.4. Challenges for Māori investment in infrastructure more generally

##### Being able to invest at the scale required

In 2010 the then New Zealand Government's Māori Economic Taskforce released resource guides regarding possible Māori investment in infrastructure (Solomon, 2010). The Māori Economic Taskforce was chaired by the then Minister of Māori Affairs, and included the then Associate Minister of Māori Affairs, Chief Executive of Te Puni Kōkiri and Kaiwhakahaere I Chair of Te Rūnanga o Ngāi Tahu. The guides were prepared with the assistance of PriceWaterhouseCoopers. They primarily focused on opportunities for Māori to invest in Crown assets such as schools, hospitals, toll roads, bridges, tunnels, ports, airports, railway networks, and energy infrastructure.

The guides noted if iwi were to successfully participate in such infrastructure investment opportunities they would probably need to act collectively. One of the guides stated (Solomon, 2010, p. 73):

“Due to the size of many infrastructure investments, it is likely that iwi would need to collaborate with each other to act as a debt or equity investor. Importantly, equity providers in PPPs need unique skills to get super economic returns, whereas debt providers do not.”

Aggregating iwi investment capital would increase the scale and breadth of the direct investment opportunities available.

KPMG (2022) in their discussion of the evolution of PSGEs, have also recommended collaboration across Māori organisations where:

- there are common kaupapa that are relevant to all members of the collective
- scale is needed to provide access to an opportunity or some other advantage
- the interests, benefits and desired outcomes are shared equitably by all organisations collaborating.

However, they caution that collaboration may not be appropriate where there are unique kaupapa or issues relevant only to some entities.

Rata (2011) has noted that the model applied by the Ministerial Taskforce on Māori Economic Development was one which was aimed at the corporate iwi entities established as a result of Te Tiriti settlements and not at potential wider Māori investment in infrastructure (for example investment by non-kin urban Māori collectives).

##### Finding out about investment opportunities early enough

The Māori Economic Taskforce guides (Solomon, 2010) note that, as potential investors in infrastructure, iwi would need to:

- engage with officials and other planners in an ongoing dialogue about local and national infrastructure requirements and the opportunities for co-investment
- further develop their links with local developers with whom they might want to form joint ventures.

##### Potentially needing to grant rights for future acquisition of whenua Māori

The guides noted that investments made in the form of assets or rights (for example leases of or other rights to use land), might be more accessible than cash for some iwi (Solomon, 2010). However, they also note that a procurer of an infrastructure project might want a right to take ownership of any land on which infrastructure is located at the end of any agreed lease.

TDB Advisory (TDB Advisory, 2023) also notes that iwi as investors typically have constraints on their ability to sell certain assets.

##### Protecting assets that a Māori group does not want to put at risk

The Māori Economic Taskforce guides noted that Māori groups have a range of assets, only some of which they will be comfortable to expose to investment risk. Some corporate structures for pursuing investments in infrastructure, such as joint ventures and general partnerships, could allow risk to ‘flow through’ to the Māori group. Other structural choices such as a company, or a limited partnership, would contain the liability within the entity, meaning that a Māori investor's risk was limited to the capital invested in that venture only, protecting its other assets from loss.

## Access to some necessary skill sets and capabilities

The Māori Economic Taskforce guides comment that, in considering the desirability of any particular investment in infrastructure projects, iwi would need to consider the various risks which arise from different levels of involvement and look to find risks where iwi have a strategic advantage. They note that to do this successfully iwi would need to have access to the technical skill sets and capabilities necessary to properly mitigate risks (including working in partnership with other iwi who have those skill sets and capabilities).

KPMG expresses the view that Māori organisations need to make a choice between developing the capability of their own people (which can result in short-term inefficiency) and hiring skillsets from outside (which can result in a misalignment of values). They state (KPMG New Zealand, 2022, p. 23):

*“The investment across decades in capability through education grants and support has not resulted in the desired level of access to or availability of the right skills and capabilities with an aligned value set – whether for the iwi organisations or the people themselves. Compounding this is the competition for Māori talent arising from increased demand by government and corporate organisations.”*

KPMG also identify a need for mentoring and coaching to support Māori group members’ motivation, self-belief, and confidence.

## Tension between achieving a successful investment and a Māori group’s values and long-term aspirations and the potential need to make trade-offs

TDB Advisory (TDB Advisory, 2023) notes that iwi as investors tend to have a strong home bias and long-time horizons and that iwi trusts (as opposed to the commercial arms of iwi) typically have social and environmental objectives in addition to their financial objectives.

Some Māori have expressed the view that they may feel that they have to adapt their values in order to succeed in a business venture (Iwi Chairs Forum Pou Tikanga, et al., 2022).

The Māori Economic Taskforce guides have noted that:

- if a Māori group participates as a minority equity investor in a project, and has no other involvement in the project, they may have limited scope to influence decision-making in relation to the asset and their investment
- Māori groups looking to invest in infrastructure should seek to ensure that commercial agreements reflect their long-term strategy and aspirations.

As noted above, KPMG has identified that hiring people with appropriate skills from outside a Māori group may result in a misalignment of values.

KPMG (2022, p. 37) also state that iwi tribal entities will need to provide clear and considered guidance to the commercial arms of iwi on what portfolio or combination of financial outcomes (dividend to the parent) and non-financial outcomes (opportunities for whānau from commercial activity) are desired “after considering the trade-offs, as well as the precise nature of their own support for such outcomes.” For tribal and commercial entities to work effectively together:

- commercial entities may need to commit to “generating broader outcomes beyond a dividend and entry-level jobs”
- tribal entities will need to understand “the extent to which the integration of more general outcomes and dividends is possible” and be willing to make trade-off between them where it is not.

# Appendix A.

## English translations of Te Reo Māori terms

### Āpitihianga A. He whakapākehātanga o ngā kupu Māori

In providing the following English translations we note that:

- providing an English translation of a Te Reo Māori term cannot capture the full depth of meaning of that term
- different Māori groups may use some terms in different ways to each other and there are differences in Te Reo Māori across different parts of New Zealand.

The English translations below primarily use, or are based on, relevant definitions contained in Te Aka Māori Dictionary ([maoridictionary.co.nz](http://maoridictionary.co.nz)) (Te Aka Māori Dictionary, n.d.). Where a definition is not sourced from that dictionary it is given in italics. The use of macrons and double vowels in Māori words is also based on how macrons and double vowels are used in Te Aka Māori Dictionary.

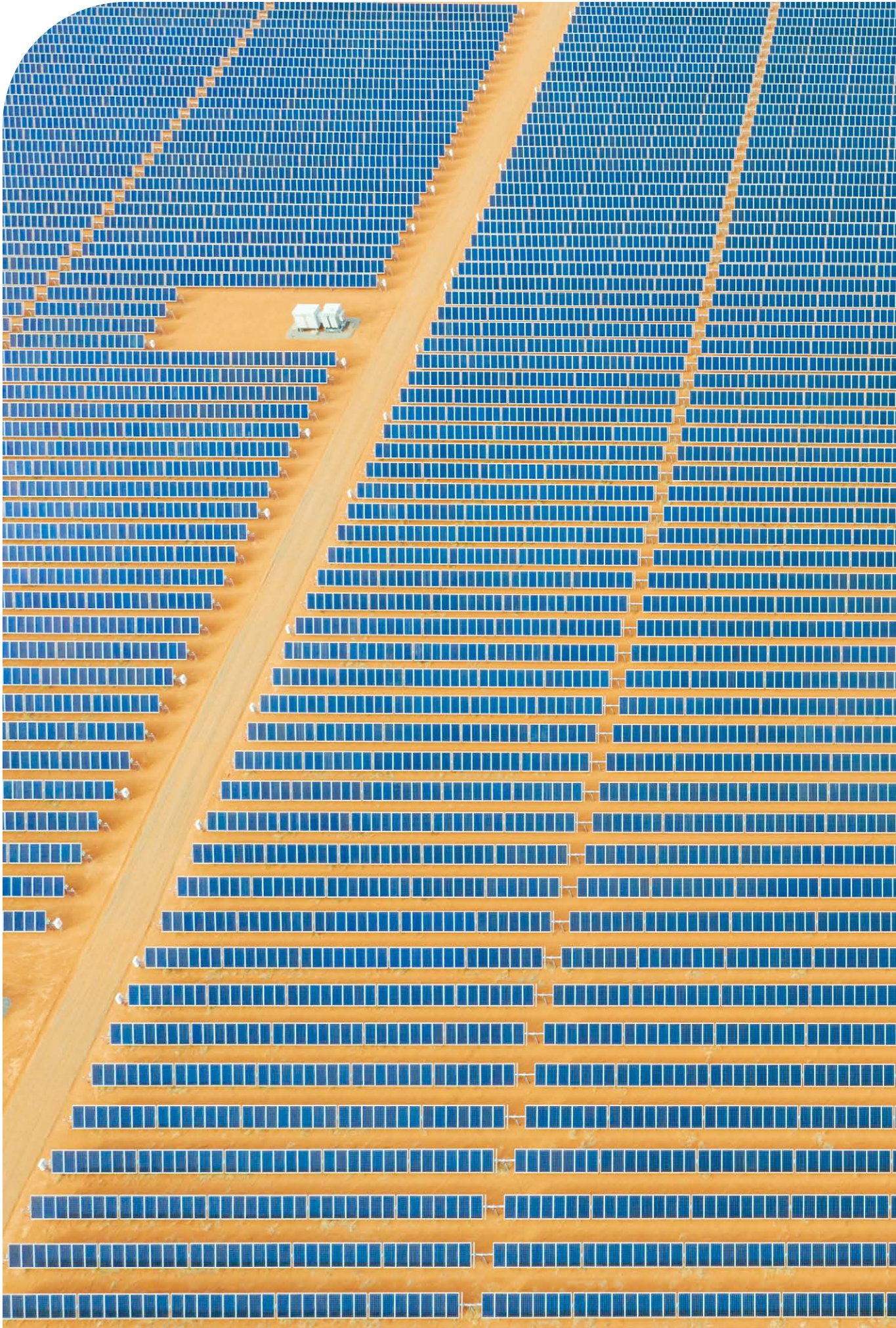
Te Reo Māori term	English translation
Ahi kā	Burning fires of occupation, continuous occupation - title to land through occupation by a group, generally over a long period of time  <i>Can also mean the members of a mana whenua group who occupy the whenua</i>
Arawhiti	Bridge
Aroha	Affection, sympathy, charity, compassion, love, empathy
Hapū	Kinship group, clan, tribe, subtribe - section of a large kinship group and the primary political unit in traditional Māori society. It consisted of several whānau sharing descent from a common ancestor, usually being named after the ancestor, but sometimes from an important event in the group's history. Several related hapū usually shared adjacent territories forming a looser tribal federation (iwi).
Hauora	Health, vigour
Iwi	Extended kinship group, tribe, nation, people, nationality, race - often refers to a large group of people descended from a common ancestor and associated with a distinct territory.
Kaikōrero	Speaker, narrator
Kai moana	Seafood, shellfish
Kaitakitanga	Guardianship, stewardship, trusteeship, trustee
Kanohi ki te kanohi	Face to face, in person, in the flesh
Kaumātua	Elder – a person of status within the whānau

Te Reo Māori term	English translation
Kaupapa	Topic, policy, matter for discussion, plan, purpose, scheme, proposal, agenda, subject, programme, theme, issue, initiative
Kaupapa Māori	Māori approach, Māori topic, Māori customary practice, Māori institution, Māori agenda, Māori principles, Māori ideology - a philosophical doctrine, incorporating the knowledge, skills, attitudes, and values of Māori society
Kawa	Marae protocol – customs of the marae and wharehau, particularly those related to formal activities such as pōhiri, speeches and mihi.
Koha	Gift, present, offering, donation, contribution
Kōrero	Discussion, conversation, discourse
Kotahitanga	Unity, togetherness, solidarity, collective action
Kuia	Elderly woman, grandmother, female elder
Kupu	Words, vocabulary
Mahinga kai	Garden, cultivation, food-gathering place
Mana	Prestige, authority, control, power, influence, status, spiritual power
Manaakitanga	Hospitality, kindness, generosity, support – the process of showing respect, generosity, and care for others
Mana motuhake	Separate identity, autonomy, self-government, self-determination, independence, sovereignty, authority
Mana whenua	Territorial rights, power from the land, authority over land or territory, jurisdiction over land or territory - power associated with possession and occupation of tribal land.
Marae	The open area in front of the wharehau where formal greetings and discussions take place. Often also used to include the complex of buildings around the marae
Mātauranga	Knowledge, wisdom, understanding, skill
Mātāwaka	Kinship group, tribe, clan, race, ethnic group (It has come to be used as a term to describe Māori who are living in an area but are not a member of a mana whenua group in relation to that area).
Maunga	Mountain, mount, peak
Mihimihi	Speech of greeting, tribute – introductory speeches at the beginning of a gathering after the more formal pōhiri
Motu	Country, land, nation
Papakāinga	Original home, home base, village, communal Māori land
Pōhiri	Welcome ceremony on a marae
Pono	Truth, validity
Rangatira	High ranking, chiefly, noble, esteemed
Rangatiratanga	Chieftainship, right to exercise authority, chiefly autonomy, chiefly authority, ownership
Rohe	Territory, area



Te Reo Māori term	English translation
Rūnanga	Council, tribal council, assembly
Taiao	World, Earth, natural world, environment, nature, country
Takiwā	District, area, territory, vicinity, region
Tāmaki Makaurau	Auckland
Tangata whenua	Local people, hosts, indigenous people – people born of the whenua
Taonga	Treasure, anything prized
Taonga tuku iho	Heirloom, something handed down, cultural property, heritage
Te Ao Māori	<i>The Māori world</i>
Te Reo Māori	<i>The Māori language</i>
Tika	Truth, correctness, directness, justice, fairness, righteousness, right
Tikanga	Correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol - the customary system of values and practices that have developed over time and are deeply embedded in the social context
Tuku	To relinquish, cede, grant, gift
Utu	Revenge, vengeance, retaliation, payback, retribution, cost, price, wage, fee, payment, salary, reciprocity - an important concept concerned with the maintenance of balance and harmony in relationships between individuals and groups and order within Māori society, whether through gift exchange or as a result of hostilities between groups
Wāhi taonga	<i>Site of significance</i>
Wāhi tapu	Sacred place, sacred site - a place subject to long-term ritual restrictions on access or use, for example a burial ground, a battle site, or a place where tapu objects were placed
Wai	Water, stream, creek, river
Wānanga	Tertiary institution that caters for Māori learning needs
Whakapapa	Genealogy, genealogical table, lineage, descent
Whānau	Extended family, family group, a familiar term of address to a number of people - the primary economic unit of traditional Māori society. In the modern context the term is sometimes used to include friends who may not have any kinship ties to other members
Whanaungatanga	Relationship, kinship, sense of family connection – a relationship through shared experiences and working together which provides people with a sense of belonging
Whenua	Land
Wharenui	Meeting house, large house - main building of a marae where guests are accommodated







# Appendix B.

## Indigenous peoples' engagement in infrastructure overseas

### Āpitihanga B.

### Te pāhekoheko a ngā iwi taketake nō tāwāhi ki te hanganga

#### B.1. Indigenous peoples' engagement on others' infrastructure initiatives overseas

This section discusses Indigenous peoples' engagement on third parties' infrastructure initiatives in three other 'settler nations':

- the United States of America
- Canada
- Australia.

The legal and political frameworks within which that engagement occurs in is different in each of those countries and different from that in New Zealand. In the United States there is also a difference between the legal and political framework within which engagement with Native Hawaiians occurs from that in which engagement with American Indians and Native Alaskans occurs.

There are significant similarities in the factors that facilitate good engagement with Indigenous groups in each of those countries and New Zealand. One factor that is emphasised more in the overseas literature, although it is present in the New Zealand literature particularly the Te Arawhiti guidelines, is the need for government to take a joined-up approach to engaging with Indigenous groups.

#### (i) United States of America – American Indians and Native Alaskans

##### Legal and political framework in which engagement occurs

The United States federal government's relationship with American Indian and Native Alaskan tribal governments is one under which tribes are recognised as "domestic dependent nations" under the United States government's "protection". Tribes have a right to self-government and, as domestic dependent nations, exercise inherent sovereign powers over their members and territory (Clinton, 2000). However, the United States federal government views itself as having also taken on trust responsibilities, such as responsibilities to protect tribal rights and resources (Shearer, 2007).

In Alaska the situation is made more complex by the 1971 Alaskan Native Claims Settlement Act (ANCSA). Under ANCSA, title to 44 million acres of ancestral lands was transferred to statutory village and regional corporations (along with monetary compensation for land lost in the settlement). The initial shares in those corporations were granted to Alaskan Natives born on or before 18 December 1971<sup>10</sup> (ANCSA Regional Association, n.d.). This means that Alaskan Native tribes do not hold title to ancestral lands themselves, the land is held by private corporations (composed of individual shareholders) (Shearer, 2007).

On 6 November 2000, then United States President Bill Clinton issued Executive Order 13175 ‘Consultation and Co-ordination with Indian Tribal Government’ (Clinton, 2000).<sup>11</sup> Executive Order 13175 applies (subject to some exceptions)<sup>12</sup> when federal agencies are proposing to take actions “that have substantial direct effects” on one or more Indian or Alaskan Native tribe, band, nation, pueblo, village, or community recognized under the Federally Recognized Tribe List Act of 1994 (25 USC 479a).

The Order requires every relevant federal agency to have an accountable process to ensure meaningful and timely input by tribal officials in the development of such actions. By United States federal law, federal agencies are required to consult with ANCSA corporations on the same basis as they are required to consult with Alaskan Native tribes under Executive Order 13175 (GAO, 2019).

The heads of relevant federal government executive departments and agencies are required to prepare detailed plans of the actions their agencies will take to implement Executive Order 13175 and to provide annual progress reports on those plans (Biden, 2021).

Executive Order 13175 states that it is not intended to be legally enforceable in Court (section 10). Similarly, a number of federal agency consultation policies developed to comply with Executive Order 13175 explicitly state that those policies did not create a right of action. However, in at least one case a Court has found that a federal agency acted arbitrarily and capriciously by failing to follow a relevant departmental policy on consultation with tribal

entities which had been developed to implement Executive Order No. 13175.<sup>13</sup>

In addition to Executive Order 13175, various statutes and regulations require United States federal government agencies to consult with tribal governments about infrastructure projects that impact tribal interests.<sup>14</sup>

## Research and commentary on the factors that facilitate good engagement with American Indians or Native Alaskans

Factors that facilitate good engagement with American Indians or Native Alaskans identified in the literature are summarised in Table 2 below.

A particular problem identified in the United States is that it can be difficult for federal agencies to determine which tribal governments might be impacted by a particular undertaking or who within a tribe to address communications to. In particular (GAO, 2019):

- it can be difficult for agencies to identify tribes which have treaty rights (to hunt, fish or gather) or sites of cultural or religious significance located outside tribal reservations<sup>15</sup>
- changes or turnover in tribal leadership can make it difficult to obtain and maintain relevant contact information.

Both the US Department of the Interior and the United States Government Accountability Office (GAO) have recommended that methods should be established to make that easier (GAO, 2019; US Department of the Interior et al., 2017).

**Table 2:** Factors that facilitate good engagement with American Indians or Native Alaskans

Factor	Sources	Comments
Regular communication	Shearer US Department of the Interior et al., 2017 GAO (Eitner, 2014)	<i>Regular communication (for example, having a quarterly or biannual meeting with a tribe), allows tribes to discuss issues of importance to them rather than just focusing on a federal agency's agenda and enables the parties to identify areas of concern on an ongoing, not project-specific, basis.</i>
Asking the tribe what their interests in a project are and not assuming that you understand their position	US Department of the Interior et al., 2017	



Factor	Sources	Comments
Not assuming silence means lack of interest	US Department of the Interior et al., 2017	<i>A lack of response from a tribe should not be treated as a lack of interest in a project, and federal agencies should make several good-faith efforts to connect with a tribe through appropriate communications (for example emails and phone calls).</i>
Engaging early	(National Congress of American Indians, 2016) (NCAI)  US Department of the Interior et al., 2017  (Furlong, 2020)  GAO	<i>The NCAI, a representative congress of American Indians and Alaskan Natives, has stated that tribes should have the same opportunities as state and local governments to participate at the early planning stages of federal infrastructure projects and should be provided full and early participation in “purpose and need” infrastructure permitting discussions.</i>  <i>Engaging late in the development stages of a project limits tribes’ opportunities to identify tribal resources near proposed project sites and influence project design.</i>
Continuity of approach	GAO  Shearer	<i>Examples of how this could be achieved cited in the literature are federal agencies employing full-time dedicated native or tribal liaison staff and having standard operating procedures documents and/or internal policy guidelines to seek to ensure continuity of approach when there is turnover within liaison positions.</i>
Support from agency leadership and engaging at appropriate levels	Shearer  US Department of the Interior et al., 2017  GAO	<i>When native or tribal liaison staff engage with tribal governments, they represent the leadership of their agencies. Therefore, it is desirable for those staff to have direct access to, and support from, their agency’s leadership. It is desirable for relationships to be established with a tribal group at all levels- between the leadership of agencies and tribes, and also between staff at the local level of each government. Federal agency decision-makers being personally involved in engagement whenever possible enables on-the-spot problem-solving, dialogue, and appropriate follow up.</i>
Understanding a tribe’s interests (including rights outside of reservations) and history	US Department of the Interior et al., 2017  GAO	
Involving tribes in planning when and how consultation occurs	Shearer  US Department of the Interior et al., 2017  GAO	<i>Native Alaskan tribes generally want consultation to be one-to-one (but constraints on agency travel budgets can make that difficult). Often agencies need to either travel to tribal villages or provide funding for tribes’ time and travel to meetings.</i>
Not seeking to limit what subjects tribes raise concerns about	GAO	<i>An example of sub-optimal engagement given in the literature is agencies not allowing tribal groups to raise issues in relation to climate change impacts.</i>
Co-ordinating engagement with that being undertaken by other agencies	US Department of the Interior et al., 2017  GAO	<i>The GAO notes that co-ordination can be difficult when there are multiple agencies involved even if an inter-agency agreement as to how consultation will be co-ordinated has been reached.</i>
Working with tribes to appropriately protect the confidentiality of information	US Department of the Interior et al., 2017	<i>Where appropriate, federal agencies need to work with tribes to protect the confidentiality of information provided to the federal government and be transparent about any limitations on their ability to protect confidentiality.</i>
Aiming to reach consensus solutions	US Department of the Interior et al., 2017  Furlong	<i>This includes agencies being prepared to adapt to changing circumstances, contemplate creative problem solving, and exhaust every alternative to seek to achieve mutually agreeable solutions.</i>

Factor	Sources	Comments
Responding in a timely manner	US Department of the Interior et al., 2017 GAO	<i>This includes responding in a timely manner to tribal concerns and requests</i>
Providing feedback on how the engagement shaped the decisions made	US Department of the Interior et al., 2017 GAO	<i>This involves clearly communicating how an agency's ultimate decision addressed tribal input and, where an agency is unable to fully address tribal concerns, explaining the reasons for that.</i>
Providing federal agency staff with education and training	Advisory Council on Historic Preservation (ACHP, 2015) Shearer US Department of the Interior et al., 2017 GAO	<p><i>Potential training topics identified in the literature include:</i></p> <ul style="list-style-type: none"> <li><i>the government-to-government and trust relationships between the United States federal government and tribes</i></li> <li><i>the various treaty rights of tribes in the relevant region</i></li> <li><i>the historical context for tribes' interests in land outside their reservations</i></li> <li><i>American Indian and tribal law</i></li> <li><i>the governance structures of relevant tribes</i></li> <li><i>traditional knowledge, customs, religion, and values</i></li> </ul>
Funding, or providing assistance towards, tribal involvement	(Eid, 2018) US Department of the Interior et al., 2017 GAO NCAI ACHP, 2015	<p><i>This potentially includes:</i></p> <ul style="list-style-type: none"> <li><i>providing funding for tribes to access technical expertise to allow them to assess infrastructure proposals</i></li> <li><i>paying trained tribal members to survey proposed routes</i></li> <li><i>paying for tribal monitoring programmes</i></li> <li><i>providing training on, or access to, computerised data or systems</i></li> <li><i>meeting transportation, accommodation, and meal costs</i></li> <li><i>providing supplies and equipment that allow a tribe to provide feedback more effectively</i></li> <li><i>providing training to tribal representative on the legislation agencies want to engage with those entities under.</i></li> </ul> <p><i>Eid comments that that funding arrangements need to be carefully structured and monitored to create no real or perceived obligations on the part of tribal officials to support projects, and to ensure funds are expended only for legitimate and approved purposes (Eid, 2018).</i></p> <p><i>ACHP guidelines state that when agency staff seek views and advice from a tribe in fulfilment of a legal obligation to consult under the National Historic Preservation Act, those staff are not required to pay the tribe for providing its views but can voluntarily provide assistance if the relevant agency's policies allow that.</i></p>

## November 2022 uniform minimum standards

On 30 November 2022, President Joe Biden issued a memorandum setting out minimum standards for federal officials' consultation with tribal nations, which agencies are encouraged to build upon consistent with their own missions and engagement with tribal nations (J. R. Biden, 2022).

Under those uniform standards, agencies are required to:

- strive for consensus with tribes or a mutually desired outcome
- ensure that officials with decision-making authority undertake the engagement.

The uniform standards also require:

- applicable information to be readily available to all parties
- federal and tribal officials to have adequate time to communicate
- tribal nations consulted to be advised how their input influenced decision-making.

The head of each federal agency is required to designate a primary point of contact for tribal officials seeking to consult with that agency. That person is to be responsible for advising agency staff on all matters pertaining to tribal consultation. However, the head of an agency can designate additional points of contact as necessary to facilitate consultation on varied subject matter areas within the agency and the designated point of contact can delegate consultation responsibilities to other decision-making officials within their agency.

Throughout consultation agencies are required to “respect and elevate Indigenous Knowledge, including cultural norms and practices”.

Agencies are required to maintain records of all consultation processes including records of how tribal input influenced, or was incorporated into, agency actions and where tribal suggestions were not incorporated or consensus could not be attained, the reasons why.

To the extent permitted by applicable law, agencies are required to ensure that information designated as sensitive by a tribal government is not publicly disclosed and obtain advance informed consent from tribal communities for the use of any sensitive information.

The head of each agency must require annual training regarding tribal consultation for agency employees who work either with tribal nations or on policies with tribal implications.

Like Executive Order 13175, the 2022 memorandum states that is not intended to be legally enforceable in court.

## (i) United States of America – Native Hawaiians

### Legal and political framework in which engagement occurs

Relations between the US federal government are shaped by the events of the late 1800s.

- In 1810 the four independent chiefdoms then governing the Hawaiian Islands were unified as one Kingdom of Hawai'i, a sovereign nation which established diplomatic relationships with other nations, including the United States of America.
- In 1887 the then Hawaiian King, David Kalakaua, was forced, by an armed group seeking to protect the business interests of settlers, to sign a new constitution for the Kingdom which transferred power to a settler-controlled Cabinet and imposed land ownership and income conditions on the right to vote.
- In 1893 Hawaiian settler sugar industry and United States interests deposed the then Hawaiian Queen, Queen Liliuokalani, and sought annexation of Hawai'i by the United States.
- Then United States President Grover Cleveland blocked the proposal and demanded the restoration of the Queen. However, the coup leaders refused to recognise President Cleveland's authority on the issue and, in 1894, established the Republic of Hawaii.
- By 1898 the Government of the Republic of Hawaii had agreed to the annexation of Hawai'i by the United States.

Hawai'i became an incorporated territory of the United States in 1900 and a US State in 1959.

In 1993, on the 100th anniversary of Queen Liliuokalani's deposition, the United States Congress passed a joint resolution apologizing for the participation of agents and citizens of the United States in that overthrow and the deprivation of the rights of Native Hawaiians to self-determination.<sup>16</sup>

The United States federal government's position is that there is a special political and trust relationship between itself and the Native Hawaiian community which has been recognised and implemented in more than 150 statutes (US Department of the Interior, 2016). Between 2014 and 2016 the US Department of the Interior developed an administrative procedure and criteria the federal government would use if the Native Hawaiian community formed a unified government and then sought a formal government-to-government relationship with the United States. The wording of this procedure implies that if such relations were established the Native Hawaiian government would have the status of a domestic dependent nation like American Indian and Native Alaskan tribes.

On 18 October 2022 the US Department of the Interior began public engagement on two proposed chapters for its Departmental Manual which would require consultation between Departmental officials (including officials in all Departmental bureaus and offices) and the Native Hawaiian community. The press release announcing the policy (US Department of the Interior, 2022b) noted that this is the “first time in

the [Department of the Interior's] history that the it will require formal consultation with the Native Hawaiian Community”. The US Department of the Interior includes the Bureau of Ocean Energy Management (which oversees development of renewable energy resources on the Outer Continental Shelf, the Bureau of Reclamation (which manages dams, hydro-electric power plants and canals and is a water wholesaler), and the National Park Service.

## Commentary on the factors that facilitate good engagement with Native Hawaiians

Factors that facilitate good engagement with Native Hawaiians identified in the literature are summarised in Table 3 below.

Engagement with Native Hawaiians communities is often undertaken through ‘Native Hawaiian Organisations’ - organisations that serve and represent the interests of Native Hawaiians, and have “as a primary and stated purpose the provision of services to Native Hawaiians” and “expertise in Native Hawaiian affairs” (US Department of the Interior, 2022a, pp. 3–4).

**Table 3:** Factors that facilitate good engagement with Native Hawaiians

Factor	Sources	Comments
Undertaking research to find the Native Hawaiian organisations to engage with	(ACHP, 2011) (Van Tilburg et al., 2017)	<i>Sources of information for identifying the organisations to engage with cited in the literature include cultural resource specialists at other government agencies, a list of Native Hawaiian organisations held by the US Department of the Interior's Office of Hawaiian Relations,<sup>17</sup> local histories, experts at local universities, and local organisations such as canoe clubs, churches, and schools. People wishing to consult are also advised to considering publishing notices in local newspapers.</i>
Engaging early	Van Tilburg et al	<i>The recommendation is that Hawaiian community leaders should be notified as soon as a project in their area is being considered.</i>
Considering using facilitators	Van Tilburg et al US Department of the Interior, 2022a and b	<i>Van Tilburg et al's suggestions for potential facilitators are appropriate agency staff, independent contractors, and members of relevant Native Hawaiian Organisations. If an independent contractor is used Van Tilburg et al recommend that contractor is someone who holds an appropriate qualification (for example in ethnography) and has experience in the relevant area and with the relevant community leaders.</i>  <i>The draft US Department of the Interior policies would require each bureau or office of the Department to have a Native Hawaiian Community Liaison Officer who was the principal point of contact for Native Hawaiian Community consultation matters.</i>



Factor	Sources	Comments
If conflicts arise between Native Hawaiian organisations on who should be engaged with, consulting with all parties but being flexible about how	ACHP, 2011	<i>One of the ACHP's suggestion is that an agency could hold separate meetings or teleconferences with each Native Hawaiian organisation.</i>
Entering into a written agreement with a Native Hawaiian organisation about its geographic area of interest and the types of project about which it wishes to be consulted	ACHP, 2011	
Seeking to promote co-operation and efficiencies between agencies with overlapping interests	US Department of the Interior, 2022a	
Developing an engagement plan but being ready to amend it as the engagement progresses	US Department of Interior, 2022b	
Using engagement approaches that work for Native Hawaiian organisations	ACHP, 2011 Van Tilburg et al	<i>This includes being mindful of the fact that Native Hawaiian Organisation representatives may not hold paid positions in the organization and may have fulltime jobs outside the organization. Therefore, they may not be able to meet during the working day.</i>  <i>It also includes asking Native Hawaiian Organisations about their preferred way of doing business and any specific protocols for meetings. Van Tilburg et al recommend establishing a Memorandum of Understanding regarding how a particular consultation process will proceed stating "this not only helps to specify details, but it also helps to preserve institutional memory should there be turnover in organizations over the course of a project, which is a common occurrence in long projects" (Van Tilburg et al., 2017, p. 5).</i>
Being flexible about timeframes	(ACHP, 2011)	<i>The ACHP notes that, due to a lack of human and financial resources, a Native Hawaiian Organisation may not be able to meet an agency's schedule and deadlines.</i>
Paying fees to Native Hawaiian Organisations for services provided	(ACHP, 2011)	<i>The ACHP states that agencies should not expect to pay a fee for an organisation to provide comments but would be justified in paying a fee if they were asking a Native Hawaiian Organisation to fulfil the duties of the agency in a role similar to that of a consultant or contractor (for example asking the organization to undertake research or a survey).</i>
Understanding the history of government relations with Native Hawaiians and the culture of Native Hawaiians	ACHP, 2011 Van Tilburg et al	
Having agency staff undertake training	US Department of the Interior, 2022b	<i>The training would cover the history of the 'government-to-sovereign' relationship between the United States federal government and the Native Hawaiian community, the trust obligations owed by the federal government to that community and the culture and history of the community.</i>

Factor	Sources	Comments
Where possible, using face-to-face meetings	US Department of the Interior, 2022a (US Department of the Interior, 2022a)	
Being clear about who will be making decisions and, if possible, creating opportunities to share decision-making	Van Tilburg et al	
Having an official with the authority to make decisions participate in the engagement	US Department of the Interior, 2022b	
Seeking consensus where an initiative would affect matters such as self-governance or land with trust status and, where needed, using collaborative problem-solving	US Department of the Interior, 2022a and b	
Appropriately addressing how culturally sensitive information will be handled	US Department of the Interior, 2022b	
Documenting the role engagement played in the decisions ultimately made	US Department of the Interior, 2022b	
Letting the people engaged with know before formal applications relating to a project are submitted	Van Tilburg et al	

## (i) Canada – Indian, Inuit, and Métis peoples

### Legal and political framework in which engagement occurs

#### The Canadian Constitution Act 1982 and different types of Indigenous rights

The Canadian Constitution Act 1982 recognised and affirmed the “existing aboriginal and treaty rights of the aboriginal peoples of Canada”, including Indian, Inuit and Métis peoples (section 35).

Métis peoples are of mixed European and Indigenous ancestry. The use of the term ‘Métis’ is “complex and contentious” and there are different definitions of who is and is not Métis centred on whether or not to be Métis a person must have ancestral ties to the former Red River Settlement which was located in present day Manitoba (Gaudry et al., 2023).

‘Aboriginal rights’ are rights held by Indigenous communities which have not been ceded under treaties (Newman, 2014). They are derived from Indigenous laws, practices, customs and traditions and are not contingent on occupation of land (Wright, 2020). ‘Aboriginal rights’ can include ‘Aboriginal title’ which confers ownership rights similar to those associated with fee simple ownership of land including the right to decide how the land will be used, rights to possess, occupy, enjoy, use and manage the land and rights to the economic benefits of the land.<sup>18</sup> Where land is held in Aboriginal title the consent of the Indigenous group must be obtained for use of the land unless the Crown can justify use of the land without consent under section 35 of the Constitution Act.<sup>19</sup>

Between 1700 and the early 20th century a series of treaties between the Crown and Indigenous groups were entered into covering most of the current Canadian provinces and parts of what are now the three Canadian territories (Northwest Territories, Nunavut and Yukon) (Wright, 2018). These are referred to as ‘historical treaties’. Historical treaty rights are interpreted in a way that provides for modern exercise of those rights (Wright, 2020).

After a period without treaty making from the 1920s to the early 1970s, the Canadian

Government resumed entering into treaties with Indigenous groups (Wright, 2020). Treaties entered into between the Crown in right of Canada and Indigenous peoples from 1975 onwards are referred to as ‘modern treaties’ or ‘land claim agreements’. Under modern treaties Indigenous peoples surrender aboriginal rights and title in exchange for the explicit rights and protections set out in their treaty. These agreements have resulted in large areas of land being vested in Indigenous peoples and payments to newly-established not-for-profit Indigenous corporations (Bennett, 2018). Modern treaties often contain explicit consultation or collaboration requirements (Wright, 2020). In each area covered by a modern treaty there are co-management boards responsible for land and resource management made of members nominated by each of the federal government, the territorial or provincial government, and the Indigenous group (Wright, 2018).

The Canadian Government also negotiates self-government agreements with Indigenous communities which are then brought into effect by federal legislation. Fiscal agreements are negotiated which provide for funding to support the operations of an Indigenous government to effectively deliver programmes and services to its members (CIRNAC, 2020).

#### Canadian Court decisions on duties to consult and accommodate

In three early 2000s decisions,<sup>20</sup> the Supreme Court of Canada held that the Crown in right of Canada has a duty to consult and, where appropriate, ‘accommodate’ when the Crown contemplates conduct that might adversely impact potential or established aboriginal or treaty rights. The Court characterised that duty as stemming from the ‘Honour of the Crown’. The concept of the ‘Honour of the Crown’ has “grown into a broader requirement that [government] interact with Aboriginal communities in a manner consistent with an ideal of honourable conduct” (Newman, 2014, p. 8).

The legal duty to consult arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title (including treaty rights) and contemplates conduct that might adversely affect any such rights or title (Bergner, 2018; Gray, 2016; Wright, 2020). The Crown’s duty applies to Canadian provincial and territorial governments as well as the federal government (Gray, 2016).

This duty does not give Indigenous groups a veto over what can be done or impose a duty on the Crown to reach an agreement with an Indigenous group about a proposal (Bergner, 2018; Wright, 2020). If the government is considering taking an action which would continue an existing a historic breach of aboriginal or treaty rights but not create a new impact on those rights, there is no duty to consult. For example, re consenting a hydroelectric facility without change has been found not to trigger the duty to consult (Newman, 2014). Legally, the duty to consult is also based on the need to avoid the impairment of asserted rights that flow from the specific project at issue and is not about resolving broader claims that go beyond the scope of the proposed project (Wright, 2020).

The Crown may delegate procedural aspects of consultation to the proponents of a particular development (although the proponents themselves do not have a legal duty to consult) (Bergner, 2018; Gray, 2016; Wright, 2020). But the ultimate responsibility for consultation and accommodation rests with the Crown (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011). In practice this frequently means that a significant share of the consultation obligation falls to project proponents (Bergner, 2018).

The Crown need not set up a separate process for fulfilling the duty to consult if there is an existing process (such as a statutory environmental impact assessment process) which is sufficient to fulfil that duty and it makes it clear to the affected Indigenous group(s) that the Crown is relying on that existing process to fulfil its duty to consult (Wright, 2018).

Where a project might significantly impair asserted rights, to meet the duty to consult the Crown must engage with concerns about the project expressed by the Indigenous group, exchange information candidly, provide meaningful feedback to the concerns raised and make a real effort to pursue two-way dialogue (not just record concerns raised by an Indigenous group).

In assessing whether the duty to consult has been met Courts will also take into account whether an Indigenous group was given opportunities to attend an oral hearing or ask informational questions to be responded to by the project proponent, or was provided with funding to participate (Wright, 2020).

The Canadian courts have held that Indigenous groups have reciprocal obligations to participate in good faith in consultation with the Crown. They cannot frustrate reasonable good faith efforts to consult by refusing to participate or meet or by imposing unreasonable conditions (Gray, 2016).

If consultation identifies that a proposed initiative would have significant adverse impacts on potential or established aboriginal or treaty rights a duty to 'accommodate' arises. 'Accommodation' in this context means taking actions to avoid, eliminate or minimize those significant adverse impacts and, when that is not possible, providing compensation to an Indigenous community for those adverse impacts (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011). Accommodation could include making changes to the project design or project approach, undertaking measures to avoid or minimize adverse effects, or providing compensation in the form of habitat replacement, provision of training or employment opportunities, land exchanges, or money (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011).

There is no requirement for the Crown and an Indigenous group to reach agreement on accommodation measures, "[r]ather, accommodation requires that aboriginal concerns be balanced with the potential impact of the particular decision on those concerns and with competing societal concerns" (Wright, 2018, p. 205). However, if proven aboriginal rights (such as aboriginal title) would be infringed and agreement cannot be reached the Crown will need to demonstrate that the infringement is justified under section 35 of the Constitution Act.

## Consultation Protocols

The Canadian Government has a practice of negotiating consultation protocols with different Indigenous groups where (Aboriginal Affairs and Northern Development Canada, 2014):

- there is sufficient federal consultation activity for an agreement to be beneficial to both the Government of Canada and the Indigenous community
- provinces and territories are key partners in the process
- Indigenous communities are interested in working together under a consultation agreement.



However, the use of a relevant protocol “is optional on any particular consultation”.

Consultation protocols can include provision for the Government to contribute funding towards the development of consultation expertise within an Indigenous community.

Some Indigenous groups have indicated that they like the flexibility afforded by federal consultation protocols but others have expressed concern about the lack of clarity (Gray, 2016). Gray notes that there are indications that federal departments and agencies sometimes depart from a protocol without informing the Indigenous community concerned.

### Impact-Benefit Agreements

Because of uncertainties about what the duty to consult requires in practice in any particular case, project proponents often engage with Indigenous communities early to seek to negotiate win-win solutions (Bergner, 2018; Newman, 2014). Often these negotiations result in the proponent and the Indigenous community entering into an ‘impact-benefit agreement’.

Impact-benefit agreements record agreed ways to mitigate the effects of projects and provide benefits to an Indigenous community (such as employment and training for community members or direct financial benefits). They can, less commonly, extend to providing for a joint venture or an equity position for an Indigenous community (Hoicka et al., 2021; Newman, 2014). They can also include commitments for project proponents to (Bergner, 2018):

- give advance notice of contracting opportunities to companies owned by members of the Indigenous community
- provide critiques of any unsuccessful tender bids made by Indigenous companies
- actively look to subdivide pieces of project work so that they are of suitable scale for potential Indigenous contractors.

The following points about impact-benefit agreements have been noted in the literature.

- Agreements which provide for employment are the most beneficial if they provide lasting or ongoing employment opportunities (rather than opportunities limited to the construction period of the project) and are supported by training or apprentice opportunities (Bergner, 2018).

- Some Indigenous communities are better suited than others to gain benefits from resource development in areas over which they have rights. Over time this may result in some Indigenous communities prospering even more than they currently are while others continue to struggle (Newman, 2014).
- Indigenous communities either have good or bad “geographic luck” in that if a development occurs close to an Indigenous community they may have the chance to gain a substantial amount of money (Coates, 2015, p. 4).

### ATRIS

The Canadian federal government has developed an online Aboriginal and Treaty Rights Information System (ATRIS) (CIRNAC, 2023). ATRIS uses an interactive map to allow users to locate Indigenous nations, groups, communities, and organisations with established or asserted rights in a particular geographic area. It is subject to ongoing updating and includes:

- contact information for chiefs and band offices
- tribal council affiliations
- information on Métis organisations and Inuit communities and governments
- copies of historic and modern treaties, self-government agreements and other agreements such as consultation protocols
- claims relating to past wrongs and land claims filed by Indigenous groups and information relating to self-government negotiations
- information about relevant court cases and court decisions
- information on historical context and community perspectives.

ATRIS is managed by the federal department, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).

Some Indigenous groups have expressed concerns that ATRIS contains inaccurate and incomplete information and that relevant information obtained by different departments and agencies is not always added to ATRIS (Gray, 2016).

## Response to the United Nations Declaration on the Rights of Indigenous Peoples

On 10 May 2016 Canada's then Minister of Indigenous and Northern Affairs announced that Canada was a full supporter, without qualification, of the United Nations Declaration on the Rights of Indigenous Peoples.<sup>21</sup> The Canadian Government subsequently released its Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. The sixth principle states (Department of Justice Canada, 2018, p. 12):

*"The Government of Canada recognises that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources."*

On 21 June 2021 the Canadian Parliament passed the United Nations Declaration on the Rights of Indigenous Peoples Act. In accordance with that Act, on 21 June 2023 the Government of Canada released an Action Plan to implement the United Nations Declaration of Rights of Indigenous Peoples (Department of Justice Canada, 2023b). A draft of that Action Plan (Department of Justice Canada, 2023a) was released for consultation on 20 March 2023 (Department of Justice Canada, 2023a) along with a report, 'What we have learned to date', (Department of Justice Canada, 2023c) which discusses what Indigenous peoples said during the federal government consultation undertaken when developing the draft Plan.

The 'What we have learned to date' report (Department of Justice Canada, 2023c) notes that Indigenous groups are seeking for:

- Indigenous knowledge to be properly valued in decisions and for elders and traditional knowledge keepers to be involved in impact assessments
- increased Indigenous representation on federal boards and panels
- financial and technical assistance including to ensure that there is meaningful Indigenous consultation on, and participation and involvement in, resource development decisions
- the specific needs of Indigenous women and 2SLGBTQI+ persons to be addressed, including holding their rights to be consulted

- federal support and participation to enable good faith, multilateral, nation-to-nation, consensus-based decision-making processes (including project-specific roundtables)
- for the rights of off-reserve and urban Indigenous people to be consulted with to be upheld.

The Plan as released includes proposals to:

- develop guidance on engaging with Indigenous peoples on natural resources projects,
- increase the ability of grassroots organizations to bring forward the interests and perspectives of Indigenous women's and 2SLGBTQI+ grassroots organizations' voices to influence the development of federal programmes.

## Guidelines and commentary on the factors that facilitate good engagement with Indigenous peoples in Canada

Factors that facilitate good engagement with Indian, Inuit and Métis peoples identified in the literature are summarised in Table 4 below.

In addition, guidelines issued by the then Minister of the Department of Aboriginal Affairs and Northern Canada in 2011 set out what the Crown "may reasonably expect" from Indigenous groups in relation to consultation (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011, p. 19). Those expectations are that Indigenous groups will:

- clearly outline in a timely manner any potential adverse impacts of a proposed activity
- share their concerns with the Crown, and share any other relevant information that can assist in assessing the strength of their claim or the seriousness of any potential impacts on their rights and interests
- attempt to resolve any issues with other Indigenous groups with overlapping claims and interests
- attempt to reach a mutually satisfactory resolution to a particular situation
- not consider that they have a veto over a proposed project.

**Table 4:** Factors that facilitate good engagement with Indian, Inuit and Métis peoples

Factor	Sources	Comments
Researching whether and, if so, how a proposal might adversely affect existing or potential aboriginal or treaty rights	Minister of the Department of Aboriginal Affairs and Northern Development (Gray, 2016)	<i>Possible sources for identifying 'aboriginal and treaty rights' within a proposed activity area cited in the literature include other officials within a department or agency, aboriginal groups with which a department or agency has an existing relationship, other government departments and agencies, and provinces, territories, and industry with which a department or agency has an existing relationship.</i>
Engaging early	Minister of the Department of Aboriginal Affairs and Northern Development  Newman  Gray  Bergner	<i>Engaging early may reduce the burden on Indigenous groups that arises from them receiving large amounts of consultation paperwork relating to a wide range of projects.</i>  <i>Engaging early means that at the time the engagement occurs there may still be significant flexibility in the design of the project whereas making changes later in a project's life may become increasingly difficult and expensive.</i>
Where infrastructure is being provided for an Indigenous community – ensuring that there is sufficient flexibility in design parameters and funding conditions to enable the project design to address the Indigenous community's unique needs	(Bradford et al., 2018)	
Focusing on relationship building	Gray	
Finding out what other consultation processes with the same Indigenous groups are being undertaken by the same agency and, if possible, co-ordinate efforts	Minister of the Department of Aboriginal Affairs and Northern Development	
Co-operating with other departments and agencies	Minister of the Department of Aboriginal Affairs and Northern Development  Gray	<i>Suggested ways of doing this include using senior government official governance structures and or a central information management system. The federal guidelines include an expectation that when several agencies need to engage with an Indigenous group in relation to an initiative a lead agency will be identified. For some types of initiatives, the guidelines also direct the use of a Crown consultation co-ordinator who develops a consultation plan to integrate the activities of all relevant departments.</i>

Factor	Sources	Comments
Providing support for Indigenous groups' consultation-related activities	Minister of the Department of Aboriginal Affairs and Northern Development  Newman  (Department of Justice Canada, 2023c)	<p><i>Support could be funding or in-kind assistance – such as technical expertise and information, providing facilitators, document writers, translators and interpreters and undertaking document production (for example printing and binding documents prepared by Indigenous groups.</i></p> <p><i>Resource issues identified by Indigenous peoples include a lack of human resources to triage and prioritise consultation requests, a lack of sufficient technical expertise to review and respond to complex consultation requests, a lack of baseline information and human resources to determine what practices were traditionally practiced and are still practiced in specific areas, and a lack of human resources for reporting back to the wider group they represent.</i></p> <p><i>Gray notes that Indigenous groups have advised that their capacity needs cannot be met with one-off project funding and that they need core capacity funding on a recurrent and predictable basis so that they can hire staff devoted to consultation.</i></p> <p><i>Gray recommends that the government develops or supports targeted skills-training and apprenticeship activities aimed at increasing the capacity of local Indigenous groups to consult and improving those groups' access to government expertise.</i></p>
Respecting the uniqueness of different Indigenous communities	Minister of the Department of Aboriginal Affairs and Northern Development  Gray  (Gray, 2016)	<i>This includes respecting Indigenous groups' historical, regional, legal and governance differences.</i>
Providing training to officials	Minister of the Department of Aboriginal Affairs and Northern Development  Gray	<p><i>Suggested topics for training include the Crown's duty to consult, the context of the relationship between the Crown and Indigenous peoples, and where to access information and practical tools to support consultation and accommodation activities.</i></p> <p><i>Gray suggests that training could also cover how to build and maintain relationships with Indigenous groups and the historical, cultural, and socio-economic differences between Indigenous groups. He suggests that such training should be led by members of the relevant Indigenous groups.</i></p>
Involving Indigenous groups in the design of the consultation process	Minister of the Department of Aboriginal Affairs and Northern Development  Gray	
Providing good quality information to Indigenous groups and opportunities for those groups to ask questions about the information	Bergner	
Paying for Indigenous communities to undertake traditional use and similar studies that are specific to the project area	Bergner(Bergner, 2018)	<i>Bergner comments that location-specific studies are of more use to a project proponent than general ones. He also notes that preparing such studies provides opportunities for Indigenous groups to document oral history and can strengthen the connection between elders and youth in a community.</i>



Factor	Sources	Comments
Using timelines for information-sharing and responses that are appropriate and adapted to the specific circumstance	Minister of the Department of Aboriginal Affairs and Northern Development Gray	
Explaining how concerns raised have been addressed or, if they have not been addressed, why that is	Minister of the Department of Aboriginal Affairs and Northern Development Gray	
Monitoring whether agreed accommodation measures are implemented and effective	Minister of the Department of Aboriginal Affairs and Northern Development	<i>The federal guidelines suggest that an accommodation implementation plan could be put in place to help achieve this.</i>
Carrying out an evaluation of the consultation and accommodation process	(Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011)	

## (i) Australia – Aboriginal and Torres Strait Islander peoples

### Legal and political framework in which engagement occurs

The term 'Indigenous Australians' includes two distinct groupings – Aboriginal peoples and Torres Strait Islander peoples. Within each of those groupings is a diverse range of different nations (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2022).

Currently engagement with Indigenous peoples in Australia is not rooted in either a comprehensive legal framework or treaty rights (Hunt, 2013).

### Changes to the Australian Commonwealth Constitution

The wording of the Australian Commonwealth Constitution has been a point of focus in discussions relating to Aboriginal and Torres Strait Islander peoples' rights.

A referendum held in 1967 made two changes to the Constitution. Those changes meant that (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2021):

- the Commonwealth and state governments could make laws with respect to the Aboriginal race (and, therefore, create policies for Aboriginal and Torres Strait Islander peoples)
- "Aboriginal natives" were counted in all relevant population statistics.

On 30 March 2023 a Bill was introduced into the Commonwealth Parliament proposing an alteration to the Constitution to establish an Aboriginal and Torres Strait Islander 'Voice' to make representations to Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.

Members of the Voice would be "selected by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities by such means as the Parliament specifies" (The Parliament of the Commonwealth of Australia, 2023, p. 4). The proposed Constitutional amendment would not confer any power on the

Voice “to prevent, delay or veto decisions of the Parliament or Executive Government” and “would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action” (The Parliament of the Commonwealth of Australia, 2023, p. 5).

Whether the proposed change proceeds will be determined by a binding national referendum. For the change to proceed it would need to be approved by a ‘double majority’ at that referendum - that is a national majority of voters (more than 50%) from all Australian states and territories and a majority of voters (more than 50%) in at least four of the six Australian states (Australian Electoral Commission, n.d.-a).

The referendum will be held on 14 October 2023.

### The ‘Closing the Gap’ community infrastructure target

An agreement to address issues facing Indigenous Australians, the National Agreement on Closing the Gap, was entered into in July 2020 (Australian Government, 2020). The parties to that agreement are the Coalition of Aboriginal and Torres Strait Islander Peak Organisations, the Commonwealth Government, the governments of all the Australian states and territories, and the Australian Local Government Association.<sup>23</sup>

The Agreement provided that within 12 months of signature the parties would develop a target or targets for community infrastructure to measure progress towards parity in infrastructure, essential services and environmental health and conditions. That target (Target 9B) was agreed in December 2021. It states (Joint Council on Closing the Gap, n.d.):

“By 2031, all Aboriginal and Torres Strait Islander households:

- within discrete Aboriginal and Torres Strait Islander communities receive essential services that meet or exceed the relevant jurisdictional standard
- in or near to a town receive essential services that meet or exceed the same standard as applies generally within the town (including if the household might be classified for other purposes as a part of a discrete settlement such as a ‘town camp’ or ‘town-based reserve’).”

However, progress in achieving Target 9B is currently not being reported on “as there is no data source currently available which includes all required data elements” (Australian Productivity Commission, 2023).

### Research and commentary on the factors that facilitate good engagement with Indigenous Australians

Factors that facilitate good engagement with Indigenous Australians identified in the literature are summarised in Table 5 below. Much of this is drawn from a literature review undertaken by Janet Hunt in 2013 (Hunt, 2013).

A term used in some of the literature is ‘Country’. ‘Country’ has been described in the following way:

*“Country” (capital C) has a specific and significant meaning for Aboriginal peoples. In the Aboriginal sense of the word, Country relates to the nation or cultural group and land that we belong to, yearn for, find healing from, and will return to. However, Country means much more than land, it is our place of origin in cultural, spiritual, and literal terms. It includes not only land but also skies and waters. Country incorporates both the tangible and the intangible, for instance, all the knowledges and cultural practices associated with land. People are part of Country, and our identity is derived in a large way in relation to Country.”*

However, descriptions of what ‘Country’ is differ from individual to individual (Government Architect New South Wales, 2020).

While often Indigenous groups preference is to engage with government through Indigenous organisations there are challenges facing those organisations. If they have been formed under government law they are subject to the accountability and funding controls applicable under those laws but they also need to be seen as legitimate by the Indigenous people they work for and have to manage the different expectations that gives rise to (Hunt, 2013).

**Table 5:** Factors that facilitate good engagement with Indigenous Australians

Factor	Sources	Comments
Identifying all relevant affected Indigenous peoples	(Department of the Environment, 2016)	<p><i>The Department of the Environment's suggestions for how to do this include contacting local Indigenous organisations, using available databases of native title representative bodies, contacting indigenous service providers, and obtaining advice from the Australian National Native Title Tribunal.</i></p> <p><i>Hunt comments that problems in engaging can arise when an indigenous community "is in conflict, has highly fractured governance or has weak leadership" (2013, p. 4).</i></p>
Engaging early	Hunt Department of the Environment (Duff et al., 2020)	<p><i>Early engagement enables deliberation about shared goals.</i></p> <p><i>Early engagement also enables Indigenous peoples to identify land that may not be appropriate for development, outline areas of cultural sensitivity, and begin conversations about economic development opportunities.</i></p>
Collaboration between agencies engaging with Indigenous Australians	Hunt(Hunt, 2013)	<p><i>Fragmented and siloed engagement by different government agencies with the same Indigenous peoples and organisations not only places unnecessarily heavy burdens on those peoples it also means that the government is not able to respond in a holistic way to Indigenous priorities and aspirations.</i></p> <p><i>Suggested mechanisms for achieving collaboration between agencies include collaboration centres and staff whose role is to co-ordinate engagement.</i></p>
Developing relationships with Indigenous groups	Hunt Department of the Environment Government Architect New South Wales(Hunt, 2013) (Hromek, 2019) (Moggridge et al., 2019)	<p><i>Hunt notes that developing such relationships takes time, people with the right skills and approaches, and good communication and leadership.</i></p> <p><i>The Department of the Environment states that agencies should develop relationships with Indigenous groups themselves and not leave this solely to consultants. However, Hromek recommends making initial contact with Indigenous communities through people with personal connections to those communities.</i></p> <p><i>The Government Architect New South Wales notes that building relationships with Aboriginal people requires an appropriate allocation of time and resources and allowing for Aboriginal people to provide leadership and guidance right throughout a project's lifecycle.</i></p>
Having regionally based agency staff (including senior people with decision-making authority)	Hunt Moggridge et al	<p><i>Moggridge et al comment that, where possible, it is beneficial if staff are located within the communities they are working with.</i></p>
Ensuring agency/project staff know about Indigenous history, culture and contemporary social dynamics and the skills of people within Indigenous communities	Hunt Government Architect of New South Wales Hromek Moggridge et al	<p><i>The Government Architect New South Wales suggests not only undertaking cultural awareness training courses but also engaging with:</i></p> <ul style="list-style-type: none"> <li><i>• works by Indigenous artists, designers, and writers</i></li> <li><i>• First Nations languages (including the meanings of place names),</i></li> </ul> <p><i>and walking on Country with Aboriginal knowledge-holders and traditional custodians.</i></p>
Agreeing the manner, timing, and level of engagement with Indigenous groups	Department of the Environment Moggridge et al Duff et al	<p><i>An example given is that Indigenous groups may want to meet outside normal business hours.</i></p> <p><i>There may also be upcoming community events that limit people's willingness to be involved in a project.</i></p>
Asking about appropriate protocols before visiting an Indigenous community	Department of the Environment Moggridge et al	

Factor	Sources	Comments
Identifying what matters should only be discussed in front of some people	Department of the Environment Moggridge et al	<i>In Aboriginal communities there can be a strong distinction between 'men's business' and 'women's business'. Men's and women's business can have differing meanings across Aboriginal Australia.</i>
Allowing for Indigenous peoples to take time to reach a consensus position	Department of the Environment	
Being clear about processes, roles, and responsibilities	Hunt	
Being clear about the limitations and parameters an agency is working within	Hunt Hromek(Hromek, 2019)	
Identifying benefits for the Indigenous group as well as benefits for the agency	Hunt Duff et al	<i>Hunt notes that indigenous people will choose to engage on government initiatives if they can see a connection between what government is offering and how they might enhance their own sense of wellbeing but, if they cannot, they may choose not to engage.</i>
Demonstrating how issues raised by Indigenous groups have been addressed	Department of the Environment(Department of the Environment, 2016)	
Being clear about what outcomes have been agreed and how they will be achieved	Hunt	
Agency staff who can deal constructively with conflict	Hunt Department of the Environment(Department of the Environment, 2016)	<i>The Department of the Environment recommends that agencies should not become involved if disputes arise between Indigenous groups but might want to consider resourcing an appropriate independent facilitator to assist the Indigenous groups to resolve their dispute and allowing time for that dispute to be resolved.</i>
Agencies being prepared to be flexible and take some risks	(Hunt, 2013)	
Considering incorporating shared histories of cultural landscapes and Indigenous knowledge systems into project designs	Government Architect New South Wales Hromek Duff et al	<i>Hromek recommends that Indigenous communities be paid for their design input and lead the Indigenous elements of design input.</i>
Agencies being prepared to support development towards Indigenous peoples' aspirations	Hunt Government Architect New South Wales Moggridge et al	<i>One suggested method for supporting Indigenous peoples' aspirations is incorporating enterprise opportunities for Indigenous businesses at all stages through a projects lifecycle. Other suggestions include agreeing to an annual payment to acknowledge an Indigenous group's status as the traditional owner of relevant land, (for an energy generation project) supplying free or discounted energy to the local community, upgrading local facilities or community housing, revegetation of abandoned land, and providing scholarships for local community members.</i>  <i>Another approach to supporting Indigenous peoples' aspirations identified in the literature is developing resources to increase Indigenous communities' capacity to engage.</i>



Factor	Sources	Comments
Ensuring that Indigenous peoples retain control of their cultural knowledge and intellectual property and how it is shared	Government Architect New South Wales Hromek	<i>Hromek suggests that one method for doing this is having Indigenous community members leading any Indigenous content in a project design</i>

## B.2 Wider involvement of Indigenous peoples in infrastructure overseas

There is limited published research on Indigenous peoples' involvement in the construction or ongoing maintenance of infrastructure overseas.

There is some information in the literature on Indigenous groups in Canada and the mainland United States obtaining equity shares in infrastructure proposals or entering into joint venture or revenue-sharing agreements in relation to infrastructure proposals. Another model used in Canada is government and Indigenous communities co-funding the provision of infrastructure on Indigenous lands.

An area that has been a particular focus of research and comment is investment by Indigenous groups in Canada and the United States in renewable energy infrastructure.

### (i) Involvement in the construction or ongoing maintenance of infrastructure

There is limited published research on Indigenous peoples' involvement in the construction or ongoing maintenance of infrastructure overseas.

In 2016 and 2017 Bennett undertook a study of the construction of an all-weather road in the Inuvialuit Settlement Region in the Canadian Northwest Territories by two Inuvialuit-owned companies using federal and territorial government funding (Bennett, 2018). Local Indigenous community members were involved in the construction of the road. A local commented to Bennett that the wages they earned building the road had fed their family for five years while an executive of one of the Indigenous companies which built the road, and

would have the job of its ongoing maintenance, commented "[t]he maintenance of this road – that's gonna be my life" (Bennett, 2018, p. 30).

The community leaders who lobbied for the project included the owners of two Indigenous-owned transportation and construction companies in the area who Bennett described as part of "the local managerial bourgeoisie" (2018, p. 32).

Bennett notes a level opposition to the project within the local Indigenous communities and inequalities and class tensions within those communities:

- One local community member told her "[t]he people with the money are the people that do something. The little people left behind that give their comments is not taken into consideration much" (Bennett, 2018, p. 31).
- Members of the local hunters and trappers committee told her they had not been consulted at all and that inadequate consideration had been given to an alternative route which would have avoided a sensitive saltwater lakes area.

### (ii) Obtaining equity shares or entering into joint venture or revenue-sharing agreements

There is some information in the literature on Indigenous groups in Canada and the mainland United States obtaining equity shares in infrastructure proposals or entering into joint venture or revenue-sharing agreements in relation to infrastructure proposals.

As noted above, in Canada project proponents often enter into impact-benefit agreements with Indigenous groups which record agreed ways to mitigate the effects of projects and provide benefits to the Indigenous community. Sometimes these agreements extend to providing for a joint venture or an equity position for an Indigenous community (Hoicka et al., 2021; Newman, 2014).

Similarly agreements between governments and Indigenous groups in Canada are sometimes used to share public revenues (such as royalties and taxes) generated from resource development (Hoicka et al., 2021).

In the United States, Ravotti refers to the Southern Ute American Indian tribe obtaining joint-venture business opportunities in exchange for granting a right of way for a liquified natural gas pipeline over tribal land (Ravotti, 2017).

### (iii) Government and Indigenous communities co-funding the provision of infrastructure on Indigenous lands

Another model used in Canada is government and Indigenous communities co-funding the provision of infrastructure on Indigenous lands.

An example of this is a water infrastructure projects on First Nations land in Saskatchewan Canada, which typically involve government agencies providing 80% of the infrastructure costs and the individual nation Chief and Council meeting the remaining 20%. A study of those projects (Bradford et al., 2018; Vogel, 2018; Vogel et al., 2018) found the following.

- The water from such projects is distributed without charge to the community (because water is seen as a spiritual resource as well as a physical necessity) making it more difficult for the Chief and Council to meet the 20% cost share.
- Water infrastructure projects benefited from including community members in the design process because such involvement was more likely to lead to outcomes that satisfied the community's ongoing technical, health, cultural and spiritual needs. Co-design could also:
  - build capacity and increase motivation, confidence, and trust within an Indigenous community
  - align the goals of community members and service providers
  - enhance holistic health.

- The initial capital investment for a co-designed water infrastructure project that meet an Indigenous community's technical, health, cultural and spiritual needs was likely to be higher than a conventional design. The delivery of such a co-designed project was also likely to be more time intensive. This was particularly problematic as the amount of government funding available for First Nations water infrastructure in the communities studied was based on the lowest cost alternative with the formula used to assess that only considering the capital cost of construction (and not operations and maintenance costs, health impacts, or costs in terms of lost time to community members due to things like the need to boil water).

- However, from the analysis Vogel et al. undertook, if project lifecycle costs were taken into account a co-designed project might ultimately result in less expensive projects than the current conventional methods.

Vogel found moving to co-design would require “a shift in education for professionals, a mindset change for the professional industry, and the adoption of other worldviews and understanding of social contexts” (2018, p. 84).

## (iv) Investment by Indigenous communities in renewable energy infrastructure

An area that has been a particular focus of research and comment is investment by Indigenous groups in Canada and the United States in renewable energy infrastructure.

LaDuke and Cowen (2020) discuss how Indigenous communities' moving to local Indigenous-owned renewable energy generation can be seen as unshackling those communities from the vagaries of international fossil fuel markets and politics. Renewable energy must be sold at the point of generation and, therefore, an Indigenous group has control over the resource and may receive an immediate benefit through the local community consuming a proportion of the energy generated (Ravotti, 2017). Some Canadian Indigenous communities and advocates view transitioning away from fossil fuels and towards renewable energy as a pathway to reconciliation between Indigenous communities and 'settler people' (Hoicka et al., 2021).

Hoicka et al (2021) have argued that using separate economic development corporations established by Indigenous group governance structures to progress renewable energy projects has benefits given that:

- generally, a large proportion of such corporations' employees are Indigenous peoples
- the corporations can draw business investment into the community through networking and preferred supplier arrangements.

They undertook a survey of renewable energy projects across Canada in which Indigenous communities were known to have been involved and found that, while Indigenous control of renewable energy projects appeared to be increasing, Indigenous communities had >50% ownership in only a little over 25% of those projects. Most projects located outside of Indian reserves or Inuit land settlement boundaries were controlled by non-Indigenous private ownership, partnerships, or local energy service providers. Indigenous political organizations, or economic development corporations established by those organisations, controlled most projects located within reserves/settlement boundaries.

Barriers to Indigenous community ownership and control of renewable energy projects can include lack of internal capacity, lack of financial capital, lack of progressive policies and mistrust of government and developers (Hoicka et al., 2021).

Renewable energy infrastructure projects involving tribal governments and American Indian corporations or non-profits referred to in the literature include:

- the Moapa Micro Grid Project – a hybrid solar, wind and diesel generator facility that powers a tribe's business district (including the tribal council building and a shopping centre) funded by a federal grant but operated and maintained by the tribe (Ravotti, 2017)
- the Moapa Southern Paiute Solar Project in Nevada and the Campo Band of Kumeyaay Windfarm near San Diego where, in both cases, the tribes leased land to third party energy developers for the construction and operation of the project (Ravotti, 2017; US Department of Transportation, n.d.)
- the Kayenta Solar Project in Arizona developed by the Navajo Tribal Utility Authority in partnership with the Salt River Project a community-based not-for-profit (LaDuke & Cowen, 2020).







# Appendix C.

## Legal requirements to engage with Māori at different stages in a project

### Āpitihanga C.

### Ngā whakaritenga a-ture ki te pāhekoheko atu ki te iwi Māori i ngā kōeke rerekē o te kaupapa

As shown below there are numerous statutory and other legal requirements relevant to infrastructure providers' engagement with Māori groups at different stages of projects.

For some types of infrastructure, such as State highways, there are multiple requirements to engage with Māori at different stages in a project (from funding through to legalisation) under a number of different statutes. For other types of infrastructure, such as the National Grid, there is no specific statutory obligation to engage with Māori.

The legislation uses multiple different models for engaging with Māori, with a range of governance and consultation mechanisms and a range of methods for identifying or appointing the individuals or groups to be engaged with. The legislation also uses multiple different formulations of the basis on which Māori groups are being engaged with, for example:

- to not act inconsistently with, or take into account, the principles of the Treaty of Waitangi
- to enable consideration of Māori historical, cultural, or spiritual interests
- to provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori
- to give effect to Te Tiriti o Waitangi
- to recognise that recognition that whenua Māori is taonga tuku iho of special significance to Māori.

This Appendix does not address the different arrangements for iwi participation under Tiriti o Waitangi settlement legislation. A discussion of that legislation is currently intended to be included in a later report. It also does not discuss obligations entities which are infrastructure providers may have to engage with Māori groups when they are acting in other capacities, for example local authorities obligations to engage with Māori groups when exercising their functions and powers as planning or consent authorities or enforcement agencies.

## C. 1. General statutory provisions

### (i) Public Service Act 2020

The Public Service Act 2020 states that role of the public service includes supporting the Crown in its relationships with Māori under Te Tiriti (section 14(1)). The Act imposes a responsibility on public service chief executives (among others) to develop and maintain the capability of the public service to engage with Māori and understand Māori perspectives (section 14(2)(a)).

The 'public service' in this context means Government departments and Ministries, departmental agencies, interdepartmental executive boards, interdepartmental ventures, and Crown entities which are classified as 'Crown agents' under the Crown Entities Act 2004.

## (ii) State-owned Enterprises Act 1986

The State-owned Enterprises Act 1986 provides that nothing in the Act permits “the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi” (section 9).

The principles of Te Tiriti include the principle of partnership which includes a duty to act reasonably, honourably and in good faith. The Courts have found that it is inherent in the Crown’s obligation to act in good faith as a Te Tiriti partner that it is obliged to make informed decisions on matters affecting the interests of Māori. This obligation will in some circumstances require the Crown to consult with Māori, depending on the importance of the issue in question. The onus on the Crown to be sufficiently informed in its decision-making on matters affecting its Te Tiriti partner does not, however, extend to an absolute duty to consult (Te Puni Kokiri, 2001).

Dr Maria Bargh commented that if officials undertook sufficient research into what is already known about an iwi or hapū group’s key issues of interest and social, economic, and political context that might indicate that a meeting with the group is not required because the necessary information has already been provided (for example to another government agency) (Billington, 2022).

## C. 2. Engagement on infrastructure project concept development and funding

### (i) Land Transport Management Act 2003

Every six financial years:

- each regional council (other than Auckland Council) must ensure that the regional transport committee for its region prepares a regional land transport plan
- Auckland Transport must prepare an Auckland regional land transport plan.

A regional land transport plan includes:

- land transport activities for the region proposed

by local authorities, Auckland Transport, the Department of Conservation, the Waitangi National Trust Board and Kāinga Ora (Approved Organisations)

- activities relating to State highways in the region that are proposed by Waka Kotahi
- any significant rail activities in the region proposed by KiwiRail.

Waka Kotahi and Approved Organisations must do everything reasonably practicable to separately consult affected Māori if they are proposing an activity that is likely to affect (section 18G(1)):

- Māori customary land or Māori freehold land (under Te Ture Whenua Māori Act 1993)
- land subject to any Māori claims settlement Act
- Māori historical, cultural, or spiritual interests.

Waka Kotahi and Approved Organisations must consult the land holding trustee under the Waikato Raupatu Claims Settlement Act 1995 about any proposed activity that is likely to affect land registered in the name of Pootatau Te Wherowhero under that Act (section 18G(2)).

Every three financial years, KiwiRail must prepare a rail network investment programme. At KiwiRail’s request, the Minister of Transport may approve a rail activity to be funded from the national land transport fund. There are no provisions in the Land Transport Management Act that require KiwiRail to engage with Māori in the development of its rail network investment programme.

Every three financial years, Waka Kotahi must prepare and adopt a national land transport programme. That programme must include activities that are:

- included in a regional land transport plan
- activities (other than those relating to State highways) for which Waka Kotahi is responsible which Waka Kotahi anticipates being funded from the national land transport fund.

Waka Kotahi can only approve a land transport activity for funding from the national land transport fund if it is satisfied that:

- the activity is included in the national land transport programme <sup>26</sup>
- the relevant consultation requirements have been complied with.

Waka Kotahi and Approved Organisations must (section 18H):

- establish and maintain processes to provide opportunities for Māori to contribute to their land transport decision making processes
- consider ways in which their organisation may foster the development of Māori capacity to contribute to land transport decision making processes
- provide relevant information to Māori for those purposes.

Waka Kotahi Statement of Intent must include “any steps that the Agency intends to take ... having considered ways in which it might foster the development of Māori capacity to contribute to the Agency’s land transport decision-making processes” (section 100(1)(f)).

## (ii) Urban Development Act 2020

The Urban Development Act contain processes for Kāinga Ora – Homes and Communities (Kāinga Ora) to develop and implement urban development projects. Potentially eligible projects include housing or urban renewal projects and the development of related ‘infrastructure’ (for example, roads and electricity transmission and distribution infrastructure) and ‘community facilities (for example public education and health facilities).

When it is assessing whether a proposed project is suitable to be progressed under the Act, Kāinga Ora must (section 33):

- seek to engage with Māori entities<sup>27</sup> with an interest in the proposed project area or in land adjoining the proposed project area
- the hapū associated with any former Māori land<sup>28</sup> within the proposed project area.

Kāinga Ora must also seek expressions of interest from Māori entities as to whether they are interested in developing any land they have an interest in as part of the project (section 33(6)). In seeking those expressions of interest, Kāinga Ora must allow adequate time for responses, “taking into account ... that Māori entities have obligations under other legislation, trust deeds, and other governance documents ... and ... tikanga Māori” (s33(7)).

Kāinga Ora must then prepare a report assessing the proposed project. That report must include (section 38):

- a summary of engagement undertaken with Māori and of feedback received, including a summary of how feedback received from Māori entities informed any of the report recommendations
- a summary of expressions of interest in developing land within the project area received from Māori entities
- a summary of any other engagement with Māori or key stakeholders which informed the assessment (for example, engagement undertaken before the project was selected for assessment)
- a summary of the attempts that Kāinga Ora made to engage with any Māori or key stakeholders who have not engaged with Kāinga Ora in relation to the project.

Following an assessment of a project by Kāinga Ora, the Minister of Finance, and the Minister for Housing (Joint Ministers) decide whether to declare the project a ‘specified development project’ under the Act. One of the criteria the Joint Ministers must apply in making that decision is whether they consider, having regard to the project’s likely effects on Māori, the engagement undertaken on the project was appropriate (section 28(g)).

If the Joint Ministers decide not to declare a proposed project to be a ‘specified development project’ that decision must either be publicly notified or Kāinga Ora must, as soon as practicable, notify the decision to Māori who were engaged with as part of the project assessment (section 46(3)).

## (iii) Infrastructure Funding and Financing Act 2020

Under the Infrastructure Funding and Financing Act:

- the Governor General can authorise the use of a levy for the purpose of funding costs, including establishment and construction costs, relating to ‘eligible infrastructure’ relating to urban development (for example water and transport infrastructure)

- any company or Crown entity can be established and operated for the sole purpose of acting as a 'responsible SPV' under the Act in relation to an authorised levy
- the levy revenue is collected by a relevant territorial authority, paid to the responsible special purpose vehicle and used by the special purpose vehicle to pay eligible costs.

'Protected Māori land'<sup>29</sup> cannot be included in a levy area unless the owners of that land consent in writing to its inclusion (section 24).

#### (iv) Investment in the National Grid - Commerce Act 1986

The State-owned enterprise Transpower New Zealand Limited (Transpower) recovers the costs of investment in the National Grid from transmission charges paid by electricity generators, local electricity lines companies, and large industrial customers connected directly to the National Grid.

The Commerce Commission scrutinises and consults on, and then approves or amends, a base level of expenditure by Transpower on the National Grid at the start of each five-year regulatory control period.

For expenditure on major grid enhancement and development projects during the regulatory control period that exceed \$20m, Transpower must submit a proposal to the Commission for approval. The Commission reviews Transpower's proposal and cost-benefit analysis, consults any interested parties – typically parties paying transmission charges to Transpower – and decides whether to approve it.

The Commission can only decide whether to approve a major capex proposal after it has (Transpower Capital Expenditure Input Methodology, clauses 3.3.5(5) and 8.1.1):

- published the proposal and a draft decision on that proposal
- sought the written views of "interested persons" on those documents
- sought the written views of "interested persons" on other people's submissions on the proposal and draft decision.

There are no specific references to Māori or Māori groups in these requirements.

#### (v) Pae Ora (Healthy Futures) Act 2022

The Pae Ora (Healthy Futures) Act disestablished the former District Health Boards and established:

- Health New Zealand (known as Te Whatu Ora)
- The Māori Health Authority (known as Te Aka Whai Ora).

Te Whatu Ora is required to act in accordance with "health sector principles" set out in the Act. One of those health sector principles is that the health sector should provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori and for that purpose, have regard to both (section 7(1)(c)):

- the strength or nature of Māori interests in a matter
- the interests of other health consumers and the Crown in the matter.

Te Aka Whai Ora is required to have systems in place for the purposes of engaging with Māori in relation to their aspirations and needs for hauora Māori and enabling the responses from that engagement to inform the performance of its functions (section 20).

Te Whatu Ora and Te Aka Whai Ora are required to jointly develop a New Zealand Health Plan that provides a three-year costed plan for their delivery of publicly funded health services. The New Zealand Health Plan is required to set out how Te Whatu Ora and Te Aka Whai Ora will "engage with Māori" (section 51(h)(ii)). Te Aka Whai Ora is required to engage with any Māori organisations it considers relevant when jointly developing the New Zealand Health Plan (section 20(1)(b)(i) and (2)). The New Zealand Health Plan must set out how Te Whatu Ora and Te Aka Whai Ora have been guided by the health sector principles identified in the Act in developing the Plan (section 51(h)(iii)).



The Act makes provision for organisations to be recognised as iwi-Māori partnership boards. The intention is for the boards to represent local Māori perspectives (section 29(c)). Once established, the boards:

- engage with whānau and hapū about local health needs, and communicate the results and insights from that engagement to Te Whatu Ora and Te Aka Whai Ora
- work with Te Whatu Ora and Te Aka Whai Ora in agreeing to plans for the relevant geographic area (Locality Plans)
- engage with Te Aka Whai Ora and “support ... its priorities for kaupapa Māori investment and innovation”.

To be recognised as an iwi-Māori partnership board (section 31(1)):

- an organisation must have:
  - taken reasonable steps to engage with Māori communities and groups present, or having interests, in the area for which it wishes to be recognised
  - constitutional and governance arrangements which demonstrate that it has the capacity and capability to perform the functions of an iwi-Māori partnership board, will engage with and represent the views of Māori within the relevant area, and Māori communities and groups in that area can hold the organisation accountable for the performance of its functions
- the area in respect of which it wishes to be recognised must not overlap with the boundaries of an area covered by an existing iwi-Māori partnership board and be consistent with the effective functioning of iwi-Māori partnership boards as a whole.

If Te Aka Whai Ora is satisfied that an organisation seeking to be an iwi-Māori partnership board meets those criteria, the Minister of Health must recommend that the organisation be recognised as one (section 30(6) and (7)). Iwi-Māori partnership boards determine their own membership and procedures (section 30(2)). Once it has been recognised, the name of an iwi-Māori partnership board, and the area it relates to, is recorded in Schedule 4 to the Act.

Generally, a Locality Plan must be agreed between Te Whatu Ora, Te Aka Whai Ora and the relevant iwi-Māori partnership board(s) (section 55(4)(a)). However, if those organisation cannot

agree on a Locality Plan, ultimately, any dispute will be determined by the Minister of Health (following consultation with the Minister for Māori Development and the Minister for Māori Crown Relations – Te Arawhiti as they consider appropriate).

Te Whatu Ora is required to provide sufficient and timely information to iwi-Māori partnership boards to support them in achieving their purpose under the Act (section 15).

Te Aka Whai Ora must (section 21):

- take reasonable steps to support iwi-Māori partnership boards to achieve their purpose, including by providing:
  - administrative, analytical, or financial support where needed
  - sufficient and timely information
- engage with iwi-Māori partnership boards when determining priorities for kaupapa Māori investment.

## (vi) Education and Training Act 2020

Public primary, intermediate, secondary, and tertiary education in New Zealand is delivered by Crown entities:

- The board of each primary, intermediate, and secondary school is its own Crown entity.
- The former polytechnics and institutes of technology have been merged into one Crown entity - Te Pūkenga—New Zealand Institute of Skills and Technology (Te Pūkenga).
- Each university and each wānanga<sup>30</sup> is a Crown entity.

One of the primary objectives of a primary or secondary school board under the Act is to ensure that its school gives effect to Te Tiriti o Waitangi, including by working to ensure that the school's plans reflect local tikanga Māori, mātauranga Māori and te ao Māori (section 127(1)(d)).

In performing their functions and exercising their powers, the councils of Te Pūkenga (and its subsidiaries), universities and wānanga are required to acknowledge the principles of Te Tiriti o Waitangi (section 281(1)(b)).

Te Pūkenga's statutory Charter includes obligations on Te Pūkenga to (Schedule 13):

- operate in a way that allows it to develop meaningful partnerships with industry across the country (including Māori and Pacific employers) and with communities at a local level (including hapū and iwi)
- reflect Māori-Crown partnerships to:
  - ensure that its operations give effect to Te Tiriti o Waitangi
  - recognise that Māori are key actors in regional social, environmental, and economic development
  - respond to the needs of, and improve outcomes for, Māori learners, whānau, hapū and iwi.

## C. 3. Engagement on the location of infrastructure projects

### (i) Local Government (Auckland Council) Act 2009

Under the Local Government (Auckland Council) Act 2009, Auckland Council was required to prepare a spatial plan for Auckland. The spatial plan identifies (among other things) the existing and future location, and mix, of critical infrastructure within Auckland.

In preparing the spatial plan Auckland Council was required to involve central government, infrastructure providers (including network utility operators), the communities of Auckland, the private sector and “other parties (as appropriate)” (section 80(1)). There was no explicit reference to Māori in the provisions of the Act specifically relating to the development of the spatial plan.

The Act established an Independent Māori Advisory Board to the Auckland Council which promotes issues of significance to mana whenua groups and mātāwaka of Tāmaki Makaurau (section 81). The Board may consult any person who it considers is likely to help the Board in carrying out its purpose (section 86(1)). Auckland Council must consult the Board on matters affecting mana whenua groups and mātāwaka of Tāmaki Makaurau and take into account the Board's advice on ensuring that the input of mana whenua groups and mātāwaka of Tāmaki

Makaurau is reflected in the Council's strategies, policies, and plans (section 88).

However, as noted on Auckland Council's website, the existence of the Board does not replace direct engagement with Māori (Auckland Council, n.d). Rather Auckland Council is required to work with the Board on the design and execution of documents and processes that relate to seeking the input of mana whenua groups and mātāwaka of Tāmaki Makaurau (section 88(1)(f)).

### (ii) Spatial Planning Act

Under the Spatial Planning Act 2023 a regional planning committee, comprising representatives from local government, and iwi, hapū, and Māori is required to jointly develop a regional spatial strategy for each region. The Minister for the Environment can appoint one member to each regional planning committee to participate in the committees' spatial planning functions.

On request, Government departments, Crown entities, iwi authorities, groups that represent hapū, and requiring authorities can be required to provide information and technical support to regional planning committees to prepare their spatial strategies.

A regional spatial strategy will include:

- major existing, planned, or potential infrastructure or major infrastructure corridors, networks, or sites (including existing designations) that are required to meet current and future needs
- other infrastructure matters, including:
  - opportunities to make better use of existing infrastructure
  - the need for other small-to-medium-sized infrastructure required to meet future needs or enable development
  - major new infrastructure that would help to address the effects of climate change in the region
- matters that require planning for, or investment in, infrastructure to be done or arranged at a regional level
- matters that require collaboration between two or more infrastructure providers.

Under the Spatial Planning Act:

- all persons exercising powers and performing duties and functions under the Act are required to recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te taiao in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their rohe or takiwā.
- in preparing a regional spatial strategy a regional planning committee is required to have particular regard to:
  - any planning document recognised by an iwi authority or a group that represents hapū and provided or available to the committee
  - any statement prepared by an iwi authority or a group that represents hapū of a region to express their view on how te oranga o te taiao can be upheld at the regional and local levels provided or available to the committee.

The Spatial Planning Act includes provisions requiring regional planning committees to invite iwi authorities, groups that represent hapū, customary marine title groups and other Māori groups with an interest in the region to enter into agreements with them which record how the parties will participate in preparing or amending the regional spatial strategy and how each party will be resourced to participate.

The Auckland spatial plan provisions of the Local Government (Auckland Council) Act have been formally repealed but will continue to apply in practice until a regional spatial strategy for Auckland is adopted under the new Spatial Planning Act.

### (iii) Marine and Coastal Area (Takutai Moana) Act 2011

Some infrastructure (including bridges and electricity lines) is located within the foreshore or seabed.

Under the Marine and Coastal Area (Takutai Moana) Act groups can obtain:

- protected customary rights
- customary marine title.

‘Protected customary rights’ can be recognised in relation to rights (for example rights to collect kai moana) that have been exercised since 1840, continue to be exercised in a particular part of

the foreshore or seabed and have not been extinguished by law.

‘Customary marine title’ can be recognised in relation to an area of the foreshore or seabed which a group holds in accordance with tikanga and has either exclusively used and occupied from 1840 to the present or been transferred to the group in accordance with tikanga.

If someone applies for resource consent under the RMA or the Natural and Built Environment Act 2023 (NBEA) for an activity within an area subject to a protected customary right the resource consent cannot be granted unless (section 55):

- the protected customary rights group gives its written approval, or
- either:
  - the activity is not likely to have more than minor adverse effects on the exercise of the protected customary right
  - the consent is for existing ‘accommodated infrastructure’ and the effects will be either the same or similar in character, intensity, and scale to those that existed before the consent application was lodged, or temporary.

If a person obtains a resource consent for an infrastructure project that consent cannot be exercised within a customary marine title area unless:

- the customary marine title group gives permission
- the infrastructure is ‘accommodated infrastructure’.

‘Accommodated infrastructure’ is infrastructure that is:

- lawfully established
- owned, operated, or carried out by (among other people) the Crown, a Crown entity, a local authority, a council-controlled organisation, a network utility operator, an electricity generator or a port company or port operator
- reasonably necessary for the national social or economic well-being or the social or economic well-being of the region in which the infrastructure is located.

#### (iv) RMA and new NBEA

There are under both the RMA, and the NBEA, two main mechanisms that a Crown infrastructure provider might use to authorise the location of an infrastructure project ahead of undertaking detailed design of that project:

- obtaining a designation for the project
- obtaining other specific provision for the infrastructure project in the relevant district or regional coastal plan(s) (RMA) or natural and built environment plan (NBEA), for example a special purpose zone.

Once an entity which is authorised as a 'requiring authority' under the legislation has lodged a 'notice of requirement' (essentially an application) for a designation for a project no one may do anything in the land subject to that notice that would prevent or hinder the project unless they obtain the requiring authority's prior written consent. If a designation is confirmed that protection continues (and the requiring authority does not need to obtain any land use consents from a city or district council to legally use the land subject to the designation for the project).

Any Minister of the Crown is a requiring authority and can seek a 'designation' under for public works for which the Crown has financial responsibility. For example, designations for secondary or primary schools are sought by the Minister of Education.

Entities (including Crown entities and State-owned Enterprises) who fall within the definition of 'network utility operator' can obtain approval from the Minister for the Environment as a 'requiring authority'.

As they were not 'network utility operators' under the RMA, universities, Te Pūkenga and wānanga, could not be approved as requiring authorities under that Act for the provision of university, polytechnic or wānanga buildings and electricity generators also could not apply to be requiring authorities in relation to their energy generation activities.

Under the NBEA there is an ability for 'other applicants' to apply to the Minister for the Environment to be approved as a requiring authority for projects or works that provide "a significant and identifiable public benefit necessary for the functioning of the economy, the health and safety of people, or the protection of the environment".

An approved requiring authority can only seek a designation in relation to a project that falls within the scope of its requiring authority approval. For example:

- Waka Kotahi is approved as a requiring authority for the construction and operation (including maintenance, improvement, enhancement, expansion, realignment, and alteration) of any State highway or motorway
- Transpower is approved as a requiring authority for the supply of 'line function services' (the provision, maintenance, and operation of works for the conveyance of electricity).

Designations cannot be obtained over the foreshore and seabed.

As a person exercising functions and powers under the Act in relation to managing the use, development, and protection of natural and physical resources, under the RMA a requiring authority is required take into account the principles of Te Tiriti (section 8). However, the RMA specifically provides that a requiring authority does not have a duty under the RMA to consult any person about requirement for a designation (section 36A(2)).

Under the NBEA all people exercising powers and performing functions under the new Act are required to "give effect to the principles of te Tiriti o Waitangi" (section 4). For designations there is no equivalent to section 36A(2) of the RMA in the NBEA.

As noted above, the Courts have found that it is inherent in the Te Tiriti principle of partnership that the Crown is obliged to make informed decisions on matters affecting the interests of Māori and that that obligation will in some circumstances require the Crown to consult with Māori, depending on the importance of the issue in question (Te Puni Kokiri, 2001).

If an infrastructure provider seeks to provide for the location of infrastructure by seeking a change to the provisions of an existing district or regional plan (RMA) or natural and built environment plan (NBEA), for example to create a special purpose zone, they can lodge a request for a plan change. Under the NBEA the plan change sought is required to be consistent with the relevant regional spatial strategy prepared under the Spatial Planning Act or a relevant exception must apply (sections 96(2) and (3)).



On receiving a plan change request, the local authority can request further information on the proposed change, including requesting information on “the nature of any consultation undertaken or to be undertaken” (Schedule 1, clause 23(1)(d) RMA and Schedule 7, clause 71(1)(e) NBEA).

Alternatively, if a district or city council initiated a review of its district plan (RMA) or a regional planning committee initiates a review of a natural and built environment plan (NBEA) an infrastructure provider could make a submission on the proposed plan seeking for provision to be made for the location of proposed infrastructure. In that situation the request becomes part of the overall plan review process. Under that process the statutory obligations regarding engagement with Māori sit with the relevant local authority/regional planning committee, not the infrastructure provider.

## (v) Urban Development Act

If a proposed urban development project has been approved to be progressed under the Urban Development Act (see above), Kāinga Ora must prepare a draft development plan for that project.

The draft development plan must include a structure plan which sets out:

- what infrastructure will be needed and, broadly, where it will be located
- the general location and a description of any new infrastructure proposed, if it is to be connected with, or integrated into, any existing infrastructure, whether within or outside the project area
- what community facilities (including public educational and health facilities) will be required and, broadly, where they will be located.

When a draft development plan is prepared, the draft can include:

- existing designations included in the relevant RMA/NBEA plans covering the project area (with or without modification)
- designations in replacement of existing designations not included in the draft
- new designations for which Kāinga Ora would have responsibility.<sup>31</sup>

There is range of legislation which provides a role for iwi or hapū in processes under the

RMA/NBEA. This is referred to as ‘iwi and hapū participation legislation’. Generally, the obligations imposed under that legislation are obligations on local authorities. For example, any obligation for a local authority to enter into a joint management arrangement with a post-settlement governance body. However, through a draft development plan, Kāinga Ora may adopt a participation arrangement or other measure contained in iwi participation legislation (section 60(4)(b)).

If an advisory board, committee, or authority has been established under iwi participation legislation to provide advice on the management of a natural resource within a project area, Kāinga Ora must have regard to any advice from that group when developing a draft development plan (section 108(3)).

When preparing a draft development plan, Kāinga Ora must take the steps that it considers necessary to enable it to be sufficiently informed on the matters relevant to achieving the project objectives and develop a plan suitable to be publicly notified. In doing so, Kāinga Ora must engage Māori and the key stakeholders who were identified in the course of the initial assessment of the urban development project (section 59).

A draft development plan must be accompanied by an evaluation report prepared by Kāinga Ora which (section 69(4)(d)(ii) and (e)):

- identifies how the draft plan takes into account any applicable iwi participation arrangements
- summarises the recommendations and comments received on the draft development plan from Māori entities and Kāinga Ora’s response to them, including any draft plan provisions that give effect to the recommendations or comments received.

Before a draft development plan is publicly notified, the Minister for Māori Crown Relations – Te Arawhiti must confirm that they are satisfied that (section 72(4)):

- any participation arrangement or redress having effect in the project area has been identified in the draft plan
- the draft plan provides adequately for those matters and adequately takes into account the Crown’s obligation to provide redress for any future settlements of Te Tiriti o Waitangi claims in the project area.

If any Māori customary land or Māori freehold land is included in the project area the Minister for Māori Development must confirm in writing that the plan is consistent with the principles in the Preamble to Te Ture Whenua Māori Act 1993, which include (section 72(5)):

- recognition that land is taonga tuku iho of special significance to Māori
- promotion of the retention of that land in the hands of its owners, their whānau, and their hapū
- protection of wāhi tapu
- facilitating the occupation development and utilisation of Māori land for the benefit of its owners, their whānau and hapū.

Once the draft development plan has been publicly notified and submissions have been received the Minister for Housing must appoint an Independent Hearing Panel (IHP) to consider the draft and provide the IHP's recommendations. The IHP may not recommend the removal or amendment of a provision in the draft plan which provides for a participation arrangement to be set up (section 79(5)).

If (after receiving the IHP's recommendations on it) the Minister approves a development plan every notice of requirement, designation or modification to a designation included in the draft plan is either confirmed or cancelled depending upon the modifications recommended by the IHP.

Once a development plan is in effect, if iwi participation legislation requires a local authority to keep or maintain records regarding iwi and hapū or provide certain information or advice at the request of a Māori entity, Kāinga Ora must comply with those obligations in relation to the project area (to the extent it holds that information or can provide that advice) (section 108).

## **(vi) Conservation Act 1987**

Some infrastructure projects involve the construction of structures within, or other use of, conservation areas. With some exceptions, no activity can be carried out in a conservation area unless it is authorised by a concession granted under the Conservation Act. If granted, a concession will be in the form of either a lease, a licence, a permit, or an easement.

The Minister of Conservation may, but is not required to, require an applicant for a concession to supply an assessment of environmental effects in relation to their proposed activity. That assessment can be in the same form as the equivalent assessment under the NBEA (or in any other form that the Minister requires). An assessment of environmental effects under the NBEA must identify any consultation undertaken, and any response to the views of any person consulted but does not oblige an applicant to consult with any person (Schedule 10, clause 6(3) NBEA).

If the concession sought is either a lease or a licence of a term (including renewals) of more than 10 years, the Minister must publicly notify the application for the concession (the Minister can also publicly notify other concession applications if they consider it appropriate to do so).

## **C. 4. Engagement on the acquisition of land for infrastructure projects**

### **(i) Public Works Act 1981**

There are two ways in which the Crown (or a local authority) can acquire land for a project under the Public Works Act:

- acquisition by agreement
- compulsory acquisition.

If land sought to be acquired is Māori freehold land, beneficially owned by multiple owners, and not vested in any trustee, a Minister (or someone acting under their authority), or a local authority can apply to the Māori Land Court for the Court to appoint one or more agents. If an agent is appointed by the Māori Land Court, they are deemed to be the owner of the land for the purposes of:

- entering into any agreement for the sale of the land, or executing any transfer or conveyance of the land
- being served with statutory notices in relation to any intended compulsory acquisition of the land.

Under Te Ture Whenua Māori Act 1993, one of the agents appointed, must be an owner of the land, or the Māori Trustee, or a body corporate constituted under an Act to be the agent of the owners. The Court cannot appoint a person to be an agent unless it is satisfied that (section 183):

- they have sufficient ability, experience, and knowledge to carry out the duties involved satisfactorily
- the appointment of that person would be broadly acceptable to the owners
- the person consents to the appointment.

## (ii) RMA and new NBEA

An approved requiring authority may apply to the Minister for Land Information under the RMA or the NBEA, to have land required for a project taken under the Public Works Act and vested in requiring authority.

This power does not apply if the requiring authority is a responsible special purpose vehicle under the Infrastructure Funding and Financing Act and the land is 'protected Māori land' under that Act.

## C. 5. Engagement on the detailed design of infrastructure projects

### (i) RMA and new NBEA

Under the RMA if a Crown infrastructure provider has the benefit of a designation authorising the land use aspects of a proposed infrastructure project, generally, they are required to submit an outline plan of the work to the territorial authority before they constructed the project.<sup>32</sup> An outline plan of work shows details like the height, shape and bulk of the proposed work, vehicular access, landscaping and "any other matters to avoid, remedy or mitigate any adverse effects on the environment". There is no obligation under the RMA for an infrastructure provider to consult anyone, other than the relevant territorial authority, on the content of a proposed outline plan.<sup>33</sup> Under the NBEA a requiring authority may continue to submit outline plans until the decisions version of the first natural and built environment plan for the relevant region becomes operative.

Under the NBEA the obligation to submit an outline plan of work has been replaced with obligations to submit primary and secondary CIPs (construction and implementation plans) (section 504). A primary CIP needs to identify the construction and operation activities involved in a project, the associated effects, and how the requiring authority intended to manage those effects. A secondary CIP must include similar information to an outline plan of works under the RMA.<sup>34</sup> Primary CIP's will be required to be publicly notified or in some cases only notified to affected persons (clause 507(3)). A secondary CIP might be publicly notified if it addresses matters not identified in the primary CIP (section 508).

Even if a Crown infrastructure provider has obtained a designation for a project (or the general use of the land for the project is permitted without the need for a resource consent under the relevant RMA/NBEA plan) the infrastructure provider is likely to require some resource consents in order to construct the project. Those consents could include consents for:

- earthworks
- contaminated stormwater discharges during the construction of the project
- impacts on historic heritage
- the removal of vegetation
- discharges to air (for example, from a concrete batching plant used during the construction of the project).

The standard procedure for processing a resource consent application under the RMA, and under the NBEA, is that the application is lodged with the relevant local authority and determined by that local authority (or an independent hearing commissioner that the local authority has delegated to). There are potential variations to this.<sup>35</sup> One of those variations is that a local authority may transfer its functions and powers in relation to some types of resource consent applications to another 'public authority' (which could be an iwi authority).

Whoever decides a consent application:

- an applicant for resource consent does not have a duty under the RMA to consult any person about their consent application (section 36A(1)(a) and Schedule 4, clause (3))
- under the NBEA, unless the national planning framework, the relevant natural and built environment plan or another Act require it, neither an applicant for a consent nor a consent authority has a duty under that Act to consult with any person about a consent application (section 163)
- a resource consent application must be accompanied by an assessment of environmental effects and that assessment must include identification of the persons affected by the activity, any consultation that was undertaken, and any response to the views of any person consulted (Schedule 4, clause 6(1) (f)) RMA and Schedule 10, clause 6 NBEA).

## (ii) Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009

Regulations were put in place under the RMA to facilitate certain activities relating to the operation, maintenance, upgrading, relocation, or removal of existing electricity transmission lines.<sup>36</sup>

Under those Regulations certain upgrades to existing transmission lines are permitted without the need to obtain a resource consent wherever they occur in the motu (subject to some conditions and parameters specified in the Regulations). Permitted activities include:

- discharging contaminants into water in relation to an existing transmission line
- adding overhead or underground conductors, earth-wires, overhead telecommunication cables, and overhead circuits
- increasing the voltage or current rating of an existing transmission line
- altering, relocating, or replacing a tower of an existing transmission line
- removing an existing transmission line

- installing or modifying a telecommunication device or a sign on a transmission line support structure on an existing transmission line
- removing trees or vegetation
- earthworks
- construction activities.

The Regulations provide that some other electricity transmission line activities are 'controlled activities' no matter where they occur in the motu.

Some activities which would be permitted under the Regulations but do not meet some of the relevant conditions or limitations under the Regulations are made 'controlled activities' wherever they occur in the motu.

This includes discharges of contaminants to water in relation to an existing transmission line which:

- create conspicuous films of oil or grease, scums or foams or floatable or suspended materials
- create a conspicuous change in colour or visual clarity
- emit an objectionable odour
- make fresh water unsuitable for farm animals to drink
- have more than minor adverse effects on aquatic life.

It also includes earthworks relating to an existing transmission line which:

- create or contribute to land instability or subsidence, erosion of the bed or bank of a waterbody or the coastal marine area
- create drainage problems or flooding of overland paths
- involve the placement of soil or debris where it could enter a water body or the coastal marine area
- take place in a historic heritage area.

While a resource consent is required under the RMA for a controlled activity that consent has to be granted. However, a controlled activity consent can be granted subject to conditions in relation to specified matters, for example effects on historic heritage and landscape effects.



The nearest equivalent to a ‘controlled activity’ under the NBEA is an ‘anticipated activity’. ‘Anticipated activities’ require resource consent, can be granted subject to conditions, and can only be declined in accordance with the relevant provisions of a national planning framework or natural and built environment plan prepared under the NBEA.

Under the RMA applications for resource consent for controlled activities are generally not publicly notified or notified to affected people unless the consent authority determines that special circumstances exist which warrant notification or the activity is on, adjacent to or might affect land subject to a ‘statutory acknowledgement’. A statutory acknowledgement is acknowledgement in a Te Tiriti settlement Act of the association of a particular Māori group with a relevant area. Under the NBEA there is a presumption that an anticipated activity will be processed without full public notification unless the national planning framework or relevant natural and built environment plan states otherwise.

Within six months of commencement of the NBEA the Minister for the Environment must give public notice of the first ‘national planning framework’ under that Act. In order to facilitate a smooth transition from the RMA that first national planning framework must include content that carries over the Regulations to the extent that they are compatible with the requirements of the NBEA.

### (iii) Government Roding Powers Act 1989

When constructing any State highway, Waka Kotahi may include works for the preservation of any affected Māori historical, cultural, or spiritual interests agreed between Waka Kotahi and the iwi or hapu to which those interests relate (section 61(5)).

## C. 6. Engagement prior to the construction of infrastructure projects

### (i) Heritage New Zealand Pouhere Taonga Act 2014

Unless an appropriate authority is granted under the Heritage New Zealand Pouhere Taonga Act, no person may modify or any part of an archaeological site if that person knows, or ought reasonably to have suspected, that the site is an archaeological site.

‘Archaeological site’ includes any place in New Zealand that was associated with human activity that occurred before 1900 and provides, or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand.

A person can apply to Heritage New Zealand Pouhere Taonga, for an authority to undertake an activity that will, or may, modify or destroy the whole or any part of any archaeological site(s) within a specified area of land. This enables infrastructure providers (and other developers) to proceed if it is suspected that there are archaeological sites in the land that would be affected by a project, but the location and precise nature of the archaeological sites is not yet known, for example the site includes an area which may contain middens or cooking sites resulting from pre-1900 Māori occupation of the land.

An application for an authority must include a statement as to whether (s46(2)(h)):

- consultation with tangata whenua has taken place, with details of the consultation including the names of the parties and the tenor of the views expressed, or
- consultation has not taken place, with the reasons why consultation has not occurred.

The Act requires Heritage New Zealand Pouhere Taonga to have an eight-member Māori Heritage Council. At least three members of that Council must be Heritage New Zealand Pouhere Taonga Board members who were appointed to the Board on the basis of their knowledge of te ao Māori and tikanga Māori. At least four members of the Council are required to be “Māori” and “collectively have the skills, knowledge, or

cultural background appropriate to the functions and powers of the Council” (s26). Applications for archaeological authorities can be referred to the Māori Heritage Council for decision, but only if the costs of an investigation of the relevant archaeological site(s) are not likely to exceed \$100,000 (s21).

If an application for an authority relates to a site of interest to Māori, but the power to decide that application has not been delegated to the Council, Heritage New Zealand Pouhere Taonga must refer the application to the Council to obtain the Council’s recommendations (s49(1)(a)). If an application is referred to the Council for its recommendations, the Council may “consult as it thinks appropriate” (s49(3)).

## C. 7. Engagement in relation to the ‘legalisation’ of Crown infrastructure projects after construction

### (i) Land Transport Management Act 2003

As part of a State highway project, new stretches of road intended to be State highway may be created or (for example, if Waka Kotahi constructs a bypass) a stretch of highway that was a State highway may no longer need to be one. Waka Kotahi has powers to declare a road to be a State highway or revoke the State highway status of a road as part of a development project.

However, if such a step affects, or would be likely to affect:

- Māori customary land
- Māori freehold land
- land registered in the name of Pootatau Te Wherowhero under the Waikato Raupatu Claims Settlement Act 1995
- land subject to any other Māori claims settlement Act
- Māori historical, cultural, or spiritual interests,

Waka Kotahi cannot make such a declaration or revocation unless it has consulted with the relevant Māori entity and is satisfied that the declaration or revocation should be made (section 103(6)).

### (ii) Government Roothing Powers Act 1989

Waka Kotahi may not request the Governor-General to authorise the construction of a motorway or declare any land to be a motorway if that would be likely to affect:

- Māori customary land
  - Māori freehold land
  - land registered in the name of Pootatau Te Wherowhero under the Waikato Raupatu Claims Settlement Act 1995
  - land subject to any other Māori claims settlement Act, or
  - Māori historical, cultural, or spiritual interests,
- unless it has consulted with the relevant Māori entity and is satisfied that the request should be made (section 71).

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# Notes

- <sup>1</sup> In Article Two of Te Tiriti, the chiefs also agreed to sell land to the Queen at a price agreed to by the person owning it and the person buying it (being the Queen's purchase agent).
- <sup>2</sup> The definition of 'infrastructure' in section 3 of the New Zealand Infrastructure Commission/Te Waihangā Act 2019 is "physical infrastructure that is in New Zealand or that results in services in New Zealand". The definition of 'infrastructure' in the Rautaki Hanganga o Aotearoa New Zealand Infrastructure Strategy 2022-2052 (New Zealand Infrastructure Commission, 2022) refers to "fixed long-term structures".
- <sup>3</sup> The NBEA includes the following definition of 'natural and green infrastructure' that applies to the designation provisions of that Act "... infrastructure that uses natural systems such as plants or soil, or mimics natural processes, to avoid, minimise or remedy the environmental impacts of activities" (clause 497(1)).
- <sup>4</sup> Two Court decisions often referred to when the issue of 'consultation' is discussed are the Court of Appeal's decision in *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 and the High Court's decision in *Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132.
- <sup>5</sup> At the time of writing Waka Kotahi had commenced further research involving engagement with Māori groups (N Mankelow, email, 28 May 2023).
- <sup>6</sup> An example of this is mana whenua's experience of the rebuild of State highway 1 (the primary road access to the coastal town of Kaikōura) following an earthquake in 2016 (Bisseker, 2021). A local rūnanga representative has said that, by 2017, the rūnanga felt it was pushed aside when the rebuild met a critical point and was pushed to accept a design that threatened to disturb burial sites and restrict or cut-off access to mahinga kai. When a new Waka Kotahi project director was appointed, he halted work on a shared path that would have disturbed wahi tapu and wahi taonga sites.
- <sup>7</sup> Te Whata is designed and operated by Te Kahui Rarauanga.
- <sup>8</sup> Sweet Analytics determined ethnicity according to StatsNZ's sourced ranked list which is summarized down into one ethnicity for each individual in the order of Māori, Pacific, Asian, MELAA (Middle Eastern, Latin American, and African), European, Other. Therefore, an individual identifying as both Māori and European was only counted once - as Māori.
- <sup>9</sup> As Quinn notes (2017, p. 1) "[t]he community of Parihaka is one with significant historical relevance. Facing land confiscation by the Government in the 1870's, the Taranaki Māori adopted a passive but persistent resistance to this perceived injustice".
- <sup>10</sup> Since 1991 ANCSA corporations can amend their constitutions to allow shares to be issued to additional shareholders.
- <sup>11</sup> Executive orders do not require Congress approval, and Congress cannot overturn them. Only a sitting US President may overturn an existing executive order - by issuing another executive order (American Bar Association, 2021).
- <sup>12</sup> Including independent regulatory agencies, the Government Accountability Office (GAO), Federal Election Commission, the governments of the District of Columbia and of the territories and possessions of the United States and their various subdivisions, and Government-owned contractor-operated facilities, including laboratories engaged in national defence research and production activities. However, independent regulatory agencies are encouraged to comply with the Order (Executive Order 13175, section 8).
- <sup>13</sup> *Wyoming v. U.S. Department of the Interior*, 136 F. Supp. 3d 1317, 1327 (D. Wyo. 2015), discussed by Eid (2018).
- <sup>14</sup> These are described in the GAO report *Tribal Consultation – Additional Federal Actions Needed for Infrastructure Projects* (GAO, 2019, pp. 8–11), Bevan (2021, pp. 565–573), Furlong (2020), and a 2009 List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance (White House - Indian Affairs Executive Working Group, 2009). Under these regulatory requirements sometimes a federal agency is consulting with tribal governments on an infrastructure project it is proposing to undertake itself and sometimes it is consulting about an infrastructure project proposed to be

undertaken by an applicant for a federal grant or permit.

- <sup>15</sup> The GAO notes that “many tribes historically from the eastern United States were removed and relocated to the western United States but still maintain interests in the east” (GAO, 2019, n. 56).
- <sup>16</sup> The US Congress noted “its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people” (Anaya, 1994, p. 311).
- <sup>17</sup> Although this list is described as being “by no means comprehensive” (Van Tilburg et al., 2017, p. 32).
- <sup>18</sup> Land held in ‘Aboriginal title’ cannot be alienated except to the Crown and cannot be encumbered or used in ways that would prevent future generations from using and enjoying it (Wright, 2018).
- <sup>19</sup> Justifying use of land in Aboriginal Title without consent under section 35 of the Constitution Act (Canada) would require the Crown to show that it had discharged its duty to consult and accommodate, that its actions were backed by a compelling or substantial legislative objective, and that the proposed action was consistent with any Crown fiduciary obligations owed to the relevant Indigenous group (Gray, 2016; Wright, 2018).
- <sup>20</sup> *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69.
- <sup>21</sup> Prior to that the Canadian Government had expressed concerns about the ‘free, prior, and informed consent’ requirements in the Declaration.
- <sup>22</sup> Three bodies established by previous Australian governments to create a representative indigenous political voice at the national level (the National Aboriginal Consultative Committee, the National Aboriginal Congress and, the Aboriginal and Torres Strait Islander Commission) were all subsequently abolished. According to the Hunt these disestablishments “largely followed tensions in the relationship and differing perceptions about powers and roles” (2013, p. 14). Subsequently a public company, the National Congress of Australia’s First Peoples, went into voluntary administration in 2019 after the Commonwealth Government ceased providing funding to it in 2014 and it ran out of reserves.
- <sup>23</sup> The Agreement replaces an earlier National Indigenous Reform Agreement which was also referred to as ‘Closing the Gap’.
- <sup>24</sup> Dr Danièle Hromek (Budawang/Yuin) quoted in *Draft Connecting with Country* (Government Architect New South Wales, 2020, p. 14).
- <sup>25</sup> Although they acknowledge that photovoltaics require the extraction of rare earth minerals.
- <sup>26</sup> Exceptions exist where an activity is in the urgent interests of public safety or necessary to effect immediate or temporary repair of damage caused by a sudden and unexpected event.
- <sup>27</sup> The term ‘Māori entities’ under the Urban Development Act 2020 includes post Te Tiriti settlement iwi governance entities, iwi authorities, hapū, an urban Māori authority, a Māori Trust Board, a Māori association (under the Māori Community Development Act 1962), the Māori Trustee, a board, committee, authority, or other body, incorporated or unincorporated, recognised in, or established under, iwi participation legislation, a body corporate, the trustees of a trust, or any other entities or people who have an ownership interest in Māori land, a body corporate or the trustees of a trust appointed to administer a Māori reservation, a customary marine title group or protected customary rights group under the Marine and Coastal Area (Takutai Moana) Act 2011, and entities that are authorised to act for a natural resource with legal personhood (for example, Te Urewera Board under the Ngāi Tūhoe Deed of Settlement).
- <sup>28</sup> The term ‘former Māori land’ as used in the Urban Development Act 2020 means land held for an urban development project by Kāinga Ora, or for a public work by the Crown or a local authority, which immediately before it was acquired or taken for a public work was Māori customary land, Māori freehold land or general land owned by Māori that ceased to be Māori land under Part 1 of the Maori Affairs Amendment Act 1967.

- <sup>29</sup> 'Protected Māori land' for the purposes of the Infrastructure Funding and Financing Act 2020 means Māori customary land, land vested in the Māori Trustee as a reserve or reservation, land subject to customary marine title or a protected customary right under the Marine and Coastal Area (Takutai Moana) Act 2011, land that is part of a natural feature that has been declared under an Act as a legal entity, maunga listed in the Ngā Manu Whenua o Tāmaki Makaurau Collective Redress Act 2014, Māori freehold land, general land owned by Māori that was previously Māori freehold land but ceased to be under a Court order, land held by a post-settlement governance entity that was acquired either as redress for the settlement of a Te Tiriti claim or by the exercise of rights under a Te Tiriti settlement Act or deed, and land held by or on behalf of an iwi or hapū which was transferred from the Crown, a Crown body or a local authority with the intention of returning the land to the holders of mana whenua over that land.
- <sup>30</sup> At the time of writing there are three wānanga in New Zealand - Te Wānanga o Raukawa, Te Wānanga o Aotearoa, and Te Whare Wānanga o Awanuiārangi.
- <sup>31</sup> Once a development plan was in effect, Kāinga Ora would be required to be treated as being approved as a network utility operator and a requiring authority under the RMA/NBEA in relation to infrastructure and community facilities reasonably necessary for achieving the project objectives.
- <sup>32</sup> The exceptions to this are if the proposed work has been otherwise approved under the Act (for example by a separate resource consent), the details of the work were incorporated into the designation when it was originally obtained, or the relevant territorial authority waives the requirement for an outline plan.
- <sup>33</sup> The relevant territorial authority may request changes to an outline plan and, if the requiring authority does not make a requested change, may appeal that decision to the Environment Court.
- <sup>34</sup> The obligation to supply a secondary CIP is subject to similar exceptions to those that apply to the obligation to supply an outline plan under the RMA.
- <sup>35</sup> If a resource consent applied for is determined to be part of a proposal of national significance the application for that consent might be determined by either the Environment Court or a Board of Inquiry. Even if a resource consent is not part of a proposal of national significance the application for that consent might, following a request by the applicant, be transferred to the Environment Court for determination. If a development plan is in effect under the Urban Development Act, Kāinga Ora is the consent authority for resource consent applications to the territorial authority for the project area.
- <sup>36</sup> Some activities are specifically excluded from those Regulations, including the construction or use of a bridge or culvert to access an existing transmission line and the use of land to prevent or mitigate any adverse effects of the storage, use, disposal, or transportation of hazardous substances.