

## DRAFT

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# Iwi/Māori

## Mā te huruhuru, ka rere te manu

*Feathers enable the bird to fly. Whakatauki on the strategic value of preparing the right tools to achieve. The focus of this chapter is the requirements under the Act in order to establish the foundations for the Commission's monitoring function in the context of iwi/Māori.*

### Introduction

This chapter of this first Emissions Reductions Monitoring report (ERM) is the Commission's opportunity to independently monitor the first Emissions Reduction Plan (ERP1) under section 5ZK(2)(b) assessing the adequacy of the ERP and progress in its implementation (including any new opportunities to reduce emissions) with regard to the aspects relating to iwi/ Māori.

The Commission's legal obligations relating to iwi/Māori are set out under section 5M(f) of the Climate Change Reduction Act 2002 (the Act). Under section 5M(f), in performing its functions and duties and exercising its powers, the Commission must consider where relevant, the Crown-Māori relationship, te ao Māori, and specific effects on iwi and Māori. The broader provisions of section 5M are also applicable to the understanding of these aspects, including likely economic effects; social, cultural, environmental, and ecological circumstances, including the differences between sectors and regions, and the distribution of benefits, costs, and risks between generations.

These mandatory considerations under section 5M, including section 5M(f), have been built within the analysis set out in the entirety of this report. The Commission has considered kaupapa Māori research and reviewed research, evidence, and participated in engagement to support the development of an analytical approach regarding section 5M(f) in the context of section 5Z(k). This mahi is constantly evolving alongside the evidence base and continued engagement, and the Commission will build upon this understanding year on year through the annual ERM reports.

However, the Act includes specific provisions relating to iwi/Māori communities and the Commission's responsibilities under our monitoring functions for the emissions reduction plan. It is these specific provisions which are the focus in this chapter.

Given that this is the first time the Commission is conducting this monitoring function, the focus of the following analysis is to ensure the foundations for monitoring are clearly set out. The Act requires specific elements within the emissions reduction plans with respect to iwi/Māori communities. In our analysis in this chapter, we will therefore apply our section 5M(f) obligations towards those specific elements which the Act requires within emissions reductions plans.

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Under the Commission's interpretation of the section 5ZK(2)(b) of the act, the monitoring function must "assess the adequacy of the emissions reduction plan and progress in its implementation" and the baseline foundation for assessing adequacy of the plan and section 5Mf requires monitoring of the Crown's setps towards the mandatory outcomes required under the Act.

Through this analysis of the requirements under the Act, the Commission aims to set out the foundation and starting point for how monitoring will be approached in future reports regarding the Act's requirements, whilst also signalling aspects for consideration under future monitoring once these foundational aspects are set out relating to the requirements of the Act.

For this chapter, the Commission has reviewed "Chapter 2: Empowering Māori" of the governments ERP1 alongside the government's "table of actions". The Commission has also reviewed related ERP1 information such as the documents setting out government's response to the Commission's recommendations and the summary of submissions from the public during consultation. The Commission has also considered the scope of progress towards implementation under the rubric of section 5Mf as relative to setting out the foundations for our analytical approach to inform future monitoring reports and provide indications on forward directions of our work related to monitoring of the government's emissions reductions plans, to support beneficial outcomes for all New Zealanders.

## Iwi/Māori & the Commission

### Te Tiriti/The Treaty

The purposes of the Commission are set out under section 5B of the Act, namely, to provide independent expert advice to Government and to monitor the Governments progress towards its emissions reduction and adaptation goals.

Regarding the Commission's relationship with iwi/Māori, it is very important to note that, as a consequence of section 5B, the Commission is not itself part of the Crown per se, and therefore, the Commission is not a party to Te Tiriti o Waitangi/Treaty of Waitangi.

The Commission is established as an independent Crown entity but is not a "Treaty partner" (under the common understanding of that phrase) and therefore, the "Treaty provisions" (as commonly understood) under section 3A of the Act do not apply to the Commission, but instead apply to the Minister made responsible for the Act by the Prime Minister under section 4 of the Act (currently the Minister of Climate Change).

Instead, aspects of these matters are within the scope of the Commission's advisory function in its independent role, under section 5M(f).

### Crown-Māori Relationship

As stated above, the goal for this report is to set out the foundation and starting point for how monitoring will be approached in future reports regarding the Act's requirements, whilst also signalling aspects for consideration under future monitoring.

The following analysis addresses foundational aspects which will better assist the Commission's monitoring function, in particular through the provision of sufficient information to better understanding of the

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government's role in the context of the Crown-Māori relationship supporting both sides of the relationship, as applies within this specific context of the emissions reduction monitoring.

### Iwi/Māori and the Crown-Māori relationship

For understanding the Commission's obligations under the Act, it is important to note that the Commission must consider the Crown-Māori relationship (under section 5Mf) whilst assessing the adequacy of the **governments** emissions reduction plan (ERP) and progress in its implementation (under section 5KZ2b). In other words, the monitoring focus is regarding the government's actions related to ERP the within the Crown-Māori relationship.

To be clear, the Commission therefore is not monitoring iwi/Māori related to the ERP, but rather, the Commission is monitoring the Crown and is considering the government's contributions towards supporting the Crown-Māori relationship within the ERP context. In addition, the Commission is particularly mindful that there is nothing under a plain reading of the Act which suggests monitoring negotiations and settlements under Te Tiriti o Waitangi/The Treaty of Waitangi.

To best support good future outcomes within the annual monitoring cycle, the Commission has considered iwi/Māori aspects within the section 5KZ monitoring obligations and finds that there are two foundational aspects to support the government's contributions to strengthening iwi/Māori under the Crown-Māori relationship: (1) uplifting diversity, (2) adequate resourcing, Māori procurement, and direct funding of roopu Māori.

#### (1) Uplifting diversity

The Commission is mindful that there is no singular "Māori voice" and the consideration of the government's support of Māori aspects within the Crown-Māori relationship will require approaches which include an ao Māori approach (as also mandated under section 5Mf). The Commission therefore considers, at a minimum, the foundational relationship-enabling aspects are necessary, such as:

- Frameworks of engagement and analysis which are co-designed and implemented alongside leadership across the diversity of Māori communities, on the understanding that non-Māori (by definition) cannot define the Māori experience of the Crown-Māori relationship.
- Approaches of engagement and analysis which research, understand, and uplift diversity in Māori voices and lived experiences in a manner which is not reductive or essentializing of the Māori community.
- Recognizing that this diversity therefore requires approaches to engagement and analysis which encompasses discussion within the diversity of Māori communities regarding how decisions will be made to plot policy pathways through such diversity within the Crown-Māori relationship, including when communities contributions differ.

#### (2) Adequate resourcing, Māori procurement, and direct funding of roopu Māori

The Commission is mindful that processes which help uplift the diversity of Māori input are resource and time intensive for both Māori and Crown public servants. The following bullet points set out examples of initial inputs which are essential for achieving these outcomes. These examples would help provide the necessary transparency for the Commission's monitoring function regarding designing and implementing the emissions reduction plan in a manner informed by Māori experiences of the Crown-Māori relationship (which can only be done through tangata whenua resourced to conduct the relevant work):

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- Adequate resourcing to conduct research on existing mahi/work and public information released by both parties to the Crown-Māori relationship, in a manner which enables the identification of the diverse aspects within each side of the relationship. For example, in the same way that Crown Ministries have different approaches to implementing response to climate change, there are diverse responses within iwi/Māori for which adequate time and resources must be allocated by the Crown to research, understand, and action, e.g. some iwi post-settlement governance entities (PSGE) have issued responses to the Cabinet Circulate regarding Te Tiriti o Waitangi/Treaty of Waitangi Guidance (CO[19]5 22 October 2019), and some roopu have issued their own strategies responding to climate change, such as hapū, Māori incorporations and Ahu Whenua Trusts.
- Adequate resourcing of Māori staff within mainstreamed business units within the Crown, and appropriate support to ensure culture safety within mainstreamed approaches.
- Adequate resourcing of Māori staff within specialist iwi/Māori business units within the Crown.
- Appropriate and accountable procurement pathways to support analysis and engagement within mainstream and specialist business units, including aspects such as implementing the Progressive Procurement Policy target of 8% of annual government contracts awarded to Māori businesses, with transparency to the public on selection criteria and disbursements.

### The Crown and the Crown-Māori relationship

Similar to the analysis set out above, the starting point for considering the context of the Crown within the Crown-Māori relationship, it is necessary to first identify the scope of the requirements under the Act.

The Act, like all legislation in Aotearoa New Zealand, is an act of the Crown. It follows that, in considering the Crown within the Crown-Māori relationship, it is even more important that the starting point for the Commission's monitoring function must be the terms of the Act as applicable to the Crown, since the Act was itself constituted by the Crown.

The Commission's monitoring function in considering section 5M(f) must therefore be built on the foundation of what the Crown has set out in the Crown's own Act regarding the Crown's contribution to the Crown-Māori relationship, as pertinent to the government's emissions reduction plan.

In this regard, we have identified three mandatory outcomes under the terms of the Act which are necessary to establish a foundation for monitoring future outcomes within the annual monitoring cycle, considering the application of section 5Mf and iwi/Māori within the context of section 5KZ monitoring obligations:

- (1) a strategy to recognise and mitigate the impacts on iwi and Māori;
- (2) adequate consultation with iwi/Māori.
- (3) considering the Commission's advice.

To demonstrate these three aspects, the relevant provisions of the Act will be set out below, followed by an assessment each of the three mandatory outcomes under the Commission's monitoring function.

#### (1) Provisions of the Act

Under the Act, there are two main provisions which set out mandatory outcomes regarding the Crown's contribution to the Crown-Māori relationship which are relevant for the Commission's monitoring function of the government's emissions reduction plan.

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The first of the two main provisions originate in the "Treaty clause" and the second are within the specific provisions which set out the Act's requirements related to the government's emissions reduction plan itself.

Although the following analysis may appear complicated, in sum, it amounts to three relatively straightforward requirements (a strategy, consultation, and consideration of the Commission's advice) which are reinforced consistently across the two main provisions of the Act related to this topic.

### *The "Treaty" Clause*

The "Treaty clause" under section 3A(ad) has very clear direction for the Crown regarding specific concrete actions required regarding Te Tiriti/The Treaty and the emission reduction plan.

The terms of section 3A(ad) are as follows: "with respect to sections 5ZG and 5ZI (which require the Minister to prepare and publish an emissions reduction plan), the Minister **must include in a emissions reduction plan a strategy** to recognise and mitigate the impacts on iwi and Māori of reducing emissions and **must ensure that iwi and Māori have been adequately consulted** on the plan" [emphasis added].

The terms of section 3A(ad) are notable because of the strength of the language used, insofar as the terms go beyond a mandatory consideration, and instead set a mandatory outcome. The "Treaty clause" sets out two separate and distinct mandatory outcomes, which are drafted conjunctively i.e. both are required (they are not either/or alternatives):

- (1) a strategy to recognise and mitigate the impacts on iwi and Māori;
- (2) adequate consultation with iwi/Māori.

### *Emissions Reduction Plan Clauses*

Section 5ZG(3)(c) reiterates the requirement that the government's emissions reduction plan "**must include... a strategy** to mitigate the impacts that reduce emissions and increasing removals will have on...iwi and Māori" and refers to section 5ZI which sets the deadline for doing so as **no later than 31 May 2022**.

Section 5ZI(1)(b) governs the obligation on the Crown to make the emissions reduction plan public and reiterates that the Crown "**must ensure that consultation has been adequate, including with... iwi and Māori**, and undertake further consultation as the Minister thinks necessary."

In addition, section 5ZI(1)(a) requires that "the Minister **must consider the advice** received from the Commission" relating to emissions reduction plans issued under section 5ZH for meeting the relevant emissions budget period.

These provisions within the emissions reduction plan clauses therefore repeats the two mandatory outcomes set out under the "Treaty clause" as per the analysis above, then adds the third requirement to consider the advice of the Commission:

- (1) the strategy must be within the emissions reduction plan and released to the public no later than 31 May 2022;
- (2) adequate consultation with iwi/Māori;
- (3) considering the Commission's advice.

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### (2) Monitoring Adequacy via Provisions of the Act

In order to conduct a the baseline monitoring assessment on adequacy of the plan and implementation according to the provisions of the Act, the Crown's actions must be assessed under each of the three mandatory outcomes.

#### *Mandatory outcome #1: Strategy to mitigate impacts on iwi/Māori*

Regarding the first mandatory outcome, the Commission has reviewed Chapter 2 of the ERP1 "Empowering Māori." The chapter includes information addressing the "[r]ole of Māori and equitable transition for Māori" and enabling "partnership, participation, protection and equity for Māori." The analysis recognises that Māori "have an important role in our transition" with particular recognition of mātauranga and will be "uniquely affected by climate change." There are four specific actions listed and eleven actions highlighted from across other chapters of ERP1 which relate to the "equitable transition for Māori." It is unclear if this content is intended as the "strategy". It is particularly unclear because the only reference to a strategy defers the matter wherein "the Government is developing proposals..." to "[s]upport development of a Māori climate strategy." The terms of the Act are clear and timebound, requiring that the strategy itself be included in the plan and released by 31 May 2022 at the latest.

**Chapter xx Finding #1: The Commission finds that the iwi/Māori strategy which addresses all the requirements of the Act, such as setting out how the Crown recognises and will mitigate the impacts on iwi and Māori, is a mandatory outcome which must be included within future emissions reduction plans within the mandatory time period. By definition, impacts on iwi and Māori can only be assessed by lived experience of iwi and Māori, therefore it is necessary to conduct appropriate prior planning and resource allocation for Māori staff to ensure this requirement can be met, or otherwise provide information regarding any reasonable decision-making regarding restraints in the operating context.**

#### *Mandatory Outcome #2: Adequate consultation*

Regarding the second mandatory outcome, the Commission has reviewed the Crown's "Appendix 4" to ERP1 which records that the held "seven sessions specifically with iwi/Māori on a variety of topics." The document provides a range of very useful details regarding the broader consultation process such as social media efforts etc, but does not indicate which aspects within the broader consultation process were tailored to iwi/Māori communities nor the outreach mechanisms within the broader consultation process of seeking written submissions which supported oral traditions or accessibility challenges within iwi/Māori communities. The Commission notes that adequacy is not defined in the Act and is subject to reasonable interpretation as can be afforded to a mandatory outcome.

**Chapter xx Finding #2: The Commission finds that there must be sufficient information regarding consultation within an ao Māori perspective (including an approach which uplifts diversity and does not essentialise Māori or adopt a reductive position) in order to facilitate the Commission's monitoring of the "adequacy" of consultation. Examples of relevant information includes documentation of a pre-defined consultation strategy setting out guiding principles for engagement (in particular, referencing steps to address existing Crown guidance related to engagement and how the strategy will approach diverse groups within iwi/Māori and overcome any barriers to access through meaningful outreach, including engagement fatigue or lack of resources) and an implementation plan which sets out due diligence aspects such as research regarding existing preferences on engagement, existing climate plans, and how the width and breadth of iwi/Māori across the motu will be meaningfully and respectfully engaged in consultation, including with a meaningful involvement in the definition of the content.**

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### (i) Consideration of advice

Regarding the third mandatory outcome, the Commission has reviewed the government's response to the Commission's recommendations in its advice prior to the government's release of ERP1. The methodology of this approach is very helpful for sharing the necessary information and transparency for enabling the Commission's monitoring obligations with respect to the mandatory consideration that the government have regard to the Commission's advice in defining its emission reduction plan.

**Chapter xx Finding #3: The Commission finds the approach in ERP1 facilitates the Commission's monitoring function regarding the consideration of the Commission's advice through tracking the governments agreement or otherwise regarding the Commission's recommendation, paired with directing the Commission to the responsible Minister, the timeline, and the relevant actions within the emissions reduction plan. More specificity is required wherein the Commission's recommendations a specific or time-bound, such that it is possible to monitor whether the advice has indeed been considered. Silence on the matter cannot reasonably be interpreted as consideration. For example, Recommendation #6 referred to factors and timeframes for implementing consultation which, if directly responded to, would have assisted in the Commissions monitoring of both the adequacy of consultation and the consideration of the Commission's advice. In comparison, the detailed response to the specificity in Recommendation #27 (regarding building takiwā-based emissions profiles by 30 June 2022) provides sufficient information to enable the Commission's monitoring function regarding adequacy (namely, that "budget and engagement dependencies" meant that this indicator was "not feasible" but could be considered under the Māori climate platform).**

## Te Ao Māori & Specific Effects

The analysis above addresses the scope of the first of the three mandatory considerations under section 5Mf, namely, the Crown-Māori relationship. The remaining two mandatory considerations concern te ao Māori and specific effects on iwi and Māori. The definition of "ao Māori" is set out in section 5H(2) and includes mātauranga Māori, te reo Māori, tikanga Māori, and the Māori world. Specific effects is written broadly under the Act and could encompass the effects of the dynamics of climate change and the policy response, including from the Commission's own advice.

Consideration of "te ao Māori" within any Crown legislation poses unique challenges given ao Māori is in essence governed by laws and tikanga which are not sourced from the Crown. An example of such challenges is considering the application of tikanga, which encompasses both process and procedure aspects, as well as outcomes and substantive matters. The common law of Aotearoa New Zealand is increasingly upholding tikanga as a source of law and expressly recognises this quality of encompassing both procedural and substantive law.

This is dual quality of tikanga has important consequences in the context of the Commissions's mandate on monitoring emissions reduction plan under the analysis set out above. Under the Commission's best understanding of tikanga, a common aspect of across hapū/iwi, is the notion that if the process is not tika, then the outcome (no matter its merits), cannot stand. It is this aspect of the mandatory considerations of te ao Māori which gives the Commission pause, until the findings set out under analysis above are addressed.

**Chapter xx Finding #4: The Commission finds that ao Māori and specific effects (as mandatory for the Commission's functions as per section 5Mf) are best practice considerations in developing policy and are**

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**able to be understood as part of the obligations on the Crown under the Act regarding the development and implementation of the emissions reduction plan.**

To this end, as an indication of the mātaḗpono (guiding principles) which the Commission applies in understanding te ao Māori and specific effects with respect to monitoring following mātaḗpono (guiding principles) have been considered by the Commission through expert advice and engagement with iwi/Māori:

- Taiao ora – The collective belief that tangata and taiao are inextricable and connected. If our taiao thrives, our people thrive
- Mātauranga ake – Recognition of iwi, hapū and whānau knowledge systems and practices that have always protected our taiao
- Ki tua – A firm focus on the future to ensure our taiao remains thriving for generations to come

In addition, the following tikanga (protocols) have been considered by the Commission through expert advice and engagement with iwi/Māori:

- Whakaute – Respect in how advice is framed should reflect Māori histories, realities and futures with due respect to those iwi, hapū and whānau who have long been kaitiaki of our taiao
- Whakamahi – Advice is geared towards tangible actions that supports the above principles and mātaḗpono
- Whakamana – Advice should reflect iwi, hapū and whānau interests and prioritises and elevates these interests
- Whakaiti – Humility is expressed towards the taiao and tangata as inextricably connected and at balance with each other<sup>3</sup>

\*END\*