

Damned if you do and damned if you don't - The Mitigation Dilemma

Juliane Chetham

I'm not sure about others preparing Cultural Impact Assessments (CIAs) but I confess I do not really stay on top of all the case law. I tend to stick to Resource Management Act 1991 [Part 2](#) matters as the foundation for assessing cultural effects, and couch any effects identified in terms of recommendations to avoid, remedy or mitigate (in that order).

However, in my experience, applicants and councils are inclined to reach straight for mitigation options in a CIA. Admittedly, that's due to the fact that oftentimes what they are saying is a less than minor effect, tangata whenua are describing as more than minor. These differences aside, it's generally accepted best practice to make recommendations to advance some form of mitigation for cultural effects.

But what happens when the findings of a CIA indicate that cultural effects are potentially so significantly adverse that they can't be remedied or mitigated, and from the perspective of tangata whenua can only be avoided, i.e. the application should not proceed? Are we doing ourselves a disservice by engaging in discussions around mitigation?

As tangata whenua, we often find ourselves placed in the unenviable position that while we may oppose an application in its entirety, our duty as kaitiaki, and as a result of our long experience with resource consents almost certainly being granted – means that we are obliged to participate in the minimised process of addressing and advocating conditions of the activity that we oppose. We do so to ensure our ongoing involvement as mana whenua, mana moana and as hau kainga in development activities occurring in our rohe. But the result is a perception that we are in agreement with the development, and our engagement is then touted as “consultation, active participation and protection”. Is this the outcome we want from a CIA process?

From a tangata whenua perspective, the consenting process may compel us to negotiate conditions, but this does not constitute partnership or effective decision-making input.

My hapū Patuharakeke are a composite hapū descended from most major iwi groups in the north. These include Ngātiwai, Ngāpuhi nui tonu and Ngāti Whatua. We are located on the southern shores of the Whangarei Harbour and our seaward boundary, reaching a point just north of Mangawhai Heads. In March 2018 we came out of a week of hearings in relation to an application to dredge 3.7 million m³ of sand from the entrance channel to the Whangarei Harbour and dispose of it at two sites in Bream Bay. A [collective CIA prepared by Patuharakeke Te Iwi Trust Board](#) (PTB) and ratified by several other harbour hapū and iwi found that overall, the range and magnitude of potentially unacceptable adverse effects meant that managing, mitigating or offsetting the effects would not be possible. An adaptive management methodology, i.e. staging and halting dredging if unexpected or greater than

minor impacts became apparent, or enabling approval for continuing to the next stage if effects prove negligible could not be applied in this instance.

The applicant's experts identified a number of minor effects that, in isolation, seem relatively benign. However, our assessment was that, when occurring concurrently and in conjunction with past impacts, the potential cumulative effects in relation to marine mammals, benthic organisms, coastal processes, kaitiakitanga, and mauri, for example, were significant. As such, the CIA recommended that the proposal in its entirety be avoided.

This firm position of opposition was maintained throughout the submission process in the face of repeated attempts by the applicant to negotiate a mitigation package. At this point tangata whenua started second-guessing ourselves; i.e.

“If consent will be granted anyway, then we risk being completely outside of any monitoring strategies, restoration initiatives, reference groups and so forth”; or

“Do we want to have some control over consent conditions or do we just accept what is handed down by the commissioners?”

Perhaps if we were in agreement with the applicant that some degree of potential adverse cultural effect of the proposal would be acceptable, and less than minor in magnitude, we would readily have engaged in discussions on mitigation measures. However, our experience has been that when mitigation measures are advanced or accepted by tangata whenua they become the default position and it becomes difficult to continue to defend opposition to the proposal. For example, it is often implied that kaitiakitanga is equivalent to participating in monitoring of consent conditions and sitting on a reference group. I myself frequently refer to participating in consent processes as “contemporary kaitiakitanga”. However, first and foremost, in our view, kaitiakitanga is an act of *guardianship* not mitigation. It is an act of safeguarding in the first instance rather than reparation after the fact.

During the hearing for the above mentioned dredging project, the Panel were at pains to draw our witnesses out on mitigation options and clearly wanted us to actively participate in discussions on conditions while stressing that of course that didn't mean they were predisposed to grant consent. They are merely doing their job and doing it very well in this particular case. I imagine we'll end up doing just that in the end, and probably even get a better suite of conditions and monitoring programme out of it. But is that where tangata whenua should be aiming our sights? Is that all we should hope for?

So that's the dilemma tangata whenua are faced with: choose not to participate in mitigation discussions and risk that the project proceeds with no or little involvement and conditions that don't address cultural effects. Or participate, and the applicant, council and panel can all feel reassured that tangata whenua have been engaged, and meanwhile the the issue of the no development option has been quietly shifted to the “too hard basket”.

It begs the question - is the current decision-making framework able to accommodate situations where the findings of CIA indicate that ‘no development’ is the only option to provide for our relationship to our ancestral waters and taonga and enable the exercise of kaitiakitanga?