
BEFORE THE WAITANGI TRIBUNAL

WAI 2358

IN THE MATTER OF the Treaty of Waitangi Act 1975
AND
IN THE MATTER OF the National Fresh Water and Geothermal
Resources Inquiry

MEMORANDUM OF COUNSEL FOR THE CROWN IN REPLY TO
SUBMISSIONS ON ISSUES OF COMITY AND PARLIAMENTARY
PRIVILEGE REGARDING MANA WHAKAHONO A ROHE/IWI
PARTICIPATION ARRANGEMENTS

9 February 2017

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MAY IT PLEASE THE TRIBUNAL:**Introduction**

1. This memorandum of counsel is filed pursuant to memorandum-directions of 19 December 2016.¹ It responds to the memorandum of counsel for the claimants dated 27 January 2017 and the memoranda of counsel for interested parties dated 2 February 2017.

Summary

2. At the outset, counsel submit the Tribunal's amended hearing timetable, issued on 1 February 2017,² means the Tribunal's ability to consider the mana whakahono proposals in the *Next Steps for Freshwater* document (*Next Steps*) is likely to be resolved by reference to s 6(6) of the Treaty of Waitangi Act 1975.
3. The Local Government and Environment Committee is due to report back to the House on the Resource Legislation Amendment Bill (the Bill) not later than 10 May 2017. If the Committee's report leads the House to include the "Mana Whakahono a Rohe/Iwi Participation Arrangement" (MWaR-IPA) proposals from the departmental report in the Bill, the Crown submits that s 6(6) will preclude the Tribunal from considering the mana whakahono proposals in *Next Steps* until the Bill is enacted or discharged. If the MWaR-IPA proposals are not included in the Bill, the Tribunal will be free to consider the *Next Steps* proposals provided it does not seek to question or impeach proceedings in Parliament.
4. In the meantime, the Crown submits any critical examination of the MWaR-IPA proposals in the departmental report would be a breach of parliamentary privilege and the broader principle of comity.
5. The claimants' assertion that the Tribunal may nevertheless inquire into the mana whakahono proposals in *Next Steps* by reference to extra-Parliamentary materials is artificial and misapprehends the rationale underpinning the comity principle. The proposals in *Next Steps* and the MWaR-IPA proposals in the departmental report are so closely connected

¹ Wai 2358, #2.6.6 at [20.c)].

² Wai 2358, #2.6.10.

that any inquiry into the former will have the effect of placing the Tribunal at the heart of the political process about the latter. This would give rise to the type of institutional conflict the comity principle is intended to avoid.

Background: Crown wishes to legislate parts of the mana whakahono proposals by proposing amendments to a Bill at select committee

6. The Local Government and Environment Committee is due to report back to the House on the Resource Legislation Amendment Bill (the Bill) no later than 10 May 2017.
7. The Crown has proposed a MWaR-IPA regime for inclusion in the Bill to the select committee, for inclusion in the Bill.³ The MWaR-IPA incorporates a proposal to legislate parts of the mana whakahono a rohe agreement set out in *Next Steps*.
8. The *Next Steps* document proposes mana whakahono a rohe agreements that will:⁴
 - 8.1 be initiated by iwi through notice to the councils;
 - 8.2 be available to all iwi but will not override or replace existing arrangements for natural resource management in Treaty of Waitangi settlements nor preclude agreement of different arrangements under a Treaty settlement;
 - 8.3 provide for multiple iwi involvement where appropriate and agreed;
 - 8.4 set out how iwi and council(s) will work together in relation to plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities; and
 - 8.5 include review and dispute resolution processes.

³ Ministry for the Environment "Departmental Report No. 2 on the Resource Legislation Amendment Bill 2015".

⁴ Wai 2358, #3.1.255(a) at 29 – 30 (Proposal 3.5).

9. The proposed amendments to the Bill would enact these proposals. They do this by amending existing clauses of the Bill regarding iwi participation agreements to provide for the new MWaR-IPA mechanism. As would be expected, the proposed amendments include more detail than the *Next Steps* proposals about the purpose of the agreements and the processes through which agreements will be reached. This reflects the process moving from high level policy work to proposed legislation.
10. The proposed amendments therefore represent proposed legislation to implement parts of the mana whakahono proposal. Although that proposed legislation is not yet contained in a Bill, it is part of parliamentary proceedings.
11. The relationship between the *Next Steps* mana whakahono proposals and the substantive legislative steps proposed to the select committee is set out in more detail in the schedule to these submissions.

Comity is key issue

12. The Crown has raised two sets of issues, comity and privilege.⁵ The two issues overlap, but the Crown submits that the issue before the Tribunal is, at present, primarily a matter of comity.
13. How comity applies depends on the particular circumstances and the subject-matter that engages comity.⁶
14. The starting point, however, must be the Tribunal's statutory jurisdiction.

Jurisdiction – section 6(6) of the Treaty of Waitangi Act 1975

15. Section 6(6) of the Treaty of Waitangi Act 1975 provides the Tribunal has no jurisdiction over a bill before the House (without a reference from the House under s 8 of that Act).
16. As set out in the Crown's memorandum of 13 December 2016,⁷ s 6(6) does not currently preclude consideration of the mana whakahono proposals in

⁵ Wai 2358, #3.2.39.

⁶ *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at 63.

⁷ Wai 2358, #3.2.29 at [3].

Next Steps, as the MWaR-IPA proposals in the departmental report are yet to be included in the Bill.⁸

17. However, if the report of the Local Government and Environment Committee leads the House to include the MWaR-IPA proposals (or some variation) in the Bill, s 6(6) will prevent consideration of both the proposals in the Bill and the precursor proposals in *Next Steps*.
18. The Tribunal recently considered the effect of s 6(6) in Wai 2650 in which the applicants asked the Tribunal to inquire urgently into matters touching on the legislative settlement of the Wai 1950 claim.⁹ In his decision on the application for urgency, His Honour Judge Savage drew a distinction between cases where the issues into which the applicants seek inquiry can be severed from those issues which are before the House and have only “indirect relevance to the Bill”, and cases where the issues are “so inextricably intertwined with the Bill that to sever them without running contrary to s 6(6) would be impossible”.¹⁰
19. In that case, His Honour held that an inquiry into the mandate of the settling entity in Wai 1950 (as requested by the applicants) would require a close analysis of the Deed of Settlement, which was before the House, and “facilitate an analysis of the Bill by proxy”.¹¹ The claim was therefore barred by s 6(6).
20. Likewise, in the present case, counsel submit the mana whakahono proposals in *Next Steps* are “inextricably intertwined” with any MWaR-IPA proposals the House decides to include in the Bill.
21. As noted, the Committee is due to report back to the House by not later than 10 May 2017. As a result, by the time of hearing week 2 (26 to 30 June 2017),¹² the Tribunal’s ability to consider the mana whakahono proposals may be resolved under s 6(6). Either:

⁸ Section 6(6) does preclude any consideration of the IPA provisions in the Bill as introduced.

⁹ Wai 2560, #3.1.1.

¹⁰ Wai 2560, #2.5.2 at [15].

¹¹ Wai 2560, #2.5.4 at [6], citing Wai 2560, #2.5.2 at [19].

¹² Wai 2358, #2.6.6 at [18].

- 21.1 the MWaR-IPA proposals in the departmental report, implementing parts of the Next Steps proposal, will be included in the Bill. In that case, the Tribunal will have no jurisdiction until the Bill is passed or discharged; or
- 21.2 the MWaR-IPA proposals will not be included in the Bill. In that case, the Tribunal will be free to consider the *Next Steps* proposals provided it does not seek to question or impeach proceedings in Parliament.

The principle of comity is broader than described by the claimants

22. The claimants say the purpose of comity is to ensure that witnesses before committees and members of the legislature are able to speak freely and are not inhibited by the risk of those statements being referred to in the courts.¹³
23. The Crown submits comity also preserves Parliament's freedom to debate and inquire into matters without coming into conflict with the courts over the particular issue Parliament is considering. It is not simply the making of statements that is protected, but the freedom of the House to consider and inquire into any matter.¹⁴
24. The principle of comity refers to the mutual respect the legislature and judiciary must have for each other in a functioning democracy. It requires:¹⁵
- ... the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges.
25. The freedom of speech protected by Article 9 of the Bill of Rights 1688 is merely one manifestation of the wider principle of comity, which is

¹³ Wai 2358, #3.2.43 at [8]. However, it is submitted the statement in *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) cited by counsel for the claimants as the purpose of the comity principle in fact refers to the purpose of Article 9: see Wai 2358, #3.2.43 at [8] and *Prebble* at 8.

¹⁴ See, for instance, the jurisprudence on the executive's freedom to propose legislation: *Te Kīnanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA) at 307-308. *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA) at 330-334. Comity also applies to steps preliminary to legislation: *Potaka-Dewes v Attorney-General* [2009] NZAR 248 (HC) at [42], [48] to [52]; *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 at 15; *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at [27] to [29].

¹⁵ Parliamentary Privilege Act 2014, s 4(1)(b). The Crown submits this statement reflects the common law position.

designed to avoid conflict between the branches of government by ensuring the “legislature and the Courts [do] not intrude into the spheres reserved to one another”.¹⁶

26. The Court of Appeal in *Te Runanga o Wharekauri Rekobu Inc v Attorney-General* described this wider constitutional principle of non-interference between the judicial and legislative branches the principle as follows:¹⁷

There is an established principle of non-interference by the Courts in parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as rule of practice ... However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Court to refrain from prohibiting a Minister from introducing a Bill into Parliament.

27. Of course, comity may not apply to the Tribunal in the same way as to the High Court. The Tribunal has a statutory jurisdiction that allows it to consider matters that would be non-justiciable before the High Court. In *Westco Lagan*, the Court noted that the requirements of the comity principle will depend very much on the particular context in which it is engaged. There was no “fixed basis” or “bright line” that governed the principle of non-interference. Rather, the principle of non-interference in parliamentary proceedings needed to be given effect to as a matter of judgment and common-sense.¹⁸

Comity breached here because of nature of Tribunal inquiry

28. If the Tribunal were to consider the mana whakahono proposals at the same time as the MWaR-IPA was being considered by the select committee, the Tribunal would be placing itself “in the heart of a political debate being carried on in the House.”¹⁹
29. Because the two sets of proposals are so closely connected, the Tribunal would be seized of essentially the same subject-matter of inquiry as the committee. The select committee is tasked with considering the Bill, and its

¹⁶ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 (PC) at [18]. See also *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, at 458-459.

¹⁷ *Te Runanga o Wharekauri Rekobu Inc v Attorney-General* [1993] 2 NZLR 301 at 307-308.

¹⁸ *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at 63.

¹⁹ *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798 at [31], citing *Boscawen v Attorney-General* [2009] NZCA 12 at [36].

jurisdiction is limited only by the broad subject-matter concerned.²⁰ The committee is entitled to consider Treaty issues and Maori rights and interests in relation to the Bill. It may also involve considering the extent to which the MWaR-IPA is consistent or inconsistent with other statements by the government, including in the *Next Steps* document that is the precursor to the MWaR-IPA proposals. Any distinction drawn between the inquiry involved in any Tribunal inquiry and the select committee's inquiry would therefore be artificial.

30. In considering the proposed amendments, the select committee is undertaking an inquiry into legislative proposals that are based (in part) on the *Next Steps* discussion document. While the claimants stress the distinction in *Jennings v Buchanan* between extra-parliamentary and parliamentary statements, the Crown submits this is a very different situation to *Jennings v Buchanan*.²¹

30.1 *Jennings* is a case about re-publication of defamatory statements outside Parliament. This is a case about proposals for legislation that have been placed before a select committee.

30.2 In this case, the legislative proposals follow the discussion document. In contrast, in *Jennings*, a statement was made outside parliament referring to a previous statement covered by privilege. The fact that the extra-parliamentary statement was made after the statement in the House was, the Privy Council found, significant. The claimants say the timing of statements is not material, but it is central to the Privy Council's reasoning²² and should not be disregarded by the Tribunal.

30.3 Here, parliamentary consideration of whether, and how best, to implement the mana whakahono proposals in *Next Steps* through

²⁰ See: Standing Orders of the House of Representatives 2014, SO 184, 188 and 189 and D McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, Wellington, 2005) at 236 to 242.

²¹ Parliament has chosen to overturn *Jennings* in the Parliamentary Privilege Act 2014 (see section 3(2)(d): a subsidiary purpose of the Act is to "abolish and prohibit evidence being offered or received, questions being asked, or statements, submissions, or comments made, concerning proceedings in Parliament, to inform or support "effective repetition" claims and liabilities in proceedings in a court or tribunal and exemplified by the decision" in *Jennings v Buchanan* [2004] UKPC 36, 2005 2 NZLR 577.

²² *Jennings v Buchanan* [2004] UKPC 36, 2005 2 NZLR 577 at [19].

the MWaR-IPA is currently in progress. That is likely to involve the select committee considering the substantive matters discussed in the mana whakahono section of *Next Steps* – the very matters the claimants say they want the Tribunal to critique.²³ In such a situation, the Tribunal ought not to risk encroaching into the select committee’s sphere of operation by considering the propriety of the mana whakahono proposals in *Next Steps*. Avoiding such a situation is part of the function of comity and clearly distinguishable from the situation in *Jennings*.

31. The claimants also refer to *Mangawhai Ratepayers*,²⁴ which suggests the High Court may judicially review an administrative or statutory power of decision on which the Executive intends to propose validating legislation. However, *Mangawhai* distinguishes between legislative policy choices and statutory powers of decision. While holding the Court had to proceed to determine the application for judicial review in the absence of legislation precluding such inquiry, the Court noted it would be “inappropriate for the judicial branch of Government to comment on the appropriateness or otherwise of the Legislative branch taking steps to validate” the matter at issue.²⁵ As will be apparent from the submissions above, the Crown says that distinction between legislative drafting decisions and a statutory power of decision is not available here: both proposals are tightly connected sets of policy choices about the content of legislation. Comity is therefore engaged by the nature of the select committee inquiry about the proposals, not by the mere mention of a subject in Parliament.²⁶
32. The appropriate response here would be for the Tribunal to avoid any conflict between the branches of government by delaying its consideration of the mana whakahono issues while the Committee is considering the proposed amendments.²⁷

²³ See paragraphs 7 – 11 above, and the schedule, on how the two proposals are tightly connected.

²⁴ *Mangawhai Ratepayers and Residents Association v Kaipara District Council* [2013] NZHC 2220. See claimants’ memorandum at [9.4].

²⁵ *Mangawhai Ratepayers’ and Residents’ Association Inc v Kaipara District Council* [2013] NZHC 2220 at [21].

²⁶ Contrary to the claimants’ submissions at Wai 2358, #3.2.43 at [27].

²⁷ See *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169 at [26].

33. This is consistent with the Tribunal’s statutory role of making “recommendations on claims relating to the practical application of the principles of the Treaty.”²⁸ The mana whakahono proposals in *Next Steps* are now part of an ongoing policy and legislative process. Separating out the proposals as they are expressed in *Next Steps* for inquiry, and divorcing them from the reality of the House’s process, (as the claimants suggest)²⁹ would potentially lead to the Tribunal inquiring into an outdated version of Crown proposals. That is an artificial approach and one of questionable utility.
34. Delaying any inquiry into mana whakahono proposals until after the select committee consideration would also be consistent with the approach taken by Simon France J in *Te Ohu Kai Moana Trustee Ltd v Attorney-General*.³⁰ In that case, His Honour accepted the proceeding could not be characterised solely as a challenge to legislation before the House, but granted a temporary stay of proceedings to avoid inviting direct or implied comment on the content of the legislation or its impact. The argument accepted by the Court was not that the matters raised in that proceeding were non-justiciable, but that the Court should not – as a matter of comity - entertain argument on them while the legislation was before the House. A temporary lull to allow Parliament to complete its processes was seen to “strike the right balance between the branches.”³¹
35. Similarly here, it should be noted that the Tribunal would not lose all jurisdiction over the MWaR-IPA and *Next Steps* mana whakahono proposals. If legislation is passed, the Act will be subject to the Tribunal jurisdiction. The timing of the parliamentary process is a matter for the House, is subject to change, and may depend on a range of political considerations. Nonetheless, officials advise there is some prospect that Parliament will have completed its consideration of the Bill before hearing week 2 (26 to 30 June 2017).

²⁸ Treaty of Waitangi Act 1975, preamble.

²⁹ Wai 2358, #3.2.43 at [27].

³⁰ *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169.

³¹ *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169 at [26].

Privilege questions arise here through common law and statute

36. The Parliamentary Privilege Act 2014 (the Act) reaffirms and clarifies the nature, scope and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees and its members.³²
37. Counsel accept the Act is not directly applicable because it commenced after the Wai 2358 Inquiry began.³³
38. However, the privileges of the House predate the Act. In particular, Article 9 of the Bill of Rights 1688, which has long been a statute in force in New Zealand,³⁴ provides:
- That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.
39. There is no dispute that a departmental report presented to a select committee constitutes a proceeding in Parliament.³⁵
40. Article 9 does not preclude evidence of parliamentary proceedings being adduced in the Tribunal per se, but excludes evidence where the reason for leading it is to “question or impeach” what was said or done in the House.³⁶ The Crown therefore acknowledges that records of parliamentary proceedings can be used to establish historical facts.
41. However, issues of privilege will arise if the material is subjected to critical examination.
42. In considering what constitutes critical examination, section 11 of the Act expresses (with minor variations) the pre-existing law, as discussed by the

³² Parliamentary Privilege Act 2014, s 3(a).

³³ See s 32 of the Act.

³⁴ Prior to the passage of the Parliamentary Privilege Act 2014, see s 242 of the Legislature Act 1908 and Schedule 1 of the Imperial Laws Application Act 1988.

³⁵ Prior to the Act, an exact and complete definition of “proceedings in Parliament” had never been given by the Courts or the House. However, as stated in *R v Chaytor* [2011] 1 AC 684 at 706 (per Lord Phillips of Worth Matravers PSC), “the principal matter to which article 9 is directed is freedom of speech and debate in the House of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place.” This statement was quoted with approval by the Supreme Court in *Attorney-General v Leigh* [2012] 2 NZLR 713 at 720.

³⁶ *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 10-11.

Privy Council in *Prebble v Television New Zealand Ltd.*³⁷ In that case, Lord Browne-Wilkinson held that the effect of article 9 was as set out in s 16(3) of the Parliamentary Privileges Act 1987 (Cth).

43. Section 16(3) of that Act provides:

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way or, or for the purpose of –
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

44. With minor variations, these provisions are replicated in s 11(a) to (c) of the Act. Accordingly, although the Act does not directly apply, the limitations set out in s 11 reflect the common law of parliamentary privilege.

45. Counsel accept it is for the Tribunal to determine whether a proposed use of parliamentary material would infringe parliamentary privilege. Counsel also accept that a simple recording of the MWaR-IPA proposals in the departmental report would not do so.

46. However, the Tribunal is inquiring into the Treaty consistency of the law relating to fresh water in New Zealand. It is submitted that any use of the MWaR-IPA proposals in the departmental report to support, or even as a relevant consideration in relation to, a claim of Treaty breach would involve the Tribunal drawing, or being invited to draw inferences or conclusions from the departmental report in breach of parliamentary privilege.

Conclusion and proposed next steps

47. The MWaR-IPA amendments proposed to the Bill are legislative proposals to give effect to part of the mana whakahono proposals in Next Steps. It is artificial to see the two sets of proposals as “stand-alone” separate

³⁷ *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 7-8.

proposals: they are closely connected parts of the process of legislative development.

48. In considering the proposed amendments, the select committee is undertaking an inquiry into legislative proposals that are based on the *Next Steps* discussion document. Although s 6(6) is not engaged, the principle of comity requires the Tribunal to delay its consideration of both sets of proposals to avoid encroaching upon the select committee inquiry. That is consistent with case law and Tribunal practice regarding legislative policy development and Parliament. The authorities cited by the claimants deal with very different contexts and circumstances.
49. However, the Crown respectfully submits it may not be necessary for the Tribunal to issue a direction on questions of privilege and comity, given the Tribunal's revised timetable. In light of the select committee's timetable, the matter may be able to be addressed directly as a question of jurisdiction under s 6(6).
50. Counsel therefore seek leave to provide any further update to the Tribunal by 10 May 2017, and submit that the Tribunal should release a direction on questions of privilege and comity only if the select committee report has not reported to the House by that date. If the select committee has not reported and the Tribunal agreed with the Crown's position on comity, there would still be sufficient time to address any question of re-filing of evidence before the second hearing week.

9 February 2017



J R Gough / D A Ward
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

SCHEDULE

CONNECTION BETWEEN MWAR-IPA PROPOSAL IN *NEXT STEPS* AND THE BILL

<i>Next Steps for Fresh Water (Proposal 3.5, pp 29–30)</i>	<i>Resource Legislation Amendment Bill (RLAB) Departmental Report No 2 (Summary of recommendations, pp 437-441 or as indicated)</i>
<p>The Government will amend the Resource Management Act to establish provisions for a new rohe (region or catchment)-based agreement between iwi and councils for natural resource management – a ‘mana whakahono a rohe’ agreement. The mana whakahono a rohe will:</p>	<p>Proceed with clause 38 with the following amendments:</p> <ul style="list-style-type: none"> • change the name of the relationship mechanism to a dual name of ‘Mana Whakahono a Rohe/Iwi Participation Arrangement’ • make consequential amendments to all references in the Bill, and any relevant new amendments to RLAB, from ‘IPA’ to ‘MWaR/IPA’.
<ul style="list-style-type: none"> • be initiated by iwi through notice to the councils 	<p>Proceed with clause 38 section 58L but with the following amendments:</p> <ul style="list-style-type: none"> • Remove the requirement for local authorities to initiate a relationship arrangement and associated timeframes. • Allow iwi authorities to initiate a relationship arrangement at any time except 90 days before a local body election.
<ul style="list-style-type: none"> • be available to all iwi but will not override or replace existing arrangements for natural resource management in Treaty of Waitangi settlements nor preclude agreement of different arrangements under a Treaty settlement 	<p>Proceed with clause 38 section 58L but with the following amendments:</p> <ul style="list-style-type: none"> • Provide that a local authority or authorities may advise any other relevant iwi authorities and local authorities that the process has been initiated and invite them to express an interest in being part of the process. • Require the local authority that received the initiation request to convene a meeting (hui) with the initiating iwi authority or iwi authorities, and any other relevant local authorities and iwi authorities who have expressed an interest in being part of the process. • Require the above meeting to be convened within 60 working days from the day on which notice of the invitation is received, unless otherwise agreed by both parties and that the purpose of the meeting is for

<i>Next Steps for Fresh Water (Proposal 3.5, pp 29–30)</i>	<i>Resource Legislation Amendment Bill (RLAB) Departmental Report No 2 (Summary of recommendations, pp 437-441 or as indicated)</i>
	<p>the parties to discuss and agree:</p> <ul style="list-style-type: none"> ○ the process for negotiating one or more MWaR/IPA arrangements ○ the parties that wish to be involved in the negotiation process ○ the timing of such negotiations. <ul style="list-style-type: none"> • Require that in considering whether there will be one or more MWaR/IPA arrangements, the relevant iwi authorities and local authorities should, where reasonably practicable, seek to collaborate and co-operate to improve effectiveness and efficiency and promote integrated processes and the co-ordination of resources in relation to relevant responsibilities and obligations. • Require parties in considering whether there will be one or more MWaR/IPA and in negotiating an arrangement to take account of the extent to which iwi participation legislation, including treaty settlements, contains resource planning and consenting provisions, and minimise any duplication of functions.
<ul style="list-style-type: none"> • provide for multiple iwi involvement where appropriate and agreed 	<p>Proceed with clause 38 section 58L but with the following amendments:</p> <ul style="list-style-type: none"> • Provide that where two or more iwi authorities have a collective MWaR/IPA with a local authority, any individual iwi authority to that arrangement seeking an amendment, must negotiate with the local authority to amend that arrangement, rather than initiating a new arrangement. • If an iwi authority does not wish to participate in the negotiation process referred to above, that iwi authority may initiate the MWaR/IPA process at a later date • Provide that where a MWaR/IPA exists with a local authority, and another iwi authority in that area initiates a MWaR/IPA process, the iwi authority seeking a MWaR/IPA will

<p><i>Next Steps for Fresh Water (Proposal 3.5, pp 29–30)</i></p>	<p><i>Resource Legislation Amendment Bill (RLAB) Departmental Report No 2 (Summary of recommendations, pp 437-441 or as indicated)</i></p>
	<p>first consider joining the existing MWA/R/IPA.</p> <ul style="list-style-type: none"> • Provide that if a local authority or local authorities receive more than one initiation notice, the parties may enter into a discussion, subject to existing agreements, to sequence the order of the negotiations process.
<ul style="list-style-type: none"> • set out how iwi and council(s) will work together in relation to plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities 	<p>Proceed with clause 38 section 58M with the following amendments:</p> <ul style="list-style-type: none"> • Amend section 58M(b)(iii) to provide that to the extent that it relates to RMA matters as provided for by MWA/R/IPA and to the extent that the parties agree, an existing arrangement may be deemed a MWA/R/IPA. • Amend 58M(c)(ii) so that parties to a relationship arrangement may identify whether iwi authorities delegate participation in any processes that are covered in the relationship arrangement where appropriate, making specific reference to the involvement of hapū. • Expand the scope of relationship arrangements to include: <ul style="list-style-type: none"> ○ In negotiating a relationship arrangement, the parties must agree on how an iwi authority may participate in the preparation or change of a policy statement or plan, including any pre-notification planning process and any streamlined or collaborative process ○ In negotiating a relationship arrangement, the parties must agree on how they may work together to develop and agree monitoring methodologies under the RMA ○ In negotiating a relationship arrangement, the parties may agree on how a local authority consults or notifies an iwi authority on resource consenting including the process for notification of resource consent applications

<p><i>Next Steps for Fresh Water (Proposal 3.5, pp 29–30)</i></p>	<p><i>Resource Legislation Amendment Bill (RLAB) Departmental Report No 2 (Summary of recommendations, pp 437-441 or as indicated)</i></p>
	<p>where the RMA provides for that consultation or notification and the circumstances in which an iwi authority may be given limited notification as an affected party</p> <ul style="list-style-type: none"> ○ In negotiating a relationship arrangement, the parties may agree to include any RMA duty, function or power. <p>Introduce a new section in clause 38 setting out the principles that iwi and local authorities, in working together to develop and working under an arrangement, are required to act in a manner consistent with:</p> <ul style="list-style-type: none"> ● using their best endeavours to ensure that the purpose of the relationship arrangement is achieved in an enduring manner ● working together in good faith and a spirit of co-operation ● being open, honest, and transparent in their communications ● recognise and acknowledge that the parties will benefit from working together by sharing their respective vision, knowledge and expertise ● commit to meeting statutory timeframes, and minimising delays and costs associated with those statutory processes ● recognise that the arrangement cannot limit any relevant provision of any iwi participation legislation or any arrangement under that legislation. <p>Introduce a new provision into clause 38 of the Bill which requires that the parties to a relationship arrangement must agree and record in their relationship arrangement a process for identifying and managing any conflicts of interest.</p> <p>Insert a new provision which requires that local authorities review their internal policies and processes to ensure they are</p>

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	<p>consistent with the relationship arrangement within 6 months of the arrangement being concluded, or at a timeframe otherwise agreed between the parties.</p> <p>Insert a new provision into clause 38, subpart 2, which requires that a relationship arrangement will not be amendable or terminable except by mutual agreement of the parties.</p> <p>Introduce a new provision (or provisions) into clause 38 requiring reporting of relationship arrangement data to the Minister under section 35 of the RMA.</p> <p>Introduce a new provisions (or provisions) into clause 38 requiring a review period for relationship arrangements of six years.</p>
<ul style="list-style-type: none"> • include review and dispute resolution processes. 	<p>Consequentially amend clause 36 sections 58M and 58N to:</p> <ul style="list-style-type: none"> • require parties to specify a process for resolving disputes about the implementation of the arrangement • allow parties to agree to a binding form of alternative dispute resolution (ADR) where the costs are met by the parties and both parties are in mutual agreement on the process • require the parties to agree to a non-binding form of ADR if they do not agree to a binding form of ADR • provide that no dispute resolution provision in a MWaR/IPA arrangement may require the local authority to suspend any RMA process. • reflect iwi initiation of an arrangement and the extension of the time frame for concluding an arrangement to 18 months.
<p>Iwi participation arrangement (IPA) is a provision under the Resource Legislation Amendment Bill that was introduced into Parliament in</p>	<p><i>Pages 103–106</i> The Bill proposes to enhance Māori participation in the policy statement and plan-making processes by requiring local</p>

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<p>December 2015. An IPA will require councils to invite iwi to discuss and agree on how iwi may participate in planning. IPAs will improve consistency in councils' engagement with iwi on plan development.</p> <p>Mana whakahono a rohe in this context is an alternative to an IPA. It differs from an IPA in that it can be initiated by iwi.</p>	<p>authorities to invite iwi authorities to form iwi participation arrangements (IPAs)³⁸ and by enhancing iwi consultation requirements in relation to the appointment of hearing commissioners and pre-notification for policy statement and plan changes.</p> <p>...</p> <p>Since the introduction of the Bill, an alternative iwi and local authority relationship arrangement has been proposed through the Next Steps for Freshwater (NSFW) consultation document. This proposal is called Mana Whakahono a Rohe (MWAR). The key differences between MWaR as proposed in the NSFW consultation document and IPAs are as follows:</p> <ul style="list-style-type: none"> • MWaR is initiated by iwi • the scope of MWaR goes beyond engagement in plan-making processes to include consenting, appointment of committees, monitoring and enforcement, bylaws and regulations and other council statutory responsibilities. <p>Due to the overlapping consultation period for the Bill and NSFW, many submissions on the Bill also make reference to MWaR and to the policy options proposed within it. This section of the Departmental Report therefore responds to both the MWaR proposal and submissions on the Bill in the analysis and recommendations of policy options in order to achieve the objectives of the Bill.</p>
<p>The call from iwi for greater participation in natural resource management has been addressed in some instances through Treaty of Waitangi settlements, for example, through establishment of a joint</p>	<p><i>Pages 103–106</i></p> <p>There are many examples of iwi participating successfully in resource management processes. However, engagement is inconsistent across the</p>

³⁸ 'Iwi participation arrangement' refers to the proposal as drafted in the Bill. 'Relationship arrangement' refers to the updated policy which incorporates analysis resulting from the RLAB submission process and the Mana Whakahono a Rohe proposal.

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<p>committee with a regional council, an advisory committee to the council and specific requirements to appoint accredited iwi commissioners to consent hearing committees.</p> <p>However, there is a still a need to consistently provide opportunities for iwi engagement in council decision-making about natural resources. For this reason, the Government included a new provision for iwi participation arrangements in the Resource Legislation Amendment Bill introduced in 2015. An IPA will require councils to invite iwi to discuss and reach agreement with them on how they may participate in planning processes.</p>	<p>country and the effectiveness of existing relationships between iwi and councils varies. In some regions poor relationships between local authorities and Māori have meant that Māori have not been engaged in resource management processes. The lack of any requirement to establish effective working relationships with iwi can lead to increased disagreement (and litigation) later in the planning process.</p> <p>...</p> <p>The IPA will detail how the iwi authority and the local authority will work together through the plan-making process. It will set out the agreed processes for giving effect to iwi participation legislation provisions and specify how iwi authorities can identify resource management issues of concern to them. If an iwi authority does not respond within a specified timeframe, the local authority will not be required to suspend the preparation of the policy statement or plan, or any other part of the plan-making process (as prescribed under Schedule 1 of the RMA). The local authority must comply with the processes agreed to under the arrangement when preparing their plans under Schedule 1.</p>
<p>However, as part of our discussions with the Freshwater Iwi Leaders Group on improving iwi participation in freshwater decision-making, we discussed an alternative proposal to the IPA. Under this proposal, iwi could invite councils to agree how iwi and councils will work together on natural resource management. The name the Freshwater Iwi Leaders Group proposed for this agreement is 'mana whakahono a rohe'. This has many similarities to the IPA, but a key difference is that would be up to iwi to decide if and when they would like to develop such an agreement with the relevant council(s).</p>	<p><i>Pages 103–106</i></p> <p>Since the introduction of the Bill, an alternative iwi and local authority relationship arrangement has been proposed through the Next Steps for Freshwater (NSFW) consultation document. This proposal is called Mana Whakahono a Rohe (MWaR). The key differences between MWaR as proposed in the NSFW consultation document and IPAs are as follows:</p> <ul style="list-style-type: none"> • MWaR is initiated by iwi • the scope of MWaR goes beyond engagement in plan-making processes to include consenting, appointment of committees, monitoring and enforcement,

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	<p>bylaws and regulations and other council statutory responsibilities.</p> <p>...</p> <p>The major changes to the IPA proposal contained in the RLAB are discussed below. These include changes to the initiation of an arrangement. Specifically, the requirement for local authorities to initiate an arrangement has been removed, and instead iwi authorities may initiate. Once an iwi has initiated, the local authority may advise any other relevant iwi and local authorities that the process has been initiated and then the local authority must convene a meeting (hui) with those parties that have responded to the invitation to discuss and agree the process, parties and timing for negotiating the arrangement. If a local authority receives more than one initiation notice the parties may enter into a discussion, subject to existing agreements, to sequence the order of negotiations. Local authorities may seek to form an arrangement with either an iwi authority or hapū.</p> <p>Further changes include the addition of monitoring under the RMA as a matter that the parties must record their arrangements about in writing. Parties may now also record their arrangements in writing about how a local authority consults or notifies an iwi authority on resource consenting, including the process for notification of resource consent applications where the RMA provides for that consultation or notification and the circumstances in which an iwi authority may be given limited notification as an affected party. They may also record arrangements about other RMA duties, functions and/or powers.</p>
<p>We will consider public feedback on the mana whakahono a rohe proposal and do further work on how it should be</p>	<p><i>Pages 103–106</i> <u>Support</u> A large number of council and iwi submitters were generally supportive of</p>

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<p>reflected in legislation.</p>	<p>increased and more formalised iwi involvement in the plan-making process. A number of councils and iwi groups stated many of the proposed changes are already undertaken as best practice. For example, Greater Wellington Regional Council submitted that “GWRC supports the proposed amendments seeking to increase opportunities for iwi to be involved in the plan-making process. GWRC has a number of processes for involving mana whenua in resource management in our region. Formalising this process and ensuring consistent opportunities for iwi nationally is a positive step”.</p> <p>While these submitters supported IPAs generally as a way for iwi and local authorities to improve working relationships on resource management issues, a number of concerns were raised on specific aspects of the proposal and how it is to be implemented. Proposals to address these concerns follow in the clause-by-clause analysis.</p> <p><u>Opposition</u></p> <p>Almost half of all submissions were from individual submitters concerned with the introduction of ‘iwi provisions’ into the RMA. These submitters considered that the proposals were race-based and therefore opposed them in principle. These submissions sought the removal of the IPA provisions and other provisions relating to iwi.</p> <p>Many of these submitters referred to a legal opinion commissioned by the group Democracy Action. This legal opinion claimed that the iwi provisions in the Bill are “incompatible with the principle of equality of citizens in democratic control of the exercise of local government powers”.</p> <p><u>Suggestions for improvement</u> <i>Maori representation</i></p>

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	<p>The RMA identifies an iwi authority as “the authority which represents an iwi and which is recognised by that iwi as having authority to do so”.³⁹ A large number of submitters expressed concern over this definition insofar as it might preclude groups representing different levels of Māori authority from engaging with local authorities, or insofar as the proposal for a relationship arrangement might undermine existing relationships between local authorities and hapū. Although we do not recommend changing the definition of ‘iwi authority’ within the RMA, officials have responded to these concerns in ways that provide for the maintenance of existing relationships between hapū and local authorities, and in providing for the special relationship between hapū and natural resources by explicitly enabling parties to a relationship arrangement to delegate certain functions to hapū, and also enabling local authorities to initiate a relationship arrangement with hapū.</p> <p><i>Implementation</i></p> <p>A number of submitters, including the Resource Management Law Association (RMLA) and Local Government New Zealand (LGNZ), expressed concern that iwi and local authorities will not be able to meaningfully engage or carry out the new processes set out in the Bill relating to Māori participation unless they are adequately resourced. It was noted that many local authorities are already struggling to fund their obligations to Māori and further requirements will only add to this burden.</p> <p>Specifically, LGNZ submitted that: “LGNZ also considers the Crown should resource iwi to participate in the processes to develop the iwi participation arrangement with council. Developing an</p>

³⁹ This definition can include groups that have not completed a treaty settlement process.

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	<p>iwi participation arrangement will take time and investment and some iwi will want to develop arrangement across a number of councils. LGNZ’s members will not support a cost shift to ratepayers of the Crown’s obligations under the Treaty in order to fulfil this new requirement. ... In order to address submitter concerns, and to mitigate the risk that the Māori participation provisions will fail to meet their purpose particularly for small, under-resourced iwi and local authorities, we propose the development of a package to support the implementation of the relationship agreements and additional consultation requirements.”</p> <p>We acknowledge that implementing the Māori participation provisions in the Bill may result in costs to iwi and local authorities. These costs will vary across different iwi and local authorities, and will depend on the scale, scope and complexity of the existing and proposed arrangements. Costs will generally be short term (3-4 years), but for meaningful relationship building and outcomes, ongoing maintenance will be required.</p> <p>We will be addressing guidance and resourcing relating to Māori participation through the implementation of the Bill as it is not a legislative issue. No further discussion is provided on this matter within the Departmental Report.</p>