

THE  
STAGE 2 REPORT  
ON THE  
NATIONAL FRESHWATER  
AND  
GEOHERMAL RESOURCES  
CLAIMS



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## CONTENTS

Letter of transmittal . . . . .	xix
Preface . . . . .	xxvii
<b>CHAPTER 1: INTRODUCTION . . . . .</b>	<b>1</b>
1.1 Introduction . . . . .	1
1.1.1 What this stage 2 inquiry is about . . . . .	1
1.1.2 The Tribunal panel . . . . .	4
1.1.3 What this chapter is about . . . . .	4
1.2 The parties in this inquiry . . . . .	4
1.2.1 The claimants . . . . .	4
1.2.1.1 The Wai 2358 claimants . . . . .	4
1.2.1.2 The Wai 2601 claimants . . . . .	5
1.2.1.3 The ‘sixth’ claimants . . . . .	5
1.2.2 Interested parties . . . . .	5
1.2.3 The Crown . . . . .	6
1.3 The stage 1 report . . . . .	6
1.4 The stage 2 inquiry . . . . .	8
1.4.1 Introduction . . . . .	8
1.4.2 Early phase and draft statement of issues . . . . .	8
1.4.3 The Crown and claimants agree on a joint approach to stage 2 . . . . .	10
1.4.4 The adjournment of the inquiry, 2015–16 . . . . .	12
1.4.5 The Crown’s request for a second adjournment is declined . . . . .	13
1.4.6 Revised statement of issues . . . . .	13
1.4.7 Exclusion of geothermal issues from the stage 2 hearings . . . . .	14
1.4.8 Hearings . . . . .	14
1.5 Treaty principles . . . . .	15
1.5.1 Introduction . . . . .	15
1.5.2 Partnership . . . . .	16
1.5.3 Māori autonomy and the guarantee of tino rangatiratanga . . . . .	17
1.5.4 Equal treatment . . . . .	18
1.5.5 Active protection . . . . .	18
1.5.6 Equity . . . . .	20
1.6 The structure of this report . . . . .	20
1.7 Note on sources . . . . .	21

<b>CHAPTER 2: IS THE PRESENT LAW CONSISTENT WITH TREATY PRINCIPLES?</b>	23
2.1 Introduction	23
2.2 The parties' arguments	25
2.2.1 Purpose and principles of the RMA: sections 5–8	25
2.2.1.1 The case for the claimants and interested parties	25
2.2.1.2 The case for the Crown	25
2.2.2 Māori participation in freshwater management and decision-making	26
2.2.2.1 The case for the claimants and interested parties	26
2.2.2.2 The case for the Crown	28
2.2.3 Proprietary rights, economic benefits, and the allocation regime	29
2.2.3.1 The case for the claimants and interested parties	29
2.2.3.2 The case for the Crown	29
2.2.4 Environmental outcomes and the need for reform	30
2.2.4.1 The case for the claimants and interested parties	30
2.2.4.2 The case for the Crown	31
2.3 The law in respect of freshwater management before 1991	31
2.3.1 Introduction	31
2.3.2 Water management law up to 1967	32
2.3.2.1 River and drainage boards, hydroelectricity, and water rights	32
2.3.2.2 The Soil Conservation and Rivers Control Act 1941	33
2.3.3 The Water and Soil Conservation Act: ownership and native title	35
2.3.4 The statutory regime for freshwater management, 1967–90	40
2.4 The purpose and principles of the RMA	43
2.4.1 The decision-making hierarchy of the RMA: sections 5–8	43
2.4.2 The relative weakness of the Treaty clause in the RMA	47
2.4.2.1 Background to the enactment of the Treaty clause	47
2.4.2.2 Waitangi Tribunal findings about the Treaty clause	49
2.4.3 National direction and monitoring	51
2.4.4 Balancing out of Māori interests	55
2.4.5 Our conclusions and findings	65
2.5 Māori participation in freshwater management and decision-making	66
2.5.1 Introduction	66
2.5.2 Mechanisms for kaitiaki control of natural resources	67
2.5.2.1 Section 33 transfers	67
2.5.2.2 Wai 262 recommendations for section 33 transfers	71
2.5.2.3 Heritage Protection Authorities	71
2.5.3 Co-management mechanisms	74
2.5.3.1 Joint Management Agreements (section 36B)	74
2.5.3.2 Wai 262 recommendations in respect of Joint Management Agreements	79
2.5.3.3 Treaty settlement legislation	79
2.5.4 Participatory or advisory mechanisms	82

2.5.5	Iwi management plans . . . . .	84
2.5.5.1	The origin and roles of iwi management plans . . . . .	84
2.5.5.2	Repeated calls for enhanced legal weight and better resourcing . . . . .	85
2.5.5.3	Why has the Crown not acted on these calls for reform? . . . . .	89
2.5.5.4	Are iwi management plans now a more effective tool? . . . . .	90
2.5.6	Consultation mechanisms . . . . .	92
2.5.6.1	Consultation mechanisms in the 1991 Act . . . . .	92
2.5.6.2	Reforms in 2005 . . . . .	92
2.5.6.3	Reforms in 2017 . . . . .	93
2.5.6.4	Māori participation in freshwater management decision-making . . . . .	94
2.5.7	Resourcing . . . . .	94
2.5.8	Is RMA participation set at the right level of customary authority for freshwater management? . . . . .	98
2.5.9	Our conclusions and findings . . . . .	100
2.6	Proprietary rights and economic benefits . . . . .	102
2.6.1	Introduction . . . . .	102
2.6.2	The Resource Management Law Reform process and the RMA . . . . .	103
2.6.3	No alternative process for negotiating ownership of water was established . . . . .	106
2.6.4	The allocation system: first-in, first-served . . . . .	108
2.6.5	Māori rights and interests include an economic benefit . . . . .	113
2.6.6	Our conclusions and findings . . . . .	114
2.7	Environmental outcomes and the need for reform . . . . .	115
2.7.1	The science of water quality . . . . .	115
2.7.1.1	Pathogens . . . . .	116
2.7.1.2	Sediment . . . . .	116
2.7.1.3	Nutrients (nitrogen and phosphorus) . . . . .	117
2.7.2	Kaitiakitanga and the cultural health of water bodies . . . . .	117
2.7.3	Examples of degraded freshwater taonga . . . . .	121
2.7.3.1	Introduction . . . . .	121
2.7.3.2	Lake Ōmāpere . . . . .	122
2.7.3.3	Taumārere River . . . . .	123
2.7.3.4	Kaeo River . . . . .	124
2.7.3.5	Ōroua River . . . . .	124
2.7.3.6	The Manawatū River . . . . .	125
2.7.3.7	Lake Horowhenua . . . . .	125
2.7.3.8	The Rangitikei River . . . . .	126
2.7.3.9	Tukituki River . . . . .	127
2.7.3.10	Waipaoa River . . . . .	128
2.7.3.11	Tarawera River . . . . .	129
2.7.4	Has the RMA failed to deliver sustainable management of fresh water? . . . . .	129
2.7.4.1	Diffuse discharges and declining water quality . . . . .	129

	2.7.4.2	Point source discharges are still a significant issue for Māori . . . . .	135
	2.7.5	Our conclusions and findings . . . . .	136
2.8		Early reform: the Sustainable Water Programme of Action, 2003–08 . . . . .	137
	2.8.1	Introduction . . . . .	137
	2.8.2	What did the Crown propose in 2004 in respect of Māori rights and interests in water? . . . . .	138
	2.8.3	What were the Māori Treaty partner's responses in 2005? . . . . .	140
	2.8.4	What did the Crown decide in 2006? . . . . .	143
	2.8.5	The achievements of the SWPOA . . . . .	145
	2.8.5.1	Building partnerships with Māori: the Crown and the Freshwater Iwi Leaders Group . . . . .	145
	2.8.5.2	Draft national policy statement and national environmental standards . . . . .	147

### CHAPTER 3: A 'FRESH START FOR FRESH WATER': THE CROWN'S

		<b>REFORM PROGRAMME TO 2014 . . . . .</b>	<b>149</b>
3.1		Introduction . . . . .	149
3.2		The parties' arguments . . . . .	151
	3.2.1	The Crown's reform process . . . . .	151
	3.2.1.1	The case for the claimants and interested parties . . . . .	151
	3.2.1.2	The case for the Crown . . . . .	153
	3.2.2	The National Policy Statement for Freshwater Management, 2011 and 2014 . . . . .	154
	3.2.2.1	The case for the claimants and interested parties . . . . .	154
	3.2.2.2	The Crown's case . . . . .	156
	3.2.3	Resourcing and funding . . . . .	157
3.3		Collaborative reform . . . . .	158
	3.3.1	'A New Start for Fresh Water' . . . . .	158
	3.3.2	Collaborative development of policy options . . . . .	160
	3.3.2.1	Three collaborative processes for policy development are established . . . . .	160
	3.3.2.2	The Iwi Leaders Group . . . . .	160
	3.3.2.3	The Land and Water Forum . . . . .	163
	3.3.3	Policy decisions on water reforms: the 'Fresh Start for Fresh Water' programme . . . . .	164
3.4		The National Policy Statement for Freshwater Management 2011 . . . . .	166
	3.4.1	What did the Crown's 2008 draft of the NPS-FM propose in respect of Māori rights and interests in water? . . . . .	166
	3.4.2	What were the Māori Treaty partner's responses in 2009? . . . . .	167
	3.4.3	The board of inquiry's report and recommendations . . . . .	169
	3.4.4	The Land and Water Forum and the IAG's recommendations . . . . .	170
	3.4.5	The section 32 evaluation . . . . .	171
	3.4.6	The Crown's decisions on the NPS-FM 2011 . . . . .	172



3.5	Māori responses to the reforms in 2012 . . . . .	175
3.5.1	Further freshwater management reforms planned in 2012 . . . . .	175
3.5.2	The Wai 2358 claim . . . . .	175
3.5.2.1	The NZMC applies for an urgent hearing . . . . .	175
3.5.2.2	The Crown's response: assurances to the Supreme Court in 2012 . . . . .	176
3.5.3	Ngā Mātāpono ki te Wai . . . . .	178
3.5.4	Māori as 'stakeholders' in the Land and Water Forum . . . . .	179
3.5.4.1	The Land and Water Forum's second report, April 2012 . . . . .	179
3.5.4.2	The Land and Water Forum's third report, November 2012 . . . . .	181
3.6	Freshwater reform 2013 and beyond . . . . .	182
3.6.1	Introduction . . . . .	182
3.6.2	'Improving our Resource Management System': consultation on phase two of the RMA reforms, 2013 . . . . .	184
3.6.2.1	What did the Crown propose in respect of Māori rights and interests? . . . . .	184
3.6.2.2	What were the Māori Treaty partner's responses? . . . . .	187
3.6.2.2.1	The consultation . . . . .	187
3.6.2.2.2	The proposed changes to sections 6 and 7 of the RMA . . . . .	187
3.6.2.2.3	Proposal 5: 'Effective and meaningful iwi/ Māori participation' . . . . .	188
3.6.2.2.4	General support for increasing 'iwi/Māori participation' . . . . .	188
3.6.3	'Freshwater reform 2013 and beyond': consultation on freshwater management reforms, 2013 . . . . .	189
3.6.3.1	What did the Crown propose in respect of Māori rights and interests? . . . . .	189
3.6.3.1.1	Introduction . . . . .	189
3.6.3.1.2	Effective provisions for 'involvement' in freshwater management . . . . .	190
3.6.3.1.3	National Objectives Framework . . . . .	192
3.6.3.1.4	Water conservation orders . . . . .	192
3.6.3.2	What were the Māori Treaty partner's responses? . . . . .	193
3.6.3.2.1	The Ministry for the Environment's summary of submissions . . . . .	193
3.6.3.2.2	The Freshwater ILG's submission . . . . .	194
3.6.3.2.3	A 'once in a generation' opportunity . . . . .	195
3.6.4	What did the Crown decide? . . . . .	196
3.6.4.1	Decisions on 'Freshwater reform 2013 and beyond', July 2013 . . . . .	196
3.6.4.2	Decisions on 'Improving our resource management system', August 2013 . . . . .	197
3.6.4.2.1	Changes to sections 6 and 7 of the RMA . . . . .	197

	3.6.4.2.2	‘Māori participation’ . . . . .	198
3.6.5		Conclusions . . . . .	200
3.7		The development of the NPS-FM 2014 . . . . .	201
	3.7.1	Introduction . . . . .	201
	3.7.2	What did the Crown propose in respect of Māori rights and interests? . . . . .	202
	3.7.3	What were the Māori Treaty partner’s responses? . . . . .	206
		3.7.3.1 Introduction . . . . .	206
		3.7.3.2 Te Mana o te Wai . . . . .	207
		3.7.3.3 Alternative suggestions for how to provide for Te Mana o te Wai . . . . .	208
		3.7.3.4 ‘Te mauri o te wai’ . . . . .	209
		3.7.3.5 The Treaty of Waitangi and Māori rights and interests in fresh water . . . . .	210
		3.7.3.6 Monitoring . . . . .	212
		3.7.3.7 Co-governance and co-management . . . . .	213
		3.7.3.8 The need for resources to improve capacity and capability . . . . .	214
	3.7.4	What did the Crown decide? . . . . .	215
		3.7.4.1 Introduction . . . . .	215
		3.7.4.2 Te Mana o te Wai . . . . .	215
			3.7.4.2.1 The Ministry’s advice and recommendations 215
			3.7.4.2.2 Outcome . . . . . 217
		3.7.4.3 The Treaty reference, Māori rights and interests in water, and co-management . . . . .	220
			3.7.4.3.1 The Ministry’s advice and recommendations 220
			3.7.4.3.2 Outcome . . . . . 221
		3.7.4.4 The need for resources to improve capacity and capability . . . . .	221
			3.7.4.4.1 The Ministry’s advice and recommendations 221
			3.7.4.4.2 Outcome . . . . . 221
		3.7.4.5 Swimming and mahinga kai . . . . .	221
			3.7.4.5.1 The Ministry’s advice and recommendations 221
			3.7.4.5.2 Outcome . . . . . 222
		3.7.4.6 Monitoring . . . . .	222
			3.7.4.6.1 The Ministry’s advice and recommendations 222
			3.7.4.6.2 Outcome . . . . . 222
		3.7.4.7 Sections 6–8 of the RMA . . . . .	222
3.8		Conclusions and findings . . . . .	223
	3.8.1	The Crown’s commitment to address Māori rights and interests . . . . .	223
	3.8.2	Collaboration and partnership . . . . .	223
	3.8.3	The reform option chosen in this period . . . . .	224
		3.8.3.1 The chosen option . . . . .	224
		3.8.3.2 Section D of the NPS-FM . . . . .	224
		3.8.3.3 Te Mana o te Wai . . . . .	226

3.8.4	RMA reform: ‘Effective and meaningful iwi/Māori participation’	227
3.8.5	The slow pace of reform.	229
<b>CHAPTER 4: ‘NEXT STEPS’ FOR FRESH WATER</b>		<b>231</b>
4.1	Introduction	231
4.2	The parties’ arguments	233
4.2.1	The ‘Next Steps for Fresh Water’ process	233
4.2.1.1	The case for the claimants and interested parties	233
4.2.1.2	The case for the Crown	234
4.2.2	The National Policy Statement for Freshwater Management (2017)	236
4.2.2.1	The case for the claimants and interested parties	236
4.2.2.2	The case for the Crown	237
4.2.3	RMA reforms	238
4.2.3.1	The case for the claimants and interested parties	238
4.2.3.2	The case for the Crown	240
4.3	Co-design: the Crown and ILG work together to address Māori rights and interests, 2014–16	242
4.3.1	The Crown renews its public commitment to address Māori rights and interests in fresh water, July 2014	242
4.3.2	The Crown’s report to the Waitangi Tribunal, September 2014	242
4.3.3	The Crown and the ILG begin a new phase of gathering information, 2014	244
4.3.3.1	Introduction	244
4.3.3.2	The IAG’s consultation hui and case studies	245
4.3.3.3	What did the Crown understand from the IAG’s hui, and what was the Crown’s response?	249
4.3.4	The Crown and the ILG agree a work plan for 2015	254
4.3.5	The Crown applies for an adjournment of stage 2, March 2015	256
4.3.6	The Crown and the ILG develop policy options for recognising Māori rights and interests in fresh water	258
4.3.6.1	The priority work streams, March–August 2015	258
4.3.6.2	Collaboration between officials and the IAG	262
4.3.6.3	Points of agreement and disagreement, October 2015	263
4.3.6.4	Officials propose a menu of options to Ministers, October–November 2015	265
4.3.6.5	The Crown considers the ILG’s ‘Mana Whakahono a Rohe’ proposal, November 2015	269
4.3.7	The Crown’s decisions on policy options for consultation, December 2015–February 2016.	272
4.3.7.1	The Crown rejects the iwi allocation recommendations of the fourth LAWf report	272
4.3.7.2	Ministers’ meeting with the ILG, 1 December 2015	272
4.3.7.3	Cabinet paper with proposed policy options for consultation, December 2015	274

	4.3.7.4	Cabinet signs off on proposals to put formally to the iwi chairs, February 2016 . . . . .	277
	4.3.7.5	The Crown makes its final decisions on the policy options for consultation, February 2016 . . . . .	279
4.4		‘Next Steps for Fresh Water’ . . . . .	280
	4.4.1	What did the Crown propose in respect of Māori rights and interests? . . . . .	280
	4.4.2	What were the Māori Treaty partner’s responses? . . . . .	285
	4.4.2.1	Public consultation . . . . .	285
	4.4.2.2	The Ministry for the Environment’s summary of submissions. . . . .	286
	4.4.2.2.1	Te mana o te wai in freshwater management	286
	4.4.2.2.2	Iwi and hapū relationships with, and values for, water bodies . . . . .	286
	4.4.2.2.3	Participation in freshwater decision-making	288
	4.4.2.2.4	Clean, safe drinking water for marae and papakāinga . . . . .	289
	4.4.2.3	The New Zealand Māori Council submission . . . . .	290
	4.4.2.4	Other issues arising from the submissions . . . . .	290
	4.4.2.4.1	Varying experiences and unequal arrangements . . . . .	290
	4.4.2.4.2	Many iwi and other Māori groups sought an allocation . . . . .	291
	4.4.3	What did the Crown decide? . . . . .	291
	4.4.3.1	Te Mana o te Wai in freshwater management . . . . .	292
	4.4.3.2	Recognition of iwi and hapū relationships with, and values for, water bodies . . . . .	292
	4.4.3.3	Participation in freshwater decision-making . . . . .	293
	4.4.3.4	Clean, safe drinking water for marae and papakainga . . . . .	295
	4.4.4	Conclusions . . . . .	296
	4.4.4.1	Was the co-design process compliant with the Treaty? . . . . .	296
	4.4.4.2	How effective was the Next Steps process in developing and progressing reforms to address Māori rights and interests in water? . . . . .	299
4.5		‘Next Steps’ reform pathway 1: amending the RMA, 2016–17 . . . . .	300
	4.5.1	Introduction . . . . .	300
	4.5.2	Participation reforms . . . . .	301
	4.5.3	The original IPA proposals in the Resource Legislation Amendment Bill 2015 . . . . .	303
	4.5.4	The ILG and Māori submitters seek broader arrangements . . . . .	303
	4.5.5	The Mana Whakahono a Rohe arrangements in the RMA . . . . .	306
	4.5.6	How significant is the Mana Whakahono a Rohe arrangement as a partnership mechanism? . . . . .	309
	4.5.6.1	Our conclusions . . . . .	309
	4.5.6.2	Our findings . . . . .	314

4.6	‘Next Steps’ reform pathway 2: amending the NPS-FM, 2016–17 . . . . .	315
4.6.1	The Crown’s decision to proceed with additional reforms . . . . .	315
4.6.2	The Crown and the ILG work together on NPS-FM amendments. . . . .	316
4.6.3	What did the Crown propose in respect of Māori rights and interests in <i>Clean Water</i> ? . . . . .	318
4.6.3.1	Cabinet’s decisions . . . . .	318
4.6.3.2	Proposals to strengthen Te Mana o te Wai . . . . .	319
4.6.3.3	Other proposed amendments . . . . .	323
4.6.4	What were the Māori Treaty partner’s responses? . . . . .	324
4.6.4.1	The submissions . . . . .	324
4.6.4.2	The submissions on Te Mana o te Wai . . . . .	325
4.6.4.3	Setting objectives ‘following’ discussion with communities and tāngata whenua . . . . .	326
4.6.4.4	Economic impacts and wellbeing . . . . .	327
4.6.4.5	The addition of mātauranga Māori to monitoring . . . . .	328
4.6.4.6	Other matters . . . . .	328
4.6.5	What did the Crown decide? . . . . .	328
4.6.5.1	Te Mana o te Wai . . . . .	328
4.6.5.2	Economic impacts and wellbeing . . . . .	330
4.6.5.3	The use of Mātauranga Māori in monitoring . . . . .	331
4.6.5.4	National values . . . . .	331
4.6.6	Follow-up work in 2017 . . . . .	333
4.6.6.1	Cultural indicators for the NPS-FM . . . . .	333
4.6.6.2	What still needed to be done for iwi and hapū engagement in freshwater management . . . . .	335
4.6.7	Conclusion and findings . . . . .	336
4.7	‘Next Steps’ reform pathway 3: capacity and capability programmes . . . . .	339
4.7.1	The issue of under-resourcing as dealt with in <i>Next Steps</i> . . . . .	339
4.7.2	The Mana Whakahono a Rohe guidance programme . . . . .	342
4.7.3	Conclusion and findings . . . . .	343
<b>CHAPTER 5: WATER QUALITY REFORMS . . . . .</b>		<b>345</b>
5.1	Introduction . . . . .	345
5.2	The parties’ arguments . . . . .	349
5.2.1	The case for the claimants and interested parties. . . . .	349
5.2.1.1	National Policy Statement for Freshwater Management . . . . .	349
5.2.1.2	Land use intensification and agriculture . . . . .	351
5.2.1.3	Slow pace of reform . . . . .	352
5.2.1.4	Restoration funding . . . . .	352
5.2.2	The case for the Crown . . . . .	353
5.2.2.1	The National Policy Statement for Freshwater Management . . . . .	353
5.2.2.2	The careful, iterative development of water quality reforms . . . . .	355

	5.2.2.3	Restoration funding . . . . .	356
5.3		Early reform proposals, 2003–08. . . . .	356
	5.3.1	Sustainable Water Programme of Action, 2003–06 . . . . .	356
	5.3.2	The Crown decides on a reform package, 2006 . . . . .	358
	5.3.3	The 2008 draft of the National Policy Statement for Freshwater Management . . . . .	360
5.4		The development of the NPS-FM 2011 . . . . .	363
	5.4.1	Introduction . . . . .	363
	5.4.2	The Crown adopts a new approach to freshwater reform . . . . .	363
	5.4.3	The board of inquiry’s recommended changes to the draft NPS-FM . . . . .	366
	5.4.4	The Land and Water Forum’s first report, September 2010 . . . . .	372
	5.4.5	The Crown’s decisions on the NPS-FM 2011 . . . . .	375
5.5		The development of the National Objectives Framework . . . . .	384
	5.5.1	Introduction . . . . .	384
	5.5.2	Starting on the second and third tranches of ‘Fresh Start for Fresh Water’ . . . . .	385
	5.5.3	The Land and Water Forum’s second and third reports . . . . .	386
		5.5.3.1 ‘Setting Limits’: the forum’s second report . . . . .	386
		5.5.3.2 Managing water quality and quantity: the forum’s third report . . . . .	391
	5.5.4	The Crown develops its position on water quality reforms for consultation . . . . .	392
	5.5.5	‘Freshwater reform 2013 and beyond’ . . . . .	397
	5.5.6	Progressing the National Objectives Framework. . . . .	400
5.6		The NPS-FM 2014. . . . .	406
	5.6.1	The Crown’s proposed amendments to the NPS-FM 2011 . . . . .	406
	5.6.2	Consultation on the proposed amendments . . . . .	410
		5.6.2.1 Māori responses to the Crown’s proposals . . . . .	410
		5.6.2.2 Submissions from stakeholders and the general public . . . . .	413
	5.6.3	The Crown’s decisions on the proposed amendments . . . . .	414
	5.6.4	Did the Crown establish adequate controls and standards in the NPS-FM 2014? . . . . .	417
		5.6.4.1 The claimants’ concerns . . . . .	417
		5.6.4.2 Science and policy: the NOF attributes and bottom lines . . . . .	418
		5.6.4.3 Non-scientific issues . . . . .	424
		5.6.4.4 Interim conclusions . . . . .	424
5.7		The ‘Next Steps’ and ‘Clean Water’ reforms, 2014–17. . . . .	426
	5.7.1	Introduction . . . . .	426
	5.7.2	After the NPS FM 2014 – stock exclusion and the fourth LAWf report . . . . .	427
		5.7.2.1 Initial decisions on the priorities for further reforms . . . . .	427
		5.7.2.2 The Land and Water Forum’s fourth report . . . . .	430
	5.7.3	Developing the ‘Next Steps’ reforms . . . . .	432
		5.7.3.1 Challenges to the NPS-FM 2014. . . . .	432
		5.7.3.2 Development of reform proposals . . . . .	435

5.7.4	The proposals in the ‘Next Steps’ consultation document . . . . .	438
5.7.5	Māori responses to the ‘Next Steps’ proposals . . . . .	440
5.7.6	The Crown’s decisions on the ‘Next Steps’ water quality reforms . . . . .	443
5.7.7	Developing the ‘Clean Water’ reforms, 2016–17 . . . . .	446
5.7.7.1	Engagement with iwi . . . . .	446
5.7.7.2	The views of the Land and Water Forum . . . . .	447
5.7.7.3	The development of stock exclusion regulations . . . . .	448
5.7.7.4	Populating the NOF . . . . .	449
5.7.8	The ‘Clean Water’ reform proposals . . . . .	452
5.7.9	Consultation on the <i>Clean Water</i> proposals . . . . .	456
5.7.9.1	Māori responses to Clean Water . . . . .	456
5.7.9.2	Public and stakeholder submissions . . . . .	458
5.7.10	The Crown’s decisions on <i>Clean Water</i> and on amendments to the NPS-FM 2014 . . . . .	459
5.7.10.1	Amendments to the NPS-FM 2014 . . . . .	459
5.7.10.2	Stock exclusion . . . . .	464
5.7.11	The need for further reforms . . . . .	465
5.8	Conclusions and findings on water quality reforms . . . . .	468
5.9	Crown funding to improve water quality . . . . .	474
5.9.1	Introduction . . . . .	474
5.9.2	Crown funding initiatives . . . . .	474
5.9.2.1	The Community Environment Fund . . . . .	474
5.9.2.2	The Irrigation Acceleration Fund . . . . .	475
5.9.2.3	The Fresh Start for Fresh Water Clean-up Fund . . . . .	477
5.9.2.4	The Te Mana o te Wai Fund . . . . .	479
5.9.2.5	The Freshwater Improvement Fund . . . . .	480
5.9.2.6	Other Crown funding initiatives . . . . .	482
5.9.3	Conclusion . . . . .	482
<b>CHAPTER 6: ALLOCATION REFORM OPTIONS, 2016–17 . . . . .</b>		<b>485</b>
6.1	Introduction . . . . .	485
6.2	The parties’ arguments . . . . .	486
6.2.1	The case for the claimants and interested parties . . . . .	486
6.2.2	The case for the Crown . . . . .	488
6.3	Background to the allocation work programme . . . . .	489
6.3.1	Co-design: allocation reform and the <i>Next Steps</i> process . . . . .	489
6.3.2	The third and fourth reports of the Land and Water Forum . . . . .	491
6.3.3	‘Managing within limits, pressures, and opportunities’: a 2014 report . . . . .	495
6.3.4	Equity as a key principle in water allocation regimes . . . . .	496
6.3.4.1	OECD report . . . . .	496
6.3.4.2	The Crown’s early thinking on equity and Māori rights and interests . . . . .	497
6.4	Cabinet’s parameters for option development in May 2016 . . . . .	498

6.5	Crown–Māori engagement in the allocation work programme . . . . .	499
6.5.1	No co-design for allocation reform options . . . . .	499
6.5.2	What did the ILG want? . . . . .	500
6.6	Development of options by the Allocation Team in 2016 . . . . .	503
6.6.1	Initial policy work . . . . .	503
6.6.2	Equity as a guiding principle . . . . .	504
6.7	The advice and recommendations of the Allocation Team . . . . .	505
6.7.1	No national percentage allocation for iwi and hapū . . . . .	505
6.7.2	Access to water and discharge rights for Māori land development as a matter of equity and regional development . . .	505
6.7.3	Broader iwi and hapū rights of access to water and discharge rights as a matter of equity . . . . .	506
6.7.4	Broader rights of access than just for economic purposes. . . . .	507
6.7.5	No royalties or perpetual allocations . . . . .	507
6.7.6	Summary . . . . .	509
6.8	Cabinet’s interim view of the options, December 2016 . . . . .	509
6.9	Further policy development in 2017 . . . . .	515
6.9.1	The Allocation Team develops new system models . . . . .	515
6.9.2	Crown–Māori engagement on the allocation work programme in 2017 . . . . .	517
6.10	Conclusions and findings . . . . .	517
6.10.1	Proprietary rights and allocation reform . . . . .	517
6.10.2	What will make the RMA’s allocation system Treaty compliant? . .	520
<b>CHAPTER 7: SUMMARY OF FINDINGS AND RECOMMENDATIONS . . . . .</b>		<b>523</b>
7.1	Introduction . . . . .	523
7.2	The law in respect of fresh water . . . . .	524
7.2.1	Introduction . . . . .	524
7.2.2	The purpose and principles of the RMA . . . . .	524
7.2.3	Freshwater management and decision-making . . . . .	526
7.2.3.1	The Treaty standard for freshwater management and decision-making . . . . .	526
7.2.3.2	The RMA’s participation mechanisms . . . . .	527
7.2.4	Proprietary rights, economic benefits, and the RMA allocation regime . . . . .	529
7.2.5	Environmental outcomes and the need for reform: why has the RMA failed to deliver sustainable management of freshwater resources? . . . . .	530
7.3	Reforms to address Māori rights and interests . . . . .	532
7.3.1	Introduction . . . . .	532
7.3.2	The Crown’s commitment to address Māori rights and issues . . .	532
7.3.3	Collaboration: 2009–14 . . . . .	533
7.3.4	Section D of the NPS-FM 2011. . . . .	533
7.3.5	Te Mana o te Wai in the NPS-FM 2014 . . . . .	535



7.3.6	RMA reforms: the Crown's decisions on enhancing participation prior to <i>Next Steps</i> . . . . .	535
7.3.7	The 'Next Steps' co-design process . . . . .	537
7.3.8	The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests . . . . .	537
7.3.9	RMA reforms: Mana Whakahono a Rohe arrangements . . . . .	540
7.3.10	Te Mana o te Wai in the NPS-FM 2014 as amended in 2017 . . . . .	542
7.3.11	Resourcing for capacity and capability . . . . .	543
7.4	Water quality reforms . . . . .	544
7.4.1	Introduction . . . . .	544
7.4.2	Active protection of freshwater taonga . . . . .	545
7.4.3	Collaboration in developing the reforms . . . . .	545
7.4.4	The NPS-FM 2011 . . . . .	546
7.4.5	The NPS-FM 2014 and the NOF . . . . .	547
7.4.6	Stock exclusion and amendments to the NPS-FM in 2017 . . . . .	547
7.4.7	Funding of restoration for degraded freshwater bodies . . . . .	549
7.5	Allocation reform options . . . . .	550
7.5.1	Introduction . . . . .	550
7.5.2	Collaboration . . . . .	550
7.5.3	Equity . . . . .	550
7.5.4	The work programme's allocation reform options . . . . .	551
7.5.5	Addressing Māori rights and interests . . . . .	551
7.5.6	Our view of a Treaty-compliant allocation regime . . . . .	552
7.6	Proposals for a water commission . . . . .	553
7.6.1	Introduction . . . . .	553
7.6.2	The Land and Water Forum's proposal . . . . .	553
7.6.3	The claimants' proposals . . . . .	554
7.6.3.1	The New Zealand Māori Council's proposal . . . . .	554
7.6.3.2	The Wai 2601 claimants' proposal . . . . .	556
7.6.4	The response of the Crown and the Freshwater ILG . . . . .	557
7.6.4.1	The Freshwater ILG's view . . . . .	557
7.6.4.2	The Crown's position . . . . .	557
7.6.5	Our view of the water commission proposals . . . . .	558
7.7	Recommendations . . . . .	559
7.7.1	Introduction . . . . .	559
7.7.2	Purpose and principles of the RMA . . . . .	559
7.7.3	Co-governance and co-management . . . . .	559
7.7.4	Co-design . . . . .	561
7.7.5	Resourcing . . . . .	561
7.7.6	Water quality . . . . .	561
7.7.7	Māori proprietary rights and economic interests vis-à-vis the allocation regime . . . . .	563
7.7.8	Monitoring and enforcement . . . . .	564
7.7.9	Clean, safe drinking water for marae and papakāinga . . . . .	564

**APPENDIX I: INTERESTED PARTIES . . . . . 569**

**APPENDIX II: NGĀ MĀTĀPONO KI TE WAI MODEL—*Not included in this edition***



*Waitangi Tribunal*

Te Rōpū Whakamana i te Tiriti o Waitangi  
*Kia puta ki te whai ao, ki te mārama*

The Honourable Nanaia Mahuta  
Minister for Māori Development

The Honourable Kelvin Davis  
Minster for Māori Crown Relations: Te Arawhiti

The Honourable David Parker  
Attorney-General and Minister for the Environment

The Honourable Andrew Little  
Minister of Justice

Parliament Buildings  
WELLINGTON

23 August 2019

E ngā Minita tēnā koutou

We have the honour to present to you our report on stage 2 of the National Freshwater and Geothermal Resources inquiry. The claim was filed by the New Zealand Māori Council in February 2012, supported by co-claimants and many Māori interested parties. We have heard the claim in stages, dealing with the more urgent stage in 2012, and completed our stage 1 report in December of that year. This was followed by a period in which the Crown developed its freshwater reforms. We adjourned our inquiry in 2015–16 so that the Crown and the Freshwater Iwi Leaders Group could ‘co-design’ reforms to address Māori rights and interests in fresh water. We then held our stage 2 hearings from November 2016 to November 2018. This stage 2 report is a pre-publication version, and some minor amendments may be made before publication, but the substance of our findings and recommendations will not change. A full summary

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of our findings is located in chapter 7 of this report, along with all our recommendations.

We were encouraged to see some level of agreement between the Crown and Māori over the period of the reforms. This included a broad agreement that Māori rights and interests in fresh water need to be addressed, that Māori values have not been reflected in freshwater decision-making, that Māori participation in freshwater management and decision-making needs to be enhanced, that the problem of under-resourcing for participation needs to be tackled, and that Māori rights in fresh water have an economic dimension. The Crown has made undertakings in many fora and public documents about its intention to address Māori rights and interests (which the Crown agreed includes elements of both control and use), and its intention to introduce reforms that provide Māori an economic benefit from their freshwater resources. The Crown has also collaborated with a national Māori body (the Iwi Chairs Forum) in the formation of policy for wider consultation with Māori and the public. The co-design of policy and reform options was an important innovation which we think should become a standard part of Government policy-making from now on. The selection of the national body or bodies would depend on the issue and the relevant constituency for that issue.

There still remains a significant gap, however, between what the Crown has been prepared to do in its reforms and the position taken by the claimants and interested parties in our inquiry as to their rights and interests. The Iwi Leaders Group, who participated in our hearings, were also of the view that the Crown's reforms do not go far enough, a point made by iwi and hapū in every consultation conducted by the Crown on its reforms.

In our view, the present law in respect of fresh water is not consistent with Treaty principles. Many Tribunal panels have already found the Resource Management Act 1991 (RMA) to be in breach of the Treaty, including the Wai 262 Tribunal, but very few of the recommendations made in previous Tribunal reports have been implemented.

In terms of the principles and purpose of the Act, we found that part 2 creates a hierarchy of matters for decision makers to consider. The Treaty section (section 8) is weak and the result is that Māori interests have too often been balanced out altogether in freshwater decision-making. We noted, however, that a recent Supreme Court decision, *Environmental Defence Society v The New Zealand King Salmon Company Limited*, may improve this situation. We recommend that section 8 of the RMA be amended to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the Act.

We also found that the RMA does not provide adequately for the tino rangatiratanga and the kaitiakitanga of iwi and hapū over their freshwater taonga. It has provision for councils to transfer functions and powers to iwi but these have never been used since 1991. The terms of section 33 of the Act have created barriers to its use, and there are no incentives and no compulsion for councils to transfer powers to iwi. Due to the failure of councils to use section 33, Joint Management Agreements were added in 2005, but these have only been used twice without the Crown's intervention in a Treaty settlement. Again, the Act creates barriers to their use but has no incentives or compulsion for councils to pursue co-management arrangements. Another essential component of the regime, iwi management plans, are not given sufficient legal weight. In addition, under-resourcing is a chronic problem which the Crown is aware inhibits Māori participation in RMA processes. We accept that some laudable Treaty settlements have arranged co-governance and co-management of a limited number of freshwater taonga. But such arrangements only began around 2010 and have not been made available to many iwi who have settled their claims.

We found that the RMA was also in breach of Treaty principles because the Crown refused to recognise Māori proprietary rights during the development of the Act (the Resource Management Law Reform in 1988–90). The result is that the RMA does not provide for Māori proprietary rights in their freshwater taonga. Further, past barriers (including some of the Crown's making) have prevented Māori from accessing water in the RMA's first-in, first-served system. This is a breach of the principle of equity. The Crown has admitted that Māori have been unfairly shut out, but has not yet introduced reforms to address what it has called the exclusion of 'new entrants' from over-allocated catchments.

In terms of the active protection of freshwater taonga, we found that the RMA has allowed a serious degradation of water quality to occur in many ancestral water bodies, which are now in a highly vulnerable state. It was clear to the Crown by 2003–04 at the latest that the RMA was failing to deliver the sustainable management of many water bodies in urban and pastoral catchments.

The Crown's freshwater reform programme started in 2003 with the Sustainable Development Programme of Action. It has now been running for 16 years under various titles, including the 'Fresh Start for Fresh Water' and 'Next Steps for Fresh Water'. We carried out an intensive examination of the reform options and proposals at each stage of the reform programme, which included major consultation rounds in 2013–14, 2016, and 2017. During that time, three major reforms to address Māori rights and interests in fresh water have been completed:

- ▶ The Crown has included section D in the National Policy Statement for Freshwater Management (NPS-FM), which requires councils to ‘involve’ Māori in freshwater management, and to work with iwi and hapū to ensure that their values are identified and reflected in freshwater management. At the time, the Minister stated that this did no more or less than what was already provided for in the RMA. In our view, section D is not Treaty compliant: it needs to specify a direct, co-governance level of involvement in freshwater decision-making to satisfy Treaty standards.
- ▶ The Iwi Leaders Group’s concept ‘Te Mana o te Wai’, which requires the health of freshwater bodies to come first in freshwater management, has been included in the NPS-FM. In our view, this has the potential to make the national policy statement a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. Te Mana o te Wai is also a vehicle for wider community as well as Māori values in respect of healthy water bodies. There is a strong risk, however, that the potential may not be fulfilled due to the weakness of section D, the relative weakness of the operative provision for Te Mana o te Wai (objective AA1), and the severing of Te Mana o te Wai from the National Objectives Framework.
- ▶ Mana Whakahono a Rohe (iwi participation) arrangements have been included in the RMA through the Resource Legislation Amendment Act 2017. Again, we think that this reform has potential – it may improve iwi–council relationships and result in better consultation in RMA plan-making. But this is as far as it goes. The version that was enacted in 2017 was watered down from that proposed by the Iwi Leaders Group. In reality, it is a mechanism for councils and iwi to do the things that schedule 1 of the Act already required them to do. Anything extra comes under the parts that the parties *may* discuss and agree but there is no requirement for them to do so.

Mana Whakahono a Rohe arrangements and the strengthening of Te Mana o te Wai in the NPS-FM were two outcomes of the ‘Next Steps for fresh water’ process, in which the Crown and the Iwi Leaders Group worked intensively to co-design reform options (as noted) in 2015–16. Although this was a promising process, its outcomes were disappointing in Treaty terms. This was mainly because the Crown did not make decisions in partnership but reserved all decision-making to itself. The Crown’s bottom lines, including ‘no one owns water’ and ‘no generic share for iwi’, meant that the Crown and Iwi Leaders Group did not reach agreement on allocation reforms. We found that it was Treaty compliant for the Crown to work with the Iwi Leaders Group in this process, although the

New Zealand Māori Council had an important perspective that we think should also have been included.

The results of the 'Next Steps' process were not Treaty compliant. So many essential reform options were omitted or not followed through. There were no reforms to the RMA's participation provisions, no reforms to address resourcing and capacity (other than a training programme), no enhancement of iwi management plans, no strengthening of section D of the NPS-FM, no agreement in principle on an allocation to iwi and hapū, no recognition of Māori proprietary rights, no funding for marae water supplies – the list goes on. The 'Next Steps' reforms, which include the Mana Whakahono provisions and the strengthening of Te Mana o te Wai, have not made the RMA and its freshwater management regime Treaty compliant.

In terms of water quality reforms, all parties agreed that New Zealand's freshwater resources are under pressure, especially from the impacts of sediment and diffuse discharges. Urban and pastoral catchments have degraded water bodies, many catchments are over-allocated, and the situation is getting worse. The Crown worked collaboratively with the Land and Water Forum stakeholders and with the Iwi Leaders Group, seeking buy-in for its reforms. The primary reform is the NPS-FM 2011, which has been significantly amended in 2014 and again in 2017. The Crown deserves credit for the difficult and intensive work carried out to develop a better national framework for freshwater management.

In our view, however, each iteration of the NPS-FM failed to meet the Treaty standard of active protection of freshwater taonga. The Crown has progressively improved the NPS-FM but its water quality standards still lack crucial attributes (such as sediment). The timeframes for implementation allow a significant period of further degradation. There are no attributes for wetlands, aquifers, or estuaries. The controls on nutrients are insufficient. There was significant agreement among scientists, including the Crown's and claimants' scientists, on these points. The bottom lines for human and ecosystem health are widely considered to be too low, even after the Crown accepted a swimmability goal in 2017. Further, there are no compulsory Māori values in the National Objectives Framework, no national bottom lines for Māori values, and no cultural indicators. The Crown's failure to promulgate stock exclusion regulations in 2017 has compounded the breach of active protection, because it further weakened the scope and effectiveness of the freshwater quality reforms.

In terms of allocation, 16 years have gone by and the first-in, first served system is still in operation. The Crown supported an allocation for Māori land development during 'Next Steps' but would not consider the Iwi Leaders Group's proposal for allocations to iwi and hapū. The officials

in the allocation work programme during 2016–17, however, suggested a combination of allocations to iwi and hapū for commercial purposes, to Māori landowners for reasons of equity, and to iwi and hapū for their cultural needs and customary uses. But no decisions were ever made on that programme. Our view is that the Crown must now recognise Māori proprietary rights and provide what the New Zealand Māori Council called ‘proprietary redress’. We recommend that the Crown arrange for an allocation on a percentage basis to iwi and hapū, according to a regional, catchment-based scheme. We also recommend an allocation for Māori land development, and that the feasibility of royalties and other forms of proprietary redress be investigated.

We have made a number of other recommendations to the Crown, which are detailed in chapter 7. Among them are recommendations that:

- ▶ the Crown establish a national co-governance body for fresh water, which would (among other things) arrange the allocation scheme for iwi and hapū, investigate other forms of proprietary recognition, and oversee more comprehensive restoration of water bodies;
- ▶ the Crown amend the RMA’s participation provisions (transfers to iwi, Joint Management Agreements, and Mana Whakahono a Rohe arrangements) to provide effectively for co-governance and co-management of freshwater taonga;
- ▶ the Crown take urgent action on the problem of under-resourcing of Māori participation in RMA processes, and to scope and provide assistance for marae and papakāinga water supplies;
- ▶ the Crown institute monitoring of the Treaty performance of councils;
- ▶ the Crown consider retaining and expanding the Te Mana o te Wai Fund as a long-term fund for the restoration of degraded freshwater taonga; and
- ▶ the Crown make co-design of policy with Māori a standard Government process where Māori interests are concerned.

We have also made several recommendations for the urgent reform of the NPS-FM to make its water quality standards compliant with the principle of active protection. The overall aim of the NPS-FM should be the improvement of water quality in freshwater bodies that have been degraded as a result of human contaminants, so as to restore or protect the mauri and health of those water bodies, while maintaining or improving the quality of all other water bodies. The board of inquiry’s objectives E1 and E2, from the board’s report in 2010 (discussed in chapter 5), should be inserted in the NPS-FM and consequential changes made.

We urge the Crown to act faster on the serious situation facing many taonga water bodies, and to provide more effectively for co-governance



and co-management in freshwater decision-making. Clearly, there is no objection to co-governance in principle since such arrangements have been provided for freshwater bodies in some Treaty settlements. Fairness and the Treaty guarantee of tino rangatiratanga require that they be made available more generally. The RMA already has mechanisms for this to occur, once statutory and practical barriers are removed.

We are aware that the Crown is planning further freshwater reforms, but the end of the 'Next Steps' reforms in 2017 was a logical place to stop our stage 2 inquiry and provide a report, and the Crown supported that approach.

We would hope that our report clearly sets out for the Crown the steps it must take to remedy the Treaty breaches we have found and to restore a healthy and enduring Treaty relationship between Māori and the Crown.

No reira kati mo tēnei wā.

Nāku noa, nā



Chief Judge Wilson Isaac  
Presiding Officer



## PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*. As such, all parties should expect that in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Photographs and additional illustrative material may be inserted, and a select index to the record of inquiry will be appended. However, the Tribunal's findings and recommendations will not change.



## ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
doc	document
DIN	dissolved inorganic nitrogen
DOC	Department of Conservation
ed	edition, editor
IMP	iwi management plan
ltd	limited
memo	memorandum
n	note
no	number
NOF	national objectives framework
NZLR	<i>New Zealand Law Reports</i>
NZMC	New Zealand Māori Council
p, pp	page, pages
para	paragraph
pt	part
RMA	Resource Management Act 1991
RMLR	resource management law reform
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
SOE	State-owned enterprise
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2358 record of inquiry. A full copy of the index is available on request from the Waitangi Tribunal.



## CHAPTER 1

### INTRODUCTION

#### 1.1 INTRODUCTION

##### 1.1.1 What this stage 2 inquiry is about

In February 2012, Sir Graham Latimer and Tom Kahiti Murray filed two claims on behalf of the New Zealand Māori Council (NZMC) and a number of co-claimants (the details are set out below). These claims were consolidated in the Wai 2358 National Freshwater and Geothermal Resources inquiry. The claims related to:

- ▶ Māori rights and interests in freshwater and geothermal resources, especially rights of a proprietary nature;
- ▶ the Crown's imminent sale of 49 per cent of its shares in State-owned Enterprise power companies (SOEs), without first addressing Māori rights and interests (the SOEs were large commercial users of freshwater and geothermal resources); and
- ▶ the Crown's programme of RMA and freshwater management reforms.

The Tribunal granted the claimants' request for an urgent hearing on 28 March 2012. The urgent inquiry was divided into stages. The first stage involved the question of what rights and interests (if any) in freshwater and geothermal resources were guaranteed by the Treaty of Waitangi. Our findings on that matter provided the foundations for stage 2 of the inquiry. We also addressed the sale of SOE shares in our stage 1 report, but our findings on that matter are not as directly relevant to stage 2, which deals with the freshwater reform programme.

Our interim and final reports on stage 1 were released in 2012 but hearings for stage 2 did not begin until 2016. Although major decisions on the reforms were planned for late 2012, the reform programme has developed at a slower pace than originally expected, and the inquiry was adjourned for a time in 2015–16 so that the Crown and the Freshwater Iwi Leaders Group could develop reforms to address Māori rights and interests.

In stage 2, the claimants argued that the present law in respect of fresh water (now largely the RMA) is not consistent with the principles of the Treaty, and that the Crown's reforms have failed to provide adequately for their rights and interests in fresh water. The reform programme has been running since 2003 but our inquiry focused mainly on the period 2009 to 2017, when the National-led Government carried out its 'Fresh Start for Fresh Water' and 'Next Steps for Fresh Water' reforms. The period is notable for the Crown's acknowledgements in various fora and official documents that:

- ▶ Māori have rights and interests in fresh water that relate to both ‘control’ and ‘use’ of freshwater resources, including an economic interest, and that those rights and interests need to be addressed;
- ▶ Māori values need to be better reflected in freshwater decision-making; and
- ▶ Māori participation in freshwater management has sometimes been inadequate, partly as a result of under-resourcing, and needs to be enhanced.

The period is also notable for the Crown’s collaboration with the Freshwater Iwi Leaders Group (ILG), and the ‘co-design’ of reform options by Crown officials and iwi advisors in 2014–17. The programme resulted in three major reforms designed to address Māori rights and interests:

- ▶ a section in the National Policy Statement for Freshwater Management (NPS-FM) designed to ensure that Māori values are reflected in freshwater decision-making;
- ▶ inclusion of the concept ‘te mana o te wai’ – the health of the water body comes first – in the NPS-FM; and
- ▶ new iwi participation mechanisms (called Mana Whakahono a Rohe) in the RMA via the Resource Legislation Amendment Act 2017.

In the claimants’ view, however, these reforms were insufficient to recognise their rights and protect their freshwater taonga. The ILG’s position in our inquiry agreed with that of the NZMC to a large extent; although the reforms have made some improvements, the ILG’s view was that they do not go far enough and are not Treaty compliant.

In addition to the need to address Māori rights and interests, the freshwater reform programme was driven by growing pressure on freshwater resources. Water quality had undergone a significant decline in many water bodies since 1991, specifically in urban and pastoral catchments, and over-allocation had become a problem in many catchments. Iwi and hapū had grave concerns about the degraded state of freshwater taonga, such as Lake Horowhenua and the Manawatū River, and these concerns were predominant in the evidence of claimants and interested parties in stage 2. The Crown has attempted to establish a more robust national framework for freshwater management, and to require councils to start setting water quality and quantity limits. But the claimants and interested parties do not agree that these reforms address the gravity of what they said was a crisis for their freshwater taonga.

The Crown’s position in our stage 2 inquiry was that it has acted fairly and in good faith to address problems in the freshwater management regime once they became apparent, and that it has conducted its reforms in partnership with Māori through collaboration with the ILG and wider consultation. The Crown also argued that its reforms to address Māori rights and interests will deliver mechanisms related to the ‘control’ and ‘use’ of fresh water, but that it is nonetheless correct to maintain its position that no-one owns water in New Zealand. In the Crown’s view, the RMA is Treaty compliant because many of the problems relate to implementation (not legislation), and the Crown’s reforms have been consistent with the principles of the Treaty.



The Crown also noted in our inquiry that the reforms are not yet complete. The present Government was developing its approach to freshwater reforms at the close of our stage 2 hearings. Following the election in September 2017, the Crown submitted that we should carry on with our final hearing of evidence in 2018 and report on the reforms to date:

Although government policy development will continue, the Crown submits the Tribunal will be able to address important issues.

The Tribunal will be in a position to consider the Treaty consistency of amendments to the Resource Management Act made by the Resource Legislation Amendment Act 2017, and the National Policy Statement on Freshwater Management (NPS-FM) as recently amended by the previous Government. This includes the Crown's processes and decisions in relation to the *Next Steps for Fresh Water* and *Clean Water* proposals. The Tribunal will be able to take into account the evidence already filed, together with Crown supplementary evidence.

Counsel is instructed that any report the Tribunal provides to the Crown on such matters will be closely considered by the Government.<sup>1</sup>

Our stage 2 report assesses whether the Crown's reforms to date have addressed the rights and interests that we found at stage 1 to have been guaranteed and protected by the Treaty of Waitangi.

Our statement of issues for stage 2 underwent some changes (discussed below), but the final statement of issues was as follows:

1. Is the current law in respect of fresh water and freshwater bodies consistent with the principles of the Treaty of Waitangi?
2. Is the Crown's freshwater reform package, including completed reforms, proposed reforms, and reform options, consistent with the principles of the Treaty of Waitangi?
  - ▶ To what extent do the completed reform package, proposed reforms, or reform options (including those proposed by the Crown in consultation) address Māori rights and interests in specific freshwater resources, as identified by the Tribunal in Stage 1?
  - ▶ Do the Crown's completed reforms or proposed reforms or reform options omit to address Māori rights and interests? What, if any, limits in addressing Māori rights might be appropriate today in Treaty terms?
  - ▶ To the extent that Māori rights and interests are addressed, is the resultant recognition of those rights consistent with the principles of the Treaty?
  - ▶ To the extent that the Crown has omitted to address Māori rights and interests, or has addressed them adequately, what amendments or further reforms are required to ensure consistent with the principles of the Treaty?

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1. Crown counsel, memorandum, 23 November 2017 (paper 3.2.160), pp1-2

### 1.1.2 The Tribunal panel

In April 2012, Chief Judge Wilson Isaac, chairperson of the Waitangi Tribunal, notified parties that he would preside in the National Freshwater and Geothermal Resources Inquiry. The chairperson also appointed Professor Pou Temara, Dr Robyn Anderson, Dr Grant Phillipson, Ron Crosby, and Tim Castle as members of the panel for this inquiry.<sup>2</sup> This was the panel that heard the claims at stage 1. After the first hearing in stage 2, however, Mr Castle recused himself from further participation in the inquiry.

### 1.1.3 What this chapter is about

In this chapter, we provide an introduction to the issues, parties, and process of the stage 2 inquiry. We then set out the principles of the Treaty of Waitangi that we have found relevant to our assessment of the claims. Following that, we provide a brief overview of the structure of this report, and a note on the sources that we have used (including the ‘sensitive’ status of some sources).

## 1.2 THE PARTIES IN THIS INQUIRY

### 1.2.1 The claimants

#### 1.2.1.1 The Wai 2358 claimants

The Wai 2358 statement of claim was lodged by Sir Graham Latimer, on behalf of the New Zealand Māori Council (NZMC) and all Māori, and Tom Kahiti Murray, the deputy chairperson of the Tai Tokerau District Māori Council. These claimants were described as the ‘first claimants’, and they were supported by 10 sets of co-claimants. The co-claimants were:

- ▶ Taipari Munro, chairperson of Whatitiri Māori Reservation at Porotī Springs in Northland ‘in the rohe of Ngāpuhi nui Tonu’;
- ▶ Kereama Pene and Rangimahuta Easthope as owners in Lake Rotokawau ‘in the rohe of Ngāti Rangiteaorere o Te Arawa’;
- ▶ Peter Clarke and Jocelyn Rameka as owners in Lake Rotongaio at Waitahanui Settlement, Lake Taupō, ‘in the rohe of Ngā Hapū o Tauhara’;
- ▶ Eugene Henare as an owner in Lake Horowhenua ‘in the rohe of Muaūpoko iwi’;
- ▶ Nuki Aldridge, Ani Martin, and Ron Wihongi, as kaumātua of Ngāpuhi and owners in Lake Ōmāpere in Northland (the sixth claimants);
- ▶ Eric Hodge as an owner in Tikitere Geothermal Field ‘in the rohe of Ngāti Rangiteaorere at Tikitere’;
- ▶ Walter Rika as an owner in Tahorakuri block at Ohaaki, Reporoa;
- ▶ Peter Clarke and Emily Rameka as owners in Tauhara Mountain Reserve (4A2A) at Taupō;
- ▶ Maanu Cletus Paul and Charles Muriwai White as members of Ngāi Moewhare, ‘a marae located in the rohe of Ngāti Manawa and a claimant in the Te Ika Whenua inquiry’; and

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2. Waitangi Tribunal, memorandum-directions, 3 April 2012 (paper 2.5.15)

- ▶ Whatarangi Winiata, on behalf of all the hapū of Ngāti Raukawa.<sup>3</sup> Claimant representation is set out in appendix 1.

### 1.2.1.2 *The Wai 2601 claimants*

In 2017, two sets of the Wai 2358 claimants sought to sever their claim from Wai 2358 and file a new statement of claim.<sup>4</sup> This followed a disagreement within the NZMC, which was not relevant to the Tribunal's inquiry. The 'tenth claimants', Maanu Paul and Charles White, and one of the 'first claimants', the chair of the Taitokerau District Māori Council, filed the Wai 2601 claim. Counsel for those claimants submitted that a separate claim was necessary because they had a different 'case theory' from that of the 'principal claimants'. Their case was that 'they possess full ownership, governance and management rights over water under Te Tiriti/Treaty, and that these rights were never ceded, and nor have they been in any way extinguished or relinquished, and therefore, they remain extant.'<sup>5</sup> The Wai 2601 claim was consolidated with Wai 2358 for hearing in June 2017.<sup>6</sup>

### 1.2.1.3 *The 'sixth' claimants*

In January 2018, another set of co-claimants sought separate representation. The sixth claimants were Nuki Aldridge, Ani Martin, and Ron Wihongi, who had claimed as kaumātua of Ngāpuhi and owners of Lake Ōmāpere. Nuki Aldridge and Ron Wihongi had passed away. The surviving claimant, Ani Martin, decided to have new legal counsel, noting that although her claim was for the owners of Lake Ōmāpere, she did not formally represent the lake trustees.<sup>7</sup> No separate claim was filed, and the 'sixth claimants' continued to support much of the NZMC's case.

## 1.2.2 *Interested parties*

There were 166 interested parties in stage 2 of this inquiry, a full list of whom is provided in appendix 1 of this report, along with their legal representation (if any). Most were iwi, hapū, and registered claimants with an interest greater than that of the general public, who supported the claimants in this inquiry. A number of District Māori Councils participated in support of Wai 2601: Mātaatua, Tāmaki Makaurau, Tāmaki ki te Tonga, and Takitimu. There were also two energy providers, Contact Energy and Trustpower, and Zodiac Holdings Ltd, a water bottling company.<sup>8</sup> The Freshwater Iwi Leaders Group (ILG) participated as an interested party, presenting evidence and submissions, including closing submissions.

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3. Wai 2358 first amended statement of claim, 2 March 2012 (paper 1.1.1(a))

4. Claimant counsel, memorandum, 20 January 2017 (paper 3.2.37)

5. Claimant counsel, memorandum (paper 3.2.37), p 4

6. Waitangi Tribunal, memorandum-directions, 7 June 2017 (paper 2.6.19)

7. Claimant counsel, memorandum, 22 February 2018 (paper 3.2.181); Ani Martin, affidavit, 22 February 2018 (paper 3.2.181(a)). These claimants were incorrectly referred to as the 'fifth claimants' in some documentation, including closing submissions.

8. Waitangi Tribunal, memorandum-directions, 9 September 2016 (paper 2.5.67); Waitangi Tribunal, memorandum-directions, 4 October 2016 (paper 2.5.68)

### 1.2.3 The Crown

The Crown was represented by the Crown Law Office. A number of legal counsel were involved in stage 2 (see appendix 1). The Government departments most involved in the reforms between 2009 and 2017 were the Ministry for the Environment and the Ministry for Primary Industries, which jointly progressed the freshwater reform programme.

### 1.3 THE STAGE 1 REPORT

Hearings for stage 1 of this inquiry were held over eight days in July 2012 at Waiwhetu Marae in Lower Hutt, and focused on the following issues:

- a) What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?
- b) Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?
  - i. Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?
  - ii. Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?
- c) Is such a removal of recognition and/or remedy in breach of the Treaty?
- d) If so, what recommendations should be made as to a Treaty-compliant approach?

We released our interim report about one month after the hearing, followed by the final report in December 2012.

Regarding question (a), our principal finding was that:

Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of hapū and iwi to control access to and use of the water while it was in their rohe.<sup>9</sup>

We then examined the issue of partial privatisation of the SOEs, assessing its significance for a modern recognition and reconciliation of Māori rights (including their residual proprietary rights), which we found was the Crown's duty to

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9. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 87

undertake.<sup>10</sup> In ‘searching for a framework in which customary rights may be given modern expression’, the claimants argued that a shareholding with special rights (settled by shareholder agreements) ‘may be an appropriate form of commercial rights recognition or redress for many groups.’<sup>11</sup> Having considered the Crown’s evidence that the possibility of royalties, levies, joint ventures, and other forms of rights recognition would still be available after the share sale,<sup>12</sup> our finding was as follows:

We accept the Crown’s assurances, given as part of our inquiry, that it is open to discussing the possibility of Māori proprietary rights (short of full ownership), that it will not be ‘chilled’ by the possibility of overseas investors’ claims, and that the MOM<sup>13</sup> policy will not prevent it from providing appropriate rights recognition once the rights have been clarified. We trust that our report has now clarified the rights for the Crown.

But there is one area in which the Crown will not be able to provide appropriate rights recognition or redress after the partial privatisation, and that is in the area that we have termed ‘shares plus’: the provision of shares or special classes of shares which, in conjunction with amended company constitutions and shareholders’ agreements, could provide Māori with a meaningful form of commercial rights recognition. As we have found, ‘shares plus’ are not ‘fungible’ and company law would in practical terms prevent the Crown from providing this form of rights recognition after the introduction of private shareholdings, certainly after the sale of more than 25 per cent of shares and arguably before that too.<sup>14</sup>

We concluded, therefore, that the sale of up to 49 percent of shares *would* affect the Crown’s ability to recognise Māori rights and remedy their breach. We further found that ‘the Crown’s Treaty duty in this case [was] the active protection of the Māori rights to the fullest extent reasonably practical, and to provide remedy or redress for well-founded Treaty claims.’<sup>15</sup> On this basis, our view was that the Crown would be in breach of Treaty principles if it proceeded to sell shares ‘without first creating an agreed mechanism to preserve its ability to recognise Māori rights and remedy their breach.’<sup>16</sup>

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10. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 80

11. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 139

12. See Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, chapter 3.

13. Mixed ownership model: privatisation of up to 49 percent of shares while the Crown retained at least 51 percent.

14. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 142

15. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 143

16. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 143

We recommended that the Crown convene an urgent national hui to consider redress in respect of the three power-generating SOEs. At a minimum, the hui would need to consider shares and shareholder agreements for Mighty River Power (the first SOE up for privatisation). But we also recommended that the parties could consider other options for rights recognition such as royalties, and write these into the SOE constitutions at the same time.<sup>17</sup>

During our stage 1 inquiry, the Crown argued that “development and commercial opportunities” would be provided for in the “resource management policy development in which iwi/Maori and the Crown are endeavouring to collaborate”.<sup>18</sup> We turn next to outline the development of stage 2 of our inquiry, in which the Crown’s RMA and freshwater management reforms were the subject of the claims before us.

## 1.4 THE STAGE 2 INQUIRY

### 1.4.1 Introduction

The Labour-led Government’s freshwater reforms began in 2003–04 with the Sustainable Water Programme of Action (discussed in chapter 2). When a National-led Government took office as a result of the 2008 election, it continued with its own reform programme (the New/Fresh Start for Fresh Water). The first major reform was a National Policy Statement for Freshwater Management (NPS-FM), which was issued in 2011 (see chapter 3). When we granted urgency to the National Freshwater and Geothermal Resources Claim in February 2012, we were advised that the Crown’s freshwater management reforms had been ‘gaining momentum’ since 2007, and that major decisions were expected in late 2012. After those decisions, the ongoing dialogue between the Crown and the ILG was expected to focus on Māori rights in water. It seemed that new private, tradeable water rights were about to be created for consent holders without Māori rights having first been recognised and addressed.<sup>19</sup> In reality, the Crown’s reforms did not progress as rapidly as had been expected, and our stage 2 hearings did not begin until November 2016.

### 1.4.2 Early phase and draft statement of issues

Following the release of our interim stage 1 report in August 2012, we published the final version of that report in December 2012. The Crown carried out consultation in response to the interim report and decided to proceed with the sale of shares in Mighty River Power. The NZMC challenged the Crown’s decision in the High Court, and that court’s decision was appealed directly to the Supreme Court. The Supreme Court’s judgment was issued in late February 2013, and it is referred

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17. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 143–144

18. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 141

19. Waitangi Tribunal, decision on application for urgent hearing, 28 March 2012 (paper 2.5.13), p 23

to frequently in this report. On the issue of ‘shares plus’, the Supreme Court took a different view from that of the Tribunal.<sup>20</sup>

Stage 2 of this inquiry began in March 2013, after the court’s decision in *Mighty River Power* was released. The first step was to finalise the statement of issues. During the course of proceedings for stage 1 in 2012, we had consulted with parties on the issues for both stages, and arrived at a draft statement of issues for stage 2, having heard issues (a)–(d) in stage 1:

- e) Where the Tribunal has found in stage one that Māori rights or interests in fresh-water or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today?
- f) If not, why not?
  - i. In particular, is the current situation an ongoing or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?
  - ii. In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?
- g) If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it causing continuing prejudice to Māori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?
- h) Alternatively, could implementation of the Government’s proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition of the rights and interests identified in issue (a) in stage one of this inquiry, cause prejudice to Māori in breach of principles of the Treaty of Waitangi?
- i) If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:
  - i. taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or
  - ii. reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.<sup>21</sup>

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20. Waitangi Tribunal, memorandum-directions, 13 March 2013 (paper 2.5.36), p1; *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (Crown counsel, bundle of authorities (3.3.46(c), tab 8)

21. Waitangi Tribunal, memorandum-directions, 20 May 2012 (paper 2.5.20), pp 5–6

**1.4.3 The Crown and claimants agree on a joint approach to stage 2**

We envisaged that stage 2 would be a relatively broad inquiry. When we sought to finalise the issues in 2013, however, the claimants and the Crown came to an agreement that there should be a relatively narrow inquiry into a single issue.<sup>22</sup> This was posed as: ‘What further reforms need to be implemented by the Crown in order to ensure that Māori rights and interest in specific water resources as found by the Tribunal at Stage One are not limited to a greater extent than can be justified in terms of the Treaty?’<sup>23</sup> This issue question was based on the Crown’s assurances to the Supreme Court in *Mighty River Power*, that it intended to bring in various reforms to address Māori rights and interests in fresh water. Inquiry into this issue would involve assessing the extent to which the Crown’s reforms addressed Māori rights and were consistent with Treaty principles.<sup>24</sup>

Some of the interested parties disagreed with the narrowing of the inquiry and the adoption of this issue question, but, after exchanges of memoranda between the parties, we were finally in a position to make a decision on the joint Crown–claimant request in November 2013. We accepted the primary issue question (as quoted above) along with the three subsidiary issues proposed jointly by the Crown and claimants, with the proviso that the exact wording may have to change once the full detail of the Crown’s reforms was available:

- ▶ The scope of the current reforms and in particular the extent to which the reforms address Māori rights and interests, and the extent to which Māori rights and interest remain unaddressed;
- ▶ To the extent that Māori rights and interests are addressed by the current reforms, whether the resultant recognition of those rights is consistent with the Treaty; and
- ▶ To the extent that Māori rights and interests are not addressed by the current reforms or are inadequately addressed, what further reforms are required?<sup>25</sup>

In their joint approach to the inquiry, the Crown and claimants suggested that stage 2 begin with the provision of information from the Crown about the details of its freshwater reforms, which would be followed by a response from the claimants as to the recommendations they sought for further reforms, and then any necessary evidence in response.<sup>26</sup> Once we had an agreed set of issues in November 2013, we asked the Crown to advise when it could file the detailed information about its reforms.<sup>27</sup> The Crown responded that it would provide information on its current and completed reforms by March 2014, followed by a report on its further proposed reforms in July 2014. Crown counsel submitted that well-advanced

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22. Claimant counsel, memorandum, 5 April 2013 (paper 3.1.191); Crown counsel and claimant counsel, joint memorandum, 19 July 2013 (paper 3.1.206)

23. Crown counsel and claimant counsel, joint memorandum (paper 3.1.206), p 8

24. Claimant counsel, memorandum (paper 3.1.191), pp 1–2; Crown counsel and claimant counsel, joint memorandum (paper 3.1.206), pp 7–9

25. Waitangi Tribunal, memorandum-directions, 6 November 2013 (paper 2.5.45), pp 1–2

26. Crown counsel and claimant counsel, joint memorandum (paper 3.1.206), p 9

27. Waitangi Tribunal, memorandum-directions (paper 2.5.45), p 2



reforms would be completed in the interim (these were amendments to the National Policy Statement for Freshwater Management 2011).<sup>28</sup>

In the event, the Crown did not file material in March 2014, and its report was delayed until September 2014.<sup>29</sup> We discuss the information conveyed in this report in chapter 3 (see section 3.6). The Crown's Fresh Start for Fresh Water programme had been running since 2009–10, and its main outcomes by 2014 were two versions of the National Policy Statement for Freshwater Management (NPS-FM), the latest having been just issued in July 2014. The claimants argued that the Crown's 25-page report was 'disappointing' and sought an urgent undertaking from the Crown that it would not introduce legislation affecting Māori rights and interests before stage 2 could be heard.<sup>30</sup>

In October 2014, we held a conference of parties to consider next steps. We sought the parties' views on whether the Crown had provided enough information for the claimants and interested parties to file their evidence, whether legislation was pending, and whether the Crown would file further evidence. We also intended to set hearing dates.<sup>31</sup> The claimants' position was that the Crown's short report did not 'provide sufficient information to enable the Stage Two issue question to be confirmed, or for the claimants to prepare their evidence.'<sup>32</sup> The Crown responded that the September 2014 report 'constitutes what is currently known as to the proposed reforms,' and that further information would not be available until Ministers met with the Iwi Chairs Forum at Waitangi in February 2015. The Crown did not, however, address the point that it had not provided detailed material on the reforms already completed. Rather, Crown counsel observed that the Crown would not file any further evidence until the claimants' evidence had been received in 'the usual way'.<sup>33</sup> It seemed, therefore, that the joint approach to the inquiry in 2013, by which the Crown would provide detailed information and the claimants would then respond on what further reforms were required, was no longer in operation.

After the discussions at the October 2014 teleconference, the 'parties agreed to meet together to discuss amongst themselves the inquiry, its next steps, and the question of Māori proprietary rights in water'.<sup>34</sup> It appeared to us that these discussions might restore the joint approach to the inquiry. We agreed to 'await the outcome of these discussions', and directed that the Crown provide an update in March 2015, following the meeting of Ministers and iwi leaders at Waitangi.<sup>35</sup>

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28. Crown counsel, memorandum, 11 December 2013 (paper 3.1.229), pp 1–4

29. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a))

30. Claimant counsel, memorandum, 12 September 2014 (paper 3.1.235), pp 1–2

31. Waitangi Tribunal, memorandum-directions, 1 October 2014 (paper 2.5.50), p 2

32. Waitangi Tribunal, memorandum-directions, 20 October 2014 (paper 2.5.51), p 1

33. Waitangi Tribunal, memorandum-directions (paper 2.5.51), p 1

34. Waitangi Tribunal, decision on application for adjournment, 10 June 2015 (paper 2.5.56), p 2

35. Waitangi Tribunal, decision on application for adjournment (paper 2.5.56), p 3; Waitangi Tribunal, memorandum-directions (paper 2.5.51), p 2

**1.4.4 The adjournment of the inquiry, 2015–16**

On 20 March 2015, the Crown's update was filed, in which it applied for an 11-month adjournment of stage 2. The Crown said that it intended to work with the ILG throughout 2015 to develop policy options for wider consultation. Options for the 'recognition of iwi/hapū rights and interests in freshwater' would then 'inform' wider consultation with Māori and the public in January 2016.<sup>36</sup> In the Crown's submission, the Tribunal's stage 2 inquiry should not proceed while the Crown's next tranche of reforms were 'still so unformed and subject to development and change'.<sup>37</sup> The claimants and interested parties opposed the Crown's application, except for two submissions from interested parties (the ILG and Ngāi Tahu). The claimants urged that stage 2 continue, with hearings in the final quarter of 2015. We convened a conference of parties for June 2015 and directed the Crown and claimants to discuss the way forward in the meantime, 'in the hope that they would be able to resume the cooperative approach which had previously characterised Stage 2'.<sup>38</sup>

A judicial teleconference was held as planned in June 2015. The parties had not reached agreement. The claimants argued that, since there had been such a long delay in the production of the Crown's proposed reforms for this urgent inquiry, the claimants would have to produce detailed evidence on reforms which *they* considered should be made to make the freshwater regime Treaty-compliant. They sought to conduct a substantial research programme, with hearings to begin in late 2015, to be followed by a full report on the original stage 2 issues. Most interested parties supported this position, arguing that their groups would have little say in a consultation on reforms worked out and agreed by the Crown and ILG. The Crown responded that the stage 2 inquiry should no longer be considered 'urgent', and that a process to develop reforms with the ILG would not deny the claimants a hearing once reforms had been developed for wider consultation. The parties did agree that RMA reform in 2015 (the Resource Legislation Amendment Bill) was not a matter that required the stage 2 hearings to have taken place before it occurred.<sup>39</sup>

The Tribunal granted the adjournment on 10 June 2015. We considered that, in reality, the needs of all parties would be served by the adjournment to 22 February 2016, since the NZMC would not be ready for hearing until late 2015 in any case. The Crown and the ILG would develop the substance of proposed reforms to address Māori rights and interests, the NZMC would have space to conduct its research, and both sides would have the benefit of the feedback in the consultation process before the claimants and interested parties were heard on the reforms. We also changed the status of our inquiry from 'urgent' to one of 'priority', noting that

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36. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), pp 1–6

37. Waitangi Tribunal, memorandum-directions, 10 June 2015 (paper 2.5.56), p 3

38. Waitangi Tribunal, decision on application for adjournment (paper 2.5.56), pp 3–4

39. Waitangi Tribunal, decision on application for adjournment (paper 2.5.56), pp 4–9

it was important that momentum be maintained and the Crown's undertakings in the Supreme Court be met.<sup>40</sup>

We discuss the Crown-ILG process to develop reform options (and its outcomes) in chapter 4. We note here that the process involved four workstreams: water quality; governance, management, and decision-making; recognition; and economic development. In February 2016, the Crown provided an update to all parties, noting that the timetable had shifted and the Crown was ready to consult on reforms arising from the first three workstreams (the *Next steps for fresh water* consultation document,<sup>41</sup> discussed in chapter 4). Originally, consultation had been planned for January and February but now it would take place from February to late April 2016. The Crown also intended to continue work with the ILG on the 'economic development' workstream throughout 2016.<sup>42</sup>

#### 1.4.5 The Crown's request for a second adjournment is declined

In April 2016, the Crown sought a second adjournment for 'at least 12 months' to allow its further work with the ILG to continue.<sup>43</sup> The Tribunal held a judicial teleconference in April, at which the claimants submitted that the adjournment should not be granted and hearings should begin in late 2016, after the production of all parties' evidence. Our view was that matters had reached the expected point for three of the four workstreams. We therefore declined the adjournment, noting that the Crown and ILG should continue their work on the fourth workstream ('economic development') as planned. We saw no reason why hearings could not begin on the already-completed reforms and options, since the reforms were being developed incrementally.<sup>44</sup> We accepted that parties would not be ready for hearing until late 2016, and that a discovery process would need to take place in the meantime. Our first hearing was therefore scheduled for November 2016.

#### 1.4.6 Revised statement of issues

In May 2016, the Crown suggested that the primary issue question, which it had proposed jointly with the claimants in 2013, was not appropriate. Crown counsel submitted:

Because it is framed in terms of 'limitations' to be 'justified' based on findings in stage 1, the question presumes the particular methodology to be followed in determining whether a Crown act or omission is consistent with the principles of the Treaty. Further, the Crown does not accept there can be property in flowing water.

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40. Waitangi Tribunal, decision on application for adjournment (paper 2.5.56), pp 9–13

41. New Zealand Government, *Next steps for fresh water: consultation document* (Wellington: Ministry for the Environment, 2016)

42. Crown counsel, memorandum, 23 February 2016 (paper 3.1.255)

43. Crown counsel, memorandum, 14 April 2016 (paper 3.1.267), p 3

44. Waitangi Tribunal, memorandum-directions, 22 April 2016 (paper 2.5.60)

The Tribunal's questions for the hearing week ought to reflect the Tribunal's jurisdiction, which is whether an act or omission of the Crown is inconsistent with the principles of the Treaty and whether Māori are prejudiced by any such inconsistency.<sup>45</sup>

After consulting parties at a teleconference in May 2016, we confirmed a revised statement of issues for stage 2 of our inquiry:

- 1) Is the current law in respect of fresh water and freshwater bodies consistent with the principles of the Treaty of Waitangi?
- 2) Is the Crown's freshwater reform package, including completed reforms, proposed reforms, and reform options, consistent with the principles of the Treaty of Waitangi?
  - ▶ To what extent do the completed reforms, or reform options (including those proposed by the Crown in consultation) address Māori rights and interests in specific freshwater resources, as identified by the Tribunal in Stage 1?
  - ▶ Do the Crown's completed reforms or proposed reforms or reform options omit to address Māori rights and interests? What, if any, limits in addressing Māori rights might be appropriate today in Treaty terms?
  - ▶ To the extent that Māori rights and interests are addressed, is the resultant recognition of those rights consistent with the principles of the Treaty?
  - ▶ To the extent that the Crown has omitted to address Māori rights and interests, or has addressed them inadequately, what amendments or further reforms are required to ensure consistent with the principles of the Treaty?<sup>46</sup>

#### **1.4.7 Exclusion of geothermal issues from the stage 2 hearings**

In October 2016, during preparations for the first hearing, claimant counsel raised the issue of whether geothermal resources were included in the freshwater reform programme (and the stage 2 inquiry). In the claimants' view, they were included because aspects of the RMA applied equally to freshwater and geothermal resources, including the first-in, first-served system of allocation. The Crown's response was that geothermal resources were not part of the freshwater reforms and that the Crown was not planning any reforms in relation to those resources. The Tribunal confirmed on 1 November 2016 that geothermal issues were not included in stage 2, but directed that evidence relating to those resources should remain on the record as it would be dealt with at a later stage of the inquiry.<sup>47</sup>

#### **1.4.8 Hearings**

The first hearing week was held at Waiwhetu Marae on 7–11 November 2016. We heard the evidence and opening submissions of the claimants and some interested parties. Our second hearing was held at Ohope Marae on 26–30 June 2017. This hearing was also for claimants and interested parties, and we heard the opening

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45. Crown counsel, memorandum, 26 May 2016 (paper 3.1.270), p 4

46. Waitangi Tribunal, memorandum-directions, 31 May 2016 (paper 3.1.62), p 2

47. Waitangi Tribunal, memorandum-directions, 1 November 2016 (paper 2.5.72), pp 2–7

submissions of the Wai 2601 claimants and a number of interested parties. We held our final hearing of evidence at the Waitangi Tribunal offices in Wellington on 13–17 August 2018. This included the last claimant witnesses, the ILG's witnesses, and a witness for one interested party (the Muaūpoko Tribal Authority). We also heard the Crown's opening submissions and the evidence of six Crown witnesses.

Although we held our final hearing of evidence in August 2018, the Crown's evidence on allocation issues (a brief of evidence and 923 pages of supporting documents) could not be filed until mid-September.<sup>48</sup> Accordingly, there was a process of written questions on this material in October 2018. Once that was completed, parties filed their written closing submissions in November. We held a hearing of closing submissions, including oral submissions and oral replies, at the Tribunal offices on 26–30 November 2018. Claimant counsel and counsel for interested parties then filed their reply submissions in March and April 2019. The NZMC's reply submissions involved detailed submissions on a proposed national water commission for the first time, so we agreed to the Crown's request to file further submissions on that matter.<sup>49</sup>

## 1.5 TREATY PRINCIPLES

### 1.5.1 Introduction

This section sets out the principles of the Treaty of Waitangi that are relevant to stage 2 of our inquiry. In determining which principles are relevant, we have considered the findings of other reports by the Waitangi Tribunal, especially in relation to the RMA and freshwater resources. We have also considered the submissions by the parties in this inquiry, who detailed the Treaty principles that they saw as relevant to the issues and evidence before us.

One of the issues that emerged during our hearings was the applicability of the findings made in stage 1 of the Te Paparahi o Te Raki inquiry. Counsel for the Wai 2601 claimants argued that we should take those findings into account when interpreting and applying the principles of the Treaty.<sup>50</sup> In brief, the Te Raki Tribunal found that the rangatira who signed Te Tiriti on 6 February 1840 did not cede their sovereignty. Rather, they intended to share power and authority on the basis that the Governor would control his British settlers, and each side would have their own spheres of authority and influence. Instances where the two spheres overlapped remained to be negotiated in the future.<sup>51</sup> The Te Raki Tribunal noted, however, that its report said 'nothing about how and when the Crown acquired the

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48. Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28); Peter Nelson, confidential documents in support of brief of evidence (doc F28(b))

49. Claimant counsel, submissions by way of reply, 22 February 2019 (paper 3.3.52); Crown counsel, memorandum, 2 April 2019 (paper 3.4.20)

50. Claimant counsel, memorandum, 14 July 2017 (paper 3.2.99)

51. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 529

sovereignty that it exercises today’, and that it would report on any consequences for Treaty principles after hearing parties in its stage 2 inquiry.<sup>52</sup>

After consulting the views of parties in our inquiry, we decided that we did not have ‘the evidence and submissions necessary to consider the question of how and when the Crown obtained the sovereignty it exercises today, a matter which is currently before the Te Raki Tribunal in its stage 2 inquiry’. We also considered that we should not make findings on matters that were ‘more particularly before the Te Raki Tribunal, including the consequences (if any) of its stage 1 report for the principles of the Treaty’.<sup>53</sup>

The principles of the Treaty that we consider relevant to stage 2 of our inquiry are: partnership, Māori autonomy, equal treatment, active protection, and equity.

### 1.5.2 Partnership

In the *Lands* case, the Court of Appeal stated that ‘the Treaty signified a partnership between races’ and between ‘the Crown and the Maori people’. This carried with it the duty to act towards each other ‘with the utmost good faith which is the characteristic obligation of partnership’.<sup>54</sup> It is a reciprocal arrangement, involving ‘fundamental exchanges for mutual advantage and benefits’.<sup>55</sup> Māori ceded *kāwanatanga* (governance) to the Crown in exchange for the recognition and protection of their *tino rangatiratanga* (full authority) over their own peoples, lands, and *taonga*, which necessarily included their freshwater *taonga*. In its report on the Te Whanau o Waipareira claim, the Tribunal stated that, by its nature, the Treaty partnership is a ‘relationship where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life’.<sup>56</sup>

We have already found in our stage 1 report that the Crown is required to govern in ‘the interests of the nation and the best interests of the environment’, and noted in that context that Māori are not just another interest group but are the Crown’s Treaty partner.<sup>57</sup> The reconciliation of *kāwanatanga* and *rangatiratanga* in that context should not exclude Māori ‘authority, control, responsibility, or stewardship in respect of natural resources which are *taonga*’.<sup>58</sup>

In the specific circumstance of legislating and making policy, the Tribunal found in its report *Whaia Te Mana Motuhake*:

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52. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, p 527

53. Waitangi Tribunal, decision on application of Te Raki stage 1 findings, 19 September 2017 (paper 2.6.29), p 14

54. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA), 664, 702 (Crown counsel, papers in support of stage 1 closing submissions (paper 3.3.15(b)), pp 662, 700)

55. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

56. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), pxxvi

57. Waitangi Tribunal, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 78

58. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1240

Neither Treaty partner can claim monopoly rights when it comes to making policy and law in the realm where their respective interests overlap. Therefore, they both owe each other a duty of good faith and a commitment to cooperate and collaborate where the circumstances require it.<sup>59</sup>

The Tribunal further found that, where matters of core interest to the Māori Treaty partner overlap with the Crown's authority to legislate, the principle of partnership can require a collaborative agreement in the making of law and policy.<sup>60</sup> In our view, the law relating to freshwater taonga is one such matter.

We also agree with the Central North Island Tribunal, which found:

the obligations of partnership included the duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.<sup>61</sup>

We apply the principle of partnership in our assessment of the RMA's regime for the governance and management of fresh water, and to the conduct and outcomes of the Crown's programme of freshwater management reforms.

### 1.5.3 Māori autonomy and the guarantee of tino rangatiratanga

Article 2 of the Treaty guaranteed to Māori that their tino rangatiratanga would be respected and protected. The principle of Māori autonomy or self-government (or mana motuhake, as it is often called) arises from this guarantee of their pre-existing ability to 'govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants.'<sup>62</sup> As the Tribunal found in the *Taranaki Report*, autonomy now 'describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State.'<sup>63</sup> We have already noted above that overlaps between Crown and Māori authority are to be resolved in partnership.

The article 2 guarantee of tino rangatiratanga was also a guarantee of property rights, which Māori are entitled to have recognised by the Crown. For fresh water, we found in stage 1 that the proprietary right guaranteed to hapū and iwi was the

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59. Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct, 2015), p 29

60. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 42

61. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

62. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996) p 5; Waitangi Tribunal, *Turanga Tangata. Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113

63. Waitangi Tribunal, *The Taranaki Report*, p 5

exclusive right to control access and use of the water while it was in their rohe. As part of the Treaty's reciprocal arrangements in 1840, they had agreed to share some water bodies on the basis of non-exclusive use rights for settlers. We also found in our stage 1 report that the Crown's Treaty duty in respect of Māori property rights in freshwater taonga was to 'undertake in partnership with Māori an exercise in rights definition, rights recognition, and rights reconciliation'.<sup>64</sup> We made no findings in stage 1 as to what might be the exact nature or outcome of such an exercise, and we now proceed to consider those matters in this report on stage 2 of our inquiry.

#### 1.5.4 Equal treatment

The principle of equal treatment obliges the Crown to act fairly and impartially towards all Māori. As the Tribunal found in its report *Te Kāhui Maunga*:

When they signed the Treaty, many Māori hoped that the Governor would act as judge and peacemaker between tribes, and as *Te Raupatu o Tauranga Moana* noted, this also meant that the Crown must 'not favour one [iwi] at the expense of others.' As many Tribunals have noted, the Crown could not unfairly advantage one group over another if they shared a broad range of circumstances, rights, and interests.<sup>65</sup>

This principle is relevant in our stage 2 report to a number of matters, including the Crown's decision to work with the ILG exclusively in the co-design of freshwater reform options for wider consultation.

#### 1.5.5 Active protection

The Crown's Treaty duty of active protection has been described in many of the Tribunal's reports and in various court decisions. The *Te Tau Ihu* Tribunal stated:

The Crown's duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties.' Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.<sup>66</sup>

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64. Waitangi Tribunal, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 79–80, 235–236

65. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report* (Wellington: Legislation Direct, 2013), p 17

66. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 4



Further, the Central North Island Tribunal found that for natural resources, the principle of active protection required the ‘active protection of lands, estates, and taonga, with duties analogous to fiduciary duties’, and the ‘active protection of rangatiratanga, including in environmental management.’<sup>67</sup> In the *Broadcasting Assets* case, the Privy Council stated that the Crown had an enduring obligation to protect taonga but did not have to go beyond what was ‘reasonable’ in doing so. If, however, a taonga was in a vulnerable state – particularly if that state was due to past breaches – then the Crown may have to take ‘especially vigorous action’:

Foremost among those ‘principles’ [of the Treaty] are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown’s obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown’s other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown’s responsibility.<sup>68</sup>

Finally, we note the finding of the Petroleum Management Tribunal about the Crown’s obligations in a statutory regime that delegates authority to councils:

With specific reference to the resource management regime, the Tribunal has observed in several earlier reports that the Crown cannot avoid its Treaty duty of active protection by delegating responsibility for the control of natural resources to others. More particularly, it cannot avoid responsibility by delegating on terms that

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67. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1235

68. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 (Crown counsel, papers in support of stage 1 closing submissions (paper 3.3.15(b)), p 751)

‘do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown.’<sup>69</sup>

In our stage 2 inquiry, the principle of active protection is relevant to Māori rights and interests in fresh water, including tino rangatiratanga and proprietary rights. It is also applicable to the claimants’ highly vulnerable freshwater taonga, and to the Crown’s obligation in respect of water quality reforms and the restoration of taonga.

### 1.5.6 Equity

The principle of equity ‘arises from the promise in article 3 of the rights and privileges of British citizenship.’<sup>70</sup> It obliges the Crown to act fairly as between Māori and non-Māori, which, like the duty of active protection, may demand that the Crown positively intervene to address disparities.<sup>71</sup> Māori may face a wide range of barriers to achieving equal outcomes. In terms of health services, for example, the Crown ‘might have to ensure equality of access by reducing barriers that disadvantaged Maori’. The Crown may even have to ensure equality of *outcomes*, where that was one of the ‘expected benefits of citizenship.’<sup>72</sup> As the Tribunal stated in the *Napier Hospital and Health Services Report*: ‘A systematic or prolonged failure on the part of the Crown to reduce such barriers would, in the absence of counter-vailing factors, commonly be inconsistent with the principle of equity.’<sup>73</sup> In respect of our stage 2 inquiry, Māori had faced barriers (including some of the Crown’s making) which prevented access to water for development.

## 1.6 THE STRUCTURE OF THIS REPORT

In chapter 2, we address the question of whether the present law in respect of fresh water, particularly the Resource Management Act 1991, is Treaty compliant. This includes the Act’s purpose and principles and its participation arrangements for iwi and hapū. On that latter point, we also examine relevant Treaty settlement legislation. In addition, we consider the issue of Māori proprietary rights and the sustainable management of freshwater taonga. We conclude chapter 2 with an examination of environmental outcomes for freshwater taonga and the need for reform, including the early Sustainable Water Programme of Action (2003–08).

In chapter 3, we examine the Crown’s reforms for the period 2009 to 2014, focusing on how the Crown addressed Māori rights and interests, the collaborative processes that the Crown developed to carry out its reforms, and the major reform from this period – the National Policy Statement for Freshwater Management 2011

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69. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p149

70. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 384

71. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 269; Waitangi Tribunal, *Whaia te Mana Motuhake*, p 31

72. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 428

73. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 62

and its revision in 2014. We also examine the Crown's white paper, *Freshwater reform 2013 and beyond*,<sup>74</sup> and address the Crown's early decisions on RMA reform in 2013.

In chapter 4, we go on to examine the Crown's reforms from the period 2014–2017. Again, our focus in this chapter is on how the Crown sought to address Maori rights and interests in its freshwater management reforms. We assess the 'co-design' of reform options by the Crown and the ILG, which resulted in the release of the consultation document *Next steps for fresh water* in February 2016. After our discussion of the *Next Steps* proposals, chapter 4 examines the three primary outcomes: the introduction of Mana Whakahono a Rohe arrangements in the RMA (through the Resource Legislation Amendment Act 2017); amendments to the NPS-FM 2014; and the provision of training and guidance on Mana Whakahono a Rohe.

In chapter 5, we turn our attention to the Crown's reforms in respect of water quality, and the Crown's various funding initiatives for the clean-up of degraded freshwater bodies.

In chapter 6, we examine the Crown's allocation work programme in 2016–17, and the reform options that it developed to address the proprietary or economic dimension of Māori rights and interests.

Finally, we summarise our findings in chapter 7, after which we examine the parties' position on a national co-governance body for fresh water. We then make our recommendations for the remedy of (or prevention of future) prejudice.

### 1.7 NOTE ON SOURCES

We received thousands of pages of documents from the Crown during our stage 2 inquiry, including discovery documents and papers in support of briefs of evidence. A number of witnesses also referred us to substantial material on websites, particularly the Ministry for the Environment website, without providing the documents directly to the Tribunal and parties. We have relied on that documentation, and – during the course of the inquiry – requested that the Crown file any relevant papers that had been removed during updates to the Ministry's website. Relevant material on the Ministry's website included Cabinet papers, briefing notes, scientific reports, and Crown publications.

As a result of the discovery protocol agreed by the parties, a significant amount of Crown documentation was labelled 'sensitive', as was some material provided in supporting papers to the briefs of evidence of Crown witnesses. This material was placed on our record and made available to all parties on the condition that it could only be used for this inquiry. The sensitive material was not made available to the public. The presiding officer accepted the protocol but noted that we would make use of the material in our report.<sup>75</sup>

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74. New Zealand Government, *Freshwater reform 2013 and beyond* (Wellington: MFE, March 2013)

75. Waitangi Tribunal, memorandum-directions, 22 July 2016 (paper 2.5.65); Waitangi Tribunal, memorandum-directions, 27 October 2016 (paper 2.5.71)



## CHAPTER 2

### IS THE PRESENT LAW CONSISTENT WITH TREATY PRINCIPLES?

#### 2.1 INTRODUCTION

This chapter addresses issue question 1 of our stage 2 inquiry: is the current law in respect of fresh water and freshwater bodies consistent with the principles of the Treaty of Waitangi? Our approach to this issue has been shaped by the narrowing of the stage 2 inquiry in 2013, which we discussed in chapter 1 (see section 1.4.3). The Crown and claimants agreed that the focus of stage 2 should be the Crown's freshwater reforms, and the question of what further reforms were required to ensure that 'Māori rights and interest in specific water resources as found by the Tribunal at Stage One are not limited to a greater extent than can be justified in terms of the Treaty'.<sup>1</sup> In order to answer that question, however, we needed to first examine the current law and management system for fresh water, so that we can determine whether the regime is consistent with Treaty principles. If it is *not* Treaty compliant in part or in whole, then that provides a lens for examining the Crown's reforms in terms of what *will* make the law for freshwater management consistent with the Treaty.

In September 2018, we advised parties:

This [first] issue question should be addressed as at 2009, the year in which the New Start/Fresh Start for Fresh Water reform programme commenced. The Labour-led Government's Sustainable Water Programme of Action in 2003–2008 . . . serves as context for the 2009–2017 reform programme.

Parties should also reassess their position on this primary issue question as at the present day (2018) at the end of their submissions, to establish whether their position has changed following their consideration of the Crown's reform package (the second primary issue question).<sup>2</sup>

We have followed this approach in our report, although it has occasionally been necessary to go past 2009 in the present chapter for the sake of completeness.

The Resource Management Act 1991 is the primary statute governing fresh water and its management. Most of the chapter focuses on this Act, although we also provide an introductory section on the law prior to 1991. We analyse the 'ongoing' aspect of the pre-1991 legislation: section 21(1) of the Water and Soil Conservation Act 1967, which vested the sole right to dam, divert, take, or use

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1. Crown counsel and claimant counsel, joint memorandum, 19 July 2013 (paper 3.1.206), p 8

2. Waitangi Tribunal, memorandum-directions, 7 September 2018 (paper 2.6.56), p 8

water, and to discharge into water, in the Crown. The 1967 Act also established a freshwater management regime in which the Crown's 'sole right' was delegated to regional water boards, supervised by a set of national bodies. This regime was transformed into the current law and freshwater management system in 1991 when the RMA was enacted, but the vesting of the sole right in the Crown was preserved in the new Act. We examine the events surrounding the vesting in 1967, and also its implications for native title, in section 2.3.

We assess the purpose and principles of the RMA in section 2.4, noting our view of part 2 of the Act, our concerns about the effectiveness of the Treaty section (section 8 of the RMA), and the evidence about how Māori interests have been balanced during the period covered by this chapter. Our findings on these matters are in section 2.4.5.

We next examine the provisions in the RMA for Māori to participate in freshwater management and decision-making. These include transfers of power from councils to iwi authorities, (section 33), Joint Management Agreements (section 36B), iwi management plans, and the provisions for Māori to be consulted about the making of council plans (schedule 1 of the Act). We also examine the Crown's argument that Treaty settlements and Māori-council arrangements have 'developed a tapestry of co-governance and co-management arrangements for waterways across New Zealand'.<sup>3</sup> Finally, we assess the balance between provisions for iwi and hapū in the Act, and the issue of chronic under-resourcing, which the Crown has admitted is a significant problem for Māori participation in RMA processes. Our findings on those matters are in section 2.5.9.

We then turn to assess in section 2.6 how the issue of Māori ownership and proprietary rights was dealt with in the Resource Management Law Reform project (1988–90) and in the passage of the RMA itself in 1991. We consider the way in which ownership questions were diverted to an alternative process (ultimately Treaty settlements), and the RMA's system for allocating water (the first-in, first-served regime). Our conclusions and findings on these matters are in section 2.6.6.

Following this examination of various aspects of the law in respect of fresh water, we consider the environmental outcomes of the regime for iwi and hapū. We discuss the science of water quality, the exercise of kaitiakitanga, and the claimants' many examples of degraded freshwater taonga. We consider the question of whether the RMA has delivered sustainable management of freshwater taonga, and the Crown's awareness by 2003 of a problem in need of urgent action. Our findings on these issues are in section 2.7.5.

We conclude the chapter with an introduction to the Labour-led Government's Sustainable Water Programme of Action (2003–08), which began the freshwater reform programme and developed a draft national policy statement by 2008.

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3. Crown counsel, closing submissions, 20 November 2018 (paper 3.3.46), p 54

## 2.2 THE PARTIES' ARGUMENTS

In this section of our chapter, we provide a brief summary of the parties' arguments about the current law in respect of fresh water, and whether it is consistent with the principles of the Treaty of Waitangi.

### 2.2.1 Purpose and principles of the RMA: sections 5–8

#### 2.2.1.1 *The case for the claimants and interested parties*

The claimants argued that part 2 of the RMA creates a hierarchy of considerations for RMA decision makers. This has allowed a balancing of interests in a way that elevates economic development over the interests of the environment and Māori.<sup>4</sup> The claimants and interested parties relied on the evidence of Professor Jacinta Ruru to argue that Māori views and interests are often balanced out altogether in the 'balancing exercise that is at the heart of the planning and resource consent process.'<sup>5</sup> In particular, the claimants and interested parties were concerned about the position and terms of the Treaty section (section 8) in part 2. In their view, section 8's requirement that decision makers should take the Treaty principles into account is too weak and is not effective in protecting Māori interests in RMA decision-making. These parties argued that section 8 should be amended or replaced entirely with a stronger requirement to give effect to the principles of the Treaty, as the Waitangi Tribunal has recommended in past inquiries.<sup>6</sup>

#### 2.2.1.2 *The case for the Crown*

In the Crown's view, part 2 of the RMA represented an attempt to introduce tikanga into general law. In doing so, sections 6–8 provided recognition for Māori values and interests, and a strong direction to decision makers to bear those interests in mind at all parts of both the planning and consenting processes. Crown counsel did not accept that Māori interests were being balanced out when decision makers had to consider and balance a range of matters.<sup>7</sup> But even if the alleged 'balancing out' was in fact occurring, the Crown argued that the 2014 *King Salmon* decision of the Supreme Court<sup>8</sup> showed that section 5 of the RMA had to be interpreted as an integrated whole, with environmental protection at its core. In the Crown's view, this same interpretation would apply to how Māori interests are treated in sections 6–8.<sup>9</sup> Further, Crown counsel submitted that section 8, which requires

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4. Claimant counsel (Wai 2601), closing submissions, 12 November 2018 (paper 3.3.38), pp 57–60

5. Counsel for interested parties (Naden, Dhaliwal, Pukepuke, Hill, Zareh, Deobhakta, and Loa), submissions by way of reply, 22 March 2019 (paper 3.3.56), p 40; claimant counsel (NZMC), closing submissions (paper 3.3.33), p 25

6. Counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 21–22; counsel for interested parties (Naden, Dhaliwal, Pukepuke, Hill, Zareh, Deobhakta, and Loa), closing submissions (paper 3.3.45), p 94; claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), pp 1–2

7. Crown counsel, closing submissions (paper 3.3.46), pp 13–16

8. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38

9. Crown counsel, closing submissions (paper 3.3.46), p 14

Treaty principles to be taken into account, ‘can amount to a focussing on tāngata whenua values over and above those of the community generally.’<sup>10</sup>

If decision makers did fail to give ‘due consideration’ to Māori interests, the Crown noted the ability to lodge an appeal with the Environment Court. Crown counsel submitted that the court is becoming more sophisticated in its balancing of Māori interests, and – although appeals are expensive – the Crown argued that it has provided assistance in the form of a central fund.<sup>11</sup>

## **2.2.2 Māori participation in freshwater management and decision-making**

### **2.2.2.1 *The case for the claimants and interested parties***

According to the claimants and interested parties, there are a number of barriers to effective Māori participation in freshwater management and decision-making, some of which are statutory and all of which are the result of Crown acts or omissions in breach of Treaty principles. Also, the claimants’ view is that co-management should be an irreducible requirement for freshwater resources.

The claimants argued that one of the key flaws of the RMA in Treaty terms is its ‘failure to confer any meaningful co-management rights on Māori.’<sup>12</sup> Section 33 (transfers of authority to iwi) and section 36B (joint management agreements) have ‘ostensibly’ provided for ‘Māori to be involved in co-management of the [freshwater] resource.’<sup>13</sup> But those sections had failed in practice due to the high barriers to using them within the statute itself, the absolute discretion of local authorities as to whether or not to use them, and the Crown’s failure to ensure adequate resourcing for iwi and hapū.<sup>14</sup> Further, the claimants argued that the provisions in the RMA for Māori groups to become Heritage Protection Authorities have not provided for Māori to exercise their tino rangatiratanga in resource management. No Māori organisations have actually been appointed by the Minister, and the claimants submitted that the terms of the Act did not allow such authorities to be appointed for the protection of water or of private property.<sup>15</sup>

The claimants and interested parties also argued that the RMA’s provision for iwi management plans had not provided those plans with an appropriate degree of status and influence in freshwater management.<sup>16</sup> Because the requirement for councils to ‘adhere to IMPS [iwi management plans] are weak’, iwi plans were ‘overlooked when other values or aspirations held more weight.’<sup>17</sup> This was exacerbated

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10. Crown counsel, closing submissions (paper 3.3.46), p 13

11. Crown counsel, closing submissions (paper 3.3.46), pp 17–18

12. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 26

13. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 15

14. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 15–16; claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 74–82; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 100–101; counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 33–34

15. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 17–18; counsel for interested parties (ILG), closing submissions, 14 November 2018 (paper 3.3.41), pp 12–13

16. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 91–92, 106–107

17. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 106



by section 36A which, the claimants argued, allowed councils not to consult Māori on resource consents (including water permits).<sup>18</sup> Counsel for interested parties argued that there is a direct link between weak participation requirements for Māori, including no consultation on consent applications, and the degradation of freshwater taonga that has occurred as a result (they said) of council decisions that have prioritised development over the environment.<sup>19</sup>

Almost all of the claimants and interested parties said that a lack of capacity and capability was a barrier to effective Māori participation. Claimant counsel submitted that the Crown's 'failure to confer any guaranteed funding to support the discharge by Māori of their statutorily recognised kaitiakitanga responsibilities' or the 'participation of Māori in local or regional planning processes' was a crucial flaw in the RMA regime.<sup>20</sup> In their view, under-resourcing prevented effective participation at almost every level of freshwater management.<sup>21</sup>

In particular, the parties relied on the findings and recommendations of the Wai 262 Tribunal on these matters.<sup>22</sup> The Tribunal recommended a number of reforms, including:

- ▶ enhanced iwi management plans;
- ▶ improved mechanisms for delivering control to Māori;
- ▶ a commitment to capacity-building for Māori; and
- ▶ greater use of the national policy statements and tools.<sup>23</sup>

Counsel submitted that none of the Wai 262 Tribunal's recommendations for RMA reform have been carried out.<sup>24</sup>

Finally, some claimants and interested parties argued that the RMA placed too much emphasis on iwi participation when hapū were often the kaitiaki of particular water bodies. In their view, the RMA should be 're-set' to provide for hapū participation where appropriate.<sup>25</sup> Counsel for the ILG, however, submitted that iwi authorities were representative of their member hapū, and that it was not 'practical for all hapū to consistently participate in a range of different freshwater processes; even with increased funding'.<sup>26</sup>

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18. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), pp 5–6

19. Counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 14–15

20. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 26

21. See, for example, counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 31–33; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 95–99

22. See, for example, counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), p 22; counsel for interested parties (ILG), closing submissions (paper 3.3.41), pp 12–13; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 106–107.

23. Counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), p 22

24. Counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), p 22

25. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 6–7, 22

26. Counsel for interested parties (ILG), closing submissions (paper 3.3.41), pp 21–22

**2.2.2.2 The case for the Crown**

According to Crown counsel, the claimants' focus on section 33 transfers and section 36B Joint Management Agreements is too narrow. In the Crown's view, the claimants have failed to consider whether Māori actually want to exercise RMA functions under a section 33 transfer. The Crown relied on a paper which suggests that Māori would rather advocate for their position than act 'fairly and judicially' as RMA decision makers.<sup>27</sup>

In terms of section 36B, the Crown submitted that a focus on that provision is too narrow because it ignores the co-governance and co-management arrangements that the Crown has negotiated in recent Treaty settlements, or which iwi and councils have arranged between themselves.<sup>28</sup> Crown counsel submitted that 'landmark Treaty settlements have extended Māori authority over particular water bodies, and established a network of co-management and co-governance throughout the country.'<sup>29</sup> In the Crown's view, this is 'transforming the Māori role in water management.'<sup>30</sup> Crown counsel provided us with an appendix containing a list of 60 arrangements, which they argued showed 'statutory arrangements and Treaty settlements' in a 'tapestry of co-governance and co-management arrangements for waterways across New Zealand'.<sup>31</sup>

In addition to this 'tapestry' of arrangements, the Crown submitted that iwi management plans have now proliferated, and their influence has 'grown and deepened over time'.<sup>32</sup> There are now more than 160 iwi management plans, which the Crown said was evidence that a dual planning system now existed in New Zealand. These iwi plans were a 'central method for Māori to influence the planning and decision-making system'.<sup>33</sup>

Crown counsel chose, however, not to make a submission on Heritage Protection Authorities, simply noting in a footnote that they were a potential tool for protecting taonga.<sup>34</sup>

In respect of resourcing, Crown counsel submitted:

The Crown acknowledges that many hapū and iwi struggle to fund their participation in resource management processes. The Crown recognises that participation is time consuming, and relies on technical expertise. Moreover, legal challenges are costly.<sup>35</sup>

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27. Crown counsel, closing submissions (paper 3.3.46), pp 57–59; R Joseph, 'Maori Values and Tikanga: Consultation under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward', conference paper, October 2002 (Crown counsel, papers in support of closing submissions (paper 3.3.46(d)), tab 36)

28. Crown counsel, closing submissions (paper 3.3.46), pp 11, 27–29, 59–62

29. Crown counsel, closing submissions (paper 3.3.46), p 3

30. Crown counsel, closing submissions (paper 3.3.46), p 11

31. Crown counsel, closing submissions (paper 3.3.46), p 54; Crown counsel, closing submissions, app A (paper 3.3.46(a))

32. Crown counsel, closing submissions (paper 3.3.46), p 25

33. Crown counsel, closing submissions (paper 3.3.46), pp 25–26

34. Crown counsel, closing submissions (paper 3.3.46), p 55 n

35. Crown counsel, closing submissions (paper 3.3.46), p 77

The Crown submitted that it had a number of central funds available to assist, but that the majority of that funding went to clean-up projects (not to build capacity or capability).<sup>36</sup> In the Crown's view, it is the responsibility of local authorities to provide funding, and the Local Government Act 2002 requires councils to 'consider ways to foster the capacity of tāngata whenua'.<sup>37</sup>

On the issue of whether the RMA is biased in favour of iwi participation, the Crown argued that local authority engagement needs to be practical for it to be effective. Crown counsel agreed with the ILG that it was simply not practical for councils to engage with all hapū. On the other hand, the Crown submitted that there were opportunities for hapū to be involved in various RMA processes.<sup>38</sup>

### 2.2.3 Proprietary rights, economic benefits, and the allocation regime

#### 2.2.3.1 *The case for the claimants and interested parties*

The claimants and interested parties argued that the Crown has failed to recognise the proprietary rights of Māori in its freshwater legislation, policies, and reforms. They focused in particular on the RMA and its system for allocating water permits, the first-in first-served principle, and the failure to provide Māori with either royalties or an allocated quantity of water for economic purposes.<sup>39</sup> Māori have been prejudiced, they said, by the 'first-in first-served principle, which has led to the (over) allocation of water taonga to third parties, many of whom have been deriving, and continue to derive, immense financial wealth from their "free" water'.<sup>40</sup> Further, claimant counsel submitted that the allocation regime has given third parties rights that cannot be resumed without expense and possibly litigation, while the allocation of those rights has locked Māori out of access to water in over-allocated catchments.<sup>41</sup>

Thus, in the view of the claimants and interested parties, the Crown's allocation regime has 'both excluded Māori from a share in economic development and ignored any Māori proprietary rights in water'.<sup>42</sup>

#### 2.2.3.2 *The case for the Crown*

According to the Crown, the 'mere fact that [Māori] ownership of natural water is not recognised under the RMA does not render it inconsistent with the Treaty'.<sup>43</sup> The Crown acknowledged that it had not yet reformed the freshwater system so as to address the 'economic benefit aspect of Māori rights and interests'.<sup>44</sup>

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36. Crown counsel, closing submissions (paper 3.3.46), pp 77–78

37. Crown counsel, closing submissions (paper 3.3.46), p 78

38. Crown counsel, closing submissions (paper 3.3.46), pp 74–76

39. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 11, 13, 14–15, 17, 26; counsel for interested parties (Gilling), closing submissions, 9 November 2018 (paper 3.3.35), p 8; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 13–15, 18–19, 20, 64

40. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 11

41. Claimant counsel (6th claimants), closing submissions, 14 November 2018 (paper 3.3.40), p 9

42. Counsel for interested parties (Gilling), closing submissions (paper 3.3.35), p 8

43. Crown counsel, closing submissions (paper 3.3.46), p 7

44. Crown counsel, closing submissions (paper 3.3.46), p 12

Nonetheless, the Crown accepted that ‘delivering economic benefits [to Māori] from water is necessary’, and argued that its reform programme had been ‘endeavouring to find ways of doing that’.<sup>45</sup> Crown counsel also submitted that ‘how best to recognise Māori rights and interests and how best to address Māori expectations of economic benefits are crucial considerations in any changes to the system of water allocation’.<sup>46</sup>

In the Crown’s view, however, the language of ownership and proprietary rights is not appropriate, and elements of those rights – use and control – can be delivered through regulatory reform.<sup>47</sup> It is well known internationally, the Crown argued, that the reform of allocation systems is complex and difficult. The fact that the Crown has not reformed the RMA’s allocation system should not be taken as a breach of Treaty principles, as the Crown does intend to finalise reforms and ensure that the system delivers economic benefits to Māori.<sup>48</sup> Crown counsel asked the Tribunal to assess the law to date in light of that intention.<sup>49</sup>

### 2.2.4 Environmental outcomes and the need for reform

#### 2.2.4.1 *The case for the claimants and interested parties*

All of the claimants and interested parties were deeply concerned about the degraded state of many freshwater taonga. Many parties attributed the decline in water quality to systemic flaws in the RMA, and to the way in which economic, environmental, and Māori interests have been balanced in RMA decision-making. According to counsel for interested parties:

The Tribunal has heard from a great number of tangata whenua who have advanced unified evidence which undeniably describes the devastating degradation of freshwater and freshwater bodies throughout both the North and South Islands of New Zealand.

This pollution would not have occurred if the principles of the Treaty of Waitangi had been upheld consistently in current freshwater law.

The Wai 1940 Claimants submit the current freshwater law does not reflect the reverence for wai as taonga under Article 2 of Te Tiriti o Waitangi necessitating active protection. Nor does the current law allow for meaningful partnership between Māori and the Crown when it comes to ensuring a balance between the competing interests of commercial use of water and environmental conservation.<sup>50</sup>

Claimant counsel argued that there had been a ‘systemic failure of the current law, in practice, to prevent the degradation of water bodies to the state we find them in today’, and that the ‘nature, extent and (geographic) breadth of

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45. Crown counsel, closing submissions (paper 3.3.46), p 3

46. Crown counsel, closing submissions (paper 3.3.46), pp 5–6

47. Crown counsel, closing submissions (paper 3.3.46), pp 6–8, 53–54

48. Crown counsel, closing submissions (paper 3.3.46), p 9

49. Crown counsel, closing submissions (paper 3.3.46), p 12

50. Counsel for interested parties (Gilling), closing submissions (paper 3.3.35), pp 4–5

degradation justifies a Treaty breach finding.<sup>51</sup> The need for reform was clear but, we were told, there is a long lag time which means that the pollution is worse than we know. Even if all pollution stopped instantly,

taonga will continue to degrade (ecologically); mauri will continue to decline; eco-systems inhabitants (eg tuna and shellfish) will continue to reduce in health and in number; and customary activities (eg mahinga kai practices) and kaitiaki responsibilities will continue to be frustrated.<sup>52</sup>

The claimants argued, therefore, that the Crown has failed in its Treaty duty to actively protect their taonga.<sup>53</sup>

#### **2.2.4.2 The case for the Crown**

According to Crown counsel, many of the issues identified by the claimants are problems of implementation, not with the RMA itself. Further, the Crown has moved to address those problems once it became aware of them. The Crown's attempts to 'address negative outcomes and improve the quality [of] decision-making' does not represent 'an admission of prior Treaty breach'.<sup>54</sup> In the Crown's view, the decline of water quality is one such issue, which it is trying to address as an 'emergent and acknowledged problem'.<sup>55</sup> Crown counsel submitted that the 'extent, magnitude, and causes of this deterioration have only recently become more widely known and understood'.<sup>56</sup>

While the Crown accepts that it has a duty to protect taonga, it argued that the duty of active protection is not 'absolute and unqualified', and it is not required to go beyond what is reasonable in the circumstances. In the Crown's submission, its recent reform programme is just such a reasonable response.<sup>57</sup> Further, Crown counsel argued that the mere fact of water pollution does not constitute a breach of Treaty principles.<sup>58</sup>

## **2.3 THE LAW IN RESPECT OF FRESHWATER MANAGEMENT BEFORE 1991**

### **2.3.1 Introduction**

In order to assess the RMA in Treaty terms, it is necessary to provide a brief account of how fresh water was managed before 1991. Our focus in this section is on the legislative regime established by the Crown. This is a contemporary inquiry and we are not reporting on historical matters per se, although some analysis of

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51. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 26; claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), p 1

52. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), p 1

53. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), p 118

54. Crown counsel, closing submissions (paper 3.3.46), pp 64–65

55. Crown counsel, closing submissions (paper 3.3.46), p 65

56. Crown counsel, closing submissions (paper 3.3.46), p 71

57. Crown counsel, closing submissions (paper 3.3.46), pp 70–71

58. Crown counsel, closing submissions (paper 3.3.46), p 70

the historical background is essential for understanding the RMA and its freshwater management regime. For matters that were ongoing as at 21 September 1992, which is the cut-off date for historical claims, we still have jurisdiction to make findings and recommendations.<sup>59</sup> This includes the RMA 1991 itself but also any other legislative provisions that were still in force at that time.

### 2.3.2 Water management law up to 1967

#### 2.3.2.1 River and drainage boards, hydroelectricity, and water rights

In the nineteenth century, statutes were enacted to provide for river and drainage boards. These boards were available to local rate-payers (mostly settlers) if a majority of rate-payers petitioned for the legislation to take effect in their districts. River boards were responsible for flood control works and other river works, while drainage boards could carry out schemes to convert wetlands to farmland.<sup>60</sup> The relevant statutes provided for local settler control of water bodies but did not apply in all districts because not all settler communities petitioned for the establishment of boards. Once a petition was granted, rate-paying settlers elected the river and drainage boards and made up their membership.<sup>61</sup> Until 1941, the boards had no central guidance or control, other than the provisions of the enabling statutes.

Māori were largely excluded from this system, except as objectors and petitioners. The legislation did not provide for Māori representation, even though their rights and interests were drastically affected by the alteration or even destruction of freshwater bodies and the loss of crucial resources, such as wetland fisheries. The future Attorney-General, Sir Francis Bell, summed up the view of most settlers when he said in 1912 that Māori rights had to give way in favour of the public good (that is, settlement).<sup>62</sup> He told Parliament:

It was impossible to permit a Maori to hold up the whole drainage of a plain, to prevent the straightening of a river, to prevent the reclaiming of swamp land and turning it into productive land. It was not alone the land immediately affected that must suffer for the public good; the whole of the land above and below it suffered if the drainage was to be held up by a lagoon or stream.<sup>63</sup>

The pre-1941 system of local control did not apply to hydroelectricity. The Water-power Act of 1903 vested in the Crown 'the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other

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59. Waitangi Tribunal, memorandum-directions, 27 April 2012 (paper 2.5.19), pp 2–4

60. Cathy Marr, 'Crown Impacts on Customary Māori Authority over the Coast, Inland Waterways (other than the Whanganui River) and associated mahinga kai in the Whanganui Inquiry District', 2003 (doc A87), pp 154–156

61. Marr, 'Crown Impacts on Customary Authority' (doc A87), p 154

62. Ben White, *Rangahaua Whanui National Theme Q: Inland Waterways: Lakes* (Wellington: Waitangi Tribunal, 1998) (doc A90), pp 60–61

63. *New Zealand Parliamentary Debates*, 1912, vol 161, p 1117 (White, *Inland Waterways: Lakes* (doc A90), p 61)

power.’<sup>64</sup> Hone Heke, the member for Northern Māori, objected to this attempt to ‘take away from Māori owners the use of water-power.’<sup>65</sup> This provision in the Water-power Act 1903 was replicated in subsequent public works legislation. It was eventually repealed in 1969 after the Water and Soil Conservation Act 1967 had made it redundant.<sup>66</sup> We discuss that Act further below.

In addition to assuming exclusive control of hydro power, the Crown regulated the granting of water rights to settlers for various purposes, including commercial activities and town water supplies.<sup>67</sup>

The system of local control via boards and other local bodies was significantly altered in 1941, when Parliament enacted the Soil Conservation and Rivers Control Act.

### 2.3.2.2 *The Soil Conservation and Rivers Control Act 1941*

By the 1930s, there was an increasing concern about erosion and its effects, especially in terms of flooding and the viability of land for farming. Deforestation and land clearance by settlers had resulted in a serious erosion problem, particularly in steeper catchments. The need for State-sponsored soil conservation was a driving force behind new legislation in 1941, the Soil Conservation and Rivers Control Act. Flooding was the other, related concern. The Crown saw the necessity of introducing more centralised control and direction in order to deal with these two significant issues. On the other hand, water pollution had also been a concern for decades but the Crown took no action to regulate it during the first half of the twentieth century. Sewerage and industrial discharges were the main sources of pollution at the time, including effluent from dairy factories and flax mills. Bills to control water pollution were introduced to Parliament in 1912 and 1937 but were not passed due to a lack of political support. Water pollution was left out of the 1941 Act as well. After a nationwide survey of water pollution in 1947, a subsequent Pollution Mitigation Bill again failed in 1949.<sup>68</sup>

The Soil Conservation and Rivers Control Act 1941 ‘empowered the Crown to control and manage rivers so as to minimise and prevent erosion and protect property from flooding.’<sup>69</sup> It established a Soil Conservation and Rivers Control Council (SCRCC) at the national level. The council was appointed by the Crown, and its members consisted of ‘senior officials of the Public Works and Lands Departments, representatives of local authorities, and one representative of

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64. Water-Power Act 1903, s 2(1); Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, p 1176

65. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1176

66. David Alexander, ‘Historical Analysis of the relationship between Crown and iwi regarding the control of water’, [2012] (doc A69(b)), p 37

67. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 21

68. Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941–1988* (Wellington: Historical Branch, Department of Internal Affairs, 1994), pp 23–30, 119–120

69. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 7, p 3298

agricultural and pastoral interests.<sup>70</sup> Māori, however, had no representation on the council, and the Māori Affairs Department was not represented either.

The SCRCC's functions included the control and supervision of catchment boards and catchment commissions, which were established to carry out flood protection works at the local level. Catchment boards were partly elected and partly appointed, whereas catchment commissions were entirely appointed by the Crown. As with the river boards and drainage boards, the 1941 Act provided for local choice as to whether to come under the Act and establish a catchment board.<sup>71</sup>

Cathy Marr, an historian whose report on the Whanganui district was placed on our record, explained that catchment boards were given extensive powers in respect of rivers and native forests. They were dominated by local settlers. The Crown could appoint representatives from Government agencies and 'special interest groups such as farmers', but 'there was still no specific requirement for Māori representation or to protect or consider Māori interests.'<sup>72</sup> Ms Marr added:

The potential for conflict between the boards and farmers over matters such as land to be retired for protection forestry was recognised by close liaison with farmers' organisations and farmer representation. However, during the course of this research no evidence was found of similar concern to establish and maintain close relationships with iwi and hapu to take Māori concerns into account, such as over the health of waterways for fisheries or continued access to bird snaring areas.<sup>73</sup>

Issues of water quality and water takes (such as for irrigation) were outside the catchment boards' remit. In the 1950s, the Crown moved to widen the scope of legislation for freshwater management. An inter-departmental committee recommended giving catchment boards the control of water allocation, since there was no clear authority to allocate water for irrigation. No action, however, was taken on this until the late 1960s.<sup>74</sup> An attempt to place the control of aquifers under the SCRCC also failed. Legislation was enacted instead in 1953 to establish Underground Water Authorities. These authorities (essentially local councils) would be able to pass bylaws to control the abstraction of water from aquifers and to prevent waste and pollution.<sup>75</sup> Only five such authorities had been established by the mid-1960s,<sup>76</sup> whereas catchment boards covered most of the country.

In addition, a Waters Pollution Act was finally passed in 1953. The influence of the meat and dairy industry, however, significantly limited the scope of this Act.

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70. Waitangi Tribunal, *Te Urewera* (Wellington: Legislation Direct, 2017), vol 7, p3298

71. Roche, *Land and Water*, pp 45–49

72. Marr, 'Crown Impacts on Customary Māori Authority' (doc A87), pp 157–158

73. Marr, 'Crown Impacts on Customary Māori Authority' (doc A87), pp 157–158

74. Roche, *Land and Water*, pp 98–99

75. David Alexander, 'Some Aspects of Crown Involvement with Waterways in the Whanganui Inquiry District', 2008 (doc A80), pp 14–17

76. Alexander, 'Some Aspects of Crown Involvement with Waterways in the Whanganui Inquiry District' (doc A80), p17



Rather than establishing a water quality management regime, the Act established a council at the national level with advisory powers only. The Pollution Advisory Council's powers were extended in 1963 but still fell 'well short of the degree of control that was needed.'<sup>77</sup>

### 2.3.3 The Water and Soil Conservation Act: ownership and native title

In 1963, the Government established an inter-departmental committee to review the laws relating to water. Officials were concerned that the country's water resources were 'coming under increasing pressure from often-conflicting demands and usages.'<sup>78</sup> Historian Michael Roche observed:

In the long post-war boom, continued urban growth, the expansion of domestic manufacturing industries, and continued intensification of agriculture put new pressure on access to water resources, for example irrigation, and on water quality as a result of industrial discharges.<sup>79</sup>

At the same time, the United Kingdom had recently consolidated the management of water resources by passing the Water Resources Act 1963, which established regional water authorities and a national Water Resources Board. This regime 'severely restrict[ed]' the operation of common law riparian rights in Britain, an action which New Zealand copied in 1967.<sup>80</sup>

The inter-departmental committee was concerned about the lack of clarity in the law with regard to the ownership of New Zealand's waterways.<sup>81</sup> First, the committee understood that the law in respect of navigable rivers was unclear in its meaning and application. We note that the Crown had vested the beds of navigable rivers in itself in 1903, without consulting Māori or obtaining their consent. It did so in section 14 of the Coal-mines Act Amendment Act 1903, which stated that the beds of navigable rivers 'shall remain and be deemed always to have been vested in the Crown.'<sup>82</sup> In an oft-quoted passage, the Court of Appeal said in *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994]:

the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is 'a whole and indivisible entity, not separated into bed, banks and waters'. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept . . .<sup>83</sup>

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77. Roche, *Land and Water*, pp 119–120

78. David Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water', [2012] (doc A69(b)), p 4

79. Roche, *Land and Water*, p 97

80. Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water', (doc A69(b)), p 4; Roche, *Land and Water*, p 100

81. Waitangi Tribunal, *Te Urewera*, vol 7, pp 3365–3369

82. Waitangi Tribunal, *Te Urewera*, vol 7, pp 3355–3371

83. *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27

Since then, the Supreme Court in *Paki* and *Paki (No 2)* has confirmed that the point remains undecided.<sup>84</sup> In any case, the inter-departmental committee was not concerned about native title but about the definition of navigability in the 1903 Act and successive public works legislation. It recommended a tighter, more far-reaching definition be inserted in the new statute, but this recommendation was not taken up by Cabinet.<sup>85</sup> Indeed, the new statute in 1967 avoided questions of ownership altogether, as we discuss further below.

The second point to make about ownership is that the committee was unsure of the effect of the English Laws Act 1858 vis-à-vis the rights guaranteed in the Treaty:

The English Laws Act, 1858, (NZ) applies to New Zealand, the laws of England as they existed on 14 January 1840 and those laws included the Common Law of England 'so far as applicable to the circumstances of New Zealand'. . . Bearing in mind the origins of the English systems of ownership of land and water on the one hand, and on the other the Treaty of Waitangi guarantee to the Maoris of the 'full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties', it seems difficult to be sure exactly how far the Common Law doctrines as to riverbank boundaries, lakeside boundaries, ownership of highways and rights of passage over water are 'applicable to the circumstances of New Zealand'.<sup>86</sup>

The Te Urewera Tribunal commented:

Since the question of what was really applicable to the circumstances of New Zealand (the wording of the English Laws Act) was thus unclear, the committee recommended that the uncertainties be resolved by statute. This recommendation . . . was not adopted.<sup>87</sup>

The claimants' witness on the 1967 legislation, David Alexander, argued that this was a missed opportunity to incorporate Treaty rights and protections into the statute law in respect of fresh water. Mr Alexander pointed out that the committee did not consider the Treaty implications of the proposed legislation, nor was there any consultation with Māori.<sup>88</sup>

The Māori Affairs Department did make a submission to the committee, and it sought comment from its district offices before doing so. Most of the district

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84. See *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 297; *Paki v Attorney-General (No 2)* [2014] NZSC 118, para 81; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27; Waitangi Tribunal, *Te Urewera*, vol 7, pp 3359–3363, 3417–3418.

85. Waitangi Tribunal, *Te Urewera*, vol 7, pp 3365–3369

86. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', p 22 (Waitangi Tribunal, *Te Urewera*, vol 7, p 3368)

87. Waitangi Tribunal, *Te Urewera*, vol 7, p 3368

88. Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water', (doc A69(b)), pp 5–6, 8–9

concerns related to practical matters, such as water supplies for Māori communities and for farm development schemes.<sup>89</sup> But the Whanganui welfare officer wrote as follows:

The Treaty of Waitangi makes provision for the protection of rivers, lakes, etc, and due consideration must be given to the agreement set out in the Treaty . . .

As I see it, the difficulties exist in the confusion that has been brought about by the variation in the articles of the Treaty of Waitangi which has allowed other enactments to encroach on properties at one time guaranteed by Queen Victoria to her Maori subjects.

If the bringing down of a comprehensive Water Act will help clarify the present situation, and so long as it does not conflict with the articles of the Treaty of Waitangi, then I would recommend that consideration be given to the desirability of taking action to introduce a Water Act Bill for discussion.<sup>90</sup>

David Alexander noted that this important recommendation was not included in the department's submission to the committee. The Māori Affairs Department made no mention of the Treaty or the Crown's Treaty obligations. None of the other departmental submissions to the committee mentioned the Treaty. Nor did any of the submissions to the select committee. The Treaty was not referred to once in the Parliamentary debate on the eventual Bill.<sup>91</sup>

When it was passed, the Water and Soil Conservation Act 1967 vested the sole right to use natural water in the Crown, with certain provisos. The Ministry of Works had suggested that the new Act should simply vest the beds of all rivers and streams in the Crown, but this suggestion was not taken up.<sup>92</sup> David Alexander argued that, having decided to exclude ownership issues from consideration, the Crown looked for another 'legal foundation' on which its new powers would rest. During the drafting of the legislation, the decision was made to vest the sole right to dam, take, or use water in the Crown as the basis of its new, overarching authority. Having established that right, the Crown would then be able to 'delegate to Regional Water Boards the power to issue water rights for the damming, diversion, taking or use of waters, or to discharge into waters.'<sup>93</sup>

Section 21(1) of the Act stated:

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89. Alexander, 'Some Aspects of Crown Involvement with Waterways in the Whanganui Inquiry District' (doc A80), p 17

90. District Welfare Officer, Whanganui, to Assistant District Officer, Whanganui, 20 August 1963 (Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water' (doc A69(b)), p 5)

91. Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water' (doc A69(b)), pp 4-5, 8; Alexander, 'Some Aspects of Crown Involvement with Waterways in the Whanganui Inquiry District' (doc A80), p 18

92. Waitangi Tribunal, *Te Urewera*, vol 7, p 3367

93. Alexander, 'Historical Analysis of the relationship between Crown and iwi regarding the control of water', (doc A69(b)), pp 5-6, 8

Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water, is hereby vested in the Crown subject to the provisions of this Act:

Provided that nothing in this section shall restrict the right to take, divert or use sea water:

Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has responsibility and for or in connection with firefighting purposes.

What this meant for riparian landowners was that the Act preserved their right to take water for domestic purposes, firefighting, and stock, but otherwise 'landowners' common law rights' were taken away.<sup>94</sup> We discuss the provisos and the significance of this part of the Act further below (see section 2.6.2), where we note that section 354 of the RMA specifically preserved the vesting effected by section 21. Here, we note Professor Jacinta Ruru's opinion of section 21 in respect of its effect on native title:

Is simply vesting water in the Crown enough to override any Māori customary property rights in rivers? According to case law precedents, the doctrine of native title requires a clear and plain extinguishment of *Māori property rights*. The initial observation thus must be that the legislation does not clearly and plainly extinguish Māori property rights.

To reiterate in conclusion, it is not possible for statute law to supersede the common law doctrine of native title without clear and plain legislation to that effect. [Emphasis in original.]<sup>95</sup>

Many of the parties who made submissions about the Water and Soil Conservation Act in stages 1 and 2 of our inquiry seem to have been in broad agreement with this position, which is an important point for our inquiry. This includes the Crown, which argued that section 21 of the 1967 Act 'displaced' the rights of riparian landowners under common law.<sup>96</sup> The RMA provisions 'dealing with the use of fresh water', the Crown said, 'are a more recent manifestation of those provided under section 21.'<sup>97</sup> But the Crown agreed that this was unlikely to have constituted an extinguishment of Māori customary rights:

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94. Waitangi Tribunal, *Te Urewera*, vol 7, p 3423

95. Jacinta Ruru, answers to questions in writing, [September 2018](paper 3.2.275(a)), p [4]. See also J Ruru, *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Landcare Research New Zealand Ltd, 2009) (doc A74), pp 82–89.

96. Crown counsel, closing submissions, app B (paper 3.3.46(b)), pp 1–2; Crown counsel, stage 1 closing submissions (paper 3.3.15), p 20

97. Crown counsel, stage 1 closing submissions (paper 3.3.15), p 14

Extinguishment requires close consideration of the interest involved and the extinguishing action. Extinguishment requires a clear and plain intent to create the extinguishing interest.

Regulation of property rights is different from the extinguishment of property rights.

The RMA is unlikely to have extinguished any common law customary rights. The RMA regulates property rights; a particular customary right may not be able to be exercised in a particular way because that would be contrary to statute but the right subsists subject to the statute. *Ngati Apa*<sup>98</sup> treats the RMA as regulating rights, not extinguishing them.<sup>99</sup>

It was also the view of many claimants and interested parties that the vesting of the sole right to use natural water in the Crown did not have the effect of extinguishing common law native title.<sup>100</sup> Claimant counsel, for example, submitted:

Essentially, in applying the dicta in *Attorney-General v Ngati Apa* ('*Ngāti Apa*') and *Yanner v Eaton*,<sup>101</sup> the purported vesting of Water in the Crown (via section 354(1)(b) of the RMA and section 21(1) of the Water and Soil Conservation Act 1967) does not appropriate the existing Native Title of Māori in Water.<sup>102</sup>

Similarly, counsel for interested parties submitted:

Only three provisions from two statutes ought to be considered—section 21 of the Water and Soil Conservation Act 1967 and sections 14 and 354 of the RMA. No other statutory provision comes close. In *Ngati Apa*, Elias CJ found that the RMA is regulatory in nature and that it does not effect the extinguishment of property rights.<sup>103</sup>

We agree with the parties on this point.

But the 1967 Act made no provision for Māori interests or for Māori to share the control which the Crown had now asserted over fresh water. In fact, the Act had an adverse effect on the rangatiratanga of iwi and hapū over their freshwater taonga, as we discuss next.

98. *Ngati Apa v Attorney-General* [2003] 2 NZLR 643 (CA)

99. Crown counsel, stage 1 closing submissions (paper 3.3.15), p 16

100. See counsel for interested parties (Mason and Agius), stage 1 closing submissions, 19 July 2012 (paper 3.3.13), p 5; counsel for interested parties (Enright), stage 1 submissions by way of reply, 25 July 2012 (paper 3.3.17), p 4 n; claimant counsel (Wai 2601), closing submissions (paper 3.3.38), p 91; counsel for interested parties (Hirschfeld and Tupara), closing submissions, 9 November 2018 (paper 3.3.44), pp 4–5; counsel for interested parties (Naden et al), submissions by way of reply (paper 3.3.56), pp 11–12;

101. *Yanner v Eaton* (1999) 201 CLR 351

102. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), p 91

103. Counsel for interested parties (Naden et al), submissions by way of reply (paper 3.3.56), p 11

### 2.3.4 The statutory regime for freshwater management, 1967–90

The Water and Soil Conservation Act 1967 created an integrated system of freshwater management for the first time, including allocation, irrigation, water quality, discharges, flood control, river flows, and gravel extraction. The long title to the Act stated its purpose:

An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water.

There was no mention of Māori interests, cultural uses, or values in this list of ‘needs’ to take into account in freshwater decision-making. A National Water and Soil Conservation Authority (NWASCA) sat at the top of the new structure. It developed water and soil policies, and supervised the work of: the SCRCC, which continued to carry out its functions as before; a new Water Resources Council, which dealt with allocation and water quality standards; and regional water boards.<sup>104</sup> The national bodies were serviced by the Ministry of Works. The Minister chaired the NWASCA. Its other members were drawn from the two subsidiary national bodies, along with a representative of local bodies and a ministerial appointee.<sup>105</sup> There was no provision for Māori representation on any of these bodies.<sup>106</sup> It was not until 1983, shortly before its dissolution, that representation on the authority was extended to include a Māori member.<sup>107</sup> The Tribunal in its *Manukau Report* referred to this belated inclusion of a single member as a ‘token’ only.<sup>108</sup>

According to Michael Roche, the new statutory regime moved the balance of power away from the regions and back towards central government. At the regional level, the fundamental role was to control the use and abstraction of water (and discharges into water) by the issuing of water rights. At the central level, the Water Resources Council set pollution standards, mainly by establishing a water classification scheme. The soil conservation and flood control work of the 1941 regime continued alongside the new one. Māori interests were not seen as relevant to the functions of the national authority, which were described as:

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104. The Water Resources Council was created in 1972. Originally, the 1967 Act created a Water Allocation Council. This was followed by a Water Pollution Control Council (which replaced the former advisory council). These two bodies were merged in 1972 to form the Water Resources Council.

105. Roche, *Land and Water*, pp pp 9–10, 106

106. Waitangi Tribunal, *Whanganui River Report*, p 247

107. Roche, *Land and Water*, pp 149, 158

108. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 1985 (Wellington: Government Printer, 1989), 2nd ed, p 80

- ▶ to advise the Minister about the efficient administration of natural water and soil conservation in ‘the national interest’;
- ▶ to review the functions and performance of the associated councils and Regional Water Boards;
- ▶ to coordinate all matters relating to natural water and to police against erosion and pollution of fresh and coastal waters;
- ▶ to control the damming and diversion of natural waters;
- ▶ to advise the Minister on funding requirements for water and soil conservation programmes;
- ▶ to provide national leadership in water and soil conservation;
- ▶ to guide research efforts;
- ▶ to demonstrate efficient water and soil conservation methods;
- ▶ to fix minimum standards of water quality;
- ▶ to promote education and training;
- ▶ to promote ‘the best uses of natural water’.<sup>109</sup>

There is not space here to discuss the regime and its functioning in any detail, but we note that the Tribunal has been critical of both the legislation and how the regime operated, including its water classification system. The Te Urewera Tribunal noted that the long title of the Act was amended in 1981:

An amendment in 1981 replaced the words ‘water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water’ with ‘community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic and other natural characteristics of rivers, streams, and lakes.’ The Treaty and Māori rights and interests were still not mentioned. This was despite the inclusion four years earlier, in the Town and Country Planning Act 1977, of the Māori relationship with their ancestral lands and waters (as a matter to be recognised and provided for).<sup>110</sup>

A further amendment in 1984 enlarged the NWASCA and made it more independent of the Government, with its own secretariat (rather than the Ministry of Works). The system was streamlined with the abolition of the SCRCC and Water Resources Council. The national authority’s policy-making role was strengthened, and it issued policy statements on a number of crucial issues, including wetlands and water quality. But the system was under attack from a number of areas. These included Treasury (which opposed its subsidies), environmentalists, and Māori, who were becoming increasingly vocal in their criticisms of individual decisions and of the exclusion of their rights and interests from the freshwater management regime.<sup>111</sup>

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109. Roche, *Land and Water*, pp 106–107

110. Waitangi Tribunal, *Te Urewera*, vol 7, p 3424; Water and Soil Conservation Amendment Act 1981, s 3

111. Roche, *Land and Water*, pp 131–168

Māori now had a new avenue for their concerns: the Waitangi Tribunal. In 1983–85, several Tribunal reports found the 1967 Act and its freshwater management regime to be in breach of Treaty principles. The Manukau Tribunal, for example, found that the Act was ‘monocultural’. The legislation gave no protection to Māori interests or to the ‘cultural and spiritual values pertaining to Māori fisheries and the natural waters.’<sup>112</sup> Similar findings were made by the Tribunal in the *Motunui–Waitara Report* and the *Kaituna River Report*.<sup>113</sup> Michael Roche noted that when the results of the Motunui–Waitara claim were presented at the New Zealand Catchment Authorities conference in 1983, ‘the audience’s reaction indicated that other catchment authorities saw it as nothing more than an isolated regional incident’. By 1985, however, a working draft for consolidated water and soil legislation had ‘clauses recognising Māori values’, and the NWCASA advised all catchment authorities of this the same year.<sup>114</sup>

In 1987, the High Court decided in *Huakina Development Trust v Waikato Valley Authority*<sup>115</sup> that ‘evidence concerning the Treaty and an iwi’s traditional relationship with natural water was admissible in relation to the granting of a water use right’. At the same time, such evidence was *not* admissible when considering a water conservation order.<sup>116</sup> From 1987 onwards, therefore, decision makers would need to give some cognisance to the Treaty and Māori values even though the 1967 Act made no provision for them. But there was a wider point at stake, as the Mohaka River Tribunal found in 1992:

The Water and Soil Conservation Act 1967 was in breach of the letter and principles of the Treaty to the extent that it conferred on central government exclusive control over the waters of the Mohaka. We make this finding on the basis that Ngati Pahauwera rangatiratanga over the Mohaka river was never relinquished, either by sale of the adjacent land or by operation of a common law riparian presumption. The assumption by the Crown of exclusive rights of control, without Ngati Pahauwera’s consent, constituted a Treaty breach.<sup>117</sup>

The Tribunal reports just referred to were delivered to the Crown during the period in which the 1967 Act was still in force (except for the *Mohaka River Report*, which came soon afterwards). Some of the Tribunal’s concerns were reflected in provisions of the RMA when it was introduced: it had a reference to the principles

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112. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, p 86

113. Waitangi Tribunal, *The Report of the Waitangi Tribunal on the Kaituna River Claim*, 1984 (Wellington: Government Printing Office, 1989), 2nd ed, p 32; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, March 1983 (Wellington: Government Printing Office, 1989), 2nd ed, pp 14–15, 18, 32–33

114. Roche, *Land and Water*, pp 157–158

115. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188

116. Waitangi Tribunal, *The Mohaka River Report* (Wellington: Brooker and Friend Ltd, 1992), pp 59–60

117. Waitangi Tribunal, *The Mohaka River Report*, p 66



of the Treaty; it had some provision for Māori interests and values; it required consultation with tāngata whenua; and it had a mechanism for councils to transfer powers to iwi authorities (and later a provision for joint management). Whether these reforms were sufficient in Treaty terms is a matter that we consider in the following sections of this chapter.

Later Tribunal reports have also made findings that the 1967 Act was in breach of the Treaty. They have found, for example, that it failed to provide for Māori ownership, it failed to recognise and protect tino rangatiratanga over waterways, and it failed to recognise or compel decision makers to recognise Treaty principles.<sup>118</sup>

The NWSA's plan for consolidated water and soil legislation was overtaken by other events. The 1967 regime was completely replaced during the Labour Government's state restructuring in the late 1980s. The SCRCC and the Water Resources Council had already been abolished in 1983. The NWSA followed in 1988. The law in respect of all natural resources, including freshwater resources, was consolidated in 1988–90 in a project entitled the Resource Management Law Reform (discussed further below in sections 2.4.2 and 2.6.2). The Ministry for the Environment became the central government agency in a new regime in which regional councils would be virtually autonomous and would manage and allocate water under a new statute, the Resource Management Act 1991.

We turn next to discuss the RMA, beginning with its purpose and principles. Our discussion includes further commentary on section 21 of the Water and Soil Conservation Act 1967 (see section 2.6.2).

## 2.4 THE PURPOSE AND PRINCIPLES OF THE RMA

### 2.4.1 The decision-making hierarchy of the RMA: sections 5–8

Section 5 of the RMA states that the purpose of the Act is to 'promote the sustainable management of natural and physical resources'. Sustainable management is defined as the use, development, and protection of resources so that people and communities are able to provide for their 'social, economic, and cultural well-being', and their health and safety. Fulfilling this purpose involves three cardinal points:

- ▶ sustaining the ability of resources to meet the 'reasonably foreseeable needs of future generations';
- ▶ safeguarding the 'life-supporting capacity of air, water, soil, and ecosystems'; and
- ▶ managing activities so that adverse effects on the environment are avoided, remedied, or mitigated.

That is the purpose of the Act.

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<sup>118</sup>. See Waitangi Tribunal, *Whanganui River Report*, pp 256, 274; Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), pp 140–141; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 544.

Sections 6–8 establish a hierarchy of matters which RMA decision makers must then consider when making their decisions. The Petroleum Management Tribunal explained the hierarchy in this way:

The Act's purpose has primacy over the numerous matters, listed in sections 6 to 8, that must be considered by all people exercising powers and functions under the Act. The different form of words used to describe how the matters in each section are to be considered reveals that those specified in section 6 must be given the greatest weight, followed by those in section 7, and then those in section 8. Thus, those working under the Act must 'recognise and provide for' seven 'matters of national importance' specified in section 6, 'have particular regard to' 11 'other matters' specified in section 7, and 'take into account' the principles of the Treaty of Waitangi (section 8).<sup>119</sup>

Thus, the top tier of the hierarchy is the Act's purpose. The second tier is the matters of national importance listed in section 6. When it was enacted in 1991, section 6 included five matters which decision makers had to 'recognise and provide for':

- ▶ preservation of the natural character of the coastal environment and freshwater bodies and 'the protection of them from inappropriate subdivision, use, and development' (section 6(a));
- ▶ the protection of 'outstanding natural features and landscapes from inappropriate subdivision, use, and development' (section 6(b));
- ▶ the protection of 'areas of significant indigenous vegetation' and 'significant habitats of indigenous fauna' (the protection was of the sites and not the flora and fauna per se) (section 6(c));
- ▶ public access to and along the coastal marine area, lakes, and rivers (section 6(d)); and
- ▶ 'The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (section 6(e)).

Section 6(e) was based on the wording of the Town and Country Planning Act 1977 (as were some of the other provisions) but now given a much broader application beyond the earlier Act's 'ancestral land', which was interpreted for a long time as being limited to land still in Māori ownership.<sup>120</sup>

Since 1991, three more matters of national importance have been added to section 6:

- ▶ the protection of 'historic heritage from inappropriate subdivision, use, and development' (6(f));
- ▶ 'protected customary rights' on the foreshore and seabed (6(g));<sup>121</sup> and
- ▶ the management of 'significant risks from natural hazards' (6(h)).

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119. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 54; see also p 159.

120. Sir Edward Taihākurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti, 'Ngā Wai o te Māori, Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori, Māori and State Law, a paper prepared for the NZMC, 23 January 2017 (doc E13), p 29

121. This refers to a provision under the Marine and Coastal Area (Takutai Moana) Act 2011.

Section 7 of the Act is a list of ‘other matters’ that decision makers ‘shall have particular regard to’, which – as noted above – gives them less weight than matters of national importance. Originally, there were eight ‘other matters’ but one was promoted to a matter of national importance in section 6 (protection of heritage), and four others were added in amendments to the Act. The current list in section 7 is:

- (a) kaitiakitanga
- (aa) the ethic of stewardship
- (b) the efficient use and development of natural and physical resources
- (ba) the efficiency of the end use of energy
- (c) the maintenance and enhancement of amenity values
- (d) intrinsic values of ecosystems
- (e) [*Repealed; originally stated ‘recognition and protection of the heritage values of sites, buildings, places, or areas’*]
- (f) maintenance and enhancement of the quality of the environment
- (g) any finite characteristics of natural and physical resources
- (h) the protection of the habitat of trout and salmon
- (i) the effects of climate change
- (j) the benefits to be derived from the use and development of renewable energy<sup>122</sup>

Finally, section 8 sits at the bottom of the hierarchy of matters that have to be considered by RMA decision makers. It uses the language ‘take into account’ which is a lesser requirement than ‘have particular regard to’. Section 8 states:

#### 8. Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

From the perspective of 2019, it is important not to forget that the introduction of sections 6(e), 7(a), and 8 was a significant change to the law for freshwater management. We agree with Crown counsel, who submitted on the incorporation of these sections into the law:

Justice Williams has noted that these Part 2 provisions of the RMA were ‘the first genuine attempt to import tikanga in a holistic way into any category of the general Law’. Lord Cooke of Thorndon for the Privy Council held that ‘these are strong directions, to be borne in mind at every stage of the planning process.’ The Supreme Court has held that through these provisions ‘the Act provides important recognition for

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122. Subsection (aa) was inserted in 1997 by the Resource Management Amendment Act 1997 and subsection (ba) was inserted and subsections (i) and (j) were added in 2004 by the Resource Management (Energy and Climate Change) Amendment Act 2004.

Māori connection to waters and to lands of significance to them in decision-making under the Act [and] substantially improved the recognition of Māori in relation to the management of waters.<sup>123</sup>

These changes to the law reflected a movement in that direction in the 1980s, as court decisions widened the significance of Māori values under the Town and Country Planning Act and the Water and Soil Conservation Act.<sup>124</sup> The Resource Management Law Reform in the late 1980s extended and codified these developments. It was a period of ‘great hopes’ for Māori. It saw a shift in the law for freshwater management (and environmental management more generally) from exploitation to ‘one more focused on environmental well-being as an outcome in its own right.’<sup>125</sup> Māori were significantly involved in the shaping of the legislation itself for the first time, and the RMA was framed in such a way to provide an unprecedented degree of recognition for their cultural interests in natural resources (though not their ownership interests, as we discuss later).<sup>126</sup> The new Act also provided mechanisms for Māori to influence resource management decision-making in a way that they previously could not, and even to exercise decision-making roles. We discuss these in the next section.

But in 2011, the Wai 262 Tribunal found: ‘Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise.’<sup>127</sup> Why has there been such a disappointing result? The Wai 262 Tribunal identified mainly structural problems with the degree of influence or control accorded Māori under the Act, and thus their ability to have their values truly influence RMA decision-making.<sup>128</sup> The Tribunal pointed to the ineffectiveness of mechanisms for Māori to be decision makers (sections 33 and 36B), the lack of central government direction to councils, the failure to adequately resource Māori to participate effectively, and the insufficient weight accorded iwi management plans.<sup>129</sup> We mostly deal with these structural issues in section 2.5. Here, we are focused more specifically on issues to do with part 2 of the Act. Relying on the Tribunal reports that deal with the period under review in this chapter, relevant publications, and the evidence and submissions in our inquiry, we note three crucial weaknesses in the operation of part 2 in relation to freshwater management:

- ▶ the relative weaknesses of the Treaty clause;
- ▶ the lack of national direction to councils; and

123. Crown counsel, closing submissions (paper 3.3.46), pp 13–14

124. JV Williams, ‘Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law’, 2013 (Crown counsel, papers in support of closing submissions (paper 3.3.46(d)), tab 31, pp 17–18; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1410

125. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 249

126. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 249–250

127. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 284

128. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 279–280

129. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 260–286

- ▶ the ‘balancing out’ of Māori interests in the hierarchy of matters to be considered by RMA decision makers.

We turn next to deal with these three matters.

## 2.4.2 The relative weakness of the Treaty clause in the RMA

### 2.4.2.1 Background to the enactment of the Treaty clause

In 1986, Cabinet instructed all Government departments to ‘give recognition to the Treaty of Waitangi as if it were part of the domestic law of New Zealand in all aspects of administration and in preparation of legislation.’<sup>130</sup> This was reflected in the Conservation Act 1987, which stated: ‘This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.’<sup>131</sup> By the time the Resource Management Bill was being prepared, however, the political mood of the Labour Government had changed.<sup>132</sup>

In 1988, one of the Crown’s objectives for the RMLR was to ensure that ‘practical effect’ would be given to Treaty principles. Recognition of the Treaty principles was to be ‘an essential element in all resource management statutes and processes.’<sup>133</sup> At the end of the year, the Minister for the Environment, Sir Geoffrey Palmer, put out a consultation paper which stated:

The new law will be both practical and just. The principles of the Treaty of Waitangi form an important component for the decisions made in this review. The new Resource Management Planning Act will provide for more involvement of iwi authorities in resource management, and for the protection of Māori cultural and spiritual values associated with the environment.<sup>134</sup>

In 1989, there was an ‘extended debate’ on the wording of the Treaty clause. At first, the discussion focused on a clause that would require effect to be given to the principles of the Treaty, as with the Conservation Act. The Planning Tribunal judges recommended against leaving it to councils or the tribunal to identify how the principles would be applied. In the judges’ view, this would abrogate the Crown’s Treaty responsibilities. Haami Piripi of the Treaty of Waitangi Policy Unit recommended that, if the Crown was going to delegate resource management functions to others, it must also delegate its Treaty responsibilities in a clear and

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130. Treasury Circular, ‘Treaty of Waitangi: Implications of Recognition’, 16 April 1986 (Robert McClean and Trecia Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98* (Wellington: Waitangi Tribunal, 2001), p 147)

131. Conservation Act 1987, s 4

132. Morris Te Whiti Love, ‘Resource Management, Local Government, and the Treaty of Waitangi’, in *Local Government and the Treaty of Waitangi*, ed Janine Hayward (Melbourne: Oxford University Press, 2003), pp 33–34

133. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98*, pp 162–163

134. Ministry for the Environment, *People, Environment, and Decision Making: the Government’s Proposals for Resource Management Law Reform* (Wellington: Ministry for the Environment, 1988), p 3 (Morris Te Whiti Love, ‘Resource Management, Local Government, and the Treaty of Waitangi’, p 32)

unambiguous way. The eventual wording of the Treaty clause, as endorsed by Ministers in November 1989, reflected this advice.<sup>135</sup> It stated that ‘in achieving the purpose of this Act all persons who exercise powers and functions under this Act have a duty to balance *kawanatanga* and *tino rangatiratanga* as referred to in the Treaty of Waitangi’.<sup>136</sup>

The Minister of Māori Affairs wanted to ensure that the Treaty relationship was defined at the Crown–Māori level, which would have made that relationship (and the Crown) a crucial factor in Māori resource management matters. He proposed an alternative clause that stated: ‘In achieving the purpose of this Act all persons who exercise functions and powers under this Act have an obligation to give practical effect to the special relationship between the Crown and *tangata whenua* as embodied in the Treaty of Waitangi’.<sup>137</sup>

Treasury, however, asked for the Treaty clause to be ‘toned down’. Cabinet therefore decided that the clause would simply state that ‘all persons who exercise functions and powers under this Act have a duty to consider the Treaty of Waitangi’.<sup>138</sup> This was the clause that went into the Bill. According to Morris Te Whiti Love, the words ‘duty to consider’ reflected both a ‘nervousness about the impact of a Treaty section’ in this particular Bill and a ‘general retreat in terms of Treaty references in legislation’. This retreat occurred partly as a result of the *Lands* case, and the way the Court of Appeal had enforced the Treaty clause in the State-Owned Enterprises Act 1986.<sup>139</sup>

Nearly all of the Māori submissions to the select committee condemned the Treaty clause as ‘weak and inadequate’. A battle then ensued between Treasury and Koro Wetere, the Minister of Māori Affairs. Treasury wanted to dilute the Treaty clause even further, arguing that ‘a strong Treaty of Waitangi clause in the legislation would cause endless litigation’. The Minister wanted to strengthen it. A compromise seems to have been arrived at in the select committee, which proposed that the clause would require all persons exercising functions under the Act to ‘take into account the special relationship between the Crown and *te iwi Māori* as embodied in the Treaty of Waitangi’. Robert McClean and Trecia Smith, in a report on Crown policies in respect of indigenous flora and fauna, suggested that this new version was more in line with the ‘watered-down clause favoured by Treasury’.<sup>140</sup>

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135. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp 171–172

136. ‘Report from the Core Group on the Treaty of Waitangi Reference in Resource Management Bill’, 22 November 1989 (McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 172)

137. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 172

138. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 172

139. Morris Te Whiti Love, ‘Resource Management, Local Government, and the Treaty of Waitangi’, p 33

140. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp 175–176

The Labour Government lost the 1990 election before the Bill was enacted. The new National Government reviewed the Bill and the Treaty clause was amended for the final time. Reference to the Crown was removed from the clause but the words 'take into account' were retained. The final version stated that all those exercising functions and powers under the Act must 'take into account the principles of the Treaty of Waitangi'. As we discussed above, this wording put the Treaty at the bottom of the hierarchy of matters that RMA decision makers must consider.

#### **2.4.2.2 Waitangi Tribunal findings about the Treaty clause**

During the period covered in this chapter, the Tribunal repeatedly found the RMA and its Treaty clause in breach of Treaty principles. This focused on two key issues: the relative weakness of the Treaty clause; and the issue of whether the Crown had delegated its Treaty responsibilities effectively along with the other responsibilities it had delegated to local government.

In 1993, the Ngawha Tribunal was the first to make these findings. Its report on a claim in respect of a geothermal resource, the Ngawha hot springs and underlying geothermal field, found:

The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed. . . .

The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty.

The Tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty.<sup>141</sup>

The substance of the Ngawha Tribunal's conclusions – the unacceptable weakness of the Treaty clause and the Crown's delegation of Treaty responsibilities – were evident to many other Tribunal panels. These include the Te Arawa

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141. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 145, 146–147

Geothermal Tribunal,<sup>142</sup> the Te Whanganui-a-Orotu Tribunal,<sup>143</sup> the Ika Whenua Rivers Tribunal,<sup>144</sup> the Whanganui River Tribunal,<sup>145</sup> the Central North Island Tribunal,<sup>146</sup> the Te Tau Ihu Tribunal,<sup>147</sup> the Wairarapa Tribunal,<sup>148</sup> and the Tauranga Moana Tribunal.<sup>149</sup>

We note in particular the following statements of the *Whanganui River Report*:

We disagree with Crown submissions that section 8 of the Resource Management Act provides for recognition and implementation of the Crown's Treaty duties. It does not require those with responsibilities under the Act to give effect to Treaty principles but only to take them into account. This is less than an obligation to apply them. When ranked with the competing interests of others, this means that guaranteed Treaty rights may be diminished in the balancing exercise that the Act requires . . .

In this case, functions under the Resource Management Act are generally exercised not by the Crown but by bodies that the Crown has established. The point has been well made, however, in earlier Tribunal reports, from 1983, that the Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to so delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.<sup>150</sup>

In addition, we note two other points about section 8. A 2001 study showed that, for the first decade of its operation at least, it was mainly interpreted as a procedural requirement – that is, it required consultation. It was also interpreted as invoking the mitigation end of the avoid–remedy–mitigate spectrum (section 5(2)), resulting in consent conditions.<sup>151</sup> In 'rare cases', it could lead to refusal of consent.<sup>152</sup> A 2009 report for MFE identified an additional problem: section 8 was interpreted in terms of sections 6(e) and 7(a), with the result that the wider Treaty principles, including partnership and active protection, were not necessarily

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142. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Claims* (Wellington: GP Publications, 1993), p 34

143. Waitangi Tribunal, *Te Whanganui a Orotu 1995* (Wellington: GP Publications, 1997), 2nd ed, pp 207–208

144. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 141–142

145. Waitangi Tribunal, *The Whanganui River Report*, pp 330–332

146. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1457–1458, 1588–1589

147. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1225

148. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 3, p 1062

149. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, vol 2, p 591

150. Waitangi Tribunal, *Whanganui River Report*, pp 300–302

151. J Stephenson, 'Consultation is not enough – the principles of the Treaty in resource management', 2001 (Michael Belgrave, David Belgrave, Chris Anderson, Jonathon Procter, Erana Hokopaura Watkins, Grant Young, and Sharon Togher, 'Taihape District Inquiry: Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga', 2012 (doc D76), p 157

152. Belgrave et al, 'Taihape District Inquiry: Environmental Impacts' (doc D76), p 157



considered. This sometimes confined the interpretation of Treaty principles to a ‘narrow focus of the values expressed in the RMA environment.’<sup>153</sup>

So far, the Crown has declined to implement Tribunal recommendations that section 8 should be amended. Crown counsel did not refer to section 8 in their closing submissions.<sup>154</sup> Claimant counsel argued that more far-reaching amendment was required to part 2, the ‘engine room’ of the Act, by revising the fundamental purpose in section 5. He suggested that section 5(1) should have the following addition: ‘The purpose of this Act is to promote the sustainable management of natural and physical resources *in conformity with the principles of the Treaty*’. He then argued that section 8 should be amended to say: ‘In achieving the purpose in s5(1), all persons exercising functions and powers shall recognise and provide for tikanga Māori and Mātauranga Māori.’<sup>155</sup>

Māori appearing as witnesses before us expressed similar views. Haami Piripi, for example, stated that ‘the introduction of a Māori perspective, if properly operationalised, will go some way towards achieving a regulatory regime of international excellence.’<sup>156</sup> He clarified:

My view is that the RMA needs a complete overhaul. The principles and framework in the Act need to be based on Mātauranga Māori and on Tikanga Māori. It is my view, and the view of many of us Maori, that the shocking state of our freshwater is the direct result of the culturally, and morally destitute principles and framework contained in the Act.<sup>157</sup>

In our view, the reference to the Treaty principles in the Act should encompass all those principles and impose an obligation or duty upon RMA decision makers. An amendment to section 8 along those lines is required to make the RMA Treaty-compliant. We explain this point further in section 2.4.5.

### 2.4.3 National direction and monitoring

As discussed in section 2.3.4, the RMA came out of the Labour Government’s reforms in the late 1980s. Those reforms reconceptualised the functions of central government and the role of the State, as well as restructuring a number of government agencies. As we stated earlier, the NWASCA worked in conjunction with a number of other national bodies and the Water and Soil division of the Ministry of Works and Development. The National Authority, the Water and Soil division, and the Ministry itself were all swept away in the reforms. The authority and its officials had exercised a significant degree of control as well as leadership of

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153. Antoine Coffin and Matt Allott, ‘Exploration of Māori Participation in Freshwater Management’, report for Ministry for the Environment by Boffa Miskell Ltd, September 2009, p18; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p91

154. Crown counsel, closing submissions (paper 3.3.46)

155. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), pp 1–2; transcript 4.1.5, pp 25–30

156. Haami Piripi, answers to questions in writing, [August 2017](doc E5(b)), pp [5], [7]

157. Haami Piripi, answers to questions in writing, [August 2017](doc E5(b)), p [7]

freshwater management.<sup>158</sup> Treasury promoted a counter view that influenced not only the RMA itself but the National Government's reforms in the 1990s:

Treasury was of the view that the current planning system needed to be replaced with an environmental management framework. This framework would mean Government intervention would be restricted to establishing a legal framework within which private market participants could operate. This would mean includ[ing] a system to confer private property rights over scarce resources, and ensur[ing] environmental matters are considered as part of all major projects. Treasury also thought the framework needed to facilitate the monitoring of environmental quality, public scrutiny of all resource decision-making, and public access to environmental information.<sup>159</sup>

The RMA delegated the primary decision-making power to local authorities. The Local Government Amendment (No 2) Act 1989 turned catchment boards and regional water boards into regional councils with resource management functions. The regions were defined on the basis of major catchments. These reforms were made in anticipation of the RMA, which divided resource management authority between regional and territorial (city and district) councils.<sup>160</sup> Many of the functions previously carried out by the National Authority would now be devolved to the regions.<sup>161</sup> Fundamental principles included the idea that local decisions should be made locally, by those with the best knowledge of (and who were most invested in) the resources. There was no national body to replace the NWASCA, although the Crown retained the power to give national direction in policy and environmental standards as necessary.<sup>162</sup> The intention was for central government to 'retain only a monitoring role, via the new Ministry for the Environment.'<sup>163</sup>

The Wai 262 Tribunal found that 'the Crown's Treaty duties remain and must be fulfilled, and it must make its statutory delegates accountable for fulfilling them too.'<sup>164</sup> The auditor-general is required to monitor local government performance under the Local Government Act 2002, but 'the measure used is the letter of the law, not the standards of the Treaty.'<sup>165</sup> A 2009 study for the Ministry found that there were no tools for monitoring the effectiveness of RMA plans in respect of part 2 matters relating to Māori. Nor were there any tools for monitoring Māori participation in freshwater management. There was no reporting, for example, on

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158. Roche, *Land and Water*, pp 106–107, 143–168

159. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 142

160. Waitangi Tribunal, *Whanganui River Report*, p 310; Roche, *Land and Water*, p 169; McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp 156–158

161. Roche, *Land and Water*, p 169

162. Resource Management Act 1991, ss 43, 45

163. Roche, *Land and Water*, p 169

164. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 270

165. Waitangi Tribunal, *He Kahui Maunga*, vol 3, p 1242

cultural indicators or even on ‘iwi satisfaction.’<sup>166</sup> Counsel for interested parties argued that the Crown has ‘provided insufficient accountability to ensure that councils are consulting with hapū and acting in accordance with the principles of Te Tiriti.’<sup>167</sup>

The Petroleum Management Tribunal found in 2011:

The fundamental problem with the present resource management system is this: having delegated its Treaty responsibilities to local authorities, the Crown has failed to include the necessary audit and monitoring processes to measure Treaty compliance. As local authorities are not the Crown, the Tribunal has no jurisdiction to assess whether any of their acts or omissions are in breach of Treaty principles. The result is that a number of local authorities act as the Crown’s delegates in several areas of the resource management system – including in the (so far) geographically limited field of petroleum resource management – but they do so without any effective oversight as to Treaty compliance.<sup>168</sup>

The problem of lack of oversight has been combined with a failure to provide national direction. Under section 45 of the RMA, the Minister may provide direction to councils through a national policy statement (NPS). An NPS states ‘objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act’. Section 45(2) states that the Minister, in deciding whether an NPS is ‘desirable’, may have regard to a number of matters, including ‘anything which is significant in terms of section 8 (Treaty of Waitangi)’. In developing an NPS, the Minister must consult the public and iwi authorities (section 46A(4)), or hold a board of inquiry into the proposed NPS (sections 47–51). Alternatively, the Crown can issue regulations known as National Environmental Standards (NES). An NES can prescribe standards for several environmental matters, including contaminants and water quality, level, or flow (section 43(1)). Counsel for the Muaūpoko Tribal Authority submitted that an NES could, for example, ‘prevent consents being issued where iwi values might be breached.’<sup>169</sup>

A number of Tribunal reports have stressed the failure to give appropriate national direction. The Wai 262 Tribunal stated:

When the RMA was enacted, it was fully expected that the setting of national standards and policies would provide significant guidance to the regional and territorial authorities, and to other agencies overseeing management of natural and physical resources. . . .

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<sup>166</sup> Antoine Coffin and Matt Allott, ‘Exploration of Māori Participation in Freshwater Management’, report for Ministry for the Environment by Boffa Miskell Ltd, September 2009, pp 21, 23

<sup>167</sup> Counsel for interested parties (Wai 1857), submissions by way of reply, 22 March 2019 (paper 3.3-54), p 3

<sup>168</sup> Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 156

<sup>169</sup> Transcript 4.1.5, p 637

In the absence of meaningful national direction for most of the period since 1991, the Environment Court's decisions became more far-reaching than might have been contemplated, as no other entity was available to fill the guidance gap. But the Court's role was to deal with particular resource consent cases, not to set down policies and standards for general application. Invariably, local authorities were left to take what guidance they could from the Court, and fill in the gaps themselves.<sup>170</sup>

In 2008, the Central North Island Tribunal stated that the Crown could have used an NPS to address the 'full nature and extent of Māori rights and interests' in natural resources (in that case, geothermal resources).<sup>171</sup> Without such direction and guidance, councils 'struggle to understand what the nature and extent of the Māori customary and Treaty interests are'.<sup>172</sup> The Tribunal found:

In this circumstance, those rights may easily be eroded. The legislative scheme of the RMA is deficient without some guidance from the Crown through the development of a national policy statement recording the nature and extent of Maori rights. That is because the Act on its own does not accord Central North Island Maori sufficient protection to ensure that their customary rights and their Treaty interests are provided for.<sup>173</sup>

Also, the Wai 262 Tribunal recommended that the Crown should issue a national policy statement on Māori participation under the RMA, requiring regional councils to develop policies for the use of participation mechanisms. We discuss that further below.

During the period covered by this chapter, the Minister had not issued a national policy statement with regard to fresh water or natural resources more generally. A NPS for freshwater management was later introduced in 2011. By that point, 20 years had elapsed since the passage of the RMA and thousands of consents to take, use, and discharge to water had already been issued. The Crown was convinced of the necessity of a national policy statement for fresh water by 2004, but the intention was not – as the Central North Island Tribunal had proposed – to address Treaty (section 8) matters or Māori rights and interests.<sup>174</sup> We discuss this further in later chapters.

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170. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 260, 261

171. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1579

172. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1589

173. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1589

174. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options – a public discussion paper on the management of New Zealand's freshwater resources* (Wellington: Ministry for the Environment, 2004), pp9, 18; Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for the Future: A Supporting Document – a technical information paper outlining key outcomes for the sustainable management of New Zealand's freshwater* (Wellington: Ministry for the Environment, 2006), pp 9–12

#### 2.4.4 Balancing out of Māori interests

First, we note that there are other valid interests than those of Māori in environmental resource management. These include the interest of the environment itself, which is also paramount to those who exercise kaitiakitanga, as well as the interests of ‘those who wish to use or develop environmental resources, others who are affected by those uses, and the community as a whole.’<sup>175</sup> The Treaty created a place for two peoples in this nation, and both were supposed to prosper from the benefits brought by colonisation. The Tribunal’s many reports on historical claims have shown, however, that this initial promise of the Treaty was not fulfilled.

Under the Town and Country Planning Act 1977, the ‘relationship of the Māori people and their culture and traditions with their ancestral land’ was one of the matters of national importance that had to be ‘recognised and provided for.’ This section of the Act was inserted by the select committee as a result of the representations of the NZMC.<sup>176</sup> But, in the period leading up to the RMA, the Māori interest had to be ‘overwhelming before it had any significant influence on planning decisions.’<sup>177</sup> When a similar provision was inserted in section 6 of the RMA, the question was: would this situation change in a material way, as required by the principles of the Treaty?

There are a number of relevant cases but *Watercare Services Ltd v Minhinnick* is often cited.<sup>178</sup> In considering the various matters in sections 6–8, an RMA decision maker (which at the ultimate level is the courts) must

weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues . . . In the end a balanced judgment has to be made.<sup>179</sup>

In the absence of national guidance and direction after 1991, councils were left to balance part 2 matters in their decisions with the occasional guidance of the Environment Court or High Court.<sup>180</sup> RMA decision makers have to fulfil the fundamental purpose of the Act (section 5). In doing so they have to recognise and provide for seven matters of national importance (section 6). There is a lesser requirement – but still important – to have particular regard to 11 other matters (section 7). Finally, they must ‘take into account’ the principles of the Treaty (which has the least weight in the hierarchy of matters to be considered). The

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175. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 270

176. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 29

177. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 249

178. *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA)

179. *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 305 (Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 159)

180. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 157–162

result has been a balancing of interests in which the Māori interest has too often been 'balanced out' or given minimal weight.<sup>181</sup>

David Alexander, a planner with decades of experience in researching Treaty claims, gave evidence in our inquiry that this result has occurred generally throughout New Zealand. Discussing section 6(e) and its reference to taonga, he told us:

The placement in section 6, or the manner in which 'taonga' recognition fits within the purpose and principles (Part 2) of the RMA, means that taonga status is just one of a lengthy list of statutorily-relevant matters that regulators have to consider. Experience around the country is that this tends to result in the combined weight of the other matters overwhelming the taonga provision, or producing decisions that only partially safeguard taonga.<sup>182</sup>

The evidence of tangata whenua agreed with this conclusion. Sir Edward Taihākurei Durie and the other authors of the custom law report stated:

As a result of these provisions [sections 5–8], when a local council draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua's customary law as it relates to kaitiakitanga for example. However, these interests do not appear to be advancing the interests of Māori. As the Waitangi Tribunal has said many times, iwi and hapū feel sidelined by the RMA consent process. Part of the challenge lies with the weak statutory directions to 'take into account' the principles of the Treaty and the fact that the Māori interests are one of several other competing interests including the overall commitment to sustainable development.<sup>183</sup>

Professor Ruru discussed the appeal stage of RMA decision-making in a 2013 article. She argued that, although part 2 of the Act provides a 'legal basis for Māori interests to be considered', this base has in fact 'done little to significantly protect Māori interests'. In 20 cases since 1991, where Māori had appealed a council's decision in respect of water, the court had received evidence about the cultural importance of the water, its mauri (life force), and its fisheries. In most of these cases, Māori have 'lost – sometimes outright, sometimes partially'. Much depends on what the court (or other RMA decision makers) understand as mitigating an

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181. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1408, 1410, 1673; Waitangi Tribunal, *Whanganui River Report*, p 330; Waitangi Tribunal, *Te Kahui Maunga*, vol 3, pp 1149–1150, 1231, 1241–1243; Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 161–162

182. David Alexander, 'Lake Waikaremoana: A Case Study of its Waters', September 2016 (doc D29), pp 61–63

183. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 69

offence to Māori values. In one case, involving harm to the mauri of a river by piping its water to another catchment, the consent was granted and the mitigation was a consultation group to monitor its exercise.<sup>184</sup> Professor Ruru advised that she has done more research since 2013 (not yet published) and the same trend has continued because ‘there is no explicit, real embedding in or recognition of Māori law’, of tikanga, mana, and rangatiratanga, in the Act.<sup>185</sup>

David Alexander also concluded that the RMA tends to result in some form of ‘mitigation’ where Māori values and the environment are concerned, more often than attempts to remedy or avoid: ‘The law provides for Māori cultural values to be considered whenever a resource consent is applied for, though it also makes it relatively easy to come up with a solution that mitigates/reduces rather than remedies/removes the cultural offence.’<sup>186</sup>

According to Professor Ruru, the recognition of Māori proprietary rights could bring about a ‘step change’ in RMA planning and consent processes. As owners of freshwater bodies, Māori would cease to be ‘stakeholders’ and their views as kaitiaki could no longer be balanced out. Instead, recognition of their proprietary rights would disrupt the ‘current cultural bias in decision-making that consistently fails to find in favour of hapū and their concerns for the health and wellbeing of water bodies.’<sup>187</sup> Alternatively, Professor Ruru suggested that section 6(g) could be amended to include customary rights in freshwater bodies as ‘protected customary rights’, although she doubted that this would achieve the same degree of change:

The recognition of these protected customary rights would be a matter of national importance to be weighed alongside other similar matters of national importance (as is similarly done with protected customary rights in the foreshore and seabed). Arguably, Māori already have their relationship with water recognised as a matter of national importance (see section 6(e) of the RMA). Practically, those hapū holding customary rights in specific water bodies would fall within the category of ‘affected persons’ when resource consents are lodged to do something with their water. The benefits of ‘customary rights’ would be possibly negligible to Māori in the RMA processes.<sup>188</sup>

The claimants also believe that scientific evidence often trumps their values and their intimate knowledge of taonga resources, especially if they cannot afford to

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184. Jacinta Ruru, ‘Indigenous Restitution in settling Water claims: the developing cultural and commercial redress opportunities in Aotearoa, New Zealand’, 2013 (Durie, Joseph, Toki, and Erueti, papers in support of ‘Ngā Wai o te Māori’ (doc E13(a)), pp [3982]–[3985])

185. Transcript 4.1.4, pp 36–37

186. David Alexander, ‘Rangitikei River and its Tributaries Historical Report’, 2015 (doc D46), p 607

187. Jacinta Ruru, answers to questions in writing, [September 2018](paper 3.2.275(a)), p [1]

188. Jacinta Ruru, answers to questions in writing, [September 2018](paper 3.2.275(a)), p [1]

hire their own experts or even be represented by counsel.<sup>189</sup> Paul Hamer's exacting study of the consenting process for Porotī Springs has demonstrated how Māori interests are sidelined or balanced out; partly by a disparity in resources between tangata whenua and consent applicants, enabling the latter to hire lawyers and technical experts, and partly by a lack of Māori decision makers at any stage of that particular RMA process.<sup>190</sup>

The Petroleum Management Tribunal suggested that economic imperatives have been a key cause of Māori interests being balanced away. That Tribunal is one of a number that found that the balancing of interests under part 2 was failing Māori. When 'key decisions must be made by weighing Māori interests against others' under the RMA, it said, 'the result is that Māori interests are minimised and systematically prejudiced'.<sup>191</sup> The Petroleum Tribunal returned to the key issue of Crown direction on Māori rights and interests to fill the gap between the broadly drawn matters to be considered under part 2 and the knowledge and understanding of RMA decision makers.<sup>192</sup> Importantly, the Petroleum Management Tribunal identified a trend that, in a clash between Māori values and economic imperatives, the Māori values are often 'far outweighed'.<sup>193</sup>

This accorded with the evidence and submissions in our inquiry.<sup>194</sup> Gregory Carlyon, one of the claimants' RMA experts, told the Tribunal:

The legislative intent of the Act, advanced by the Hon. Simon Upton, Minister for the Environment, was for non-negotiable bottom lines to be met at all times. This would allow for communities to provide for their wellbeing, while meeting the requirements of section 5(2). In my view, decision makers at the local government level and, for the most part, supported at the judicial level by the Environment Court have taken an approach focused on a 'broad overall judgement' or 'balancing', when interpreting the definition of 'sustainable management'. This general approach has served to elevate economic growth and development as the most important consideration in decision-making, at the expense of environmental protection and Maori interests.<sup>195</sup>

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189. Meryl Taimania Carter, brief of evidence, 31 August 2016 (doc D19), pp 3–7, 10–13; Cletus Maanu Paul, brief of evidence (doc E1), pp 13–14. See also M Laurenson, 'Cultural Effects Assessment Report', 2000 (Vivienne Taueki, papers in support of brief of evidence (doc D51(a)), pp 3–4); Antoine Coffin and Matt Allott, 'Exploration of Māori Participation in Freshwater Management', report for Ministry for the Environment by Boffa Miskell Ltd, September 2009, p 17; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 91.

190. See Paul Hamer, 'Porotī Springs and the Resource Management Act, 1991–2015' (doc D3), chapters 3–8; Paul Hamer, summary of 'Porotī Springs and the Resource Management Act, 1991–2015', September 2016 (doc D3(a)), pp 6–17

191. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 162

192. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 161–162

193. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 162

194. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 57–60

195. Gregory Carlyon, brief of evidence, 10 February 2017 (doc E18), p [7]



David Potter, whose evidence was for Tangihia hapū, expressed a common sense of frustration on this point:

Having made many submissions over many years on resource consent applications, and having given cultural based evidence in four Environment Court appeals, all to no avail, it is painfully evident that the provisions of the RMA which require that Māori values must be given consideration, have absolutely no teeth.

In my experience the findings of the Consent Authorities and of the Environment Court, heavily reflect the weight given to commercial interests in water, over that of Māori and the environment.<sup>196</sup>

This does not mean that Māori are opposed to economic development per se.<sup>197</sup> Some within the Porotī Springs hapū, for example, wish to obtain an economic benefit from their springs. Nonetheless, in the claimants' view, development must be 'sustainable' in terms of Māori tikanga. The claimants' custom law team gave evidence about how Māori see sustainability. Their views echoed those of many witnesses in our inquiry.<sup>198</sup> They said:

Embedded in Tikanga Māori is a concept which transcends the right to use. It is the responsibility to so use as to maintain to the fullest practicable extent, pure, freshwater regimes. It is a concept which requires a balancing of the benefits of ownership with the responsibilities of ownership. It is a responsibility which is owed to one's forebears and one's descendants. The concept, based upon the natural world as a divine inheritance, questions our current understanding of what constitutes sustainable development and points to the need for greater constraint in the interests of the survival of the natural world and human survival.<sup>199</sup>

This imbalance in RMA decision-making, where economic imperatives have tended to trump Māori values, was illustrated by some of the evidence in our inquiry.<sup>200</sup> No one could easily deny, for example, that a crisis facing our freshwater resources has been developing for decades. The quality of water in their rivers and lakes has been a constant source of concern for the kaitiaki who appeared before us. But councils themselves have also begun to express concern about the dominance of economic interests in freshwater management.

According to a 2006 report for MFE, most councils identified nutrient discharges as 'the biggest freshwater management issue facing their region'. These councils admitted that 'the opportunity to avoid adverse effects has passed or is

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196. David Potter, answers to questions in writing, [August 2017](doc E20(c)), p [1]

197. Mark Chrisp, brief of evidence, [April 2017](doc F1), p 16

198. See, for example, Keith Katipa, brief of evidence, 27 September 2016 (doc D81), p 5.

199. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 31

200. See, for example, Carlyon, brief of evidence (doc E18), pp [29]–[31]

overruled by economic development drivers' (emphasis added).<sup>201</sup> Councils found themselves ill-equipped to deal with the scale of conflict between economic and environmental imperatives. The report stated: 'Several regions indicated that a "whole of government" approach is required to enable the conflicting issues (at this scale) of economic development and natural resource management to be considered in a wider national context.'<sup>202</sup> These concerns drove the Labour Government's Sustainable Water Programme of Action, which we discuss later in the chapter and in chapter 5.

Crown counsels' response to the claim about the balancing of interests was mainly based on the *King Salmon* case of 2014, *Environmental Defence Society v New Zealand King Salmon Ltd*,<sup>203</sup> and its projected effect on the situation. The *King Salmon* case concerned a board of inquiry's decision on an application to change the Marlborough Sounds Resource Management Plan. The application was to change salmon farming from a prohibited to a discretionary activity in eight sites. The applicant, the New Zealand King Salmon Company, also sought resource consents to establish farms in those places and at one other. The board granted the application and resource consents in four of the eight locations, and the High Court dismissed an appeal against that decision. The Supreme Court, however, upheld an appeal against the board's decision in respect of one site.<sup>204</sup>

In respect of this case, Crown counsel submitted:

The claimants allege that the balancing provisions of the RMA, in particular the requirement to balance environmental interests with social and economic wellbeing, prejudice Māori. However, the recognition of Māori values as matters of national importance is significant and not merely part of a general balancing exercise. Indeed, in *King Salmon*, the Supreme Court rejected the 'overall judgment' approach to Part 2 that weighed development interests against environmental protection. Instead, the respective parts of s 5 are 'an integrated whole' that has environmental protection at its core. The Supreme Court underscored that the Māori values expressed in ss 6, 7 and 8 are part of the integrated whole of Part 2.

This clarified approach to Part 2 should give renewed priority to the protections for Māori interests, and limit the risk of the 'balancing out' that is said to be occurring. These core values are not to be balanced out, but rather given priority and protection through policy making and planning.<sup>205</sup>

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201. Hill Young Cooper Ltd, *Improving the Management of Freshwater Resources: Issues and Opportunities*, report prepared for Ministry for the Environment, August 2006, pp 8–9

202. Hill Young Cooper Ltd, *Improving the Management of Freshwater Resources*, p 9

203. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38

204. We note that there was a second, related decision which we do not need to discuss here: *Sustain our Sounds Incorporated v NZ King Salmon Co Ltd* [2014] NZSC 40.

205. Crown counsel, closing submissions (paper 3.3.46), p 14

The Crown pointed to Gregory Carlyon's evidence that *King Salmon* could potentially assist Māori.<sup>206</sup> Mr Carlyon stated in his brief of evidence:

The Supreme Court directed decision makers to read the respective parts of section 5 'as an integrated whole'. Further, the Supreme Court found 'environmental protection is a core element of sustainable management'.

For tangata whenua, my observation is that sections 6, 7 and 8 matters have been consistently 'balanced' in favour of matters of greater priority to decision makers. It is my view that the *King Salmon* decision, which gave renewed priority to protection and the instruments providing for it, developed principles that could be equally applied to tangata whenua rights and interests. To date this has not been the case, but there are a number of cases before the courts testing these ideas at present.<sup>207</sup>

The Crown's witness on RMA matters, Mark Chrisp, responded to Mr Carlyon's evidence on the balancing out of Māori interests. Mr Chrisp argued that the solution is to significantly increase the 'level of participation by Māori in resource management decision making', for example by co-management arrangements. He suggested that this is already happening, and it should 'provide a much greater ability for Māori to exercise kaitiakitanga in relation to resources within their rohe'.<sup>208</sup> Mr Chrisp pointed to the Waikato River Treaty settlement legislation and the development of a 'Vision and Strategy' for the river. He told us that this was an example of 'Māori rights and interests being at the forefront of a planning process intended to address the water quality of the Waikato River, along with a range of other objectives'.<sup>209</sup> It did not take an amendment of the RMA, he said, to achieve this outcome.<sup>210</sup>

We agree with Mr Chrisp that greater Māori involvement in decision-making should increase the weight of Māori values in resource management, at least in theory. We discuss the issue of Māori participation in freshwater management in the next section, where we test the extent of Māori involvement in decision-making and its effectiveness. We simply note here that it does not assist where Māori are not significant decision makers, which in our view is still the case for the majority of regions. Further, claimant counsel submitted that a greater role for Māori in decision-making does not necessarily assist at the Environment Court or High Court level, where judicial officers will balance matters in freshwater management as before.<sup>211</sup> As noted, the Crown put significant weight on *King Salmon*, and on a recent suggestion by Deputy Chief Judge Fox that the Environment Court

206. Crown counsel, closing submissions (paper 3.3.46), p 14

207. Carlyon, brief of evidence (doc E18), p [8]. See also transcript 4.1.3, p 271

208. Mark Bulpitt Chrisp, brief of evidence, [April 2017](doc F1), pp 10–11

209. Chrisp, brief of evidence (doc F1), p 11

210. The Resource Management Act was in fact amended by the settlement legislation to provide that the vision and strategy prevails over any inconsistent provision in a national policy statement: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s12(1).

211. Transcript 4.1.5, pp 97–98

is becoming more ‘sophisticated’ in its balancing of Māori interests. Māori Land Court judges sometimes sit as alternate judges on Environment Court cases.<sup>212</sup> We are encouraged by these recent developments but we also agree with the Crown’s submission that ‘the appeal stage comes late, is expensive and complex, and that it is far preferable to have good decisions in the first instance.’<sup>213</sup>

On the significance of *King Salmon*, we have read and considered that case, which was provided to us by the Crown, along with some other cases which the Crown said showed the influence of iwi management plans in RMA decision-making. We deal with iwi management plans later. Our view of *King Salmon* is that it concerned a plan change request and therefore is mostly concerned with the requirement for regional councils to ‘give effect to’ a national policy statement (in this case, the New Zealand Coastal Policy Statement (NZCPS)). This is obviously relevant for later chapters of our report, where we address the National Policy Statement for Freshwater Management (NPS-FM) that was finally issued in 2011. More broadly, *King Salmon* says that environmental protection must not be balanced out in RMA decision-making, which we think is a timely message.

In terms of part 2 of the Act, the court’s discussion focused on the explanation of sustainable management in section 5(2), and the question of whether the purpose of the RMA requires an ‘environmental bottom line approach’ or an ‘overall judgment approach’. The court found that the components of section 5 are to be read as an integrated whole, and stressed that ‘sustainable management of natural and physical resources involves protection of the environment as well as its use and development’. Environmental protection is a ‘core element of sustainable management.’<sup>214</sup> The court’s view was that the wording of the statute ‘suggests that the RMA contemplates what might be described as “environmental bottom lines”’.<sup>215</sup>

Most of the judgment, however, is focused on the role of the NZCPS in the board of inquiry’s decision-making. As the court saw it, the board took the view that the NZCPS is ‘essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations.’<sup>216</sup> Also, the court noted that the board did not determine the application (for a plan change) so as to give effect to the NZCPS but rather by going back to part 2 of the RMA. The court considered this the wrong approach because the NZCPS states policies ‘in order to achieve the RMA’s purpose’ and therefore the national policy statement ‘gives substance to Part 2’s provisions in relation to the coastal environment’. By giving effect to the

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212. Crown counsel, closing submissions (paper 3.3.46), pp17–18; Deputy Chief Judge C Fox and C Bretton, ‘Māori Participation, Rights and Interests’, [2016] (Crown counsel, bundle of cross-examination documents for Gregory Carlyon (doc E18(b)), p10)

213. Crown counsel, closing submissions (paper 3.3.46), p17

214. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 616–618, 622–623

215. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 626

216. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 637

NZCPS, a council is ‘necessarily acting “in accordance with” Part 2.’<sup>217</sup> The court warned of a risk that part 2 could be used to trump the NZCPS. One caveat to the court’s position was the significance of section 8. The court considered that section 8 would still raise ‘procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS.’<sup>218</sup> Another caveat was that if the meaning of the NZCPS was uncertain, reference to part 2 might be required.<sup>219</sup>

It was in this context that the court found that an ‘overall judgment’ approach of considering a number of factors in part 2 could not be used instead of applying the relevant policies of the NZCPS (in this case, relating to the inappropriate development of an area of ‘outstanding natural character and outstanding natural landscape’). Rather, the court’s view was that the statutory requirements provide for the policies in the NZCPS, where relevant, to be binding on decision makers. They are not simply a relevant consideration.<sup>220</sup> The Supreme Court noted: ‘Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.’<sup>221</sup> Reflecting the ‘open-textured’ nature of part 2, Parliament had provided for a hierarchy of planning documents to ‘flesh out’ the purpose and principles in part 2. ‘It is these documents,’ the court found, that ‘provide the basis for decision-making, even though Part 2 remains relevant.’ And though part 2 may be ‘open textured,’ those documents need not be.<sup>222</sup> In the court’s view, some of the policies in the NZCPS did provide ‘something in the nature of a bottom line.’ This was consistent with the definition of sustainable development in section 5(2), which ‘contemplates protection as well as use and development.’<sup>223</sup>

We take two key points from this decision. The first is that the Crown and other commentators may be right, and *King Salmon* may result in judgments which focus on an environmental bottom line in their interpretation of section 5. That will certainly be a positive development for many of the groups who appeared in our inquiry. We think that greater environmental protection is more in line with the meaning that Māori would give to ‘sustainable management,’<sup>224</sup> although

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217. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 637–638

218. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 638

219. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 638–639

220. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 641–657

221. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 651

222. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 657

223. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at 651

224. See Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 31; counsel for interested parties (Naden et al), submissions by way of reply (paper 3.3.56), pp 38–41

Māori do not protect resources by looking for bottom lines. The custom law team observed:

[T]he value system on which Tikanga Māori is based, is aspirational, setting desirable standards to be achieved. Thus, where our state law sets bottom lines, or minimum standards of conduct below which a penalty may be imposed, Tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward.<sup>225</sup>

The second point is the court's emphasis on a national policy statement as 'fleshing out' part 2 matters, and the imperative that councils must give effect to it, even to the extent of not considering part 2 unless the national policy statement is unclear or section 8 requires it. In our view, this places great weight on the question of how well the NPS-FM expresses and provides for Māori rights and interests, especially if decision makers might not go beyond the NPS-FM to consider part 2 of the Act. We discuss this issue further in chapters 3 and 4. Here, we simply observe that in *Environmental Defence Society v King Salmon*, the consents could not be granted without first changing the coastal regional plan. In other circumstances, section 104 requires decision makers to consider a *number of matters* when deciding whether or not to grant a consent and on what conditions. That has not changed.

Finally, we note that this decision was made at a time when the Crown had decided to amend part 2 of the Act to end what it called 'the predominance of environmental matters in section 6, and the hierarchy between sections 6 and 7'. The Crown's view at the time was that the hierarchy of matters in part 2 'may result in an under-weighting of the positive effects (or net benefits) of certain economic and social activities.'<sup>226</sup> It considered that its proposal to amalgamate sections 6 and 7, so as to form a single list of matters that decision makers should consider, was 'consistent with the current purpose of the Act and the overall broad judgement approach taken by the courts.'<sup>227</sup> As we discuss in the next chapter, the Crown's proposed amendments did not occur (due mainly to the refusal of the Māori Party to support them in 2013–15).

To date, we have seen no compelling evidence to dispute the trend that Māori interests were often 'balanced out' in RMA decision-making in relation to freshwater issues. Professor Ruru, who has made a close study of consent decisions over many years, was firmly of the view that this trend still exists.

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225. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 8

226. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, February 2013), p 35; New Zealand Government, *Resource Management: Summary of Reform Proposals 2013* (Wellington: Ministry for the Environment, August 2013)

227. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 38

We note the evidence that the Environment Court is now more ‘sophisticated’ in its treatment of Māori interests,<sup>228</sup> but much still depends on whether the court finds that mitigation is possible (and how the court defines the mitigation). Horiana Irwin-Easthope, in a 2017 article relied on by the Crown, stated that the ‘place of tikanga Māori in the Environment Court, and the Environment Court’s assessment, has come *some way* since the RMA’s inception’ (emphasis added).<sup>229</sup> Importantly, the Crown – in relying on this article in its submissions – misquoted this as saying ‘has come *a long way* since the RMA’s inception (emphasis added).’<sup>230</sup> Ms Irwin-Easthope noted that the court now ‘has more experience considering tikanga’. Also, ‘practitioners are more accustomed to presenting arguments that involve, or are based on tikanga’. But, although she considered that there was an opportunity for transformative change to come, Ms Irwin-Easthope concluded that ‘*there is still a long way to go*’ (emphasis added).<sup>231</sup>

In any case, most RMA decisions do not reach the Environment Court, and such litigation is still beyond the means of many Māori groups. As at 2009, before the multiple Treaty settlements of the last decade, even fewer groups could afford to engage technical experts or lawyers – or to run the risk of an award of costs against them in either the Environment Court or the High Court.<sup>232</sup> The inadequate resourcing of Māori to participate in RMA processes has been noted in many Crown documents over the past 15 years, and has been admitted by the Crown in this inquiry.<sup>233</sup>

This brings us to the issue of Māori participation in freshwater management and decision-making, and the suggestion of the Crown’s expert witness, Mr Chrisp, that such participation is a remedy for the balancing out of Māori interests when RMA decisions are made.<sup>234</sup> We consider the issue of Māori participation in section 2.5 below.

#### 2.4.5 Our conclusions and findings

We agree with the findings of many earlier Tribunal reports in respect of part 2 of the RMA, and in respect of how it has been interpreted and applied in the absence of national direction or legislative amendment. The balancing exercise which has been widely applied under the RMA has allowed Māori interests to be balanced out altogether in many freshwater management decisions. We accept the evidence

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228. Deputy Chief Judge C Fox and C Bretton, ‘Māori Participation, Rights and Interests’, [2016] (Crown counsel, bundle of cross-examination documents for Gregory Carlyon (doc E18(b)), p 10)

229. Horiana Irwin-Easthope, ‘The Increasing and Enduring Importance of Tikanga Māori and Cultural Evidence in the Environment Court’, 2017, p 110 (Crown counsel, papers in support of closing submissions (paper 3.3.46(g)), p [10])

230. Crown counsel, closing submissions (paper 3.3.46), p 18

231. Horiana Irwin-Easthope, ‘The Increasing and Enduring Importance of Tikanga Māori and Cultural Evidence in the Environment Court’, p 110 (Crown counsel, papers in support of closing submissions (paper 3.3.46(g)), p [10])

232. See, for example, Arapeta Hamilton, brief of evidence, 9 September 2016 (doc D43), p 9

233. Crown counsel, closing submissions (paper 3.3.46), pp 77–78

234. Chrisp, brief of evidence (doc F1), pp 10–11

of Professor Ruru on that point. At the same time, we agree with the Crown that sections 6–8 introduced tikanga requirements in environmental management. The legislation prior to that was mono-cultural and did not recognise Māori values or interests at all (see section 2.3 above). We also note the Crown's submission that the Environment Court has become more sophisticated in its treatment of Māori interests, but litigation remains a costly exercise, time and expertise-intensive, which remains beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori.

We agree with the claimants that part 2 of the RMA, the 'engine room' that contains its purpose and principles, is not fully consistent with the principles of the Treaty. Section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty.

We also agree with the finding of the Petroleum Management Tribunal (quoted above) that the Crown's delegation of Treaty responsibilities in resource management must be done in a manner that ensures Treaty compliance.<sup>235</sup> In our view, section 8 should be amended to state that the duties imposed on the Crown in terms of Treaty principles are imposed on all persons who exercise powers and functions under the Act. Such an amendment would ensure that Māori interests are protected (not balanced out), that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that part 2 of the RMA is Treaty compliant. We will be making a recommendation to this effect in chapter 7.

But we also agree with the Petroleum Management Tribunal that amending section 8 will not, by itself, ensure that RMA decision-making is carried out consistently with the Treaty.<sup>236</sup> The role of Māori as decision makers needs to be enhanced to meet the Treaty guarantee of tino rangatiratanga, as we discuss in the next section of this chapter.

## **2.5 MĀORI PARTICIPATION IN FRESHWATER MANAGEMENT AND DECISION-MAKING**

### **2.5.1 Introduction**

Māori want to be decision makers in the management of their freshwater resources. We heard that message constantly at our hearings. Māori told us that they do not want to be submitters and appellants, they want to be at the table, to be decision makers for the resources over which they exercise tino rangatiratanga and kaitiakitanga.

Claimant counsel submitted that co-management is the minimum Treaty requirement in freshwater management.<sup>237</sup> That was a common theme in the evidence we heard, and some told us that they want to be the sole decision makers for their taonga. Matthew Sword, for example, said in respect of Lake Horowhenua:

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235. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 156

236. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 169

237. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21



‘Decisions about uses of the lake should be made solely by Muaūpoko, with public use being a necessary consideration, but secondary where core Muaūpoko interests are affected.’<sup>238</sup> The calls for sole control arose in part from the Treaty guarantee of tino rangatiratanga, the rights of ownership, and the great distress of kaitiaki who say that their taonga have been mismanaged and degraded under decades of Crown or council management.<sup>239</sup>

The Wai 262 Tribunal considered that structural change in this area – to give kaitiaki authority in the management of resources – would be the crucial factor in remedying the deficiencies of the RMA in Treaty terms. The Tribunal found that, depending on the nature of the kaitiaki relationship with the taonga or resource, decision-making should involve kaitiaki control of the taonga/resource, co-management, or effective influence in the management of the resource. The Tribunal also found that there are already mechanisms in the RMA that are capable of delivering all three levels of authority. But first those mechanisms must be made truly effective by legislative reform, national direction, the improvement of relationships, and the investment of sufficient resources to enhance capacity and capability.<sup>240</sup>

These RMA mechanisms include:

- ▶ a transfer of powers and functions from councils to iwi authorities;
  - ▶ the ability to become a Heritage Protection Authority;
  - ▶ joint management agreements between councils and iwi or a body representing hapū;
  - ▶ iwi management plans; and
  - ▶ funding to enhance capacity, capability, and participation in RMA processes.
- We deal with each of these in turn.

## 2.5.2 Mechanisms for kaitiaki control of natural resources

### 2.5.2.1 Section 33 transfers

Kaitiaki control of natural resources was envisaged in the RMA from the beginning. The framers of the Act anticipated occasions where local authorities could relinquish their role and powers to iwi authorities, and provided for this in section 33.<sup>241</sup> This provision in the RMA was supposed to work in tandem with the Runanga Iwi Act 1990, which enabled the devolution of Crown functions to iwi authorities.<sup>242</sup> It is not possible to argue today, therefore, that Māori control of natural resources was inconceivable or was not intended by the legislation in 1991. Section 33 of the RMA empowered councils to transfer their ‘functions, powers or duties’ to another public authority (which included iwi authorities), except

238. Matthew Sword, brief of evidence in reply, 2 June 2017 (doc G2), p 7

239. See, for example, Ian Mitchell, brief of evidence, 23 September 2016 (doc D62), pp 39, 47.

240. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, chapter 3

241. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, 3 vols (Wellington: Legislation Direct, 2011), Te Taumata Tuarua, vol 1, pp 273–274

242. Paul Hamer, ‘Porotū Springs and the Resource Management Act, 1991–2015’, April 2016 (doc D3), pp 22, 24

for the power to change or approve plans.<sup>243</sup> This was very wide ranging and was deliberately conceived of as a *transfer*, not a *delegation* (delegations were covered in section 34).<sup>244</sup> Since 1991, this section has been used to transfer powers from one local authority to another,<sup>245</sup> but it has never been used to transfer power to an iwi organisation. This means that for the 28 years that the RMA has been in force, section 33 has been a dead letter in terms of a mechanism to recognise and provide for tino rangatiratanga and kaitiaki control of natural resources.

The key question for this section is: why has section 33 never been used in the way intended by Parliament when it was enacted in 1991, and why has the Crown not acted to remove any barriers to section 33 transfers?

First, the use of the term ‘iwi authorities’ as ‘public authorities’ reflected the Runanga Iwi Act 1990, which envisaged the incorporation of iwi rūnanga which would be recognised by the Crown and local authorities as the ‘authorised voice of the iwi’.<sup>246</sup> According to the evidence of Paul Hamer, the repeal of the Runanga Iwi Act in 1991 removed the essential context in which section 33 was to be applied. Councils were left with the task of deciding whether a body (or which body) represented an iwi. This made it more difficult at first for councils to transfer authority to iwi, although the existence of representative rūnanga, Māori trusts, and other organisations has more recently been reinforced by Treaty settlements and the creation of mandated PSGES.<sup>247</sup>

Secondly, it is important to note that councils have the sole initiative and decision-making power. The RMA provides no incentives for councils to make a transfer, and there is no compulsion for councils to consider using section 33. Further, ‘the RMA does not allow for kaitiaki to challenge a local authority which decides not to utilise this provision.’<sup>248</sup> This situation would not change without some form of compulsion or incentives, and claimant Maanu Paul argued that the Crown’s new Mana Whakahono a Rohe mechanism will make little difference in that respect.<sup>249</sup>

In 1998, the Parliamentary Commissioner for the Environment reported that councils had been ‘extremely reluctant’ to contemplate the use of section 33, and

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243. This exception was removed in 2003, when the only exception became the ability to transfer the power of deciding whether a transfer should occur: Resource Management Amendment Act 2003, s12.

244. Resource Management Act 1991 (as enacted in 1991), ss 33–34

245. Gregory Carlyon, brief of evidence (doc E18), p [34]; Ministry for the Environment, *Section 33: Transfer of functions, powers or duties – a stocktake of council practice* (Wellington: Ministry for the Environment, 2015), pp 9–11

246. Runanga Iwi Act 1990, s77

247. Hamer, ‘Porotī Springs’ (doc D3), p 24; Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata whenua participation in environmental management* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1998), p 11; Elizabeth Clark, ‘Section 33 of the Resource Management Act’ in *Local Government and the Treaty of Waitangi*, ed Janine Hayward (Oxford University Press: Melbourne, 2003), p 49

248. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 282

249. Maanu Paul, speaking notes, 27 June 2017 (doc E1(b)), p [16]

were perceived as ‘fearful and distrustful’ of transferring power to iwi.<sup>250</sup> Tangata whenua contrasted this situation with the willingness of councils to devolve activities and responsibilities to almost anyone other than Māori.<sup>251</sup> The commissioner observed:

Tangata whenua are impatient with councils’ timidity in this area, and keen to demonstrate their practical abilities and commitment. Tangata whenua believe that there would be constructive opportunities, with a more direct tangata whenua role, to determine more culturally sensitive management approaches to avoid or mitigate some of the negative environmental impacts of current methods.<sup>252</sup>

Further investigation in 2000 showed that troubled relationships and a lack of trust between Māori and councils had inhibited section 33 transfers.<sup>253</sup> Gregory Carlyon, an expert on RMA decision-making, suggested that there is an underlying problem: councils are unwilling to share power, and are concerned about what Māori might do with that power. In his experience, councils have an institutional focus on development and economic growth, and they are worried that Māori would not share that focus when making decisions about the environment.<sup>254</sup> The Crown submitted that new arrangements for Māori–council relationships, inserted into the RMA in 2017, may improve the situation and provide a new pathway to section 33 transfers.<sup>255</sup> We discuss this very recent reform in chapter 4.

Thirdly, the provisions of section 33 itself have posed an almost insuperable barrier to transfers of authority to iwi. The Wai 262 Tribunal found that the requirements of section 33 are so ‘bureaucratic and conditional as to discourage its use’, and actually ‘impose unnecessary barriers to partnership or transfer of power.’<sup>256</sup> Section 33(4) sets out a number of conditions that have to be met before a transfer can occur. The council has to serve notice on the Minister and consult the community, allowing for public submissions before making a decision. The consultation process provides for submitters to be heard.<sup>257</sup> As the Wai 262 Tribunal has found, this particular consultation process is at the higher end. It is ‘designed for the most significant [council] decisions’, and may not be appropriate depending on the degree of power or the nature of the functions transferred.<sup>258</sup> The council also has to agree that a transfer would be ‘desirable’ on three grounds:

- ▶ the iwi authority represents ‘the appropriate community of interest relating to the exercise or performance of the function, power, or duty’;

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250. Hamer, ‘Porotī Springs’ (doc D3), p 24

251. Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, p 70

252. Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, p 71

253. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, p 50

254. Gregory Carlyon, brief of evidence (doc E18), p [35]

255. Crown counsel, closing submissions (paper 3.3.46), p 58

256. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 282

257. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 257–258

258. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 274, 282

- efficiency; and
- ‘technical or special capability or expertise’.

The council has to agree that a transfer to an iwi authority meets all three grounds before it can transfer any of its powers or functions.<sup>259</sup>

According to a 1998 study by the Ministry for the Environment, councils felt that they were unable to transfer powers or functions to iwi for a number of reasons, including a ‘lack of ability of iwi/hapū to meet the criteria in section 33.’<sup>260</sup> The ‘efficiency’ criterion has been interpreted as meaning that a transfer must be ‘cost-effective’. This in itself has been a major barrier. Also, most councils have taken the view that Māori authorities lacked either the technical expertise required by section 33(4), or the funds to contract that expertise. The question of whether a transfer of powers to iwi would also entail a transfer of the relevant funding has not been resolved.<sup>261</sup> According to Gregory Carlyon, the sharing of ‘existing resources within council’ would be needed. With such a sharing, he said, and the availability of the ‘very large consulting community supporting council decision making, the cost implications of a section 33 transfer are minimal.’<sup>262</sup> In terms of capacity and capability, this meant that the section 33 transferee would be able to buy in the necessary expertise. A 2008 workshop, however, showed that councils continued to identify capacity as a reason for not transferring functions or authority to iwi, a decade after the 1998 study.<sup>263</sup> Other local bodies, on the other hand, are assumed to have the capacity and skills necessary to receive a transfer.<sup>264</sup>

The Crown has been aware of these legislative barriers since at least the late 1990s,<sup>265</sup> and has remained aware of them throughout the current reform process.<sup>266</sup> Nonetheless, no amendments have been introduced to make section 33 transfers more practically assessible to iwi. In the early 2000s, the Crown decided not to amend section 33 but rather to rely on ‘promoting best practice among local government.’<sup>267</sup> There had still been no section 33 transfers to iwi by 2005, however, so the Crown decided to introduce a new mechanism altogether; a provision for co-management.<sup>268</sup> We discuss this new provision in section 2.5.3.

259. Resource Management Act 1991, s 33(4)(c)

260. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, p 48

261. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, pp 49–51

262. Carlyon, brief of evidence (doc E18), p [35]

263. Antoine Coffin and Matt Allott, ‘Exploration of Māori Participation in Freshwater Management’, report for Ministry for the Environment by Boffa Miskell Ltd, September 2009, p 13

264. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, p 48

265. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, pp 47–53; Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* (Wellington: Parliamentary Commissioner for the Environment, 1998), pp 70–71

266. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, February 2013), p 67; briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 1030–1031)

267. Elizabeth Clark, ‘Section 33 of the Resource Management Act’, p 53

268. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 259

Finally, we note that section 33 does have some significant flaws in terms of a mechanism for the exercise of tino rangatiratanga and kaitiaki control of natural resources. The Act stated that a local authority continued to be responsible for the exercise of any powers or functions which it transferred.<sup>269</sup> According to Dr Robert Joseph, this suggested that councils would 'keep a close eye' on the transferee to avoid potential litigation or costs.<sup>270</sup> At the same time, councils had the power to change or cancel the transfer at any time simply by giving notice to the transferee. This was a unilateral power and did not require the agreement of – or even discussion with – the transferee.<sup>271</sup> The combined effect of these provisions was significant as to the degree of control actually allowed to transferees, but the former provision was repealed in 2003.<sup>272</sup> The latter provision is still in force, however, and the Wai 262 Tribunal considered it to be a crucial flaw in need of amendment.<sup>273</sup>

### 2.5.2.2 *Wai 262 recommendations for section 33 transfers*

The Wai 262 Tribunal recommended that the statutory barriers to the use of section 33 should be replaced by incentives to use it, the special consultation process should not be automatic, and councils should not be allowed to terminate the transfer unilaterally. The Tribunal recommended that the RMA be amended to give effect to these changes. In addition, councils should be required to actively explore opportunities to make transfers to iwi, and should report regularly to the Parliamentary Commissioner for the Environment on this matter. The commissioner would then need to report to Parliament on the performance of councils in making (or not making) section 33 transfers.

Finally, the Tribunal recommended that the Crown issue a national policy statement on Māori participation. Councils would have to insert policies in their regional policy statements about the use of section 33 transfers, Joint Management Agreements, and consistent implementation of iwi management plans.<sup>274</sup>

None of these recommendations have been carried out.

### 2.5.2.3 *Heritage Protection Authorities*

According to the Wai 262 report, the RMA offers a second mechanism which could potentially be used for kaitiaki control of natural resources: the ability to become a Heritage Protection Authority (HPA) under section 188 of the Act.<sup>275</sup> Section 188 provides for a body corporate with 'an interest in the protection of any place' to

269. Resource Management Act 1991, s33(3)

270. R Joseph, 'Maori Values and Tikanga: Consultation under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward', conference paper, October 2002 (Crown counsel, papers in support of closing submissions (paper 3.3.46(d)), tab 36, p17)

271. Resource Management Act 1991, s33(8)

272. Resource Management Amendment Act 2003, s12(2)

273. Resource Management Act 1991, s33(8); Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 274, 282

274. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 282–283, 284

275. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 258–260

apply to the Minister to become an HPA ‘for the purpose of protecting that place’. The ‘place’ in question can include a ‘feature’, area, or structure. The Minister has to be satisfied that the applicant is an appropriate body to protect the place, and that the applicant is able to carry out all the responsibilities of an HPA (including the financial obligations). If the Minister is satisfied, then a notice is published in the *Gazette*, setting out the terms and conditions of the appointment as an HPA. These terms and conditions include the payment of a bond by the applicant. As with section 33 transfers, section 188 includes a unilateral power of termination. The Minister can revoke the HPA status by another notice in the *Gazette*.

Under section 189, the HPA can require a territorial authority (council) to institute a heritage protection order over the ‘place’ in need of protection. The heritage order can cover:

[a]ny place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons; and

[s]uch area of land (if any) surrounding that place as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of that place.<sup>276</sup>

At the time the Wai 262 Tribunal reported in 2011, the protection order could apply to any land. In 2017, however, the Resource Legislation Amendment Act introduced a crucial limitation on the powers of an HPA.<sup>277</sup> Ministers and local authorities can act as HPAs but if the HPA is a body corporate (such as an iwi rūnanga), the heritage order cannot apply to private land. This is, of course, a huge restriction on the power of an HPA but we note that the Minister for Māori Development and a local authority can act as an HPA ‘on the recommendation of an iwi authority’ (section 187).

Under section 190, the territorial authority treats the HPA’s notice as virtually a consent application, to which the relevant notification and hearing provisions of the RMA apply. After holding a hearing, it is then up to the council to decide whether or not to confirm, modify, or withdraw the protection order. Under section 191, the council has to have regard to the information supplied by the HPA, and ‘particular regard to’ whether the ‘place’ merits protection, whether the kind of protection ordered is ‘reasonably necessary’, and any national policy statement or relevant plan. Having made its decision, the council then needs to include the heritage order in its district plan. Under section 193, which prescribes the effect of a heritage order, the inclusion of the order in a district plan prevents ‘any use of land’, ‘subdividing any land’, and ‘changing the character, intensity, or scale of the [existing] use of any land’ without the written permission of the HPA. Anyone who is denied permission by an HPA can appeal to the Environment Court (section 195).

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276. Resource Management Act 1991, s189(1)

277. Resource Management Act 1991, s189(1A); Resource Legislation Amendment Act 2017, s98(1)

Thus, if the Minister approves a Māori body corporate to become an HPA, if the council decides to accept an HPA's heritage order, and if the heritage order does not apply to private land, then a Māori authority could conceivably act as HPA to protect a 'place' of special significance. Importantly, there is no restriction on the kind of body corporate that can apply; it could be an iwi organisation, a hapū body, or some kind of local land trust. The definition of private land is very wide. It includes all land that is held in fee simple, Māori land (as defined in section 4 of *Te Ture Whenua Māori*), and any Crown land held by a person under a lease or licence. The Crown is defined in section 189(6) to include State-owned enterprises, Crown entities, mixed ownership model companies, and local authorities.

According to the evidence of Gregory Carlyon, the HPA provisions have 'the potential and intention to better provide for Māori rights and interests.'<sup>278</sup> He suggested: 'There appears to be a ready-made instrument in Heritage Protection Orders, overseen by Heritage Protection authorities that would allow tangata whenua the power to protect places and the values contained in them.'<sup>279</sup> Paul Hamer agreed that the framers of the Act intended for Māori organisations to act as HPAs, with the power to seek heritage orders for places 'of special significance to the tangata whenua.'<sup>280</sup> But no Māori body corporate has actually been made an HPA.<sup>281</sup> Gregory Carlyon explained that only a few bodies have been made HPAs since 1991, including the Save Erskine College Trust; the Forest and Bird Society; Taupo Orchid Society (since revoked); and the Orchid Council of New Zealand.<sup>282</sup>

Clearly, this is an extremely under-utilised provision of the RMA. Mr Carlyon pointed to the example of Te Runanga o Ngāti Pikiao's application to become an HPA for the Kaituna River in 1994. The application covered the bed and banks of the river, in an attempt to protect more than 50 wahi tapu. The Minister declined the application on the grounds that the Rotorua District Council was better able to protect the 'place', and because there was 'insufficient detail regarding the "place" for which the application was being sought.'<sup>283</sup> The district council opposed the protection order because, it said, the order would alienate 'publicly owned and used land' (that is, the bed of the river) for 'minority group use alone.'<sup>284</sup> Te Runanga o Ngāti Pikiao had enough resource to seek a judicial review of the Minister's decision in the High Court. Although the court directed the Minister to reconsider his decision, the application lapsed. Mr Carlyon suggested that this was an example of the degree of opposition (from both central and local government) that an application from Māori could provoke. Other tribal organisations were likely discouraged from making the attempt. It may be the case that no

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278. Carlyon, brief of evidence (doc E18), p [37]

279. Carlyon, brief of evidence (doc E18), p [37]

280. Hamer, 'Porotī Springs' (doc D3), p 25

281. Hamer, 'Porotī Springs' (doc D3), p 25

282. Carlyon, brief of evidence (doc E18), p [33]

283. Carlyon, appendix to brief of evidence (doc E18(a)), p 13

284. Carlyon, appendix to brief of evidence (doc E18(a)), p 14

other Māori bodies have applied, and certainly none have been made an HPA.<sup>285</sup> The incentive to apply must surely have been reduced by the 2017 amendment in respect of private land.

The NZMC, however, is not convinced that heritage orders are relevant to this inquiry if an order cannot apply to fresh water. Claimant counsel submitted that the RMA is not ‘somehow “saved” by the possible use by Māori of Heritage Protection Orders.’<sup>286</sup> As noted above, the effects of a heritage order in a district plan all relate to land. Under section 31 of the RMA, a territorial authority’s jurisdiction is ‘limited to the surface of the water or the bed underneath.’<sup>287</sup> Ngāti Pikiao’s application related to the bed and banks of the Kaituna River.<sup>288</sup> In the claimants’ submission, a heritage order over the bed or surface of a river ‘cannot apply to the water in between.’<sup>289</sup> This means that a heritage order could not protect a freshwater resource from point discharges, where ‘protection of just the bed and the surface would be meaningless.’<sup>290</sup>

Further, the restriction of heritage orders to Crown land (and even then, Crown land that is not under a lease or licence) makes the possibility of Māori protecting even the beds of water bodies much less feasible. As claimant counsel pointed out, the Whatatiri trustees could not become an HPA and seek a heritage order to protect the source of Porotī Springs, because their land is a Māori Reservation and therefore private land.<sup>291</sup> Here, the 2017 amendment has clearly had a very significant effect.

The Crown put no great reliance on the HPA provisions in our inquiry. Crown counsel stated, in a footnote to their closing submissions, that heritage protection orders were simply a tool that ‘could deliver protection for taonga.’<sup>292</sup>

Having considered these submissions, our view is that the provision for Heritage Protection Authorities and heritage orders is not a relevant tool for Māori to protect freshwater taonga.

## 2.5.3 Co-management mechanisms

### 2.5.3.1 Joint Management Agreements (section 36B)

As we discussed above, the Crown was fully aware of the barriers that prevented section 33 transfers to iwi authorities. In the early 2000s, Ministry officials recommended against amending section 33. In the Government’s view, the use of section 33 could be improved by ‘promoting best practice among local government.’<sup>293</sup>

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285. Carlyon, appendix to brief of evidence (doc E18(a)), p 14; Carlyon, brief of evidence (doc E18), p [33]; transcript 4.1.3, pp 296–297

286. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 17

287. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 18

288. *Te Runanga o Ngāti Pikiao v Minister for the Environment*, unreported, 15 June 1999, Gallen J, High Court, Wellington, CP 113/96, p 7

289. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 18

290. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 18

291. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 18

292. Crown counsel, closing submissions (paper 3.3.46), p 55 n

293. Clark, ‘Section 33 of the Resource Management Act’, p 53



This advice was accepted by the select committee on the Resource Management Amendment Bill in 2001. The committee was concerned that no transfers had occurred to iwi. It proposed amending section 33 to clarify the application process for a transfer, providing a right of appeal if a transfer was declined, and resourcing public authorities (including iwi authorities) for transfers. Having decided not to recommend these amendments, the select committee suggested that co-management might be the more 'realistic option than forcing the use of section 33, possibly recognising the fact that relationships between councils and iwi are in a fragile, yet developing phase'.<sup>294</sup>

By 2005, there had still been no transfers to iwi under section 33. Instead of trying to fix the problems with section 33 and make it more accessible to iwi, the Crown decided to introduce Joint Management Agreements (JMAs) under section 36B of the RMA.<sup>295</sup> The Crown's intention was that the RMA would 'explicitly allow co-management options (eg, so that an iwi authority and local authority could jointly manage a natural resource such as a lake)'.<sup>296</sup> Co-management provided a partnership model. It enabled 'Māori involvement in RMA decision-making, without excluding central or local government or wider communities of interest'.<sup>297</sup> This was a very significant amendment to the RMA. It had great potential for the exercise of tino rangatiratanga in freshwater management and decision-making. We note, too, that section 36B had a wider scope than section 33, in that JMAs could be forged with a group representing (one or more) hapū as well as with iwi authorities.<sup>298</sup>

Crown counsel have drawn a distinction between co-governance, meaning the power to make policy, and co-management, meaning the exercise of 'day-to-day operational responsibilities'.<sup>299</sup> In introducing what it called 'co-management' in 2005, the Crown did not draw this distinction. Section 2 of the RMA stated that a JMA could involve the joint exercise of 'any of the local authority's functions, powers, or duties under this Act'.<sup>300</sup> The JMA would have to specify the functions, powers, or duties, the natural or physical resource involved, and whether the resource was in the whole or part of a region or district.<sup>301</sup> This was extremely broad. A JMA could cover a single water body or all the freshwater bodies in a region, and it could specify a range of functions, including strategic, policy, and operational matters.

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294. Clark, 'Section 33 of the Resource Management Act', p 53

295. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 259; Hamer, 'Porotī Springs' (doc D3), p 25; Ministry for the Environment, *Section 33: Transfer of functions, powers or duties – a stocktake of council practice*, p 7

296. Ministry for the Environment, 'Regulatory impact and compliance cost statement', [2005], p 12

297. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 275

298. Resource Management Act 1991, s 36B(1)(b)(i)

299. Crown counsel, memorandum, 5 February 2019 (paper 3.2.349), pp 4, 7–8

300. Resource Management Act 1991, s 2

301. Resource Management Act 1991, s 2

As with section 33, the initiative and decision-making power for entering into a JMA was vested in local authorities. A council may (or may not) decide to make a co-management arrangement. There was no requirement in the Act (or in any national policy statement or other national guidance) for councils to form or even actively consider JMAs.<sup>302</sup> In that situation, much would depend on local circumstances and the health of the relationship between Māori and councils, and there were often many disincentives for councils to want a JMA with iwi.<sup>303</sup> Iwi and hapū were accorded no right of appeal if a council declined to enter into a JMA. Nor did the framers include a right of appeal if the council decided to cancel the JMA (which it could do unilaterally). The iwi or hapū body could also decide to cancel the JMA. Both parties must give 20 days notice but there is no requirement for them to discuss or agree on terminating the agreement.<sup>304</sup>

The ILG witnesses in our inquiry considered this one of several weaknesses in the JMA provisions. In response to those weaknesses, they sought an arrangement that was initiated by iwi, and mandatory for councils to negotiate upon iwi initiation. They also wanted an agreement that could not be terminated but could only amended by agreement.<sup>305</sup>

Before councils could enter into a section 36B JMA, there were similar requirements to those under section 33. Councils did not, however, have to run a special consultation process. The council could simply decide to negotiate a JMA with a public authority, an iwi authority, or a group representing hapū. This removed an important barrier. On the other hand, section 36B retained some of the other barriers imposed by section 33. The council had to be satisfied that the other party to the JMA represented the ‘relevant community of interest’. This provision was not in itself insuperable, but the council also had to be certain that the public authority had the ‘technical or special capability or expertise to perform or exercise the function, power or duty jointly with the local authority’.<sup>306</sup> This was always going to be a problem for under-resourced iwi bodies unless the problem of funding was addressed (see further discussion below). We note, however, that it was not as high a barrier as for full transfers of authority.

Finally, and most importantly, the council had to satisfy itself that a JMA was ‘an efficient method of performing or exercising the function, power or duty’.<sup>307</sup>

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302. N Coates, ‘Joint-Management Agreements in New Zealand: Simply Empty Promises?’, 2009 (Crown counsel, cross-examination bundle (doc E18(b)(i)), pp 111–112)

303. N Coates, ‘Joint-Management Agreements in New Zealand: Simply Empty Promises?’, 2009 (Crown counsel, cross-examination bundle (doc E18(b)(i)), pp 111–112); Carlyon, brief of evidence (doc E18), pp [34]–[37]

304. Resource Management Act 1991, section 36E

305. Donna Flavell and Gerrard Albert, answers to questions in writing, 12 October 2018 (doc G22(f)), p 13

306. Resource Management Act 1991, s 36B(1); Resource Management Amendment Act 2005, s 18

307. Resource Management Act 1991, s 36B(1); Resource Management Amendment Act 2005, s 18

This was a high barrier because the costs involved would always make it difficult to meet the efficiency test.<sup>308</sup> Officials advised in 2015:

There are a number of practical barriers preventing the establishment and workability of JMAS under the RMA, besides any unwillingness of the parties to work together. The wording of the existing provisions for JMAS is one such barrier.

Specifically, for a JMA to be implemented, the local authority must be satisfied that the agreement is an efficient method of exercising the function, duty or power. Yet the costs to local authorities presented by executing the arrangement and meeting its administrative needs mean the requirement is unlikely to be met. Alternatively, these costs fall on iwi. Iwi groups have identified financial resources as a significant barrier to their participation in the RMA system. The efficiency requirement therefore raises practical impediments to the implementation of JMAS.<sup>309</sup>

But, as officials also noted in 2015, there were in fact ‘net benefits’ from collaborative arrangements like JMAS. Such arrangements would reduce the uncertainties and costly appeals that result if Māori have been excluded from freshwater management and decision-making.<sup>310</sup> Thus, repealing the efficiency criterion might result in higher initial costs – JMAS were ‘resource-hungry’ during the start-up phase – but the overall and long-term benefits would compensate for those initial costs.<sup>311</sup>

The Wai 262 Tribunal found that section 36B duplicated some of the provisions that prevented Māori from obtaining section 33 transfers.<sup>312</sup> We agree. The result was that, by the time that that Tribunal reported in 2011, there had only been one JMA established between a council and an iwi authority.<sup>313</sup> Ngāti Tūwharetoa succeeded in establishing a JMA with the Taupō District Council in 2009. The JMA provided for

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308. N Coates, ‘Joint-Management Agreements in New Zealand: Simply an Empty Promise?’, 2009 (Crown counsel, cross-examination bundle (doc E18(b)(i)), pp 110–111); Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 1030–1031); briefing to Minister, ‘Fresh water: Further detail on options to enhance iwi/hapū participation in freshwater decision-making’, 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1069–1070)

309. Briefing to Minister, ‘Fresh water: Further detail on options to enhance iwi/hapū participation in freshwater decision-making’, 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1069)

310. Briefing to Minister, ‘Fresh water: Further detail on options to enhance iwi/hapū participation in freshwater decision-making’, 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1069–1070)

311. Briefing to Minister, ‘Fresh water: Further detail on options to enhance iwi/hapū participation in freshwater decision-making’, 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1070)

312. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 282–283. See also Carlyon, brief of evidence (doc E18), p [36]

313. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 275

iwi involvement in notified resource consents, plan change applications, or any matters relating to Māori land within the rohe. For decision making purposes, the parties appointed equal numbers of commissioners and jointly appointed a fifth commissioner and chair.<sup>314</sup>

In 2013, the Tūwharetoa Māori Trust Board commented that its JMA had not in reality provided much of a role for the iwi:

The Trust Board worked with the Taupō District Council to develop the first Joint Management Agreement (JMA) under Section 36B of the RMA in New Zealand. In terms of an outcome for Ngāti Tūwharetoa, the JMA has done little to increase participation in Council-led resource management processes. The Trust Board sees little benefit from rolling out the Section 36B framework, if in reality; the outcomes of a JMA do not achieve the Crown's intention of enabling more effective participation in RMA processes.<sup>315</sup>

This likely reflects the narrow scope of the particular JMA, which claimant counsel noted was limited to Māori land.<sup>316</sup> The Wai 262 Tribunal reported:

While a unique and laudable initiative, it remains unproven and appears to be somewhat tentative – perhaps a first step towards partnership, rather than a fully realised partnership. Though it might appear at first glance to have wide coverage, several layers of restriction come into play. First, it applies only to notified resource consents and private plan changes on, or affecting, multiply owned Māori land. Secondly, while the resource consent or private plan change applicant is notified of the option of having the application heard by a joint committee, the applicant can opt out – in which case the process is controlled by the council. Thirdly, if a joint committee is convened, the council and Ngāti Tūwharetoa each choose two qualified commissioners. The council chooses a fifth commissioner and chairperson if agreement cannot be reached between the parties, and that chairperson has a casting vote in the event of a split vote.<sup>317</sup>

Fourteen years after the enactment of section 36B in 2005, there has only been one more JMA negotiated with iwi under the RMA. Mark Chrisp, the Crown's RMA expert, told us:

In 2015, Gisborne District Council signed a Joint Management Agreement (JMA) with Ngāti Porou covering all resource management decisions affecting their rohe within the District, including the development of catchment management plans,

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314. Carlyon, brief of evidence (doc E18), p [36]

315. Tamarapa Lloyd, submission, 'Freshwater Reform 2013 and the Resource Management Reform Document', [2013] (Crown counsel, document bundle (doc E14(a)), p 290)

316. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 15

317. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 275–276

plan changes, and decision-making on resource consent applications. For all such decisions, the iwi and council each appoint equal numbers of panel members as representatives. These representatives then appoint an additional panel member to serve as Chair. The JMA further commits both parties to mutual capability building and acknowledges the aspiration of Ngāti Porou to take even stronger roles in management in the future.<sup>318</sup>

We have no information about the effectiveness of this second JMA, but we note that Ngāti Porou's intention was 'staircasing' from this section 36B arrangement to a section 33 transfer within five years.<sup>319</sup>

In our view, the fact that the RMA has only resulted in two JMAs since 2005 is unacceptable. Despite the initial promise of section 36B, it has failed utterly in providing for partnership arrangements.

### **2.5.3.2 Wai 262 recommendations in respect of Joint Management Agreements**

The Wai 262 Tribunal made the same recommendations for section 36B as for section 33, with the exception of the special consultation process, which did not apply to JMAs (see section 2.5.2(4)).

### **2.5.3.3 Treaty settlement legislation**

The RMA is virtually a dead letter in respect of mechanisms for tino rangatiratanga over freshwater bodies. There have been no section 33 transfers, no Māori Heritage Protection Authorities, and only two section 36B JMAs. Treaty settlements have been far more significant in terms of delivering co-governance/co-management of water bodies and other natural resources. For example, some settlement deeds and legislation have required the establishment of JMAs. This suggests that the Crown's role in encouraging such agreements is crucial; it cannot apparently be achieved under the RMA without Crown involvement and support. One reason is that JMAs arising from settlement legislation are 'usually mandatory and not subject to the same considerations for JMAs in terms of efficiency and iwi capability'.<sup>320</sup> Claimant counsel pointed to the Waikato River and Waipa River Settlement Acts, which required JMAs between:

- ▶ Raukawa Settlement Trust and Waikato Regional Council;
- ▶ Maniapoto Māori Trust Board and Otorohanga District Council, Waikato District Council, Waikato Regional Council, Waipa District Council, Waitomo District Council;
- ▶ Te Arawa River Iwi Trust and Waikato Regional Council;

318. Mark Chrisp, brief of evidence, [April 2017](doc F1), p 14

319. Horouta Iwi case study (for ILG): Ngāti Porou Freshwater Group, 'Horouta II Milestone report: Ngāti Porou', January 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 2863, 2882–2883)

320. Briefing to Minister, 'Fresh water: Further detail on options to enhance iwi/hapū participation in freshwater decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1069 n)

- ▶ Waikato Raupatu River Trust and Waikato Regional Council; and
- ▶ Waikato Raupatu River Trust and Waikato District Council.<sup>321</sup>

The Wai 262 Tribunal found that Māori should not have to spend their Treaty settlement ‘credits’ in negotiating arrangements that should have been available to them anyway under the RMA.<sup>322</sup> We agree. But we accept nonetheless that Treaty settlements have become the primary vehicle for iwi to obtain co-management authority (a partnership vehicle) in respect of their taonga. This has increasingly been the case since the Wai 262 Tribunal report in 2011 and our stage 1 report in 2012.<sup>323</sup> Co-management arrangements were not included in most settlements before 2009, nor have they necessarily been included in settlements since then.<sup>324</sup> The settlements have been ad hoc and dependent on a number of factors unrelated to the degree of authority the Treaty requires in respect of water bodies and other natural resources. In particular, since co-governance or co-management has mainly been available in more recent Treaty settlements, iwi who settled early or who have not yet settled have no such arrangements.

The Wai 262 Tribunal put it this way:

For many reasons, the settlement process should not have to be the solution. Iwi should not have to spend valuable Treaty credits in full and final settlements to achieve what the RMA was supposed to deliver in any case. Nor should those that have not yet settled have to wait for rights the RMA should already have delivered over the past 20 years.

What is needed is a fair, transparent, principled system for balancing kaitiaki and other interests in all parts of New Zealand. Historical settlements cannot deliver that, because they are, by their nature, local and ad hoc. Negotiations are subject to high levels of political pragmatism and leverage, not to broadly applicable standards or accountabilities. Big iwi get more, not only in terms of financial redress but also in ongoing opportunities for partnership and control; small iwi get less. Some of the more recent settlements, too, have delivered more in terms of partnership than older settlements. Using the settlement process to determine resource management issues is, in short, a recipe for unfairness and inconsistency – not only in the balancing of kaitiaki and other interests, but also in environmental outcomes. Having said that, we entirely understand iwi seeking to utilise the settlement process in the absence of any other alternative.<sup>325</sup>

Keeping these points in mind, we acknowledge that some iwi have obtained co-governance and/or co-management arrangements through their Treaty settlement

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321. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 77–78

322. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 273

323. Crown counsel, closing submissions (paper 3.3.46), pp 11–12

324. Draft Cabinet paper, [2014], app 2, attached to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p 1339)

325. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 273

legislation.<sup>326</sup> Crown counsel pointed in particular to the Waikato River and Whanganui River settlements:

New and novel Treaty settlements have delivered real authority over waters of significance. Landmark settlements like the Whanganui River have changed the way water is conceived of, and directly incorporated Māori perspectives and law into the general laws. The Waikato River settlement too remains a powerful and durable example of co-governance, as well as the incorporation of tikanga into water management.<sup>327</sup>

No one could question that these settlements have provided for a meaningful degree of co-governance of highly significant taonga, although they do not provide for full kaitiaki control of those taonga (the standard set by section 33 of the RMA).

Crown counsel submitted that these two ‘major settlements’ had been accompanied by other significant arrangements:

These two major examples have been accompanied by the establishment of authority over other significant waters, such as Lake Waikaremoana, the Rangitaiki River, and the Kaituna River. Deeds of settlement have been concluded for similar arrangements for Lake Taupō, the Waihou, Piako, and Coromandel Catchment, the Ahuriri, the Whangaehu, Wairarapa Moana, Ruamahanga River, and Manawatū. In some parts of New Zealand co-governance bodies have been established for entire regions, rather than particular waters.<sup>328</sup>

According to counsel for the ILG, no settlements have achieved the same degree of co-governance and co-management as the Waikato River settlements, and that this has been a deliberate choice by the Crown.<sup>329</sup> This was certainly the view taken in the hui and research for the ILG report on recognising iwi rights and interests in fresh water, a study that was undertaken in 2015. This report argued that co-governance and co-management arrangements needed to be extended to all catchments, and that RMA mechanisms such as sections 33 and 36B should be maximised and strengthened.<sup>330</sup> In stating that the ‘strongest form’ of co-management to date had been provided for in the Waikato River model, the report noted that this has not been replicated for other iwi. Further, ‘the reality for most (if not all) iwi/hapū/whānau is that, even those with a greater recognition of rights than others,

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326. See Crown counsel, app A, ‘Arrangements over particular waters’ (Crown counsel, papers in support of closing submissions (paper 3.3.46(a)).

327. Crown counsel, closing submissions (paper 3.3.46), pp 26–27

328. Crown counsel, closing submissions (paper 3.3.46), p 61

329. Transcript 4.1.5, pp 405–409

330. ‘Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream: Research Report’, [2015], pp 5, 68 (Tania Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 786, 849)

the level of kaitiakitanga they wish to exert over their taonga is still not available to them.<sup>331</sup>

#### 2.5.4 Participatory or advisory mechanisms

In 2015, Ministry staff noted that some 22 participation arrangements had been established for freshwater management since the enactment of the RMA. Only five of those had been developed under the Act itself, ‘outside the ambit of Treaty settlements’. These arrangements ‘var[ied] widely in terms of the relative agency they afford iwi/hapū in decision-making, and the extent to which they cover freshwater planning and consenting processes.’<sup>332</sup> Many participatory mechanisms have an advisory role.

Tania Ott, who was a deputy director of the Office of Treaty Settlements at the time of our stage one hearings, told us that the Crown only began to negotiate specific mechanisms for natural resource management in 2008.<sup>333</sup> As noted above, the Crown decided in 2010 that the arrangements for the Waikato River would not be allowed for other river claims. Cabinet directed that iwi involvement in the management of natural resources would be limited to an advisory board or a planning committee. These limits could only be varied by Cabinet in exceptional circumstances (as happened with the Whanganui River and a number of others in the period since 2010). Of the two mechanisms, the more powerful was the joint planning committee, which would have ‘direct input’ to regional policy statements and plans. The recommendations of a joint committee would then go through the usual council planning process, which included consultation. The Crown’s intention was that local authorities would retain full power of decision-making under both the advisory board and joint committee models.<sup>334</sup>

One example is the Hawke’s Bay Regional Planning Committee. This committee has equal numbers of councillors and iwi representatives. It was established in 2012 as a result of Treaty settlements (the first of which occurred in 2010). The Crown introduced legislation in 2015 to ensure that the council could not dismiss or disestablish the committee.<sup>335</sup> In terms of freshwater resources, however, the council set up a collaborative stakeholder group (TANK) to amend the regional plan. Ngāti Kahungunu were highly dissatisfied with how their interests were being balanced in that process.<sup>336</sup> According to the evidence of Adele Whyte, chief executive of Ngāti Kahungunu Iwi Inc, the process had placed enormous pressure

331. ‘Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream: Research Report’, [2015], p 4 (Tania Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), p 785)

332. Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p 1031)

333. Tania Ott, brief of evidence, 29 June 2012 (doc A92), p 6

334. Office of Treaty Settlements, ‘Involving iwi in natural resource management through Historical Treaty of Waitangi settlements’, October 2010 (Tania Ott, papers in support of brief of evidence (doc A92(a)))

335. Hawke’s Bay Regional Planning Committee Act 2015

336. The process was not completed at the time of our hearings.



on Māori organisations and volunteers. Those involved were constantly pressed to explain, justify, and ultimately compromise their values in favour of industry.<sup>337</sup>

We note that the Crown has not been prepared to roll out the more powerful model (a joint planning committee) to all the regions.<sup>338</sup> Advisory committees have been more common, and some have had a lengthy period of advising councils on local government issues (more broadly than just resource management). Their role and influence have varied over time.

One example is the Freshwater Advisory Group (FWAG) established by the Gisborne District Council in 2010. This group consisted of one councillor, 10 representatives of iwi and hapū, a DOC representative, a member of Fish and Game, a representative from an environmental NGO, and six representatives from 'industry sector groups'. It provided a forum for stakeholder collaboration over the development of a freshwater plan, as well as for discussion and information-sharing on freshwater management.<sup>339</sup> We heard evidence from Te Whanau a Kai representatives on this group, who argued that iwi representatives were not able to influence the plan effectively in just a stakeholder role. Keith Katipa argued that iwi involvement was a box-ticking exercise, that commercial interests dominated the group (and the council), and that the final decisions were made afterwards, with iwi left as objectors if they had the resources to pursue an Environment Court appeal.<sup>340</sup> We have no evidence from other iwi members of the group, but it is clear the group was advisory only and did not provide iwi with a decision-making role. In Mr Katipa's evidence, this group was task-specific and was discontinued after the plan was prepared for wider consultation.<sup>341</sup>

Another example is Te Whakaminenga o Kapiti, a partnership committee established by the Kāpiti Coast District Council in 1994.<sup>342</sup> A report on this body, published by the district council in 2007, suggested that it had had some success but its inability to participate in decision-making had frustrated iwi and significantly reduced their ability to influence resource management.<sup>343</sup>

Ultimately, our view of these mechanisms is shaped by the many Crown reform proposals in the last 10 years. All of these have recognised that Māori participation in freshwater management and decision-making still needs to be significantly enhanced. We return to this point below.

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337. Adele Whyte, brief of evidence, 7 September 2016 (doc D40), pp 10–11

338. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015), p 4 (Crown counsel, sensitive discovery documents (doc D92), p 1029)

339. Crown counsel, 'Arrangements over particular waters' (Crown counsel, papers in support of closing submissions (paper 3.3.46(a)), pp 15–16)

340. Keith Katipa, brief of evidence, 27 September 2016 (doc D81), pp 6–14; counsel for interested parties, submissions by way of reply, 22 March 2019 (paper 3.3.57), pp 26–27

341. Keith Katipa, brief of evidence (doc D81), p 6

342. Crown counsel, 'Arrangements over particular waters' (Crown counsel, papers in support of closing submissions (paper 3.3.46(a)), pp 28–29)

343. Sonia and James Mitchell, *The History of Te Whakaminenga o Kapiti* (Paraparaumu: Kāpiti Coast District Council, 2007), pp 45–62, 77–82

### 2.5.5 Iwi Management Plans

#### 2.5.5.1 *The origin and roles of iwi management plans*

As we discuss in the following section, Māori ownership of natural resources was excluded from the ambit of the Resource Management Law Reform process. After that, the framers of the Act focused on iwi management plans as a key mechanism for Māori to participate in resource management. The plans were intended as a 'scheme for tribal self-management' in respect of the resources in a rohe, which would have status alongside regional and district plans to 'provide a tribal overlay to resource management'.<sup>344</sup> An iwi management plan was supposed to be an opportunity for Māori to set out their priorities for the management of their taonga, their views and aspirations as kaitiaki, the sites and resources of significance to them, and their vision for how their values should be infused into resource management decision-making.<sup>345</sup> It was also intended that iwi plans would be the district plan for Māori land.<sup>346</sup>

Māori strongly supported the concept of iwi management plans and advocated for them to have the same status and force in the Act as regional and district plans.<sup>347</sup> The Resource Management Bill, however, simply required councils to 'have regard to' iwi plans when preparing their own. A joint submission from the New Zealand Māori Council, the National Māori Congress, and the Māori Womens Welfare League asked for iwi management plans to be given a 'greater weight and role in the Bill', but this submission was rejected.<sup>348</sup>

The content and purpose of iwi management plans is not prescribed in the RMA. Under sections 61(2A), 66(2A), and 74(2A), councils must take account of any 'planning document recognised by an iwi authority' in preparing or changing a regional policy statement, a regional plan, or a district plan.<sup>349</sup> There is no equivalent requirement at the national level when the Minister prepares or changes a national policy statement. Before they can be 'taken account of', iwi management plans must be formally lodged with the appropriate council, and their content must be considered to have a 'bearing on the resource management issues of the region.'

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344. Ministry for the Environment, RMLR paper: 'Nga Taonga a Ranginui Raua ko Papatuanuku, Background Notes for Consultation Hui', January 1989 (McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p168)

345. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 281; Brian Cox, brief of evidence, 2 September 2016 (doc D24), p17

346. Joseph, 'Maori Values and Tikanga: Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward', p 13 (Crown counsel, papers in support of closing submissions (paper 3.3.46(d)), tab 36, p 13)

347. McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp 169–170, 175, 177

348. McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p177

349. In sections 61, 66, and 74 of the RMA, councils were required to 'have regard to' iwi management plans but this was amended in 2003 to 'take into account': Resource Management Amendment Act 2003, ss 24, 27, 31.

The RMA only recognises the planning documents of iwi authorities or a group that has a customary marine title under the Marine and Coastal Area (Takutai Moana) Act. The plans of hapū are not specified in the Act but councils can choose to take account of them. There is no requirement for a council to take an iwi management plan into account in consent decision-making, although some have done so under section 104(1)(c).<sup>350</sup> This sub-section states that a consent authority must have regard to ‘any other matter’ that it considers ‘relevant and reasonably necessary to determine the application’.

### **2.5.5.2 Repeated calls for enhanced legal weight and better resourcing**

The claimants in our inquiry were highly critical of the Crown’s failure to provide an enhanced role for iwi management plans. In their view, the requirements of councils to ‘adhere to IMPS are weak’, and those groups who lack the resources to prepare a plan (or to prepare an effective plan with professional assistance) have even less opportunity to influence freshwater decision-making. Counsel for interested parties cited studies in 2004 and 2009, as well as the Wai 262 report in 2011, in support of a submission that iwi management plans – when they exist – had been overlooked because ‘other values or aspirations held more weight’.<sup>351</sup> The Crown, on the other hand, argued that iwi management plans have now ‘proliferated, giving expression to Māori aspirations for water resources and shaping planning and decision-making in their regions’.<sup>352</sup>

Dr Andrew Erueti and Dr Valmaine Toki summarised the problems with iwi management plans as follows:

Despite the introduction of enhanced consultation requirements [in 2005] and provision for the consideration of iwi management plans, the current RMA regime has not empowered iwi. A major issue has been the weak impact of iwi management plans. Regional or district plans are not required to be consistent with iwi management plans. There is no requirement to consider iwi management plans when determining whether or not to grant resource consents. The RMA is also silent as to the purpose and content of iwi management plans. Consequently, iwi management plans tend to be uneven in style and content. Their quality depends on the extent to which iwi have the resources ‘to get legal and technical advice, consult on and develop the plan, and engage in RMA processes.’ The Waitangi Tribunal has called upon the Ministry for the Environment to ‘step up with funding and expertise, to ensure that [Māori] are not prevented from exercising their proper role by a lack of resources or technical skills.’<sup>353</sup>

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350. Mark Chrisp, brief of evidence (doc F1), pp8–10. The exception to this is section 104(2B), where a consent authority must have regard to the planning documents of a customary marine title group.

351. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp91–92, 106–107

352. Crown counsel, closing submissions (paper 3.3.46), p3

353. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p70

From the evidence available to us, there have been frequent calls for iwi management plans to be given greater weight in freshwater management. In the period under focus in this chapter, many of those calls came during the mid-2000s as the Crown began to consult on water reform, although the Freshwater Iwi Leaders Group (ILG) continued to seek an enhanced role for iwi management plans in the 2010s:

- ▶ 1998: The Parliamentary Commissioner for the Environment reported that the RMA did not oblige councils to ‘follow or accommodate the concerns or priorities’ expressed in the plans. Some iwi and hapū found this ‘limited statutory requirement’ a restraint on their ability to participate in resource management, and a number of councils had ignored their plans. They called for iwi management plans to have the same status as regional and district plans under the Act. The PCE noted that the Waitangi Tribunal, in its *Te Whanganui-a-Orotu Report on Remedies*, had recommended an amendment to the RMA to give iwi management plans the ‘appropriate weight’ due to the plan of a Treaty partner.<sup>354</sup>
- ▶ 2004: KCSM prepared a report for MFE on the effectiveness of iwi management plans. This study showed that many iwi did not have the resources to prepare a plan. For those who had developed a plan, they found it very useful internally for defining and agreeing their environmental priorities, but relationships with councils were still poor and the iwi management plans had not given the iwi ‘a significant role in environmental management’. KCSM saw the key problems as a lack of resources and expertise for iwi, a lack of support by councils ‘for iwi involvement in environmental management’, and ‘limited requirements in the legislation to ensure iwi involvement.’<sup>355</sup> Counsel for interested parties submitted that the situation has not improved since this report was written.<sup>356</sup>
- ▶ 2004: An inter-departmental working group produced a technical report on policies to improve water allocation and use, as part of the Crown’s Sustainable Water Programme of Action (discussed below). This paper put forward a series of policy options for consideration. Under the heading ‘Improve Māori participation and engagement’, the officials proposed a number of options. Those options were of two types: resourcing to build capacity and improve participation; and legislative change to strengthen the obligations of local authorities. Officials were clearly aware of the issues about iwi management

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354. Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* (Wellington: Parliamentary Commissioner for the Environment, 1998), pp78–79; Waitangi Tribunal, *Te Whanganui-a-Orotu Report on Remedies* (Wellington: GP Publications, 1998), p32

355. KCSM Solutions Ltd, ‘Review of the Effectiveness of Iwi Management Plans: an iwi perspective’, 2004, pp iv–v, 25; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp105–106

356. Counsel for interested parties (Naden et al), submissions by way of reply (paper 3.3.56), pp20–26

plans because one of the options was to ‘improve [the] effectiveness of iwi management plans and other iwi planning documents through capacity building and training or greater legislative status.’<sup>357</sup>

- ▶ 2005: MFE published the results of 17 hui around the country to discuss the Crown’s Sustainable Water Programme of Action. In terms of iwi management plans, the report summarised the views of the Māori participants as: ‘Participants thought that central government should provide funds for development of iwi management plans and that these plans should be included more in regional planning.’<sup>358</sup> The information from these hui was important in Crown policy formation,<sup>359</sup> although no changes to the legislative requirements for iwi management plans were made as a result.
- ▶ 2006: A Te Puni Kōkiri review of Māori–council engagement under the RMA identified the lack of iwi management plans (and of resources to prepare them) as one of several reasons for a lack of effective engagement.<sup>360</sup>
- ▶ 2009: A report on Māori participation in freshwater management was prepared for MFE. This report found that iwi management plans had a strong focus on freshwater resources and that the most effective plans had been professional pieces of work for post-settlement iwi.<sup>361</sup> Iwi who were unable to prepare such plans ‘may struggle to improve the effectiveness of their participation in RMA processes.’<sup>362</sup>
- ▶ 2009: A report on Māori issues in respect of water allocation was produced for the Crown and the ILG as part of a joint research programme. Iwi management plans were a major focus of the interviews for the report. On the council side, iwi plans did not include ‘precise targets and outcomes’ and so their utility was sometimes limited. Councils also acknowledged, however, that they needed to ‘commit to implementing processes that ensured the take up of these documents amongst their staff’. Despite some examples of iwi management plans being used by councils, the report identified that Crown guidance was required as to how to take them into account (the statutory requirement), especially when they conflicted with regional or district plans. Further, both councils and iwi identified that the resources and funding to prepare iwi management plans was a crucial issue, especially for iwi who did not have a Treaty settlement. There was also a need for capacity building and

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357. Ministry for the Environment and Ministry of Agriculture and Fisheries, *Water Programme of Action: Water Allocation and Use: Technical Working Paper* (Wellington: Ministry for the Environment, 2004), pp 17–18

358. Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (Wellington: Ministry for the Environment, 2005), pp vii, viii

359. Guy Beatson, brief of evidence, 24 February 2012 (doc A3), pp 7, 11

360. Te Puni Kōkiri, *Te Kotahitanga o te Whakahaere Rawa: Māori and Council Engagement under the Resource Management Act 1991* (Wellington: Te Puni Kōkiri, 2006), pp [10]–[11], [15], [48]

361. Coffin and Allott, ‘Exploration of Māori Participation in Freshwater Management’, pp 1, 22

362. Coffin and Allott, ‘Exploration of Māori Participation in Freshwater Management’, p 18; counsel for interested parties, closing submissions (paper 3.3.45), p 92

training for both councils and iwi so that the plans could be used more often and effectively in freshwater management.<sup>363</sup>

- ▶ 2009: Labour member Nanaia Mahuta introduced the Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 2009 into Parliament. The explanatory note stated that iwi management plans were not integrated into regional planning, so Māori had no option but to object during resource consent hearings with few positive outcomes. The purpose of the Bill, therefore, was to ‘strengthen the provisions by which iwi management plans influence regional and district plans and policies, and elevate their status in the planning hierarchy’.<sup>364</sup> This would increase the influence of iwi views during the planning process and thereby, it was hoped, reduce the need for objections and litigation. The proposed amendment would require councils to ‘recognise and provide for’ the contents of iwi management plans. This would elevate their statutory weight by using the same wording as section 6 of the Act.<sup>365</sup> This Bill did not progress but claimant counsel emphasised it as proof that a ‘practical legislative solution’ was available for the lack of weight accorded to iwi management plans.<sup>366</sup> Claimant counsel submitted that such an amendment, in addition to the proposed amendment to sections 5 and 8 (discussed above), would ‘go a long way’ to making the RMA Treaty compliant.<sup>367</sup>
- ▶ 2011: The Wai 262 Tribunal made a number of findings and recommendations relevant to iwi management plans. The Tribunal found that about half of all councils had iwi planning documents lodged with them, but these were having ‘little impact on RMA activities’. Many iwi were still consultees and objectors (when the law allowed them to be).<sup>368</sup> Nonetheless, iwi management plans were often the only chance for Māori to put their views on resource management without any other institution filtering their content, and proactively, rather than commenting on someone else’s proposals. There were two key problems identified by the Tribunal: Māori were under-resourced to produce high-quality, effective plans; and the statutory provision – ‘take into account’ – was too weak.<sup>369</sup> The Tribunal recommended that enhanced iwi management plans should become the ‘lynchpin of a Treaty-compliant RMA system’. These enhanced plans should be negotiated with councils (which may require some compromise) and then would become binding on

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363. M Durette, C Nesus, G Nesus, and M Barcham, ‘Māori Perspectives on Water Allocation’, report prepared for Ministry for the Environment, 2009, pp 45–47 (Cox, papers in support of brief of evidence (doc D24(a)), pp 251–253)

364. Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 2009 (claimant counsel, attachment to memorandum (paper 3.2.336(a)))

365. Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 2009 (claimant counsel, attachment to memorandum (paper 3.2.336(a)))

366. Transcript 4.1.5, pp 68–69

367. Transcript 4.1.5, p 69

368. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 273

369. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 280

councils. Where it dealt with fresh water, the enhanced iwi plan would have the status of a regional plan. Additionally, iwi would need to be funded to devise and negotiate their plans. In the Tribunal's view, these reforms would make iwi management plans a genuine tool for partnership and the exercise of kaitiakitanga.<sup>370</sup>

### 2.5.5.3 *Why has the Crown not acted on these calls for reform?*

Why has the Crown not acted on these repeated calls to enhance the statutory weight and effectiveness of iwi management plans? We do not have a great deal of evidence on the point. Although it is not strictly within the period covered in this chapter, we note the following post-2009 developments. In 2013, the Crown released a consultation document on its proposed RMA reforms. This document had several proposals for enhancing Māori participation in RMA processes. In Treaty terms, the proposal for iwi management plans was very disappointing. The consultation document noted that greater use of them would result in RMA decisions that reconciled values more effectively. While we agree with that, the Crown's proposal was very minor. The Act would be amended to specify how plans should be structured, what they should contain, and how they should be lodged. They would also be made more accessible online. These proposals, it was said, would improve the 'awareness and accessibility' of iwi planning documents.<sup>371</sup>

Consultation on the 2013 document showed that Māori thought the Crown's proposals did not go far enough. In respect of iwi management plans, Māori still wanted them to have 'greater statutory weight', as well as seeking resources to facilitate engagement.<sup>372</sup> Following this consultation, no changes were made to the RMA provisions for iwi planning documents.

The consultation on RMA reform in 2013 was followed by a period of engagement and co-design of freshwater management reforms by the Crown and the ILG. The ILG continued to seek the enhancement of iwi management plans during this engagement, without success.<sup>373</sup> At this point, the Crown's response was shaped by the formal role the Act accords to iwi management plans; that is, that councils must take account of them when preparing their own plans. The Crown adopted the position that iwi can better influence the content of regional plans by having direct input at the beginning, during the development phase, and not

370. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 281–282

371. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, February 2013), p 67

372. Ministry for the Environment, *Summary of submissions: improving our resource management system*, 2013, pp 11, 14

373. See Donna Flavell and Gerrard Albert, answers to questions in writing, 2 August 2018 (doc G22(b)), pp 3–4; 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014 (Tania Gerrard, sensitive papers in support of brief of evidence (doc D88(b), p 11); 'Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream: Research Report', [2015], pp 7, 10 (Tania Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 11, 788, 791); briefing to Minister, 'Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015', 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1105, 1107).

through enhanced iwi management plans.<sup>374</sup> As we see it, however, the two are not mutually exclusive, and both are required for a more Treaty-compliant process and outcome. In any case, the Crown later justified not reforming the law in respect of iwi management plans – and other RMA mechanisms – on the basis that new iwi–council relationship provisions made it unnecessary.<sup>375</sup> We return to this issue later in the report but we note here that we do not agree that improved relationships are a sufficient answer on their own. A combination of RMA mechanisms is required for effective Māori participation in freshwater decision-making, including enhanced iwi management plans.

#### **2.5.5.4 Are iwi management plans now a more effective tool?**

According to Crown counsel, iwi management plans have now become an effective tool. Crown counsel submitted that the influence of these plans has ‘grown and deepened over time.’<sup>376</sup> In 2016 there were more than 160 iwi plans, and the Crown cited a recent article which described this as ‘proof that a parallel or dual planning system exists.’<sup>377</sup> Mr Chrisp stated that iwi management plans are influential in consents processes. The examples he gave related to Waikato-Tainui and Raukawa.<sup>378</sup> As discussed above, these iwi now have JMAs and access to resources as a result of their Treaty settlements. This underlined two things for us: the significance of JMAs under section 36B as partnership arrangements; and the resources needed to prepare effective iwi plans.

We accept that Treaty settlements have made iwi management plans more effective for some iwi, especially those that have obtained co-management or co-governance arrangements. Not all iwi have Treaty settlements, however, and, as we stated above, nor do all settled iwi have the same arrangements. Mr Carlyon’s evidence is that ‘Māori rights and interests . . . are often accorded less weight than other matters before a hearing committee.’<sup>379</sup> This view arises from his own experience as a practitioner, and it was echoed by many of the claimant witnesses in our inquiry.

According to the evidence of Brian Cox, which was based on information as at 2015, 53 councils had one or more iwi management plans lodged with them

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374. Briefing to Minister, ‘Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015’, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1107)

375. Tania Gerrard, answers to questions in writing, [September 2018](doc F18(d)), pp 2–4; Crown counsel, closing submissions (paper 3.3.46), p 41. This refers to Mana Whakahono a Rohe arrangements.

376. Crown counsel, closing submissions (paper 3.3.46), p 25

377. Crown counsel, closing submissions (paper 3.3.46), p 25; C Jacobs, H Matunga, H Ross and RW Carter, ‘Mainstreaming indigenous perspectives: 25 years of New Zealand’s Resource Management Act’, *Australasian Journal of Environmental Management*, vol 23, no 4 (2016), p 332 (Crown counsel, papers in support of closing submissions (paper 3.3.46(d)), tab 33)

378. Chrisp, brief of evidence (doc F1), pp 9–10

379. Gregory Carlyon, evidence in reply, 2 June 2017 (doc G5), p 12



but 25 councils had none.<sup>380</sup> It is significant to us that so many councils still had no iwi management plans after decades of the RMA regime. In a number of the Crown documents that were filed in this inquiry, there were references to the need to reduce uncertainty and contest at the resource consenting stage of the RMA process. Ensuring that Māori have an appropriate influence and role in decision-making, especially during the development of regional and district plans, has been seen as a necessary remedy for the long, drawn-out battles that too frequently occur over resource consents. The Crown has therefore looked to provide greater input for Māori at the initial plan and policy-making stage.<sup>381</sup> This does not suggest to us that iwi management plans have been influencing regional and district plans to the requisite degree.

There are certainly more iwi management plans than ever before, and – where Treaty settlements have empowered iwi – those plans can be an important tool for kaitiaki to influence plan-making and consenting. But this situation is not the norm. As the Crown stated in 2013, Māori should be able to have ‘their values provided for without having to go through costly judicial processes.’<sup>382</sup> It also stated:

Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners.

As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes.<sup>383</sup>

Finally, we note that in 2016, Māori still sought an enhanced role for their iwi management plans. The ILG was not successful in persuading the Crown to include a reform proposal for iwi planning documents in the *Next Steps for Freshwater* consultation document (discussed in chapter 4).<sup>384</sup> Even though iwi plans were not mentioned in the *Next Steps*, many submissions called for them to be ‘utilised more and in a more consistent way across councils.’<sup>385</sup> Again, this points to long-term dissatisfaction with the status and degree of influence accorded iwi management plans.

380. Cox, brief of evidence (doc D24), p17

381. New Zealand Government, *Freshwater reform 2013 and beyond* (Wellington: Ministry for the Environment, March 2013), pp18–19, 21–22, 24–27 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 614–615, 617–618, 620–623)

382. New Zealand Government, *Freshwater reform 2013 and beyond*, p22 (Brunt, papers in support of brief of evidence (doc D89(a)), p 618)

383. New Zealand Government, *Freshwater reform 2013 and beyond*, p19 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 615)

384. Briefing to Minister, ‘Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015’, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), pp1105, 1107)

385. Ministry for the Environment, *Next Steps for Fresh Water: Summary of Submissions* (Wellington: Ministry for the Environment, June 2016), p37

**2.5.6 Consultation mechanisms****2.5.6.1 Consultation mechanisms in the 1991 Act**

The Wai 262 Tribunal found that Māori participation under the RMA was largely reduced to that of consultees and objectors.<sup>386</sup> The claimants and interested parties in our inquiry gave a unanimous message that Māori want to be decision makers in freshwater management. We have addressed the opportunities for a greater role in decision-making above (section 33 transfers, joint management agreements, heritage protection authorities, and an enhanced legal status for iwi management plans). In terms of consultation, the provisions of the RMA are mostly aimed at input from Māori in the planning stage. Schedule 1 set out the requirements for who must be consulted when councils prepare or change a regional policy, regional plan, and district plan. As originally framed, the 1991 version of the schedule required councils to consult 'the tangata whenua of the area' who may be affected by the policy or plan. Consultation was to occur through iwi authorities or 'tribal runanga'.<sup>387</sup> In addition, councils had to consult the public more widely through submissions and hearings, and any Māori could participate in that process. Any person or group who made a submission had a right of appeal to the Planning Tribunal (later Environment Court).

**2.5.6.2 Reforms in 2005**

Schedule 1 was amended in 2005 as part of an attempt by the Crown to enhance Māori participation. As we discussed above, co-management provisions were introduced for the first time in 2005 (section 36B). Schedule 1 was amended to require councils to comply with section 82 of the Local Government Act 2002.<sup>388</sup> This inserted some much-needed detail about how consultation should be conducted. Also, a new clause was added which stated that, in order to consult with iwi on a policy and plan, more than consultation per se was required. A council would not be considered to have consulted with an iwi unless it:

- (a) considers ways in which it may foster the development of their capacity to respond to an invitation to consult; and
- (b) establishes and maintains processes to provide opportunities for those iwi authorities to consult it; and
- (c) consults with those iwi authorities; and
- (d) enables those iwi authorities to identify resource management issues of concern to them; and
- (e) indicates how those issues have been or are to be addressed.<sup>389</sup>

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386. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 273

387. Resource Management Act 1991, sch 1, cl 3(1)(d)

388. Resource Management Act 1991, sch 1, cl 3(4)

389. Resource Management Act 1991, sch 1, cl 3B; Resource Management Amendment Act 2005,

Importantly, another amendment to the schedule required councils to have ‘particular regard to’ any ‘advice’ from iwi authorities on the policy or plan.<sup>390</sup> This was the same level of weight accorded to the matters listed in section 7 of the RMA. Finally, the RMA was amended to require councils to keep contact details and information regarding iwi and their rohe.<sup>391</sup>

These changes were designed to ensure councils made ‘reasonable endeavours’ to consult iwi on their policies and plans.<sup>392</sup> As the Crown put it at the time: ‘Anecdotal evidence has indicated that iwi groups are concerned that their views are not being incorporated into resource management planning.’<sup>393</sup> In our view, there was more than anecdotal evidence available on the point, as will be clear from our discussion in the preceding sections.

In addition, the Crown wanted to clarify that no consultation was required over resource consents.<sup>394</sup> Section 36A of the Act stated that no persons, including local authorities and consent applicants, had ‘a duty under this Act to consult any person about the application’. Consultation *could* occur but it was not mandatory.

### 2.5.6.3 Reforms in 2017

RMA mechanisms for consultation were not a major focus of the Crown’s freshwater reforms but we note here that, in 2017, the RMA was amended to include two further obligations. First, in the preparation of policy statements or plans, councils had to consult iwi authorities as to whether a tikanga expert should be included among the hearing commissioners.<sup>395</sup> Secondly, councils’ section 32 reports needed to summarise the views of iwi and explain how they had been addressed. This requirement, too, was limited to consultation on policy statements or plans.<sup>396</sup>

Thirdly, a new section 46A was inserted, which changed the process to be followed for national policy statements if the Crown decided not to use a board of inquiry. The old section 46A (inserted in 2005) had required the Crown to give the public time to make submissions. The Crown would now be required to notify public authorities and iwi authorities of its intention to introduce a national policy statement with an explanation as to the reasons. Those authorities then had to be given time to make submissions. But the Crown no longer had to consult the public – the new section 46A merely stated that the Minister ‘may’ carry out consultation.<sup>397</sup> If the Minister chose not to consult more widely, therefore, Māori

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390. Resource Management Act 1991, sch 1, cl 4A

391. Resource Management Act 1991, s 35A

392. Ministry for the Environment, ‘Regulatory impact and compliance cost statement’, [2005], pp 3, 12

393. Ministry for the Environment, ‘Regulatory impact and compliance cost statement’, [2005], p 3

394. Resource Management Act 1991, s 36A; Resource Management Amendment Act 2005, s 18

395. Tania Gerrard, answers to questions in writing (doc F18(d)), p 10; Resource Management Act 1991, s 34A(1A); Crown counsel, closing submissions (paper 3.3.46), p 45n

396. Tania Gerrard, answers to questions in writing (doc F18(d)), p 10; Resource Management Act 1991, s 32(4A)

397. Resource Management Act 1991, s 46A; Resource Management Amendment Act 2005, s 32; Resource Legislation Amendment Act 2017, s 37

input would be confined to iwi authorities, but at least that input was guaranteed regardless of the Minister's preferences.

The legislation was not amended to require consultation with Māori over resource consents or any other RMA matter.

#### **2.5.6.4 Māori participation in freshwater management decision-making**

We accept that the Crown has strengthened the consultation provisions in the RMA at the plan formulation stage. Councils must obtain input from Māori during the preparation of their policy statements and plans. It is clear, however, that these mechanisms have not provided Māori with a decision-making role in freshwater management at the plan making stage, and no mandated role at all at the consenting stage. The Crown has frequently accepted the need to enhance Māori participation in decision-making.<sup>398</sup>

#### **2.5.7 Resourcing**

Lack of resources has profoundly affected the ability of Māori to participate in freshwater management and other RMA processes. Arapeta Hamilton of Ngāti Manu summarised the situation that affects most iwi and hapū:

I thought the introduction of the Resource Management Act 1991 was going to greatly enhance our opportunity for our voice on environmental issues to be heard and acted upon. When the legislation was made law, it unfortunately was not resourced appropriately and we had to carry costs of even the basic functions of the Act. As usual, with Government initiatives, we were expected to operate on pipi and aroha. It seemed as though we had been set up to fail. The fact that many of the hapū in the North have struggled and endured to make this piece of legislation work for us is an indication of the tenacity and resilience of our people.

The second part was the establishment of the Environment Court, an avenue to appeal Resource Consent decisions. However, the cost of lodging and fighting an appeal was and still is prohibiting and daunting for our people. An environmental fund to assist Māori groups only gives a contribution towards costs. The approximate cost for an appeal can start from \$30,000 and if you lost, costs can be awarded against you. Kia tupato ī ngā ngāngara.<sup>399</sup>

It is not necessary to recite the extensive evidence we received on this point. Many witnesses told us that Māori were under-resourced to participate effectively

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398. See, for example, Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, 2013) pp 8, 65–67; New Zealand Government, *Freshwater reform 2013 and beyond* (Wellington: Ministry for the Environment, 2013), pp 19, 20, 26 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 615, 616, 622)

399. Arapeta Hamilton, brief of evidence, 9 September 2016 (doc D43), p 9

in RMA processes.<sup>400</sup> The crucial fact is that the lack of resources has inhibited Māori participation in several ways:

- ▶ It has made their participation less effective because they lacked the capacity to employ technical advisors and legal counsel, which has significantly reduced the effectiveness of their participation in many RMA processes;
- ▶ It has placed an enormous burden on iwi resource management units (where they exist) or unpaid volunteers, who have felt out-matched by the better-resourced, more technical contributions of commercial and other interests;
- ▶ 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 did not and could not 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 section 33 transfers and section 36B joint management agreements;
- ▶ It has sometimes reduced the quality and effectiveness of iwi management plans; and
- ▶ It has sometimes prevented Māori from participating in RMA processes at all.

The Local Government Act 2002 was supposed to help address this problem. Section 81 of that Act required councils to establish processes through which Māori could ‘contribute to decision-making’. Each council had to ‘consider ways’ of ‘foster[ing] the development of Māori capacity to contribute to the decision-making processes of the local authority’. This has resulted in some funding for the preparation of iwi management plans, for example, but we do not have full information on exactly how much assistance has been provided.

In 2005, three years after the passage of the Local Government Act, a major consultation round showed the Crown that funding and resourcing remained a key constraint:

The capacity and capability of iwi and hapū to engage with councils in both consultation processes and decision-making or joint management was raised as an issue in some areas, as many organisations lack the structures and resources to engage as they would like. This was seen as a major impediment to greater Māori participation. While some iwi have resource management units staffed by full-time staff, most iwi

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400. See, for example, Michelle Marino, brief of evidence (doc E11), p 22; Gregory Carlyon, brief of evidence (doc E18), p [29]; Toro Bidois, brief of evidence (doc D13), pp 2–4; Millan Ruka, brief of evidence (doc D18), pp 6–8, 13, 17–18; Meryl Carter, brief of evidence (doc D19), p 5; Robert Earnest MacDonald, brief of evidence (doc D28), pp 10–11; Jenny Mauger, brief of evidence (doc D32), pp 8–10; Hugh Sayers, brief of evidence (doc D36), pp 10–12; Merle Ormsby and Tiaho Pillot, brief of evidence (doc D79), pp 27–28; Paul Hamer, summary of ‘Poroti Springs and the Resource Management Act, 1991–2015’ (doc D3(a)), pp 7, 17; Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 70; Jane Mihingarangi Ruka Te Korako, brief of evidence (doc G1), p 3.

and hapū rely on voluntary contributions and people undertaking unpaid work to deal with councils and Resource Management Act processes. A common suggestion at the hui was that central and local government should make greater provision of resources to allow Māori organisations to participate effectively (perhaps through direct resourcing or shared funding with councils), which would lead to higher quality engagement and better Māori involvement. Many participants also sought assistance to develop technical/scientific skills to complement the mātauranga Māori (traditional knowledge) and kaitiaki skills already existing in Māori communities.

It was often noted that iwi and hapū are not resourced by local or central government to take part in the consultation processes under the Resource Management Act or with central government. This could result in limited resources being stretched far too thinly. It was also seen as a distinct disadvantage when dealing with other parties, such as council staff or lawyers, who are paid for their time, while iwi participants are not.<sup>401</sup>

Six years after the 2005 consultation hui, the Wai 262 Tribunal found in 2011 that the lack of resources was still a crucial problem for Māori participation, despite the requirements of the Local Government Act.<sup>402</sup> Four years after the Wai 262 report, Cabinet agreed in 2015 that it was still necessary to '[e]nhance iwi/hapū participation at all levels of freshwater decision-making', and to '[b]uild capacity and capability' among both iwi and councils, including through resourcing.<sup>403</sup> The Crown and the ILG established a 'Governance/Management/Decision-making' workstream to deal with these two issues (discussed in chapter 4), although no resourcing for Māori participation came out of that process. In 2018, Martin Workman, a director at MFE, reported that the operations of the NPS-FM had been reviewed. He noted that a lack of 'capacity and capability within iwi and hapū to take advantage of opportunities to be involved' was still a 'barrier to furthering iwi and hapū involvement in freshwater governance and management'.<sup>404</sup>

In its closing submissions for this inquiry, the Crown admitted that 'many hapū and iwi struggle to fund their participation in resource management processes'. Crown counsel also acknowledged that participation was time consuming, technical expertise was essential, and 'legal challenges' were 'costly'. Further, counsel admitted that most of the Crown's funding for Māori in environmental management has gone into clean-up funds (not resourcing for Māori to participate effectively in decision-making).<sup>405</sup> Nonetheless, the Crown relied on the Local Government Act's requirements and its own advice to councils that *they* should

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401. Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (Wellington: Ministry for the Environment, July 2005), pp 10–11

402. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 280, 283

403. Tania Gerrard, brief of evidence, [October 2016](doc D88), pp 9–10; Cabinet paper, 'Freshwater reform: Next steps in policy development', 21 July 2015, pp 6, 9 (Crown counsel, sensitive discovery documents (doc D92), pp 143, 146)

404. Martin Workman, brief of evidence, [March 2018](doc F21), p 17

405. Crown counsel, closing submissions (paper 3.3.46), pp 77–78

provide funding.<sup>406</sup> Clearly, this has not been an effective solution, as the Crown's closing submissions and Cabinet's decision in 2015 have demonstrated.

The advice referred to by the Crown is located on the Quality Planning website. The document is called 'How to facilitate consultation with tangata whenua', and it was provided to us by the Crown in 2017. It is worth quoting in detail because it shows how the problem of resourcing has persisted, with significant prejudice to Māori:

Tangata whenua groups are rarely resourced to respond to requests for consultation and participation in RMA processes. Yet, they may receive large volumes of requests by councils seeking input on plan development or lodged applications for resource consent, or from applicants seeking to consult on their proposals. The capacity and capability issues that tangata whenua face in engagement in RMA processes in responding to such requests often affect their ability to respond meaningfully, promptly, or at all. Common capacity issues are:

- › Basic costs frequently stand in the way of tangata whenua engagement on important issues. These include parking, petrol or bus fares, wages, stationery, office rentals, computers, reference libraries, internet access, expert advice (lawyers, planners, engineers), phones, vehicles, and licences for software.
- › Many small and medium-sized tangata whenua groups do not have the administrative capacity to engage.
- › Many tangata whenua groups have to be selective about which issues they engage in, due to a lack of resources.

Common capability issues:

- › Lack of staff with relevant technical expertise.
- › Insufficient resources of some councils.
- › Lack of tangata whenua planners.
- › Lack of tangata whenua in senior levels of council.
- › Lack of strategic direction to prioritise when and what tangata whenua engage in.
- › Most tangata whenua groups rely on volunteers, who cannot compete with professional planners and lawyers.
- › Often tangata whenua RMA technicians do not have any formal training. Some groups benefit from the expertise of members who work or have worked for councils or central government.
- › Lack of young tangata whenua who are developing technical RMA expertise.

There are also capacity and capability issues facing tangata whenua engagement in the plan development process in particular which are additional to those above, these can include:

- › councils not having effective processes for involving tangata whenua in planning
- › distraction of more immediate developments, such as resource consent applications, Treaty of Waitangi claims; and negotiations or political issues

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406. Crown counsel, closing submissions (paper 3.3.46), p 78

- ▶ scepticism from tangata whenua, based on past experiences, that their efforts to participate will not lead to significant results
- ▶ cost, length and complexity of the planning process
- ▶ overall lack of understanding among tangata whenua of the impact of council planning on their interests
- ▶ difficulty in translating tangata whenua values and customary concepts into technical planning, policy and rules
- ▶ lack of strategic direction and iwi management plans
- ▶ lack of effective direction and resources from central government.<sup>407</sup>

These constraints have profoundly affected the ability of many Māori to participate or to participate effectively in freshwater decision-making and RMA processes more generally. The Quality Planning website document, referred to by the Crown, advised councils to build their own capacity to engage with Māori and to consider how to ‘assist in raising the capacity of tangata whenua to engage with council, both financially and from a technical knowledge perspective.’<sup>408</sup> In the RMA, the Local Government Act, and the National Policy Statement for Freshwater Management, the Crown has not directed councils to provide funding, nor has the Crown filled the gap with its own funding. Advice on a website is not an effective substitute. The claimants argued that ‘the gross-under-funding of Māori participation’ has posed a huge barrier to their ability to exercise kaitiakitanga in freshwater management.<sup>409</sup> We do not wish to detract from the assistance that councils have sometimes provided, but the evidence is that a significant problem remains. For many Māori, this barrier to participation is as high as ever.

### **2.5.8 Is RMA participation set at the right level of customary authority for freshwater management?**

According to the claimants and some interested parties, customary rights and control of water bodies were traditionally set at the hapū level, whereas the RMA provides for participation by iwi in freshwater management.<sup>410</sup> The claimants accepted, however, that with large water bodies or overlapping hapū interests, the appropriate authority would ‘need to be at iwi level.’<sup>411</sup> Nonetheless, the claimants argued that the RMA needed to be ‘re-set’ so that its participatory arrangements were fixed at the hapū level.<sup>412</sup> The ILG disagreed, arguing that there did need to be greater engagement with hapū in freshwater management, but that the current RMA provisions were set at the correct level:

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407. ‘How to facilitate consultation with tangata whenua’, [2017] (Crown counsel, cross-examination bundle for Gregory Carlyon (doc E18(b)(ii), pp 7–8)

408. ‘How to facilitate consultation with tangata whenua’, [2017] (Crown counsel, cross-examination bundle for Gregory Carlyon (doc E18(b)(ii), pp 3, 13–14)

409. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 9, 26, 27

410. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 6–7, 22

411. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 6

412. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 22



There should be better provision for hapū engagement but the engagement also needs to be practical. The Freshwater ILG has been particularly cognisant of this during engagement with the Crown. It is simply not practical for all hapū to consistently participate in a range of different freshwater processes; even with increased funding. It is the Freshwater ILG's view that iwi authorities, as entities that have been established to represent their iwi (including respective hapū within that iwi), with individuals democratically elected onto those bodies (in accordance with strict processes enforced by the Crown in order to be recognised as post settlement governance entities), should be participating in the majority of those RMA processes. An exception may be where a hapū leads a particular matter with an iwi authority providing support.<sup>413</sup>

The Crown agreed with the ILG about the practical challenge of councils engaging with all hapū, but also argued that the RMA does provide for hapū participation as appropriate in some of its mechanisms.<sup>414</sup> MFE official Tania Gerrard, in explaining why one of those mechanisms (Mana Whakahono a Rohe – see chapter 4) was for iwi to initiate with councils, stated:

The policy needed to be workable for councils as well as tangata whenua. Due to the number of hapū throughout New Zealand, Cabinet determined that the policy should apply to iwi authorities with the ability to delegate to hapū within those agreements and enable councils to initiate with hapū.<sup>415</sup>

We agree with the Crown that RMA mechanisms provide for a mix of iwi and hapū involvement. As far as we can determine, this partly reflects the scale of the matter on which engagement or consultation is required, and the original focus of the RMA on iwi authorities in conjunction with the Runanga Iwi Act 1990 (see section 2.5.2). Where matters have been set at the national or regional levels, iwi participation is the default arrangement in the RMA, but hapū-specific engagement has also been provided for in some mechanisms where particular freshwater bodies may be involved.

In addressing this issue, we include some of the more recent mechanisms for the sake of completeness:

- ▶ If the Minister chooses not to use the board of inquiry process, mandatory consultation for national instruments is confined to iwi authorities (section 46A of the RMA) but the Minister can choose to consult more widely;
- ▶ Consultation by local authorities on policy statements and plans is mandatory with iwi authorities (RMA schedule 1), which for freshwater management is at the regional level;

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413. Counsel for interested parties (ILG), closing submissions (paper 3.3.41), pp 21–22

414. Crown counsel, closing submissions (paper 3.3.46), pp 74–76

415. Tania Gerrard, answers to questions in writing, [July 2018](doc F18(b)), p 8

- ▶ Setting limits and objectives for 'freshwater management units', which may involve one waterway or multiple waterways depending on the size of the 'unit', involves iwi and hapū (section D of the NPS-FM);
- ▶ Section 33 transfers of RMA functions and powers are confined to iwi authorities;
- ▶ Section 36B JMAs can be made with iwi or hapū (recalling that hapū were inserted at the select committee stage in 2005);
- ▶ Heritage Protection Authorities, which can be constituted for particular sites, have to be body corporates, which could be an iwi authority, a hapū body, a trust, or some other organisation (section 188 of the RMA);
- ▶ Mana Whakahono a Rohe arrangements can be initiated with councils by iwi authorities but councils can choose to initiate one with hapū (sections 58O-58P of the RMA); and
- ▶ Iwi management plans are planning documents which have been recognised by an iwi authority, and this can include hapū management plans that have been endorsed by an iwi authority (sections 61(2A), 66(2A), and 74(2A) of the RMA).

The only one of these mechanisms that is specifically confined to freshwater management is the NPS-FM, and that instrument provides for both iwi and hapū to be 'involved' in freshwater management (see chapter 3). Regional planning is otherwise confined to iwi authorities in the RMA.

In our view, the RMA does not need to be 're-set' on this issue of iwi and hapū authority, as the claimants argued. Rather, there is a need for some minor amendments and some nationally directed changes to council practice. Hapū are sometimes the kaitiaki of tribal taonga, as is the case of the Whatatiri hapū and Porotī Springs, and councils can enter into JMAs with hapū – although this has never happened. Also, iwi planning documents include hapū management plans that have been approved by an iwi authority. In those two cases, the requirement is for the RMA mechanisms to be better funded and actually used in a systematic way, in cases where Treaty settlements have not already delivered co-governance and co-management. Section 33, however, does need to be amended to enable transfers of RMA functions and powers to hapū where that is appropriate for particular freshwater taonga.

### 2.5.9 Our conclusions and findings

The Wai 262 Tribunal referred to a sliding scale for how Māori should be involved in the management of a wide range of natural resources under the RMA and other statutes. We agreed with the Wai 262 Tribunal in our stage 1 report, where we said:

The Tribunal found that kaitiaki rights exist on a sliding scale. At one end of the scale, full kaitiaki control of the taonga will be appropriate. In the middle of the scale, a partnership arrangement for joint control with the Crown or another entity will be the correct expression of the degree and nature of Māori interest in the taonga (as balanced against other interests). At the other end of the scale, kaitiaki should have influence in decision-making but not be either the sole decision-makers or

joint decision-makers, reflecting a lower level of Māori interest in the taonga when balanced against the interests of the environment, the health of the taonga, and the weight of competing interests.

This scheme is not incompatible with Māori having residual proprietary interests in – or, indeed, full ownership of – water bodies that are taonga. Rather, that would be a factor to be considered in terms of the weight accorded the kaitiaki interest vis-à-vis other interests in the resource.<sup>416</sup>

Having heard the evidence of the claimants and interested parties in both stage 1 and stage 2 of this inquiry, our view is that the Māori Treaty right in the management of freshwater taonga is at the co-governance/co-management part of the scale. Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. As we see it, the Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga. In some cases, the strength of the Māori interest may be such that it requires Māori governance of the freshwater taonga – for example, through the use of section 33 of the RMA. For the most part, however, the presence of other interests in New Zealand's water bodies requires a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga. That is the Treaty standard for freshwater management.

At present, the general law for freshwater management is the RMA, although many statutes arising from Treaty settlements have created particular freshwater participation arrangements. In this section of our chapter, we have found the following flaws in the RMA's participation arrangements:

- ▶ Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- ▶ Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used.
- ▶ Iwi management plans have not been accorded their due weight in RMA planning. The Crown has turned down repeated calls for the enhancement of their legal weight.
- ▶ The consultation requirements of the RMA have been confined to plan-making, and have suffered from under-resourcing and the lack of a clear path for consultation to take place in a meaningful and effective way. The Crown

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<sup>416</sup> Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 69

has argued that the new Mana Whakahono a Rohe mechanism provides just such a path (see chapter 4).

- ▶ Under-resourcing has contributed to a lack of capacity and capability for many Māori entities in freshwater management. This has crippled their ability to participate effectively in RMA processes. Examples include the preparation of effective iwi management plans and participation in consultation and hearing processes. The Local Government Act 2002's requirement that councils must 'consider ways to foster the capacity of tāngata whenua' has not sufficiently addressed this crucial problem.

For all these reasons, the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced where they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and where their rights and interests have been excluded or considered ineffectively in freshwater decision-making.

There have been some countervailing points. Treaty settlements have delivered co-governance and co-management authority for a selection of freshwater taonga. Council practice and iwi-council relationships have improved in some areas – mostly but not entirely due to Treaty settlements. Some councils have provided limited funding, mostly for the preparation of iwi management plans. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making.

On balance, our view is that Treaty settlements have provided for the exercise of tino rangatiratanga over certain waterways, such as the Waikato River, the Whanganui River, and Lake Taupō, but not for others, where Māori participation in freshwater management remains limited in nature. We do not think, therefore, that the Crown can rely on its Treaty settlement process as a reason for not reforming the participatory arrangements in the RMA to make them effective. We do not consider such an approach to be consistent with the Treaty guarantee of tino rangatiratanga and the principle of partnership.

In a number of consultation documents and other public documents from 2004–16, the Crown has accepted that Māori participation in RMA processes is still not adequate and that Māori need to be involved in decision-making. It has advised the public that this is necessary in order to meet the Crown's Treaty obligations and to address Māori rights and interests in fresh water. We assess the Crown's freshwater management reforms in chapters 3–4 to determine whether they have made the RMA's participation arrangements compliant with Treaty principles.

## **2.6 PROPRIETARY RIGHTS AND ECONOMIC BENEFITS**

### **2.6.1 Introduction**

One of the claimants' principal concerns about the RMA is that it does not recognise their proprietary rights, nor does it provide them with an economic benefit

from the commercial use of water by ‘third parties’ (that is, water permit holders). They were particularly critical of the ‘first-in first-served’ mechanism for the allocation of water rights. We discuss these issues in this section of our chapter, beginning with the battle over the issue of Māori ownership during the development of the RMA.

### 2.6.2 The Resource Management Law Reform process and the RMA

Māori raised the ownership of natural resources constantly throughout the resource management law reform process (RMLR) in 1988–90.<sup>417</sup> The Wai 262 Tribunal summarised this in its report:

Early in the process, Māori raised the issue of unresolved Treaty claims to the ownership of resources that would come to be regulated under the new law – minerals, geothermal energy, water, the foreshore and seabed, riverbeds, and so on – all of which had been the subject of long-standing political or legal claims. In response, the Government excluded ownership of resources from the RMLR project, on the basis that it would be addressed separately, and instead declared that the Act would only ‘regulate’ the use of resources. It is fair to say that Māori were generally sceptical, especially as consent access to resources such as water effectively secured their ownership.<sup>418</sup>

Although Māori had called for ‘the clear recognition of Māori authority and ownership of natural resources,’ officials recommended that – as far as Māori interests were concerned – the law reform should focus on Māori ‘participation, control and authority in resource management decision-making’.<sup>419</sup>

Cabinet agreed with the officials’ view that Māori ownership issues should be excluded from the RMLR. Nonetheless, it also decided that earlier statutory provisions for Crown ownership, such as for navigable riverbeds, would be continued in the new legislation.<sup>420</sup> This approach included the Crown’s exclusive rights to use and control natural water, which had been established for the first time in 1967. Section 354(1) of the RMA stated that the repeal of certain Acts would not affect ‘any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed’. This included section 21 of the Water and

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417. Robert McClean and Trecia Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98* (Wellington: Waitangi Tribunal, 2001), pp166–175; Morris Te Whiti Love, ‘Resource Management, Local Government, and the Treaty of Waitangi’, pp 30–32; Waitangi Tribunal, *Whanganui River Report*, pp 312, 332–333

418. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 249–250

419. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98*, p167

420. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98*, pp166–168; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp1406, 1409; Waitangi Tribunal, *Whanganui River Report*, p312

Soil Conservation Act 1967, which had vested in the Crown the sole right to dam, divert, take, or discharge into water.<sup>421</sup>

When the Water and Soil Conservation Bill was in process, the National Government took action to forestall the opposition of farmers by including a proviso in section 21. The farming community felt that ‘the Crown was usurping and threatening something that they had always had an absolute right to’ in their farming operations.<sup>422</sup> The proviso allowed farmers to continue to exercise their prior right to water for ‘the needs of animals’, regardless of the vesting in the Crown. It also preserved the right of any person to take water for domestic needs or firefighting. Although the Crown was willing to provide for the commercial needs of its farming constituency in 1967, it did not similarly consider its Treaty obligations or prior Māori rights in the proviso to section 21.<sup>423</sup> With Māori ownership issues excluded from the RMLR, section 21 (and its proviso) continued to be the law after 1991 even though other aspects of the law on fresh water had been completely overhauled.

The Crown’s decision to exclude Māori ownership of natural resources from the RMLR did not go unchallenged. The consultation process included 33 hui and written submissions. Māori participation ‘continued to highlight the issue of ownership of resources’.<sup>424</sup> The Crown was challenged at many hui to ‘recognise Māori ownership of resources before any resource management regime was implemented’.<sup>425</sup> A hui on water pollution in 1989, for example, attended by Maori Marsden, Nganeko Minhinnick, and other Māori leaders, called for the Crown to ‘immediately commence negotiations with iwi, hapū to enable the resolution’ of ownership claims over resources.<sup>426</sup>

By the time the Resource Management Bill was before Parliament in 1990, Māori were still submitting that a new resource management system could not be put in place without first recognising Māori proprietary rights in those resources. Submitters on that point included the Taitokerau District Māori Council, the Tainui Māori Trust Board, and Nga Kaiwhakamarama i Nga Ture.<sup>427</sup> The

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421. David Alexander, ‘Historical Analysis of the relationship between Crown and iwi regarding the control of water’ (doc A69(b)), p 3

422. Alexander, ‘Historical Analysis of the relationship between Crown and iwi regarding the control of water’ (doc A69(b)), pp 3, 7

423. Alexander, ‘Historical Analysis of the relationship between Crown and iwi regarding the control of water’ (doc A69(b)), pp 7–9; Brian Cox, speaking notes, [November 2016](doc D24(b)), pp 3–4

424. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 169

425. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 169

426. Notes from Pollution Hui, 15–17 February 1989 (McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 170)

427. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp 174–175

submission of the Taitokerau District Māori Council (which is a claimant in this inquiry) stated:

The purpose of the legislation is to determine principles of resource management irrespective of ownership of the resources in question. This should mean that if a general law, and its processes of application are to apply to Maori-owned resources then that law and its implementation should reflect the values and concerns of both Treaty partners. It should be noted that identification of ownership can have major consequences for resource management. For instance . . . [with regard to] fishing – the Maori input into decision making has increased greatly since acknowledgement of Maori ownership. It is too simplistic to ignore ownership . . . If issues of Crown ownership are considered relevant to the Bill, then issues of Iwi ownership must be given equal status in the legislation.<sup>428</sup>

None of the Māori representations during either the RMLR or the passage of the Bill were successful in getting the Crown to reconsider the issue of Māori ownership. The NZMC, the National Māori Congress, and the Māori Women's Welfare League made a 'last ditch' attempt in 1991. Their joint submission challenged the Crown's 'presumed ownership rights' in rivers, lakes, and the coastal marine area.<sup>429</sup> It stated:

Because the Bill goes far beyond its mandate of regulating management of resources and deals specifically with allocating ownership rights, Maori demand that their ownership rights are protected and safeguarded under the Bill. A failure by the Crown to do so would be a retrograde step in the evolving Treaty relationship. Maori have stated many times since the Resource Management Law Reform process began, that major legislation which adversely affects taonga and assets protected by Te Tiriti-o-Waitangi should not proceed until those claims are either resolved or the legislation contains provisions to adequately safeguard Treaty rights. In its present form, the Bill violates Maori rights and fails to provide any effective safeguards.<sup>430</sup>

The right to allocate water by way of consents, for example, was seen by many as effectively conferring ownership of the resource. As the Wai 262 Tribunal found,

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428. Taitokerau District Māori Council, submission, 1990 (McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p175)

429. McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, pp176–177

430. NZMC, National Māori Congress, and Māori Women's Welfare League, submission, 1991 (McClelland and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p177)

this made Māori ‘generally sceptical’ of the Crown’s claim that the Act was confined to regulation.<sup>431</sup>

### 2.6.3 No alternative process for negotiating ownership of water was established

As noted, the issue of Māori ownership was excluded from the RMLR on the basis that there would be a ‘process outside the review to negotiate ownership issues.’<sup>432</sup> Robert McClean and Trecia Smith, in a publication for the Waitangi Tribunal, theorised that this may have been one reason for the establishment of the Treaty of Waitangi Policy Unit (TOWPU).<sup>433</sup> As far as we are aware, however, no such process was established for freshwater resources.

Since 1991, the Crown has been willing to recognise ‘de facto’ Māori ownership rights in some natural resources. This has been done piecemeal through a number of settlements and statutes, including for commercial fishing (1992), pounamu (1997), and commercial aquaculture (2004). The claimants’ customary law team argued that it was possible for ‘de facto’ ownership of water to be ‘shoehorned’ into such statutory regimes. They emphasised the Māori Commercial Aquaculture Claims Settlement Act 2004 because that settlement was especially ‘analogous to claims to freshwater bodies, given that it recognises a right to exclusively occupy a water space.’<sup>434</sup> The Act stated that iwi would have 20 per cent of all new space set aside for aquaculture after 1 January 2005. The settlement also included the equivalent of 20 per cent of all space created between September 1992 and 31 December 2004 (or compensation where that second commitment could not be met).<sup>435</sup> But the Crown chose not to adopt a solution of this kind for proprietary rights in fresh water.<sup>436</sup>

Since 1991, many tribal groups have continued to pursue their individual river and lake claims in the Waitangi Tribunal. Notable examples include the Mohaka River, Ika Whenua Rivers, and Whanganui River claims. Waterways (and the issue of their ownership) have also been major features in district inquiries. Claims in respect of Lake Taupō, Lake Ōmāpere, Lake Horowhenua, the Wairarapa lakes, Te Urewera rivers, and the Rangitikei River are among the many that have been pursued in the various districts. The ownership of natural resources more broadly has also been an issue in these inquiries, and in the Wai 262 inquiry into claims about flora and fauna (and Māori knowledge systems). A number of Tribunal reports have found the Crown in breach of Treaty principles because it has failed

431. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, pp 249–250. See also McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 164.

432. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 167

433. McClean and Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices*, 1983–98, p 167 n

434. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 50

435. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 3, p 1151

436. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), pp 50, 58–67



to recognise and provide for Māori proprietary rights and tino rangatiratanga over their water bodies.<sup>437</sup>

TOWPU handled Treaty settlement negotiations for the Crown until its successor agency, the Office of Treaty Settlements (OTS), was established in 1995. The Treaty settlements process has not provided for negotiation over the ownership of water. Tania Ott, a deputy director of OTS, explained during our stage 1 hearings that the Crown does not consider water ownership to be a matter that OTS can negotiate about in Treaty claims. She told us that, almost without exception, Treaty claims include grievances in relation to natural resources, in many case freshwater resources, raising the loss of ownership or control, lack of access, exclusion from decision-making about the resources, and the degradation of water quality. But Treaty settlement policy has not generally included the ‘vesting of ownership of natural resources.’<sup>438</sup> Reasons include:

- ▶ the use of water is ‘needed for the benefit of all New Zealanders’;
- ▶ hydro-electricity generation is ‘essential to the well-being of all New Zealanders and the nation’s economic development’; and
- ▶ the legal position is that no one owns flowing water, including the Crown, and ‘the Crown cannot transfer what the Crown does not own.’<sup>439</sup>

The Crown has, however, been prepared to vest ownership of the beds of rivers or lakes ‘of great significance’ where this is ‘also legally possible’ (that is, when the beds are considered to be in Crown ownership). Ms Ott noted that this involved a vesting of the bed, not the water, and ‘typically involves protection of existing property, use and access rights.’<sup>440</sup> As far as we are aware, this has only happened infrequently (in the cases of Te Waihora (Lake Ellesmere), Lake Taupō and its tributaries, and the Te Arawa lakes).<sup>441</sup> Given the importance of freshwater resources to Māori, the Crown developed mechanisms instead of ownership, such as involving the claimant group in management and decision-making, access to sites where traditional foods and aquatic species can be obtained, and mechanisms for recognising traditional associations.<sup>442</sup> Management mechanisms for particular freshwater resources, however, only began to be an option from about 2008.<sup>443</sup> In terms of the economic benefits arising from ownership, Ms Ott’s evidence was that settlements provide financial and commercial redress. The commercial

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437. See Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), chapter 2.

438. Tania Ott, brief of evidence, 29 June 2012 (doc A92), pp 3–4

439. Ott, brief of evidence (doc A92), pp 4–5

440. Ott, brief of evidence (doc A92), pp 6–7

441. Jacinta Ruru, ‘Indigenous Restitution in settling water claims: the developing cultural and commercial redress opportunities in Aotearoa, New Zealand’, March 2013 (Sir Edward Taihākurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti, papers in support of ‘Ngā Wai o te Māori’ (doc E13(a)), pp [3990]–[3991])

442. Ott, brief of evidence (doc A92), p 5

443. Ott, brief of evidence (doc A92), p 6

arrangements can ‘reflect the relationship with the resource but do not necessarily involve transfer of ownership.’<sup>444</sup>

In some of the more recent settlements, the Crown and iwi have expressed their different views about the ownership of the freshwater resource in the settlement itself. There have not been many resource-specific settlements in any case. Jacinta Ruru noted that the context of the Crown–Māori ‘battle’ over proprietary rights is ‘evident even in these settlement statutes’, referring to the Waikato River (2010), Waipa River (2012), and Te Arawa Lakes (2006) settlements. According to Professor Ruru:

The river co-management statutes take a neutral stance where they record that both parties believe that they own, or have responsibility, for the river but then ‘converge in the objective to restore and maintain’ the health and wellbeing of the river. These river settlements clearly stipulate that they are concerned with the management aspects of the water, and not the ownership of the water. The river settlements accept that the Crown and the tribes have different views as to the ownership of the water and state that the settlements ‘are not intended to resolve these differences.’ In comparison, while the Te Arawa Deed of Settlement records that Te Arawa believe that they ‘own’ the lakes, the settlement statute is then silent on this aspect but makes clear that it is a full and final settlement. Despite the tension as to ownership, these settlements illustrate how partial reconciliation can occur by focusing on cultural redress namely management.<sup>445</sup>

As this chapter deals mainly with the period up to 2009, we end the discussion at this point. Treaty settlement issues arising after 2009 will be addressed in later chapters.

The final point to consider here is that in 2012, once again faced with a major reform of the regulatory regime (this time for fresh water alone), the claimants again raised the point that ownership issues should be considered before management arrangements could be decided. As Sir Edward Taihākurei Durie put it: ‘In a democratic capitalist society, . . . you get the rights right first, you do the management thing later.’<sup>446</sup>

#### **2.6.4 The allocation system: first-in, first-served**

Brian Cox, a claimant witness with long experience in the energy sector, explained the effects of the decision to exclude ownership issues from the RMLR and ultimately the RMA. In his experience, it has meant that Māori rights to *use* fresh water – one of the integral components of ownership – are not provided for in

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444. Ott, brief of evidence (doc A92), pp 5–8

445. Ruru, ‘Indigenous Restitution in settling water claims’ (Durie, Joseph, Toki, and Erueti, papers in support of ‘Ngā Wai o te Māori (doc E13(a)), p 452)

446. Waitangi Tribunal, decision on application for urgent hearing, 28 March 2012 (paper 2.5.13), p17

the RMA regime. RMA decision makers do not have to consider Māori rights when allocating water for commercial uses, nor are those rights a matter of relevance when charges are levied on commercial uses. Only the consent authorities' administration costs are covered by charges under the RMA.<sup>447</sup>

Mr Cox told us:

Other than with regard to culture, it has been my experience that the RMA and National Environmental Standards/planning instruments in practical terms do little to protect Maori use rights and interests. That is because Maori property rights with regard to water were never addressed in 1991, and the RMA and associated planning processes assume that no such rights exist. That in turn limits the right, and therefore the ability, of Maori to participate in many water resource management processes. It also means they stand on an equal footing, subject only to the first in/first served principle, with companies and individuals who seek to take and use water but, unlike Maori, do not have pre-existing rights in that water.<sup>448</sup>

The 'first-in, first-served' principle is not specifically prescribed in the RMA but it has developed as a matter of statutory interpretation.<sup>449</sup> In *Fleetwing Farms Ltd v Marlborough District Council*, the Court of Appeal identified five ways of proceeding: a comparative assessment of applications; tendering; proportional allocation; allocation by lot; and first-come, first-served. The court decided: 'On our reading of the Resource Management Act Parliament has used the final approach of first come first served.'<sup>450</sup> This does not mean that all applications go into the same queue. Regional councils can allocate water to various activities, such as urban water supplies or aquaculture, but the applications must be determined in order within each activity.<sup>451</sup> A law change in 2005 clarified that resource consent renewals take priority over new applications, which has high significance in fully allocated catchments.<sup>452</sup>

In the period under discussion in this chapter, decision makers had to satisfy themselves that an application to take water for irrigation, for example, was consistent with the principle of sustainable management, having considered the matters in sections 6–8, and that any harmful effects would be avoided or mitigated. Outside of that balancing exercise, the Act did not require the merits of applications to be compared or higher-value uses to be prioritised. A report for the Ministry shows that this has been considered a major weakness in the RMA regime since at least 2004. It has resulted in some catchments becoming fully or even over-allocated, leaving no room for new entrants and putting undue pressure

447. Brian Cox, brief of evidence, 2 September 2016 (doc D24), pp 28–29

448. Cox, brief of evidence (doc D24), p 28

449. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 17

450. *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA), at 265

451. 'Factsheet on Freshwater Allocation', [2016], p 3 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 7)

452. Resource Management Amendment Act 2005, s 67; Resource Management Act 1991, s 124B

on the resource.<sup>453</sup> Research has shown that significant proportions of allocation have been locked up in consents but not used.<sup>454</sup> In 2009/2010, for example, 65 per cent of the consented volume was used.<sup>455</sup> According to Brian Cox, 'resource banking by potential developers' is common.<sup>456</sup>

In 2004, the Ministry for the Environment identified the following Māori concerns with over-allocation and the whole system of allocation:

Māori have particular concerns about the effects of over-allocation of water – including diminishing mauri of a water body (caused by inadequate water flows, pollution or inappropriate mixing of waters), the loss of habitats supporting indigenous species, and an inability to practice customs and traditions related to waterbodies. All these effects can offend the mana of hapū and iwi. The Treaty of Waitangi is seen by Māori as having provided a Crown guarantee of their rights in relation to water bodies. These are sometimes expressed as an ownership right, especially where there are extensive riparian Māori landholdings, or the beds of waterways are still in Māori ownership. Property rights in, and management of, freshwater is frequently an issue in Treaty settlement negotiations. Section 6 of the RMA recognises the relationship of Māori with water as a matter of national importance. However many Māori consider that, in practice, their opportunities to participate in management and decision-making on water allocation are restricted, due to both a lack of capacity and resources (within their own institutions and in local government) and limitations in the legislative framework. Māori want greater engagement in resource management, and will expect greater involvement, better opportunities to express their kaitiakitanga and value systems, and improved relationships.<sup>457</sup>

Thus, Māori were concerned about the environmental impacts of over-allocation on freshwater resources, and wanted to exercise some management and decision-making authority over allocation. The Ministry also noted the issue of proprietary rights, which was another crucial concern. A 2009 study for the Crown and the ILG showed that environmental health and the mauri of water bodies was the first priority for Māori. Economic benefits came second to this concern. But it was also clear that economic benefits *were* a concern. What Māori wanted was an allocation of water in recognition of their ownership interests, and for those interests to be resolved. 'Iwi and hapū say they own the water', it was reported, but it was not

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453. Ministry for the Environment, *Water Programme of Action: Water Allocation and Use – Technical Working Paper* (Wellington: Ministry for the Environment, 2004), pp 9–10; Bryan Jenkins, brief of evidence, 2 September 2016 (doc D23), pp 2–6

454. Cerridwen Elizabeth Bulow, table summarising Crown discovery documents (Bulow, papers in support of brief of evidence (doc D25(a)), pp 453–454)

455. 'Factsheet on Freshwater Allocation', [2016] (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 6)

456. Cox, brief of evidence (doc D24), p 28

457. Ministry for the Environment, *Water Programme of Action: Water Allocation and Use – Technical Working Paper*, p 11

clear at that stage what quantity of water was being sought.<sup>458</sup> In a series of hui in 2005, some Māori considered that the allocation should be for Māori land, which they said ought to be given priority in the allocation regime. The same priority was needed for land returned in Treaty settlements, otherwise that land might not be capable of development.<sup>459</sup>

As well as an allocation for iwi and hapū or for Māori land, many Māori sought a fairer system for allocating water. In their view, the system was inequitable because it assumed an even playing field for applicants when that did not in fact exist. Historically, there had been statutory and other barriers to the development of Māori land, many of them of the Crown's making.<sup>460</sup> This had given Māori a huge disadvantage in accessing water for development under the first-in, first-served system. The matter was put best in a submission to the Crown by the Tūwharetoa Māori Trust Board in 2016, which described the barriers to Māori participation in the water economy:

Much of our rohe is either fully allocated or over-subscribed for surface water and also fully allocated for nitrogen discharge permits. As such we are already experiencing many issues with over-allocation.

Accordingly, a key issue is the inability for our Tūwharetoa Economic Authorities to access water and discharge contaminants, to enable the development of our land blocks. Barriers and restrictions, including historical legislation and past government policies, have limited the development of Māori land blocks. In this way, the first-in, first-served approach to water allocation provided by the RMA has rewarded those with ready access to capital, and by the same token generally disadvantaged Māori land owners. It is important that future policies and regulations do not further limit Māori land development but rather provide for Māori land development, the economic benefits of which will be felt wider than Tūwharetoa whānau, hapū and entities, and have a broader positive impact on the regional and national economy.<sup>461</sup>

As we discuss in chapter 6, this issue of equity for Māori (and other 'new users') was eventually accepted by the Crown as a necessary component of its freshwater reforms.<sup>462</sup> In the mid-2000s, however, the Crown decided that it was not prepared

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458. M Durette, C Nesus, G Nesus, and M Barcham, 'Māori Perspectives on Water Allocation', report prepared for Ministry for the Environment, 2009, pp10, 59 (Brian Cox, papers in support of brief of evidence (doc D24(a)), pp 216, 265); Peter Nelson, answers to questions in writing, [October 2018](doc F28(d)), p 3

459. Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (Wellington: Ministry for the Environment, July 2005), p16

460. Waitangi Tribunal, *He Maunga Rongo*, vol 3, chapter 14

461. Tūwharetoa Māori Trust Board, submission on *Next Steps for Fresh Water*, [2016], pp10–11 (Bulow, papers in support of brief of evidence (doc D25(a)), pp 424–425)

462. See Cabinet paper, 'Fresh Water: Initial Report Back on Allocation Options', [7 December 2016], (Crown counsel, sensitive allocation documents bundle (doc F25), pp45–46, 49–50); New Zealand Government, *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater* (Wellington: Ministry for the Environment and Māori Crown Relations Unit, October 2018), pp 31–33, 51–52

to go beyond enhancing Māori participation in management as its answer to all their concerns. That included the issues of allocation and economic benefits.<sup>463</sup>

Three regional councils were prepared to go slightly further than this by making allocation provisions in their plans. The Tasman District Council (which is a unitary authority) has a policy in its plan to reserve water for the irrigation of Māori land under perpetual leases. Although perpetually leased land was later returned to iwi in a Treaty settlement, other returned land was not provided with the same access to water. The policy arose from a decision in 2008. Local iwi considered it too limited.<sup>464</sup> Peter Nelson, an official from the Crown's allocation work team, observed:

Although this policy is an example of targeting priority of access to particular types of Māori land, in this case officials were aware the policy could be criticised as being too narrow and excluding the majority of Māori owned land, especially after Treaty settlements.<sup>465</sup>

In the Waitaki catchment, Environment Canterbury and the Otago Regional Council have agreed with Ngāi Tahu on an allocation for mahinga kai. Officials advised that this arrangement, however, took 'at least two decades to reach a consensus on an approach'.<sup>466</sup>

The Waikato Regional Council has made arrangements with iwi for the allocation of discharge rights. Some councils have tried to reduce diffuse discharges by setting up schemes to control and allocate discharge rights. The Taupō 'cap-and-trade' scheme for nitrogen discharges, which was established in 2009, includes a 'nitrogen discharge allowance allocation' for Ngāti Tūwharetoa. The Crown played a central role in establishing this scheme.<sup>467</sup> Finally, in the Waikato and Waipā catchments, the *Healthy Rivers* plan change – which arose out of the co-governance arrangements instituted by Treaty settlements – will provide for an allocation of discharge rights for the development of Māori land. This is a very

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463. See Ministry for the Environment, *Freshwater for the Future: a supporting document – a technical information paper outlining key outcomes for the sustainable management of New Zealand's freshwater*.

464. 'Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft), report prepared for 28 September TAG meeting, p 6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 487); Nelson, answers to questions in writing (doc F28(d)), p 3; M Durette et al, 'Māori Perspectives on Water Allocation', p 10 (Cox, papers in support of brief of evidence (doc A24(a)), p 216)

465. Nelson, answers to questions in writing (doc F28(d)), p 3

466. 'Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft), report prepared for 28 September 2016 TAG meeting, p 6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 487)

467. 'Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft), report prepared for 28 September 2016 TAG meeting, pp 4–6; Ministry for the Environment and MPI, 'Freshwater Programme: Managing within limits, pressures, and opportunities', [2014], p 23 (Peter Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), pp 130, 485–487)

recent development.<sup>468</sup> But it was not considered possible under the RMA to ‘move iwi to the head of the queue to give them an allocation of water for extraction.’<sup>469</sup>

It seems that these arrangements are quite limited. Officials noted that they have only occurred in four regions, they mostly arise from Treaty settlements or some form of national direction, some have taken a long time to negotiate, and they only address either an allocation of water or discharge rights but not both.<sup>470</sup> It is difficult to imagine that councils will (or can) develop significant allocations for Māori without a law change and a strong direction from central government. Officials commented in 2016 that an attempt to ‘address the needs of Iwi/Hapū within the allocation space’ relies on the Crown ‘to resolve and provide clarity on [it] as Treaty partners.’<sup>471</sup> Regional economic growth may also incentivise councils to make allocations to Māori for development if the law allows.<sup>472</sup>

### 2.6.5 Māori rights and interests include an economic benefit

In our inquiry, the Crown acknowledged that there is an ‘economic benefit aspect of Māori rights and interests’ in fresh water, and that its reforms must deliver economic benefits to iwi and hapū from their freshwater resources.<sup>473</sup>

We agree that Māori are entitled to an economic benefit from their interests in fresh water. We also agree with the Whanganui River Tribunal, which saw that right as inextricably linked to rights of property. As the Tribunal put it: ‘If one owns a resource, it is only natural to assume that one can profit from that ownership. That is the way with property.’<sup>474</sup> For many, however, the environmental health and mauri of the resource must first be assured before a profit is sought.<sup>475</sup>

Poroti Springs is an example where Māori have been shut out of the economic benefits of a healthy freshwater resource because of the allocation system, past barriers to their participation, and the lack of any partnership mechanisms for

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468. ‘Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy’ (draft), report prepared for 28 September 2016 TAG meeting, pp 5–6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), pp 486–487); Chrisp, brief of evidence (doc F1), pp 11–13

469. ‘Options to provide for Iwi/Hapū rights and interests within allocation – enhanced access’ (draft), report for 28 September 2016 TAG meeting, p 6 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 495)

470. ‘Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy’ (draft), report prepared for 28 September 2016 TAG meeting, pp 5–6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), pp 486–487)

471. ‘Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy’ (draft), report prepared for 28 September 2016 TAG meeting, p 6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 487)

472. ‘Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy’ (draft), report prepared for 28 September 2016 TAG meeting, pp 5–6 (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), pp 486–487)

473. Crown counsel, closing submissions (paper 3.3.46), pp 3, 12

474. Waitangi Tribunal, *The Whanganui River Report*, p 338

475. See, for example, Ani Taniwha, brief of evidence, 19 September 2016 (doc D49), pp 5–6.

managing the resource.<sup>476</sup> Millan Ruka, a beneficiary of the Whatatiri Trust, told us:

We do not gain any economic value from our water supply. We have, for nearly 30 years now, had to give all our intellectual and human resources to try to retain what taonga we have left. Our governing bodies have now grossly over-allocated our water and deny us any economic opportunity. We too have long held aspirations for sustainable economic benefit from Porotī but we have never in this time had the luxury to implement these. Always we have been faced with everyone's insatiable needs for our water. We have expressed our aspirations to Minister Chris Finlayson in the hopes that this will eventually result in the effective management of our waterways and the recognition of our interest.<sup>477</sup>

Meryl Carter has found that when Māori have economic goals for natural resources, they are sometimes accused of 'less than honourable purposes'. She explained:

The Hapū wishes to benefit economically from the water resources of Porotī Springs, as do the entities who extract from the Springs waters, however the first concern for the Hapū is the health and sustainability of the waters. Many Porotī families live in poverty and they deserve to benefit from the resource that was reserved for them.<sup>478</sup>

### 2.6.6 Our conclusions and findings

The discussion in section 2.6 has shown that there were a number of problems with the RMA and its regime for allocating water, and Māori were increasingly concerned about these issues in the first decade of this century:

- ▶ the RMA made a proviso for the prior rights of farmers (preserving the effect of section 21 of the 1967 Act), but did not do the same for the prior rights of Māori in that section or anywhere else in the Act, and did not otherwise recognise or provide for their rights of a proprietary nature;
- ▶ even if the prior rights of Māori had been provided for in the Act, the first-in first-served system of allocation did not allow applications for water permits to be compared or prioritised;
- ▶ the first-in, first-served system was also unfair to Māori, especially in catchments that had become fully or over-allocated, because of statutory and other barriers that had prevented Māori landowners from participating;
- ▶ RMA mechanisms allowed Māori little or no say in the decisions about allocation and use;

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476. See Hamer, 'Porotī Springs' (doc D3); David Alexander, 'Porotī Springs: "A Spring of Celebration, then a Spring of Conflict since 1973"', May 2016 (doc D2).

477. Millan Tame Ruka, brief of evidence, 30 August 2016 (doc D18), pp 17–18

478. Meryl Carter, 'Māori Resources and Environmental Management', 8 July 2013 (Meryl Carter, papers in support of brief of evidence (doc D19(a)), p 16)



- ▶ councils very rarely provided an allocation to Māori in the absence of strong national direction; and
- ▶ the first-in first-served system had resulted in over-allocation and environmental problems, and needed urgent reform.

For all these reasons, we find that the RMA and its allocation regime are not consistent with Treaty principles, including the principle of equity. Māori have been prejudiced by the ongoing omission to recognise their proprietary rights, barriers that have prevented their participation in the first-in, first-served allocation system, and the lack of partnership in allocation decision-making. Economic opportunities have been foreclosed by the barriers to their access to water.

In the period covered by this chapter, Māori also sought new mechanisms for the recognition of their proprietary rights. As we noted in section 2.6.4, an allocation to iwi and hapū, or an allocation for the development of Māori land, had been put forward to the Crown as possible mechanisms.

Whether it be an economic opportunity from a particular water body (such as Porotī Springs), an allocation of a quantity of water to iwi and hapū or for Māori land development, a royalty for commercial use by third parties, or some other mechanism, Māori have consistently sought some economic benefit from their proprietary rights in water. This has been the case ever since the issue of ownership was raised so insistently during the reform of resource management laws in 1988–91. Māori have not ceased to raise the question of ownership and it seems to us that they will never do so unless some form of recognition is provided.

We discuss the Crown's allocation reforms in chapters 4 and 6, noting here that the process had not yet gone beyond identifying reforms options as at 2019. The prejudice to Māori, therefore, continues without a remedy.

## 2.7 ENVIRONMENTAL OUTCOMES AND THE NEED FOR REFORM

### 2.7.1 The science of water quality

In this inquiry, the science of water quality is an important matter. The Parliamentary Commissioner for the Environment released a report in 2012, explaining water quality science as a 'basis for assessing policy interventions'.<sup>479</sup> We have relied on this report for this section, as well as on the evidence of Dr Mike Joy, a freshwater ecologist who appeared for the claimants.

According to the Parliamentary commissioner's report, the 'big three' problems for water quality in New Zealand are pathogens (which make people sick), sediment, and excess nutrients (nitrogen and phosphorus).<sup>480</sup> Relying on NIWA maps, Dr Joy told us:

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479. Ministry for the Environment and Ministry for Primary Industries, *Essential Freshwater: Healthy Water, Fairly Allocated* (Wellington: Ministry for the Environment, October 2018) (doc F29), p10

480. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science* (Wellington: Parliamentary Commissioner for the Environment, 2012), p9

The poor and deteriorating state of water quality in New Zealand is undeniable. Nutrient, pathogen and sediment impacts are worsening, particularly in intensively farmed and urban areas.<sup>481</sup>

We discuss each briefly in turn.

### 2.7.1.1 Pathogens

In terms of human health, pathogens from faecal sources are the main problem. These pathogens are largely present in water bodies as a result of humans (sewage) and animals (manure). Livestock are the main source of manure – deposited directly in the waterways by cattle, washed off pasture into waterways, or as a result of effluent from dairy sheds (which is now mostly disposed of to land rather than water). Some sewage systems still discharge treated effluent into water bodies. Breakdowns (especially during storms) can result in raw sewage entering waterways.<sup>482</sup> The recent gastroenteritis outbreak at Havelock North was caused by the bacteria campylobacter from sheep faeces.<sup>483</sup> The issue of regulations to keep stock out of waterways will be discussed in chapter 5.

According to Dr Joy, New Zealanders have the worst per capita rate in the developed world of a number of waterborne diseases.<sup>484</sup>

### 2.7.1.2 Sediment

Erosion causes the washing of sediment from hillsides and banks down waterways to the sea. This is a natural process but the clearance of forests in New Zealand has significantly increased and accelerated it.<sup>485</sup> Pasture results in ‘two to five times more sediment than an equivalent area of forest.’<sup>486</sup> Excess sediment reduces water clarity, smothers aquatic species, and affects the flow of a river. Suspended sediment can scour plants and damage fish and insects. Indigenous plants struggle to grow in murky water, and the feeding opportunities for fish are also affected. The greatest impact, however, comes from the settling of sediment on the beds of waterways. This ruins the habitat of many native plants, fish, and invertebrates that live on the stony bottom of a water body, and if the blanket of silt is thick enough it can kill them directly. The loss of these plants reduces the food available for other aquatic species.<sup>487</sup>

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481. Mike Joy, brief of evidence, 31 August 2016 (doc D20), p10

482. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, p 22

483. *Report of the Havelock North Drinking Water Inquiry: Stage 1* (Auckland: Department of Internal Affairs, 2017), pp 48–51

484. Mike Joy, brief of evidence (doc D20), pp 31–37

485. Mike Joy, brief of evidence (doc D20), pp 16–17; Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, pp 6, 15–17, 25–26

486. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, p 26

487. Mike Joy, brief of evidence (doc D20), pp 16–18; Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, pp 25–28

Sediment can make water bodies shallower and more prone to flooding over time.<sup>488</sup>

### 2.7.1.3 *Nutrients (nitrogen and phosphorus)*

The third main issue for water quality is excess nutrients, nitrogen and phosphorus. If both nitrogen and phosphorus are present in too great a quantity, they cause algal blooms and the 'other unwanted plant growth in waterways that has become such a concern today'.<sup>489</sup> These plants then alter habitats, making them less liveable for fish and invertebrates. Most of the phosphorus comes from the sediment that is washed into rivers and lakes. Other sources include sewage, wastewater from factories, and animal manure. Nitrogen overwhelmingly gets into water from animal urine, primarily from agriculture, but other contributors include treated effluent and fertilisers. The nitrogen from animal urine is soluble and travels across ground or leaches into the waterways through ground water. This process can take a long time, resulting in a lag between the discharge and its effects on water. Riparian strips can help to reduce the amount of phosphorus entering a water body but not of nitrate.<sup>490</sup>

The nutrients that leach into a waterway or come from an eroded river bank are called 'diffuse discharges', a term that is used often in this report. It is much harder to manage these discharges than a point-source discharge from a pipe.<sup>491</sup>

Native plants generally prefer low sediment and nutrients. When there is sufficient light, nitrogen, and phosphorus (usually in summer), mats of slimy algae smother river beds, destroying habitat and restricting the availability of food. Invasive weeds also flourish in those conditions. Results include the depletion of oxygen at nights, which can badly affect fish and insect populations. At extreme levels, nutrient-driven algal growth can have lethal effects. Cyanobacteria, a blue-green algae, can also produce toxins that remain for days after an algal bloom, rendering some fish and shellfish poisonous for consumption.<sup>492</sup>

## 2.7.2 *Kaitiakitanga and the cultural health of water bodies*

Dennis Emery, a kaumatua of Ngāti Kauwhata, began his evidence with a whakatauki:

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488. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, p 28

489. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, p 31

490. Mike Joy, brief of evidence (doc D20), pp 5–9, 31; Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, pp 6, 31–34; Ministry for the Environment and MPI, 'Freshwater Programme: Managing within limits, pressures, and opportunities', p 7 (Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), p 114)

491. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, p 49

492. Mike Joy, brief of evidence (doc D20), pp 5–9; Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, pp 32–37

*Kei te ora te wai, kei te ora te whenua, kei te ora te tangata!*

*If the water is healthy, the land and the people are nourished.*<sup>493</sup>

The claimants' custom law team, Sir Edward Taihākurei Durie, Dr Val Toki, Dr Robert Joseph, and Dr Andrew Erueti, explained that tikanga was 'based on a worldview in which all things descended from the Gods, and were passed down through the generations to the present by meticulously memorised whakapapa (genealogies) which establish the relationship of all people and all things'.<sup>494</sup> Whakapapa connects people to the gods (atua), land, water bodies, mountains, and other people, and 'helps define their rights and responsibilities'. In the taking of food such as fish, Māori are 'encroaching on the domain of particular atua' and must 'show respect, not exploiting mindlessly, but taking only that which is necessary and beneficial to others'.<sup>495</sup> The custom law team stated that fresh water is 'closely associated with the wairua [spirit], having come directly from the atua'. Termed 'waiora (lifegiving water)', it is used for various rituals, for healing, and to protect people when undertaking 'functions of spiritual significance'.<sup>496</sup> Dennis Emery explained that waiuatanga enables Māori to connect to the spiritual nature of their taonga, to have empathy with the life force of their rivers. The 'stains of pollution and toxicity', he said, are thus 'injurious to our nature as Māori'.<sup>497</sup>

Each water body has 'its own mauri (life-force) and hau (vitality) which gives it a distinct personality or mana (authority)'.<sup>498</sup> Traditionally, there were certain creatures, taniwha or birds, which were kaitiaki and 'invested with the spirits of ancestors or closely related to remote ancestors by whakapapa'. The observation of those kaitiaki by the people revealed whether 'all is well in the world or whether some action is needed'.<sup>499</sup> Titewhai Harawira told us that natural resources, including ancestral water bodies, must be protected for the next generation. For Māori, kaitiakitanga is the means for 'preserving the mauri of all the natural resources'.<sup>500</sup> The practices of kaitiakitanga have been 'passed down over time', she said, although the tikanga for managing resources have become fragmented as a result of colonisation.<sup>501</sup> Those people who were closely connected to a taonga through whakapapa, and who exercised mana whenua, had 'inherited responsibilities to safeguard this taonga for all time and for future generations'.<sup>502</sup>

493. Transcript 4.1.2, pp 29–30; Dennis Emery, brief of evidence, 2 September 2016 (doc D35), p 11

494. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 7

495. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 9

496. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), pp 10–11

497. Dennis Emery, brief of evidence (doc D35), p 9

498. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 11

499. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 30

500. Titewhai Harawira, brief of evidence, 23 December 2016 (doc E2), p [7]

501. Titewhai Harawira, brief of evidence (doc E2), p [8]

502. Dr Benjamin Pittman, brief of evidence, 23 December 2016 (doc E10), p 12; Moana Jackson, brief of evidence, 8 February 2017 (doc E15), p [22]; Dennis Emery, brief of evidence (doc D35), pp 8–9

Tikanga Māori did not allow ‘the discharge of waste of any kind to water’. The custom law team reported that ‘[b]odily waste, food scraps, fish scales and gut, or even pipi shells, were discharged only to land.’<sup>503</sup> Maggie Ryland of Te Whānau a Te Ao said that in her hapū’s use of the Waitākeo Stream, areas for drinking water were up stream, separated from the swimming area, which was in turn further up stream from the area for washing clothes. Water was taken out of the stream for the washing.<sup>504</sup> ‘The contamination of water was a ‘hara or spiritual offence which would bring serious misfortune to the offenders and their hapū.’<sup>505</sup> The mauri of a water body can be diminished by the discharge of sewage into water, even if it is treated, and by the artificial fusing of separate water bodies.<sup>506</sup> Māori see the discharge of sewage into waterways as a ‘deeply spiritual offence.’<sup>507</sup> Harm to the mauri of a waterway has a profound impact on its kaitiaki.<sup>508</sup> Jordan Winiata-Haines and Lewis Winiata spoke of the Rangitikei River and its tributaries, stating:

When our waters and riverways are sick (mauri mate) then so are our people.  
When our waters and riverways are well (mauri ora) then so are our people.<sup>509</sup>

How do the values of kaitiakitanga talk to the values or measurements of western science? According to the custom law team, Māori assess the strength and health of a water body by the ‘abundance of wildlife and taniwha which inhabit it.’<sup>510</sup> One claimant witness, Dr Kepa Morgan, told us that mahinga kai contribute to this kind of assessment:

Mahinga kai reflects the need to protect the diversity and abundance of species, and safeguard the ability of Hapū to gather and use these resources, both now and in the future, as a key component of their cultural identity. Mahinga kai encompasses access to the resource (legal and physical access), the sites where gathering occurs, the activity of gathering and using the resource, and the mauri of the resource – it must be fit for culturally appropriate usage.<sup>511</sup>

Mauri is not a physical characteristic that can be ‘readily measured.’<sup>512</sup> Dr Morgan noted that Māori values have been ‘discussed and balanced against other scientific baselines without any real need to understand them in a *practical* sense’ (emphasis

503. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 13

504. Maggie Ryland, brief of evidence, 4 October 2016 (doc D84), p 4

505. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 13

506. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 13

507. Dennis Emery, brief of evidence (doc D35), pp 6–7

508. Vivienne Taueki, brief of evidence, 22 September 2016 (doc D51), pp 22–24; Gerrard Albert, report for Horizons, [1999], pp 2–3 (Vivienne Taueki, papers in support of brief of evidence (doc D51(a)), pp 107–109)

509. Jordan Winiata-Haines and Lewis Winiata, powerpoint presentation, [June 2017](doc D48(b)(i)), p [20]

510. Durie, Joseph, Toki, and Erueti, ‘Ngā Wai o te Māori’ (doc E13), p 12

511. Te Kipa Kepa Brian Morgan, brief of evidence, 1 September 2016 (doc D33), p 4

512. Te Kipa Kepa Brian Morgan, brief of evidence (doc D33), p 5

added).<sup>513</sup> This has led to the ‘under-recognition and the under-protection of those values through RMA processes’. This in turn has been a ‘consistent theme of the indigenous opposition to inappropriate environmental management that has been mounted by Tāngata Whenua many times in the Waitangi Tribunal’.<sup>514</sup> We have discussed the balancing process above in section 2.4.4. Here we simply note that there *are* practical ways of measuring the cultural health of water bodies, which Māori have been using for centuries.

Researchers have formulated ‘tools to bridge the gap between mātauranga Māori [Māori knowledge systems] and western science’.<sup>515</sup> Dr Morgan put forth his ‘mauri model decision-making framework’, which provides for mauri to be measured as the life-supporting capacity of water (in this case), from which basis effects can be measured and assessed. Within that framework, it is necessary to assess environmental well-being but also cultural, social, and economic well-being of the whānau. All these things together contribute to the life-supporting capacity of a waterway, for example. This model has been used in a number of water-related RMA processes.<sup>516</sup>

Another model is the Mauri Compass, which Dr Morgan described as using the health of tuna (eels) as a ‘proxy’ for the health of the mauri of a water body.<sup>517</sup> This tool was designed by Te Runanga o Turanganui a Kiwa and the Gisborne District Council, and its use provided these parties with an opportunity for partnership in the assessment and monitoring of the Makauri Aquifer and the Waipaoa River.<sup>518</sup> It involves 12 indicators relating to the health of the tuna species, the relationship of tangata whenua with the river and its mahinga kai, and the health of the river in respect of its aquatic life and its freedom (or otherwise) from contamination.<sup>519</sup> The Ministry expects that this model will be used more generally.<sup>520</sup>

Another tool is the Cultural Health Index, which also sets out indicators for ‘recognising and expressing Māori values’ in respect of streams and waterways.<sup>521</sup> Sheree De Malmanche, a Crown witness from MFE, advised that this model is one which the Crown hopes will be used widely in resource management.<sup>522</sup> She told us:

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513. Te Kipa Kēpa Brian Morgan, brief of evidence (doc D33), p 6

514. Te Kipa Kēpa Brian Morgan, brief of evidence (doc D33), pp 6–7

515. Ministry for the Environment and Statistics New Zealand, *Environment Aotearoa 2015: Data to 2013* (Wellington: Ministry for the Environment and Statistics New Zealand, 2015), p 19 (Sheree De Malmanche, papers in support of brief of evidence (doc D87(a)), p 21)

516. Te Kipa Kēpa Brian Morgan, brief of evidence (doc D33), pp 8, 10, 19–20

517. Te Kipa Kēpa Brian Morgan, brief of evidence, [June 2017](doc G4), pp 1–2

518. Te Aitanga a Mahaki Trust, ‘Ministry for the Environment Water Case Study: Application of the Mauri Compass to the Makauri Aquifer Recharge Process’, March 2017, p 4 (Martin Workman, papers in support of brief of evidence (doc F6(a)), p 921)

519. Te Aitanga a Mahaki Trust, ‘Ministry for the Environment Water Case Study: Application of the Mauri Compass to the Makauri Aquifer Recharge Process’, March 2017, p 16 (Martin Workman, papers in support of brief of evidence (doc F6(a)), p 933)

520. Sheree De Malmanche, brief of evidence (doc D87), p 27

521. Te Kipa Kēpa Brian Morgan, brief of evidence (doc D33), p 5

522. Sheree De Malmanche, brief of evidence (doc D87), p 27

The assessments take a more holistic approach to understanding the health of waterbodies, drawing on information about a site's water quality, and the experience and observations of people from iwi and hapū who have had a relationship with the waterway over generations. For example, to help assess the mauri of the site, questions centre on: whether or not tāngata whenua would return to live at the site, do present day species match traditional species, was the site of traditional significance, and do tāngata whenua have access to the site. It also assesses people's ability to gather food or other resources (mahinga kai) from the site.<sup>523</sup>

According to the first report of the Land and Water Forum in 2010, the Cultural Health Index provides 'a means by which iwi can communicate with water managers in a way that can be understood and integrated into resource management processes.'<sup>524</sup>

Thus, there are now methodologies for providing freshwater decision makers (who are usually not iwi unless there is a JMA) with a way in which Māori values for water can be measured and included in their decision-making. All of these models have been developed since the early 2000s. In the meantime, many freshwater taonga have become polluted and degraded, and the mauri of those taonga has been negatively affected. Adele Whyte of Ngāti Kahungunu told us that being immersed in and cleansed by the rivers is an essential matter for 'the relationship of Māori our culture and traditions with our ancestral waters.'<sup>525</sup> 'Tāngata whenua', she said, 'have never knowingly consented to the degradation of the waterways to a point that they are no longer swimmable; it contravenes our spiritual values and section 6E of the RMA.'<sup>526</sup> The claimants believe that the RMA has failed them and it has failed their taonga water bodies.

We turn next to set out examples of what has happened to those freshwater taonga. These examples were provided to us by the claimants and interested parties.

## 2.7.3 Examples of degraded freshwater taonga

### 2.7.3.1 Introduction

Many witnesses in our inquiry reported that their freshwater taonga are in a degraded state. They have been struggling to improve the condition of those water bodies for many years. Some of their lakes and rivers have had a long legacy of degradation, arising mostly from point source discharges over a century or more. Even the removal of some of those discharges (such as disposing of treated effluent to land) has not always resulted in a recovery. In Lake Horowhenua, for example,

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523. Sheree De Malmanche, brief of evidence (doc D87), p 26; see also Gail Tipa and Laurel Teirney, *A Cultural Health Index for Streams and Waterways: Indicators for recognising and expressing Maori values* (Wellington: Ministry for the Environment, 2003) (Morgan, papers in support of brief of evidence (doc D33(a)), pp 14–95)

524. LAWf, *Report of the Land and Water Forum: A Fresh Start for Freshwater* (Wellington: Land and Water Forum, 2010), p 20 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 166)

525. Adele Whyte, brief of evidence (doc D40), p 5

526. Adele Whyte, brief of evidence (doc D40), p 5

a growth in the discharge of nutrients in the surrounding catchment has reduced any improvements after Levin switched to land-based disposal of sewage.<sup>527</sup> While some water bodies have this kind of historical legacy, others have become increasingly degraded in recent years as a result of the combined effects of erosion and a rapid increase in agricultural production.

The kaitiaki expressed their great distress at our hearings. They told us that they are unable to protect their taonga from degradation, which has had a profound impact on them and their spiritual relationships with those taonga. Nor, in many instances, are they able to exercise their customary practices such as fishing and food gathering, or pass the relevant knowledge about those practices to the next generations.<sup>528</sup> For Māori, there is a crisis in terms of fresh water which they believe threatens their cultural survival as a people.

It is not possible here to give a full account of all the examples that we were given, so the following text provides a selection to illustrate the main points.

### 2.7.3.2 Lake Ōmāpere

Much of the evidence we received came from members of Northland iwi and hapū, relating to Lake Ōmāpere and to rivers that are highly significant to those people. Many kaumatua told us about the pollution and degradation of Lake Ōmāpere, which is a taonga for the whole of Ngāpuhi. As we discussed in our stage 1 report, the ownership of the lake and its waters was vested in trustees on behalf of the tribe in 1956, after a 40-year court battle with the Crown.<sup>529</sup>

In the 1970s the Kaikohe Borough Council used the lake for its water supply but has since ceased to do so as a result of Lake Ōmāpere's polluted state.<sup>530</sup> High nutrient levels from farming, fouling of the water by cattle (it is not fenced), and high sediment levels (making the lake shallower and warmer) have all contributed to weed growth, contamination, and occasional algal blooms. By 1999–2000 the lake was choked by weeds, low oxygen levels had caused the deaths of freshwater mussels, and there were downstream effects on the Utakura River and the Hokianga Harbour. In 2001, the Māori Affairs Committee urged the Crown to assume an active role in assisting the lake trustees to prevent the ecological collapse of the lake.<sup>531</sup> David Alexander noted that the Crown had provided assistance and the weed levels had since been brought under better control, although the high levels

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527. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report: Pre-publication Version* (Wellington: Waitangi Tribunal, 2017), pp 580–584

528. Millan Ruka, brief of evidence, 21 September 2016 (doc D50), p 16; Ian Mitchell, brief of evidence (doc D62), pp 15–16

529. Waitangi Tribunal, *The Stage 1 Report on National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), pp 39–42

530. Rudy Taylor, brief of evidence, 2 September 2016 (doc D26), p 1; Ian Mitchell, brief of evidence (doc D62), p 28

531. David Alexander, 'Northland Research Programme: Land-based resources, waterways and environmental impacts' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A81), pp 391–395



of nutrients left Lake Ōmāpere at risk of further algal blooms.<sup>532</sup> The lake water is still polluted and unsafe for humans or animals.<sup>533</sup> In 2018, the lake had its worst algal bloom ‘in memory’, resulting in headlines like ‘Far North lake once brimming with life turns to pungent, frothy mess.’<sup>534</sup>

Ian Mitchell told us:

You can judge the health of the people of Ngāpuhi by the quality of the waterways in the rohe. You can tell how healthy my hapū is by looking at the lake. The lake is just so central, and it has all these known pā sites around it: these key maunga. Ngāpuhi and Lake Ōmāpere are intrinsically entwined. The state of Lake Ōmāpere in particular is a reflection of the health of the Ngāpuhi people. When Lake Ōmāpere is clean and healthy, the Ngāpuhi people will mirror the state of the lake. But in my whole 30 years up in the North, I have never seen anybody in that lake because it is too dangerous and poisonous due to pollution and toxic algae. This is so saddening, given that this lake was once known as the jewel of Ngāpuhi. To me it is a ghost lake. Only ghosts swim in there.<sup>535</sup>

### 2.7.3.3 Taumārere River

Several Ngāti Manu witnesses gave evidence about the Taumārere River. This river is part of a large catchment and extensive river system in the Bay of Islands. The Ngāti Manu speakers were particularly concerned about the coastal stretch of the river, the estuarine environment, and the Opua marina. In 2015, an agreement was reached with the marina owners to ensure that Māori ‘cultural values are not adversely interfered with in the Awa and in the Opua area.’<sup>536</sup>

The effects of excess sediment on habitat, discharges from the Kawakawa sewerage system and AFCO meatworks, run-off from pastoral and forestry activities, and the major decline of pipi and cockles, are all of significant concern. The river also has relatively low numbers and small sizes of tuna.<sup>537</sup> Ngāti Manu placed a rāhui on the gathering of food from the river in 1998 due to concerns about the Kawakawa sewage plant.<sup>538</sup> It is an enormous cultural offence to discharge human waste into ancestral taonga from which kai is taken.<sup>539</sup> Dr Shane Kelly, who prepared a report on the Taumārere, noted that there was little monitoring or scientific information about its water quality. One of its tributaries, the Waiharakeke River, has been monitored as having a fair quality and marginal habitat, which together result in a

532. David Alexander, ‘Northland Research Programme: Land-based resources, waterways and environmental impacts’ (doc A81), p 395

533. Ian Mitchell, brief of evidence (doc D62), p 36

534. Claimant counsel (6th claimants), closing submissions (paper 3.3.40), p 8

535. Ian Mitchell, brief of evidence, 23 September 2016 (doc D62), p 10

536. Arapeta Hamilton, brief of evidence (doc D43), p 10

537. Shane Kelly, brief of evidence, 9 September 2016 (doc D44), pp 6–8; Shane Kelly, answers to questions in writing, 19 June 2017 (doc D44(b)), pp 4–6; Peter Van Kampen, brief of evidence, 9 September 2016 (doc D45), pp 4–5

538. Arapeta Hamilton, brief of evidence (doc D43), p 5

539. *AA Hamilton v Far North District Council and Northland Regional Council* [2015] NZEnvC 012, para 87 (Arapeta Hamilton, papers in support of brief of evidence (doc D43(a)), p 211)

## 2.7.3.4

classification of 'degraded'. Dr Kelly considered that the water quality in the outer estuary was 'reasonably good'. The major issue for the outer estuary is the impact of sediment.<sup>540</sup>

**2.7.3.4 Kaeo River**

The Kaeo River is about 18 kilometres long, running from around the confluence of two streams – the Waiare and Upokorau – to the Whangaroa Harbour. The river mostly passes through native forest and scrub but its lower reaches cross exotic forest, farmland, and a small town (Kaeo).<sup>541</sup> Deforestation and pastoral farming has resulted in sedimentation, especially in the lower catchment. The river has become narrower, shallower, and prone to flooding.<sup>542</sup>

Another issue is the Kaeo wastewater plant. In 1995 and again in 2005, a resource consent was sought to discharge treated sewage into the river via an artificial wetland. The scientific information was that the treated effluent was contributing to the contamination of the river and harbour. Ironically, its effect was considered negligible because the river already had 'higher faecal coliform levels' from diffuse sources than what was contained in the effluent from the plant. At times the river was unsafe for 'contact recreation/bathing' and the consumption of shellfish.<sup>543</sup> According to the authors of the 'Northland Rural Rivers' report, which was prepared for the Te Raki inquiry, the district council failed to investigate land-based disposal options despite assurances that it would do so. An upgraded 'vermiculture'<sup>544</sup> plant was opened in 2012.<sup>545</sup>

Ani Taniwha told us:

The deposit of human and animal waste (treated or not) into the Kaeo River is abhorrent to us as Maori. As the ['Northland Rural Rivers'] report discusses, agricultural run-off and human sewage appear to have caused the quality of the water to degrade over the years.<sup>546</sup>

**2.7.3.5 Ōroua River**

The Ōroua River flows from its headwaters in the Ruahine Ranges down (via Feilding) to the south of Palmerston North, where it joins the Manawatū River.<sup>547</sup> Sir Edward Taihākurei Durie stated that the claimants' case began with the evidence of Ngāti Kauwhata on the Ōroua River, 'not because it is the best river but because,

540. Shane Kelly, brief of evidence (doc D44), p 8; Shane Kelly, answers to questions in writing, 2 August 2017 (doc D44(c)), pp 2–3

541. M Cunningham, R Webb, P Gilkison, and J Maynard, 'Northland Rural Rivers: Environmental Management, Pollution, and Kaitiakitanga since 1991', [2016] (doc D47), pp 182–183; Ani Taniwha, brief of evidence, 19 September 2016 (doc D49), p 4

542. Cunningham, Webb, Gilkison, and Maynard, 'Northland Rural Rivers' (doc D47), pp 195–199

543. Cunningham, Webb, Gilkison, and Maynard, 'Northland Rural Rivers' (doc D47), pp 234–235

544. A worm filter in one of the oxidation ponds.

545. Cunningham, Webb, Gilkison, and Maynard, 'Northland Rural Rivers' (doc D47), p 244

546. Ani Taniwha, brief of evidence (doc D49), p 4

547. Dennis Emery, brief of evidence (doc D35), pp 2–3

in terms of degradation, it is the worst.<sup>548</sup> Dennis Emery of Ngāti Kauwhata told the Tribunal that the Ōroua River had been ‘unusable’ for his people ‘throughout the whole of my lifetime’. Point source discharges included animal waste from a local freezing works, discharges from other factories, and treated sewage from a wastewater plant. ‘Throughout my lifetime’, he said, ‘the dream of our people has been to return the river to what it was’; ‘the symbol of Ngāti Kauwhata identity, a reminder of our significant past, and our potential food store for eeling provided we can get rid of the waste discharges from Feilding town and from factory and farm pollution.’<sup>549</sup> North of the wastewater plant, some traditional foods can still be taken from the river. South of the plant, a rāhui has forbidden the use of some 72 kilometres of the river since the 1960s.<sup>550</sup>

### 2.7.3.6 *The Manawatū River*

Dennis Emery stated that the Manawatū River is one of the most polluted rivers in the world. Mr Emery and Dr Mike Joy both referred us to a 2009 study by the Cawthron Institute.<sup>551</sup> This study showed that the river was not the *worst* in the western world per se – as had been reported in the media – because many worse rivers are not in fact tested, but that the Manawatū River was certainly in a very unhealthy state. In terms of the measures used by the institute, the results from the lower part of the river ‘were among the highest ever reported internationally’, and well above the thresholds for transition to ‘poor ecosystem health.’<sup>552</sup> The Manawatū River Leaders Accord was signed in 2010 with a commitment to ‘return the Manawatū River catchment and its tributaries to a healthy condition.’<sup>553</sup> The accord’s action plan acknowledged that point source discharges, nutrients from agriculture, sediment from eroded farmland, and storm water had all contributed to the state of the river.<sup>554</sup>

### 2.7.3.7 *Lake Horowhenua*

Dr Jonathan Procter told us that Lake Horowhenua is a ‘microcosm of environmental issues worldwide, representing a conflict between the development of urban areas, increased agricultural production and the values of the community’s desire to protect [the] environment.’<sup>555</sup> This lake has been classified as hypertrophic, which means that it has high nitrogen and phosphorous levels, low water clarity, and is subject to algal blooms.<sup>556</sup> In 2010, it ranked ‘the 7th worst out of

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548. Transcript 4.1.2, p 18

549. Dennis Emery, brief of evidence (doc D35), p 6

550. Transcript 4.1.2, pp 46–47

551. Transcript 4.1.2, p 35; Mike Joy, brief of evidence (doc D20), p 9

552. Roger Young, Cawthron Institute, ‘Ecosystem Metabolism in the Manawatu River’, [2009] (Mike Joy, papers in support of brief of evidence (doc D20(a)), pp 10–11)

553. Dennis Emery, brief of evidence (doc D35), p 11

554. ‘Ours: The Manawatū River Leaders’ Accord: Action Plan’, 2011, pp 6–9 (Crown counsel, bundle of documents for the cross-examination of Dennis Emery (doc D35(a)), pp 12–15)

555. Jonathan Procter, brief of evidence, 23 September 2016 (doc D67), p 2

556. Waitangi Tribunal, *Horowhenua*, p 600

2.7.3.8

112 monitored lakes in New Zealand.<sup>557</sup> As well as the historic legacy of sewage effluent, which was discharged into the lake from 1952 to 1987, water quality has declined again from 2000 as a result of increased nutrients and sediment from the catchment. The stream which flows into the lake has become highly degraded, contributing to the poor state of the lake.<sup>558</sup> Sewage from the wastewater plant still enters the lake occasionally as a result of storms, and pollution from Levin's stormwater drains is also a serious problem.<sup>559</sup> Several members of Muaūpoko gave evidence in our inquiry. They expressed their great concern and grief at the pollution of their taonga. Vivienne Taueki told us: '[T]he Lake is our taonga and was at one time our food basket. To see it used as a toilet and rubbish bin for Levin is devastating.'<sup>560</sup>

### 2.7.3.8 *The Rangitikei River*

The Rangitikei River is the third longest in the North Island. It flows from the Kaimanawa Ranges to the coast south of Bulls.<sup>561</sup> David Alexander's report on the river quoted a 'Māori perspective' on its management, published in 2010:

Recent activities such as water extraction and water damming within the Rangitikei catchment have affected both the water quality and quantity. Generally, water quantity is being affected by extraction for irrigation and diversion for power generation. This affects water quality, which impacts on the flora and fauna of the river. Water quality is adversely affected not only by extraction and diversion, but also by pollutants and runoff from land-based activities. These affect the flora and fauna and water-drinking capability of the river for those who rely on it. Overall, these activities have impacted on the traditional uses of the rivers within the Rangitikei. For example practices such as tohi and mahinga kai have ceased as water quality and quantity has declined.<sup>562</sup>

Jordan Winiata-Haines, of Ngāti Hinemanu and Ngāti Paki, referred to the Taihape sewerage system. He said that it 'flows into the Hautapu River almost opposite the doorstep of Winiata Marae', and then falls into the Rangitikei River some five kilometres down stream. The Winiata whānau used to swim in the river but stopped once the sewage effluent began to enter the water, reiterating that it is

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<sup>557</sup> Horizons Regional Council, *He Hokioi Rerenga Tahi/Lake Horowhenua Accord Action Plan, 2014–2016* (Palmerston North: Horizons Regional Council, 2014), p 8 (Waitangi Tribunal, *Horowhenua*, p 600)

<sup>558</sup> Jonathan Procter, brief of evidence (doc D67), pp 3–7; Waitangi Tribunal, *Horowhenua*, pp 590, 599–600. See chapters 10–11 of that report for further details.

<sup>559</sup> Vivienne Taueki, brief of evidence, 22 September 2016 (doc D51), pp 14–17; Philip Taueki, brief of evidence, 23 September 2016 (doc D75), pp 6–7; Jonathan Procter, brief of evidence (doc D67), pp 3–4, 6–7

<sup>560</sup> Vivienne Taueki, brief of evidence (doc D51), p 17

<sup>561</sup> David Alexander, 'Rangitikei River and its Tributaries Historical Report', 2015 (doc D46), p 18

<sup>562</sup> Te R Warren, 'Nga Pae o Rangitikei: a model for collective hapu/iwi action?', 2010 (David Alexander, 'Rangitikei River and its Tributaries Historical Report', 2015 (doc D46), p 663)

‘repugnant to say the least’ for human waste to be disposed of to waterways in this way.<sup>563</sup> They were still, however, able to take tuna from the Mangaone Stream.<sup>564</sup>

Gregory Carlyon, an RMA expert who presented evidence on behalf of the Wai 2601 claimants, noted the irrigation and intensive farming taking place beside the Rangitikei River, the multiple point-source discharges (which he said were all ‘grossly non-compliant’), and the council’s decision to grant land-use consents in defiance of its own regional plan.<sup>565</sup> The latter point was a reference to *Wellington Fish and Game Council v Manawatu–Wanganui Regional Council*.<sup>566</sup>

### 2.7.3.9 Tukituki River

Several Ngāti Kahungunu witnesses spoke about the Tukituki River and the Ruataniwha aquifer in central Hawke’s Bay.<sup>567</sup> According to Jenny Mauger, the Tukituki River had become over-allocated, and the extraction of water for irrigation had resulted in lower flows and ‘adverse effects on river ecology’. Nutrient run-off from existing farmland, as well as discharges from two sewage treatment ponds, had diminished the river’s water quality and resulted in nitrogen levels that were ‘already double the allowable level’ in some areas.<sup>568</sup> The river suffered from slime and algae in the summer months.<sup>569</sup>

In 2011–13, the Hawke’s Bay Regional Council began a process towards building a dam on the Makaroro River, a tributary of the Tukituki, to store water for the irrigation of some 28,000 hectares of land.<sup>570</sup> We do not have space here to consider the Ruataniwha water storage scheme in any depth. We simply note that many among Ngāti Kahungunu were concerned about the effects of the proposed scheme on their ancestral lands and waters, including the Tukituki River and the Ruataniwha aquifer. According to Jenny Mauger and Te Hira Huata, the RMA processes were stacked against them in favour of wealthier parties and production interests.<sup>571</sup> Some Kahungunu hapū, however, supported the project and its promise of economic development.<sup>572</sup>

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563. Jordan Winiata-Haines, speaking notes, 29 June 2017 (doc D48(b)), pp 9–10

564. Transcript 4.1.3, p 642

565. Transcript 4.1.3, p 238

566. *Wellington Fish and Game Council v Manawatu–Wanganui Regional Council* [2017] NZEnvC 37; transcript 4.1.3, pp 238, 288–289

567. Jenny Winipere Hina Taranga Mauger, brief of evidence, 2 September 2016 (doc D32); Marei Boston Apatu, brief of evidence, no date (doc D93); Adele Whyte, brief of evidence (doc D40); Obrana Te Hīrarangi Mātatewharematā Huata, brief of evidence, 1 September 2016 (doc D27)

568. Jenny Mauger, brief of evidence (doc D32), p 5

569. ‘The Government’s Ruataniwha water storage scheme remains dogged by controversy and litigation’, *New Zealand Listener*, 24 August 2016 (Jenny Mauger, papers in support of brief of evidence (doc D32(a)), p 32)

570. Jenny Mauger, brief of evidence (doc D32), pp 4–7

571. Jenny Mauger, brief of evidence (doc D32), pp 7–10; Te Hira Huata, brief of evidence (doc D27), pp 2–5

572. ‘The Government’s Ruataniwha water storage scheme remains dogged by controversy and litigation’ (Jenny Mauger, papers in support of brief of evidence (doc D32(a)), p 38)

Several environmental organisations, including Forest and Bird, helped Ngāti Kahungunu Incorporated to take an appeal to the Environment Court in 2014–15. This appeal was against a decision to confirm changes to the regional plan, which would have allowed reduced water quality in the Heretaunga and Ruataniwha aquifers.<sup>573</sup> The court decided in favour of Ngāti Kahungunu about the plan change in 2015.<sup>574</sup>

### 2.7.3.10 *Waipaoa River*

David Hawea and Keith Katipa of Te Whānau a Kai told us about the Waipaoa River, which runs from its headwaters in the Mangatu Forest, which is located east of the Raukumara Ranges, down to the sea through Poverty Bay (the Gisborne district). This river was named for Paoa, the captain of the *Horouta* waka, and it is a taonga for the several tribes who live along (and controlled stretches of) its length.<sup>575</sup> In 2007, NIWA identified the Waipaoa as New Zealand's second largest river in terms of suspended sediment discharge, delivering 15 million tonnes of mud per year to coastal Poverty Bay.<sup>576</sup> Three bridges have been built from Whatatutu into Mangatu: the first is buried 30 feet beneath the current riverbed, the top of the second 'is at about where the river bed is now', and the third is still functioning.<sup>577</sup> High country and river bank erosion have been combatted by planting pine trees but it has been predicted that it will take centuries for the present load of silt to all be washed out to sea. Keith Katipa explained:

In my lifetime, the Waipaoa has always been silty and dirty. . . . As the flushing continues over the decades and centuries ahead, the silt build-up along the Poverty Bay flats stretch of the Waipaoa and down towards the river mouth will be tremendous. In the end, it will resemble a slow moving glacier of mud.<sup>578</sup>

The water quality problems arising from sediment have been exacerbated by the extraction of large quantities of water for irrigation, such that Te Whanau a Kai believe the river might not have 'enough for its own survival'. In their view, the river is being managed unsustainably, but they are labelled as anti-development when they try to put this view forward to the council. Mr Katipa stated: 'Our awa is NOT their limitless resource to treat as they like.'<sup>579</sup> Te Whanau a Kai are very critical of the present allocation system and even more so of the idea that permits might become tradeable property rights.<sup>580</sup>

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573. Jenny Mauger, brief of evidence (doc D32), pp 9–11; see also Adele Whyte, papers in support of brief of evidence (doc D40(a)), pp 100–258.

574. *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50

575. David Hawea, brief of evidence, 27 September 2016 (doc D82), pp 4–7

576. Keith Katipa, brief of evidence, 27 September 2016 (doc D81), p 3

577. Keith Katipa, brief of evidence (doc D81), p 3

578. Keith Katipa, brief of evidence (doc D81), pp 4–5

579. Keith Katipa, brief of evidence (doc D81), p 5

580. Keith Katipa, brief of evidence (doc D81), pp 6–9

There are also concerns about nitrogen levels in the river.<sup>581</sup>

### 2.7.3.11 Tarawera River

The Tarawera River flows from Lake Tarawera in the Rotorua region to the coast in the Bay of Plenty near Matatā. A number of witnesses spoke about the pollution of the Tarawera River as the result of discharges from the Tasman pulp and paper mill. David Potter explained that the establishment of the mill in the 1950s resulted in the pollution of ‘our once pristine Tarawera River, and the pollution of our sea into which it flows.’<sup>582</sup> Maanu Paul, chair of the Mataatua District Māori Council, told us that this ‘treasured taonga’ had been turned into a ‘black drain’. The RMA has allowed the toxic discharges to continue polluting the river.<sup>583</sup> Farm run-off and Edgecumbe’s sewage have also contributed to the pollution of the river. Until recently, the Caxton paper mill’s effluent was discharged into the Tarawera River as well.<sup>584</sup> In 1997, the Crown’s ‘state of the environment’ report stated that, even though the Tarawera River was still discoloured and polluted, diffuse discharges had reduced ‘dissolved oxygen in some of the region’s rivers and streams to concentrations as much as five times lower than those in the lower Tarawera.’<sup>585</sup>

## 2.7.4 Has the RMA failed to deliver sustainable management of fresh water?

### 2.7.4.1 Diffuse discharges and declining water quality

As we have shown, the claimants and interested parties are very concerned about the state of many of their water bodies. Counsel for interested parties made a submission that reflected the views of all the Māori groups in our inquiry:

The ongoing degradation of freshwater quality and the destruction of freshwater ecosystems is leading to a rapid and irreversible loss of taonga. We refer to our clients’ loss of mahinga kai with the decline of the tuna population in their awa, and the loss of clean freshwater for rongoa and healing. Our clients cannot endure further delay to improving water quality.<sup>586</sup>

Dr Joy has called the situation a ‘freshwater crisis.’<sup>587</sup> Urban pollution is an important contributor but it should be noted that ‘urban areas affect only 3% of New Zealand’s length of rivers,’ whereas ‘around 60% of New Zealand’s land area is under primary production.’ This means that rural land uses can ‘impact on a

581. Keith Katipa, brief of evidence (doc D81), p 12

582. David Potter, brief of evidence (doc E20), p 17

583. Maanu Paul, brief of evidence (doc E1), pp 4–5

584. David Potter, brief of evidence (doc E20), p 21; Ministry for the Environment, *The State of New Zealand’s Environment 1997* (Wellington: GP Publications, 1997), ch 7, p 39; see also Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1454–1455

585. Ministry for the Environment, *The State of New Zealand’s Environment 1997*, ch 7, p 39

586. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 133

587. Mike Joy, *Polluted Inheritance: New Zealand’s Freshwater Crisis* (Wellington: Bridget Williams Books, 2015)

large number of waterways.<sup>588</sup> One of the most notable changes in recent decades is the intensification of farming through the growth of dairying, which involved a significant increase in the number of cows per hectare.<sup>589</sup> There was a 68.9 per cent increase in the number of dairy cows between 1994 and 2015, from 3.84 million to 6.49 million.<sup>590</sup> This was supported by a large increase in the extraction of water for irrigation. The allocation of water, for example, increased by 50 per cent between 1999 and 2006. This was mostly because of irrigation, which accounted for 80 per cent of the water allocated by councils.<sup>591</sup>

A 2004 report for MFE defined the problem in this way:

We are observing that water quality in some water bodies (particularly those passing through catchments with mainly agricultural land use) is declining and/or not meeting desirable water quality 'standards' . . . A major contributing factor is diffuse discharges from rural land use and intensified agricultural activities. Such activities have economic benefits, but they put pressure on water bodies to cope with additional nutrients (eg, from animal excreta and fertilisers), micro-organisms and sediment. The underlying reason why these activities are impacting on water quality, and therefore the problem we need to address, is a *lack of effective action in the management of diffuse discharges of contaminants on water quality, in some catchments.*<sup>592</sup> [Emphasis in original.]

The Crown's 'state of the environment' report in 1997 showed that agriculture was by far the most important cause of poor water quality, partly because it covered such a large proportion of New Zealand's catchments.<sup>593</sup> There was an awareness at that time that the intensification of dairying was having a significant effect. The 'relatively depressed economic conditions during the 1980s and early 1990s may have temporarily reduced some of the agricultural pressures on water', but the growth and intensification of dairy farming resulted in increases of nitrogen fertilisers, animal waste, and damage to the banks of streams. While pressure on steep catchments declined along with sheep numbers, it increased significantly in lower-lying catchments.<sup>594</sup> Pastoral run-off was also affecting lakes, especially smaller, shallower lakes in the North Island, although insufficient data

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588. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality*, technical working paper (Wellington: Ministry for the Environment, 2004), p 1

589. Parliamentary Commissioner for the Environment, *Growing for good: Intensive farming, sustainability and New Zealand's Environment* (Wellington: Parliamentary Commissioner for the Environment, 2004), p 15

590. Sheree De Malmance, brief of evidence, 29 March 2018 (doc F22), p 32

591. Ministry for the Environment, *Environment New Zealand 2007* (Wellington: Ministry for the Environment, 2007), p 262

592. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality*, p 3

593. Ministry for the Environment, *The State of New Zealand's Environment 1997*, Chapter 7, pp 31-41, 47, 53-56

594. Ministry for the Environment, *The State of New Zealand's Environment 1997*, Chapter 7, pp 40-41



existed for the report to say whether the situation was getting better or worse.<sup>595</sup> On the other hand, the situation with point source discharges was understood to be improving,<sup>596</sup> a point which has been made in a number of reports since then.<sup>597</sup>

Public awareness of the problem grew in the early 2000s as a result of the New Zealand Fish and Game Council's 'dirty dairying' campaign, which drew attention to 'the declining ecological health of freshwater in New Zealand.'<sup>598</sup> It was supported by a report from NIWA in 2002, which outlined a 'substantial and ongoing decline in water quality' in farming catchments.<sup>599</sup> The result was the development of the Dairying and Clean Streams Accord by Fonterra, MFE, MAE, and Environment Waikato in 2003. Essentially, this was a voluntary arrangement by which the dairy industry accepted that it should address its effects on fresh water by attempting to:

- ▶ exclude dairy cattle from rivers, lakes, and streams (50 per cent by 2007, 90 per cent by 2012);
- ▶ ensure that crossing-points used more than twice a week have bridges or culverts (50 per cent by 2007, 90 per cent by 2012);
- ▶ ensure that farm effluent is treated and discharged appropriately;
- ▶ manage nutrients (nitrogen and phosphorus) by establishing farm nutrient plans; and
- ▶ fence 'regionally significant' wetlands.<sup>600</sup>

A report for the Ministry in 2004 noted that voluntary agreements of this kind were 'unlikely to fully address water quality issues where there are high water quality risks or a significant reduction of discharges is required.'<sup>601</sup> Regulatory reform of land-use and freshwater management would still be needed. The Crown had already been working towards freshwater management reforms in the early 2000s, alongside the development of the accord.<sup>602</sup> In January 2003, the Crown introduced its intended reforms in a paper named *Sustainable Development for New Zealand: Programme of Action*. We discuss the proposed reforms, insofar as they deal with water quality, in chapter 5. Here, we note the Crown's acknowledgement of, and definition of, the problem:

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595. Ministry for the Environment, *The State of New Zealand's Environment 1997*, Chapter 7, pp58–59

596. Ministry for the Environment, *The State of New Zealand's Environment 1997*, Chapter 7, p39

597. See, for example, Ministry for the Environment and MPI, 'Freshwater Programme: Managing within limits, pressures, and opportunities', p7 (Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), p114)

598. Phil Holland, 'The Dirty Dairying Campaign and the Clean Streams Accord' in *Lincoln Planning Review*, vol 6, December 2014, p63

599. Phil Holland, 'The Dirty Dairying Campaign and the Clean Streams Accord', p63

600. Russell Harding, 'Muddying the Waters: managing agricultural water quality in New Zealand', *Policy Quarterly*, vol 3, no 3, 2007, p18

601. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality*, p12

602. Russell Harding, 'Muddying the Waters: managing agricultural water quality in New Zealand', p19

New Zealand has made significant progress in reducing direct discharges of human and agricultural sewage and industrial waste into our waterways, although the quality of some water bodies remains poor. In particular, the quality of many lowland streams, lakes, ground waters and wetlands in areas of intensive land use continue to fall below acceptable standards. Water abstraction, urban and industrial uses, intensive farming activities, rapid urban growth, discharges, and diffuse runoff into waterways and groundwater, all contribute to reduced water quality. The main issue is diffuse discharges, such as urban and agricultural runoff. But reducing these types of discharges is often difficult and complex.<sup>603</sup>

The Crown saw the problem as a management one. Marian Hobbs, Minister for the Environment, stated in 2004: ‘We know now that our current ways of managing this precious resource are not always sustainable and have not kept pace with economic, cultural, social and environmental changes.’<sup>604</sup> This was seen as a serious matter: ‘Declining water quality – largely the result of changing land uses – is an increasing concern.’<sup>605</sup> The issues that the Crown identified with the freshwater management system in 2004 included:

- ▶ the Crown had not provided national direction to councils;
- ▶ the Crown had not provided sufficient support to councils;
- ▶ nationally important values had not been identified or prioritised, which could require changes to water conservation orders to protect nationally important water bodies or a new schedule for the RMA;
- ▶ water had become over-allocated, and there was a lack of RMA tools to enable councils to deal effectively with over-allocation and with declines in water quality;
- ▶ diffuse discharges had not been managed effectively, partly because of a lack of RMA tools to do so;
- ▶ there was a need to set environmental bottom lines and allocation limits but there was also a lack of either strategic planning or good scientific information to support this;
- ▶ the definitions for water permits needed to be changed to enable more flexibility in how they were managed; and
- ▶ there had been a failure to engage with Māori in freshwater decision-making because of lack of resources or any clear process through which to do so (which is discussed in section 2.8).<sup>606</sup> Māori interests and values needed to

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603. Department of Prime Minister and Cabinet, *Sustainable Development for New Zealand: Programme of Action* (Wellington: Department of Prime Minister and Cabinet, 2003), p 14

604. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options: a public discussion paper on the management of New Zealand's freshwater resources* (Wellington: Ministry for the Environment, 2004), p 2

605. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options*, p 3

606. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options*, pp 15–16, 19, 20–23

be incorporated into regional planning, a need that had been identified in a review of the RMA in 2004.<sup>607</sup>

In respect of applying the RMA to diffuse discharges, councils had mainly focused on education and encouraging good practice (not regulation). Economic drivers could easily defeat this approach, yet more forceful measures were politically contentious – councils were reluctant to tackle the problem.<sup>608</sup> MFE officials considered that councils had made insufficient use of the regulatory tools available under the RMA, but also admitted that the tools needed to be strengthened by legislative amendment.<sup>609</sup>

The Parliamentary Commissioner for the Environment agreed, stating:

In many regions, the use of regulation under the RMA has been relatively light-handed. The farming sector has been resistant to this approach to managing the environmental effects of farming. Regional councils have found it politically more palatable to rely on non-regulatory instruments such as raising awareness through education and extension services and limited financial incentives, to promote better environmental outcomes. Central government, through MAE, has also favoured a voluntary individual and industry-based response to concerns about the environmental impacts of farming.

Thus the range of tools used so far to promote more environmentally sustainable outcomes has been rather limited. The carrots are not always obvious and the stick has been relatively non-existent.<sup>610</sup>

As we discussed above (section 2.4.4), a 2006 report for the Ministry showed that councils were very aware that diffuse discharges had become their biggest freshwater management issue. The opportunity to manage this by avoiding adverse impacts on freshwater bodies was either already gone or was ‘overruled by economic development drivers.’<sup>611</sup> Several regional councils indicated that a “‘whole of government” approach’ was required to ‘enable the conflicting issues (at this scale) of economic development and natural resource management to be considered in a wider national context.’<sup>612</sup> An example is the need for national regulations to exclude stock from waterways, with the aim of excluding pathogens

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607. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options*, p 9; see also Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for the Future: A supporting document*, p 5.

608. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality*, p 11

609. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality*, p 13

610. Parliamentary Commissioner for the Environment, *Growing for good: Intensive farming, sustainability and New Zealand’s Environment*, p 174

611. Hill Young Cooper Ltd, *Improving the Management of Freshwater Resources*, pp 8–9

612. Hill Young Cooper Ltd, *Improving the Management of Freshwater Resources*, p 9

(from animal manure) as well as further erosion and sediment. This would entail legislative amendment as well as the issuing of regulations.<sup>613</sup>

In 2004, the Parliamentary Commissioner for the Environment released a report entitled *Growing for Good*, to which we were referred by claimant counsel. For the claimants, this report reinforced the point that the decline in water quality as a result of intensified farming and other factors was ‘well known to the Crown’ by then.<sup>614</sup> The evidence certainly shows that this was the case. Using the language of section 5 of the RMA, the commissioner recommended that the priority must be remedying, mitigating, and ultimately avoiding ‘non-point source pollution’ (diffuse discharges). But, given the ‘declining trends in the quality of the environment, particularly fresh water, it would appear the voluntary approaches used to date are not sufficient’. The commissioner noted that regulation would likely be required.<sup>615</sup> The commissioner did not focus on the RMA, but did note that a lack of national direction had resulted in ‘considerable variability’ in the quality of local planning. It was ‘very concerning’ to note that, as at 2004, some regional councils still did not have their ‘first RMA plans in operation.’<sup>616</sup>

Following the receipt of this and other reports, the Crown concluded in 2006:

Water quality in many lowland streams throughout the country is deteriorating, mostly because of changes in the way land is used. About half of all lowland water bodies consistently fail to meet key water quality guidelines.<sup>617</sup>

An ancillary issue is the extent to which the Crown had encouraged and prioritised farming over the environment in its policies and actions in the period up to (and, indeed, after) the mid-2000s. In the 2004 consultation document, which recognised the water quality problems arising from intensified farming, the Crown also noted that a further 200,000 hectares could be irrigated.<sup>618</sup> Schemes to promote irrigation were a feature of both past and current policies. After the freshwater crisis was admitted publicly by the Crown in the early 2000s, central government continued to promote and fund the expansion of irrigation and agricultural production. The Crown’s reasoning was that farming could continue to intensify so long as freshwater quality and quantity limits were set.

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613. New Zealand Government, *Next steps for fresh water: consultation document*, February 2016 (paper 3.1.255(a)), pp 19–20

614. Transcript 4.1.5, p 86

615. Parliamentary Commissioner for the Environment, *Growing for good: Intensive farming, sustainability and New Zealand’s Environment*, p 185

616. Parliamentary Commissioner for the Environment, *Growing for good: Intensive farming, sustainability and New Zealand’s Environment*, p 70

617. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for the Future* (Wellington: Ministry for the Environment, 2006), p 2; Ministry of Agriculture and Fisheries, Ministry for the Environment, *Freshwater for the Future: A supporting document*, p 8

618. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options*, p 14

**2.7.4.2 Point source discharges are still a significant issue for Māori**

Many of the groups who appeared before us were concerned about point source discharges and their effects, as well as diffuse discharges. Ever since the Tribunal issued its *Kaituna River* and *Motunui–Waitara* reports in the early 1980s, the Crown has been fully aware that the discharge of sewage effluent into water bodies is spiritually and culturally offensive to Māori, no matter how well the effluent is treated.<sup>619</sup> As we discussed in sections 2.7.2 and 2.7.3, a number of witnesses told us that the mauri of freshwater taonga is still being harmed by the discharge of treated effluent into rivers and lakes. The claimants' custom law team also stressed this point, stating:

[A] river or lake loses its power or force and may become dead when there is a discharge of effluent into an awa. In such a case, the mauri has diminished and can only be restored through Papatūānuku. Discharging sewerage and other waste material into waterways is highly offensive to Māori, no matter how well treated.<sup>620</sup>

In the early 1980s, all of New Zealand's large towns were discharging sewage effluent into the sea, lakes, or rivers, almost none had tertiary treatment before discharge, and no land-based disposal was occurring.<sup>621</sup> Land-based disposal has now been adopted in some places, such as Levin.<sup>622</sup> Waste water treatment systems have also undergone significant improvements since the 1980s. Sheree De Malmanche advised that, out of 262 waste water plants (covering 90 per cent of the population), 118 currently discharge solely to freshwater bodies, 56 discharge to marine waters, and 85 'discharge solely to land'. Three plants discharge to a mix of land, fresh water, and sea water.<sup>623</sup> In terms of volume, by far the largest amount is disposed to the sea:

On the basis of volumes discharged, on average between 2014 and 2017, 89 million cubic metres of wastewater was discharged solely to freshwater, 49 million cubic metres was discharged solely to land and the significant majority of the remainder (489 million cubic metres) discharged to marine waters or were mixed discharges (to marine waters, land and freshwater).<sup>624</sup>

From the Crown's point of view, improved treatment systems, and more stringent management under the RMA, have resulted in less pollution from point

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619. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 8–10, 28–30; Waitangi Tribunal, *The Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 8–11

620. Durie, Joseph, Toki, and Erueti, 'Ngā Wai o te Māori' (doc E13), p 13

621. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, p 27

622. Waitangi Tribunal, *Horowhenua*, pp 580–584

623. Sheree De Malmanche, answers to questions in writing, [September 2018](doc F22(f)), p 7

624. Sheree De Malmanche, answers to questions in writing (doc F22(f)), p 7

source discharges.<sup>625</sup> From the point of view of the claimants and interested parties in our inquiry, shown by the evidence about several rivers (see section 2.7.3), point source discharges remain a cause of great cultural offence and a contributing cause of the nutrients and *E coli* in those rivers.

### 2.7.5 Our conclusions and findings

By the early 2000s, the Crown was aware of a significant problem in water quality, largely in lower-lying pastoral and urban catchments. The Crown was also aware that the RMA regime had not delivered sustainable management of fresh water in those catchments, and that greater regulation at the national and regional levels was required, as well as targeted legislative amendments. Further, the Crown acknowledged that Māori values in fresh water were not being provided for, and that Māori needed a greater role in freshwater decision-making. These points are clear in the various reports and policy documents developed between 2003 and 2006, as discussed in section 2.7.4. The question then became: how rapidly and effectively would the Crown address the acknowledged problems? The first significant intervention did not occur until 2011, when the Crown finally issued a national policy statement for freshwater management (see chapter 3).

In our inquiry, the Crown argued that the problem was not with the RMA but with its implementation by councils (which are not ‘the Crown’). It also argued that an acknowledgement of a problem with the regime was not an acknowledgement that the regime and its statute were inconsistent with the Treaty.<sup>626</sup> The claimants and interested parties, on the other hand, argued that the Crown had failed to provide a regime which actively protected their taonga, and that this was a breach of Treaty principles.<sup>627</sup> Claimant counsel stated that ‘fundamental tenets’ of the RMA had prejudiced Māori, including:

The provisions of the RMA that permit, and have in practice been authorising the granting and renewal of, land use resource consents and water discharge permits that have caused or contributed to the significant degradation of water bodies that is our reality today . . .<sup>628</sup>

We agree with the claimants that systemic problems with the RMA regime had allowed the situation to develop and worsen, with apparent disregard for the fundamental purpose of the RMA. Councils could not manage the effects of land use on water, or the clash of commercial and environmental imperatives, without a better management framework and strong national direction from the Crown. As we discuss in the following chapters, the Crown has attempted to rectify those

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625. Ministry for the Environment, *Environment New Zealand 2007*, pp 262, 265

626. Crown counsel, closing submissions (paper 3.3.46), pp 64–65

627. See, for example, counsel for interested parties (Gilling), submissions by way of reply, 22 March 2019 (doc 3.3.60), pp 3–4, 6–7, 8–9

628. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 11

failings by providing national direction in a national policy statement (NPS-FM). As noted above, the first version was issued in 2011, but this had to be significantly amended in 2014 and 2017 to strengthen the decision-making framework.

We assess the NPS-FM and related reforms in chapters 3–5. Here, we note that the Crown’s reforms are not yet completed, and the current Government stated in 2018 that with ‘many waterways becoming degraded over the last 25 years, councils have been failing to fulfil [their] statutory duty’ to safeguard the life-supporting capacity of water.<sup>629</sup> This failure, and the ‘poor outcomes we are now experiencing’, were attributed to ‘systemic failures and gaps across the current freshwater management system.’<sup>630</sup>

According to Crown counsel, the failures have been matters of implementation, and the Crown’s move to address the problems is not an ‘admission of prior Treaty breach.’<sup>631</sup> We have already found that section 8 of the RMA is too weak to protect Māori interests, and that the balancing of interests that has occurred under part 2 of the Act has sometimes led to Māori interests being balanced away in freshwater management. We have also found that the RMA’s participatory arrangements excluded Māori from partnership and effective participation in freshwater decision-making. Treaty settlements did not begin to deliver significant co-governance and co-management in freshwater decision-making until the late 2000s, and even then it has only occurred for some taonga waterways. As a result of these Treaty breaches, the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches.

The evidence of the claimants and interested parties showed how they have been prejudiced by this systemic failure. We have given examples of degraded freshwater taonga in section 2.7.3, and many more could be given. The decline of water quality has profoundly affected the relationship of Māori and their culture and traditions with their ancestral waters, a matter of national importance that should have been recognised and provided for under section 6(e) in part 2 of the Act.

## **2.8 EARLY REFORM: THE SUSTAINABLE WATER PROGRAMME OF ACTION, 2003–08**

### **2.8.1 Introduction**

By 2003, the Crown was convinced of the need for a wide-ranging reform of freshwater management. The Labour Government established the Sustainable

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629. Cabinet paper, ‘Restoring our freshwater and waterways’, [June 2018](Ministry for the Environment and Ministry for Primary Industries, *Essential Freshwater: Healthy Water, Fairly Allocated* (doc F29), p 34)

630. Cabinet paper, ‘Restoring our freshwater and waterways’, [June 2018](Ministry for the Environment and Ministry for Primary Industries, *Essential Freshwater: Healthy Water, Fairly Allocated* (doc F29), p 38)

631. Crown counsel, closing submissions (paper 3.3.46), p 65

Water Programme of Action (SWPOA).<sup>632</sup> The reforms were intended to address serious problems. As noted in the previous section, Fish and Game had launched the ‘dirty dairying’ campaign the year before, which made a considerable impression on the public. Water quality was declining in many lakes, rivers, and streams, and there was a widespread belief that the impacts of land use were not being managed effectively. Water was also close to being fully allocated in some regions, without necessarily being allocated efficiently or to the highest-value use. The Government’s view was that greater central government direction was required to begin addressing the problems, which also included the apparent absence of Māori from water management processes. At the same time, there was a strong perception that solutions would only work if developed in partnership with local government, industry, Māori, and water users. These fundamental points underlay the SWPOA.<sup>633</sup>

The programme was led jointly by the Minister for the Environment and the Minister of Agriculture. It had three ‘initial work areas: water allocation and use, water quality, and water bodies of national importance.’<sup>634</sup> Officials worked on these areas in 2003–04 and consulted a Māori Reference Group while developing initial policy proposals for wider consultation. The Māori Reference Group was made up of Heitia Hiha, Waaka Vercoe, Jane West, Paul Morgan, and Gail Tipa. Officials also consulted a stakeholder reference group made up of various interests, including Federated Farmers, Forest and Bird, FOMA, and many others.<sup>635</sup> By October 2004, the Crown had developed 13 proposed ‘actions’ to reform water management, and was ready to take its initial proposals out for consultation.<sup>636</sup>

### 2.8.2 What did the Crown propose in 2004 in respect of Māori rights and interests in water?

In December 2004, the Crown released its first consultation document for the SWPOA, with the intention of holding public meetings and hui to obtain feedback in February 2005. As noted, 13 ‘actions’ had been developed to tackle the issues as the Government saw them (the need to increase central government involvement, reform the allocation regime to enhance efficiency and economic development, and improve water quality):

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632. Department of Prime Minister and Cabinet, *Sustainable Development for New Zealand: Programme of Action*, January 2003; Beatson, brief of evidence (doc A3), p 4

633. Ministry for the Environment, *Freshwater for the Future: a supporting document*, pp 1–3; Cabinet paper, ‘Water Programme of Action – consultation on policy direction’, October 2004, paras 10–17; Cabinet paper, ‘Sustainable Water Programme of Action – Implementation Package’, April 2006, paras 9–13

634. Cabinet paper, ‘New Start for Fresh Water’, June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [40])

635. Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, July 2005, pp 2, 48

636. Cabinet paper, ‘Water Programme of Action – consultation on policy direction’, October 2004, para 18



- Action 1:* Develop national policy statements
- Action 2:* Develop national environmental standards
- Action 3:* Address nationally important values
- Action 4:* Increase central government participation in regional planning
- Action 5:* Increase central government's support for local government
- Action 6:* Develop special mechanisms for regional councils
- Action 7:* Enhance the transfer of allocated water between users
- Action 8:* Develop market mechanisms to manage diffuse discharges
- Action 9:* Set requirements for regional freshwater plans to address key issues and challenges
- Action 10:* Enhance Māori participation
- Action 11:* Enable regional councils to allocate water to priority uses
- Action 12:* Raise awareness of freshwater problems and pressures, and promote solutions
- Action 13:* Collaboration between central and local government, scientists and key stakeholders, on pilot projects to demonstrate and test new water management initiatives.<sup>637</sup>

The Government noted in the discussion document that there was a parallel process to reform the RMA, which would provide 'more certainty about iwi consultation and iwi resource planning.'<sup>638</sup> We have already discussed the provision for JMAs and other reforms that the Crown introduced in 2005. The issues and action identified in the SWPOA discussion document underlined that there was a similar approach and objectives in both the freshwater and RMA reforms, at least as far as Māori rights and interests were concerned. As well as identifying the broader need for improvements to consultation (to be dealt with in the RMA reform), the Crown's specific issue for Māori in respect of freshwater management (issue 6) was: 'Māori participation in water management could be improved'. This issue was framed not solely in terms of better consultation processes, but also identified the need to improve the capacity of resource-starved Māori groups to participate:

Effective Māori engagement with water management has not been widespread. Reasons include the limited capacity and resources of both councils and iwi, and the need to clarify processes for effectively including Māori in water planning decisions.<sup>639</sup>

In order to deal with this issue, the Crown proposed to:

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<sup>637</sup>. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, p 5

<sup>638</sup>. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, p 9

<sup>639</sup>. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, p 16

## 2.8.3

- ▶ ‘increase central government’s support for local government’, helping to build the capacity and good practice of regional councils so that they would engage effectively with Māori, as proposed in the RMA review (action 5);
- ▶ ‘clarify the involvement of Māori in planning at both national and regional levels, as proposed in the RMA review’ (action 10: ‘enhance Māori participation’);
- ▶ provide ‘central government guidance for better engagement between Māori and local government, consistent with the RMA review’ (action 10); and
- ▶ establish pilot projects, collaborating between central government, local government, scientists, and ‘key stakeholders’ (including Māori), to ‘demonstrate and test new water management initiatives’ (action 13).<sup>640</sup>

For Māori rights and interests in their water bodies, therefore, the Crown had defined the essential issue as a need to ‘enhance Māori participation’ in water management. This was because Māori interests were considered through the lens of the RMA.<sup>641</sup> Further, Māori values were seen as compatible with RMA decision-making for sustainable development: Māori had both traditional interests (water was a taonga to be preserved for future generations) and commercial interests in water (as ‘landowners, farmers, business people, tourism operators, and recreational users’). Their values were ‘consistent with the principles of sustainability.’<sup>642</sup> Hence, in terms of the proposals put forward in the consultation, the Crown considered that what was necessary was to ‘enhance Māori participation’ in the sustainable management of fresh water.

### 2.8.3 What were the Māori Treaty partner’s responses in 2005?

In February and March 2005, 17 consultation hui were held around the country. According to Crown witness Guy Beatson’s evidence in 2012, the ‘feedback from the 2005 engagement process continue[d] to inform the Crown’s understanding of Māori interests in water policy.’<sup>643</sup> Mr Beatson referred us to the report of the consultation hui, noting that ‘[m]any of the rights and interests put forward by Māori’ were identified in it.<sup>644</sup> In the Crown’s understanding, as a result of the 2005 consultation:

The range of rights and interests claimed by Māori includes the protection of mauri, mahinga kai and wāhi tapu; kaitiakitanga; the status of water as a taonga; rights to participate in decision-making; Article 2 rights to exercise control or management rights; customary rights; and ownership of water and/or waterbodies.<sup>645</sup>

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640. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, pp 20, 23, 24

641. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, p 13

642. Ministry of Agriculture and Fisheries and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options*, p 11

643. Beatson, brief of evidence (doc A3), p 7

644. Beatson, brief of evidence (doc A3), p 11

645. Beatson, brief of evidence (doc A3), p 11

Claimant witness Tata Parata also referred to the report of the 2005 consultation hui. Mr Parata attached an extract of it to his evidence when the Wai 2358 claim was lodged in 2012, as a response to (as the claimants saw it) the Crown's failure to provide for or protect their rights and interests in fresh water in its reforms.<sup>646</sup>

The report of the consultation, *Wai Ora*, was published by the Ministry for the Environment in July 2005.<sup>647</sup> The report noted the consistent anger, pain, and sorrow expressed by Māori at the hui, due to the effects of pollution and over-allocation on their water bodies. They spoke of the harm to the mauri of the waters, the cultural offence caused by discharge of sewage and effluent, the loss of mahinga kai, and the loss of 'cultural wellbeing'. There was much frustration over what was seen as a longstanding failure to deal with the decline of water quality and other issues.<sup>648</sup>

In respect of the Government's proposals, there was some support of the swPOA and its early consultation at the beginning of policy development. But there was strong criticism of the fact that the consultation document did not discuss Treaty issues or the ownership of water, and that it made little reference to Māori values and issues. Many hui participants called for the Treaty relationship to become a priority of the swPOA, and said that 'Treaty-based relationship and ownership issues must be addressed before any major changes to water management can be considered.'<sup>649</sup> A 'wide range of views' were expressed on the ownership issue, but sorting it out was seen as a priority. Another general theme was the importance of kaitiakitanga and Māori values in water, and a complaint that the current water management system did not recognise the role of Māori as kaitiaki or the importance of mātauranga Māori in measuring the health of waterways.<sup>650</sup> What was necessary, in the view of the hui participants, was to make kaitiakitanga and the restoration of mauri 'a central part of the water management framework', and to establish an appropriate role for Māori in water management as one 'akin to partnership with the Crown rather than a stakeholder.'<sup>651</sup> Hui participants called for joint governance (such as Māori seats on regional councils like Environment Bay of Plenty) or co-governance and co-management arrangements to become the norm. This was to remain a theme throughout the freshwater reform process, as we discuss in the following chapters.

On the specific action point 10, to 'enhance Māori participation' in water management, there was a general view that

simply enhancing Māori participation is not enough – Māori want a role in decision-making. In particular, the capacity and capability of iwi and hapū to engage with

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646. Tata Parata, brief of evidence, 7 February 2012 (doc A1), pp [43]–[48]

647. Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, July 2005

648. Ministry for the Environment, *Wai Ora*, pp 5–6

649. Ministry for the Environment, *Wai Ora*, p 7

650. Ministry for the Environment, *Wai Ora*, pp 8–9

651. Ministry for the Environment, *Wai Ora*, p 40

councils was raised as many organisations lack the structures and resources to engage as they would wish. Key issues included:

- ▶ a lack of resources and technical ability that prevent some iwi from participating in council processes, including that they cannot make submissions
- ▶ the need for greater encouragement, and uptake, of Māori science and monitoring
- ▶ councils not fully including Māori values.<sup>652</sup>

One of the key suggestions for enhancing Māori participation was to ‘ensure a shared role with local authorities’ at all levels, including ‘at governance level, at management level, and in regulation and compliance’. Both central government and formal iwi monitoring of water bodies were seen as important. Other key suggestions were:

- ▶ facilitate a better relationship between central government, local government and iwi
- ▶ provide assistance and education for Māori to manage resources
- ▶ resource iwi/hapū to participate in policy, planning and consent processes
- ▶ ensure a shared role with local authorities at governance level, at management level, and in regulation and compliance
- ▶ make greater use of Māori commissioners
- ▶ build capacity for Māori in freshwater science
- ▶ facilitate an annual national hui on water issues to discuss the role of iwi and hapū in water management, and working with local government.<sup>653</sup>

In addition, the hui participants wanted Government funding for iwi management plans, Government training of councillors on Māori issues, and clear national direction to local authorities (national policy statements and national environment standards). There was also strong support for action 13 (collaboration between central government, local government, and stakeholders to test new management initiatives). Participants saw this as a means to work towards ‘joint management, co-management, and integrated catchment management of water’. There was much concern, however, at the possibility that economic priorities and market tools would prevail over government direction and concerns about water quality, although it was also noted that Māori landowners had their own interests in the economic uses of water.<sup>654</sup>

In sum, key issues raised by Māori in the 2005 consultation included the need to address the Treaty relationship and ownership issues before reforming water management processes, the need to give effect to Māori values in the management of water, the need for Māori to be involved in decision-making at all levels (and for co-governance and co-management arrangements), and the need for

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652. Ministry for the Environment, *Wai Ora*, p 40

653. Ministry for the Environment, *Wai Ora*, pp 40–41

654. Ministry for the Environment, *Wai Ora*, pp 32–33, 41–43

Māori bodies to be resourced so that they could participate in water management processes effectively. All these issues continued to dominate Māori responses to reform proposals for the next 12 years.

Finally, there was support for the Māori Reference Group to be replaced by a 'broader reference group with members from around the country representing waka or iwi'. This would be part of 'a longer ongoing process of engagement' with Māori in the SWPOA's further development of policy.<sup>655</sup> Concern was expressed that the reference group had not consulted at hui before giving its advice to the Crown.<sup>656</sup>

#### 2.8.4 What did the Crown decide in 2006?

The Crown's consultation with Māori, stakeholders, community groups, and the public had revealed 'little consensus' on solutions to the problems in freshwater management. In respect of Māori rights and interests, it was understood that discussion with 'community groups, local government and Māori' had all 'confirmed' a broad goal to 'enable increased effectiveness of Māori participation in water management'.<sup>657</sup> To give effect to this and other 'broad goals,' the Crown decided that it was essential to forge strong partnerships with local government, industry, Māori, and community organisations so that further policy development could be worked out with – and supported by – local communities and water users. As part of this 'partnership programme,' the Crown intended to work with Māori to 'develop and implement opportunities for engagement, to improve participation in statutory [water] decision-making processes, and to develop guidance for councils on incorporating Māori values into policy making and planning'.<sup>658</sup> In other words, the Crown's response to its consultation with Māori was to look for ways to improve Māori participation in freshwater management, and to give guidance to local authorities about incorporating Māori values in their plans and decisions.

Potentially, this fell far short of what Māori had sought. In the risks section of the relevant Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package,' it was noted:

Māori will raise concerns about projects that could be viewed as raising the issue of ownership of water. Many Māori also consider that their Treaty interests go beyond solely ownership of water resources – extending to the protection of Māori cultural values in water, equitable access to the use of water for economic and cultural benefit and a role in decision-making about water allocation that reflects the Treaty relationship. While the actions proposed do not represent a substantial change to the existing

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655. Ministry for the Environment, *Wai Ora*, pp 6–7

656. Ministry for the Environment, *Wai Ora*, p 59

657. Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package,' April 2006, para 8 [dated by reference on p 1 of the April 2006 publication, which is based on the Cabinet paper]

658. Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package,' paras 17–19

rights regime, or preclude any future changes, Māori may consider that their interests need further recognition.<sup>659</sup>

But the Crown had committed to a ‘partnership programme’ to work with Māori on a very generally defined goal, which could end up having a broad or narrow interpretation – depending on the outcomes of the ‘partnership’ work.

In April 2006, the Ministry for the Environment published the Crown’s decisions on its package of ‘actions’ for freshwater management. Moving forward, the Crown had decided to focus the SWPOA on achieving three national outcomes:

- ▶ improve the quality and efficient use of freshwater by building and enhancing partnerships with local government, industry, Māori, science agencies and providers, and rural and urban communities
- ▶ improve the management of the undesirable effects of land use on water quality through increased national direction and partnerships with communities and resource users
- ▶ provide for increasing demands on water resources and encourage efficient water management through increased national direction, working with local government on options for supporting and enhancing local decision making, and developing best practice.<sup>660</sup>

To achieve these outcomes, the Crown had decided that water would continue to be managed by regional councils as a ‘public resource’, but that the Crown would develop partnerships (including with Māori) to advise and prioritise on reforms, it would provide national direction (possibly through a national policy statement and national environmental standards), and it would develop tools to assist regional councils to manage fresh water in a way that gave effect to the goals of the SWPOA.

Māori rights and interests in fresh water were dealt with under the first outcome, ‘build and enhance partnerships’. As part of building partnerships with local government, the Crown would provide ‘guidance and direction to local government on improving Māori capacity, capability and opportunity to contribute to water management decisions.’<sup>661</sup> This was important because a key issue in the 2005 consultation with Māori had been the serious problem for Māori organisations which lacked the resources to participate effectively (or sometimes to participate at all) in water management processes.

Under the heading ‘Action 1.4: Build partnerships with Māori’, the Crown described the results of the 2005 consultation as:

The 2005 freshwater consultation emphasised the strong desire of Māori to play a more active role in local decision making. The view that the Treaty relationship

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659. Cabinet paper, ‘Sustainable Water Programme of Action – Implementation Package’, para 59

660. Ministry for the Environment, *Freshwater for the Future: a supporting document*, p 1

661. Ministry for the Environment, *Freshwater for the Future: a supporting document*, p 4

should be more explicit in the area of water management was expressed, as was the belief that kaitiaki knowledge could make a significant and positive contribution to the quality of freshwater decision making.<sup>662</sup>

The plan of action was focused on existing RMA tools:

Government will seek to strengthen, in partnership with local government, the ability of Māori to use existing resource management tools. Potential ways of doing this include:

- ▶ enhancing participation of Māori in planning and policy development – for example, assisting councils to incorporate Māori values into regional planning and policy making
- ▶ encouraging Māori into existing training programmes on decision making
- ▶ increasing the use and appointment of Māori Commissioners for specific hearings
- ▶ promoting Māori uptake of joint management, transfer and devolution options under the Resource Management Act.<sup>663</sup>

In other words, the Crown's view was that the RMA already provided the tools for Māori and councils to enhance Māori participation in water management, including JMAs and section 33 transfers. If the Crown had in fact acted to promote Māori uptake of JMAs and transfers of powers and functions, the Wai 262 report might have come to quite different conclusions in 2011.

There was no mention of proprietary rights or an economic benefit for Māori, and this was to prove controversial as the reforms unfolded.

## 2.8.5 The achievements of the SWPOA

### 2.8.5.1 *Building partnerships with Māori: the Crown and the Freshwater Iwi Leaders Group*

As noted above, one theme of the 2005 consultation had been the need for the Crown to involve Māori in further decision-making on the SWPOA, and to replace the Māori Reference Group with a 'broader reference group with members from around the country representing waka or iwi.'<sup>664</sup>

The Iwi Chairs Forum was established in 2005 as 'a platform for sharing knowledge and information between iwi.'<sup>665</sup> It 'discusses the challenges and aspirations of iwi and Māori in the spheres of cultural, social, economic, environmental and political development.'<sup>666</sup> The forum's vision was that iwi could work together and achieve a better future for their people through combined strength. As part of that approach, it appointed smaller iwi leaders' groups to provide a 'focused means of

662. Ministry for the Environment, *Freshwater for the Future: a supporting document*, p 5

663. Ministry for the Environment, *Freshwater for the Future: a supporting document*, p 5

664. Ministry for the Environment, *Wai Ora*, pp 6–7

665. Sir Mark Solomon and Donna Flavell, brief of evidence, 7 October 2016 (doc D85), p 3

666. Solomon and Flavell, brief of evidence (doc D85), p 4

direct engagement between iwi and the Crown on matters of mutual interest and concern.' Each iwi leaders group consulted more widely with iwi and hapū through national and regional hui as required, as well as reporting to (and seeking direction from) the forum at its quarterly hui.<sup>667</sup>

Sir Mark Solomon and Donna Flavell explained that a Freshwater Iwi Leaders Group (ILG) was appointed in 2007:

The Freshwater ILG was formed in 2007 at a national hui of iwi hosted by Tā Tumu te Heuheu held at Pukawa Marae. The Freshwater ILG was formed at that time in response to the then Labour Government's Sustainable Water Programme of Action with the objective of advancing the interests of all iwi in relation to fresh water through direct engagement with the Crown.<sup>668</sup>

At that time, the ILG consisted of leaders from Tūwharetoa, Ngāi Tahu, Whanganui, Te Arawa, and Waikato-Tainui.<sup>669</sup> The iwi leaders were assisted by an iwi advisory group (IAG), consisting of 'iwi and technical advisors'. Engagement between Ministers and the ILG began in May 2007 at a 'leadership/governance level', while the IAG engaged with officials at a 'technical level'.<sup>670</sup> That engagement was 'based on the principle, stated by iwi leaders and confirmed by the Hon Dr Michael Cullen', that the 'Treaty of Waitangi underpins our relationship with the Crown and is the basis for our engagement on all issues over water'.<sup>671</sup>

From the beginning, the engagement between the Crown and the ILG was not seen as a substitute for the necessary direct engagement between all iwi and the Crown, nor a means of negotiating a national settlement of water claims. Rather, it was seen as the identification and development of policy options to be 'brought back to the motu for discussion with all iwi'.<sup>672</sup>

According to a June 2009 Cabinet paper, progress on SWPOA issues, such as allocation mechanisms and rights, was

brought to a halt due to an unwillingness on the government side to discuss a full range of potential interests (because of perceived Treaty and litigation risks). Relationships have, however, been rebuilt over the past two years and there is a real opportunity now to make progress through good-faith engagement.<sup>673</sup>

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667. Solomon and Flavell, brief of evidence (doc D85), p 4

668. Solomon and Flavell, brief of evidence (doc D85), p 4

669. The members of the ILG in May 2007 were Sir Tumu Te Heuheu, Mark Solomon, Tukuroirangi Morgan, Sir Archie Taiaroa, and Toby Curtis: Billy Brough (on behalf of the IAG), 'Freshwater Management', report prepared for the Iwi Chairs Forum, May 2010, p [3]

670. Solomon and Flavell, brief of evidence (doc D85), p 5

671. Sacha McMeeking, 'Background Paper 6: Freshwater Management', February 2010, p 35

672. Solomon and Flavell, brief of evidence (doc D85), pp 8–9

673. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [31])



The relationship rebuilding mentioned in the Cabinet paper was a reference to the Crown's engagement with the ILG and IAG, which began in May 2007. In 2008, a multi-year joint work programme was established by officials and the IAG but progress was temporarily interrupted when the Labour Government lost the 2008 election.

### **2.8.5.2 Draft national policy statement and national environmental standards**

As we noted above, the lack of central direction had left a significant gap in the RMA regime. In 2007–08, the Crown focused on the development of central government instruments to guide, direct, and set limits for regional councils in their management of fresh water (actions 1–5 of the 2004 policy options). By mid-2008, officials had produced a draft National Policy Statement for Freshwater Management (NPS-FM), a draft National Environmental Standard on the measurement of water takes, and a draft National Environmental Standard on water flows and water levels.<sup>674</sup> These draft instruments were the 'deliverables' of the SWPOA, but they were not completed before the new National-led Government was elected in late 2008.<sup>675</sup> The two National Environmental Standards were not completed and issued by the new Government but it did proceed with the NPS-FM.

In July 2008, the Labour-led Government announced its decision to release a draft of the proposed NPS-FM. It noted that 'iwi and hapū roles, and tāngata whenua values and interests' were matters that needed to be recognised in the NPS as being of national significance.<sup>676</sup> The Crown also noted:

The Treaty of Waitangi (Te Tiriti o Waitangi) is the underlying foundation of the Crown-Māori relationship with regard to freshwater resources. The proposed National Policy Statement is intended to represent one step toward addressing tāngata whenua values and interests, not only through its outcomes, but also during the process of reaching those outcomes, particularly iwi and hapū involvement in decision-making.

It is not the whole answer. Other parts of the Sustainable Water Programme of Action are investigating how to enhance tāngata whenua involvement in water management. There are also other processes, such as the historical Treaty claim settlements process, which provide avenues to address tāngata whenua interests.<sup>677</sup>

The Government had got as far as appointing a board of inquiry before it lost the election. We consider the outcome in the following chapter.

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674. Beatson, brief of evidence (doc A3), p 4

675. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [40])

676. Ministry for the Environment and Ministry of Agriculture and Fisheries, *Finding the Balance: Managing Fresh Water in New Zealand*, July 2008, p 3

677. Ministry for the Environment and Ministry of Agriculture and Fisheries, *Finding the Balance: Managing Fresh Water in New Zealand*, July 2008, p 3



## CHAPTER 3

### A 'FRESH START FOR FRESH WATER': THE CROWN'S REFORM PROGRAMME TO 2014

#### 3.1 INTRODUCTION

This chapter of our report addresses the Crown's programme of water reforms from 2009 to 2014, focusing on proposed or completed reforms which sought to address Māori rights and interests in freshwater resources. Water quality reforms are addressed separately in chapter 5.

We note that the original impetus for reform came from the Labour-led Government in 2003. The first National Policy Statement for Freshwater Management (NPS-FM) was drafted in 2008. We discussed the Sustainable Water Programme of Action (SWPOA) in the previous chapter. It did not result in any concrete reforms prior to the 2008 election. Labour's draft NPS was the subject of a board of inquiry in 2009–10. Ultimately, the first NPS-FM was issued in 2011 but it had been changed substantially by the new National-led Government. From 2009, the National-led Government began its 'Fresh Start for Fresh Water' reform programme. The main achievement of the National-led Government in 2009–14 was the production of two national policy statements: the NPS-FM 2011 and the revised NPS-FM 2014. During this period, the national policy statement was the primary mechanism for water management reform. It therefore receives detailed treatment in this chapter. A further version, promulgated in 2017, is addressed in the following chapter.

A national policy statement is an instrument which sits under the RMA and provides national direction to regional councils by stating objectives and policies of national importance. The NPS-FM directs councils on how to manage fresh water at the regional level in their regional policy statements, plans, and resource consent decisions. Section D of the 2011 version (which has not changed in later versions) directs councils on how to engage with iwi.

The main outlines of the NPS-FM have remained largely the same since 2011. One of the major innovations in 2014 was the introduction of the concept 'Te Mana o te Wai' into the NPS preamble as an overarching idea for freshwater management. In brief, the Freshwater Iwi Leaders Group (ILG) and the Crown held discussions which led to the inclusion of Te Mana o te Wai in the 2014 version. The preamble stated that '[f]reshwater objectives for a range of tangata whenua values

are intended to recognise Te Mana o te Wai.<sup>1</sup> A ‘National Significance’ statement said that the NPS-FM was intended to ‘recognise the national significance of fresh water to all New Zealanders and Te Mana o te Wai’. A ‘range of community and tāngata whenua values’ would collectively enable this recognition to take place.<sup>2</sup> No further definition or explanation was given in the national policy statement. Both the preamble and the ‘national significance’ statement came before the operative provisions of the NPS-FM. The effectiveness of these versions of the NPS-FM, and the meaning and significance of Te Mana o te Wai, were points of dispute in our inquiry.

The Crown’s decision to confine its policy discussions with Māori to the ILG was also the subject of debate in our inquiry, as we explore in this chapter and the next. In brief, the engagement between the Treaty partners on freshwater reform took two forms:

- ▶ initial policy development via Crown and ILG discussions; and,
- ▶ consultation by the Crown with Māori and the public more broadly on a series of policy options and proposals that had been developed with ILG input.

Both of these forms of Crown–Māori engagement are major features of this chapter, and we set out each successive consultation document – and the Māori Treaty partner’s responses – in some detail. There was also an indirect form of engagement which operated alongside the other two. Throughout this period (and through to 2018), a stakeholder group called the Land and Water Forum advised the Crown on water reforms. Iwi had significant and influential representation on this forum. Where relevant, we have set out various reports and recommendations of the Land and Water Forum (LAWF).

The engagement between Māori and the Crown was framed by the Crown’s commitment to address Māori rights and interests in fresh water, which – the Crown acknowledged – needed to be better recognised and provided for through its water reforms. This was exemplified by the assurances given to the Supreme Court in November 2012 by the Deputy Prime Minister, Bill English, but it was also stated in Cabinet papers and public policy documents. The Supreme Court noted:

Mr English summarised the Crown position as being that it acknowledges that Maori have ‘rights and interests in water and geothermal resources’. Identifying those interests is being addressed through the ‘ongoing Waitangi Tribunal Inquiry’ and a number of ‘parallel mechanisms’. The Crown position is that any recognition must ‘involve mechanisms that relate to the on-going use of those resources, and may

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1. New Zealand Government, *National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2014), p 4 (Martin Workman, papers in support of brief of evidence (doc F6(a)), p 4)

2. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 6 (Workman, papers in support of brief of evidence (doc F6(a)), p 6)

include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues.' The Court should accept that it is not an empty exercise.<sup>3</sup>

It is important to observe, however that the engagement was also framed by the Crown's position that 'no one owns water'.<sup>4</sup>

Subjects of Crown-Māori engagement included not only the NPS-FM but also the vexed issue of RMA reform, and how Māori rights and interests in fresh water should be provided for through the RMA. A 2013 consultation document, entitled *Improving our resource management system*,<sup>5</sup> included a number of reform proposals to address Māori rights and interests.

The focus of this chapter is thus Crown-Māori engagement on the Crown's water reforms, and the substance of the various reform options put forward to address Māori rights and interests in fresh water. It is not our intention to address the entire reform programme in all its details, nor is it necessary for us to do so in order to report on the claims before us. The issue of reforms to improve water quality, which is a matter of great importance to the claimants, will be the subject of a later chapter. Further, we note that the reform process was not complete in 2014, and the subsequent reforms developed by the Crown and the ILG in 2014-17 will be addressed in the next chapter.

## 3.2 THE PARTIES' ARGUMENTS

### 3.2.1 The Crown's reform process

#### 3.2.1.1 *The case for the claimants and interested parties*

The claimants' view is that the Crown's reform process has been too slow and fragmented to develop the effective, timely, and comprehensive reforms needed in freshwater management.<sup>6</sup> In the meantime, 'fundamental tenets of the RMA that have been prejudicing, and continue to prejudice, Māori, have continued in operation'.<sup>7</sup> The claimants' criticism of the long, slow, compartmentalised reforms included arguments that the Crown failed to provide effectively for either co-management or capacity funding for Māori involvement in RMA processes.<sup>8</sup>

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3. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, bundle of authorities (3.3.46(c), tab 8)

4. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 31

5. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, February 2013)

6. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 9, 10-11, 26. See also counsel for the ILG, closing submissions (paper 3.3.41), p 4.

7. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 11

8. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 9-11, 15-16, 26-27. See also claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), pp 40-50.

Further, the claimants argued that the Crown's position that 'no one owns water', which has been a key plank of the Crown's reforms since at least 2012, has also prejudiced Māori.<sup>9</sup> This Crown position, we were told, is 'hostile to Māori proprietary rights in water and, as such, it constitutes a Te Tiriti inconsistent policy that is impeding, and will continue to impede, Te Tiriti compliant freshwater reforms'.<sup>10</sup> In the claimants' view, the Crown has effectively controlled 'the content, timing, and delivery of reform proposals', and has not engaged properly with Māori as a Treaty partner.<sup>11</sup>

The NZMC and a number of interested parties also criticised the Crown for only working with the ILG. In their view, the Crown has failed to meet its Treaty partnership obligations.<sup>12</sup> Some interested parties also argued that the Crown's attempts at wider consultation were 'tokenistic and insufficient to enable hapū to exercise their tino rangatiratanga and mana over their freshwater resources'.<sup>13</sup>

Counsel for the Freshwater ILG, however, argued that the Crown-ILG engagement had never been intended to usurp the rangatiratanga of others. Any options co-developed by the Crown and the ILG were 'brought back to the motu' for wider consultation with all Māori.<sup>14</sup> Also, the ILG argued that the engagement model was a good one, but that it was compromised by the 'politicisation' of the process, unilateral Crown decision-making about reforms, and the compartmentalised nature of the Crown's reforms.<sup>15</sup>

Finally, we note that a number of groups submitted that the Crown's reforms failed to deliver the same kind of co-governance or co-management that the Crown was prepared to accord in some Treaty settlements during this period.<sup>16</sup> Counsel for the NZMC, however, argued that even the 'bespoke Treaty settlements', such as the Waikato River and Whanganui River settlements, did not go far enough because they failed to address ownership rights or resource consent decision-making.<sup>17</sup>

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9. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p13; counsel for interested parties (Gilling), closing submissions (3.3.35), pp12-13

10. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 28. See also claimant counsel (Wai 2601), closing submissions (paper 3.3.38(c)), pp27-35.

11. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp9-10, 26, 29

12. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp7-10, 29; claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), pp24-27; counsel for interested parties (Stone and Leauga), closing submissions (3.3.36), pp5-7, 10; counsel for interested parties (Lyll and Thornton), closing submissions (paper 3.3.43), pp8-10

13. Counsel for interested parties (Stone and Leauga), closing submissions (3.3.36), p7; counsel for interested parties (Lyll and Thornton), closing submissions (paper 3.3.43), p10

14. Counsel for the ILG, closing submissions (paper 3.3.41), pp5-6

15. Counsel for the ILG, closing submissions (paper 3.3.41), pp4-6, 22

16. Counsel for interested parties (Sykes), closing submissions (paper 3.3.39), pp34-35; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp125-126. See also claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp77-82.

17. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b), p3

### 3.2.1.2 *The case for the Crown*

In the Crown's submission, its reform process has been a 'novel and collaborative approach to partnership'.<sup>18</sup> The co-development and co-design of reform options with the ILG, alongside the iwi role in the LAWf, enabled a new and 'extremely collaborative' form of Crown-Māori engagement to occur.<sup>19</sup> In the Crown's view, it did not prescribe the parameters of the reforms which resulted; rather, the ILG sought information from Māori through hui as to the reforms sought.<sup>20</sup>

Also, Crown counsel argued that the ILG approached the Crown and asked to work with it. In the Crown's view, the ILG was able to ascertain and convey the views of a wide range of iwi and hapū, and was the organisation which best represented the customary interests in waterways. The co-designed reforms were then put to Māori more widely through standard forms of consultation (hui and written submissions). The Crown did not accept, therefore, that it could be justly criticised for only working with the ILG in the initial policy formation process.<sup>21</sup> Instead, Crown counsel submitted that the 'innovative nature and significance of the arrangement should not be understated'.<sup>22</sup>

On the issue of proprietary rights or ownership, the Crown argued that there was now some agreement between the parties that the concept of English-style ownership was not the best way to address Māori rights and interests in water. A 'title lens' is 'too narrow' and may require forensic proof of continued ownership waterway by waterway, and may result in unfair discrepancies between and within iwi. 'Instead', Crown counsel submitted, 'the Crown's focus has been on the regulatory regime – including water allocation – and on better recognition of Māori rights and interests within it'.<sup>23</sup> The Crown's view is that the 'multiple values, rights and interests' that underlie the concept of ownership can still be delivered in various ways through a regulatory regime.<sup>24</sup> Hence the Crown and the ILG have worked towards regulatory reform that will deliver 'greater decision-making and economic benefits' to Māori.<sup>25</sup> In the Crown's submission, the Supreme Court's decision in *Mighty River Power* supports this approach. In essence, the Crown's position is that 'use' and 'control', which are essential elements of ownership, were 'front and centre in the rights and interests work and reform proposals'.<sup>26</sup>

On the issue of co-management, the Crown's position is that 'landmark Treaty settlements have extended Māori authority over particular water bodies, and established a network of co-management and co-governance throughout the

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18. Crown counsel, closing submissions (paper 3.3.46), p 91

19. Crown counsel, closing submissions (paper 3.3.46), pp 39–40

20. Crown counsel, closing submissions (paper 3.3.46), pp 5, 6

21. Crown counsel, closing submissions (paper 3.3.46), pp 5, 8–9, 34–35, 76–77, 79–80

22. Crown counsel, closing submissions (paper 3.3.46), p 39

23. Crown counsel, closing submissions (paper 3.3.46), pp 3–4, 57

24. Crown counsel, closing submissions (paper 3.3.46), pp 6, 53

25. Crown counsel, closing submissions (paper 3.3.46), p 7

26. Crown counsel, closing submissions (paper 3.3.46), p 81

country'.<sup>27</sup> In addition, the Crown relied on a 2017 reform – *mana whakahono a rohe* agreements (see chapter 4) – which the Crown said offered a 'similar promise to non-settled iwi to generate co-governance relationships with local councils'.<sup>28</sup> We will discuss the latter part of that submission in the next chapter.

In terms of the pace and segmented nature of its reforms, the Crown argued that the issues are very complex, that it takes time to gather and analyse the necessary information, and that deep and broad consultation has been necessary. Crown counsel submitted that it is 'unreasonable to simultaneously require speedy and totally comprehensive policy development, while also demanding deep and wide consultation'.<sup>29</sup> In the Crown's view, it has implemented a number of reforms over time which will have a cumulative effect, and the 'process of staged development was a reasonable and active response to policy issues'.<sup>30</sup> The Crown also argued: 'Recognising that there is a problem and trying to fix it are the acts of a good Treaty partner, conducting itself reasonably and in good faith'. In the Crown's view, the claimants should not rely on its admission of the existence of problems as a concession of Treaty breach, as the Treaty does not require perfection but rather 'ongoing improvement and corrective action'.<sup>31</sup>

### 3.2.2 The National Policy Statement for Freshwater Management, 2011 and 2014

#### 3.2.2.1 *The case for the claimants and interested parties*

While claimant counsel focused on the NPS-FM as amended in 2017, counsel for interested parties had a number of explicit criticisms about the 2011 and 2014 versions of the national policy statement. First, counsel argued that the Crown failed to properly carry out the recommendations of the board of inquiry with regard to the NPS-FM 2011, thereby significantly weakening the provisions for Māori involvement in freshwater management and decision-making. Secondly, counsel for interested parties argued that section D of the NPS-FM (unchanged since 2011) falls far short of what is required for co-management and the effective exercise of *kaitiakitanga*.<sup>32</sup> The policies in section D are 'open to wide interpretation . . . and they fail to make the participation of iwi or hapū in decision-making processes a mandatory requirement upon local authorities'.<sup>33</sup>

In respect of the NPS-FM 2014, counsel for some Northland interested parties noted that councils were given until 2025 to implement its requirements, and that councils were supposed to do so by identifying values (and how to implement them) with iwi, hapū, and the wider community. Counsel submitted that the Northland Regional Council has already announced that it cannot meet this deadline, and argued that the council's implementation plan has been released

27. Crown counsel, closing submissions (paper 3.3.46), pp 3, 11, 27–29, 54. See also the Crown's appendix on co-management arrangements (paper 3.3.46(a)).

28. Crown counsel, closing submissions (paper 3.3.46), p 3

29. Crown counsel, closing submissions (paper 3.3.46), p 66

30. Crown counsel, closing submissions (paper 3.3.46), p 32

31. Crown counsel, closing submissions (paper 3.3.46), p 67; see also p 65.

32. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 111, 123–126

33. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 111



**Section D of the NPS-FM 2011****D. Tāngata whenua roles and interests***Objective D1*

To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.

*Policy D1*

Local authorities shall take reasonable steps to:

- a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region
- b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region and
- c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

without the opportunity for submissions. The 2014 version of the NPS-FM, therefore, failed to compel councils to 'work in partnership with tangata whenua in the implementation of freshwater policy'.<sup>34</sup> Counsel for the Muaūpoko Tribal Authority submitted that the NPS-FM 2014 also allowed an extension to 2030, and that appeals in respect of plans could put the date even later, arguing that this time period left essential reforms far too late.<sup>35</sup>

According to some counsel, the NPS-FM 2014 established a 'weak regime for managing water quality that was developed with no Māori input, contrary to common law and Te Tiriti principles of consultation'.<sup>36</sup> Amendments in 2017, they said, have not corrected this fundamental weakness.<sup>37</sup> The parties' criticisms about technical aspects of the NPS-FM, relating to measures for the improvement of water quality, will be addressed in chapter 5.

In respect of the Te Mana o te Wai concept, counsel pointed to a Crown admission in 2017 that 'councils, iwi/hapū, and interested stakeholders all felt that the

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34. Counsel for interested parties (Stone, Leauga, and Hopkins), closing submissions (paper 3.3.36), pp 8–9

35. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 5

36. Counsel for interested parties (Lyll and Thornton), closing submissions (paper 3.3.43), p 11

37. Counsel for interested parties (Lyll and Thornton), closing submissions (paper 3.3.43), p 11

meaning of and status of the statement about Te Mana o te Wai was unclear, and the direction provided to councils through the [2014] Freshwater NPS was uncertain.<sup>38</sup> The interested parties also submitted that the use of te reo titles for the 'additional national values' in the NPS-FM 2014 was inappropriate, as the values did not actually reflect 'iwi values and interests in fresh water'.<sup>39</sup> The adoption of Māori concepts in the 2014 version of the NPS-FM (and later) was dismissed by some parties as tokenism.<sup>40</sup> These parties also argued that the 2017 amendments did not address this fundamental problem,<sup>41</sup> but counsel for the Freshwater ILG, argued that the inclusion of Te Mana o te Wai in the operative provisions of the NPS-FM in 2017 was a notable and positive reform (see the next chapter).<sup>42</sup> Those parties agreed, however, that the inclusion of Te Mana o te Wai by the Crown in 2014 without the other concepts in the ILG's 2012 'Ngā Mātāpono ki te Wai' (see section 3.5.3) was entirely inadequate.<sup>43</sup>

### 3.2.2.2 *The Crown's case*

In the Crown's submission, many of the problems identified by the claimants are problems with how the RMA has been implemented. Crown counsel argued that 'the Crown's effort to address negative outcomes and improve the quality of decision-making' does not amount to an admission of 'prior Treaty breach'.<sup>44</sup> In this respect, the Crown pointed to the NPS-FM as a key way of improving local decision-making, especially through the operation of section D (established in the 2011 version). The Crown did not accept the other parties' criticisms of section D, nor did it accept that the Minister's decisions with regard to the board's recommendations were disadvantageous to Māori.<sup>45</sup> Rather, Crown counsel submitted that the claimants have 'underestimated the power of the NPS-FM to recognise Māori rights and interests through the operation of Objective D1 and Te Mana o te Wai'.<sup>46</sup>

The Crown partly relied on the Ministry for the Environment's guide to how to implement section D, arguing that while 'Policy D1 does not specify the exact form of involvement [of Māori], the implementation guide contemplates consultation, joint management agreements, joint committees, and direct decision-making roles'.<sup>47</sup> As part of explaining the Ministry's implementation guidance, Crown counsel submitted:

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38. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 129. Counsel quoted a fact sheet published by Ministry for the Environment in 2017: *Changes to Freshwater NPS – 2017: Te Mana o te Wai* (Wellington: Ministry for the Environment, August 2017), p 2.

39. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 129–130

40. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 129–131

41. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 129

42. Counsel for interested parties (Freshwater ILG), closing submissions (paper 3.3.41), p 4

43. Counsel for interested parties (Freshwater ILG), closing submissions (paper 3.3.41), pp 4–5; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 111–112

44. Crown counsel, closing submissions (paper 3.3.46), p 65

45. Crown counsel, closing submissions (paper 3.3.46), pp 21–24, 35–37, 67–68

46. Crown counsel, closing submissions (paper 3.3.46), p 67

47. Crown counsel, closing submissions (paper 3.3.46), p 68

The Ministry expects that councils will work with iwi and hapū through early engagement in planning processes, commission reports from them, use mātauranga Māori in planning and decision-making, and include iwi and hapū members on plan hearing committees. Councils need to do more than have regard to Māori values and interests, and must ensure that they are transparently reflected in planning and decision-making.<sup>48</sup>

The Crown also submitted that if councils fail to deliver on Objective D1, it may result in the 'invalidation' of their plans and policies.<sup>49</sup>

Thus, the Crown's view is that the NPS-FM 2011 established objectives and policies in section D that were 'intended to ensure that tangata whenua values and interests were reflected in policy and decision-making'.<sup>50</sup>

In terms of the introduction of Te Mana o te Wai in 2014, the Crown simply noted that in mid-2013 it proposed a series of changes to the NPS-FM, including the inclusion of this concept in the preamble as 'an interpretative guide to the entire document'.<sup>51</sup> The reference to Te Mana o te Wai was 'added to the preamble based on discussions with the ILG and on submissions from the 2013 consultation process'.<sup>52</sup> Otherwise, the Crown did not make submissions about the nature and significance of the 2014 reference to Te Mana o te Wai, relying instead on its 2017 amendments (see the next chapter for those amendments).

### 3.2.3 Resourcing and funding

One of the most important issues for this period was the lack of funding and resourcing for Māori groups to participate effectively (or at all) in freshwater management, and the question of how the Crown's reforms would address this issue. In the view of the claimants and interested parties, Māori have been 'hopelessly prejudiced in their ability to participate in RMA processes involving freshwater issues' because of the 'gross under-funding of Māori participation'.<sup>53</sup> The Crown's reforms to date, they said, had failed to address this issue.<sup>54</sup> Counsel for interested parties also submitted that some councils are too poor to carry the funding burden themselves.<sup>55</sup>

The Crown acknowledged the existence of the problem but argued that it has provided *some* funding, mostly directed to clean-up and restoration of waterways. Crown counsel argued that this priority reflected a 'chief concern' expressed in ILG

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48. Crown counsel, closing submissions (paper 3.3.46), p 22

49. Crown counsel, closing submissions (paper 3.3.46), p 70

50. Crown counsel, closing submissions (paper 3.3.46), p 36

51. Crown counsel, closing submissions (paper 3.3.46), pp 36–37

52. Crown counsel, closing submissions (paper 3.3.46), p 37

53. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 9–10

54. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 27; Counsel for interested parties (Sykes), closing submissions (paper 3.3.39), p 4; counsel for interested parties (Gilling), closing submissions (paper 3.3.35), pp 15–16; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 104, 114–115

55. Counsel for interested parties (Sykes), oral closing submissions (transcript 4.5), pp 296, 335

hui and in our inquiry. The Crown also emphasised that the Ministry provides guidance to councils on how they should assist Māori participation, and also argued that the establishment of new arrangements in 2017 has created a 'further avenue for Māori to negotiate funding and resourcing of RMA functions' with councils.<sup>56</sup>

### 3.3 COLLABORATIVE REFORM

#### 3.3.1 'A New Start for Fresh Water'

In June 2009, Cabinet signed off on the shape and direction of a new freshwater reform programme, entitled 'New Start for Fresh Water'.<sup>57</sup> Crown witness Guy Beatson explained:

The rationale for reform through the New Start for Fresh Water programme was that in some parts of New Zealand, water resource limits are being approached, which is seen in deteriorating water quality, water demand outstripping supply, and constrained economic opportunities. Dissatisfaction with the status quo management model was rising among Māori and other sectors of the community.<sup>58</sup>

When the new reform programme was announced, one of its stated aims was to ensure that fresh water contributed to economic growth as well as 'environmental integrity'. Another aim was to reform water allocation systems so that they provided for 'ecological and public purposes (including Treaty considerations) as well as economic returns'.<sup>59</sup>

In addition, the Crown intended to maintain 'Treaty-based engagement with Māori on water management policy'.<sup>60</sup> On this point, the Cabinet paper stated:

Meaningful Treaty-based engagement with Māori will continue (including discussion on the roles, rights and interests of Māori) and is central to a robust policy process and durable outcomes. For example, progress on allocation will not be possible without resolving issues around Māori interests, and all options need to be on the table for discussion.<sup>61</sup>

This was because the 'rights and interests of Māori in New Zealand's freshwater resources remain undefined and unresolved, which is both a challenge and an opportunity in developing new water management and allocation models'.<sup>62</sup> For

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56. Crown counsel, closing submissions (paper 3.3.46), pp 77-78

57. Beatson, brief of evidence (doc A3), p 4

58. Beatson, brief of evidence (doc A3), p 4

59. Beatson, brief of evidence (doc A3), p 5

60. Beatson, brief of evidence (doc A3), p 5

61. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [27])

62. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [26])

water allocation models, in particular, 'Treaty issues in water and roles in decision-making' would have to be worked through with iwi leaders in designing a better system than the status quo.<sup>63</sup>

The Crown acknowledged that Māori interests in water were varied, and that proprietary or ownership rights were still a major concern for Māori:

Early consultation with Māori has indicated they have a wide range of interests in fresh water. These may include not only traditional and cultural connections, but also economic development interests (as water users and landowners), fisheries interests recognised through the Fisheries Settlement, and an expectation that Māori will have a role in water management. Many Māori also claim a property or ownership right in water that they wish to have recognised. Each iwi will have its own view on how it wants its interests to be accommodated.<sup>64</sup>

The new Government saw an opportunity for change in 2009, with the possibility of 'radical reforms to water management'. But there was nothing like a complete break with the SWPOA, at least at first. The new Government's view was that the SWPOA had been slow (failing to meet many milestones) and 'widely perceived as ineffective in tackling the big issues'.<sup>65</sup> Nonetheless, the Crown intended to continue with its 'deliverables', which were the National Policy Statement, two National Environmental Standards, and a 'Primary Sector Water Partnership'.<sup>66</sup> It was also necessary to build on the progress that had been made in Treaty settlements. Options for water governance and decision-making 'will depend on, and be linked to . . . further development of co-management arrangements for natural resources in Treaty of Waitangi settlement redress'.<sup>67</sup> These co-management arrangements were being sought in a number of Treaty negotiations. In the Cabinet paper, the Crown noted that the Waikato River Treaty settlement was 'likely to form a strong precedent for future Treaty settlements', and that this would have implications for the management of all 'major' water bodies.<sup>68</sup>

Thus, Cabinet formally acknowledged that Māori interests and roles in water remained unresolved (including claimed ownership rights), that 'the full range of potential roles and interests of Māori is open to consideration',<sup>69</sup> that the

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63. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [29])

64. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [31])

65. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [24])

66. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [24])

67. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [28])

68. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [34])

69. Cabinet paper, 'New Start for Fresh Water', June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [37])

co-management arrangements developed in Treaty settlements had implications for water governance and management reform, that there would need to be provision for Treaty issues in any new allocation system, and that it was important to work collaboratively with iwi leaders to design new options for water management and allocation.

### 3.3.2 Collaborative development of policy options

#### 3.3.2.1 *Three collaborative processes for policy development are established*

Guy Beatson observed: ‘From the outset, the policy approach was centred on the need to develop policy solutions with wide buy-in from all interested sectors, including Māori.’<sup>70</sup> The framework for developing policy involved three processes running in parallel:

- ▶ a ‘stakeholder-led collaborative process’ to develop agreed options for water management reform, and to ‘build the social consensus for change that is necessary before proceeding to solutions’;
- ▶ ‘Continuing engagement between Ministers and iwi leaders on the position and interests of Māori with regard to fresh water, including a joint work programme on matters of mutual interest’; and
- ▶ the scoping and researching of policy options by Government officials.<sup>71</sup>

The joint work programme involved what has been called the ‘co-design’ of freshwater reforms by officials and the Iwi Advisory Group (IAG), a team of specialists and advisors appointed by the ILG. There were links and cross-overs between these three parallel processes, because officials and the IAG were involved in the stakeholder-led collaboration (officials as ‘active observers’<sup>72</sup> and the IAG as members), and the IAG was involved with officials in the programme which scoped policy options.<sup>73</sup>

#### 3.3.2.2 *The Iwi Leaders Group*

In February 2009, Sir Tumu Te Heuheu wrote to the new Prime Minister, John Key, on behalf of the ILG. Sir Tumu ‘approached the incoming National-led Government to reiterate a desire to continue to work jointly on water policy.’<sup>74</sup> In his letter, the chair of the ILG referred to the dialogue that was necessary ‘regarding the important issue of rights and interests in our natural resources, particularly water, and improving the management of those resources’. Engagement with iwi ‘as the Crown’s Treaty partner’ on water management options, and on ‘the rights and interests affirmed by Māori in relation to freshwater’, were seen as different but ‘related’ issues. Sir Tumu reminded the Prime Minister that iwi placed immense value on their rights and interests in water as well as their obligation as kaitiaki to

70. Beatson, brief of evidence (doc A3), p 5

71. Cabinet paper, ‘New Start for Fresh Water’, June 2009 (Beatson, brief of evidence (doc A3), attachment 3, p [23])

72. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, September 2010, p vi (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 136)

73. Beatson, brief of evidence (doc A3), pp 5, 10

74. Beatson, brief of evidence (doc A3), pp 7–8

'maintain the health and wellbeing of waterways'. The ILG sought to continue its 'productive engagement' with the previous Government in the SWPOA. It sought a commitment to regular meetings between Ministers and iwi leaders, a continuation of the IAG's work with officials, a commitment that the Crown would not create or dispose of proprietary rights in water without the prior agreement of iwi, and that iwi be involved in upcoming RMA reforms (especially if those reforms dealt with the allocation of water).<sup>75</sup>

According to Haami Piripi of Te Rarawa, the Crown chose to work with the Iwi Chairs Forum because it recognised that 'a national confederation of democratically elected leaders could be seen as a bona fide voice on nation-wide iwi issues'.<sup>76</sup> Ministers agreed to meet regularly with the ILG, to have their officials work with the IAG, and for iwi to participate in the Land and Water Forum. The Prime Minister also agreed to establish a formal communications protocol with the ILG, but final decisions on all matters would remain with Cabinet.<sup>77</sup>

When the ILG engaged with the Crown in 2009, it defined eight outcomes that it wanted to achieve (at a minimum):

- (a) avoidance of the creation of a legal 'ownership' of, or property rights in, water that are adverse to the rights and interests of iwi;
- (b) protection of the health and wellbeing of waterways and the continuous supply of freshwater in order to ensure the sustainable social, environmental, cultural and economic development of Iwi;
- (c) engagement on freshwater issues in parallel with and/or informed engagement on natural resources, co-management, fisheries, the Resource Management Act reform, local government reform and Treaty principles;
- (d) greater involvement in decision-making on freshwater management at the national and regional level;
- (e) inclusion of iwi cultural and economic aspirations into all levels of freshwater decision making;
- (f) provision for iwi cultural and customary values;
- (g) provision for iwi use, including iwi economic development; and
- (h) intergenerational equity (ie favouring long-term outcomes ahead of shorter term (often economic) 'benefits' that dominate governmental and commercial decision making).<sup>78</sup>

When the Crown and the ILG agreed to work together in 2009 to develop policy solutions, there was common ground on achieving some parts of the ILG's bottom line, as will become apparent later in the chapter.

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75. Sir Tumu Te Heuheu to the Prime Minister, 19 February 2009 (Beatson, brief of evidence (doc A3), attachment 1, pp 1-2)

76. Haami Piripi, answers to questions of clarification, [August 2017] (doc E5(b)), p [5]

77. Prime Minister to ILG, 1 May 2009 (Beatson, brief of evidence (doc A3), attachment 2, pp 1-3); 'Communication and Information Exchange Protocol between the Iwi Leaders group and the Crown', October 2009 (Beatson, brief of evidence (doc A3), attachment 4)

78. Solomon and Flavell, brief of evidence (doc D85), p 7

These goals were further elaborated upon at a national summit, which the Iwi Chairs Forum called in December 2009 to discuss the ‘rights and expectations of iwi and hapū concerning freshwater.’<sup>79</sup> The Minister of Māori Affairs gave the keynote address at this hui, after which the participants were provided with an overview of the Crown’s reform programme and of the Crown–ILG engagement. The rest of the summit consisted of workshops on key themes. At one of these workshops, Sir Edward Taihakurei Durie raised the possibility that the Crown was about to create new property rights in water, and that a claim could be taken to the Waitangi Tribunal before this happened:

Justice Durie – this discussion [on Māori rights and interests] repeats the discussion held in the early 1980s regarding the Quota Management System. In the early discussions on the QMA, the model was presented as a management model with a clear disclaimer that it was not about ownership. However it is fact now that the QMA established property rights. In my opinion, there is an inevitability that freshwater will be, in time, subject to an equivalent quota management system. Accordingly it is imperative that we are thinking strategically about engaging with this trajectory. How we do this must be founded in tikanga Māori and the recognition of our pre-existing rights to water. Perhaps a case could be taken to the Tribunal to have the prior right to extract identified so that it can be put to the government. There is a great deal of jurisprudential support for these assertions.<sup>80</sup>

In addition to the possibility of a Treaty claim, the rights and interests workshop also discussed taking claims to the courts to ‘have their mana over their waters determined at law.’ Pre-existing Māori rights according to tikanga or Māori law, especially ‘ownership’, were also stressed.<sup>81</sup>

Views expressed at other workshops included:

- ▶ Water quality – the problems of diffuse and point-source pollution needed to be dealt with by raising standards (to be developed by iwi and the Crown because ‘at this time local government doesn’t recognise Treaty obligations’);<sup>82</sup> mātauranga Māori should be used as part of monitoring and measuring compliance with the new standards; and Māori indicators of water quality included good fisheries, drinkable water, flows, and the ability to use water for healing;
- ▶ Management and allocation – improved management and allocation required legislative provision for iwi and hapū to take part in decision-making, decision-making processes that included Māori values, compulsory implementation of iwi management plans, iwi and hapū monitoring, an increase to

79. McMeeking, ‘Background Paper 6: Freshwater Management’, February 2010, p 36, <https://iwichairs.maori.nz/wp-content/uploads/2015/06/Water.pdf>

80. McMeeking, ‘Background Paper 6: Freshwater Management’, February 2010, p 36

81. McMeeking, ‘Background Paper 6: Freshwater Management’, February 2010, pp 36–37

82. McMeeking, ‘Background Paper 6: Freshwater Management’, February 2010, p 37



the capacity and capability of iwi to participate, and a reprioritisation to put the health and wellbeing of waterways first;

- ▶ Governance – there are philosophical debates about the differences between governance and ownership (which has English 'baggage'), and about matters of principle vis-à-vis pragmatic concerns, which make it difficult to design a governance framework, but 'practical outcomes' should include iwi and hapū decision-making about the waters in their rohe, iwi and hapū decision-making at whatever level they wish, and the transmission of 'strong and vital waters' to future generations.<sup>83</sup>

The outcomes of this hui were published in a report on the Iwi Chairs Forum's website in 2010.

### 3.3.2.3 *The Land and Water Forum*

The stakeholder collaborative process was entrusted to the Land and Water Forum. This organisation had begun life the year before as the Sustainable Land Use Forum. In 2009, its membership was significantly increased and it was renamed the Land and Water Forum.<sup>84</sup> Gregory Carlyon called the forum 'the most significant exercise in cross-sector collaboration in New Zealand's environmental history.'<sup>85</sup> The Crown asked it to develop a 'shared understanding' of the issues involved in water reform, and – from that shared understanding – to agree on 'options to achieve outcomes and goals for improved water management.'<sup>86</sup> Mr Beatson noted that any detailed consideration of Māori rights and interests in fresh water was 'specifically excluded from the scope of the LAWf's work.'<sup>87</sup>

In 2009, the Land and Water Forum was a 'diverse group of about 60 organisations comprising primary industry representatives, electricity generators (both SOEs and privately owned generators), environmental groups and recreational NGOs, iwi . . . and other organisations with an interest in freshwater and land management.'<sup>88</sup> The iwi representatives included the members of the IAG, and they were 'active participants' in the forum,<sup>89</sup> known colloquially as 'Team Iwi'.<sup>90</sup> According to a 2010 research report for MFE, 'Team Iwi' had a major and positive impact on the work of the forum and its efforts to find common ground.<sup>91</sup>

83. McMeeking, 'Background Paper 6: Freshwater Management', February 2010, pp 37–39

84. Land and Water Forum, *A Fresh Start for Freshwater*, p 59 (Brunt, papers in support of brief of evidence (doc D89(a)), p 205)

85. Gregory Carlyon, brief of evidence (doc G5), p 11

86. Guy Beatson, second brief of evidence, 29 June 2012 (doc A93), p 4

87. Beatson, second brief of evidence (doc A93), p 6

88. Beatson, second brief of evidence (doc A93), p 5

89. Beatson, brief of evidence (doc A3), p 10

90. James Baines and Marg O'Brien, *Reflections on the Collaborative Governance Process of the Land and Water Forum*, research report prepared for Ministry for the Environment, (Wellington: Ministry for the Environment, 2012), pp 32–33

91. Baines and O'Brien, *Reflections on the Collaborative Governance Process of the Land and Water Forum*, pp 58–59

In September 2010, the Land and Water Forum released its first report, *A Fresh Start for Freshwater*.<sup>92</sup> The report was prepared by a ‘Small Group’ of 21 ‘major stakeholders’, assisted by six ‘active observers’ from central and local government.<sup>93</sup> The IAG members were part of the Small Group. The forum’s report was highly critical of the current system of freshwater management. It made 53 formal recommendations to the Crown, covering ‘the setting of limits for quantity and quality, achieving targets, improving allocation, rural water infrastructure, changes to governance (including changes to better reflect the Treaty relationship with iwi), science and knowledge, water services management, drainage and floods’.<sup>94</sup>

The forum’s primary concern was that limits had to be set to protect water quality and prevent over-allocation. It recommended the establishment of a national body on a ‘co-governance basis with iwi’ to set water policy and advise Ministers. This commission would develop a National Land and Water Strategy that should (among other things) recognise the Crown–iwi relationship and iwi expectations for water management. Iwi should also be represented on all regional water committees, and mātauranga Māori should become an integral part of managing water and land-use.<sup>95</sup>

The forum’s chair advised that its recommendations should be treated as an integrated package, and that the work of collaborative policy development should continue. A return to central government consulting stakeholders would, he said, make ‘the process of implementation more contested, less certain and slower’, and the outcomes ‘much less satisfactory’.<sup>96</sup>

### 3.3.3 Policy decisions on water reforms: the ‘Fresh Start for Fresh Water’ programme

In April–May 2011, the Crown made a series of decisions based on the Land and Water Forum’s recommendations, after consulting the IAG and ILG about the forum’s report. The ‘New Start for Fresh Water’ programme was renamed ‘Fresh Start for Fresh Water’, so as to ‘align with the Land and Water Forum’s report, and to mark the significant transition from the LAWf’s initial collaborative process to the government’s consideration of its response to the report’.<sup>97</sup>

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92. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, September 2010. A copy of this report was provided to the Tribunal in the supporting papers of Ministry for the Environment witness Peter Brunt.

93. Land and Water Forum, *A Fresh Start for Freshwater*, September 2010, p v (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 135)

94. Beatson, brief of evidence (doc A3), p 5

95. Land and Water Forum, *A Fresh Start for Freshwater*, pp 1–6 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 147–152)

96. Alastair Bisley, chair, Land and Water Forum, to Minister for the Environment and Minister of Agriculture and Forestry, 5 April 2011, <http://www.landandwater.org.nz/includes/download.aspx?id=118915>

97. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, p 12 (Mike Joy, papers in support of brief of evidence (doc D20(b)), pp 178)

The key plank for water reform was agreed by the forum, the ILG, and officials as the need for 'a more effective limits-based regime for making decisions on water management'. In the Crown's view, the necessary changes could be accommodated within the existing RMA framework, but improvements were needed in how the framework was implemented on the ground.<sup>98</sup> The Crown accepted as a 'main issue' that there was a need for 'a stronger partnership between the Crown and iwi in managing water resources; and the need for effective involvement of iwi at all levels of water management'.<sup>99</sup>

In May 2011, the Crown announced a series of staged reforms to 'embed the concept of setting and managing to limits at the core of the reform process'.<sup>100</sup> This involved three tranches of work to take place in sequence, the scope and timing of which had been discussed with the ILG before Cabinet's decisions were made. Guy Beatson explained:

*Tranche 1:* Early progress on three key interventions to signal the new limits-based regime: the Irrigation Acceleration Fund, Fresh Start for Fresh Water Clean-up Fund, and the National Policy Statement for Freshwater management.

*Tranche 2:* A broad programme of work on setting limits for water quality and quantity, including governance arrangements, to be delivered to Cabinet by May 2012.

*Tranche 3:* Work on managing to limits, including more efficient allocation mechanisms and additional tools to manage the effects of land use, to be delivered to Cabinet by November 2012.<sup>101</sup>

The priority for 2011 was to establish the two funds and complete the NPS-FM, and continue an officials' work programme (with the IAG) on the setting of limits for water quantity and quality. In August 2011, the Crown also decided that the Land and Water Forum would play a further role in the work of the second and third tranches, developing policy options on 'issues that still need reconciling between key stakeholders'.<sup>102</sup> The forum was expected to report back on each of the tranches by May and November 2012 respectively.<sup>103</sup> Importantly, the Crown decided to keep working with the forum and the ILG, and not to conduct any further consultation (including more widely with Māori) before May 2012.<sup>104</sup>

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98. Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, p1 (Joy, papers in support of brief of evidence (doc D20(b)), p167)

99. Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, p5 (Joy, papers in support of brief of evidence (doc D20(b)), p171)

100. Beatson, brief of evidence (doc A3), p6

101. Beatson, brief of evidence (doc A3), p6

102. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, pp1–2, <https://www.mfe.govt.nz/sites/default/files/cab-min-fresh-start-for-fresh-water-lawf.pdf>

103. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, p8

104. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, pp7–8

The Crown's formal response to the Land and Water Forum's recommendations was released publicly in August 2011, in the form of a Cabinet paper published on the MFE website.<sup>105</sup> The response was brief and 'high level'. In respect of the recommendations relating to Māori, the Crown accepted that:

- ▶ decision-making arrangements needed to recognise the 'relationship between iwi and the Crown';
- ▶ improved decision-making structures for limit-setting needed to have specific provisions for 'iwi/Māori' participation in processes and decisions at catchment, regional and national levels; and
- ▶ good management required good science (including mātauranga Māori).<sup>106</sup>

Many of the governance proposals, however, involved a semi-autonomous national body (the National Land and Water Commission) which the Crown was not prepared to consider without further information.<sup>107</sup>

We consider the two funds that the Crown established in 2011, the irrigation and clean-up funds, in chapter 5. We turn now to address the development of a national policy statement for freshwater management. As we discussed in chapter 2, the lack of central direction was a flaw in the RMA regime, so the creation of a national policy statement was a significant matter. There was potential for the Crown to give strong direction on how Māori rights and interests in fresh water should be addressed.

### 3.4 THE NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2011

#### 3.4.1 What did the Crown's 2008 draft of the NPS-FM propose in respect of Māori rights and interests in water?

The 2008 draft of the NPS-FM contained a preamble, which referred to the Treaty as 'the underlying foundation of the Crown-Māori relationship with regard to Freshwater Resources'.<sup>108</sup> The preamble noted that the proposed NPS was one step in the process of addressing 'tāngata whenua values and interests' in water, including 'the involvement of iwi and hapū in the management of fresh water'.<sup>109</sup>

In the main body of the draft NPS, the Crown set out a number of objectives and policies which regional councils would have to give effect to in their regional plans and policies. Specifically, on Māori rights and interests, objective 8 was for

105. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, p 11

106. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, pp 4–5, 6, 13–15

107. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, pp 4, 14

108. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, p 49)

109. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, p 49)

councils 'to ensure that iwi and hapū are involved, and Tāngata Whenua Values and Interests are identified and reflected, in the management of Freshwater Resources'. Objective 9 stated that councils would have to undertake effective monitoring and reporting of all the objectives, including objective 8.<sup>110</sup>

A number of policies were also specified to give effect to the objectives. The first (policy 1) required councils to publicly notify a regional policy statement (or a variation to an existing one) within two years. This regional policy statement would have to 'guide and direct' local authorities on the involvement of iwi and hapū in the management of freshwater resources. It would have to specify the involvement of iwi and hapū in decision-making, and how this 'involvement' would be achieved. The policy statement would also 'identify Tāngata Whenua Values and Interests in respect of all Freshwater Resources of the region'. The regional policy statement would also have to guide regional and district plans on how tāngata whenua values and interests would be recognised in freshwater management, including in terms of resource consents, notification, and sustaining 'non-consumptive Tāngata Whenua Values and Interests in times of low flow'.<sup>111</sup> Councils and territorial authorities had to 'consider' tāngata whenua values and interests more generally in preparing or varying their plans (policies 4–5).<sup>112</sup>

Finally, policy 8 required councils to publish the details of the process used to identify the tāngata whenua values and interests in all the freshwater resources of their regions.<sup>113</sup>

The draft NPS-FM also recognised that Māori had interests in water quality, water allocation, and all the other matters covered by the proposed national instrument. Matters of water quality are addressed in chapter 5 but we note, for completeness sake, that the IAG wanted the document to say that 'appropriate freshwater resources' should be improved so that they reached or *exceeded* a 'swimmable standard'.<sup>114</sup>

### 3.4.2 What were the Māori Treaty partner's responses in 2009?

Under the RMA as reformed in 2005, the Minister had two choices for preparing and consulting on a national policy statement. The first was to use a board of inquiry, with the Minister to make the final decisions after considering the board's recommendations.<sup>115</sup> The second process was inserted into the Act in 2005 by way

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110. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, p 52)

111. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, p 53)

112. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, pp 55–56)

113. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app A, p 57)

114. Donna Flavell, Gerrard Albert, and Tina Porou, answers to questions in writing, 12 October 2018 (doc G22(f)), p 10

115. RMA 1991, ss 47–52

of section 46A. It allowed the Minister to give the public time to make submissions and to obtain a report on the proposed statement without the full board process.<sup>116</sup> The Labour-led Government opted for the full board of inquiry process, which was already underway before the election in 2009. This was the only time the Crown chose to use a board of inquiry – future consultation on the NPS-FM was conducted under section 46A. The board was chaired by Judge David Sheppard, an Environment Court judge. The other members were Associate Professor Jon Harding, Kevin Prime, and Jenni Vernon.

In September 2008, the board released the proposed NPS-FM for the public to make submissions, which had to be filed by 23 January 2009. A summary of the 149 submissions was then published, after which the board received further submissions and held hearings between 30 June and 18 September 2009. The board reported to the Minister in January 2010.

Based on the board's analysis of submissions from Māori groups and organisations, it would be fair to say that Māori were not at all satisfied with the ways in which the proposed NPS dealt with their rights and interests in freshwater resources.

A primary issue for many Māori submitters was the question of ownership. The board noted:

For many Māori submitters, issues of rights and interests in fresh water, and questions of ownership of the resources, were of key importance. A number of iwi submitters deliberately set aside the question of rights and interests, noting that it is an issue to be addressed between iwi and the Crown separately from the proposed NPS. Other submitters noted that the NPS should not compromise the ability for the Crown and Māori to settle future claims for fresh water.<sup>117</sup>

Although some Māori submitters were prepared to set aside the question of ownership for the purposes of the NPS – a stance with which the board agreed<sup>118</sup> – they were not willing to relinquish the Treaty partnership as the basis for the water management system. A 'number' called for the role of iwi as Treaty partners to be specifically recognised in the NPS. They were partners, not stakeholders. They wanted a specific Treaty objective and associated Treaty policies added to the NPS. Without this, Māori submitters did not believe that the NPS would provide 'a meaningful role for Māori within water management at the local level, due to the dilution of their status as Treaty partners and kaitiaki'. In addition, there was some Māori support for the Treaty partnership to be with local government, and for the

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116. Resource Management Amendment Act 2005, s32. This section inserted a section 46A into the RMA. This section has since been replaced by a new section 46A in 2017.

117. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p20

118. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p20

Crown (through the NPS) to state that Māori and local government should be full Treaty partners in freshwater management.<sup>119</sup>

To give effect to the Treaty partnership, many of the iwi groups who made submissions wanted co-management arrangements to be added to the NPS, such as those set up for the Waikato River and the Rotorua lakes. In their view, this was 'the appropriate way forward'. They wanted the NPS to recognise the Treaty relationship and provide for co-management arrangements so that iwi and hapū could 'more fully carry out their kaitiakitanga'. Without such arrangements, the Māori submitters believed that the proposed NPS would not empower kaitiakitanga, which they considered fundamental to freshwater management.<sup>120</sup>

Overall, the Māori Treaty partner's view was that the objectives and policies in the proposed NPS were not 'strong enough to protect Māori interests, partly due to the perceived relegation of iwi and hapū interests and the Treaty partnership.'<sup>121</sup>

### 3.4.3 The board of inquiry's report and recommendations

The board of inquiry did not accept any of the Māori submissions (as summarised in its report) or recommend adopting any of the changes sought by Māori. No Treaty objectives or co-management requirements were introduced. In the board's view, the draft NPS-FM already provided sufficiently for Māori interests and 'involvement' in management (of whatever kind and at whatever level would be arranged locally). Further, the RMA already provided for decision makers to take account of the Treaty.<sup>122</sup> The board even deleted the reference to the Treaty in its new version of the preamble, presumably because of the RMA's Treaty clause (section 8); 'the board sees little value', it said, 'in repeating in the NPS what is already stated in the RMA.'<sup>123</sup>

In its 2010 report to the Minister for the Environment, the board recommended that the language of the RMA be used in the proposed NPS. It therefore suggested that the NPS should require councils to recognise and provide for Māori values and interests in freshwater management. This reflected the terms 'recognise and provide for' used in section 6 of the RMA for 'matters of national importance'. The board suggested removing references to 'iwi and hapū' for the same reason.

The board also recommended consolidating and simplifying the references to Māori in various policies by having a single, briefly stated objective and policy, with terminology more closely aligned to the RMA:

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119. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 20, 40-41

120. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 20-21, 40-41

121. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 41

122. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 20-21, 40-41

123. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 20; app c, pp 63-64

**B. Tāngata Whenua roles and Māori values and interests***Objective B1*

To ensure that tāngata whenua are involved, and Māori values and interests are recognised and provided for, in the management of fresh water and associated ecosystems.

*Policy B1*

By every regional council making or changing its regional policy statement for the extent needed to ensure it contains policy:

- a) for identifying Māori values and interests in all fresh water and freshwater ecosystems in the region; and
- b) for involving tāngata whenua in management and decision-making regarding fresh water and freshwater ecosystems in the region.<sup>124</sup>

**3.4.4 The Land and Water Forum and the IAG's recommendations**

Ministers received the board of inquiry's report in January 2010. The Minister for the Environment, however, was 'reluctant to make a decision on the NPS' before the Land and Water Forum had reported, and engagement with the ILG had been completed. The Minister requested the forum to consider the board's recommendations in its report.<sup>125</sup>

The Land and Water Forum released its first report, *A Fresh Start for Fresh Water*, in September 2010. As discussed above, the forum made a number of statements and recommendations about Māori rights and interests, including:

- ▶ a national co-governance body should be established to coordinate and lead water policy;
- ▶ iwi should be represented on all regional committees dealing with fresh water;
- ▶ the Treaty relationship between the Crown and Māori in the (delegated) regional governance of water needed to be resolved; and
- ▶ giving effect to the Treaty relationship between the Crown and Māori regarding water should 'complement existing Treaty settlements.'<sup>126</sup>

The forum noted:

Iwi consider resolution of governance issues at the level of the Crown-iwi Treaty relationship provides the best likelihood of avoiding regional conflicts and addressing ad hoc policy making via individual iwi Settlements or iwi litigation. Iwi are positive that governance participation by iwi is an essential component of any step change on freshwater.<sup>127</sup>

124. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, app C, p 65

125. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 3, [https://www.mfe.govt.nz/sites/default/files/freshwater\\_nps.pdf](https://www.mfe.govt.nz/sites/default/files/freshwater_nps.pdf)

126. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, September 2010, pp 13, 16, 43, 52–53 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), pp 159, 162, 189, 198–199)

127. Land and Water Forum, *A Fresh Start for Freshwater*, p 16 (Brunt, papers in support of brief of evidence (doc D89(a)), p 162)



In respect of the NPS-FM, the forum recommended that a national policy statement should be established quickly, that the board of inquiry's draft was a 'basis to work from', and that the Crown should consider changes to the 'references to Tāngata Whenua roles and Māori values and interests'.<sup>128</sup> The IAG met separately with officials and encouraged that the forum's recommendation on this point be accepted. In their view, the board had removed 'a number of the Iwi Māori matters that the IAG had advocated to be included', but we have no details on that point.<sup>129</sup>

### 3.4.5 The section 32 evaluation

Section 32 of the RMA requires an analysis of whether the objectives and policies in a NPS were the most appropriate way of achieving the RMA's purpose (sustainable management). A section 32 report must also have an analysis of the costs, benefits, and risks.

After the Minister revised the NPS-FM in 2011, his amended text was referred to NZIER and Harrison Grierson (consultants) for a section 32 evaluation. The consultants noted that the RMA already required councils to consult iwi authorities. They also noted MFE research from 2010 which suggested that all councils were involving iwi to 'varying degrees, in the process around freshwater values, objectives and limit setting'. Some councils used 'specific iwi representatives, some Māori regional representation committees and groups, some iwi representatives on hearing panels, some through consultation with iwi as a part of stakeholder consultation'. Iwi involvement, however, was limited because of a lack of expertise and resources in both councils and iwi organisations. On the other hand, the mechanism established by the Waikato River Treaty settlement and the Wellington region's joint council-iwi committee (Te Upoko Taiao) were seen as positive developments.<sup>130</sup>

In terms of the matters considered in this chapter, the section 32 report identified that the problem (for the NPS to fix) was: 'The provision for iwi or hapū to be involved in, or consulted on freshwater management is variable.'<sup>131</sup> Having identified the problem, the section 32 review accepted that the text of the Minister's revised objective (D1 – see below) addressed the problem appropriately. The section 32 report also considered that the associated policy (policy D1) would fulfil the objective, although the reviewers noted some looseness in the language (the word 'involve', for example), which gave flexibility but might undermine the effectiveness of the policy.<sup>132</sup> It was expected that both sides ('all levels of government' and iwi) would have to bear the costs of increased iwi participation, but that iwi would benefit significantly: 'Participation in the management of natural resources,

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128. Land and Water Forum, *A Fresh Start for Freshwater*, pp 5, 53 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 151, 199)

129. Flavell, Albert, and Porou, answers to questions in writing (doc G22(f)), pp 11–12

130. NZIER and Harrison Grierson, 'Freshwater Management National Policy Statement: Section 32 Evaluation', April 2011, pp 30–31

131. NZIER and Harrison Grierson, 'Section 32 Evaluation', p 32

132. NZIER and Harrison Grierson, 'Section 32 Evaluation', pp 82–83

such as water, is highly important to tāngata whenua and further recognition of this in NPS reinforces their status under the RMA.<sup>133</sup>

#### 3.4.6 The Crown's decisions on the NPS-FM 2011

The Crown issued its NPS-FM in May 2011. The final version restored a reference to the Treaty relationship in the preamble, which the board of inquiry had removed. This stated:

The Treaty of Waitangi (Te Tiriti o Waitangi) is the underlying foundation of the Crown-iwi/hapū relationship with regard to freshwater resources. Addressing tangata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water, are key to meeting obligations under the Treaty of Waitangi.<sup>134</sup>

The NPS-FM 2011 also consolidated and simplified all the 2008 references to 'tāngata whenua values and interests' under one objective and policy, which was very general and high-level:

#### D. Tāngata whenua roles and interests

##### *Objective D1*

To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.

##### *Policy D1*

Local authorities shall take reasonable steps to:

- a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region
- b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region and
- c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.<sup>135</sup>

In his explanation of the changes made to the board's version, the Minister noted that the board's use of RMA terms had been removed. Hence, the NPS once again referred to 'iwi and hapū', reflecting 'the special relationship that iwi and hapū have with land and freshwater resources'. The phrase 'recognise and provide

133. NZIER and Harrison Grierson, 'Section 32 Evaluation', p 83

134. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, 12 May 2011, p 3 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 564)

135. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, p 10 (Brunt, papers in support of brief of evidence (doc D89(a)), p 571)

for' was replaced by 'identify and reflect'. This was because the RMA terminology had a 'specific legal interpretation not intended by the policy'.<sup>136</sup> In other words, the Crown did not intend section D to be interpreted by the courts in the same way (or with the same weight) as the words in section 6 of the RMA.

Another important change was the removal of the board's policy statement that councils must involve tāngata whenua in decision-making (as well as in management) for all freshwater resources. This was replaced by the requirement for councils to involve iwi and hapū in freshwater management, and reflect their values and interests in management and decision-making. The Minister's decision was explained in terms of mechanisms already available under the RMA:

Reference to involving tāngata whenua in freshwater 'decision-making' generally has been removed. The lack of specificity on the level of decision-making is seen as a potential risk in interpretation. Freshwater management includes decision-making. The level of decision-making can be decided at a regional level between councils and iwi/hapū. Councils will retain the ability to use existing tools under the RMA, such as joint management agreements, as they wish. Requiring decision-making at all levels nationally would impact on the resources of both regions and iwi/hapū.<sup>137</sup>

In our view, this was a serious defect in the NPS-FM, and it has not been corrected. Section D was not amended when other parts of the statement were revised in 2014 and 2017. The Crown decided not to direct councils on this specific and crucial point. The Minister summarised the NPS directive on tāngata whenua issues as for councils to 'involve iwi and hapū in the management of fresh water, and in particular, work with them to identify their values and reflect this in freshwater planning'.<sup>138</sup>

Based on the section 32 report, the Minister noted the results of a survey of current council practice. In respect of the 'tāngata whenua interests' provisions in the proposed NPS, one regional council's practice would not be compliant, 10 showed 'some compliance', only one council would already be 'largely compliant', and there were four councils for which the information was not known.<sup>139</sup> Clearly, the NPS-FM was seen as essential to improve councils' practice in this area. The likelihood of it doing so effectively, however, was significantly weakened by the watered down version of section D.

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136. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry's Recommendations and Minister for the Environment's Decision* (Wellington: Ministry for the Environment, May 2011), p 5 (Crown counsel, attachment to memorandum (paper 3.2.289))

137. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry's Recommendations and Minister for the Environment's Decision*, p 6 (Crown counsel, attachment to memorandum (paper 3.2.289))

138. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 2

139. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, app 1: 'Status Quo of regional plans and compliance with the NPS'

The result, as the Minister advised, was that the NPS-FM would do ‘no more or less than what is already provided for in the RMA.’<sup>140</sup> The ‘variable iwi involvement’, he said, was occurring *despite* the RMA’s provision of ‘mechanisms for Treaty partnership with iwi/hapū in freshwater management’, not because of any lack in the RMA. These mechanisms, he said, had not been ‘well or widely utilised.’<sup>141</sup> The NPS-FM was an opportunity for the Crown to direct that these mechanisms be used, as Te Puni Kokiri pointed out (see below), but it failed to do so.

The Minister summarised the provision for Māori rights and interests as:

The NPS makes it clear that involvement of iwi and hapū is important in plan making. The related policies do no more or less than what is already provided for in the RMA. Councils will retain the ability to utilise existing tools under the RMA, such as joint management agreements, as they wish. The real benefit is clarifying that tāngata whenua values and interests should be identified by, or with, iwi and hapū and not just by councils themselves.<sup>142</sup>

Te Puni Kokiri, the Ministry of Māori Development, advised that the NPS did not go far enough to require an appropriate level of Māori involvement in freshwater management and decision-making. Further, it could have required that under- or un-utilised RMA mechanisms be *used*:

Te Puni Kōkiri notes that the National Policy Statement only refers to iwi involvement in decision-making regarding planning or ensuring that iwi values and interests are identified and reflected in decision-making. Te Puni Kōkiri considers that this potentially pre-determines and constrains policy decisions on governance. It is also less than is currently provided in the Resource Management Act 1991. There are currently mechanisms under the RMA that would provide for iwi involvement in all freshwater decision-making eg Joint Management Agreements, transfer of powers, delegation of decisions and appointment of iwi commissioners. Therefore Te Puni Kōkiri considers that the National Policy Statement should refer to iwi involvement in all freshwater decision-making.<sup>143</sup>

The Minister noted: ‘I have considered these matters and do not agree.’<sup>144</sup>

Thus, as the Minister put it, the ‘real benefit’ of the NPS-FM 2011 was its requirement that ‘tāngata whenua values and interests should be identified by, or with, iwi and hapū and not just by councils themselves.’<sup>145</sup> This was a disappointing result in Treaty terms, given the requirements that Māori told the board of inquiry they wanted in the NPS (see above, section 3.4.2), and the Land and Water Forum’s governance recommendations to the Crown. Māori had obtained nothing more than

140. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 7

141. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 5

142. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 7

143. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 13

144. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 13

145. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 7

they already had (and that, only in theory), and nothing of what they had told the board of inquiry (or the Land and Water Forum) they wanted.

### 3.5 MĀORI RESPONSES TO THE REFORMS IN 2012

#### 3.5.1 Further freshwater management reforms planned in 2012

The Crown's decisions on the NPS-FM 2011 did not mean that work on Māori involvement in water governance and management was considered complete. Guy Beatson's evidence in February 2012 stated:

Given the Crown's understanding that Māori have a very strong interest in the control and management of water in a broad sense, and the sequencing of the overall Fresh Start for Fresh Water programme (as discussed with the Iwi Leaders Group), I would expect that initial engagement with the Iwi Leaders Group in 2012 will focus on governance and decision-making processes and identify options for Māori to be involved in an appropriate way in all stages of governance and decision-making.<sup>146</sup>

It seemed that the failure to do this in the NPS-FM might be remedied in further reforms. Even so, there was growing concern among Māori at the direction the reforms were taking. These concerns were expressed in three ways: the filing of an urgent claim in the Waitangi Tribunal; the development of a new model for reform by the ILG as the basis for future discussions; and the advocacy of iwi representatives in the Land and Water Forum. We discuss each in turn.

#### 3.5.2 The Wai 2358 claim

##### 3.5.2.1 *The NZMC applies for an urgent hearing*

In response to the freshwater reforms, the NZMC and several Māori groups sought an urgent hearing from the Tribunal. In February 2012, Sir Graham Latimer and others lodged a claim on behalf of the NZMC, the Taitokerau District Māori Council, and 10 co-claimant groups (see chapter 1 for the details). At the time, many Māori groups were concerned about the Crown's plan to sell shares in the large power companies. We made our findings on that aspect of the claim in our stage one report.

But the claim was not only about the sale of shares. Its second set of issues related to the Crown's freshwater management reforms. The claimants objected to the Fresh Start for Fresh Water programme proceeding without the necessary knowledge of and provision for Māori rights and interests in water, especially proprietary rights. They also objected to the reforms proceeding by, as they saw it, 'negotiation' with the ILG in the absence of other Māori, including the claimant groups.<sup>147</sup> Property rights were the 'primary consideration for the claimants',

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<sup>146</sup>. Beatson, brief of evidence (doc A3), p12

<sup>147</sup>. First amended statement of claim, 2 March 2012 (paper 1.1.1(a)), pp [10], [13]–[15]; claimant counsel, amended application for urgent hearing, 2 March 2012 (paper 3.1.24); claimant counsel, memorandum, 5 March 2012 (paper 3.1.25)

and the Crown was developing water policy without being properly informed on 'Māori water interests'.<sup>148</sup>

Earlier consultation processes, including the 2005 SWPOA consultation and the 2010 NPS board of inquiry, had shown a consistent view among many Māori that their rights and interests in water must be resolved before any management reforms were cemented into place. This concern had been growing, as shown in the documents presented by the claimants' first witness, Tata Parata,<sup>149</sup> and it contributed significantly to the filing of the Wai 2358 claim. When granting an urgent hearing, we noted Sir Edward Taihakurei Durie's widely supported view:

'In a democratic capitalist society', we were told, 'you get the rights right first, you do the management thing later.' The claimants reasserted that their rights must be defined and protected before management regimes were finalised. The intention that ownership issues might be addressed by the Crown and iwi leaders after the management system was overhauled would simply come too late to be of any real effect.<sup>150</sup>

The NZMC and its co-claimants were concerned that the Fresh Start for Fresh Water programme would create 'new private rights in water, including tradable use rights' without first clarifying and providing for Māori rights.<sup>151</sup> Along with the partial sale of the SOE power companies, their fear was that a 'formidable array of private rights in water would be created in 2012, adding a further and powerful layer of opposition to Māori rights, and reducing the prospect of those rights ever receiving proper recognition or proper compensation for past breaches.'<sup>152</sup> The claimants were also concerned that the reforms would not restore their tino rangatiratanga over freshwater bodies, which, they said, had been infringed by the Crown's statutory rights under the Water and Soil Conservation Act 1967 and its successor, the RMA.<sup>153</sup>

In support of the claimants, around 100 groups and tribal leaders sought to participate as interested parties.<sup>154</sup>

### **3.5.2.2 The Crown's response: assurances to the Supreme Court in 2012**

The Tribunal granted an urgent hearing on 28 March 2012. As noted, our stage one report dealt with the partial privatisation of Genesis, Mighty River Power, and Meridian. After that report was issued and the Crown made its decision to

148. 'Council's arguments: Water claim Wai 2358', attached to 'A message from Sir Graham Latimer, Chairman, New Zealand Māori Council concerning the Treaty clause in the State-owned Enterprises Act', 13 March 2012 (paper 3.1.53), pp [2]-[3]

149. Tata Parata, brief of evidence and attachments (doc A1)

150. Waitangi Tribunal, 'Decision on application for urgent hearing', 28 March 2012 (paper 2.5.13), p17

151. Waitangi Tribunal, 'Decision on application for urgent hearing' (paper 2.5.13), p12; Wai 2358 Statement of Claim, 2 March 2012 (paper 1.1.1(a)), pp [14]-[15]

152. Waitangi Tribunal, 'Decision on application for urgent hearing' (paper 2.5.13), p12

153. Wai 2358 Statement of Claim, 2 March 2012 (paper 1.1.1(a)), pp [6]-[16]

154. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), pp155-161

continue with the sales, the NZMC applied to the courts for a judicial review of the decision (the *Mighty River Power* case). The substance of the case does not concern us here, but the Crown placed some reliance on aspects of the Supreme Court's judgment in its closing submissions.<sup>155</sup>

In particular, the Crown made assurances to the court about the nature and extent of Māori rights and interests in fresh water, and its commitment to address them. The evidence of the Deputy Prime Minister, Bill English, showed that the Crown's conception of the range of Māori rights and interests was now much broader than the earlier focus on participatory rights. His evidence to the Supreme Court was as follows:

The Crown acknowledges that Māori have rights and interests in water and geothermal resources. The Crown made this position clear in the course of stage one of the Waitangi Tribunal inquiry into the Freshwater and Geothermal Claim . . . In addition to the ongoing Waitangi Tribunal Inquiry, these issues are being addressed through a number of parallel mechanisms. The recognition of rights and interests in freshwater and geothermal resources must, by definition, involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues.<sup>156</sup>

The Deputy Prime Minister also stated that the Crown was providing redress for past breaches of Māori rights and interests in its Treaty settlements, including the Waikato River settlement. Treaty settlements, he said, included acknowledgments of mana, rangatiratanga, and kaitiakitanga, and the 'provision of redress that, despite being in settlement of historical claims, is contemporary in nature, forward looking, and that provides for on-going rights and interests.'<sup>157</sup> He also told the court that the sale of shares would not affect 'the government's ability and commitment to provide appropriate recognition for Māori rights and interests in water and geothermal resources, and to develop mechanisms for redress for breaches of those rights and interests.'<sup>158</sup>

In addition to stressing the Deputy Prime Minister's evidence, the Crown asked the Tribunal to rely on the following passage of the Supreme Court's judgment:

The Waitangi Tribunal described the ownership interest guaranteed by the Treaty in terms of use and control. In large part, this may be more directly delivered through

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155. See Crown counsel, closing submissions (paper 3.3.46), pp 4, 7, 9, 12, 54, 60, 67, 78–79, 81, 83, 87

156. Simon William English, affidavit, 7 November 2012 (Tania Gerrard, papers in support of brief of evidence (doc D88(a)), p 918)

157. Simon William English, affidavit, 7 November 2012 (Gerrard, papers in support of brief of evidence (doc D88(a)), p 921)

158. Simon William English, affidavit, 7 November 2012 (Gerrard, papers in support of brief of evidence (doc D88(a)), p 930)

changes to the regulatory system, augmented by specific settlements, as Crown policy proposes. Regulation of water use and control is under review by the Crown and the [Treaty] settlements have indicated the willingness of the Crown to consider extension of Māori authority in connection with specific waters. There may be some ownership interest insufficiently addressed by regulatory reform, but the significance of the interest needs to be assessed against the opportunities under consideration for real authority in relation to waters of significance.<sup>159</sup>

We note, however, that the Crown also told the Supreme Court that it was ‘open to discussing the possibility of Māori proprietary rights short of full ownership’.<sup>160</sup>

These various assurances to the Supreme Court were important, and they inform our analysis of the Crown’s Treaty obligations in this report.

### 3.5.3 Ngā Mātāpono ki te Wai

Partly as a response to the reforms to date, the ILG developed a model for a full and thorough reform of freshwater law in 2012 as a basis for future discussions with the Crown.<sup>161</sup> In their view, this model, which was named Ngā Mātāpono ki te Wai, would give effect to Māori rights and interests in fresh water (a copy of the model will be included as appendix III in the published version of this report).<sup>162</sup> Donna Flavell and Gerrard Albert explained it as follows:

Ngā Mātāpono ki te Wai is a framework developed by the Pou Taiao ILG (and endorsed by the Iwi Chairs Forum) which reflects and affirms the multi-faceted nature of the rights and interests of iwi and hapū in relation to freshwater. In the view of the Pou Taiao ILG, those rights and interests should be recognised and provided for across all aspects of freshwater governance and management, including:

- (a) providing for participation in governance and decision-making at a national and regional level, including setting robust qualitative and quantitative limits;
- (b) recognising iwi values in the decision-making framework; and
- (c) providing iwi with an equitable share of allocation for customary and commercial purposes in every rohe (from the water available for use above the limits that are set to maintain and protect Te Mana o te Wai).<sup>163</sup>

From 2012 onwards, Ngā Mātāpono ki te Wai was the theoretical foundation of the ILG’s work in the ‘co-design’ of freshwater reforms.<sup>164</sup>

159. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, closing submissions (paper 3.3.46), p 54)

160. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 68

161. ‘2012 National Iwi Freshwater Summit, 23–24 February 2012, Hopuhopu’, ICF panui, February 2012 (Guy Beatson, papers in support of brief of evidence (doc A93(b)); Waikato-Tainui Te Kauhanganui Inc, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 787–788)

162. Solomon and Flavell, brief of evidence (doc D85), pp 9–11

163. Donna Flavell and Gerrard Albert, brief of evidence, 25 July 2018 (doc G22), pp 11–12

164. Solomon and Flavell, brief of evidence (doc D85), p 10



### 3.5.4 Māori as 'stakeholders' in the Land and Water Forum

#### 3.5.4.1 *The Land and Water Forum's second report, April 2012*

One of the most important ways in which the Iwi Advisory Group responded to – and sought to influence – the Crown's reforms was through their participation in the Land and Water Forum. The other 'stakeholder' groups in the forum were very aware that there would always be a degree of uncertainty and a lack of security for what the forum called 'general rights' unless Māori rights and interests were addressed.<sup>165</sup> The IAG voice in the forum, therefore, had some traction in explaining those rights and interests to the other members, and obtaining recommendations to address them.

In April 2012, the Land and Water Forum's second report was released.<sup>166</sup> Crown witness Guy Beatson summarised the report's treatment of Māori rights and interests:

The April 2012 LAWf report contains advice to government on how tāngata whenua values might be incorporated into the setting of objectives and limits at the national and local level, the role of iwi/Māori as participants in collaborative planning processes for water management, and the involvement of iwi in local government decisions on water planning. The proposed collaborative planning process goes beyond traditional models of consultation.<sup>167</sup>

We address issues of water quality and quantity in other chapters. Here, our focus is on the forum's recommendations for dealing with Māori rights and interests.

The forum's second report noted (as the first one had) that iwi have a Treaty relationship with the Crown but 'no clear path to engage in planning and decision-making' in respect of freshwater resources.<sup>168</sup> The forum also recognised that the particular 'rights and interests' of iwi in freshwater management were derived from their status as Treaty partners. Any regulatory framework must therefore recognise this status and provide for their participation in decision-making and structures.<sup>169</sup>

In respect of the NPS-FM 2011 (discussed above), the forum's view was that the national instrument needed to give better guidance about Māori values and what they mean. In the preamble, the Crown could provide a description of Māori

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165. See Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Wellington: Land and Water Trust, 2012), p vi (Workman, papers in support of brief of evidence (doc F6(a)), p 330)

166. Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Wellington: Land and Water Forum, 2012) (Beatson, papers in support of brief of evidence (doc A93(a)))

167. Beatson, brief of evidence (doc A93), p 6

168. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), p 1)

169. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 7–8)

values and interests, in order to assist a more detailed investigation and inclusion at the local level. This description in the NPS, the forum considered, should be based on the IAG's Ngā Mātāpono model,<sup>170</sup> which described some intrinsic and 'use values' (see above). This would mean the inclusion of mauri, wairua, and mana as core Māori values, as well as the practical Māori interests in water: for ceremonial use, for drinking and other consumptive uses, for food gathering, for navigation, for economic use, and for recreation. These, then, were the Māori values and interests which the forum and the IAG considered should be included in the NPS-FM to inform the setting of objectives and policies.<sup>171</sup>

Many of the forum's observations and recommendations concerned 'collaboration'. Forum members agreed that, at both the national and local level, collaborative processes should be put in place to develop, review, and change instruments (such as the NPS-FM and regional plans). These processes would be available as an alternative to the current system, where communities wanted them or had the capacity to carry them out. For example, the council would no longer develop plans and policies, followed by consultation and decision-making. Instead, a stakeholder group (including iwi members) would work with the council, the community, and iwi to develop or amend regional plans, after which there would be a process of submissions, hearings, and decision-making. The forum stressed that iwi should have the option of being involved in both stages – the collaborative process and the final decision-making which followed it. Iwi would, of course, need sufficient resources to participate.<sup>172</sup>

The forum noted:

For iwi, the contemporary discussion of fresh water evokes legacies marked by their exclusion from decision making, by delegated authorities that have not included them, and by painful ecological and cultural losses. Iwi consider that these legacies are a fundamental part of their conversations with the Crown and create obligations such as the recognition of iwi rights and interests, clean-up of degraded waterways, and 'future-forward' attention to effective governance participation.

Fundamental issues between the Crown and iwi concerning iwi rights and interests are not on the table in this Forum.

Collaborative processes nevertheless provide an important way for iwi to progress, bearing in mind their dual role as Treaty Partners (which goes to their participation in the processes of mandating collaboration, and participation at the decision-making

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170. The forum was provided with an early version of this model.

171. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), ppvii, 10)

172. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), pp x, 29–34, 39)

stage) and their role as participants who bring particular values, knowledge and experience to the table.<sup>173</sup>

The forum's idea of a collaborative process was eventually inserted in the RMA in 2017, as an alternative method for developing or changing plans.

### 3.5.4.2 *The Land and Water Forum's third report, November 2012*

In November 2012, the forum supplied the Crown with its third report.<sup>174</sup> This report was entitled *Managing Water Quality and Allocating Water*.<sup>175</sup> The focus of tranche 3 of the Fresh Start for Fresh Water programme was on 'how to manage to limits, including allocation mechanisms and additional tools to manage the effects of land use, and consideration of a national fresh water strategy'.<sup>176</sup> The forum's report for this tranche focused on managing within limits (both quality and quantity).

In preparing its third report, the forum had to tackle the clash of economic, ecological, and iwi interests in the allocation of (and economic benefits of) freshwater resources. It could not do so directly in the case of Māori rights and interests because the Crown and the ILG were supposed to be working together on this issue. The forum's response was to propose management and allocation methods which did not 'prejudge discussions between the Treaty partners', and which were flexible enough to 'accommodate outcomes from negotiations between Iwi and the Crown'. In the stakeholders' view, no management system would last if 'iwi rights and interests' were not resolved.<sup>177</sup>

The forum also made a formal statement on 'iwi rights and interests', which we reproduce in full:

#### **Forum statement on iwi rights and interests in fresh water**

Our experience in preparing this report has given us confidence that New Zealanders can move forward together to create an effective and fair system of freshwater management – one which will create incentives for economic growth, strengthen our communities, enhance our environment and safeguard the ecological systems on which we all depend. Indeed, in many regions around the country they have already begun to do so.

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173. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 30–31

174. Workman, brief of evidence (doc F6), p 15

175. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Wellington: Land and Water Trust, 2012) (Workman, papers in support of brief of evidence (doc F6(a)))

176. Workman, brief of evidence (doc F6), p 9

177. Land and Water Forum, *Managing Water Quality and Allocating Water*, pp vi, 7–8 (Workman, papers in support of brief of evidence (doc F6(a)), pp 330, 341–342)

For a system which articulates general rights and interests to be stable and durable, however, iwi rights and interests also need to be resolved. We can see significant win-wins in this process, including the development of under-utilised land and resources, and the ability of iwi to partner with others the growing of the water economy – including through the development of infrastructure.

Recommendations in our first and second reports relate to the involvement of iwi and of iwi values in developing national objectives and instruments and setting catchment objectives and limits. They go to the *mana* of waterways, *rangatiratanga* and *kaitiakitanga*. We believe that giving effect to these recommendations can play an important part in recognising and providing for iwi rights and interests in freshwater. They do not, however, address rights of iwi to access water for customary and commercial use.

In our first report, we also recommended that the transition to a new system of water allocation should proceed hand in hand with Crown-iwi discussions on iwi rights and interests in freshwater management.

In summary, the forum has acknowledged that iwi have rights and interests in freshwater. The responsibility for resolving the nature of these rights and interests, including any options for providing for them, rests with iwi and the Crown.

We also recognise that others have established rights and interests in New Zealand's freshwater resource that must also be respected. Existing rights should not be compromised, and costs relating to Crown-Iwi resolutions should not be transferred on to other parties.

The Treaty Partners should seek solutions which provide win-win opportunities to develop New Zealand's freshwater resource and enhance all parties' interests in freshwater.<sup>178</sup>

A number of the forum's formal recommendations referred specifically to roles for iwi and *mātauranga Māori* in management and allocation tools. At this point in the reform process, however, the Crown was only in the early stages of trying to grapple with allocation reforms. For the most part, therefore, the forum's recommendations influenced the way in which Māori values would be included and addressed in future iterations of the NPS-FM.

We turn next to the Crown's major reform initiatives in 2013, all of which responded at least in part to the forum's recommendations, the ILG's work with the Crown, and the NZMC's claim to the Tribunal and litigation in the superior courts.

### 3.6 FRESHWATER REFORM 2013 AND BEYOND

#### 3.6.1 Introduction

By 2013, the Fresh Start for Fresh Water programme had been running for four years. Its substantive achievement in that time was the NPS-FM, which built on the

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<sup>178</sup> Land and Water Forum, *Managing Water Quality and Allocating Water*, pp 8, 78 (Workman, papers in support of brief of evidence (doc F6(a)), pp 342, 412)

base established in the previous reform programme. In total, the Crown had been trying to reform freshwater management for 11 years, and the production of the national policy statement was an important but solitary achievement.

In terms of consultation, the Crown had worked in collaboration with the ILG and the LAWf but it had not consulted more widely with Māori and the public since 2005. During the period between 2005 and 2013, the only consultation had been conducted by the board of inquiry. It is not difficult to see, therefore, why some Māori groups were becoming concerned about the Crown's dialogue with the ILG.

The iwi leaders, on the other hand, were soon to become frustrated by the slow, piecemeal nature of the reforms in the face of what they saw as a freshwater crisis. For its part, the Land and Water Forum asked more than once that its recommendations be carried out in toto rather than piecemeal and selectively. The Crown, however, was determined to move carefully, to reform different parts of the system at different times, and to carry the community (and consent-holders) with it.

In 2013, the Crown was ready to consult. It conducted a series of consultation rounds to communicate the major planks of its intended reforms. These included both freshwater management and broader changes to the RMA, a 'long-term and difficult project needed to bring about sustainable change'.<sup>179</sup> Each consultation round began with the release of a discussion document:

- ▶ *Improving our Resource Management System*, a discussion document on the proposed reforms of the RMA, released in February 2013;
- ▶ *Freshwater reform 2013 and beyond*, a discussion document on proposed Fresh Start for Fresh Water policies (based largely on the Land and Water Forum's recommendations), released in March 2013; and
- ▶ *Proposed Amendments to the National Policy Statement for Freshwater Management*, a discussion document released in November 2013.<sup>180</sup>

In this section, we discuss the consultation on the February and March discussion papers, and the Crown's initial decisions following that consultation. Those decisions shaped the reform programme through to 2017. Crown counsel provided a report to the Tribunal in 2014, summarising the main proposals to address Māori rights and interests:

- ▶ require councils to invite iwi/hapū to enter into an arrangement that details how iwi/hapū and councils will work together through the regional planning process.
- ▶ establish a collaborative planning process to be used as an alternative to the RMA Schedule 1 process. The collaborative planning process would ensure that there is early buy-in from communities to the planning process for their region.

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179. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), p 5

180. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), pp 9–10

## 3.6.2

- ▶ require councils to ensure that iwi/Māori views are explicitly considered before decisions on fresh water are made, no matter whether councils choose the collaborative option or the existing RMA Schedule 1 process.<sup>181</sup>

In addition to calling for written submissions, the Crown held 13 consultation hui on the first two discussion documents in March 2013, and 14 hui in November and December 2013 on the third discussion document. Policy decisions on the RMA reforms were announced in August 2013.<sup>182</sup> As it turned out, however, the proposed legislative reforms lacked the support of the Māori Party and so were postponed until after the 2014 general election. A Resource Legislation Amendment Bill was finally enacted in 2017 (see section 4.5).

### 3.6.2 'Improving our Resource Management System': consultation on phase two of the RMA reforms, 2013

#### 3.6.2.1 What did the Crown propose in respect of Māori rights and interests?

As noted above, the Crown's phase two RMA reform proposals were announced in a discussion document entitled *Improving our resource management system*, released in February 2013.<sup>183</sup> The Crown consulted with Māori at 13 hui which addressed both the RMA reforms and the Fresh Start for Fresh Water reforms. There was a significant overlap because of the proposed changes to 'iwi/Māori participation' in the RMA's 'planning processes'.<sup>184</sup> The Crown took the Land and Water Forum's recommendations into account when designing its proposed RMA reforms.<sup>185</sup> The general aim of these reforms was to make RMA processes more streamlined, faster, and less 'costly'.<sup>186</sup> 'Effective and meaningful iwi/Māori participation' was a key goal (one of six proposals in the consultation document).<sup>187</sup>

The 2013 proposals were controversial and attracted significant opposition, partly because of the intention to amend sections 6–7 of the Act.<sup>188</sup> The Crown's intention was to introduce what it called 'balance' into the RMA, by increasing the

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181. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), p 16

182. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), pp 9–10

183. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, 2013)

184. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), pp 9–10; Ministry for the Environment, 'Summary of submissions: improving our resource management system', no date, p 5 [Ministry for the Environment website],

185. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 29

186. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 6–8

187. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 76–78

188. See, for example, Parliamentary Commissioner for the Environment, 'Improving our resource management system: a discussion document – Submission to Minister for the Environment', 2 April 2013 <https://www.pce.parliament.nz/media/1367/pce-mfe-rma-discussiondocumentfinal.pdf>

priority of economic matters in the Act's core principles.<sup>189</sup> We set out the purpose and principles of Part 2 in the previous chapter (see section 2.4), and the balancing of interests that occurs when decision makers apply sections 5–8 of the Act. The Crown's proposal was to amalgamate sections 6 and 7, ending the 'predominance of environmental matters in section 6, and the hierarchy between sections 6 and 7', which the Government believed 'may result in an under-weighting of the positive effects (or net benefits) of certain economic and social activities'.<sup>190</sup> There was no proposal, however, to 'alter the wording or interpretation of section 8' (the Treaty clause), or its priority in the hierarchy.<sup>191</sup>

In terms of the text relating specifically to Māori values and interests, the proposal was to have a sub-clause which required decision makers to recognise and provide for 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, taonga species and other taonga including kaitiakitanga'. This wording was identical to the previous section 6(e), except that it added the relationship of Māori with their 'taonga species' to the matters which must be recognised and provided for, and gave kaitiakitanga a higher priority than previously (under section 7). The definition of kaitiakitanga as 'the ethic of stewardship' (section 7(aa)) was to be deleted from the Act.<sup>192</sup> Kaitiakitanga was now defined as a taonga, which proved controversial.

Section 6(g), the 'protection of recognised customary activities', was to be changed to the 'protection of protected customary rights'. The term 'protected customary rights' was not defined in the discussion paper, but it related to the establishment of such rights on the foreshore under the new foreshore and seabed legislation. Section 6(f), the 'protection of historic heritage from inappropriate subdivision, use, and development', would be changed to recognising and providing for 'the importance and value of historic heritage'.<sup>193</sup>

Apart from the proposed changes to Part 2, which guides decision makers, the most relevant change for our purpose was the Crown's intention to improve Māori 'participation' in water management. This had been a goal since at least 2004 (see section 2.8), and section D of the NPS-FM had done little to improve the situation. The Crown's 'proposal 5' was headed: 'Effective and meaningful iwi/Māori participation.' The goal was to provide for more effective and meaningful participation early in the plan-making stage, which was consistent with the 'work underway as

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189. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 34–36; Parliamentary Commissioner for the Environment, 'Submission to the Minister', 2 April 2013, pp 7–9

190. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 35

191. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 37

192. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 36–37

193. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 36

part of the Government's work on improving freshwater management.<sup>194</sup> In the Crown's view, more effective Māori involvement in planning would help prevent later conflict and litigation at the resource consenting stage.<sup>195</sup>

The proposed tools to meet the objective were:

- ▶ Requiring councils to establish an arrangement that gives 'the opportunity for iwi/Māori to directly provide *comprehensive advice* during the development of plans' (emphasis added). This advice would have 'statutory weight' under the RMA – that is, councils would have to recognise and provide for the matters under the new principles section of the Act. This requirement would only apply where a Treaty settlement or some other arrangement did not already 'meet or exceed' these specifications. There was also a statement that where Treaty settlement legislation provided for *more* than this requirement, that legislation would prevail over the amended RMA. After much future work and consultation, this proposal would evolve into the Mana Whakahono a Rohe arrangements discussed in chapter 4.
- ▶ Requiring councils to appoint at least one member of independent hearing panels with knowledge of tikanga and the perspectives of local tribes, in consultation with those tribes. As with all the Crown's reforms, this was to be limited to plan-making and not resource consents.
- ▶ Requiring the Minister to 'seek and consider comment from the relevant iwi authorities' before developing a proposed National Environmental Standard.
- ▶ Amending the criteria for existing RMA tools – joint management agreements and section 33 transfers of authority – to enable iwi participation by making them easier to use, thus facilitating 'greater uptake of these under-used tools.'
- ▶ Improving the 'awareness and accessibility' of iwi management plans (another existing RMA tool for iwi participation). We discussed this measure in chapter 2 (see section 2.5.4).<sup>196</sup>

Out of these proposals, there was only one that might give iwi a direct role in decision-making: the amendment of criteria for joint management agreements and section 33 transfers. Although it was not stated specifically, this reflected the recommendations of the Wai 262 Tribunal. Labour, too, had planned to promote the uptake of JMAs and transfers as part of its proposed reforms in 2006 (see chapter 2). Thus, the Crown had moved significantly from the position adopted in the NPS-FM 2011, which was simply that existing RMA tools provided adequately for Māori participation without any need for amendment.

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194. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 66

195. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 8, 66

196. Ministry for the Environment, *Improving our resource management system: a discussion document*, pp 66–67



**3.6.2.2 What were the Māori Treaty partner's responses?****3.6.2.2.1 THE CONSULTATION**

The period for consultation was just over a month: the discussion document was released on 28 February, and the date for submissions closed on 3 April 2013. This was extremely brief. The Crown received 13,277 written submissions, of which the great majority were 'form' submissions from the Greenpeace 'Save the RMA campaign'. Forty submissions were made by 'iwi, hapū or Māori organisations'. As well as the 13 hui mentioned above, the Crown conducted 15 public meetings and 20 meetings with local authorities.<sup>197</sup>

**3.6.2.2.2 THE PROPOSED CHANGES TO SECTIONS 6 AND 7 OF THE RMA**

In its summary of submissions, the Ministry for the Environment noted that 59 per cent of submissions from Māori groups were 'opposed or had serious concerns with the proposed changes to sections 6 and 7'. This opposition was mostly based on a conviction that the changes would 'compromise environmental protection and sustainable management under the RMA'.<sup>198</sup> In particular, the introduction of matters of infrastructure and economic development threatened to reduce the importance of the environmental and of the cultural matters in sections 6 and 7.<sup>199</sup> Officials expanded on the reasons given in three submissions:

It would diminish the importance of provisions of particular importance to Māori that secure the position of tangata whenua in resource management (Te Arawa River Iwi Trust, #10346; Waikato-Tainui Te Kauhanganui Incorporated, #9583).

It would create new tension within section 6 (Te Whare Tapu o Nga Puhī, #8035). It was noted that the benefits of infrastructure are easier to identify than the loss of kaitiakitanga and other values of importance to iwi.

The relative importance of environmental matters in decision-making will be reduced (Te Arawa River Iwi Trust, #10346).<sup>200</sup>

Only 17 per cent of submissions from Māori groups indicated 'partial support' of the proposed changes to sections 6 and 7, and some observed that kaitiakitanga should not be 'classified as a form of taonga'.<sup>201</sup>

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197. Ministry for the Environment, 'Summary of submissions: improving our resource management system', [2013] [Ministry for the Environment website] pp 5, 8

198. Ministry for the Environment, 'Summary of submissions: improving our resource management system', pp 13–14

199. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 19

200. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 18

201. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 14

## 3.6.2.2.3

**3.6.2.2.3 PROPOSAL 5: 'EFFECTIVE AND MEANINGFUL IWI/MĀORI PARTICIPATION'**

On the question of 'effective and meaningful iwi/Māori participation', the general response of Māori groups was that the Crown's proposed reforms did not go far enough, although officials considered that there was significant support for what was proposed:

The proposal to enable more effective Māori participation in resource management planning was addressed in 88 per cent of these submissions [from Māori groups]. Opinions were divided, with 20 per cent of these submitters indicating unreserved support, 40 per cent partial or conditional support, and 11 per cent opposition or serious concerns; 29 per cent did not express a clear position.

A general theme emerging from iwi, hapū and Māori groups was that although there is support in principle for better engagement of Māori in resource management processes, the proposals do not go far enough to achieve this. For example, several submissions suggested that greater statutory weight should be given to iwi management plans under council processes, and that resourcing should be made available to facilitate Māori engagement. Some submitters made further suggestions for amendments that would require greater involvement of Māori/iwi, both during the planning stages and in day-to-day resource management. A number of submissions stated that Māori participation should not refer to 'iwi', which narrows the scope of participation, but to 'Māori' or 'tangata whenua' more generally.<sup>202</sup>

Another concern was that iwi organisations lacked sufficient resources to participate, and that councils lacked the necessary expertise to deal properly with 'advice' from Māori. According to the official summary, however, only a few Māori submissions 'suggested that a transfer of powers and co-management should be provided.'<sup>203</sup> There was also a view from Māori that they should play an 'active role' in developing the RMA tools for participation.<sup>204</sup>

**3.6.2.2.4 GENERAL SUPPORT FOR INCREASING 'IWI/MĀORI PARTICIPATION'**

The March 2013 consultation revealed general support from local government for the proposal to enhance Māori participation, although some councils were concerned that Māori groups would not have the resources to participate effectively, and others felt that they had already adopted collaborative processes with Māori or that the actual changes to be made were not clear from the discussion

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202. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 14

203. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 44

204. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 45

document.<sup>205</sup> Fewer than half of the submissions from 'business and industry' groups addressed proposal 5, but those which did were generally in support. Similarly, fewer than half of the submissions from 'non-governmental organisations, environment groups and community groups' expressed an opinion, but those who did expressed support.<sup>206</sup>

Although there was generally support, there was some opposition (17 per cent of the submissions which addressed proposal 5) to what was called separate and possibly expensive processes for Māori.<sup>207</sup>

### 3.6.3 'Freshwater reform 2013 and beyond': consultation on freshwater management reforms, 2013

#### 3.6.3.1 What did the Crown propose in respect of Māori rights and interests?

##### 3.6.3.1.1 INTRODUCTION

The Crown's white paper, *Freshwater reform 2013 and Beyond*, was released in March 2013. According to the Crown's witness, Peter Brunt, the Government's approach in the 'discussion document' was 'based on and consistent with' the recommendations of the Land and Water Forum's first three reports.<sup>208</sup> In Mr Brunt's summary, the Crown proposed the following 'reform actions':

- ▶ Planning as a community, including an optional collaborative planning process in the RMA and formalising a role for iwi in providing advice and recommendations to councils on fresh water.
- ▶ A National Objectives Framework to be included in the NPS-FM.
- ▶ Managing within quantity and quality limits, including requiring councils to account for all water takes and contaminants, and guidance on setting limits, good management practice, water efficiency, water permits and using models to manage freshwater quality.<sup>209</sup>

The issue of Māori rights and interests in water was the subject of a commitment from the Crown:

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205. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 11

206. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 13

207. Ministry for the Environment, 'Summary of submissions: improving our resource management system', pp 44–45

208. Brunt, brief of evidence (doc D89), pp 13–14. Mr Brunt called it a 'discussion document'. According to Cabinet papers, *Freshwater Reform 2013 and Beyond* was technically a 'white paper' rather than a consultation document, in which the Crown carried out 'targeted engagement' with the public for any new comments on reform policies rather than taking options out for consultation and formal submissions. See Cabinet paper, 'Water reform: permission to release freshwater reform proposals and undertake targeted engagement', no date (Crown counsel, sensitive discovery documents (doc D92), pp 719, 721, 724)

209. Brunt, brief of evidence (doc D89), p 14

The Government is committed to recognising Māori rights and interests in water in appropriate ways. Iwi/Māori rights and interests in fresh water are multifaceted. There is no one reform we could introduce now that would resolve all rights and interests at once. This resolution will need to be woven through different aspects of the reform.<sup>210</sup>

This was a reiteration of the Crown's commitment in May 2011 to recognise Māori rights and interests in water.<sup>211</sup>

### 3.6.3.1.2 EFFECTIVE PROVISIONS FOR 'INVOLVEMENT' IN FRESHWATER MANAGEMENT

In terms of the '2013 and beyond' proposals, the problem for 'resolution' at this stage was defined in much the same way as for the RMA reforms: 'iwi/Māori interests and values are not always fully considered in planning and resource management decision-making.'<sup>212</sup> The Crown's discussion paper stated:

Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners.

As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes.<sup>213</sup>

This definition of the problem certainly echoed the Land and Water Forum's analysis (as informed by the IAG). It was also noted that where such issues as iwi exclusion had been 'inherited from the past', it was time for those to be addressed and resolved transparently and fairly.<sup>214</sup>

In terms of tools to achieve this, there was significant cross-over with the proposals in February's *Improving our resource management system*, although the freshwater-specific proposals were both narrower and more detailed. The Crown proposed both a collaborative planning process for fresh water (only), as an alternative to RMA planning processes, and 'effective provisions for iwi/Māori involvement in freshwater planning and decision-making', whether through collaboration or the schedule 1 RMA processes.<sup>215</sup> Again, the need for Māori to be included in decision-making was one of the key points of the Land and Water Forum's recommendations. The forum had also recommended a collaborative planning process

210. New Zealand Government, *Freshwater reform 2013 and beyond* (Wellington: Ministry for the Environment, March 2013), p 9 (Brunt, papers in support of brief of evidence (doc D89(a)), p 605)

211. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 12

212. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 4

213. New Zealand Government, *Freshwater reform 2013 and beyond*, p 19 (Brunt, papers in support of brief of evidence (doc D89(a)), p 615)

214. New Zealand Government, *Freshwater reform 2013 and beyond*, p 20 (Brunt, papers in support of brief of evidence (doc D89(a)), p 616)

215. New Zealand Government, *Freshwater reform 2013 and beyond*, p 24 (Brunt, papers in support of brief of evidence (doc D89(a)), p 620)

for freshwater management.<sup>216</sup> When it came down to the particulars, however, the Crown was not actually proposing to give Māori a direct role in decision-making, other than 'alongside other key parties' in the collaborative option for freshwater planning.<sup>217</sup>

In this collaborative option, councils would 'partner' with 'communities and iwi/Māori' through a stakeholder group on the drafting of plans, on 'desired values' for particular freshwater bodies, and on objectives and limits for those bodies. The council's plan would need to reflect the 'consensus views of stakeholder groups'. Public submissions would then be heard by an independent hearing panel, of which one member would be required to 'have an understanding of tikanga Māori and the perspectives of local iwi/Māori', and would be appointed in consultation with those iwi. The council would make the final decisions after receipt of the panel's recommendations, but 'iwi/Māori' would have the chance to provide 'advice and formal recommendations' of their own ahead of final decisions. Legislation would require councils to 'consider this advice and recommendations' when making decisions.<sup>218</sup>

This role in collaboration ('alongside other key parties and interests') was one proposal for giving Māori a more effective role in 'national and local freshwater planning and decision-making'. This was considered 'a crucial aspect of recognising them as Treaty partners'.<sup>219</sup> The Crown also proposed to create a statutory role for iwi in the schedule 1 RMA process, so that they would still provide 'advice and formal recommendations to a council ahead of its decisions on submissions', even if the collaborative option was not chosen.<sup>220</sup>

Thus, the Crown's proposed role for iwi in decision-making would come at the stage at which a council was hearing public submissions on a freshwater plan before making its decision. The law would require the council to explicitly consider the advice and recommendations of iwi before making that decision. On the face of it, 'iwi/Māori' would have a much greater role in planning and decision-making if the collaborative process was chosen, since the council's plan (before public submissions) would have to reflect the consensus of 'stakeholders', including 'iwi/Māori'.

But there was no mention of iwi co-governance or co-management, which was a crucial omission. The discussion document did state that its proposed new role for Māori would not 'displace or override any existing arrangements that have been created under Treaty settlements'. It also stated that iwi and councils would be free to reach a different arrangement for the 'advisory and recommendation

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216. Beatson, brief of evidence (doc A93), p 6

217. New Zealand Government, *Freshwater reform 2013 and beyond*, p 26 (Brunt, papers in support of brief of evidence (doc D89(a)), p 622)

218. New Zealand Government, *Freshwater reform 2013 and beyond*, pp 25–26 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 621–622)

219. New Zealand Government, *Freshwater reform 2013 and beyond*, p 26 (Brunt, papers in support of brief of evidence (doc D89(a)), p 622)

220. New Zealand Government, *Freshwater reform 2013 and beyond*, p 26 (Brunt, papers in support of brief of evidence (doc D89(a)), p 622)

## 3.6.3.1.3

role, according to local needs.<sup>221</sup> What was notable, however, was the Crown's characterisation of its proposals as an 'advisory and recommendatory' role for 'iwi/Māori'. Strengthening the statutory role of iwi in this way was the Crown's method in 2013 for recognising Māori rights and interests in water. The Crown intended to include the collaboration option and the formal planning role for iwi in a Resource Management Reform Bill later in the year.<sup>222</sup>

## 3.6.3.1.3 NATIONAL OBJECTIVES FRAMEWORK

The setting of limits under the NPS-FM depended on communities deciding on what their objectives were for particular water bodies or catchments. In response to recommendations from the Land and Water Forum, the Crown wanted to give guidance for that process by adding a National Objectives Framework (NOF). This framework would give national direction on the values for which freshwater bodies could be managed, and 'what state of water is needed to provide for a particular value'. This would include the setting of bottom lines.<sup>223</sup> One of the benefits of this direction at the national level would be to ensure that 'iwi values are understood and considered appropriately' in freshwater management and limit setting.<sup>224</sup>

The Crown's discussion document made no mention of what role Māori would play in defining the values and desired states for the NOF, as set out in the NPS-FM. It did however, refer to 'te mana o te wai' – 'water's most intrinsic qualities' – and the 'Mana Atua Mana Tangata' framework presented to the Crown by the ILG in 2012 (later renamed Ngā Mātāpono ki te Wai).<sup>225</sup> The discussion paper stated that the NOF 'incorporates the consideration of tangata whenua values, consistent with the Mana Atua Mana Tangata Framework'. The intention seems to have been to use this ILG definition of Māori values in the NPS-FM.<sup>226</sup> It would then be up to '[c]ouncils, iwi and communities' to apply the NOF in the reformed planning process. They would need to decide which values applied to each water body, and how those water bodies would be managed to objectives and limits.<sup>227</sup>

## 3.6.3.1.4 WATER CONSERVATION ORDERS

The Crown proposed to reform the process for deciding whether water conservation orders should be granted or amended. As part of this reform, the Crown

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221. New Zealand Government, *Freshwater reform 2013 and beyond*, p 26 (Brunt, papers in support of brief of evidence (doc D89(a)), p 622)

222. New Zealand Government, *Freshwater reform 2013 and beyond*, p 27 (Brunt, papers in support of brief of evidence (doc D89(a)), p 623)

223. New Zealand Government, *Freshwater reform 2013 and beyond*, pp 28–29 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 624–625)

224. New Zealand Government, *Freshwater reform 2013 and beyond*, p 29 (Brunt, papers in support of brief of evidence (doc D89(a)), p 625)

225. New Zealand Government, *Freshwater reform 2013 and beyond*, p 5 (Brunt, papers in support of brief of evidence (doc D89(a)), p 601)

226. New Zealand Government, *Freshwater reform 2013 and beyond*, pp 29, 31 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 625, 627)

227. New Zealand Government, *Freshwater reform 2013 and beyond*, p 32 (Brunt, papers in support of brief of evidence (doc D89(a)), p 628)

proposed a change that would require 'Water Conservation Order processes to involve iwi and ensure that tangata whenua values and interests are considered in decision-making'.<sup>228</sup> The Crown did not, however, propose anything specific about how it would involve iwi or ensure Māori values were 'considered' when water conservation orders were decided.

### 3.6.3.2 What were the Māori Treaty partner's responses?

#### 3.6.3.2.1 THE MINISTRY FOR THE ENVIRONMENT'S SUMMARY OF SUBMISSIONS

In addition to the 13 hui mentioned above, the Crown received 36 written submissions from 'iwi/hapū and Māori organisations'.<sup>229</sup> The Ministry published a brief summary of all the submissions on its website. In respect of collaborative planning and 'effective provisions for iwi/Māori involvement in freshwater planning and decision-making', Māori were agreed on some key points in response to the Crown's proposals:

- ▶ There was 'broad support from iwi/Māori for the collaborative planning process with some saying it should be compulsory'. But there was concern about the level of 'engagement' envisaged for Māori by the Crown. Most of the Māori submitters sought 'a clear role for iwi/Māori in decision-making that is *more than advisory*' (emphasis added).
- ▶ There was 'general support' for the proposal of an independent hearing panel, but Māori considered that iwi and hapū should have a role in choosing the Māori 'representative' on the panel.
- ▶ In addition, Māori pointed out the by-now very familiar need to 'provide for capacity and capability building for iwi/Māori to participate in the process', and for local authorities to have the capability to 'understand the concerns that Māori raise'.<sup>230</sup>

On the National Objectives Framework, there was general support from Māori for such a framework, but they sought 'greater involvement in establishing the NOF and ensuring its implementation'. Similarly, Māori wanted 'greater iwi/Māori involvement' in deciding Water Conservation Orders. There was some disagreement, however, as to whether the Crown's proposed changes to the water conservation order system were desirable, and also some disagreement with aspects of what the Crown proposed for the NOF.<sup>231</sup>

On the reforms more generally, the Ministry summarised the views of Māori as:

Comments broadly supported the reforms to improve water quality and quantity, in particular requiring freshwater accounting and mātauranga Māori in water research and good practice. The use of good practice guidance was supported but seen as a mechanism that should be used alongside, not instead of, regulatory

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228. New Zealand Government, *Freshwater reform 2013 and beyond*, p 33 (Brunt, papers in support of brief of evidence (doc D89(a)), p 629)

229. Brunt, brief of evidence (doc D89), p 13

230. Ministry for the Environment, 'Feedback on freshwater reform proposals – 2013 and beyond', [www.mfe.govt.nz/consultation/feedback-freshwater-reform-proposals-2013-and-beyond-0](http://www.mfe.govt.nz/consultation/feedback-freshwater-reform-proposals-2013-and-beyond-0)

231. Ministry for the Environment, 'Feedback on freshwater reform proposals – 2013 and beyond'

## 3.6.3.2.2

measures. Concerns were raised about the need for longer-term reform discussions to commence with urgency. Discussions such as water allocation and trading were seen to have direct implications for how Māori rights and interests in fresh water may be addressed. Delaying these discussions was also seen to have direct implications on the health of water bodies and inhibited the ability for the NOF to be effectively implemented. Longer-term consents were not supported, but a simpler permitting system for renewals was proposed as an alternative. Nearly all iwi/Māori submitters considered they have a clear role in helping develop water research, good practice, and the monitoring and regulatory processes proposed.

Concerns were raised about the level of engagement and the need for both central and local government to ensure that the right groups were represented, and that this may not always be iwi but instead hapū or rūnanga.<sup>232</sup>

## 3.6.3.2.2 THE FRESHWATER ILG'S SUBMISSION

In its submission to the Crown, the ILG argued: 'Appropriately recognising and providing for iwi rights and interests in freshwater is . . . critical to developing a durable and sustainable water management regime that provides the certainty required for ongoing investment in the economy.'<sup>233</sup>

The ILG considered that the proposal for Māori involvement in the collaborative mechanism – iwi involvement in the stakeholder group that develops the plan, an iwi member on the hearing panel, and iwi advice to the council before it makes its final decision – fell 'well short of iwi expectations for an *effective* role in decision making processes' (emphasis in original). In fact, the ILG's submission was that the collaboration proposals offered 'little more than the status quo under the schedule 1 process that already requires councils to consult with iwi.'<sup>234</sup>

In respect of reform 2, '[e]ffective provisions for iwi/Māori involvement in freshwater planning', the ILG was similarly dismissive. 'Ultimately,' the iwi leaders argued, 'these proposals are unlikely to result in better outcomes for iwi than the existing provisions in respect of enabling iwi to participate in RMA planning processes or to increase the effectiveness of iwi/Māori participation in RMA planning.'<sup>235</sup> In the ILG's view, the Crown's reform proposals were unlikely to either strengthen or require anything different from the existing RMA provisions.<sup>236</sup> Nor was there any provision for building the capacity and capability of iwi to

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232. Ministry for the Environment, 'Feedback on freshwater reform proposals – 2013 and beyond'

233. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, [2013], p [8] (Crown counsel, document bundle (doc F14(a)) p 105)

234. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, [2013], p [2] (Crown counsel, document bundle (doc F14(a)) p 99)

235. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, p [2] (Crown counsel, document bundle (doc F14(a)) p 99)

236. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, pp [2]–[3] (Crown counsel, document bundle (doc F14(a)) pp 99–100)



participate, which was a vital element of ensuring effective Māori 'participation' in freshwater management.<sup>237</sup>

The ILG was also concerned that the proposals in 'Freshwater reform 2013 and beyond' did not provide iwi with a greater role in water policy development or decisions at the national level, and did not ensure that Māori values and interests would be properly recognised or enforced under a National Objectives Framework.<sup>238</sup> What was required was a mechanism to ensure 'iwi values are given sufficient weighting consistent with the status of iwi as Treaty partners.'<sup>239</sup> Further, the ILG was concerned that other, substantive reforms to resolve Māori rights and interests in water, such as 'the allocation of an equitable share of economic benefits', had been deferred.<sup>240</sup>

In terms of the Crown's consultation with Māori, the ILG considered it entirely inadequate. There was only four weeks to consider 'what the Crown is pitching as "the most comprehensive and positive reform of our freshwater management system for a generation"'. In addition, there had been too little time to consider the proposals before the hui were held, as well as insufficient notice given of the hui.<sup>241</sup> The ILG, therefore, intended to convene regional hui and a national hui to 'discuss the freshwater issue as a whole with iwi', and continue to engage with the Crown on the 'much more focused work' required 'throughout the reform process to satisfactorily address the issue of iwi rights and interests.'<sup>242</sup>

### 3.6.3.2.3 A 'ONCE IN A GENERATION' OPPORTUNITY

Some Māori submitters took the opportunity to point out what they saw as a lack of real progress in *Freshwater reform 2013 and beyond*. This was a 'once in a generation' opportunity to reform freshwater governance, and the Wai 262 Tribunal had recommended provision for kaitiaki control, partnership (co-management) or increased influence in the management of natural resources.<sup>243</sup> There was a very real possibility that the proposed reforms would do little to address the problems faced by Māori in RMA decision-making. The reforms would ensure that 'iwi rights and interests can only at best reach a special role alongside other stakeholders

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237. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, p [7] (Crown counsel, document bundle (doc F14(a) p 104)

238. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, pp [3]–[4] (Crown counsel, document bundle (doc F14(a) pp 100–101)

239. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, p [3] (Crown counsel, document bundle (doc F14(a) p 100)

240. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, pp [7]–[8] (Crown counsel, document bundle (doc F14(a) pp 104–105)

241. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, p [7] (Crown counsel, document bundle (doc F14(a) p 104)

242. Freshwater ILG, 'Freshwater reform 2013 and beyond', submission, p [8] (Crown counsel, document bundle (doc F14(a) p 105)

243. Sir Tumu Te Heuheu, submission, 8 April 2013 (Crown counsel, document bundle (doc F14(a)), pp 266, 267, 269)

## 3.6.4

and additionally offer advice and recommendations to councils.<sup>244</sup> This was likely in practice ‘to lead to a balancing away of iwi/Māori rights and interests.’<sup>245</sup> We discussed the balancing out of Māori values and interests in chapter 2 (see section 2.4.4).

For one iwi,

the foundation measures, for iwi rights and interests, do not include ‘governance’ of freshwater. The absence of this essentially steers iwi rights and interests down a path of ‘water planning’ and ‘setting objectives and water limits’. These are important matters. But failing to include governance as a foundation measure implies it is being precluded from resolution of iwi rights and interests.<sup>246</sup>

Others agreed that the Crown’s proposals relegated Māori to the stakeholder role and did not ‘affirm the rightful place of iwi at the decision-making table.’<sup>247</sup>

### 3.6.4 What did the Crown decide?

After consultation on the freshwater management and RMA reforms, the Crown announced its decisions in July and August 2013 respectively. Because of the significant overlap between the subject matter, there was essentially one set of decisions covering both reform programmes.

#### 3.6.4.1 Decisions on ‘Freshwater reform 2013 and beyond; July 2013

The July 2013 announcement of freshwater management reforms was brief. The Minister for the Environment and the Minister of Primary Industries put out a joint press release on 10 July 2013. They stated that the reforms would begin with:

- ▶ Establishing a collaborative process for developing council plans for waterway management, in which a ‘representative group of stakeholders drawn from the community’ would prepare the plan instead of the council doing so;
- ▶ Introducing an ‘improvement’ to the way in which ‘iwi/Māori engage in freshwater planning, no matter whether councils decide to choose the collaborative option or the existing process’; and
- ▶ Developing a NOF and ‘better accounting’.<sup>248</sup>

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244. Sir Tumu Te Heuheu, submission, 8 April 2013 (Crown counsel, document bundle (doc F14(a)), p 270)

245. Sir Tumu Te Heuheu, submission, 8 April 2013 (Crown counsel, document bundle (doc F14(a)), p 270)

246. Sir Tumu Te Heuheu, submission, 8 April 2013 (Crown counsel, document bundle (doc F14(a)), p 269)

247. Te Runanganui o Ngāti Porou, submission, 13 March 2013 (Crown counsel, document bundle (doc F14(a)), p 95)

248. Ministers for the Environment and Primary Industries, ‘Government finalises first stage of freshwater policy’, press release, 10 July 2013 <https://www.beehive.govt.nz/release/government-finalises-first-stage-freshwater-policy>

Further reforms in respect of water allocation and other water management issues would be 'tackled over the next few years', after these 'immediate steps for the freshwater reforms' took place.<sup>249</sup>

More detail was supplied in August 2013, when the Crown issued its policy decisions in a paper entitled *Resource Management: Summary of Reform Proposals 2013*.<sup>250</sup> The decisions on the proposals in *Freshwater reform 2013 and beyond*, which had been 'recently announced', included:

- ▶ Collaborative planning for freshwater management (only) would be introduced as an alternative to the RMA schedule 1 process, and it would enable communities to 'develop a shared vision for their water bodies' and to balance their 'different aspirations'. This would reduce the risk of litigation further down the track, and in fact appeal rights would be changed to 'incentivise collaboration'.
- ▶ Under the heading 'Iwi participation', the Crown had decided: 'Iwi/Māori views will need to be explicitly considered before decisions on fresh water are made, no matter whether councils choose the collaborative option, the joint planning process or the existing schedule 1 process'.
- ▶ The proposed reforms to the Water Conservation Order process would not continue.
- ▶ Central government would work with regional councils to provide guidance, and a NOF would be developed.<sup>251</sup>

Most of these reforms would be covered by the Crown's intention to bring in a Resource Management Reform Bill.

### 3.6.4.2 Decisions on 'Improving our resource management system,' August 2013

#### 3.6.4.2.1 CHANGES TO SECTIONS 6 AND 7 OF THE RMA

The Crown intended to introduce an RMA Reform Bill in 2013, which would contain 'the most comprehensive set of reforms to our resource management system since its creation'.<sup>252</sup> One aspect of this was the proposed changes to the principles under which RMA decision makers evaluated various considerations (including Māori interests). The Crown's decision in August 2013 was that the proposed changes to sections 6 and 7 of the Act would go ahead, with minor amendments. The Crown no longer intended to define kaitiakitanga as a taonga, and it would not insert 'taonga species' as a matter of national importance.<sup>253</sup>

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249. Ministers for the Environment and Primary Industries, 'Government finalises first stage of freshwater policy', press release, 10 July 2013

250. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013* (Wellington: Ministry for the Environment, 2013)

251. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 28

252. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 4

253. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, pp 11–15

## 3.6.4.2.2

As will be recalled, the majority of submissions from Māori had opposed the changes to sections 6 and 7 of the existing Act, especially the intention to insert economic imperatives and reduce the degree of protection for the environment in Part 2 of the Act.

**3.6.4.2.2 'MĀORI PARTICIPATION'**

The Crown received more than 13,000 submissions during the March consultation on RMA reform, and the Minister for the Environment noted general support for the proposals to improve 'iwi participation'.<sup>254</sup> The issue in need of reform for Māori was described as:

There are many examples of iwi participating successfully in resource management processes. However, engagement is inconsistent across the country and in many areas Māori values are not always effectively recognised in resource management processes, or the decisions that come out of those processes.

In a number of areas there appears to have been differing expectations about the role of iwi in these processes and this has led to uncertainty, costs, and delays while matters are debated in the Courts. Some iwi have also looked to Treaty of Waitangi settlements to ensure that their interests are considered.<sup>255</sup>

Under the heading 'Māori participation', the Crown announced that its RMA reforms would require councils to actively seek and have 'particular regard to the advice of iwi/hapū' in developing regional plans. In order to achieve this goal, councils would need to approach 'iwi/hapū' and invite them to enter into a 'participation arrangement'. These changes would 'support greater consideration of Māori interests in the resource management system, and ensure transparency over how those interests are considered'.<sup>256</sup>

The detail of the Crown's decisions about 'Māori participation' was as follows:

The reforms include a number of provisions to achieve greater clarity on the role of iwi/hapū in local government resource management planning. The reforms will specify requirements for councils to involve iwi/hapū in planning, setting out a clear role for iwi/hapū early in the process.

While final decisions will always remain with councils, changes across all planning pathways will require councils to seek and have particular regard to the advice of iwi/hapū on a draft plan and report on how this advice was considered. The changes also provide for hearing/review panels on plan processes to include members with understanding of tikanga and the perspectives of local iwi/hapū.

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254. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 4

255. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, pp 5-6

256. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 8

The changes aim to incentivise effective working relationships between iwi/hapū and councils. The critical mechanism to achieve this is the 'arrangement', which is both a trigger for councils to engage with iwi/hapū and a way to further clarify the role of iwi/hapū in the planning process.

Councils will be required to invite iwi/hapū to enter into an arrangement that details how iwi/hapū and councils will work together through the planning process. Council-iwi/hapū arrangements would add greater detail, potentially supplementing the statutory requirements, and be tailored to meet particular circumstances. There is no requirement for iwi/hapū to enter an arrangement with councils. However, there will be a requirement for councils to take into consideration all advice from iwi/hapū on draft plans and policy statements. The Crown will have the ability to step in to ensure an arrangement is followed and to facilitate arrangements where relationships between parties have broken down.

Existing arrangements under Treaty settlements will be maintained, and could work alongside or be supplemented by any other arrangements set up between iwi/hapū and councils.

The reforms are expected to provide greater certainty over the role of iwi/hapū in the planning system, and incentivise early engagements between iwi/hapū and councils. The changes support greater consideration of Māori interests in the resource management system, and ensure transparency over how these interests are considered. This is expected to reduce disagreement (and litigation) late in the planning process as issues are confronted and resolved early.<sup>257</sup>

In addition, the Crown's RMA reforms would 'provide guidance and support to improve the awareness and accessibility of iwi management plans'.<sup>258</sup> As we discussed in chapter 2, this proposal amounted to little more than ensuring that iwi plans were better publicised. Even this minor reform did not actually progress when the Resource Legislation Amendment Bill was introduced in 2015.

The Crown's most important decision, in our view, was that changes to the criteria for joint management agreements and section 33 transfers of power – an important proposal to make these under-used options more practicable – were 'not being progressed'.<sup>259</sup> This was a crucial change to the Crown's reforms. As noted above, Māori submitters were not satisfied that the iwi 'participation' proposals went far enough.<sup>260</sup> We have no direct evidence as to why the proposal was dropped. Tania Gerrard told us that there had been 'limited interest' from submitters during the consultation.<sup>261</sup> A report from officials to the new Minister in 2015 confirmed this: 'Feedback from hui and discussion with IAG suggested this option

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257. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 8

258. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 9

259. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, p 9

260. Ministry for the Environment, 'Summary of submissions: improving our resource management system', p 45

261. Tania Gerrard, answers to questions in writing (doc F18(d)), p 2

was not going to achieve transformational change, and the previous Minister for the Environment decided not to progress it.<sup>262</sup> Officials, on the other hand, considered that it was still a desirable option to revise the criteria for joint management agreements and section 33 transfers, making it easier for Māori to participate in freshwater management via these RMA tools.<sup>263</sup> The Crown's emphasis was that decision-making remained with councils alone; there was apparently no scope for co-management in the RMA reforms, despite its use in some Treaty settlements. This double standard is difficult to justify in Treaty terms.

### 3.6.5 Conclusions

In a 2014 report to the Tribunal on its reforms, the Crown emphasised the importance of the Crown's 2013 decisions on RMA and freshwater management reform. The Crown's proposal for 'Iwi Participation Arrangements' was seen as meeting its commitment to address Māori rights and interests in fresh water:

To date the Government has taken steps to meet its ongoing commitment to address iwi/hapū rights and interests in fresh water through announcing its intention to strengthen iwi and hapū participation in freshwater planning processes through amendments to the RMA. The Government consulted on options to give effect to this in February 2013, and announced proposals in August 2013 requiring councils to invite iwi/hapū to enter into an arrangement that details how iwi/hapū and councils will work together through the regional planning process, establish a collaborative planning process to be used as an alternative to the RMA Schedule 1 process, and require councils to ensure that iwi/Māori views are explicitly considered before decisions on fresh water are made, no matter whether councils choose the collaborative option or the existing RMA Schedule 1 process.<sup>264</sup>

At that time, therefore, the Crown placed significant emphasis on its proposed RMA reforms as the means to recognise Māori rights and interests, although it acknowledged that further reforms would be necessary to 'further and appropriately provide for iwi/hapū rights and interests beyond the measures included in the reforms that have been proposed to date.'<sup>265</sup>

In reality, the proposals were mostly about greater certainty that iwi authorities would participate in the development of regional and district plans. The RMA already required councils to consult iwi in the preparation of their plans. But the

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262. Acting Manager, Water Rights and Interests, to Minister for the Environment, 'Fresh water: Further detail on options to to enhance iwi/hapū participation in freshwater decision-making', 16 November 2015 (Crown counsel, discovery bundle (sensitive) (doc D92)), pp 1069–1070

263. Acting Manager, Water Rights and Interests, to Minister for the Environment, 'Fresh water: Further detail on options to to enhance iwi/hapū participation in freshwater decision-making' (Crown counsel, discovery bundle (sensitive) (doc D92)), p 1070

264. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), p 10

265. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a)), p 24

Act did not set out a process by which this had to occur. The Iwi Participation Arrangements, the collaborative planning option, and the proposed changes to the schedule 1 option were all designed to do just that; to establish processes for consultation on plans and to make sure that it actually happened. The ability to influence council plans was of course very important but Māori did not want to be confined to the planning part of the RMA regime, nor did they want to be restricted to the role of consultee. The proposals to make sections 33 and 36B more accessible to Māori were abandoned with little fanfare. Yet these were the proposals that offered a pathway to greater exercise of tino rangatiratanga through a transfer of power or a co-management agreement. It does not appear to us that the Crown considered the recommendations of the Wai 262 Tribunal in making that decision.

As we discuss in the next chapter, a variant on the iwi participation provisions was not actually enacted until 2017. The National Government was unable to get the agreement of either the Māori Party or United Future to pass its RMA reforms in 2013, and so could not introduce a Bill before the 2014 general election. The issue of section 33 transfers, joint management agreements, and co-governance more generally, were debated further in the development of the RMA reform Bill in 2015–17.

The Crown, however, did not need to wait for the election to progress some of its other freshwater management reforms. If the Crown could not legislate, it could still introduce some of its reforms by way of regulation. The national objectives framework and some other reforms could be implemented by making changes to the NPS-FM 2011. It is to that development we turn next.

### 3.7 THE DEVELOPMENT OF THE NPS-FM 2014

#### 3.7.1 Introduction

In terms of Māori rights and interests, the NPS-FM reform saw a shift in focus from *participation* to the issue of Māori values and how they should be articulated in freshwater planning.

The NPS-FM 2014 repeated much of the 2011 text, but it also introduced a National Objectives Framework (NOF) and a menu of defined national values for councils and communities to choose from in local freshwater management. Crown witness Martin Workman explained that the main changes arose from the 'Freshwater reform 2013 and beyond' consultation:

Following consultation on *Freshwater reform: 2013 and beyond*, in 2014 the NPS-FM was amended to include the NOF, requirements for councils to develop monitoring plans and accounting systems, and bring the deadline for councils to implement the NPS-FM forward [from 2030] to 2025.<sup>266</sup>

Some of the key requirements of the revised NPS-FM were for councils to:

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266. Martin Workman, brief of evidence, no date (May 2017) (doc F6), p 16

- ▶ safeguard fresh water's life-supporting capacity, ecosystem processes and indigenous species and the health of people who come into contact with the water through recreation;
- ▶ maintain or improve the overall quality of fresh water within a region;
- ▶ protect the significant values of wetlands and outstanding freshwater bodies;
- ▶ follow a specific process (NOF) for identifying the values that tāngata whenua and communities have for water, and using a specified set of water quality measures (called attributes) to set objectives for water;
- ▶ set limits on resource use (eg how much water can be taken or how much of a contaminant can be discharged) to meet target limits over time and ensure they continue to be met;
- ▶ determine the appropriate set of methods to meet the objectives and limits;
- ▶ take an integrated approach to managing land use, fresh water, and coastal water;
- ▶ involve iwi and hapū in decision-making and management of fresh water; and
- ▶ avoid over allocation.<sup>267</sup>

In order to develop this revised NPS, the Crown decided not to repeat the board of inquiry process, which had been used for the NPS-FM 2011. Instead, the Ministry for the Environment released a discussion document in November 2013, which described the proposed amendments and contained a draft text of an amended NPS.<sup>268</sup> This was followed by public consultation, including 13 hui with Māori in November and December 2013. The Crown also received 35 written submissions from Māori groups and organisations. Ministry officials wrote a report to the Minister in April 2014, summarising the outcomes of the consultation and making recommendations as to how the proposed amendments should be finalised.<sup>269</sup> The Minister made the necessary decisions and the NPS-FM 2014 was released in July 2014, along with a report outlining the recommendations received and the Minister's decisions.<sup>270</sup>

### 3.7.2 What did the Crown propose in respect of Māori rights and interests?

It is important to note at the beginning that the Crown did not propose to make any changes to the Māori 'participation' arrangements through an amendment

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267. Workman, brief of evidence (doc F6), pp 16–17

268. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document* (Wellington: Ministry for the Environment, November 2013); New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions* (Wellington: Ministry for the Environment, July 2014), p 4

269. For the confidential version of this report in April 2014, see 'Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions', April 2014 (Crown counsel, sensitive discovery documents (doc D92), pp 231–316). For the published version, see New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions* (Wellington: Ministry for the Environment, July 2014). All references are to the published version.

270. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions*



of the NPS-FM 2011. Those arrangements were to be part of the RMA Reform Bill (which did not actually eventuate in 2013 as originally planned). Thus, the Crown did not propose any amendments to the text of section D of the NPS, which directed councils to involve iwi and hapū in freshwater management and to reflect tangata whenua 'values and interests' in freshwater plans.<sup>271</sup> In the proposed NPS amendments, the focus for Māori rights and interests was on the NOF and the definition of Māori values in that framework.<sup>272</sup> Ultimately, this was supposed to assist councils with fulfilling the requirements of policy D1(b), under which they had to 'work with iwi and hapū to identify tangata whenua values and interests in fresh water and freshwater ecosystems in the region.'<sup>273</sup>

One of the key problems identified in the Crown's discussion document was that there was a lack of clarity in the NPS as to how councils should manage water to protect 'community and iwi values', partly because 'tangata whenua values for fresh water are not clearly articulated.'<sup>274</sup> The Crown's intention was to provide a definition of Māori values at the national level, which councils and Māori groups could choose to include in RMA plans at the regional level if they wished.<sup>275</sup> The vehicle for this was Te Mana o te Wai, a concept developed by the ILG in 2012.<sup>276</sup> Sir Mark Solomon and Donna Flavell defined Te Mana o te Wai as 'being the integrated and holistic wellbeing of a water body'<sup>277</sup>

The discussion document stated:

#### **Tāngata whenua values are not clearly articulated**

During the March [2013] consultation on the potential water reforms, the Government received feedback from iwi throughout the country that the NPS-FM does not give Te Mana o te Wai sufficient weight. Te Mana o te Wai represents the innate relationship between te hauora o te wai (the health and mauri of water) and te hauora o te taiao (the health and mauri of the environment), and their ability to support each other, whilst sustaining te hauora o te tangata (the health and mauri of the people).

Providing for Te Mana o te Wai requires maintaining the integrity and mana of the water resource (and consequently all connected resources including land). For Māori and many in the community, this is a primary outcome for managing water and is

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271. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, p 10 (Brunt, papers in support of brief of evidence (doc D89(a)), p 571)

272. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document* (Wellington: Ministry for the Environment, November 2013), p 7

273. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, p 10 (Brunt, papers in support of brief of evidence (doc D89(a)), p 571)

274. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document* (Wellington: Ministry for the Environment, November 2013), p 8

275. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p 23

276. Solomon and Flavell, brief of evidence (doc D85), p 9

277. Solomon and Flavell, brief of evidence (doc D85), pp 12-13

seen as an overriding goal. Without some recognition of Te Mana o te Wai in the NPS-FM, there is potential that this concept may not follow through to regional plans. Te Mana o te Wai and other tāngata whenua values should be clearly articulated in the NPS-FM.<sup>278</sup>

As a result of the 2013 consultation, the Crown understood that the ‘health and mauri’ of the water, the environment, and the people was seen by Māori as the ‘primary outcome for managing water’ and an ‘overriding goal’. Many in the community shared this view, hence this concept was also used in appendix 1 of the proposed NPS-FM to describe wider community values as well as Māori values. ‘Te Hauora o te Wai/the health and mauri of water’ was therefore described as ‘ecosystem health’. ‘Te Hauora o te Tangata/the health and mauri of the people’ was translated into the specific goal of ‘human health for secondary contact recreation’ (such as wading or boating). This use of ‘secondary contact’ was to draw much criticism from both Māori and Pākehā. ‘Te Hauora o Te Taiao/the health and mauri of the environment’ was defined as meaning the ‘natural form and character’ of a waterway or multiple waterways.<sup>279</sup> On this interpretation of Te Mana o te Wai, its ‘explicit recognition . . . in the NPS-FM’ was seen as necessary to ensure that ‘the inherent mana of the water’ was recognised in regional plans and decision-making about resource consents.<sup>280</sup>

The Crown’s intention was to include Te Mana o te Wai in the preamble of the NPS-FM. It was hoped that this would guide councils on the importance of the concept (thereby guiding councils’ recognition of the tāngata whenua relationship with fresh water). The proposed text in the preamble was part of a discussion of the NOF and the new bottom lines:

For tāngata whenua, the national bottom lines will contribute to the protection of Te Mana o te Wai. Te Mana o te Wai represents the innate relationship between te hauora o te wai (the health and mauri of water) and te hauora o te taiao (the health and mauri of the environment), and their ability to support each other, whilst sustaining te hauora o te tangata (the health and mauri of the people). Managing for Te Mana o te Wai requires the maintenance of appropriate freshwater quality and quantity, and improvement where these are below expected levels. Iwi and hapū have a kinship relationship with the natural environment, including fresh water, through shared whakapapa. Iwi and hapū recognise the importance of fresh water in supporting a healthy

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278. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p11

279. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, pp10, 29, 65

280. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p29

ecosystem, including human health, and have a reciprocal obligation as kaitiaki to protect freshwater quality.<sup>281</sup>

In addition to the text in the preamble, the values associated with Te Mana o te Wai (ecosystem health, 'secondary contact recreation', and 'natural form and character') would be included in appendix 1, as part of the NOF. This would 'enable iwi to articulate the value [Te Mana o te Wai] at a local level, and have it provided for through managing the associated attributes for those values.'<sup>282</sup>

In the wording of the proposed appendix 1, there were two compulsory national values, which councils had to provide for in their plans. These were 'ecosystem health' and 'human health (secondary contact recreation)'. These were headed 'Te Hauora o te Wai' and 'Te Hauora o te Tangata', and described as 'contributing' to Te Mana o te Wai. In addition, councils could choose to provide for 'natural form and character'. This was also described as contributing to Te Mana o te Wai.<sup>283</sup>

There were eight other national values for freshwater management, each of which was described as contributing to 'Mana Tangata' and given a Māori title:

- ▶ 'Mahinga kai/food gathering, places of food' – included mahinga kai for customary uses and knowledge as well as fishing more generally;
- ▶ 'Mahi māra/cultivation' – included all forms of primary production;
- ▶ 'Wai tākaro/recreation' – included swimming, kayaking, rafting, canoeing, and waka ama;
- ▶ 'Wai tapu/sacred waters' – specifically a Māori value, representing the 'places where rituals and ceremonies are performed', '[e]ncompassing values of tohi (baptism), karakia (prayer), waerea (protective incantation), whakatapu (placing of raahui), whakanoa (removal of raahui), tuku iho (gifting of knowledge and resources for future generations';
- ▶ 'Wai Māori/drinking water' – supplies of potable water and water for stock;
- ▶ 'Āu Putea/economic or commercial development' – commercial and industrial uses, including irrigation and hydroelectricity; and
- ▶ 'He ara haere/navigation' – transport and tauranga waka, with places to launch boats and waka and 'appropriate places for waka to land (tauranga waka).'<sup>284</sup>

In addition to the preamble and appendix 1, the Crown also included the possibility of adding Te Mana o te Wai as a new objective in the main text of the NPS-FM as Objective A1(c). This was not an actual proposal but a 'potential' change which

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281. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p 48

282. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, pp 29–30

283. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p 65

284. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, pp 66–68

was couched in language that was at best neutral if not actively discouraging. It had been inserted at the request of the ILG to give Te Mana o te Wai greater legal weight, but it was not supported by the Crown.<sup>285</sup> The discussion paper expressed concern that having Te Mana o te Wai as an objective would have the effect of making ‘natural form and character’ a compulsory value which councils must include and provide for in their plans. It might also affect ‘ease of interpretation in the planning context’, as well as having other unintended consequences.<sup>286</sup> It would also require the Crown to provide a formal definition of Te Mana o te Wai in the main body of the NPS-FM.

### 3.7.3 What were the Māori Treaty partner’s responses?

#### 3.7.3.1 Introduction

In July 2014, the Ministry for the Environment published a summary of public submissions, along with recommendations on the proposed amendments to the NPS-FM 2011.<sup>287</sup> This report had been provided to the Minister back in April 2014, and he had relied on it to finalise the revisions to the NPS.<sup>288</sup> There were 35 submissions from ‘Māori/Iwi’.<sup>289</sup> According to the Ministry’s summary, there was significant Māori support for aspects of the proposed changes but many Māori groups felt that further changes were required. Te Rūnanga o Ngāi Tahu, for example, noted that the NOF had the *potential* to deliver outcomes for iwi, and its development had been supported by the ILG via the Land and Water Forum.<sup>290</sup> Despite a large degree of Māori support for some of the proposed amendments, there was fairly general concern about certain proposals. These included the standard of ‘secondary’ contact (boating and wading), the possibility of exceptions to bottom lines, and the possibility of averaging water quality across regions (allowing some water bodies to remain degraded).

Some iwi submissions covered the full range of issues relating to the proposed amendments, whereas others focused specifically on Māori rights and interests. A number of Māori organisations noted that they had not been able to have the benefit of technical advice, which limited the scope and extent of their submissions.

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285. Briefing to Ministers, ‘Freshwater Reform – Te Mana o te Wai and the NPS-FM’, September 2013 (Sheree De Malmanche, papers in support of brief of evidence (doc D87(b)), pp 3–10); Cabinet paper, ‘Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management’, no date [December 2013], Appendix 5, ‘Additional drafting of the National Policy Statement proposed for consultation’ (Crown counsel, discovery bundle (doc D92), p 656)

286. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: a discussion document*, p 30

287. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions* (Wellington: Ministry for the Environment, July 2014)

288. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment’s Decisions* (Wellington: Ministry for the Environment, July 2014), p 4

289. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 8

290. Te Runanga o Ngāi Tahu, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 523)

### 3.7.3.2 *Te Mana o te Wai*

The Ministry summarised the submissions on *Te Mana o te Wai* from all sectors, groups and individuals (including the submissions from Māori):

The proposed amendments included a description of *Te Mana o te Wai* in the Preamble of the *NPS-FM* and three national values in Appendix 1 were proposed to contribute to *Te Mana o te Wai*.

A high percentage of submissions commented on the way *Te Mana o te Wai* might be included in the *NPS-FM*. A number of submissions stated that *Te Mana o te Wai* needs to be in the body of the *NPS*, not just the Preamble and Appendix.

Another group of submissions identified risks with the inclusion of *Te Mana o te Wai*. Submissions noted the ambiguities around the status of *Te Mana o te Wai* and the national values that contribute to it, particularly natural form and character. Submissions identified significant costs to implement a requirement to safeguard *Te Mana o te Wai*.

Many submissions identified limitations in the proposed definition of *Te Mana o te Wai* in both the Interpretation and in the proposed linking of *Te Mana o te Wai* to three national values. A high percentage of Iwi/Māori submissions stated the need to allow for flexibility so that local *tāngata whenua* can define and express their values for fresh water differently.

A number of submissions, mostly from Iwi/Māori, offered an alternative approach of including *Te Mana o Te Wai* in a high level overarching purpose, statement, *korowai*, or objective of the *NPS-FM*.<sup>291</sup>

More particularly, some Māori groups wanted *Te Mana o te Wai* to be included in the main body of the *NPS-FM*, not just the preamble. In other words, they hoped that incorporating *Te Mana o te Wai* in the objectives and policies of the *NPS* would give it 'more legal weight'.<sup>292</sup> The Raukawa Charitable Trust argued that 'the preamble has no statutory weight and cannot be relied upon by iwi as a mechanism to ensure *Te Mana o Te Wai* is woven into regional freshwater management policy'.<sup>293</sup> A number of submissions supported the ILG's proposal to add *Te Mana o te Wai* as Objective A1(c) in the *NPS*.<sup>294</sup> The Taiao Raukawa Environmental Resource Unit noted: 'It is vital that Māori values from freshwater are well recognised as they are often weighted against, or devalued by other interests and values

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291. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 10

292. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 16

293. Raukawa Charitable Trust, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 645)

294. See, for example, Taiao Raukawa Environmental Resource Unit, submission (Crown counsel, document bundle (doc F14(a)), p 684); Māori Party, submission, February 2014 (Crown counsel, document bundle (doc F14(a)), pp 689–693); Tapuika Iwi Authority, submission (Crown counsel, document bundle (doc F14(a)), p 715); Ngā Runanga Papatipu o Murihiku, submission (Crown counsel, document bundle (doc F14(a)), p 724); Waahi Pa Marae, submission (Crown counsel, document bundle (doc F14(a)), pp 773–774)

taking precedence.<sup>295</sup> Ngāti Whakaue suggested a ‘forum of council, community, scientists and tangata whenua to work together on how to implement the NPS-FM’, which might ‘alleviate tangata whenua concerns on “Te Mana o Te Wai” being given some weight.’<sup>296</sup>

Others, however, preferred that the ‘holistic’ concept of Te Mana o te Wai be expressed in one place and not divided into constituent parts under the various policies and objectives in the NPS-FM.<sup>297</sup> Many supported the idea that Te Mana o te Wai should become the main, overarching outcome for the nation, and that this was compatible with the wider interests of the community (as reflected by the two compulsory values already proposed for the NOF).<sup>298</sup>

### 3.7.3.3 *Alternative suggestions for how to provide for Te Mana o te Wai*

The Ministry summarised a range of submissions as to how exactly councils should be directed to provide for Māori values in freshwater management. One frequent request was that Te Mana o te Wai be made a ‘compulsory national value in the NPS-FM’ with its own specific ‘attributes.’<sup>299</sup> Other submissions were summarised by the Ministry as:

- ▶ linking more compulsory national values to Te Mana o te Wai, particularly values of importance to tāngata whenua such as contact recreation, mahinga kai, and wai tapu
- ▶ including Te Mana o te Wai as an additional value in the NPS-FM to enable community identification with that value where relevant
- ▶ identifying tāngata whenua values at a local level then requiring councils to state in plans how the identified values will be provided for
- ▶ including Te Mana o te Wai in Policy D1(c) directing local authorities to take reasonable steps to reflect tangata whenua values such as Te Mana o te Wai and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region

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295. Taiao Raukawa Environmental Resource Unit, submission (Crown counsel, document bundle (doc F14(a)), p 684)

296. Te Runanga o Ngāti Whakaue ki Maketu, submission (Crown counsel, document bundle (doc F14(a)), p 673)

297. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 16

298. See, for example, Raukawa Charitable Trust, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 645–647); Te Runanga o Ngāi Tahu, submission (Crown counsel, document bundle (doc F14(a)), p 531)

299. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 19. See also various submissions in Crown counsel, document bundle (doc F14(a)), pp 505, 516, 529–531, 569, 590, 622, 668, 671, 683–684, 705–706, 723, 730, 767, 770.

- ▶ using different terminology either instead of, or as well as, Te Mana o te Wai (for example Te Mauri o te Wai, Mana Atua, kaitiakitanga, manakitanga, rangatiratanga, and whanaungatanga)
- ▶ including Te Mana o te Wai directly after “safeguard” in both Objective A1 and Objective B1<sup>300</sup>
- ▶ referring to Iwi Management Plans and obliging councils to support implementation of freshwater objectives in Iwi Management Plans
- ▶ developing a national outcome, objective, or korowai<sup>301</sup> for Te Mana o Te Wai that sits above the NPS-FM objectives and policies as recommended by the Freshwater Iwi Leaders Group and many Iwi/Māori submissions.<sup>302</sup>

Thus, Māori wanted Te Mana o te Wai to be woven into the objectives and policies of the NPS-FM or to be placed into an overarching statement at the beginning that would apply to all objectives and policies. There was also a fairly general view among Māori groups that setting the compulsory values at ‘secondary’ contact, instead of swimming and the taking of food (mahinga kai), would not provide for Māori interests.<sup>303</sup> As Ngāti Kahungunu put it: ‘Ngāti Kahungunu believe that if you are able to swim with the eels then [the] river is healthy.’<sup>304</sup> The Te Wai Māori Trust wanted mahinga kai to be made a compulsory value.<sup>305</sup>

### 3.7.3.4 ‘Te mauri o te wai’

According to the Ministry’s summary of submissions, some groups requested that the core concept be changed to ‘te mauri o te wai’, because:

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300. Objective A1 related to safeguarding the life-supporting capacity of freshwater ecosystems and species in sustainably managing land use and discharges. Objective B1 related to safeguarding the life-supporting capacity of freshwater ecosystems and species in the taking, use, damming, or diverting of fresh water.

301. Waikato-Tainui Te Kauhanganui, for example, sought further amendment to the NPS-FM to ‘give greater legal weight to Te Mana o Te Wai (not just referenced in preamble), specifically that Te Mana o Te Wai is elevated to become a national Korowai that provides for an overarching objective to achieve national outcomes for fresh water.’ (Waikato-Tainui Te Kauhanganui Inc, submission (Crown counsel, document bundle (doc F14(a)), p 793))

302. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 19–20

303. See for example Ngāti Ruanui, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 600); Ngāti Kahungunu Iwi Incorporated, submission (Crown counsel, document bundle (doc F14(a)), pp 572–573); Ngāti Whatua Orakei Whai Maia Limited, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), p 612); Ngāti Rangī Trust, submission (Crown counsel, document bundle (doc F14(a)), pp 621–622, 625); Māori Party, submission (Crown counsel, document bundle (doc F14(a)), pp 691–692); Tapuika Iwi Authority, submission (Crown counsel, document bundle (doc F14(a)), pp 709, 711, 713); Te Runanga o Ngāti Whatua, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 762)

304. Ngāti Kahungunu Iwi Incorporated, submission (Crown counsel, document bundle (doc F14(a)), p 573)

305. Te Wai Māori Trust, submission (Crown counsel, document bundle (doc F14(a)), pp 779–781)

## 3.7.3.5

- ▶ mana is something a person or entity might have, whilst mauri refers to a life force that binds and energises a system
- ▶ te Mauri o te Wai recognises the whakapapa links of people and the environment to various waterways and the need to manage these collectively so as to facilitate integrated management
- ▶ tāngata whenua values incorporate spiritual values as well as Te Mana o Te Wai.<sup>306</sup>

The Mana Whenua Kaitiaki Forum of Tāmaki Makaurau, for example, argued that waterways should be managed as a system rather than individually. Providing for ‘te mauri o te wai’ would require integrated management of all waterways in a region, with the purpose of maintaining or enhancing the ‘life supporting capacity of the water system.’<sup>307</sup> The forum argued that a new ‘Objective c2’ should require councils to ‘maintain and enhance Te Mauri o te Wai in whole catchments and between catchments. A new ‘Policy c3’ would compel councils to manage water bodies and land use to maintain and enhance the life supporting capacity of water systems.’<sup>308</sup> This would involve the management of waterways for swimming and food gathering to become ‘the norm.’<sup>309</sup>

The Te Wai Māori Trust, on the other hand, argued that

[d]ifferent beings/persons/places/areas have different levels of mana. The more polluted or ‘sick’ a water body is, the less mana it has. Alternatively, the more pristine a water body – and the more pride we can associate with it the more mana it will have. The same would be said for a water body that maintains healthy fisheries that provide a healthy food source. Te Mana o te Wai is affected not only by the water body itself, but everything it is connected to.<sup>310</sup>

We note that the claimants’ custom law team in our inquiry, and the evidence of Professor Patu Hohepa, agreed that water bodies have mana.<sup>311</sup>

### 3.7.3.5 *The Treaty of Waitangi and Māori rights and interests in fresh water*

In addition to the Crown’s proposed amendments to the NPS-FM, some Māori groups sought changes to other parts of the text. They wanted to strengthen the

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306. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 16–17

307. Mana Whenua Kaitiaki Forum, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 497); see also Te Runanga o Ngāti Whatua, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 759–761)

308. Mana Whenua Kaitiaki Forum, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 497–498)

309. Mana Whenua Kaitiaki Forum, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 498)

310. Te Wai Māori Trust, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 777)

311. Sir Edward Taihakurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti, ‘Ngā Wai o te Māori’ (doc E13), pp 11–12; Patu Hohepa, brief of evidence, 9 February 2017 (doc E17), pp [11], [17]



reference to the Treaty in the preamble to include an explanation of tino rangatira-tanga and a definition of fresh water as a taonga under the Treaty. They also wanted to expand the Treaty reference to encompass Treaty principles and 'iwi rights and interests [in water] more broadly'.<sup>312</sup> A 'number of iwi submissions noted the need for further work with the Crown and Freshwater Iwi Leaders Group to develop options to recognise the full range of iwi rights and interests [in water], establishing a process and timeframes in the first instance'.<sup>313</sup> There was also a concern to ensure that any amendments to the NPS did not 'prejudice the ability of iwi or Māori to claim rights and interests in fresh water'.<sup>314</sup>

Te Rūnanga o Ngāi Tahu, for example, argued that amending the NPS was not sufficient to address the full spectrum of Māori rights and interests in fresh water, and that the Crown should provide 'clarity and guidance around incorporating iwi interests and values in [NPS] objectives and monitoring programmes to assist delivery of Objective D'.<sup>315</sup> The Ngāti Rangi Trust cautioned that while the question of iwi rights and interests remained unresolved, the NOF (and the availability of water for various purposes) could not be finalised.<sup>316</sup> Ngāti Kahungunu Iwi Incorporated wanted to expand Objective D1 to include a requirement that councils must ensure no further Treaty grievances were created through their decisions on plans or consents.<sup>317</sup>

The Raukawa Charitable Trust submitted:

Raukawa *believe* addressing iwi rights and interests in freshwater is critically important to developing a robust and durable freshwater management regime. Weaving the resolution of rights and interests into the new freshwater management regime would also create certainty for all water stakeholders (including iwi). In our experience there is wide support among the wider community for addressing these issues.

Raukawa *support* the Crown continuing to engage constructively with iwi to establish a process and timeframe for recognising and providing for the full ambit of iwi rights and interests [emphasis in original].<sup>318</sup>

A number of iwi submissions expressed support for the discussions between the Crown and the ILG to resolve the issue of Māori rights and interests in fresh water

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312. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 21

313. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 21

314. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 21

315. Te Runanga o Ngāi Tahu, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 515)

316. Ngāti Rangi Trust, submission (Crown counsel, document bundle (doc F14(a)), p 624

317. Ngāti Kahungunu Iwi Incorporated, submission, app 1 (Crown counsel, document bundle (doc F14(a)), p 552)

318. Raukawa Charitable Trust, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 642)

## 3.7.3.6

and freshwater management.<sup>319</sup> Waikato-Tainui submitted to the Crown that the ILG's Ngā Mātāpono model, and the principles adopted at the national freshwater summit in 2012, should form 'the basis for further intensive work between the Crown and the ILG, to develop more detailed options that recognise and provide for, the full range of iwi rights and interests in fresh water'. The proposed amendments to the NPS-FM were seen as 'part of a package, but further and more focused work is required to satisfactorily address the issue of Iwi rights and interests'. Waikato-Tainui recommended that the Crown establish a process and timeline for 'recognising and providing for the full gambit of Iwi rights and interests in freshwater'.<sup>320</sup>

**3.7.3.6 Monitoring**

The Ministry's summary of submissions noted that the proposed amendments to the NPS-FM required councils to develop monitoring plans. On the question of what to monitor and criteria for monitoring, '[s]ubmissions from iwi/Māori stated that monitoring plans should include a requirement to monitor against tāngata whenua values'.<sup>321</sup> Local Government New Zealand also submitted that guidance was needed on how to monitor against the Māori values in (or under) the NPS-FM.<sup>322</sup>

There was some support for using the Cultural Health Index (developed recently) to define the attributes to be measured.<sup>323</sup> Te Rūnanga o Ngai Tahu also suggested that councils' performance in carrying out Objective D1 should be monitored (see above for that objective).<sup>324</sup> Ngāti Kahungunu recommended that tāngata whenua should 'interpret the meaning, intent and the successful implementation of te Mana o te Wai', and that the NPS should provide for 'cultural monitoring' and the use of 'mātauranga Māori as a science in its own right'.<sup>325</sup> The Ngāti Koroki Kahukura Trust agreed that mātauranga Māori and cultural health indicators should be measured as part of the NOF. In the trust's view, 'further work should be supported to develop numerical and narrative states for these attributes' as part of the framework.<sup>326</sup> Ngāti Whatua Orakei Whai Maia Ltd made a similar

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319. See, for example, Raukawa Charitable Trust, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), p 643)

320. Waikato-Tainui Te Kauhanganui Inc, submission (Crown counsel, document bundle (doc F14(a)), pp 787-788)

321. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 58

322. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 58

323. Maniapoto Māori Trust Board, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), p 503)

324. Te Runanga o Ngai Tahu, submission (Crown counsel, document bundle (doc F14(a)), p 520)

325. Ngāti Kahungunu Iwi Incorporated, submission (Crown counsel, document bundle (doc F14(a)), pp 576, 583). See also Ngāti Ruanui, submission (Crown counsel, document bundle (doc F14(a)), p 602).

326. Ngāti Koroki Kahukura Trust, submission (Crown counsel, document bundle (doc F14(a)), p 664)

submission that 'Māori cultural indicators for local monitoring of freshwater' should be 'designed and adopted for local conditions in partnership with iwi'.<sup>327</sup> The Māori Party suggested that local hapū should develop their own water quality indicators, and then kaitiaki would take part in monitoring and in selecting representative sites to be monitored.<sup>328</sup> Ngāti Whatua ki Kaipara also submitted that kaitiaki would have to be involved in monitoring, and that the monitoring system should recognise and incorporate cultural values.<sup>329</sup>

There was a suggestion from Te Rūnanga o Toa Rangatira that cultural indicators and measures could be included in the NPS-FM by providing for the monitoring of indigenous species, and whether their populations were sustainable.<sup>330</sup> This point was also made by the Te Wai Māori Trust, which recommended the monitoring of fish populations to monitor 'mahinga kai and ecosystem health'.<sup>331</sup> The Māori Party's submission argued that the NPS should require each monitoring plan to include the selection of representative sites in collaboration with kaitiaki

### 3-7-3-7 Co-governance and co-management

A number of submissions from Māori groups sought co-management and co-governance of water bodies, but differed in their approach. Some, such as the Maniapoto Māori Trust Board and Waahi Pa Marae, wanted to ensure that existing co-management agreements would not be affected by the revisions to the NPS-FM 2011.<sup>332</sup> Others, such as Ngāti Kahungunu and Ngāti Toa Rangatira, wanted to write co-management and co-governance arrangements into the NPS-FM. Ngāti Kahungunu Iwi Incorporated suggested amending the existing text about the Treaty in the preamble, to state that iwi and hapū should be involved in the 'co-governance and co-management of fresh water', as key to meeting the Crown's obligations under the Treaty of Waitangi.<sup>333</sup> One possible mechanism was for iwi and councils to agree and draft proposed changes to regional plans before wider consultation with the public took place.<sup>334</sup> Te Rūnanga o Toa Rangatira Inc called for new provisions in the NPS-FM, requiring councils to participate in co-management of fresh water 'at a governance level' with Māori as Treaty Partners.<sup>335</sup>

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327. Ngāti Whatua Orakei Whai Maia Ltd, submission (Crown counsel, document bundle (doc F14(a)), p 612)

328. Māori Party, submission (Crown counsel, document bundle (doc F14(a)), pp 693-694)

329. Ngāti Whatua ki Kaipara, submission (Crown counsel, document bundle (doc F14(a)), pp 608, 609-610)

330. Te Runanga o Toa Rangatira, submissions (Crown counsel, document bundle (doc F14(a)), p 685)

331. Te Wai Māori Trust, submission (Crown counsel, document bundle (doc F14(a)), p 779)

332. Maniapoto Māori Trust Board, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 499-500; Waahi Pa Marae, submission (Crown counsel, document bundle (doc F14(a)), p 765)

333. Ngāti Kahungunu Iwi Incorporated, submission, app 1 (Crown counsel, document bundle (doc F14(a)), p 537)

334. Ngāti Kahungunu Iwi Incorporated, submission (Crown counsel, document bundle (doc F14(a)), p 578)

335. Te Runanga o Toa Inc, submission (Crown counsel, document bundle (doc F14(a)), p 686)

Ngā Rūnanga Papatipu o Murihiku reiterated a commonly held view that there was still no ‘clear role’ for Māori Treaty partners in the decision-making process for freshwater management.<sup>336</sup>

Other iwi sought co-management arrangements as part of the wider freshwater reforms, and reminded the Government of this during the NPS-FM consultation round. Te Atiawa Manawhenua ki te Tau Ihu Trust argued that there was a fundamental flaw in freshwater management, which treated Māori as stakeholders to be consulted rather than providing for co-management of freshwater resources.<sup>337</sup> Waikato-Tainui agreed that the freshwater reforms in general should provide enhanced co-management, and provide for iwi rights and interests.<sup>338</sup> Ngāti Whatua ki Kaipara wanted to ‘consider the development and implementation of co-management regimes for freshwater.’<sup>339</sup>

### 3.7.3.8 *The need for resources to improve capacity and capability*

Many submissions referred to the need for resources to enhance the ability of Māori groups to participate in freshwater management processes.<sup>340</sup> The Maniapoto Māori Trust Board argued that processes required by national legislation should be resourced, or else barriers would remain to Māori participation (and that of community groups).<sup>341</sup> The trust board’s submission stated:

The Government must recognise and provide for the increased resourcing that will be required to achieve real collaboration during the processes to implement the NOF in each region and the other amendments to the NPS-FM. Maniapoto do not expect to enter into collaborative processes that are not appropriately resourced when these processes are required under national legislation. We do note that the investment in resourcing this process is likely to produce a savings with less resources allocated to the litigious process that will continue to occur in the absence of a collaborative approach.<sup>342</sup>

Te Rūnanga o Ngai Tahu submitted to the Crown:

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336. Ngā Runanga Papatipu o Murihiku, submission (Crown counsel, document bundle (doc F14(a)), p 717)

337. Te Atiawa Manawhenua ki Te Tau Ihu Trust, submission, app (Crown counsel, document bundle (doc F14(a)), pp 739, 742)

338. Waikato-Tainui, submission (Crown counsel, document bundle (doc F14(a)), p 787)

339. Ngāti Whatua ki Kaipara, submission (Crown counsel, document bundle (doc F14(a)), p 607)

340. See, for example, Maniapoto Māori Trust Board, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 499–501); Ngāti Whatua Orakei Whai Maia Ltd, submission (Crown counsel, document bundle (doc F14(a)), p 615); Ngāti Koroki Kahukura Trust, submission (Crown counsel, document bundle (doc F14(a)), p 662); the Māori Party, submission, February 2014 (Crown counsel, document bundle (doc F14(a)), p 689); Waahi Pa Marae, submission (Crown counsel, document bundle (doc F14(a)), p 766)

341. Maniapoto Māori Trust Board, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 500–501)

342. Maniapoto Māori Trust Board, submission, 3 February 2014 (Crown counsel, document bundle (doc F14(a)), p 500)

Improving the capacity and capability of both iwi and councils will be critical to meeting the expected outcomes for freshwater. This will require support and resources (financial included) from central government and it is of concern to Te Rūnanga that there is no indication how the Crown intends to develop capacity and capability at a regional level to enable effective participation.<sup>343</sup>

### 3.7.4 What did the Crown decide?

#### 3.7.4.1 Introduction

As noted above, the Ministry for the Environment prepared a summary of all submissions in April 2014. As part of that report, officials also made a series of recommendations to the Minister as to which submissions should be accepted or rejected. The Minister for the Environment accepted all of the Ministry's recommendations, and also made some further changes to the text, and the final version of the NPS-FM 2014 was approved by the Governor General on 30 June 2014.<sup>344</sup>

#### 3.7.4.2 Te Mana o te Wai

##### 3.7.4.2.1 THE MINISTRY'S ADVICE AND RECOMMENDATIONS

The Crown was faced with some real quandries after the consultation round. On the one hand, Māori groups wanted Te Mana o te Wai to become an overarching national outcome and/or be written into the policies and objectives of the NPS-FM. On the other hand, some Māori submissions had criticised the particular choice of words and concepts, and wanted to maximise definition of Māori values by Māori themselves at the local level.

The Ministry's principal recommendation was:

EITHER

Describe Te Mana o te Wai in the Preamble as proposed

OR

Add an overarching purpose, statement, objective, or korowai to the NPS-FM to provide a language for tāngata whenua and communities to express their collective values using Te Mana o Te Wai or any other appropriate expression. Amend Appendix 1 to show that all values can contribute to the overarching statement.<sup>345</sup>

As part of treating Te Mana o te Wai in this way, officials opposed adding it to any of the objectives in the main body of the NPS-FM.<sup>346</sup> This included a specific recommendation that Te Mana o te Wai should not be added as objective A1(c), as initially sought by the ILG. In particular, the Ministry was concerned that adding Te Mana o te Wai to objective A1 would 'elevate natural form and character to

343. Te Runanga o Ngai Tahu, submission (Crown counsel, document bundle (doc F14(a)), p 514)

344. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions*, p 4

345. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 12, 21

346. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 16-21

a compulsory value, because natural form and character had been defined as a Te Mana o te Wai value in the NOF. Officials concluded: 'Given the uncertainty, potential costs, and implementation difficulties, inclusion of Objective A1(c) to safeguard Te Mana o Te Wai is not recommended.'<sup>347</sup> Officials also recommended deleting the description of Te Mana o te Wai attached to A1(c) as

the innate relationship between te hauora o te wai (the health and mauri of water) and te hauora o te taiao (the health and mauri of the environment), and their ability to support each other, whilst sustaining te hauora o te tangata (the health and mauri of the people).<sup>348</sup>

This definition had been provided for the NPS-FM by the ILG.

Instead, the Ministry preferred that any description of Te Mana o te Wai in the preamble or an overarching statement be broad enough for different local expressions of Māori values. It should also discuss the way in which all the values in the NOF 'collectively contribute to Te Mana o te Wai and recognise the significance of fresh water for all New Zealanders'.<sup>349</sup> Officials envisaged an overarching statement or korowai so broad that it would be 'inclusive of all communities and allow for collective values to be expressed by both tangata whenua and the broader community'. This kind of overarching statement would 'bring together the range of values tangata whenua and communities have for freshwater, including environmental, economic, cultural and social values'. Its language would 'frame the regional discussion and identification of tangata whenua and community values holistically', but it would not be 'mandatory' for councils to use the language in the overarching statement. Officials noted that an overarching statement that 'includes te mana o te wai' would carry none of the risks or costs of having Te Mana o te Wai as a defined objective in the main body of the NPS-FM or as one of the compulsory values in appendix 1.<sup>350</sup>

For appendix 1, the Ministry suggested removing the specific link between Te Mana o te Wai and three national values (see section 3.7.2). Instead, all values should be able to connect to Te Mana o te Wai. That way, officials recommended, local tangata whenua would be free to choose and define values in local plans, 'whether as Te Mana o Te Wai, Te Mauri o Te Wai, or otherwise'.<sup>351</sup> Thus, appendix 1 should be restructured so that 'any values [in the NOF] can be linked to Te Mana

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347. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p18

348. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p19

349. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p17

350. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p20

351. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp17–18

o Te Wai or other expressions of a community's collective values for fresh water.<sup>352</sup> Officials did not make a recommendation that 'te mauri o te wai' should replace Te Mana o te Wai as the core concept. Rather, they wanted a definition that could encompass both and allow for local choice. The Ministry did not propose any specific text.<sup>353</sup>

In terms of the range of options put forward by Māori for alternative ways of recognising Te Mana o te Wai (see section 3.7.3.3), officials considered that the best way to resolve competing views was to have an overarching statement or 'korowai'.<sup>354</sup> In the Ministry's view, there was no need to give weight to iwi management plans in the NPS-FM (as some Māori groups had sought), because those plans had their own statutory role.<sup>355</sup>

#### 3.7.4.2.2 OUTCOME

The Minister accepted all of these recommendations.<sup>356</sup> He 'agreed to reduce the Preamble discussion of Te Mana o te Wai given that a new stand-alone part on the national significance of freshwater and Te Mana o te Wai would be progressed'.<sup>357</sup> The new stand-alone statement took a 'flexible or high-level approach' because of:

- ▶ the wide range of opinions on how best to express tangata whenua values;
- ▶ the need for regional variation in expressing those values; and
- ▶ the difference in values (and how to express them) between different groups.

As a result, the Minister's new stand-alone statement combined a recognition of the national significance of fresh water with Te Mana o te Wai.<sup>358</sup>

The ILG's objective A1(c), and its definition of Te Mana o te Wai, were not included in the final version of the NPS-FM 2014. All references to Te Mana o te Wai were also removed from appendix 1, which listed and explained the values of the NOF, although a te reo title was retained for each value.

As a result of these decisions, Te Mana o te Wai was virtually removed from the final text of the NPS-FM 2014. The final version of the preamble stated:

Freshwater objectives for a range of tāngata whenua values are intended to recognise Te Mana o te Wai. Iwi and hapū have a kinship relationship with the natural environment, including fresh water, through shared whakapapa. Iwi and hapū recognise

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352. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p18

353. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp16–21

354. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp19–21

355. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p20

356. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions*, p4

357. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions*, p6

358. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment's Decisions*, p6

the importance of fresh water in supporting a healthy ecosystem, including human health, and have a reciprocal obligation as kaitiaki to protect freshwater quality.<sup>359</sup>

The overarching statement bore no resemblance to what Māori submitters had wanted.<sup>360</sup> It read:

**National Significance of fresh water and Te Mana o te Wai**

This national policy statement is about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai.

A range of community and tāngata whenua values, including those identified as appropriate from Appendix 1, may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole. The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.<sup>361</sup>

This piece of text appeared after the preamble but before the main body of the NPS-FM. There was no explanation of its significance or why it had been placed there. It was certainly not defined as an overarching national outcome, as had originally been sought by some Māori groups. There was no explanation of what was meant by Te Mana o te Wai, and this was the final mention of the term in the document. It does not appear anywhere in the main body or the appendices of the NPS-FM 2014. According to Martin Workman, '[a]ll parts of the NPS-FM together recognise the national significance of fresh water and Te Mana o te Wai.'<sup>362</sup>

In 2015, there was some attempt on the part of the Crown to rectify the lack of any definition of (or supporting information about) Te Mana o te Wai. The Cabinet paper seeking approval of the revised NPS-FM noted that '[g]uidance would be provided to regional councils to support councils' interpretation' of the high-level statement about Te Mana o te Wai and 'national significance.'<sup>363</sup> The Ministry published a guide to the NPS-FM 2014, although its disclaimer noted that the guide had no 'official status' and did not alter 'official guidelines or requirements.'<sup>364</sup> Thus, although neither councils nor Māori could rely on it in any official capacity, the guide did restate the ILG's definition of Te Mana o te Wai for the guidance of councils.

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359. New Zealand Government, *National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2014), p 4

360. See Te Runanga o Ngāi Tahu, submission, 4 February 2014 (Crown counsel, document bundle (doc F14(a)), pp 530–531)

361. New Zealand Government, *National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2014), p 6

362. Workman, brief of evidence (doc F6), p 17

363. Cabinet paper, 'Freshwater programme: amendments to the National Policy Statement for Freshwater Management', 23 May 2014 (Crown counsel, discovery bundle (doc D92), pp 176–177)

364. New Zealand Government, *A Guide to the National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, August 2015), p 2 (Brunt, papers in support of brief of evidence (doc D89(a)), p 36)



First, the guide explained the significance of the 'statement' after the preamble in the NPS-FM. Essentially, the statement's purpose was to emphasise the importance of identifying community and tangata whenua values that would 'collectively recognise the national significance of fresh water and Te Mana o te Wai'.<sup>365</sup>

Secondly, the guide offered a definition of Te Mana o te Wai, and tried to show that (despite no mention of it) the rest of the NPS-FM provided for it:

For the purposes of the NPS-FM, Te Mana o te Wai represents the innate relationship between te hauora o te wai (the health and mauri of water) and te hauora o te taiao (the health and mauri of the environment), and their ability to support each other, while sustaining te hauora o te tângata (the health and mauri of the people).

The recognition and expression of the national significance of fresh water and Te Mana o te Wai is reflected in the national values contained in Appendix 1 of the NPS-FM. The national values incorporate tângata whenua values at a high level, and the National Objectives Framework (NOF) process set out in Policy CA2 allows for regional flexibility in the way tângata whenua values are defined and expressed by each iwi and hapū. The aggregation of community and tângata whenua values and the ability of fresh water to provide for those values over time recognises the national significance of fresh water and Te Mana o te Wai.<sup>366</sup>

Thirdly, the guide indicated various ways in which aspects of the NPS-FM could contribute to Te Mana o te Wai, and ensure tangata whenua values and wider community values were identified and included in regional policy statements and regional plans.<sup>367</sup> The Ministry also suggested ways in which objective D1 could be implemented so as to identify and reflect tangata whenua values, and make decisions about them *with* rather than *for* iwi and hapū. These could include:

- ▶ early engagement in the freshwater planning process;
- ▶ commissioning reports from iwi or hapū;
- ▶ including members of iwi or hapū on relevant plan hearing committees;
- ▶ joint management agreements;
- ▶ joint committees;
- ▶ relationship agreements;
- ▶ decision-making roles for iwi or hapū; and
- ▶ statutory acknowledgements.<sup>368</sup>

All these arrangements (except for statutory acknowledgements) could be originated locally by councils and iwi but, as we noted in the previous chapter,

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365. New Zealand Government, *A Guide to the National Policy Statement for Freshwater Management 2014*, p 27 (Brunt, papers in support of brief of evidence (doc D89(a)), p 61)

366. New Zealand Government, *A Guide to the National Policy Statement for Freshwater Management 2014*, p 27 (Brunt, papers in support of brief of evidence (doc D89(a)), p 61)

367. New Zealand Government, *A Guide to the National Policy Statement for Freshwater Management 2014*, pp 28, 45, 58, 67 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 62, 79, 92, 101)

368. New Zealand Government, *A Guide to the National Policy Statement for Freshwater Management 2014*, pp 86–87 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 120–121)

there were high barriers in the RMA to the establishment of Joint Management Agreements.

### **3.7.4.3 The Treaty reference, Māori rights and interests in water, and co-management**

#### **3.7.4.3.1 THE MINISTRY'S ADVICE AND RECOMMENDATIONS**

In respect of the submissions on the Treaty and Māori rights and interests in water (section 3.7.3.5), the Ministry recommended no changes to the existing text of the NPS-FM. Officials saw no need to expand the Treaty reference to include Treaty principles, explain tino rangatiratanga and the status of water as a taonga, or deal with 'iwi rights and interests more broadly'.<sup>369</sup> The Ministry noted the submissions about the need for the Crown and the ILG to 'develop options to recognise the full range of iwi rights and interests' and the need for the Crown to establish a process and timeframes for it.<sup>370</sup> Officials did not address the question of a process and timeframe. Nor was co-management referred to in the Ministry's report. For the meantime, it relied on the Crown's proposed RMA reforms (see section 3.6) in response to these submissions:

Further work is likely to be required to satisfactorily address the issue of iwi rights and interests. The Government outlined a suite of proposals in the document Resource Management Summary of Reform Proposals 2013. The wider package of reforms will provide greater certainty over the role of iwi and hapū in the planning system, and incentivise early engagement. Many of these reforms are outside the scope of the current changes to the NPS-FM but will contribute to the overall approach to iwi rights and interests.<sup>371</sup>

In addition, the Ministry did not recommend any changes to the existing text of objective D1 and its associated policies, which (it was said) would 'continue to support and clarify the Treaty obligations of regional councils under the RMA'.<sup>372</sup> In officials' view, both the existing text and the proposed amendments to the NPS would address Māori values and provide for 'the involvement of iwi and hapū in the overall management of fresh water', which was key to meeting the Crown's obligations under the Treaty.<sup>373</sup>

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369. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 21, 78

370. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 21

371. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 21

372. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 78

373. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 78

### 3.7.4.3.2 OUTCOME

As noted earlier, the Minister accepted the Ministry's advice and recommendations. No change was made to the Treaty reference or to the objectives and policies under D1. Nor was there any mention in the Minister's report of a process or timeframe for recognising and providing for Māori rights and interests in water more broadly. The latter point comes as no surprise, as a report on changes to the NPS-FM proposals would not likely be the vehicle for such an announcement. The Crown later committed to a process and timeframe in March 2015, as we discuss further in the next chapter.

### 3.7.4.4 *The need for resources to improve capacity and capability*

#### 3.7.4.4.1 THE MINISTRY'S ADVICE AND RECOMMENDATIONS

Ministry officials did not specifically note the question of resources for iwi capacity and capability, as raised by Māori. They did, however, comment on the issue of costs involved in implementing the NPS, and advised that costs could not be dealt with in a national policy statement.<sup>374</sup>

#### 3.7.4.4.2 OUTCOME

There was no mention of these matters in the Minister's report or the NPS-FM 2014.

### 3.7.4.5 *Swimming and mahinga kai*

#### 3.7.4.5.1 THE MINISTRY'S ADVICE AND RECOMMENDATIONS

The Ministry noted that the majority of 'iwi groups', along with many other submitters, were opposed to setting the compulsory value for human health at the level of 'secondary recreation'.<sup>375</sup> The 'most common request in submissions was for the compulsory value to be set at a level that would allow water to be suitable for swimming, with many also asking for fishing, food gathering and some for drinking water quality as a compulsory value'.<sup>376</sup> Officials, however, advised against the sheer difficulty of inserting this as a compulsory value in the NPS-FM. They argued instead that the proposed text should remain as it was, or there should be a joint human health value with a range of activities from low to high contact (with councils setting the level as appropriate for their communities).<sup>377</sup> The Ministry also recommended against making 'mahinga kai' a compulsory value in its own right.<sup>378</sup>

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374. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 59

375. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 30–31

376. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 31

377. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 31–33

378. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 67

**3.7.4.5.2 OUTCOME**

The Minister decided to combine the two values for human health (recreation) as a single compulsory value. Secondary contact (wading or boating) became the minimum standard that must be met, and therefore remained compulsory. Councils could choose to set swimmability as an objective if they wished.<sup>379</sup> This revised value in the NOF was entitled ‘Te Hauora o te Tangata / the health and mauri of the people’.<sup>380</sup>

**3.7.4.6 Monitoring****3.7.4.6.1 THE MINISTRY’S ADVICE AND RECOMMENDATIONS**

Officials characterised the Māori submissions on monitoring as: ‘Submissions from Iwi/Māori stated that monitoring plans should include a requirement to monitor against tāngata whenua values.’<sup>381</sup> In the Ministry’s view, the NOF would result in objectives based on Māori values, and the existing proposals for monitoring against those objectives would suffice without any changes.<sup>382</sup> There was no discussion of cultural health indicators or the involvement of kaitiaki in monitoring.

**3.7.4.6.2 OUTCOME**

The Minister accepted this recommendation. It was not discussed specifically in the Minister’s report.

**3.7.4.7 Sections 6–8 of the RMA**

The Ministry’s report assessed the proposed amendments against the statutory guidelines for RMA decision makers. As noted earlier, section 6(e) requires decision makers to recognise and provide for the ‘relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga’. Officials considered that the inclusion of Te Mana o te Wai, and of Māori values in the NOF, would strengthen the ability of RMA decision makers to give effect to section 6(e):

The proposed amendments support the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. The proposed amendments to the NPS-FM incorporate tāngata whenua values in the national values in Appendix 1. The proposed amendments require councils and communities to consider these values when setting objectives and limits for fresh water. National bottom lines will contribute to tāngata whenua values and freshwater

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379. New Zealand Government, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment’s Decisions*, pp 7, 10; New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 20

380. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 20

381. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 58

382. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 58

objectives may also be set to provide for specific values of importance to tāngata whenua.<sup>383</sup>

In respect of section 7(a) of the RMA (kaitiakitanga), officials advised the Minister that the proposed NOF would require councils to consider 'mahinga kai' and 'wai tapu', with associated attributes, when deciding which objectives to set for freshwater bodies. In addition, the existing text of objective D1 (and policies) would provide for:

the involvement of iwi and hapū and ensure tangata whenua values and interests are identified and reflected in the management of, and decision-making for, fresh water (contributing to [section 7(a)]).<sup>384</sup>

With regard to section 8 (taking account of Treaty principles), the Ministry repeated the points about tangata whenua values in the NPS-FM, and the 'involvement of iwi and hapū in the overall management of fresh water'.<sup>385</sup>

### 3.8 CONCLUSIONS AND FINDINGS

#### 3.8.1 The Crown's commitment to address Māori rights and interests

During the period covered by this chapter, the Crown repeatedly stated its intention to address Māori rights and interests in fresh water. This undertaking was stated in Cabinet papers (some of which were published), policy documents, consultation documents, and the Deputy Prime Minister's evidence to the Supreme Court in *Mighty River Power* in 2012. In our view, the Treaty principles required the Crown to act on its knowledge that Māori rights and interests were *not* adequately provided for, and urgent action was required to address that matter in partnership with Māori.

The issue in this chapter, therefore, is: what did the Crown do (or omit to do) in respect of its stated intention to address Māori rights and interests in fresh water?

#### 3.8.2 Collaboration and partnership

From 2009–14, the Crown collaborated with the Freshwater ILG and the LAWf on the development of reform options. It also put out a number of proposals for wider consultation with Māori and the general public in 2013, partly as a result of the collaboration and partly as a result of officials' research and policy work. The Crown did not accept all the LAWf's thinking and recommendations, nor did it reach fully agreed positions with the ILG. Nonetheless, our view is that the joint work of officials and the IAG, the work of the IAG with other stakeholders in the LAWf, and

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383. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 77

384. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 77

385. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 78

the high-level meetings between Ministers and the ILG, all contributed to a degree of Crown–Māori cooperation in the development of freshwater reforms. We hesitate to characterise this as a partnership model in this period, because there was no co-design of the version of the NPS-FM that was issued in 2011, and only limited co-design of the 2014 version. The real co-design phase came in 2015–17 (dealt with in the next chapter). The result was a very limited treatment of Māori rights and interests in the first six years of the Crown's freshwater reform programme.

### **3.8.3 The reform option chosen in this period**

#### **3.8.3.1 *The chosen option***

In respect of its commitment to address Māori rights and interests, the reforms which the Crown completed in this period were focused on a single matter: an attempt to ensure that Māori values were better reflected in freshwater management, especially in regional policy statements and plans. The mechanism for this was the NPS-FM.

#### **3.8.3.2 *Section D of the NPS-FM***

The first major reform in this respect was the national direction given to councils by section D of the NPS-FM. In 2011, the Crown made some crucial decisions about the content and extent of section D which have not been altered since. Section D remained untouched in the amendments of 2014 and 2017.

As we discussed in section 3.4, the board of inquiry's consultation revealed that the Māori provisions of the proposed NPS-FM fell well short of what Māori saw as their Treaty rights in freshwater management. Both the IAG and the Māori submitters called for a governance and decision-making role for Māori. The final text of Objective D1, however, directed councils to provide for Māori 'involvement', and to ensure that their 'values and interests' were 'reflected and identified' in, freshwater management and decision-making in freshwater planning. Policy D1 required councils to 'take reasonable steps' to 'involve iwi and hapū' in freshwater management, work with them to identify their values and interests, and reflect those values and interests in freshwater management and decision-making.

The key words here were 'reasonable steps', 'involve', and 'identify and reflect'. The Crown argued in our inquiry that the use of this language amounted to a significant requirement: councils had to do more than have regard to Māori values and interests, they had to ensure that those values and interests were 'transparently reflected' in their decisions.<sup>386</sup> Crown counsel also argued that the Minister did not want to specify a particular way or mechanism for the 'involvement' of Māori in the interests of 'flexibility', because councils already had statutory options available to them such as Joint Management Agreements.<sup>387</sup>

The first point to note is that the Minister did not accept the board's recommendation that councils would have to 'recognise and provide for' Māori values and interests in freshwater management and in decisions about plans. The wording

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386. Crown counsel, closing submissions (paper 3.3.46), p 22

387. Crown counsel, closing submissions (paper 3.3.46), pp 35–36

'recognise and provide for' is the most powerful requirement in the RMA, and the Crown did not want to use it because it had a 'specific legal interpretation not intended by the policy'.<sup>388</sup> In our view, the Crown clearly preferred the alternative language 'identify and reflect' because it was a less stringent requirement for councils. It gave a comparatively lesser degree of protection for Māori interests.

The second point is the use of the word 'involve' without specifying a particular form or level of involvement. The Minister explained in 2011 why the Crown did this:

Reference to involving tāngata whenua in freshwater 'decision-making' generally has been removed. The lack of specificity on the level of decision-making is seen as a potential risk in interpretation. Freshwater management includes decision-making. The level of decision-making can be decided at a regional level between councils and iwi/hapū. Councils will retain the ability to use existing tools under the RMA, such as joint management agreements, as they wish. Requiring decision-making at all levels nationally would impact on the resources of both regions and iwi/hapū.<sup>389</sup>

It was certainly correct that councils would retain the ability to use the governance and co-management mechanisms in the RMA, but they had almost entirely failed to exercise that ability so far. As we set out in chapter 2, there have been no section 33 transfers of authority and only two section 36B joint management agreements (outside of Treaty settlements). The Wai 262 Tribunal recommended that the Crown provide national direction to councils to actively promote and use section 33 and section 36B by including policies to do so in their plans.<sup>390</sup> The Crown chose not to do this in promulgating and amending the NPS-FM.

The effect of the Crown's decisions about section D was summarised as follows by the relevant Cabinet paper in 2011:

The NPS makes it clear that involvement of iwi and hapū is important in plan making. The related policies do no more or less than what is already provided for in the RMA. Councils will retain the ability to utilise existing tools under the RMA, such as joint management agreements, as they wish. *The real benefit is clarifying that tāngata whenua values and interests should be identified by, or with, iwi and hapū and not just by councils themselves.* [Emphasis added.]<sup>391</sup>

Section D's requirement that councils work *with* iwi and hapū to identify their values was an important one. But overall this was a very disappointing outcome in

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388. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry's Recommendations and Minister for the Environment's Decision*, p 5

389. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry's Recommendations and Minister for the Environment's Decision*, p 6

390. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 282

391. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 7

## 3.8.3.3

terms of the Crown's stated intention to address Māori rights and interests in fresh water. The section D requirements of the NPS-FM have not changed in any of the subsequent reforms.

Section D is an inadequate mechanism for ensuring the Māori 'involvement' in freshwater decision-making required by the Treaty principle of partnership. We find that it is not Treaty compliant and Māori have been prejudiced in their exercise of tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga.

It follows that the NPS-FM will not be Treaty compliant until section D is reformed in such a way that it provides more effectively for the tino rangatiratanga of iwi and hapū. This requires, at the minimum, a national direction for councils to use partnership mechanisms in plan-making and in freshwater management more generally.

**3.8.3.3 Te Mana o te Wai**

In section 3.7, we discussed the Crown's attempt to provide greater direction on how Māori values should be reflected in freshwater plan-making. This was not done by providing more specific direction on how Māori should be 'involved' in freshwater management. Instead, the ILG worked with the Crown to insert a new, overarching objective in the NPS-FM for councils to uphold: Te Mana o te Wai. As Sir Mark Solomon and Donna Flavell explained:

[U]pholding Te Mana o Te Wai acknowledges and protects the mauri of the water, and supports Te Hauora o Te Taiao (health of the environment), Te Hauora o Te Wai (health of the waterbody) and Te Hauora o Te Tangata (the health of the people). The recognition of Te Mana o Te Wai through the NPS-FM is intended to establish a framework which ensures that the health and wellbeing of freshwater bodies is at the forefront of all discussions and decisions on freshwater values, objectives and limits.<sup>392</sup>

The ILG sought to integrate Te Mana o te Wai in all parts of the NPS-FM by inserting an overarching purpose statement, a new objective A1(c) in section A (the 'Water Quality' section), and links to the national values of the NOF in appendix 1.

The Crown, however, was only prepared to agree to a very disjointed and watered-down version of Te Mana o te Wai in 2014. The overarching statement was entitled 'National significance of fresh water and Te Mana o te Wai'. It was inserted before the body of the NPS-FM (and therefore had only the same weight as a second preamble). The statement was so minimal in its content that no council could have relied on it in the task of identifying and reflecting Māori values in their decisions. The full text of the statement is quoted in section 3.7.4. It stated that the NPS-FM was 'about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai'. It then stated that a range of 'community and tāngata whenua values', including the national values in appendix 1,

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392. Solomon and Flavell, brief of evidence (doc D85), p 13



may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole. The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.<sup>393</sup>

As we discussed in section 3.7.4, there was no definition of Te Mana o te Wai or any explanation of it or how councils might provide for it. The preamble contained the only other mention of Te Mana o te Wai, noting that 'freshwater objectives for a range of tāngata whenua values are intended to recognise Te Mana o te Wai'.<sup>394</sup> The ILG's proposed Objective A1(c), which would have provided a place for Te Mana o te Wai in the body of the NPS-FM, was rejected by the Crown. The many submissions from Māori seeking to strengthen and integrate the Te Mana o te Wai requirements in the NPS-FM were also rejected.

Appendix 1 did use the titles 'Te Hauora o te Wai', 'Te Hauora o te Tāngata', and 'Te Hauora o te Taiao' for three of the NOF's national values. But the text of those values did not necessarily identify Māori values or correspond to the titles, nor was there any explanation that these titles were connected to te Mana o te Wai.

We conclude that the Crown's attempt to introduce Te Mana o te Wai into the NPS-FM in 2014 was weak and ineffective. It did not enhance the Crown's objective that Māori values would be better reflected in freshwater management and plan-making.

We make no Treaty finding, however, because the 2014 version of the NPS-FM did not represent the Crown's final decision on this issue. In 2015–17, there was a further drive to reform the NPS-FM, and to enhance the role and effectiveness of Te Mana o te Wai as an overarching objective in freshwater management.

### **3.8.4 RMA reform: 'Effective and meaningful iwi/Māori participation'**

As we discussed in section 3.6, the Crown conducted a major consultation initiative on freshwater reforms in 2013 – the first since 2005. The Crown's reform proposals were released in two inter-related documents: a consultation document entitled *Improving our resource management system*; and a white paper entitled *Freshwater reform 2013 and beyond*. In these papers, the Crown renewed its commitment to address Māori rights and interests, and acknowledged that there was a problem with 'effective and meaningful iwi/Māori participation' in freshwater management (and resource management more generally). In *Freshwater reform 2013 and beyond*, the Crown stated:

Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners.

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393. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 6

394. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 4

As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes.<sup>395</sup>

The Crown proposed to amend the RMA to, among other things:

- ▶ create a new mechanism for iwi input at the plan-making stage, called iwi participation arrangements, which would have an advisory and recommendatory role – this was also intended to improve RMA efficiency overall because ‘if iwi/Māori interests and values were to be considered at the right stages of resource management planning processes, solutions could be sought upfront’;<sup>396</sup>
- ▶ to remove the statutory barriers for the under-used sections 33 and 36B to ‘facilitate greater uptake of these under-used tools’;<sup>397</sup>
- ▶ to make iwi management plans more effective; and
- ▶ to introduce a new stakeholder-led planning process.

The Crown’s decisions on these matters were initial decisions in the sense that an RMA Bill still needed to be drafted and passed through Parliament, but some of the Crown’s decisions to omit certain matters proved to be long-lasting and we make findings about those decisions.

We note that the ‘iwi/Māori participation’ issue in these documents was in reality focused on more effective reflection of Māori values in the plan-making stage, even if some of the language used in the documents had been broader in scope. This point is reflected in the Crown’s decisions. The need for reform was described more narrowly than it had been in *Freshwater reform 2013 and beyond*:

There are many examples of iwi participating successfully in resource management processes. However, engagement is inconsistent across the country and in many areas Māori values are not always effectively recognised in resource management processes, or the decisions that come out of those processes.

In a number of areas there appears to have been differing expectations about the role of iwi in these processes and this has led to uncertainty, costs, and delays while matters are debated in the Courts. Some iwi have also looked to Treaty of Waitangi settlements to ensure that their interests are considered.<sup>398</sup>

The Crown’s decision in 2013 was to establish ‘iwi participation arrangements’ that would create an effective working relationship between councils and iwi, focused on plan-making. Clearly, this was intended to complement section D of the NPS-FM by providing a mechanism for Māori to be ‘involve[d]’ in

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395. New Zealand Government, *Freshwater reform 2013 and beyond*, p 19 (Brunt, papers in support of brief of evidence (doc D89(a)), p 615)

396. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 66

397. Ministry for the Environment, *Improving our resource management system: a discussion document*, p 67

398. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013*, pp 5–6

plan-making. We make no findings about this here because the Crown pursued this reform further in its 2015 Resource Management Bill, resulting eventually in Mana Whakahono a Rohe arrangements (see chapter 4).

Importantly, the Crown decided not to make any reforms in respect of section 33 transfers, joint management agreements, and iwi management plans. We have already described in chapter 2 how urgently reforms were needed on these parts of the RMA to remove statutory barriers to their adoption, and to make them more genuinely available to iwi and councils. The Wai 262 Tribunal had recommended significant reforms in its 2011 report. The Crown decided, however, to limit its enhanced 'iwi/Māori participation' to a mechanism for giving advice to councils on RMA plans. The role for Māori was to be an 'advisory and recommendation role'.<sup>399</sup>

The Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to actually be used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was very serious.

It is particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown has put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We find that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective is a breach of Treaty principles. We return to this point in chapter 4, when we consider the 'iwi participation arrangements' that eventually came out of the Resource Legislation Amendment Act in 2017.

In our view, the Treaty requires a degree of co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership. We agree with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring/enforcing water quality requirements, and thereby protecting the mauri of water bodies'.<sup>400</sup>

### 3.8.5 The slow pace of reform

As we discuss further in chapter 5, the partial introduction of the NOF in 2014 was a significant step in the Crown's freshwater reform programme. But the provision for Māori rights and interests in the NPS-FM was still limited. The claimants and the ILG have both expressed great concern at the very slow and selective nature of the reforms. We agree that progress has been slow and piecemeal, especially given

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399. New Zealand Government, *Freshwater reform 2013 and beyond*, p 26 (Brunt, papers in support of brief of evidence (doc D89(a)), p 622)

400. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

3.8.5

the urgent nature of the need to reform freshwater management and to provide for Māori rights and interests in a Treaty-consistent manner. Attempts at reform began in 2003. By 2014, the Crown had issued a national policy statement that did not provide for the exercise of tino rangatiratanga in freshwater decision-making. Nor did it yet provide effectively for the exercise of kaitiakitanga. We discuss the further reforms in the following chapters.

## CHAPTER 4

**'NEXT STEPS' FOR FRESH WATER****4.1 INTRODUCTION**

In this chapter, we consider the ways in which the Crown attempted to address Māori rights and interests in fresh water during the period 2014–17. The Crown's freshwater reforms programme continued to be led by a National Government during this period. The Government's third term in office resulted in major progress in its water reforms. In 2017, the Crown issued a revised version of the National Policy Statement for Freshwater Management (NPS-FM), which very significantly expanded upon the brief mention of Te Mana o te Wai in 2014. In the same year, the Government was finally able to get a revised version of its 2013 RMA reforms enacted (see the previous chapter). The Bill was introduced in 2015 and passed into law in 2017 with the title of the Resource Legislation Amendment Act. Most importantly for our purposes, this Act introduced a new mechanism for arranging the relationships between Māori tribes and regional councils. This mechanism was called the Mana Whakahono a Rohe (iwi participation) arrangements. Both the Act and the NPS-FM 2014 as revised in 2017 are significant issues for this chapter.

In terms of process, we also examine the ways in which the Crown engaged with Māori in the design and enactment of these reforms. The Crown's process remained essentially the same as that discussed in the previous chapter, although it was much more intensive during this period. Iwi Advisory Group (IAG) members continued to influence the recommendations of the Land and Water Forum (LAWF) through their representations to the other 'stakeholders' on that body. Government officials and political advisers engaged with the IAG in the 'co-design' of reform options and proposals. Ministers engaged with the Iwi Leaders Group (ILG) and then made the final decisions based on a set of parameters, including that no one owns water. This form of engagement was a major exercise which began with research, hui, and other information gathering in 2014–15, and then the intensive design of reform options and proposals for public consultation in the *Next Steps for Fresh Water* document, which gives its name to this chapter. *Next Steps* was released in February 2016. Although originally intended to be a joint document, the ILG did not support its contents sufficiently to agree to endorse it officially. During this period of 'co-design', the Tribunal's stage 2 inquiry was suspended so that the reform proposals could be developed and consulted upon by the Crown and the ILG.

The *Next Steps* consultation document proposed a number of reforms under the heading 'Iwi rights and interests in fresh water'. Those reforms focused on:

- ▶ giving Māori values more influence in freshwater management through Te Mana o te Wai; and
- ▶ increasing Māori involvement in freshwater decision-making through the Mana Whakahono a Rohe arrangements.

The Crown also proposed that it would provide a vehicle for specific recognition of iwi and hapū relationships with particular water bodies. The reform paths for these options were the amendment of the NPS-FM and the RMA. In addition, the Crown proposed reforms that would increase the resourcing available for Māori participation in freshwater management, and which would give a much-needed boost to water infrastructure on marae.

The Crown and the ILG, however, were unable to make sufficient progress on the vexed issue of allocation rights to include any allocation reform options in *Next Steps*. Currently, the right to use fresh water is allocated through a resource consent granted by a regional council or unitary authority. The basis on which councils allocate water to applicants is on a first in, first served system. Although fresh water is a relatively abundant resource in New Zealand, some catchments are now over-allocated or almost fully allocated. One of the fundamental thrusts in freshwater management reforms, therefore, is that a new system is required for determining how water is allocated. On the issue of allocation as a way to address Māori rights and interests, the Crown preferred an option that would increase the availability of water to develop Māori land that is not in production or is under-developed. The ILG, on the other hand, considered this insufficient and, at the least, wanted an allocation of water to iwi above and beyond any focus on Māori land development. The *Next Steps* document advised:

The Government is still finalising the package of allocation policy proposals that will fully address the range of interests of those wishing to access freshwater resources, including iwi/hapū, as further work is required to develop options that the Government and stakeholders can support.<sup>1</sup>

The Crown then established an Allocation Work Programme, which operated from mid-2016 to late 2017. This programme is discussed in chapter 6.

At the same time as the Allocation Work Programme began to operate, the Crown was making decisions on the *Next Step* reform proposals following consultation with Māori and the public. Aspects of the reforms were incorporated into the 2017 version of the NPS-FM after a further round of consultation (entitled the *Clean Water* consultation) and into the Resource Legislation Amendment Bill. We discuss these matters in some detail in this chapter, as the culmination of the previous work by the Crown and the ILG, and we assess whether the completed reforms and the reform programme have been consistent with the principles of the Treaty of Waitangi.

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1. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 22

## 4.2 THE PARTIES' ARGUMENTS

In this section of our chapter, we provide a brief introduction to the parties' arguments.

### 4.2.1 The 'Next Steps for Fresh Water' process

#### 4.2.1.1 *The case for the claimants and interested parties*

The claimants and a number of interested parties argued that they were wrongly excluded from the Crown's joint policy development with the ILG.<sup>2</sup> Claimant counsel submitted: '[I]t beggars belief that it has taken the Crown until 2018 to include NZMC in any policy formation engagement.'<sup>3</sup> While some accepted that the Crown's engagement with the ILG was not necessarily 'wrong or inappropriate', they nonetheless argued that it excluded significant Māori parties or sectors.<sup>4</sup> Counsel for the sixth claimants, owners in Lake Omapere, submitted that the Crown is required to obtain the 'free, full and informed consent' of Māori for reforms relating to their water taonga.<sup>5</sup> Further, in the submission of some interested parties, much valuable work was done by the ILG but the Crown failed to include many of the ILG's most important measures in its freshwater reforms.<sup>6</sup> Indeed, claimant counsel submitted, the ILG did not support the *Next Steps* consultation document as reflective of its views.<sup>7</sup>

The NZMC was also critical of other aspects of the way in which the Crown engaged with the ILG (and Māori more broadly) during the policy formation process. In the claimants' view, the Crown failed to meet its Treaty partnership obligations when it decided unilaterally on the 'parameters and mechanics of engagement'. The result was a very slow, piecemeal engagement on topics selected by the Crown, divorcing those topics from others (such as proprietary rights). The claimants also criticised the Crown's imposition of 'bottom lines', and its decision to retain 'ultimate decision-making power' during the policy formation. These decisions were not made in partnership and did not reflect a Treaty partnership.<sup>8</sup> Counsel for the NZMC submitted: 'Māori have not been accorded the role of an equal and meaningful Te Tiriti partner to the Crown in the reform process.'<sup>9</sup>

In particular, the NZMC argued that two of the Crown's bottom lines for engagement – 'no one owns water' and 'no generic share of water resources to Māori'

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2. Claimant counsel (NZMC), closing submissions, 26 October 2018 (paper 3.3.33), pp 7–8; claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), pp 24–27

3. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 7

4. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 8, 10. See also claimant counsel (6th claimants), amended closing submissions (paper 3.3.40), p 11

5. Claimant counsel (sixth claimants), amended closing submissions (paper 3.3.40), pp 11–12

6. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 111–115, 126–128, 141–143

7. Claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), p 10

8. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 10–13, 26–27; claimant counsel (6th claimants), amended closing submissions (paper 3.3.40), p 12; claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), pp 27–30; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 118–121

9. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 27

– were inconsistent with Treaty principles.<sup>10</sup> The Tribunal, we were told, has already found that Māori have proprietary rights in water, so the Crown's refusal to accept this finding has caused continuing prejudice.<sup>11</sup> The Wai 2601 claimants argued that the Crown's position during the reforms – 'no one owns water' – was contrary to the Treaty, the common law of New Zealand, and this Tribunal's stage one report.<sup>12</sup>

The Freshwater ILG's submission was that the model of Crown–ILG/IAG engagement was 'sound', and that it had some successes in terms of reform policies. But, in the ILG's view, the 'politicisation' of the process meant that priorities changed or matters could not be discussed because of the Crown's bottom lines. This slowed and compartmentalised the reforms, leaving the difficult issue of allocation to near the end.<sup>13</sup> Further, the ILG submitted that the Crown–ILG engagement was never intended to be exclusive, and any reform options had to be 'brought back to the motu for discussion'.<sup>14</sup> Nonetheless, the ILG's view was that the engagement model was a good one and could be used for engagement with other Crown departments.<sup>15</sup>

#### 4.2.1.2 *The case for the Crown*

In the Crown's view, the 'Next Steps' process (and the reform programme more broadly) has been a novel, innovative, and collaborative approach to partnership.<sup>16</sup> The ILG co-designed reform options with the Crown at every step of the process, after which the Crown consulted the public and the Māori community more generally on each iteration of the proposed reforms.<sup>17</sup> For future reforms, the Crown said that it intends to work collaboratively with its new group of advisors, Kahui Wai Māori,<sup>18</sup> to develop further reform options for wider consultation.<sup>19</sup>

Although the purpose of Kahui Wai Māori is for the Crown to engage with a 'broad range of Māori expertise and perspectives',<sup>20</sup> the Crown denied that there had been any Treaty impropriety in its earlier engagement with the ILG alone. In the Crown's submission, it did not exclude the NZMC from 'all or any engagement', but rather chose to engage with the ILG on the initial development of policy. The

10. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 13

11. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p13; claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), 27–36

12. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 7, 56, 88–111

13. Counsel for the ILG, closing submissions (paper 3.3.41), pp 4–7

14. Counsel for the ILG, closing submissions (paper 3.3.41), p 5

15. Counsel for the ILG, closing submissions (paper 3.3.41), p 6

16. Crown counsel, closing submissions (paper 3.3.46), pp 8, 31–32, 39, 79–80, 91

17. Crown counsel, closing submissions (paper 3.3.46), pp 31–35, 37–45, 47, 49, 51–52, 79–80

18. The Kahui Wai Māori, or Māori Freshwater Forum, was established in August 2018. It is a body of Māori advisors appointed by the Crown to 'enable collaborative development and analysis of freshwater policy options for matters of particular relevance to Māori' (Cabinet paper, 'A new approach to the Crown/Māori Relationship for Freshwater', no date (2018) (Crown counsel, documents (doc F30), p 41).

19. Crown counsel, closing submissions (paper 3.3.46), p 52

20. Crown counsel, closing submissions (paper 3.3.46), p 52



ILG had approached the Crown seeking engagement on freshwater matters. It was appointed by the Iwi Chairs Forum, which included 74 iwi chairs and was in a position to engage broadly with Māori through hui in the policy design stage.<sup>21</sup> Crown counsel submitted: 'The Crown considered that in those circumstances – and for that stage of the process – focussed engagement with the ILG would be the most productive way forward.'<sup>22</sup>

In terms of the substance of engagement, the Crown denied that it set the parameters for discussion with the ILG, arguing instead that these were developed jointly. Crown counsel also submitted that the bottom lines 'did not prevent the Crown being open to engagement on broad issues of use, control and authority'.<sup>23</sup> The Crown and the ILG shared the objectives of increasing both 'political authority' and 'economic benefits' for Māori through the agreed 'Next Steps' reform proposals in 2016, which were:

- ▶ enable formal recognition of iwi/hapū relationships with particular waterbodies;
- ▶ enhance iwi/hapū participation at all levels of freshwater decision-making;
- ▶ build capacity and capability amongst iwi/hapū and councils, including resourcing;
- ▶ develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality;
- ▶ develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests; and
- ▶ address uncertainty of supply of potable water on marae and in papakāinga.<sup>24</sup>

Further, when the Crown and ILG were unable to reach agreement in 2016 on allocation and the issue of economic benefits, the issue was left out of the 'Next Steps' consultation process by agreement for further collaborative development.<sup>25</sup>

Finally, the Crown denied that its reform process had been too slow and fragmented.<sup>26</sup> Crown counsel submitted: 'It is unreasonable to simultaneously require speedy and totally comprehensive policy development, while also demanding deep and wide consultation.'<sup>27</sup> In the Crown's view, the important and difficult issues of freshwater management reform, in particular the issue of allocation, needed to be addressed in a 'measured, consultative and balanced way'. The Crown repeated its submission to the Supreme Court in 2012, that it would be counter-productive to rush the process, which could lead to inappropriate outcomes and lose the broad support necessary for 'sustainable change in this field'.<sup>28</sup>

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21. Crown counsel, closing submissions (paper 3.3.46), pp 76–77, 79–80

22. Crown counsel, closing submissions (paper 3.3.46), p 77

23. Crown counsel, closing submissions (paper 3.3.46), pp 38, 79–80

24. Crown counsel, closing submissions (paper 3.3.46), p 38

25. Crown counsel, closing submissions (paper 3.3.46), pp 40–41, 49, 80

26. Crown counsel, closing submissions (paper 3.3.46), pp 66–67

27. Crown counsel, closing submissions (paper 3.3.46), p 66

28. Crown counsel, closing submissions (paper 3.3.46), p 67

**4.2.2 The National Policy Statement for Freshwater Management (2017)****4.2.2.1 The case for the claimants and interested parties**

The NZMC was highly critical of the NPS-FM, arguing that the Crown was to be ‘applauded’ for the Te Mana o te Wai provisions, but that these provisions were ‘too little, too late’ and did not go ‘anywhere near far enough.’<sup>29</sup> Although strengthened in 2017, the obligation in the NPS-FM is only for councils to ‘consider and recognise’ Te Mana o te Wai in their regional plans, not to ‘recognise and provide for’ it – it thus does not have the same import and status as section 6 matters under the RMA.<sup>30</sup> Further, counsel submitted that the economic well-being objectives inserted in the NPS-FM by the Crown in 2017 may conflict with (and limit the effectiveness of) Te Mana o te Wai.<sup>31</sup> According to claimant counsel, under-resourcing will inhibit the ability of Māori to utilise the Te Mana o te Wai provisions in practice. The claimants were also very critical of the revised NPS-FM for not altering the first in, first served system of allocation (discussed further below).<sup>32</sup> Overall, the claimants argued that the NPS-FM failed to address water quality improvement in a meaningful way (an issue that will be addressed in chapter 5).<sup>33</sup>

In terms of RMA outcomes, counsel for interested parties argued that the definition of Te Mana o te Wai lacked clarity, which has resulted in regional councils either misunderstanding or ignoring it in practice. Māori groups in Northland, for example, argued that they had struggled to get their interests recognised and heard by councils. The Te Mana o te Wai provisions, they said, would not correct this problem without greater national direction and increased accountability for councils (to show that they are meeting their ‘Te Mana o te Wai obligations’).<sup>34</sup> Interested parties were also concerned at the long period of time allowed in the NPS-FM before councils have to set objectives (possibly well after 2030 if appeals are taken into account), and that there would be no sanctions from the Crown if a council failed to meet its NPS-FM objectives.<sup>35</sup>

Some interested parties feared that, although a definition of Te Mana o te Wai had been provided in the 2017 version, it still lacked clarity not only in meaning but also in terms of how it would be implemented. In their view, inclusion of the concept in freshwater management amounts to ‘lip service.’<sup>36</sup> Those parties were equally critical of the Crown’s failure to amend section D of the NPS-FM, leaving

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29. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 16

30. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 16, 27; counsel for interested parties (Gilling), closing submissions (paper 3.3.35), p 15

31. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 16, 27; counsel for interested parties (Gilling), closing submissions (paper 3.3.35), p 15

32. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 16–17

33. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 27–28; counsel for interested parties (Gilling), closing submissions (paper 3.3.35), p 16; counsel for interested parties (Bennion), closing submissions (paper 3.3.34), pp 5–6

34. Counsel for interested parties (Stone and Leauga), closing submissions (paper 3.3.36), p 12

35. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 5; counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), p 37

36. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 112–113, 129

it up to councils to decide what 'reasonable steps' they should take to engage with Māori on NPS matters and what weight to give to Māori views.<sup>37</sup> Counsel submitted:

None of these amendments [in the NPS-FM] explicitly confer an obligation on local authorities to directly involve tangata whenua in the governance or decision-making process for policy or freshwater management. They acknowledge Māori, iwi and hapū values but the level of involvement of these groups remains unspecified. The policies are open to wide interpretation as to what 'reasonable steps' are, and they fail to make the participation of iwi or hapū in decision-making processes a mandatory requirement upon local authorities. Our clients have seen this kind of provisioning before and they are unmoved by it. Ultimately the reforms fail to bring the NPS-FM up to a standard where it gives effect to the Crown's Treaty obligations of active protection, good faith and partnership.<sup>38</sup>

Finally, the view of the Freshwater ILG was that the insertion of Te Mana o te Wai as an operative provision of the NPS-FM was a 'positive step forward'. But the ILG was opposed to other matters in the NPS, such as the insertion of 'economic considerations' in 2017. In the ILG's view, the positive steps it had achieved, such as the inclusion of Te Mana o te Wai in the national policy statement, were not sufficient to make the freshwater management framework Treaty compliant.<sup>39</sup>

#### 4.2.2.2 *The case for the Crown*

In the Crown's view, the NPS-FM as revised in 2017 provides the national direction called for by the Tribunal in its Wai 262 report, and does so in a Treaty-compliant manner.

First, the Crown did not accept that section D of the NPS-FM required amendment. Crown counsel agreed that objective D1 does not specify how councils were to 'involve' iwi in their decision-making. Nonetheless, the Crown relied on the Ministry's guidance document for councils on this point.<sup>40</sup> The Ministry's advice 'contemplates' a range of measures, including membership of 'plan hearing committees', 'consultation, joint management agreements, joint committees, and direct decision-making roles'.<sup>41</sup> The Crown also argued that the requirement in Policy D1 to 'reflect' Māori values and interests in freshwater decisions was a high one.<sup>42</sup> The Crown further submitted that its RMA reforms, especially the establishment

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37. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp110–111, 124–126

38. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p111

39. Counsel for the ILG, closing submissions (paper 3.3.41), pp 4, 10, 13–14

40. Crown counsel, closing submissions (paper 3.3.46), pp 21–22, 67–68. The Crown relied on Ministry for the Environment, *A Guide to the National Policy Statement for Freshwater Management 2014 (as amended in 2017)* at tab 32 of its supporting documents (paper 3.3.46(d)).

41. Crown counsel, closing submissions (paper 3.3.46), p 22

42. Crown counsel, closing submissions (paper 3.3.46), pp 21–22, 36, 67–68

of Mana Whakahono a Rohe arrangements, would provide a mechanism for section D to be implemented.<sup>43</sup>

Secondly, the Crown put great emphasis on Te Mana o te Wai in the 2017 version of the NPS-FM, especially the inclusion of this concept in the operative provisions through Objective AA1.<sup>44</sup> The Crown also denied that the new economic provisions in the 2017 version would detract from the primacy accorded Te Mana o te Wai.<sup>45</sup> Crown counsel submitted:

The claimants are incorrect that Te Mana o te Wai may be subordinate to economic values. The current NPS-FM has placed the concept of Te Mana o te Wai at the forefront of all planning and decision-making. Under Objective AA1, councils must consider and recognise Te Mana o te Wai when making decisions about fresh water. It is for Māori and local communities to define the content of Te Mana o te Wai as it applies to their waterways. Contrary to the claimants' submissions, the health of fresh water must come first in these discussions.

Professor Ruru has referred to this deliberate repositioning of Te Mana o te Wai as an example of how 'the RMA and associated policy, provides a legal base for Māori interests to be considered in making decisions about the use of water'. Indeed, Māori perspectives will be central to the process of operationalising Te Mana o te Wai.<sup>46</sup>

In the Crown's submission, the 'repositioned and strengthened version of Te Mana o te Wai' in 2017 would provide a strong platform for Māori to have their values and interests – including the health and mauri of waterways – 'placed at the forefront' of freshwater decision-making.<sup>47</sup> The Crown cited an ILG witness that the provision for Te Mana o te Wai at the centre of the NPS-FM provides recognition of the Treaty partnership and a very strong basis for Māori to 'advocate for their rights and interests at a regional level'.<sup>48</sup>

Finally, in terms of enforcement, the Crown submitted that the 'failure of councils to deliver on Objectives D1 and AA1 in their limit setting, planning or decision-making may lead to the invalidation of their plans and policies' in the courts. Crown counsel pointed to two cases in support of this submission.<sup>49</sup>

### 4.2.3 RMA reforms

#### 4.2.3.1 *The case for the claimants and interested parties*

The NZMC accepted that the Mana Whakahono a Rohe provisions, which were introduced to the RMA in 2017, are 'an improvement to the prior position', but argued that it is 'too early to tell what success hapū or iwi that seek to utilise

43. Crown counsel, closing submissions (paper 3.3.46), pp 26–27

44. Crown counsel, closing submissions (paper 3.3.46), pp 11, 23–24, 36–37, 50, 55–56, 67–70

45. Crown counsel, closing submissions (paper 3.3.46), pp 46, 68

46. Crown counsel, closing submissions (paper 3.3.46), p 68

47. Crown counsel, closing submissions (paper 3.3.46), pp 55, 70

48. Crown counsel, closing submissions (paper 3.3.46), p 50

49. Crown counsel, closing submissions (paper 3.3.46), p 70

these provisions will have.<sup>50</sup> In the claimants' view, those outcomes will be limited because the Crown has failed to address the 'legal and practical barriers' to transfers of power (section 33) and joint management agreements (section 36B). The failure to amend these sections, we were told, means that Treaty-compliant processes and outcomes will remain unattainable in practice for Māori.<sup>51</sup> In the absence of such amendments to section 33 transfers or JMAs, one counsel characterised Mana Whakahono a Rohe agreements as 'just another bureaucratic toothless paper tiger'.<sup>52</sup> In the claimants' view, co-management and co-governance arrangements are essential for Treaty compliance, and must include a leading role in policy development (nationally and locally) and powers in relation to consents.<sup>53</sup>

Also, the NZMC argued that Māori participation in Mana Whakahono a Rohe arrangements will continue to be 'constrained by the same resourcing problems that inhibit effective Māori participation in RMA processes more generally'.<sup>54</sup> In the claimants' submission, the Crown's RMA reforms simply failed to address the funding problems that pose a 'huge barrier' to the ability of Māori to exercise their 'statutory rights and responsibilities'.<sup>55</sup> The claimants also pointed to the Crown's failure to increase funding assistance for appeals to the Environment Court, given the lack of capacity and capability for Māori to take such appeals and the crucial importance of those appeals in RMA decision-making.<sup>56</sup>

Counsel for interested parties argued that the Crown's RMA reforms are not Treaty compliant because the recommendations of earlier Tribunal reports, such as the Wai 262 report, have still not been carried out. The Crown has 'made progress from previous legislation' but the RMA will not 'reach its full potential' unless the Crown provides for enhanced iwi management plans, 'improved mechanisms for delivering control to Māori', capacity building for Māori, and a requirement that decision makers must act consistently with the principles of the Treaty.<sup>57</sup> Claimant counsel proposed that section 5(1), which states that the 'purpose of this Act is to promote the sustainable management of natural and physical resources', should be amended to add: 'in conformity with the principles of the Treaty of Waitangi'.<sup>58</sup> After clarifying that sustainable management must conform with Treaty principles, claimant counsel suggested that section 8 should be amended to read: 'In achieving the purpose in s 5(1), all persons exercising functions and powers shall

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50. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 16, 27

51. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 15–16, 27; claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 86–88; counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 36–37

52. Claimant counsel (Wai 2601), closing submissions (paper 3.3.38), pp 86–88

53. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

54. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 15–16

55. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 27. See also counsel for interested parties (Gilling), closing submissions (paper 3.3.35), pp 15–16; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 104, 114–115.

56. Claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), pp 40–50

57. Counsel for interested parties (Sykes and Bartlett), closing submissions (paper 3.3.39), pp 20–22

58. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), p 2

recognise and provide for tikanga Māori and Mātauranga Māori'. In the NZMC's view, these amendments would satisfy the recommendations of the Ngawha and Central North Island Tribunals.<sup>59</sup>

The Freshwater ILG's position was that the new Mana Whakahono a Rohe arrangements were a 'positive step forward'. Nonetheless, the ILG considered that further reforms to address Māori rights and interests, especially the resourcing of new tools like Mana Whakahono a Rohe, were required before the freshwater management framework would be Treaty compliant.<sup>60</sup>

#### 4.2.3.2 *The case for the Crown*

In the Crown's submissions, its RMA reforms are Treaty compliant, although the reforms are not yet complete and more changes to the RMA will occur.

First, the Crown has provided national direction in its NPS-FM (as recommended in earlier Tribunal reports), and the 2017 amendments have 'put Te Mana o Te Wai at the centre of freshwater planning' (see above).<sup>61</sup> Secondly, the Crown's view is that sections 6–8 do not require amendment because the Supreme Court in the *King Salmon* case has clarified that Part 2 of the RMA works as an integrated whole with 'environmental protection at its core'. Māori values and interests, therefore, cannot be balanced out.<sup>62</sup> Thirdly, the Crown submitted that iwi management plans have 'proliferated' since 2012, and are proof of a 'parallel or dual planning system' in which those plans are a 'central method for Māori to influence the planning and decision-making' of Regional Councils.<sup>63</sup> The proliferation of iwi management plans, we were told, satisfies one of the Wai 262 Tribunal's concerns about the Treaty consistency of the RMA.<sup>64</sup>

Fourthly, the Crown argued that the claimants had not taken proper account of the effects of Treaty settlements in freshwater management. In particular, the Crown relied on the 'landmark' Whanganui River and Waikato River settlements.<sup>65</sup> Crown counsel submitted:

Through the combination of Treaty settlements and iwi and council initiatives, various types of co-governance and co-management mechanisms now cover major waterways throughout New Zealand. This is transforming the role of Māori in water management.<sup>66</sup>

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59. Claimant counsel (NZMC), outline of oral closing submissions (paper 3.3.33(b)), pp 1–2

60. Counsel for the ILG, closing submissions (paper 3.3.41), pp 4–5, 10, 13–14, 21

61. Crown counsel, closing submissions (paper 3.3.46), p 11

62. Crown counsel, closing submissions (paper 3.3.46), pp 11, 13–17

63. Crown counsel, closing submissions (paper 3.3.46), pp 3, 11, 25–26. The Crown relied here on a 2016 article in the *Australasian Journal of Environmental Management*: see Tab 33 of the Crown's supporting documents (paper 3.3.46(d)).

64. Crown counsel, closing submissions (paper 3.3.46), p 25

65. Crown counsel, closing submissions (paper 3.3.46), pp 11, 27–29, 60–62

66. Crown counsel, closing submissions (paper 3.3.46), p 11

In the Crown's view, this makes the under-utilisation of sections 33 (transfer of powers) and section 36B (joint management agreements) much less relevant. Further the Crown argued that the Mana Whakahono a Rohe provisions in 2017 will complement and extend the 'tapestry of co-governance and co-management arrangements for waterways across New Zealand'.<sup>67</sup> The new arrangements have created a statutory mechanism that will compel councils to reach a legally binding agreement with iwi as to how those iwi will be involved in RMA functions and decision-making.<sup>68</sup> Counsel submitted: 'This is expected to extend and deepen the types of co-management and co-governance already in place'.<sup>69</sup> The Crown argued that Mana Whakahono a Rohe arrangements could provide a 'pathway' for joint management agreements or section 33 transfers to occur, but cautioned that Māori in fact are unlikely to want full transfers of authority in any case.<sup>70</sup> In the Crown's submission, Mana Whakahono a Rohe simply 'overtook' any need to reform the arrangements for section 33 transfers, joint management agreements, and iwi management plans.<sup>71</sup>

Finally, on the issue of capacity and capability, the Crown acknowledged that one of the goals of its reform programme with the ILG was the building of 'capacity and capability among iwi/hapū and councils, including resourcing'.<sup>72</sup> The Crown also acknowledged that 'many hapū and iwi struggle to fund their participation in resource management processes'. The Crown 'recognises that participation is time consuming, and relies on technical expertise. Moreover, legal challenges are costly'.<sup>73</sup>

In the Crown's submission, it has assisted Māori and councils through guidance and training. Most of its funding assistance has gone into clean-up funds for degraded waterways, arguing that this reflected the real priority of Māori in respect of freshwater management. Otherwise, the Crown's view is that funding assistance for participation is the role of local councils, and that it has recommended councils to provide such funding.<sup>74</sup> Crown counsel also submitted that Mana Whakahono a Rohe arrangements may 'provide a further avenue for Māori to negotiate funding and resourcing for RMA functions'.<sup>75</sup>

Having provided a brief introduction to the parties' main arguments, we now proceed with our analysis of the evidence and submissions in the following sections.

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67. Crown counsel, closing submissions (paper 3.3.46), pp 54, 62–64

68. Crown counsel, closing submissions (paper 3.3.46), pp 29–30

69. Crown counsel, closing submissions (paper 3.3.46), p 11

70. Crown counsel, closing submissions (paper 3.3.46), pp 29, 57–58

71. Crown counsel, closing submissions (paper 3.3.46), pp 41–42

72. Crown counsel, closing submissions (paper 3.3.46), p 38

73. Crown counsel, closing submissions (paper 3.3.46), p 77

74. Crown counsel, closing submissions (paper 3.3.46), pp 77–78. This was a reference to the Ministry's guidance on the Quality Planning website, and to the local Government Act 2002 and schedule 1 of the RMA (both of which require councils to consider ways to foster the capacity of Māori to participate).

75. Crown counsel, closing submissions (paper 3.3.46), p 78

### 4.3 CO-DESIGN: THE CROWN AND ILG WORK TOGETHER TO ADDRESS MĀORI RIGHTS AND INTERESTS, 2014–16

#### 4.3.1 The Crown renews its public commitment to address Māori rights and interests in fresh water, July 2014

In July 2014, the Crown released *Delivering Freshwater Reform: A High Level Overview*.<sup>76</sup> This short pamphlet was intended to supplement the more technical information that had been released, and was aimed at updating the general public rather than ‘informed stakeholders’.<sup>77</sup> One of the Crown’s intentions was to ‘socialise with a wider audience that iwi rights and interests in fresh water need to be appropriately recognised’.<sup>78</sup> As part of the brief description of the reforms, therefore, the Crown stated in the pamphlet that when the reforms were completed, ‘iwi rights and interests in water [would] continue to be addressed’.<sup>79</sup> Some material about the role of iwi in collaborative processes, the role in decision-making given by some Treaty settlements, and the statement that ‘the Government continues working with iwi/Māori on rights and interests’, were all removed from the draft pamphlet.<sup>80</sup>

#### 4.3.2 The Crown’s report to the Waitangi Tribunal, September 2014

In September 2014, the Crown filed a report in the Tribunal containing information about the freshwater reform programme. We have cited this report in the previous chapter, as it set out the Crown’s reliance on the proposed RMA reforms (2013), freshwater-specific reforms (*Freshwater Reform 2013 and Beyond*), and the introduction of ‘te mana o te wai’ and the national objectives framework in the NPS-FM 2014. In part, the Crown relied on these reforms to say that it was providing for Māori rights and interests in fresh water and freshwater management.<sup>81</sup>

In its 2014 report, the Crown explicitly acknowledged that ‘iwi/hapū’ have rights and interests in water which had not been recognised or provided for by the Crown, and argued that those rights and interests must be balanced against other interests in freshwater management:

In developing a contemporary system for freshwater management, it is incumbent on the Crown to take account of all interests and consider how any rights and interests of iwi/hapū that have not been addressed can be integrated into a system of often

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76. New Zealand Government, *Delivering Freshwater Reform: a high level overview* (Wellington: Ministry for the Environment, 2014) (paper 3.1.234(a)(iii))

77. Draft Cabinet paper, ‘Release of the Delivering Freshwater Reform document’, no date (May or June 2014) (Crown counsel, sensitive discovery documents (doc D92), pp 702–703)

78. Draft Cabinet paper, ‘Release of the Delivering Freshwater Reform document’, no date (May or June 2014) (Crown counsel, sensitive discovery documents (doc D92), p 703)

79. New Zealand Government, *Delivering Freshwater Reform: a high level overview*, p[7] (paper 3.1.234(a)(iii))

80. See ‘Delivering Freshwater Reform’, draft, no date, attachment to draft Cabinet paper, ‘Release of the Delivering Freshwater Reform document’, no date (May or June 2014) (Crown counsel, sensitive discovery documents (doc D92), p 707–712)

81. Crown counsel, Crown report on the freshwater reform programme, 9 September 2014 (paper 3.1.234(a))



overlapping and competing interests. In essence, the Crown must undertake a balancing exercise in which the range of rights and interests are weighed in order to develop a framework that best meets the needs of all stakeholders. That requires the Crown to undertake a process of careful, informed, and deliberate reform, which necessarily will take time.

The Crown acknowledges that iwi/hapū have rights and interests in freshwater resources and has consistently expressed that position throughout this inquiry, including in Stage One. The Crown has also acknowledged that, generally, ongoing work was required to consider how any rights and interests might be recognised and provided for in the context of the complexities of freshwater management. The development of options for Treaty-consistent frameworks to provide for the recognition of iwi/hapū rights and interests in water is thus a key focus for the Crown.<sup>82</sup>

The Crown also stated that there were 'many different elements to iwi/hapū rights and interests in fresh water', and 'no single accepted view among iwi/hapū as to the exact nature and relative importance of the different rights and interests asserted'.<sup>83</sup> Nonetheless, the Deputy Prime Minister, Bill English, had announced the Crown's 'commitment to recognising in appropriate ways remaining iwi and hapū rights and interests in water and geothermal resources', over and above the work the Crown had already carried out so far. This was conceived as a complex task requiring considerable time in order to 'develop appropriate outcomes that are workable and sustainable, and enjoy broad support'.<sup>84</sup>

The Crown was also guided by the ILG's Ngā Mātāpono framework, discussed in the previous chapter:

Further guiding the engagement between the Crown and the ILG has been the Nga Matapono ki te Wai framework, which the ILG presented to Ministers in 2012. Nga Matapono ki te Wai reaffirms that iwi/hapū rights and interests in fresh water are multifaceted and cover the full spectrum of freshwater issues, including use, management, and protection. The framework continues to provide Ministers and the ILG with a strong platform for their ongoing engagement.<sup>85</sup>

To date, the Crown considered that it had 'taken steps to meet its ongoing commitment to address iwi/hapū rights and interests in fresh water through announcing its intention to strengthen iwi and hapū participation in freshwater planning processes through amendments to the RMA.' The RMA reforms, which by September 2014 were on hold until after the next election, would include provisions requiring councils to

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82. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 5

83. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 5

84. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), pp 5–6

85. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 9

invite iwi/hapū to enter into an arrangement that details how iwi/hapū and councils will work together through the regional planning process, establish a collaborative planning process to be used as an alternative to the RMA Schedule 1 process, and require councils to ensure that iwi/Māori views are explicitly considered before decisions on fresh water are made, no matter whether councils choose the collaborative option or the existing RMA Schedule 1 process.<sup>86</sup>

This reform was seen by the Crown as a way to ‘partly address iwi/hapū rights and interests in fresh water’.<sup>87</sup> In addition, the NOF and the use of ‘te mana o te wai’ in the NPS-FM 2014 should also strengthen the inclusion of Māori values and interests in freshwater management decisions.<sup>88</sup>

The next stage of the ‘fresh start for fresh water’ reform programme was tranche 3 (see the previous chapter for a description of the first and second tranches). The third tranche was supposed to address allocation of water and economic issues, and would include work to recognise and provide for Māori rights and interests in fresh water as an integral part of it. The basis for tranche 3 would be an information-gathering phase in 2014–15, followed by substantive reforms. For Māori rights and interests, the key component of the information-gathering was planned as a cooperative process involving the Crown, the ILG, and the IAG.<sup>89</sup> We address this new information-gathering phase for tranche 3 next.

### 4.3.3 The Crown and the ILG begin a new phase of gathering information, 2014

#### 4.3.3.1 Introduction

Crown witness Tania Gerrard explained: ‘In early 2014 the Crown committed to progressing conversations with the Freshwater ILG on iwi/hapū rights and interests in relation to freshwater allocation and use [tranche 3].’<sup>90</sup> Ministers had signalled the beginning of these conversations back in November 2013, when Minister Amy Adams wrote to the ILG, proposing that the next stage of reform focus on economic issues and the ‘allocable quantum’, while ensuring that ‘iwi/Māori rights and interests in fresh water are recognised in appropriate ways.’<sup>91</sup> There was also a reference to giving new or previously excluded users access to water for economic purposes.<sup>92</sup>

Ministers met with iwi leaders at the Iwi Chairs Forum on 5 February 2014 at Waitangi and with the ILG on 18 February 2014. They outlined the ‘high level approach’ through to February 2015, including a plan to gather information

86. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 10

87. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 16

88. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), pp 17–19

89. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), pp 7–8, 20–24

90. Tania Gerrard, brief of evidence, no date (May 2016) (doc D88), p 4

91. Briefing to Ministers, ‘Freshwater Programme: 2014 Policy Work Programme’, no date (February/March 2014) (Crown counsel, sensitive discovery documents (doc D92), pp 2053–2054)

92. Briefing to Ministers, ‘Freshwater Programme: 2014 Policy Work Programme’, no date (February/March 2014) (Crown counsel, sensitive discovery documents (doc D92), p 2054)

that would enable an assessment of policy options. Ministers indicated that 'by February 2015, the Government intends to be finalising options for addressing iwi/Māori rights and interests that relate to managing within limits (including allocation) for wider discussion.'<sup>93</sup> This was canvassed again with the Forum members at Te Kuiti in April 2014. Ministers explained the aims of tranche 3 at these hui. In its September 2014 report to the Tribunal, the Crown noted its commitment to 'progressing in early 2015 its conversation with Iwi Leaders on iwi/hapū rights and interests in the context of freshwater allocation and use, once a comprehensive information base has been developed.'<sup>94</sup> The Crown's plan was to have a 'substantive conversation with Iwi Leaders on 5 February 2015 at Kerikeri' as to 'options for addressing iwi/hapū rights and interests.'<sup>95</sup>

On the Crown's side, there was also a perceived shortage of information on water quantities and quality in the different catchments. Officials set out to gather 'data on the nature of New Zealand's freshwater resource, its availability and where it is under pressure, how it is being used, and where there may be opportunities for improvement.'<sup>96</sup> Ministers instructed that no new reform options were to be developed for the remainder of 2014, while the focus was on building this information base. Instead, reform options would be developed 'following Waitangi 2015 in collaboration with key stakeholders.'<sup>97</sup> Officials stressed that '[a]ny efforts to maximise the value of fresh water need to go hand-in-hand with addressing iwi/hapū rights and interests in fresh water because reform may offer an opportunity to address rights and interests.'<sup>98</sup> At the same time, it was acknowledged that failure to address those rights and interests posed a risk of litigation, which 'may lead to court decisions, increased uncertainty, and economic risk.'<sup>99</sup>

#### **4.3.3.2 The IAC's consultation hui and case studies**

Ms Gerrard noted: 'It became apparent to Crown officials from mid-2014 that understanding rights and interests in the context of fresh water was a critical element of the information base being developed by officials and the Freshwater Iwi Leaders.'<sup>100</sup> According to Ms Gerrard, the first step was for the ILG to identify and define the range of Māori rights and interests in water so that these could be 'fully articulated' for the first time. The ILG began the 'assembly of the information base by holding a series of hui around the country to gather iwi/hapū views on the

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93. Briefing to Ministers, 'Freshwater Programme: 2014 Policy Work Programme', no date (February/March 2014) (Crown counsel, sensitive discovery documents (doc D92), p 2054)

94. Crown counsel, Crown report on the freshwater reform programme (paper 3.1.234(a)), p 10

95. Gerrard, brief of evidence (doc D88), p 4

96. Gerrard, brief of evidence (doc D88), p 4

97. Briefing to Ministers, 'Freshwater Programme: Managing within limits, pressures and opportunities', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p 1348)

98. Briefing to Ministers, 'Freshwater Programme: Managing within limits, pressures and opportunities', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p 1348)

99. Briefing to Ministers, 'Freshwater Programme: Managing within limits, pressures and opportunities', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p 1350)

100. Gerrard, brief of evidence (doc D88), p 4

rights and interests in fresh water.<sup>101</sup> The hui were facilitated by the IAG. Over 20 regional hui were held in October and November 2014. In addition, the iwi advisers commissioned a series of case studies in '2014/2015 to gather further evidence on understanding hapū/iwi rights and interests in fresh water at a catchment level (including water quality, power sharing [in management] and allocation).<sup>102</sup>

The IAG put two questions to the hui in October and November 2014, focusing on the rights and interests affected by tranche 3:

Do you support iwi having a 'use right' (allocation) as part of iwi rights and interests in freshwater?

What should this look like? Should any such rights be perpetual, inalienable, and/or tradeable? What percentage of all water rights should be allocated? Should use rights include take and discharge rights?<sup>103</sup>

Ms Gerrard filed the IAG's report on the regional hui (November 2014) and the results of the four case studies (Horouta Iwi case study, Hapori o Maungatautari Iwi case study, Ngāti Kahungunu Iwi case study, and Te Wai Pounamu 'te mana o te wai' case study).<sup>104</sup> The IAG's report on the hui was also published on the Iwi Chairs Forum's website.<sup>105</sup>

The IAG's report concluded that iwi and hapū supported the ILG framework for engagement with the Crown, and generally supported a unified voice for discussions (though some wanted to hold their own discussions with the Crown). The IAG summarised the results of the hui as:

There was overwhelming support for the assertion of rights and interests that are in the nature of ownership. Strong statements were made in some hui that rights and interests in water are seen as whānau and hapū rights. Whilst the focus of the regional hui was upon rights and interests, it was clear that water quality continues to be a matter of deep concern. Stories of the special relationships that whānau and hapū have enjoyed with their waterways were shared, as were numerous examples of the need for restoration and rehabilitation of those waterways and life within. The ILG was urged to be bold in advocating for the highest possible standards for water quality – that water be drinkable and swimmable. Other key points to emerge included: access to water and allocation are cultural issues and economic issues for Māori; a strong call for collaboration and information sharing between iwi and hapū; the need for resourcing over and above Treaty settlements to build capability and capacity to be involved in decision-making and management; the importance of puna; the security

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101. Gerrard, brief of evidence (doc D88), p 4

102. Solomon and Flavell, brief of evidence (doc D85), pp 15–16

103. Gerrard, brief of evidence (doc D88), pp 4–5

104. Gerrard, papers in support of brief of evidence (doc D88(b)), pp 1–647

105. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, p 6 (Tania Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), p 6)

of access to water for marae; the inequity of freshwater Treaty settlements, and frustrations in dealing with Councils at local government level.<sup>106</sup>

Broadly speaking, feedback at the IAG hui ranged over a number of topics:

- ▶ *The Treaty of Waitangi and Treaty settlements*: the Treaty was seen as the starting point for discussions with the Crown about fresh water. Iwi and hapū said that they did not cede their rights to fresh water, and the Treaty promise of rangatiratanga was seen as including 'full participation by Māori in decision-making, mutual respect, and an equitable share in the country's wealth.'<sup>107</sup> Treaty settlements to date had included ownership of *beds*, co-management regimes (including resourcing for that), restoration projects for degraded waterways, and relationship agreements and accords with government (central and local). The Waikato, Kaituna, and Whanganui River models were emphasised. Those iwi who had not yet settled their claims wanted to match the Waikato and Whanganui river settlements. But there was concern that Treaty settlements do not provide for allocation or ownership of water. Also, many claimants who had settled had not received a co-management regime for a water body or bodies but wanted one (or wanted the same level of resourcing for co-management as Whanganui and Waikato). Many groups continued to struggle to get those aspects of settlements up and running with councils. The IAG reported a growing concern that councils would see 'collaboration' as a way to 'water down the voice of Māori who have fought for a special status as Treaty partners.'<sup>108</sup>
- ▶ *Te Mana o te Wai*: There was 'clear support for the concept of Te Mana o Te Wai' and for it to be an overarching objective in the NPS-FM, but there was also a need for more explanation and education about its meaning, especially for local authorities.<sup>109</sup>
- ▶ *Kaitiakitanga*: There was a strong emphasis on (and concern about) issues of water quality and the need to restore degraded water bodies. When discussing the NPS-FM, there were calls for water to be kept at (or restored to) a standard of swimmable or drinkable, and for matauranga Māori indicators (such as the 'presence of important kai species like tuna and watercress') to be used to 'monitor and assess the health and wellbeing of waterways'. The importance of puna (springs) and secure marae water supplies were also

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106. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, p 4 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 4)

107. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, p 7 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 7)

108. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, p 7 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 7)

109. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, pp 8, 10 (Gerrard, papers in support of brief of evidence (doc D88(b)), pp 8, 10)

emphasised.<sup>110</sup> At some hui, concern about dairy farming was a theme, and there was support for commercial users of water to be charged.<sup>111</sup>

- ▶ *Freshwater management decision-making*: There was criticism of the Crown position that ‘no one owns water’, and a desire for ‘meaningful input into decision-making about fresh water at all levels’. There was a ‘clear call for seats on decision-making boards and guaranteed seats on councils’, as well as strong criticisms of the ways in which councils were perceived to be (mis)managing water.<sup>112</sup> Many hui also emphasised the need for resourcing so that Māori could build their capacity and capability to participate effectively in freshwater management. Some supported the idea of stronger national direction to councils through a NPS about Māori and decision-making. In respect of RMA reforms, there was a concern that Māori interests not be further reduced, and that there should be arrangements to enhance the importance and effectiveness of iwi management plans, and resourcing for capacity-building.<sup>113</sup>
- ▶ *Rights and interests*: Although there were some concerns about the term ‘ownership’, the IAG reported ‘strong and widespread support for the assertion that Māori have rights in the nature of ownership in water and for the language of proprietary rights.’<sup>114</sup> There was support from almost everyone that the ILG should seek a ‘use right’ or allocation of water for whānau, hapū, iwi, or Māori landowners – there was much debate about exactly who should receive and/or control this use allocation or use right.<sup>115</sup>

As noted above, the IAG had posed two questions to the hui about a use or allocation right, and it summarised the responses in its report as follows:

There were strong calls for any rights allocated to Māori to be inalienable and to be perpetual – but able to be leased out. For others rangatiratanga means that any rights acquired should be tradeable.

Some of the specific responses taken from the hui summaries on the issues of use rights and percentages are listed below:

- ▶ Use rights must include discharge as well as use
- ▶ Rights should include:
  - a right to veto
  - a right to develop

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110. ‘Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, pp 8–9 (Gerrard, papers in support of brief of evidence (doc D88(b)), pp 8–9)

111. ‘Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, p 10 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 10)

112. Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, pp 9–10 (Gerrard, papers in support of brief of evidence (doc D88(b)), pp 9–10)

113. ‘Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, pp 9–11 (Gerrard, papers in support of brief of evidence (doc D88(b)), pp 9–11)

114. Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, p 10 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 11)

115. ‘Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui’, 2014, p 11 (Gerrard, papers in support of brief of evidence (doc D88(b)), p 11)

- rights to protect, nurture and care for Te Wai
- Rights and access and use for all purposes that contribute to our wellbeing
- Rights to access are cultural and economic
- There is strong opposition to foreign ownership of water
- Māori understand that a new regime more beneficial to Māori may be achieved by providing certainty for existing users, but there is a concern about existing use rights and a reluctance for anyone other than Māori to have perpetual rights under any new regime
- Transition into a new regime could include rates rebates
- Metering will play an important role and should be used to support iwi allocation
- In response to the specific IAG consultation question about percentages, a 10% iwi allocation was suggested in Tāmaki. In Nelson 30% was suggested. In Taranaki and Mataatua it was suggested that the starting point be 100% and work out what we are prepared to give others. In Otākou, there was support for 20% of allocable water going back into rivers
- Climate change will have an impact on allocation
- Water is already being traded, this must be taken into account when discussing an allocation for iwi
- There is a need for better measurement and control of what is taken out of rivers and streams
- There were deep and widespread concerns about security of access to water for Marae.
- The question was asked as to whether asserting title to rivers can assist in the process of asserting rights and interest in water
- Waters taken under the Public Works Act for water facilities but not being used in a catchment must be returned by councils
- There needs to be a separate consenting authority or an independent water allocation board (rather than Councils) and iwi must play a major role on this
- Analyse other models for lessons on what to do and what not to do:
  - Broadcasting spectrum, fisheries qms model, a specific allocation to marae, foreshore and seabed model
- Advocate for an 'environmental flow'.<sup>116</sup>

The ILG presented the results of the hui to Ministers in November 2014.<sup>117</sup>

#### **4.3.3.3 What did the Crown understand from the IAG's hui, and what was the Crown's response?**

On 13 November 2014, officials reported to Ministers on 'emerging themes' from the hui. These were:

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<sup>116</sup>. 'Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui', 2014, p12 (Gerrard, papers in support of brief of evidence (doc D88(b)), p12)

<sup>117</sup>. Briefing to Ministers, 'Freshwater Programme: Managing within limits – addressing iwi/hapū rights and interests', 13 November (Crown counsel, sensitive discovery documents (doc D92), p1321)

- A. decision-making – desire for a way for tāngata whenua to exercise rights to make decisions (including in relation to consenting and to kaitiakitanga);
- B. quality – concerns about freshwater quality and the need for monitoring;
- C. customary uses – seeking to ensure protection of customary activities (eg food gathering, access to sacred sites, use of water for spiritual practices); and
- D. allocation – rights to access water, and discharge nutrients for development of land.<sup>118</sup>

Ministry officials advised the new Minister, Nick Smith, that three outcomes would likely be sought as a result of iwi ‘aspirations’:

- ▶ the meaningful recognition of kaitiaki rights and obligations towards water bodies through a ‘stronger role in decision-making to determine how freshwater resources are used’;
- ▶ stronger rights to use water and discharge into water for the development of land; and
- ▶ an ‘equitable allocation’ of both water takes and ‘discharge allowances’.<sup>119</sup>

At the Iwi Chairs Forum on 27 November 2014, the ILG presented the ‘preliminary findings’ of the ‘nationwide series of hui held to gather iwi and hapū views on their rights and interests in fresh water’. The key points made to Ministers and iwi chairs in this presentation included the same four points quoted above about decision-making, water quality, customary uses, and allocation.<sup>120</sup>

From the Crown’s perspective, Tania Gerrard summarised the outcomes of the iwi rights-definition exercise in 2014 as:

Each of the reports and case studies focussed on different deliverables, including reviewing regional council (and territorial authority) planning documents in relation to fresh water and assessing how they provide for iwi/hapū plans and aspirations in relation to freshwater management; and reporting on water quality, water allocation and iwi decision-making.

From these hui and reports it was clear that iwi and hapū rights and interests in freshwater were not limited to ‘allocation’ and ‘use’. The reports and hui highlighted that a lot of iwi and hapū faced the same issues and themes in terms of freshwater, including:

- ▶ Quality – concerns about freshwater quality and the need for monitoring;
- ▶ Decision-making – desire for a way for tāngata whenua to exercise rights to make decisions (including in relation to consenting and to kaitiakitanga);

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118. Briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1321)

119. Briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1321)

120. Draft Cabinet paper, no date, appendix 1 to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), pp 1331–1332)



- ▶ Customary uses – seeking to ensure protection of customary activities (eg food gathering, access to sacred sites, use of water for spiritual practices); and
- ▶ Allocation – rights to access water, and discharge nutrients for development of land.

The information collected through the hui, reports and the case studies provided a good grounding in the key issues to be addressed in the freshwater reform process, and an informed understanding of the broad scope of iwi/hapū rights and interests across the country.<sup>121</sup>

From the information provided by the Iwi Leaders Group, officials compiled a list of what 'iwi/hapū are seeking':

- ▶ 'Protection for mauri/life force of water bodies' ('te mana o te wai');
- ▶ 'Protection of customary activities' (including mahinga kai, use of water for 'cultural/spiritual practices', such as purification rituals or transport of bodies for burial, and protection of wāhi tapu);
- ▶ 'Recognition of iwi mana/authority over water bodies' ('tino rangatiratanga, mana whakahaere, kaitiakitanga');
- ▶ 'Economic benefit' (the 'reciprocal aspect of rangatiratanga/kaitiakitanga roles');
- ▶ 'Residual proprietary interests', described as 'exclusive or priority rights to access, possess, and enjoy a given freshwater body; to decide how to use the freshwater resource; and (as above) to the economic benefits of those uses', which 'rights may be parsed as being appurtenant to a *extant customary interest* in fresh water (akin to ownership in common law)' (emphasis in original).<sup>122</sup>

In November 2014, Crown officials outlined three pathways by which the Crown could address or give effect to these 'iwi/hapū rights and interests in fresh water'. One such pathway was through the courts and the Tribunal – this column was blanked out in the version of the paper supplied to the Tribunal. The other two pathways were the freshwater reform process itself and the Treaty settlement process.<sup>123</sup>

Cabinet's view was that the Treaty settlement process was an appropriate mechanism to 'address iwi claims to preferential rights and interests in water'. This was being done on an iwi-by-iwi basis, settling historical grievances about water bodies. Treaty settlement redress was 'forward looking and establishes ongoing provision for rights and interests'. Treaty settlements had thus 'provided

121. Gerrard, brief of evidence (doc D88), pp 5–6

122. 'Three pathways to give effect to iwi/hapū rights and interests in fresh water', no date, appendix 2 to briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), pp 1338–1339)

123. 'Three pathways to give effect to iwi/hapū rights and interests in fresh water', no date, appendix 2 to briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), pp 1338–1339)

for greater participation of some iwi in decision-making over important sites or water bodies (for example through return of sites, statutory acknowledgements, and joint management or advisory committee arrangements for water bodies).<sup>124</sup> The other main tool was the freshwater reform process, which would ‘improve the participation of iwi/hapū in freshwater planning processes’ through the 2013 proposals to reform the RMA (which were now back on the table after the 2014 general election). Freshwater reform had also resulted in an initiative for ‘better inclusion of tangata whenua values in freshwater decision-making’ (via the NPS-FM), and would improve water quality in general. The clean-up funds had also provided for restoration of certain water bodies, and this work would continue.<sup>125</sup>

Taking the five points above in turn, the Crown’s view was:

- ▶ *‘Protection for mauri/life force of water bodies’ (‘te mana o te wai’)*: Treaty settlements were resulting in individual clean-up funds and restoration efforts, had given input into decision-making over water bodies, and had recognised significant water bodies (such as the legal personality of the Whanganui River). In terms of freshwater reform, this too had resulted in clean-up funds (including the Te Mana o te Wai Fund). Also the NPS-FM recognises the national significance of ‘te mana o te wai’, and requires local authorities to involve Māori in freshwater management, work with them to identify their values, and reflect those values in decision-making.<sup>126</sup>
- ▶ *‘Protection of customary activities’ (including mahinga kai, use of water for ‘cultural/spiritual practices’, such as purification rituals or transport of bodies for burial, and protection of wāhi tapu)*: Treaty settlements resulted in initiatives to restore ecosystems or fisheries, exemptions (or access) for customary food gathering, statutory acknowledgements (which involved notifying iwi of consent applications), and the return of sites of particular cultural significance. The freshwater reform process had established the NPS-FM 2014, which required councils to consider national values such as mahinga kai and wai tapu, and reflect them in decision-making. Also, the proposed RMA reforms would strengthen iwi participation in freshwater management.<sup>127</sup>
- ▶ *‘Recognition of iwi mana/authority over water bodies’ (‘tino rangatiratanga, mana whakahaere, kaitiakitanga’)*: Treaty settlements were resulting in the

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124. Draft Cabinet paper, no date, appendix 1 to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1330)

125. Draft Cabinet paper, no date, appendix 1 to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), pp 1330–1331)

126. ‘Three pathways to give effect to iwi/hapū rights and interests in fresh water’, no date, appendix 2 to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1338)

127. ‘Three pathways to give effect to iwi/hapū rights and interests in fresh water’, no date, appendix 2 to briefing to Ministers, ‘Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests’, 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1338)

return of sites (which allowed some exercise of authority over them), input into decision-making (ranging from advisory bodies to joint planning committees to governance bodies like the Waikato River Authority), and joint management agreements over specific water bodies. But such arrangements, especially co-management arrangements, were not a feature of Treaty settlements before 2009, and had not been provided in all Treaty settlements since 2009 either. In terms of the freshwater reform process, the ILG was involved in freshwater policy development, and the RMA reforms would result in enhanced iwi participation arrangements, a collaborative process for fresh water as an alternative to the schedule 1 process, and require councils to explicitly consider iwi views before making decisions on freshwater management.

- ▶ *'Economic benefit'* (the *'reciprocal aspect of rangatiratanga/kaitiakitanga roles'*): Treaty settlements provide financial redress for past wrongs, although redress for water grievances was not usually explicit. The freshwater reform process had not yet developed initiatives in this area – this was yet to come.
- ▶ *'Residual proprietary interests'*: Treaty settlements did not provide any settlement of 'extant rights and interests in fresh water, and have therefore left open that these still exist'. There were 'no initiatives developed to date' in the freshwater reform process.<sup>128</sup>

In addition, in November 2014, the Cabinet Strategy Committee set some Crown 'bottom-lines', in response to iwi leaders' 'expectations related to iwi rights and interests in water – particularly related to allocation.'<sup>129</sup> Those bottom lines 'reiterated the position that has been stated publicly by Ministers over the past two years.'<sup>130</sup> They included that 'no-one owns fresh water', there would be no 'generic share' of freshwater resources for iwi, there would be no national settlement of iwi water claims, and iwi 'claims to rights and interests' would be considered on a catchment-by-catchment basis.<sup>131</sup> Officials recognised that the Māori wish for 'joint iwi/community governance' had also not been realised but, again, put great stock in the expected RMA reforms to deal with this issue at the local level. Those reforms would improve iwi participation in planning, provide for their

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128. 'Three pathways to give effect to iwi/hapū rights and interests in fresh water', no date, appendix 2 to briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1339)

129. Briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1318); briefing to Minister, 'Draft Cabinet paper on next steps and discussions at Waitangi 2015', 12 December 2014 (Crown counsel, sensitive discovery documents (doc D92), p1300)

130. Briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1318)

131. Briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1318)

involvement in the new collaborative process, and require councils to report on how they had dealt with iwi advice.<sup>132</sup>

Thus, the Crown's view was that the 'two key mechanisms for addressing iwi/hapū rights and interests in fresh water' were the Treaty settlement process, which would continue, and the freshwater reform programme.<sup>133</sup> The question for the Crown was how, and under what parameters, it would develop the next tranche of reforms relating to allocation and use, and how it would provide for 'iwi/hapū rights and interests' in doing so. Equally important was the phase two RMA reform, which was once again under consideration after the re-election of the National-led Government in September 2014.

#### 4.3.4 The Crown and the ILG agree a work plan for 2015

In November-December 2014, Ministers and officials worked out the Crown's parameters for engagement with the ILG to address Māori rights and interests in any reformed system of permits and allocations. In the Crown's view, there would be two 'interdependent' work streams, one on developing options to address iwi rights and interests, the other on 'managing within limits' (tranche 3). The speed of progress in the iwi rights work stream would 'dictate to some degree the priorities and pace for the "managing within limits" work'.<sup>134</sup>

The key decisions were approved by Cabinet in January 2015, including the decision that discussions with the IAG and ILG would be used to develop policy options for wider consultation with Māori and the public, and that the policy options would need to include national-level 'tools' for addressing rights and interests at the catchment level.<sup>135</sup> Once national-level tools were in place, the 'recognition of iwi/hapū rights and interests in a given catchment would become a matter for discussion with individual iwi'.<sup>136</sup> These tools might include criteria for 'establishing the need to provide preferential access for iwi in catchment-based processes', and guidelines for councils when reviewing existing allocations or choosing new approaches to allocation.<sup>137</sup> The Crown noted: 'Ensuring that all reforms to the

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132. Briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1319)

133. Draft Cabinet paper, no date, appendix 1 to briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1330)

134. Briefing to Minister, 'Draft Cabinet paper on next steps and discussions at Waitangi 2015', 12 December 2014 (Crown counsel, sensitive discovery documents (doc D92), p1301)

135. Cabinet paper, 'Freshwater Reform: Next Steps and discussions at Waitangi', no date (January 2015) (Crown counsel, sensitive discovery documents (doc D92), pp156–161)

136. Briefing to Ministers, 'Freshwater Programme: Managing within limits – Addressing iwi/hapū rights and interests', 13 November 2014 (Crown counsel, sensitive discovery documents (doc D92), p1321)

137. Cabinet paper, 'Freshwater Reform: Next Steps and discussions at Waitangi', no date (January 2015) (Crown counsel, sensitive discovery documents (doc D92), p160)

freshwater management regime are consistent with the Treaty is a key objective of the Government.<sup>138</sup>

Cabinet's parameters for discussions with the ILG repeated the 'bottom lines' noted above, and were as follows:

- ▶ no-one owns fresh water, including the Crown;
- ▶ there will be no generic share of freshwater resources provided for iwi;
- ▶ there will be no national settlement of iwi/hapū claims to freshwater resources;
- ▶ freshwater resources need to be managed locally on a catchment-by-catchment basis within the national freshwater management framework; and
- ▶ the next stage of freshwater reform will include national-level tools to provide for iwi/hapū rights and interests.<sup>139</sup>

Prior to the meeting of Ministers and the Iwi Chairs Forum on 5 February 2015, officials and the IAG agreed on a work programme for 2015, to develop policy options by the end of the year. This work programme was approved by Cabinet in January 2015, before its formal presentation to the Forum.<sup>140</sup> Tania Gerrard's evidence set out the key aspects of the work plan for 2015, which would involve:

- ▶ the ILG completing further engagement with iwi/hapū focusing on possible mechanisms for recognising rights and interests;
- ▶ exchange of materials gathered by the Crown and the ILG in the course of the recent information-gathering efforts;
- ▶ analysis on what iwi/hapū rights and interests are recognised within the current resource management framework and Treaty settlements, and what the potential gaps are, including:
  - the underlying bases for iwi/hapū rights and interests in fresh water, and an evaluation of how effectively those rights and interests currently are addressed;
  - the outcomes that iwi/hapū exercising those rights and interests would achieve (eg development of land returned under settlements and underutilised Māori land, water being available for cultural and spiritual purposes);
  - the possible mechanisms for supporting the achievement of those outcomes, and the value to iwi/hapū and the wider community in doing so;
- ▶ identification of priority workstreams for options development; and
- ▶ options development and analysis.<sup>141</sup>

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138. Cabinet paper, 'Freshwater Reform: Next Steps and discussions at Waitangi', no date (January 2015) (Crown counsel, sensitive discovery documents (doc D92), p 158)

139. Gerrard, brief of evidence (doc D88), pp 7–8

140. Cabinet paper, 'Freshwater Reform: Next Steps and discussions at Waitangi', no date (January 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 161–162); Cabinet minute of decision, 'Freshwater Reform: Next Steps and discussions at Waitangi', 27 January 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 166–167)

141. Gerrard, brief of evidence (doc D88), pp 6–7; see also Cabinet paper, 'Freshwater Reform: Next Steps and discussions at Waitangi', no date (January 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 161–162)

Ministers met with the ILG on 28 January 2015, in advance of the Forum, and this meeting generated some concern about iwi expectations – specifically that the 2014 information gathering had shown a desire for a national ‘iwi allocation’ of water. Officials were worried that this idea would gain traction, and Ministers were advised to reiterate the Crown’s five parameters at the Forum meeting. Those parameters included that there would be ‘no generic share of freshwater resources provided to iwi/hapū’.<sup>142</sup> These were the Crown’s parameters, and the ILG did not formally respond to them or necessarily agree with them.<sup>143</sup>

#### **4.3-5 The Crown applies for an adjournment of stage 2, March 2015**

On 20 March 2015, Crown counsel applied to the Tribunal for an adjournment of stage 2 until late February 2016. Crown counsel advised the Tribunal that the Crown and the ILG had agreed to work together in 2015 to develop ‘options for the recognition of iwi/hapū rights and interests in freshwater’, and that these options would then ‘inform consultation and discussion with iwi/hapū and with other communities’.<sup>144</sup> The Crown and iwi chairs had reached agreement on this as the way forward at Kerikeri on 5 February 2015.

The Crown reiterated Deputy Prime Minister English’s commitment to ‘recognising in appropriate ways remaining iwi/hapū rights and interests in water and geothermal resources’.<sup>145</sup> The Crown was committed to working with iwi on the RMA reforms, and to ‘addressing iwi/hapū rights and interests in freshwater’ as part of ‘improving the regime for freshwater allocation and use’.<sup>146</sup>

The Crown’s timetable for the 2015 work plan was designed to reach the point of wider consultation by January 2016:

- ▶ in March and April [2015], officials and the ILG will discuss prioritisation of workstreams for options development in respect of addressing iwi/hapū rights and interests in freshwater;
- ▶ before the end of June it is anticipated that Cabinet will decide which workstreams it wishes to prioritise for policy development;
- ▶ the ILG and the Crown will undertake work on developing policy options across 2015;
- ▶ in October/November, the Crown and the ILG will seek to agree on options for freshwater law reform to be included in a public consultation process; and

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142. Briefing to Ministers, ‘Fresh Water: Upcoming meeting with Iwi Chairs at Kerikeri – 5 February 2015’, 30 January 2015 (Gerrard, papers in support of brief of evidence (doc D88(b)), pp 661–662)

143. Cabinet paper, ‘Freshwater Reform: Next Steps in Policy Development’, 21 July 2015 (Crown counsel, sensitive discovery documents (doc D92), p 141)

144. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 1

145. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 3

146. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 3

- ▶ in January 2016, the Crown intends to release a public discussion document and allow for 6–8 weeks of public consultation, including with iwi/hapū. The Crown anticipates that a spectrum of policy options may be presented for consultation.<sup>147</sup>

In addition to this work plan for tranche 3 issues, the Crown advised that it intended to bring in an RMA reform Bill, which would include 'provisions intended to improve Māori participation under the RMA, and to ensure a consistent approach is adopted by local government when including iwi in resource management processes'.<sup>148</sup> For the details, the Tribunal was referred to the 2013 paper *Resource Management: Summary of Reform Proposals 2013*, which was discussed in chapter 3 (section 3.6.4).<sup>149</sup>

On the basis of its collaboration with the ILG, the Crown applied for an adjournment of stage 2 of the Tribunal's inquiry, to give the Crown and the ILG the 'opportunity to undertake the agreed policy development process'.<sup>150</sup>

The application for adjournment was supported by the ILG but opposed by the claimants and most of the interested parties. In particular, the claimants were concerned about the Crown's plan to exclude them (and others) from the discussions with the ILG, and that the reform programme was proceeding without Tribunal findings on how proprietary rights should be provided for in the reforms. After hearing the parties at a judicial teleconference on 2 June 2015, the Tribunal granted the adjournment on 10 June 2015.<sup>151</sup> The Tribunal noted:

It seems to the Tribunal that the most sensible option available, and which will best serve the interests of all parties, is for the adjournment to be granted. The adjournment will allow the Crown time to develop policy options by collaborative agreement with relevant informed Māori entities, and consultation will then take place more generally between the Crown and Māori. The claimants and interested parties, along with all Māori, would have the important opportunity to study the policy options, participate in consultation, and make their views known to the Crown through that mechanism.

If the Crown meets its projected timetable, the Tribunal's inquiry would resume at the end of February 2016.<sup>152</sup>

The claimants had indicated that the participatory reforms envisaged in the RMA reform Bill were not 'central to the matters which they wish to have heard', so the timing of the Bill was not a factor in the Tribunal's decision.<sup>153</sup>

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147. Crown counsel, memorandum, 20 March 2015 (paper3.1.237), p 4

148. Crown counsel, memorandum, 20 March 2015 (paper3.1.237), pp 4–5

149. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 5

150. Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 6

151. Waitangi Tribunal, decision on application for adjournment, 10 June 2015 (paper 2.5.56)

152. Waitangi Tribunal, decision on application for adjournment, 10 June 2015 (paper 2.5.56), pp 10–11

153. Waitangi Tribunal, decision on application for adjournment, 10 June 2015 (paper 2.5.56), p 10

### 4.3.6 The Crown and the ILG develop policy options for recognising Māori rights and interests in fresh water

#### 4.3.6.1 *The priority work streams, March–August 2015*

The 2015 work plan and timetable are set out in the preceding sections. In March 2015, officials proposed five Crown–IAG work streams, based on discussions with the IAG. These five work streams were described as:

- ▶ Governance/Management/Decision-making: improving iwi/hapū participation in all levels of freshwater decision-making and management
- ▶ Water quality: improving water quality
- ▶ Customary use: enhancing access and uses of fresh water for customary purposes
- ▶ Economic Development: enabling iwi/hapū access to and use of freshwater resources for economic development
- ▶ Recognition: enabling formal recognition of iwi/hapū/whānau relationships with particular freshwater bodies.<sup>154</sup>

Officials pointed out that only the proposed ‘customary use’ and ‘economic development’ work streams were closely linked to the ‘broader managing within limits programme, which aims to maximise the economic benefit from fresh water within limits set by councils while addressing iwi/hapū rights and interests.’<sup>155</sup> Officials also noted that ‘investment uncertainty’ would continue until those rights and interests were addressed.<sup>156</sup> Tania Gerrard noted that these officials were not just drawn from the two ministries directly involved (Environment and Primary Industries) but also included representatives from the Treasury, TPK, and the Department for Prime Minister and Cabinet, who worked with the IAG in 2015.<sup>157</sup>

On 30 March 2015, Ministers met with the ILG to discuss and agree on priority work streams. The Crown’s proposal outlined the five proposed work streams:

- ▶ *Governance/management/decision-making*: In addition to existing proposals for collaborative planning, it was necessary to ‘significantly improve iwi/hapū participation and decision-making at all levels.’ This could include the Crown’s RMA reforms, options for participation in governance and decision-making such as increasing the use of section 33 of the RMA, and identifying

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154. Briefing to Ministers, ‘Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p1251)

155. Briefing to Ministers, ‘Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p1251)

156. Briefing to Ministers, ‘Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p1252)

157. Gerrard, brief of evidence (doc F7), p2



'options to build capacity and capability amongst iwi/hapū and councils and government to give effect to decision making by iwi/hapū at all levels.'

- ▶ *Water quality*: This work stream would identify options to improve water quality and enhance Te Mana o te Wai, including ensuring that Te Mana o te Wai was 'clearly reflected' in the NPS-FM and NOF.
- ▶ *Customary use*: This work stream was for 'considering possible options to enhance access to and use of fresh water for customary purposes', which would at least include access to water for marae, papakainga, and mahinga kai, and might 'extend to' access to water for Māori land.
- ▶ *Economic development*: This work stream would look at how to 'enable iwi/hapū access to and use of freshwater resources for economic development while protecting Te Mana o Te Wai and as part of the Ngā Mātāpono ki te Wai framework'. This would include developing options for new users to have access, and identifying options for under-developed Māori land.
- ▶ *Recognition*: This work stream would 'enable formal recognition of iwi/hapū/whanau relationships with particular water bodies', by developing options to recognise iwi, hapū, whanau or Māori landowners as 'the kaitiaki and decision makers' for particular water bodies, and 'alternative forms of iwi relationship to freshwater bodies' such as the form of title given the Whanganui River.<sup>158</sup>

Although the IAG had 'expressed comfort' with these work streams as the priority, officials remained concerned that the ILG might raise the issue of an "iwi allocation" or "share" of freshwater resources.<sup>159</sup> The Crown's response would be to point to the 'economic development' work stream, addressing how to provide access to fresh water for economic development.<sup>160</sup> Also, for the 'recognition' work stream, officials noted that many hui participants (in the IAG hui of 2014) had 'considered their relationship with certain freshwater bodies to be in the nature of ownership'. The Crown's response to this would be that its 'bottom line' was 'no-one can own fresh water', but 'other mechanisms' could still be explored by which relationships with freshwater bodies could be 'formally recognised'.<sup>161</sup> Importantly, there seems to have been a view within the Government at this time

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158. 'Proposed priority workstreams for addressing iwi/hapū rights and interests in fresh water', appendix to briefing to Ministers, 'Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests', 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), pp 1262–1263)

159. 'Upcoming meeting with Freshwater Iwi Leaders Group', appendix to briefing to Ministers, 'Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests', 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p 1260)

160. 'Upcoming meeting with Freshwater Iwi Leaders Group', appendix to briefing to Ministers, 'Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests', 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p 1260)

161. Briefing to Ministers, 'Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests', 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p1254)

that the Whanganui River form of title could be used more widely to recognise the relationships of other groups to their water bodies.<sup>162</sup>

Also, Crown officials seem to have been prepared at this point to acknowledge a Treaty development right in respect of fresh water:

There are no existing provisions for iwi/hapū to access freshwater resources for the purpose of economic development on the basis of the Treaty (for example access for iwi/hapū or for Māori-owned land).

This workstream [economic development] could link in with the managing within limits work programme to explore ways to enable iwi/hapū to access and use freshwater resources for economic development.<sup>163</sup>

At the meeting on 30 March 2015, the Crown and the ILG agreed on four priority work streams. According to Ms Gerrard, this decision was ‘informed by the information base and associated hui from 2014’ (discussed above).<sup>164</sup> The four work streams were: recognition; economic development; water quality; and ‘governance/management/decision-making.’<sup>165</sup> This was more far-reaching than earlier indications that the discussions would focus on matters of allocation and managing within limits. The ‘customary uses’ work stream was dropped because ‘the Crown were informed that “customary uses” was woven throughout the other areas and did not need a specific work stream.’<sup>166</sup>

The next step was not for the Crown and the IAG to choose options for each work stream, but rather to agree on a series of ‘objectives’ (that is, *outcomes*) that the options would be designed to achieve. The specification of objectives would help to show the work streams’ ‘direction of travel’ and ‘refine the description of each workstream to identify its specific policy objective(s).’<sup>167</sup> In April and May 2015, therefore, the IAG and officials concentrated on defining ‘specific policy objectives aligned with each workstream to guide options for development.’<sup>168</sup> At the same time, the IAG commissioned research to help develop iwi positions on the four work streams, which was completed and presented to the Crown in June and July 2015 (discussed below). This research proposed options which iwi leaders

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162. ‘Proposed priority workstreams for addressing iwi/hapū rights and interests in fresh water’, appendix to briefing to Ministers, ‘Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p 1263)

163. Briefing to Ministers, ‘Fresh water: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive document bundle (doc D92), p 1254)

164. Gerrard, brief of evidence (doc D88), p 8

165. Gerrard, brief of evidence (doc D88), p 8

166. Gerrard, brief of evidence (doc D88), p 6

167. Briefing to Minister, ‘Support material for Senior Ministers meeting on 24 June 2015’, 19 June 2015 (Crown counsel, sensitive document bundle (doc D92), p 1200)

168. Gerrard, brief of evidence (doc D88), p 8

thought could address Māori rights and interests.<sup>169</sup> The IAG also held regional hui around the country in January, April–May, and July–August 2015.<sup>170</sup> These hui focused on ‘possible mechanisms for recognising rights and interests.’<sup>171</sup> For their part, officials also worked on identifying a ‘range of existing and potential high-level options’, and criteria for what kinds of options could be developed.<sup>172</sup> They studied existing arrangements in Treaty settlements and other legislation relating to resource management regimes.<sup>173</sup>

This work was partly carried out while officials and the IAG were awaiting a Cabinet decision on the objectives for each of the work streams. The ILG and the relevant Ministers (Environment and Primary Industries) signed off on the text of the objectives in July 2015, and Cabinet approved them on 3 August 2015.<sup>174</sup> Across the four workstreams, the objectives agreed by the Crown and the ILG were:

- ▶ *Governance/management/decision-making*: ‘Enhance iwi/hapū participation at all levels of freshwater decision-making’, and build capacity and capability among both ‘iwi/hapū and councils, including resourcing’.
- ▶ *Water quality*: ‘Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality’.
- ▶ *Economic development*: ‘Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests’.
- ▶ *Recognition*: ‘Enable formal recognition of iwi/hapū relationships with particular freshwater bodies’, and address the ‘uncertainty of supply of potable water on all marae and in papakainga.’<sup>175</sup>

In addition to approving these objectives, Cabinet set criteria to guide the development of policy options for each of the work streams. According to Tania Gerrard, the development of options for the work streams was seen as needing to ‘balance the rights and interests of iwi/hapū with those of the wider community, including existing users and other stakeholders.’<sup>176</sup> First, Cabinet set criteria for all future options:

Each option:

- ▶ is widely seen as being fair
- ▶ has benefits that exceed costs
- ▶ is consistent with existing arrangements in Treaty settlements
- ▶ is sufficiently flexible for application in different types of catchments

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169. Gerrard, brief of evidence (doc D88), pp 8, 12

170. Solomon and Flavell, brief of evidence (doc D85), p 15

171. Crown counsel, update report to the Waitangi Tribunal, 30 June 2015 (paper 3.1.251), p 2

172. Gerrard, brief of evidence (doc D88), p 9

173. Crown counsel, update report to the Waitangi Tribunal, 30 June 2015 (paper 3.1.251), p 2

174. Gerrard, brief of evidence (doc D88), pp 8–9

175. Crown counsel, update report to the Waitangi Tribunal, 30 September 2015 (paper 3.1.252), p 2

176. Gerrard, brief of evidence (doc D88), p 11

## 4.3.6.2

- ▶ has transition times that minimise social and economic disruption
- ▶ can be integrated with options to maximise the value of fresh water and the wider reform of the freshwater regulatory framework.<sup>177</sup>

Secondly, Cabinet set particular criteria for developing options in each of the work streams:

- ▶ *Governance/management/decision-making*: There needs to be certainty for other community members about how *they* can ‘contribute to freshwater decision-making processes’, and any policy options must minimise complexity for ‘councils, resource users, iwi/hapū, and other Māori groups’.
- ▶ *Water quality*: ‘Resource users [should] have sufficient certainty about what is required of them in order to work towards freshwater quality objectives and plan investments accordingly’.
- ▶ *Economic development*: Existing users’ costs must be minimised, and users need ‘sufficient certainty about their access over time to make well-informed investment decisions’.
- ▶ *Recognition*: Councils should be ‘incentivised to recognise iwi/hapū relationships with fresh water.’<sup>178</sup>

It should be noted that these were the criteria which guided officials, but they were not criteria adopted by the IAG or the ILG.

After Cabinet approved the objectives for the priority work streams, officials and the IAG finally started the work of trying to finalise policy options for wider consultation. They began by considering the four research reports produced for the IAG in June 2015.

#### 4.3.6.2 Collaboration between officials and the IAG

As noted above, the Crown and the ILG had agreed on objectives for each of the four work streams, and the task was now to develop policy options to meet those objectives. The six objectives had a much wider focus than ‘tranche 3’ of the reform programme:

- ▶ Enable formal recognition of iwi/hapū relationships with particular waterbodies
- ▶ Enhance iwi/hapū participation at all levels of freshwater decision-making
- ▶ Build capacity and capability amongst iwi/hapū and councils, including resourcing
- ▶ Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality
- ▶ Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests
- ▶ Address uncertainty of supply of potable water on marae and in papakāinga.<sup>179</sup>

177. Gerrard, brief of evidence (doc D88), p 11

178. Gerrard, brief of evidence (doc D88), p 10; see also Cabinet paper, ‘Freshwater Reform: Next Steps in Policy Development Work’, 28 July 2015 (Crown counsel, sensitive discovery documents (D 92), pp 136–137).

179. Briefing to Minister, no date (October/November 2015) (Crown counsel, sensitive discovery documents (doc D92), p 1027)

Officials studied the options and recommendations in the four IAG reports, and then categorised them as options which could (a) proceed to development, (b) required further discussion with the IAG, or (c) possibly fell outside Cabinet's criteria and bottom lines. Officials also came up with additional options for discussion with the IAG. This work was followed by a crucial meeting on 19 August 2015, when the IAG and officials agreed on 'a revised list of 62 options (across the 6 agreed policy objectives) to address iwi/hapū rights and interests in fresh water'.<sup>180</sup> This list was the basis for further discussions between officials and the IAG. They held more than 25 meetings from August to November 2015, working on further developing and refining options that could be put to Ministers and the ILG for consideration.<sup>181</sup>

Tania Gerrard commented that this collaboration between the IAG and officials provided a crucial role for iwi leaders in the development of policy:

Over this period (August–November 2015) there was intensive collaboration and discussion of potential policy options, including in respect of points of agreement and difference. The working relationship between officials and the IAG is unique in that it has provided for, and continues to enable intensive discussion and debate in developing policy options before they are put before Cabinet and before they are consulted on more widely. This does not replace the consultation process, but rather involves iwi/hapū in the policy development process.<sup>182</sup>

#### **4.3.6.3 Points of agreement and disagreement, October 2015**

The confidential attachments to Ms Gerrard's evidence set out some of the points of agreement and difference that had developed by October 2015. In discussing the list of potential options, officials noted:

- ▶ In the recognition workstream, officials and the IAG agreed that there could be case-by-case discussions on the ownership of lake and river beds, recognition that 'iwi/hapū' have 'a right to access to water resources', and that there would need to be clarity on the roles of the Crown and councils in providing for 'recognition'. They also agreed on '[a]cknowledgement of non-derogation re owning water and iwi/hapū rights to claim aboriginal or customary title'. This meant that any resolution of matters between Māori and the Crown would not bar Māori from taking a native title case to the courts. The IAG, however, wanted 'statutory recognition' of the relationship between 'iwi/hapū' and water bodies, as well as recognition that 'iwi/hapū have [a] right to "equitable share" of allocable quantum and discharges'. By contrast, officials wanted councils to 'reflect iwi/hapū associations with water bodies in plans', and recognise that 'iwi/hapū have a right to access water resources to develop' rather than providing a general allocation at the national level. For the second

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180. Gerrard, brief of evidence (doc D88), pp 12–13

181. Gerrard, brief of evidence (doc D88), pp 11, 13

182. Gerrard, brief of evidence (doc D88), p 13

objective in this work stream, the IAG and officials agreed that marae and papakainga ‘need[ed] drinking water.’<sup>183</sup>

- ▶ In the governance/management/decision-making work stream, there was common agreement on the need to establish a ‘baseline’ for what councils must do to ensure ‘iwi participation in freshwater planning’. The IAG and officials also agreed that it was necessary to ‘[s]upport resourcing/capacity and capability building for both iwi/hapū and councils’. Otherwise, there were significant points of disagreement. The IAG wanted to introduce compulsory Joint Management Agreements in all catchments. They also wanted ‘iwi/hapū’ to have ‘roles, status, weighting, [and] appointments on councils’. Further, the IAG wanted options for ‘iwi/hapū’ to participate in ‘national decision-making’ about freshwater management. Further, the iwi advisors wanted ‘enhanced legal weighting’ for Iwi Management Plans. Officials disagreed with all these points, and also wanted the baseline for council and iwi engagement to include arrangements for water conservation orders.<sup>184</sup> The IAG’s position on water conservation orders is discussed further below.
- ▶ In the water quality work stream, the IAG and officials had reached common ground at a high level. They agreed on the need for a description of Te Mana o te Wai in the NPS-FM 2014, and to include it as an ‘operative purpose statement’ for the NPS-FM. Also, tangata whenua values needed greater ‘prominence/weight/support for inclusion in community planning.’<sup>185</sup>
- ▶ For the economic development work stream, the IAG and officials agreed that a ‘range of mechanisms’ were needed to ‘generate headroom’, no ‘perpetual rights’ should be created, a common consent expiry date would be useful, and ‘[p]riority must be given to iwi to access water resources that come available through headroom generation’. Officials disagreed with the IAG, however, that iwi dispossessed of their lands should get access to water, or that water resources should be reserved for all ‘iwi/hapū’. The IAG dissented from the officials’ view that ‘iwi/hapū need access to water resources to develop their land’ (that is, confined to land they still possessed). Officials proposed that ‘[n]on-allocable regimes should also be required to support development of iwi land’, a point which lacked support from the IAG.<sup>186</sup>

Notwithstanding these differences, in October 2015 officials proposed a list of options for Ministers to discuss and perhaps agree with the ILG.<sup>187</sup>

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183. ‘Crown and IAG common ground and points of difference for each of the objectives’, no date (October 2015) (Gerrard, papers in support of brief of evidence (doc D88(b)), p 882)

184. ‘Crown and IAG common ground and points of difference for each of the objectives’, no date (October 2015) (Gerrard, papers in support of brief of evidence (doc D88(b)), p 882)

185. ‘Crown and IAG common ground and points of difference for each of the objectives’, no date (October 2015) (Gerrard, papers in support of brief of evidence (doc D88(b)), p 882)

186. ‘Crown and IAG common ground and points of difference for each of the objectives’, no date (October 2015) (Gerrard, papers in support of brief of evidence (doc D88(b)), p 882)

187. Briefing to Minister, ‘Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015’, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1105–1108)

**4.3.6.4 Officials propose a menu of options to Ministers, October–November 2015**

In October–November 2015, officials proposed a menu of options to Ministers, which were then further developed or redeveloped in November. Initially, these policy options (objective-by-objective) were:

- ▶ *Enable formal recognition of iwi/hapū relationships with particular water bodies:* The first option was to require councils to engage with 'iwi/hapū' at the beginning of freshwater planning, to ensure that 'associations' with water bodies were 'appropriately reflected' in plans. The second option was to require councils to engage with any 'iwi/hapū' with acknowledged associations when it came time to apply the NOF and identify values and objectives for those water bodies.<sup>188</sup> Both of these options would be given effect by 'building on the existing elements in Objective D1 and Policy D1 in the National Policy Statement – Freshwater Management' (the text of D1 is set out in section 3.2.2).<sup>189</sup> The ILG had already disagreed that these options went far enough, and wanted additional options such as the vesting of certain lake and river beds in iwi.<sup>190</sup>
- ▶ *Enhance iwi/hapū participation at all levels of freshwater decision-making:* To meet this objective, Ministers had signalled their preference to 'build upon the existing and proposed mechanisms for iwi/hapū participation provided in the RMA'.<sup>191</sup> The first proposed option was to create a baseline model for iwi–council engagement, restricted to freshwater management. If iwi and councils did not already have a similar level of engagement through a Treaty settlement or an existing arrangement, then councils would be required to invite iwi to 'participate' in planning via a 'joint entity' to develop the plan, an iwi or water body-specific strategy, or an Iwi Participation Arrangement (IPA) (via the RMA reforms), 'perhaps culminating in a JMA' [Joint Management Agreement].<sup>192</sup>

Officials considered two possibilities for a joint entity: the Hawke's Bay Regional Planning Committee, a joint committee with 50/50 council members and 'tangata whenua', focusing on regional plans and policy statements; and the Canterbury Zone Committees, each of which had a Ngai Tahu

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188. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1113)

189. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p 1028)

190. Briefing to Minister, 'Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015', 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1107)

191. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p 1028)

192. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1113)

representative and other 'sectoral' representatives.<sup>193</sup> The officials were worried that a regional-level joint entity like the Hawkes Bay committee might cause problems in terms of past (and future) Treaty settlements, and could 'serve as a disincentive' to the negotiation of 'more regionally-sensitive' Iwi Participation Agreements. The Zone Committees, on the other hand, represented many interests and could not serve as a joint council-iwi entity. The IAG and ILG were unlikely to accept any joint entity which did not 'expressly reflect the nature of the Treaty partnership'.<sup>194</sup>

A second option was for the Crown to provide guidance or funding to support 'iwi/hapū resource and expertise' in freshwater planning processes, provide guidance to councils on how to engage with iwi, and 'increase the focus that councils must give to iwi/hapū values in freshwater decision-making'.<sup>195</sup>

A third option was to provide guidance and funding to support the setting up of JMAS, and to amend the RMA to 'improve their accessibility'.<sup>196</sup> As discussed in chapter 2, the requirements of section 36B had created a high barrier to the establishment of JMAS. Officials advised, however, that the IAG no longer sought compulsory JMAS in all catchments (a point of difference noted above). The Ministry recommended making JMAS more practicable for councils and iwi by amending the RMA so that JMAS could be established for the specific purpose of 'improving iwi/Māori participation in decision-making'. The criterion of 'efficiency', which had to be met before a JMA could be established, should also be removed. Officials suggested that the same amendments could be made to section 33 of the RMA (transfer of powers from councils to public or tribal authorities), if Ministers wanted to make this mechanism more accessible to councils and iwi.<sup>197</sup>

A fourth option was to amend the RMA to improve iwi participation in the establishment of water conservation orders (WCOs).<sup>198</sup> This would involve amending the RMA to require WCO applicants to consult 'relevant iwi', ensuring that the special tribunal (which decided applications) had either Māori

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193. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1029)

194. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1029)

195. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

196. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

197. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp1030-1031)

198. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)



expertise or members nominated by iwi, and requiring the special tribunal to consider the interests of iwi.<sup>199</sup>

Officials did not include an option to enhance the legal weight of iwi management plans, as sought by the ILG. Ministers considered that the most effective way to increase Māori participation in planning was through *direct input* into the development of regional plans, although iwi management plans were still useful to 'iwi in their internal processes'.<sup>200</sup>

- ▶ *Build capacity and capability amongst iwi/hapū and councils, including resourcing*: The first option was to review the capacity of 'iwi/hapū' to participate in freshwater management processes, including through JMAs. The second option was to provide guidance and funding to support 'increased capability within iwi/hapū' by supporting certification of members as hearing commissioners, and providing guidance and training on freshwater management processes. The third option was to provide guidance and training to councils on how to engage iwi in freshwater management.<sup>201</sup>
- ▶ *Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality*: Officials noted that discussions with the IAG had focused on the way in which 'te mana o te wai' was 'described and included in the NPS-FM'. Both councils and the ILG had advised that the status of the text about 'te mana o te wai', and its meaning, was 'unclear and provides ambiguous and inadequate direction'.<sup>202</sup> The first proposed option was to have 'te mana o te wai' as an overarching 'purpose statement' in the NPS-FM, but also to 'weave it through the objectives and policies' in the main body of the NPS-FM. Specifically, the latter would include section C (integrated management) of the NPS.<sup>203</sup> Officials suggested, however, that this should be done 'without imposing any additional requirement on councils beyond the existing provisions for maintaining or improving water quality'.<sup>204</sup>

The second option under this objective would be to 'increase the consideration that councils and/or collaborative groups must extend to tangata

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199. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1031)

200. Briefing to Minister, 'Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015', 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1107)

201. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

202. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1032)

203. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

204. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1032)

whenua values in freshwater planning.<sup>205</sup> Officials considered that this option would be provided for by the measures described above for giving formal recognition to iwi/hapū relationships with water bodies.<sup>206</sup>

- ▶ *Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests:* Ministers wanted options under this objective to focus on the development of Māori land, especially where institutional or historical factors had frustrated that development, and to provide for both ‘access to water quantity and assimilative capacity’. Both were considered ‘critical to the development of lands.’<sup>207</sup> The options proposed by officials had to first create ‘headroom’ for new users, and then ensure that the development of Māori land was assisted by the water thus made available.

First, there were three options to ‘generate headroom in fully allocated catchments’. Secondly, once headroom was generated, councils would be required to allocate ‘newly available’ water according to ‘national and/or regional priorities’. One of the criteria councils would have to include in allocation plans was the enabling of Māori land development (both lands returned to iwi through Treaty settlements and Māori land held under Te Ture Whenua Māori Act 1993). Thirdly, new regimes for allocating contaminants would also have to include Māori land development as an allocation criterion. Common expiry dates would facilitate opportunities ‘for the effective use of these criteria’. Fourthly, councils would be required to provide for the development of Māori lands when ‘providing headroom for new uses’ through regimes to manage non-allocable contaminants, such as sediment.<sup>208</sup>

Officials noted that the ILG was likely to ‘continue to seek preference for any iwi/hapū applications more generally’. This might, for example, provide preference for joint ventures between iwi and other landowners.<sup>209</sup> In the IAG’s view, there should be ‘preference to uses of freshwater resources that enable Māori economic development in a broad sense (ie beyond the

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205. ‘Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

206. Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1032)

207. Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1032)

208. ‘Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113); Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp1032–1033)

209. Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1033)

development of Māori lands).<sup>210</sup> Other options proposed by the IAG were the allocation of a portion of current water and discharge permits to 'iwi/hapū' at the point each permit expired, and 'reserving a portion of unallocated water and discharge loads for iwi/hapū'.<sup>211</sup> The ILG was very concerned that iwi who had been 'dispossessed of traditional lands' not be further disadvantaged by exclusion from these opportunities for economic development.<sup>212</sup>

- ▶ *Address uncertainty of supply of potable water on marae and in papakāinga:* The option for this objective was a contestable fund to 'develop or improve infrastructure for drinking water in marae and papakainga'.<sup>213</sup> Officials considered that it might be necessary to include 'wastewater treatment/disposal infrastructure' in this option. In their view, TPK's existing infrastructure grant system or the defunct Drinking Water Subsidy Scheme could be used to provide for this option.<sup>214</sup>

#### **4.3.6.5 The Crown considers the ILG's 'Mana Whakahono a Rohe' proposal, November 2015**

Officials were concerned that the Crown's policy options for economic development and for iwi roles in decision-making would fall well short of the ILG's 'aspirations'.<sup>215</sup> On 11 November 2015, the ILG provided the Crown with a paper outlining the iwi leaders' preferred option for the objective of 'enhanc[ing] iwi/hapū participation in freshwater decision-making'.<sup>216</sup> This option was entitled 'Mana Whakahono a-Rohe: Iwi-Local Authority Agreements'.<sup>217</sup> It had the potential to apply to all RMA matters rather than being confined to freshwater management if – as expected – the ILG pushed to have this model replace IPAS in the RMA

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210. Briefing to Ministers, 'Fresh Water: Framework for Allocation', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1047)

211. Briefing to Ministers, 'Fresh Water: Framework for Allocation', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1047)

212. Briefing to Minister, 'Freshwater reform: Upcoming meeting with the Freshwater Iwi Leaders Group – 14 October 2015; 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1107)

213. 'Potential approach to addressing iwi/hapū rights and interests through freshwater reform, no date (October 2015), appendix to briefing to Minister, 9 October 2015 (Crown counsel, sensitive discovery documents (doc D92), p1113)

214. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1033)

215. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1033)

216. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1066)

217. 'ILG Proposal – Mana Whakahono a-Rohe', appendix 1 to briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1072)

reforms. By this stage, a Resource Legislation Amendment Bill had been drafted and was almost ready for introduction to Parliament.<sup>218</sup>

The ILG proposed that Mana Whakahono a Rohe agreements would be initiated by iwi (not councils), but compulsory for councils to enter into once iwi began the process. They could take the form of multi-iwi, multi-council agreements or be more restricted to a single catchment as iwi preferred. Iwi and councils would be able to agree on amendments (or enter into dispute resolution if they could not agree), but the agreements would not be terminable. They would, however, be reviewable and provide for ongoing dispute resolution procedures. Nonetheless, the 'compulsory' Mana Whakahono a Rohe agreements could not override existing Treaty settlement provisions, and future settlements would be able to provide for another form of agreement.<sup>219</sup> The underlying principles would be 'te mana o te wai', good faith cooperation, honest communication, and using 'best endeavours' to ensure an enduring agreement. Both iwi and councils would have to report to the Minister on the effectiveness of the agreements.<sup>220</sup>

In terms of scope and powers, the ILG envisaged that joint or delegated decision-making could be a feature of the agreements, but that they *must* cover:

- ▶ the preparation of planning documents (including any community collaborative arrangements established for freshwater planning);
- ▶ the exercise of 'duties, functions and powers' relating to consents;
- ▶ the appointment of committees and decision makers such as hearing committees;
- ▶ monitoring (which had been a significant issue in the 2014 consultation on amendments to the NPS-FM);
- ▶ enforcement;
- ▶ council bylaws;
- ▶ council responsibilities for waterways under the Maritime Transport Act; and
- ▶ 'planning for growth under the RMA/LGA [Local Government Act]'.<sup>221</sup>

The ILG also argued that resourcing would be needed to help councils and iwi arrange these agreements and build their capacity to carry them out.<sup>222</sup>

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218. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1066–1067)

219. ILG Proposal – Mana Whakahono a-Rohe', appendix 1 to briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1072–1073)

220. ILG Proposal – Mana Whakahono a-Rohe', appendix 1 to briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1073)

221. ILG Proposal – Mana Whakahono a-Rohe', appendix 1 to briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1072–1073)

222. ILG Proposal – Mana Whakahono a-Rohe', appendix 1 to briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1073)

Crown officials noted that this proposal differed significantly from the proposed IPAS in the Resource Legislation Amendment Bill. The IPA model had been the subject of consultation back in 2013 (see chapter 3). It did not have the comprehensive coverage of the proposed Mana Whakahono a Rohe agreements. IPAS were restricted to freshwater planning (regional plans or policy statements). They were initiated by councils, not iwi, and had no resourcing or reporting requirements. Clearly, the ILG model was very different from the IPAS in both nature, scope, and functions.<sup>223</sup> Nonetheless, officials advised that the Bill could be amended to include at least a process initiated by iwi rather than councils, and suggested that the crucial *outcome* of an IPA or a Mana Whakahono a Rohe agreement could be a Joint Management Agreement (JMA) or a section 33 transfer of powers – that is, either of the agreements to work together could be a path to the adoption of existing RMA mechanisms for joint or transferred decision-making.<sup>224</sup>

Officials, therefore, returned to the recommendation (noted above) that section 36B (JMAS) and/or section 33 (transfer of powers) be amended to make them more accessible. They noted that only two section 36B JMAS had ever been established, and no section 33 transfers of power to iwi had occurred at all. If councils and iwi could agree to work together through a Mana Whakahono a Rohe agreement or an IPA, then JMAS needed to be made a more accessible means for them to do so. One barrier in the legislation was that the establishment of JMAS must be 'efficient', but the initial costs of executing a JMA and 'meeting its administrative needs' meant that the requirement of efficiency was very unlikely to be met. Alternatively, those costs would have to fall on iwi, which was not feasible given that iwi had 'identified financial resources as a significant barrier to their participation in the RMA system'. Officials pointed out that adversarial processes and the likelihood of costly legal appeals also led to 'inefficiencies' and recommended that this criterion be amended for council-iwi JMAS. They also reiterated their earlier option of amending section 36B of the RMA to make iwi participation in decision-making a specific purpose for establishing JMAS.<sup>225</sup> Further, officials restated the option of making both of those amendments to section 33 so that transfer of powers could be a more meaningful prospect once councils and iwi had made agreements on how to work together.<sup>226</sup>

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223. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1066–1068)

224. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1069)

225. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1069–1070)

226. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1070)

### 4.3.7 The Crown's decisions on policy options for consultation, December 2015–February 2016

#### 4.3.7.1 *The Crown rejects the iwi allocation recommendations of the fourth LAWf report*

The LAWf's fourth report was issued in November 2015. In respect of Māori rights and interests, the report was premised on the idea that the Crown would agree to allocation of water and discharge rights to iwi. In brief, the forum recommended that in under-allocated catchments, the Crown should require councils to reserve unallocated water and discharge allowances for that purpose. In fully or over-allocated catchments, councils would have to provide iwi access to water 'over time', while the Crown compensated existing consent holders when necessary. The forum also recommended that the Crown should assist iwi to become more fully involved in the 'water economy', such as by facilitating joint ventures or buying up allocation rights for transfer to iwi.<sup>227</sup>

The Crown received an early draft report from the forum.<sup>228</sup> Ministry officials reiterated Cabinet's bottom lines: 'no generic share of freshwater resources will be provided to iwi, and there will be no national settlement of iwi/hapū claims to freshwater resources.'<sup>229</sup> Also, the Crown was not prepared to envisage anyone – including iwi – obtaining a perpetual right to a water resource consent. As one official put it, the forum's recommendations about Māori rights and interests 'extend[ed] beyond' what the Crown was considering.<sup>230</sup>

While Ministers were not prepared to consider generic iwi allocations, they were willing to look at Māori land development as a consideration for councils in allocation. Even there, however, the idea of the Crown getting directly involved in commercial arrangements to transfer allocation to Māori was outside of scope.<sup>231</sup>

#### 4.3.7.2 *Ministers' meeting with the ILG, 1 December 2015*

As discussed above, officials proposed a menu of policy options to Ministers for their consideration. They also provided the IAG with an early draft of the 'Next Steps' consultation document in late November, in the run-up to the meeting between Ministers and the ILG on 1 December 2015.<sup>232</sup> At the meeting, the Minister

227. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Wellington(?): Land and Water Trust, 2015), pp 8–10 (Workman, papers in support of brief of evidence (doc F6(a)), pp 465–467)

228. Briefing to Ministers, 'Fresh Water: Framework for Allocation', no date (early November 2015) ((Crown counsel, sensitive discovery documents (doc D92), pp 1047, 1059)

229. Briefing to Ministers, 'Fresh Water: Framework for Allocation', no date (early November 2015) ((Crown counsel, sensitive discovery documents (doc D92), p 1047)

230. Briefing to Minister for the Environment, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015', 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1099)

231. Briefing to Minister for the Environment, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015', 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1099)

232. Briefing to Minister, 'Upcoming meeting with the Freshwater Iwi Leaders Group – 1 December 2015', 27 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1094)

for the Environment, Nick Smith, 'highlighted the seven key components of the package the Government is proposing to address iwi/hapū rights and interests in fresh water'.<sup>233</sup> These were presented at a relatively high level, with the detail reserved for the Iwi Chairs Forum on 5 February 2016.<sup>234</sup> The high-level proposals included the Crown's decision to adapt the ILG's mana whakahono a rohe model:

- ▶ Making Te Mana o Te Wai the overarching principle for freshwater management
- ▶ Recognising relationships of iwi and hapū with water bodies
- ▶ Improving Water Conservation Order (wco) processes so iwi are involved
- ▶ Implementing Mana Whakahono a Rohe
- ▶ Supporting the development of Māori lands through the allocation framework
- ▶ Supporting capacity and capability building
- ▶ Funding water infrastructure at marae and papakāinga.<sup>235</sup>

At the 1 December meeting, the Crown agreed to the ILG's request for the iwi advisors to work with officials on the text of the discussion document. But the results of the meeting were not necessarily encouraging. Ministers would be meeting the full Iwi Chairs Forum four days later at Hokitika, and officials noted:

The ILG will already have updated Iwi Chairs on the progress of their discussions with the Crown on freshwater reform. While the ILG may acknowledge the progress to date, it is likely that they will have indicated the reform proposals will not meet iwi expectations, and that they are seeking to negotiate better proposals.<sup>236</sup>

In particular, the IAG had already indicated their concerns that the Crown's mana whakahono a rohe proposal did not apply to all resource management matters (only fresh water), and that the Crown's options for allocation and economic development (discussed above) did not 'go far enough to address iwi/hapū rights and interests'. Also, iwi leaders objected to the inclusion of changes to the wco process as a means of addressing Māori rights and interests. The 'IAG/ILG does not want to be seen to endorse the concept of wcos'.<sup>237</sup>

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233. Briefing to Minister, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015, 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p1099)

234. Briefing to Minister, 'Upcoming meeting with the Freshwater Iwi Leaders Group – 1 December 2015; 27 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1095)

235. Briefing to Minister, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015, 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p1099)

236. Briefing to Minister, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015, 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p1098)

237. Briefing to Minister, 'Upcoming meeting with the Freshwater Iwi Leaders Group – 1 December 2015; 27 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1095)

#### **4.3.7.3 Cabinet paper with proposed policy options for consultation, December 2015**

In the meantime, a Cabinet paper had been prepared for a meeting of the Economic Growth and Infrastructure Committee on 9 December 2015. The Ministers for the Environment and Primary Industries sought Cabinet's agreement to a final set of policy proposals for presentation to iwi chairs on 5 February 2016 and for the consultation document.

In terms of the economic development options, the suggestion developed by officials had been to provide for the development of Māori-owned land (held under Te Ture Whenua and as a result of Treaty settlements) in any allocation plans. One of the criteria for weighing up new consent applications for water takes or discharges would thus be: 'enables development of Māori land'.<sup>238</sup> But the December 2015 Cabinet paper put two extra options for Cabinet to choose between, which removed the specific reference to Māori land. First, the criterion could be the development of any under-developed land, but its 'broadness' diminished the likelihood of Māori land getting access to freshwater resources.<sup>239</sup> Secondly, the criterion could be the development of any land that was 'under-developed as a result of Crown actions.' This could encompass general land (such as any land returned to former owners under the Public Works Act 1981) as well as Māori land, and it might not cover land returned to iwi as part of a Treaty settlement.<sup>240</sup> The third option was to use the original proposal: the criterion would be the development of Māori land.<sup>241</sup> These options were put to Cabinet to decide.

In terms of other policy options, the Ministers for the Environment and Primary Industries had narrowed the menu of options to seven proposals (for discussion with the iwi chairs and for wider consultation). The first two required further changes to the 2014 version of the NPS-FM:

- ▶ Amending the Freshwater NPS to better describe the meaning of Te Mana o Te Wai and require councils to demonstrate its use as the platform for community discussions and in their implementation of all relevant policies in the Freshwater NPS
- ▶ Amending the Freshwater NPS to ensure that councils identify iwi/hapū relationships with particular freshwater bodies, and engage iwi/hapū in RMA planning processes for waterbodies with which they have relationships.<sup>242</sup>

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238. Draft Cabinet paper, '2016 Freshwater Reform: Policy Proposals and Consultation Process', no date, appendix to briefing to Ministers, 'Fresh water: Cabinet paper on 2016 Freshwater reform, policy proposals and consultation process', 18 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 965)

239. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 879)

240. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 879)

241. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 879)

242. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 881)



The next three proposals required amending the RMA:

- ▶ Amending the RMA to improve the accessibility of Joint Management Agreements (JMAs) by clarifying that JMAs may be established for the purpose of improving iwi/hapū participation in decision-making
- ▶ Improving iwi/hapū participation in freshwater management and decision-making by introducing an iwi-initiated agreement with councils called 'Mana Whakahono a Rohe' about how they will work together on freshwater issues. This is a similar but refined concept to that of Iwi Participation Arrangements in the Resource Legislation Amendment Bill. If iwi do not initiate this, the status quo will apply. Councils will remain the final decision-making authority, unless this has been superseded by agreement
- ▶ Amending the RMA to improve Water Conservation Order processes by:
  - Requiring pre-application consultation with the relevant iwi; having a nominated representative of the relevant iwi on the Special Tribunal (the body that hears and reports on the application); and require the Special Tribunal to consider the relevant needs of iwi
  - Increasing the effectiveness of Water Conservation Orders by providing for greater integration with regional planning processes.<sup>243</sup>

The Resource Legislation Amendment Bill had just been introduced to Parliament at the end of November 2015, so the plan was to introduce these amendments to that Bill after the consultation process, by means of a supplementary order paper.<sup>244</sup> It is notable that the proposal to make RMA mechanisms more accessible did not refer to section 33 (transfer of powers) or the 'efficiency' criterion for establishing JMAs, which officials considered made it very difficult for councils or iwi to justify the costs of a JMA (see above). Also, the proposal (at this stage) was for the 'mana whakahono a rohe agreement' to be confined to freshwater management.

The sixth proposed policy option was for the Crown to support councils and iwi to 'build capacity and capability by providing training and guidance.'<sup>245</sup> Notably, the earlier possible option of supporting iwi capacity and capability with funding was not included.

Finally, the Crown proposed '[c]onsidering if funding is required to develop or improve water infrastructure at marae and papakāinga.'<sup>246</sup> This was a somewhat cautious amendment of the earlier official-IAG consensus that funding was needed, and officials' proposal that a contestable fund should be established.

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243. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 881–882)

244. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 886–887, 894)

245. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 882)

246. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 882)

By and large, these became the reform options that were put out for public consultation in February 2016, with some amendments. The most significant of those was the removal of the allocation options from the consultation document. On 9 December 2015, the Cabinet Economic Growth and Infrastructure Committee reviewed the Cabinet paper but did not approve its recommendations. Instead, the committee referred the paper back to a group of Ministers for further discussion and refinement.<sup>247</sup> One of the crucial problems was the economic development/allocation issue, and the difficulty of formulating a proposal that would meet Cabinet's original bottom lines, balance the interests of Māori and other resource users, and still meet the iwi leaders' views as to how access to water (and discharge rights) should be addressed. Cabinet had concerns about the impact of the proposed allocation options on existing or new users and on councils.<sup>248</sup>

Following the Cabinet committee meeting, officials noted that allocation issues had been 'contentious' in their discussions with the IAG. Iwi leaders did not want allocation options restricted to iwi who had land to develop (which penalised those who had lost land through raupatu, for example). Further, if the Crown's proposed option did not provide certainty that Māori lands would be 'able to access freshwater resources', officials warned that this would likely put 'significant strain' on the Crown-ILG relationship and lead to court action.<sup>249</sup>

Officials considered, however, that the IAG agreed with the 'general direction' of the rest of the draft consultation document. Even so, the IAG had advised iwi leaders that the consultation document should be a Crown paper, not a joint paper. Although the original work plan in early 2015 had envisaged joint Crown-ILG proposals going out for consultation, that was simply not possible and the parties needed 'scope . . . to disagree in public.'<sup>250</sup>

Tania Gerrard explained:

Although the intended process at this stage was for the Crown and the ILG to seek agreement on the options to address iwi/hapū rights and interests, the proposals did not go far enough for the ILG. However, the ILG and IAG continued to provide feedback on the draft discussion document and were actively engaged with the Crown in relation to the proposals to address iwi/hapū rights and interests. Ultimately both sides acknowledged that the discussion document would be a Crown document and not necessarily reflective of ILG views on objectives and options. The ILG/IAG reserved their right to comment publicly and independently on the proposals put forward.<sup>251</sup>

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247. Cabinet EGI Committee, minute of decision, 'Freshwater Reform: 2016 Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 132)

248. Briefing to Ministers, 'Fresh Water: Material to Support Further Discussions on the Reform Proposals', 19 December 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 896–897)

249. Briefing to Ministers, 'Fresh Water: Material to Support Further Discussions on the Reform Proposals', 19 December 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 896–897)

250. Briefing to Ministers, 'Fresh Water: Material to Support Further Discussions on the Reform Proposals', 19 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p 897)

251. Gerrard, brief of evidence (doc D88), pp 13–14

In reply to questions in writing, Tania Gerrard, Donna Flavell, and Gerrard Albert set out the ways in which the Crown's reform proposals fell short of what the Freshwater ILG had sought to achieve.

First, the ILG had wanted to ensure substantive progress on a number of significant matters, but the Crown 'would not progress discussions on those matters':

- ▶ statutory recognition of the relationships between iwi and hapū and their water bodies;
- ▶ creation of a new form of title for water bodies, to be vested in iwi and hapū, which would confer a 'harder form of "ownership" right' entitling titleholders to 'certain privileges';
- ▶ Crown recognition that 'iwi/hapū' have a right to an 'equitable share' of allocable water quantum and discharge rights, and the reservation of water resources for 'iwi/hapū' (including for iwi without land); and
- ▶ certain governance, management, and decision-making roles for iwi and hapū, including enhanced legal weight for iwi management plans, compulsory section 36B JMAs in every catchment, appointments on councils, and participation in national decision-making about fresh water.<sup>252</sup>

Without any progress on these matters, the Crown's reform proposals did not go far enough for the ILG to agree to a joint consultation document.<sup>253</sup>

Secondly, the ILG felt that some of the reform proposals that the Crown did put forward fell short of what was necessary. We return to this point below.

#### **4.3-7.4 Cabinet signs off on proposals to put formally to the iwi chairs, February 2016**

In late January 2016, officials provided further advice to Ministers about how to address Māori rights and interests in fresh water.<sup>254</sup> After receipt of this advice, the group of Ministers met on 26 January 2016, as requested by EGI the previous month. They discussed the Crown's reform proposals and decided that 'the proposals specific to allocation are not yet far enough progressed for public consultation at this stage.'<sup>255</sup> This followed a meeting between officials and the IAG on 21 January 2016, at which the iwi advisors 'indicated an understanding that proposals on allocation have been difficult to develop in a way that addresses iwi/hapū rights and interests.'<sup>256</sup> The IAG 'indicated that they wish to continue discussions with

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252. Tania Gerrard, answers to questions in writing, no date (24 July 2018) (doc F18(b)), pp 4–5; Donna Flavell and Gerrard Albert, answers to questions in writing, 2 August 2018 (doc G22(b)), pp 3–4

253. Gerrard, answers to questions in writing (doc F18(b)), pp 4–5; Flavell and Albert, answers to questions in writing (doc G22(b)), pp 3–4

254. Briefing to Ministers, 'Fresh Water: Papers on 2016 Freshwater Reform, 15 January 2016 (Crown counsel, sensitive discovery documents (doc D92), p 870)

255. Cabinet paper, 'Freshwater Reform 2016: Discussion with Iwi Chairs 5 February', no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 884)

256. Cabinet paper, 'Freshwater reform 2016: Discussion with Iwi Chairs 5 February', no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885)

the Crown to develop options in this area.<sup>257</sup> Clearly, further work was required to ‘develop options that the Crown, Iwi Leaders and other stakeholders can support.’<sup>258</sup>

The Ministers for the Environment and Primary Industries submitted a revised Cabinet paper on 2 February 2016.<sup>259</sup> This paper advised Cabinet that ‘[w]e have not yet finalised a package of policy proposals for allocation that address the range of interests of those wishing to access freshwater resources, including iwi/hapū.’<sup>260</sup> The revised work plan for 2016 would include working with the ILG and other ‘stakeholders’ on allocation issues. Ministers would ‘return to Cabinet in due course on the development of options for allocation and enabling iwi/hapū to access freshwater resources in order to realise and express their economic interests.’<sup>261</sup> Thus, Ministers did not resile from the Crown’s commitment to address Māori rights and interests in the economic development work stream.

On 2 February 2016, Cabinet approved the following ‘key messages’ for the Iwi Chairs Forum on 5 February:

- ▶ There has been good progress in freshwater reform over the last five years, especially over the last 18 months, when you have undertaken a series of hui around the country and produced reports that have assisted us in developing proposals. However, there is still further work to ensure we can improve the way we use our natural resources within environmental limits while addressing iwi/hapū rights and interests.
- ▶ We are proposing that Te Mana o Te Wai is embedded as the overarching framework for councils and communities to discuss freshwater management. This would require amendments to the Freshwater NPS.
- ▶ We are proposing better mechanisms for iwi participation in governance and decision-making, and want to develop the Mana Whakahono a Rohe proposal.
- ▶ There is more work required to develop proposals to ensure our freshwater resources are better enabling economic growth within environmental limits. We want to continue working on this with Iwi Leaders and key stakeholders.
- ▶ The discussion document for public consultation is being finalised and consultation on proposals for freshwater reform – except allocation – will commence next month.<sup>262</sup>

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257. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885)

258. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885). See also Gerrard, brief of evidence (doc D88), p 16

259. Cabinet, minute of decision, ‘Freshwater Reform 2016: Discussion with Iwi Chairs on 5 February’, no date (5 February 2016) (Crown counsel, sensitive discovery documents (doc D92), p 95)

260. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885)

261. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885)

262. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), pp 885–886)

#### **4.3.7.5 *The Crown makes its final decisions on the policy options for consultation, February 2016***

We do not have direct evidence about what transpired at the Iwi Chairs Forum on 5 February 2016, but Cabinet made its final decisions on the policy options for consultation on 10 February 2016.<sup>263</sup> Essentially, the options approved by Cabinet are set out above in section 4.3.7.2. The main amendments were the removal of the allocation options (which had been decided previously) and now the deletion of the option for making Joint Management Agreements more accessible to iwi and councils. The relevant Cabinet paper noted that Joint Management Agreements or section 33 transfers could still be the outcomes of a Mana Whakahono a Rohe agreement; otherwise final decision-making would remain with councils. But proposals to improve the accessibility of those two RMA mechanisms had been removed from the reform options.<sup>264</sup> The policy options will be explained further in the next section, which sets out the Crown's reform proposals in the consultation document. This document was publicly released on 20 February 2016.

Here, we note simply that the Crown had decided to develop its own version of the Mana Whakahono a Rohe model for consultation, and it had narrowed the options significantly from what had originally been proposed. The ILG's view of all this was set out in October 2016 by Sir Mark Solomon and Donna Flavell, in their evidence for our inquiry:

The Freshwater ILG's ultimate goal has always been to work with the Crown to develop – for the consideration of the iwi and hapū of the motu – a comprehensive and integrated freshwater framework in which the rights and interests of iwi and their hapū are identified, recognised and provided for in a tangible and meaningful way that supports both the relationship of iwi and hapū with the waters in their rohe and the active exercise of responsibilities by iwi and hapū in respect of those waters. Unfortunately, that is made very difficult by the nature of the Crown's review and reform programme which sees issues being considered, determined and implemented in parts over a lengthy period with the most challenging questions relating to allocation and property rights deferred to the end of that process.

In its engagement with the Crown to date, the Freshwater ILG has made slow, yet constructive, progress. Given the politically charged nature of certain of the issues, election cycles, and the internal administrative and decision-making mechanisms of the Crown, it was to be expected that difficult challenges and delays would arise, and they have. This has caused great frustration on the part of the Freshwater ILG on a number of occasions.

The reforms that have been implemented or signalled by the Crown to date attempt to address some of the issues, and they represent a positive step forward in several

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263. Cabinet EGI Committee, minute of decision 'Freshwater Reform 2016: Policy Proposals for Public Consultation', no date (February 2016) (Crown counsel, sensitive discovery documents (doc D92), pp75-77)

264. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals for Public Consultation', no date (January/February 2016) (Gerrard, papers in support of brief of evidence (doc D88(b)), pp892, 896-897)

respects. However, they are a work in progress and by no means deliver the optimal or ultimately desired outcomes for iwi, hapū and whānau at this stage. Important issues like allocation remain to be progressed and other initiatives need more work. The Freshwater ILG therefore continues to push the Crown to go further and show courage in its reforms.<sup>265</sup>

The Crown's plan for 2016 was to continue to work with the ILG and IAG to further develop the options which had been put out for consultation (such as the changes to the text of the NPS-FM), and to 'continue throughout 2016 to discuss the policy options for the allocation of water and allocable discharges.'<sup>266</sup>

#### 4.4 'NEXT STEPS FOR FRESH WATER'

##### 4.4.1 What did the Crown propose in respect of Māori rights and interests?

The Crown released its consultation document, *Next Steps for Fresh Water*, in February 2016.<sup>267</sup> Before discussing the Crown's proposals, it is necessary to reiterate three points from the previous discussion.

First, Cabinet had decided to remove the parts of the draft document which had referred to economic options to provide for Māori rights and interests in water. The draft consultation document stated that Māori rights and interests would be recognised through 'the opportunity to access freshwater resources for economic development'.<sup>268</sup> A 'generic "iwi share" of freshwater resources' was ruled out. Instead, the Government would support councils to create 'headroom' in catchments where water had been fully allocated. From this more efficiently allocated resource, councils would be required to provide allocation of both water and discharge rights for Māori land development. The tool for this, it was proposed, would be a set of criteria which councils had to apply in allocating water and discharge rights; one of the criteria would be 'enabling the development of Māori land'. The draft discussion document suggested that this could add hundreds of millions of dollars to regional economies, as well as benefitting Māori landowners and their whanau and hapū.<sup>269</sup> As discussed above, these proposals were removed because the Crown and the ILG could not agree on whether they were an adequate reflection of Māori economic rights and interests in water. The Crown reported to the Tribunal that further work was needed in the fourth work stream to develop 'a range of mechanisms to enable iwi/hapū to access fresh water in order to realise and express their economic interests'.<sup>270</sup>

265. Solomon and Flavell, brief of evidence (doc D85), pp18–19

266. Crown counsel, fourth update report to the Tribunal, 23 February 2016 (paper 3.1.255), p 3

267. Workman, brief of evidence (doc F6), p 26; New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a))

268. 'Next Steps for Fresh Water – Draft 2016 Consultation Document', 17 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 998)

269. 'Next Steps for Fresh Water – Draft 2016 Consultation Document', 17 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 999, 1004)

270. Crown counsel, memorandum, 23 February 2016 (paper 3.1.255), p 2

Secondly, one of the key premises of the consultation document was that Māori could obtain particular recognition of their rights and interests in water bodies through the Treaty settlement process (see section 4.3.3.3). The Crown saw this as the appropriate path for arrangements like those negotiated for the Whanganui River. These kinds of arrangements were not to be made available to all Māori through the Crown's reform programme, but only to those who could or had negotiated them as part of their settlements.

Thirdly, the consultation document reflected the Crown's bottom lines (as described earlier in section 4.3.4). It was not a joint Crown-ILG discussion paper, even though that had originally been intended. The ILG did not accept that the options in the paper went far enough to provide for Māori rights and interests in water, and wanted the opportunity to dissent from it in public.

The Ministers for the Environment and Primary Industries introduced the consultation document in February 2016 by explaining the Crown's three objectives in water management reform. These objectives were:

- ▶ better environmental outcomes;
- ▶ sustainable economic growth; and
- ▶ improved Māori 'involvement in freshwater decision-making'.<sup>271</sup>

In particular, the Crown's reform proposals sought to deal with water pollution by excluding stock from waterways, investing \$100 million in water quality improvement, and providing clearer national direction to councils when setting water-use limits. The Ministers noted that the reform proposals had been developed by collaboration with both the Land and Water Forum and the ILG. Ministers advised the public:

A key aim has been to improve iwi involvement in freshwater decisions. These proposals are therefore the product of intensive and ongoing dialogue with the Iwi Leaders Group. Mana whakahono a rohe provides for iwi to enter into agreements with councils on how Māori can better participate in decisions on fresh water. Te Mana o te Wai sets overarching principles that are proposed to be included in the National Policy Statement for Freshwater Management. The proposed changes to water conservation orders ensure iwi have a say in how water bodies are protected.<sup>272</sup>

In the main body of the consultation document, the Crown stated:

The Government recognises that iwi have rights and interests in fresh water. As Treaty of Waitangi partners we are working together towards a freshwater management system that benefits everyone.

Iwi and hapū have traditional and cultural connections with freshwater resources, as well as significant economic interests across a range of industries contributing to

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271. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 4

272. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 4

the New Zealand economy. For iwi and hapū, core objectives are active protection of Te Mana o te Wai and upholding their guardianship (kaitiaki) obligations towards the water bodies in their rohe.<sup>273</sup>

Thus, the Crown once again publicly recognised that Māori had rights and interests in fresh water. It also argued that it was working together with the Māori Treaty partner to develop a management system that benefitted ‘everyone’. Within the context of the consultation document’s proposals, Māori objectives were described as protection of ‘te mana o te wai’ and upholding kaitiakitanga. In order to provide for these objectives, and for Māori traditional and cultural connections with freshwater resources, the Crown summarised its proposals as:

Strengthen Te Mana o te Wai as the underpinning platform for community discussions on fresh water.

Improve iwi/hapū participation in freshwater governance and management.

Better integrate water conservation orders (wcos) with regional water planning and allow for increased iwi participation and decision-making on wcos.<sup>274</sup>

In this chapter, we are not concerned with the Crown’s broader water management reform proposals. Those which relate to the improvement of water quality are largely addressed in the next chapter. Here our focus is on what the Crown proposed in respect of Māori rights and interests, which was discussed in detail in a section of the discussion document entitled ‘Iwi rights and interests in fresh water’. The content of that section reflected the Crown–ILG discussions of 2014–16, and the decisions which Cabinet had made as per its bottom lines. The Crown reiterated its commitment to ‘addressing iwi and hapū rights and interests in fresh water’. It noted the Tribunal’s findings in our stage 1 report, particularly in respect of proprietary rights and our finding that Māori retain residual proprietary rights in water bodies today. The Crown then stated that the reform proposals had been developed through ‘engagement’ with the ILG (the word collaboration had been used earlier) but noted: ‘Both parties acknowledge the proposals do not address all aspirations of iwi/hapū, nor does the engagement represent all iwi/hapū/whanau perspectives’. The Crown also reiterated its view that ‘no one owns water’. Nonetheless, the Crown’s position was that Māori rights and interests would finally be recognised when (a) freshwater management gave effect to ‘te mana o te wai’, (b) Māori values and relationships with particular water bodies were recognised, (c) iwi and hapū participated in decision-making about fresh water in their rohe, and (d) marae and papakainga had access to clean drinking water.<sup>275</sup>

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273. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 9

274. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 10

275. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 27



Based on this articulation of what was necessary to provide for Māori rights and interests, the Crown set out its particular reform proposals. These were:

- ▶ *Te Mana o te Wai in freshwater management*: Both regional councils and the ILG had advised the Crown that the current reference to 'te mana o te wai' in the NPS-FM 2014 was unclear, and that it provided 'ambiguous and inadequate direction' to councils as to how to give effect to it. The Crown's reform proposal was to insert an explanatory 'purpose statement' in the NPS-FM, and to require councils to give effect to 'te mana o te wai' in carrying out all the policies in the national policy statement.<sup>276</sup>
- ▶ *Recognition of iwi and hapū relationships with, and values for, water bodies*: The Crown noted that some Māori had obtained particular recognition of their relationships with water bodies through Treaty settlements, including statutory acknowledgements, the vesting of beds, and 'the establishment of a new legal personality, such as Te Awa Tupua of the Whanganui River'.<sup>277</sup> But not all Māori had had their 'associations' recognised in this way. Similarly, there was already provision to recognise Māori values in the National Objectives Framework of the NPS-FM, including food gathering (mahinga kai), wai tapu (sacred waters for rituals and ceremonies), and economic uses and development. Also, councils already had to work with iwi and hapū to identify those values and reflect them in decision-making.<sup>278</sup>

The Crown's proposed reforms under this heading were that councils would have to engage with iwi and hapū at the beginning of planning processes to ensure their relationships with water bodies were identified in regional plans. Councils would then have to engage with those iwi and hapū in setting objectives for water bodies (not singly but collected together as 'freshwater management units').<sup>279</sup>

- ▶ *Participation in freshwater management decision-making*: Again, the Crown noted that the 'call from iwi for greater participation in resource management' had already been addressed by some Treaty settlements. This included co-management arrangements such as joint committees, advisory committees, and requirements to appoint iwi commissioners for consent hearings. The Crown accepted, however, that it had to provide for Māori involvement in decision-making more generally (and consistently). The Crown's reform proposal was to amend the RMA, providing for the establishment of rohe-based agreements in all catchments or regions. These agreements would be available to all iwi but would not override more specific Treaty settlement arrangements for those who had them. The rohe agreements, called 'mana

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276. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 27–28

277. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 28

278. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 28–29

279. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 28–29

whakahono a rohe' agreements, would be initiated by iwi, and would provide for multiple iwi to be involved where necessary. These agreements would cover how iwi and councils would 'work together' in respect of 'plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities'. There would also be provisions for review and dispute resolution. According to the Crown's explanation, the main difference between the mana whakahono a rohe agreements and its earlier proposal for 'iwi participation agreements' was that iwi, not councils, would initiate the agreements.<sup>280</sup>

In addition, the Crown proposed to amend the RMA to 'provide a greater role for iwi' in the water conservation orders process.<sup>281</sup>

Finally, the Crown noted that most iwi and councils would need greater capacity and capability to make the participation provisions effective. The Crown's reform proposal was not to provide them with resources but to 'facilitate and resource' capability-building programmes.<sup>282</sup>

- ▶ *Clean, safe drinking water for marae and papakāinga*: The Crown's final set of reform proposals related to the provision of safe drinking water for marae and papakāinga housing. As will be recalled, the original proposal had been to provide resourcing for water supplies. In the consultation document, however, the Crown proposed to 'consider if additional funding is required to develop or improve water infrastructure at marae and papakāinga'. The Crown noted that a sample of 21 marae in the Turanga district revealed that four marae had no water supply and a further three did not have safe drinking water. The consultation document sought responses from marae or papakāinga residents so that the size of the problem (and the funding needed) could be assessed.<sup>283</sup>

In sum, the Crown's proposed reforms focused on:

- ▶ giving Māori values more weight in freshwater management through the 'te mana o te wai' mechanism in the NPS-FM;
- ▶ providing greater recognition for iwi and hapū relationships with their water bodies in freshwater planning and objective-setting processes;
- ▶ improving Māori participation in freshwater management decision-making through the mechanism of mana whakahono a rohe agreements, and by resourcing capability-building programmes; and
- ▶ providing clean water to marae and papakāinga housing, beginning by seeking information as to how much funding might be required.

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280. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 29–30

281. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 30–31

282. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 31

283. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 31–32

Most of these proposed reforms were to be carried out by amending the NPS-FM or the RMA. Also, apart from the marae water supply proposal, all the Crown's reforms were concerned with freshwater management processes. For the water supply proposal, the document seems to suggest that the consultation process itself would be the means for 'consider[ing] if additional funding is required'. No other mechanism was proposed.

In our view, this was a limited and disappointing outcome in light of the many reform options discussed by the ILG and the Crown (see section 4.3.6). Nonetheless, there was a potential for some significant reform if the proposals were adopted (and proved effective).

We turn next to consider the Māori Treaty partner's responses to the Crown's reform proposals.

#### **4.4.2 What were the Māori Treaty partner's responses?**

##### **4.4.2.1 Public consultation**

The Crown consulted the public on its reform proposals from 20 February to 22 April 2016. Officials conducted hui and public meetings attended by about 1050 people. Forty iwi and other Māori groups made formal, written submissions about the proposed reforms. In all, the Crown received almost 4000 individual submissions, including from local authorities, NGOs, businesses, primary industry groups, electricity companies, universities, the LAWf, and the Parliamentary Commissioner for the Environment.<sup>284</sup> Around half of the 3,966 submissions were template submissions prepared by the Forest and Bird Society, the Green Party, and the Morgan Foundation.<sup>285</sup>

Martin Workman provided evidence summarising the public feedback on proposals relating to Māori rights and interests. He told us that most organisations supported the 'te mana o te wai' proposals. Central government, councils, and 'Māori/iwi' supported the mana whakahono a rohe proposal. There was also 'general support' for iwi involvement in RMA processes for water conservation orders.<sup>286</sup> There was also support for processes to ensure increased recognition of 'iwi/hapū relationships with, and values for, freshwater bodies'. The Crown found 'strong support' for proposals to enhance iwi engagement with councils, and support for additional funding to 'develop or improve water infrastructure' at marae and papakāinga.<sup>287</sup>

It seemed, therefore, that there was public support for increasing Māori participation in freshwater management (in a variety of ways), and for improving marae and papakāinga water supplies. Both the Crown and iwi leaders must have been encouraged by this.

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284. Workman, brief of evidence (doc F6), p 28

285. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions* (Wellington: Ministry for the Environment, June 2016), p 4

286. Workman, brief of evidence (doc F6), pp 28–30

287. Ministry for the Environment, briefing to Ministers, 'Summary of consultation submissions and next steps', 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), p 685)

We begin our more detailed study of the Māori Treaty partner's responses with the Ministry for the Environment's summary of the submissions.

#### **4.4.2.2 The Ministry for the Environment's summary of submissions**

The Ministry for the Environment published a summary of submissions in June 2016. The Ministry's approach was to summarise submissions in respect of each set of reform proposals. We deal with each of the relevant reform proposals in turn.

##### **4.4.2.2.1 TE MANA O TE WAI IN FRESHWATER MANAGEMENT**

A number of individual submissions opposed the Crown's reform proposals in respect of 'te mana o te wai', on the grounds that 'te mana o te wai' was a 'Māori-centric policy'. The Ministry noted in its report that this was not the case because 'the underlying concept is applicable to all New Zealanders'.<sup>288</sup> This reflects the way in which 'te mana o te wai' had been presented in the NPS-FM and its national objectives framework as an 'aggregation of community and tāngata whenua values' (see chapter 3).<sup>289</sup>

The majority of submitter groups and organisations, however, supported the proposals, especially iwi, local authorities, and NGOs. The submissions sought a clear definition of 'te mana o te wai', and some suggested that the concept should be 'interpreted by iwi themselves', as iwi definitions may differ around the country. The other 'common themes' among supporters included the submission that funding should be provided, and the capacity and capability of both iwi and councils should be strengthened. In order to ensure the concept was fully reflected in decisions, there were submissions that tāngata whenua should be involved in the consenting process – either through mandatory consultation or by 'involvement in the consenting authority'. Public education was also seen as necessary, by way of workshops, education programmes, training local facilitators, and including it in the national 'state of the environment' reporting requirements. A national communications and education strategy was also requested.<sup>290</sup>

##### **4.4.2.2.2 IWI AND HAPŪ RELATIONSHIPS WITH, AND VALUES FOR, WATER BODIES**

Again, there were individual submissions opposed to the proposals for recognising iwi and hapū relationships with, and values for, water bodies. These submissions did not engage with the content of the proposals but rather saw any such recognition as 'race-based' and 'exclusionary'. Primary industry groups gave some support to recognising iwi and hapū relationships. They were, however, unanimously opposed to the proposal that councils would engage with iwi and hapū

288. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 34

289. New Zealand Government, *National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2014), pp 6, 20–23 (Workman, papers in support of brief of evidence (doc F6(a)), pp 6, 20–23)

290. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 34

when 'identifying values and setting objectives' for particular water 'units' (which could include a number of water bodies).<sup>291</sup>

Otherwise, the submissions from all other groups, including Māori groups and organisations, were 'predominantly in support' of the proposals. Some pointed out that the identification of iwi and hapū relationships with freshwater bodies should already be occurring anyway. In particular, the majority of Māori submitters were concerned that the Local Government Act 2002, the RMA, and Treaty settlement legislation already required councils to recognise iwi and hapū relationships with their ancestral water bodies. They were concerned that existing RMA requirements to 'recognise and provide for' were actually stronger than the Crown's proposal to 'recognise and record' relationships with water bodies. The Ministry noted a 'clear desire' for the Crown's proposals to enhance existing requirements and not merely restate them.<sup>292</sup>

The 'strongest theme' among the submissions in support was that both iwi and councils needed extra resources to support their increased engagement on these matters. Māori groups and councils indicated that there were already heavy demands on both time and money with existing consultative requirements. In particular, it took both time and resources to 'pull information together' for use in engagement over identifying relationships and applying values. In addition, there were proposals for the Crown to train council staff on why engagement was necessary and how to engage, and to supply specialists to help at the beginning. More guidance was also requested on how to handle overlapping iwi and hapū relationships with water bodies. More broadly, iwi sought resources to develop and deliver education to the community about the Treaty, Māori rights in (and the history of) particular water bodies, kaitiaki responsibilities, and the traditional practices associated with each water body. Submitters identified a need for educating iwi organisations as well, in respect of freshwater management processes.<sup>293</sup>

Many submitters referred to the need to develop strong iwi and hapū relationships with councils so that engagement would work, and this could involve more open communications between Māori groups and councils, as well as the Crown requiring evidence from councils about their engagement with iwi and hapū. Iwi wanted to initiate their engagement with councils, and did not want the form of the relationship to be prescribed by councils.<sup>294</sup>

It was also clear from the submissions that Māori wanted iwi management plans used more for information about 'issues important to iwi/hapū' regarding water bodies; councils should be using these plans more (and more consistently). In addition, Māori had concerns about how their sensitive information about sites would be handled and protected. Suggestions included iwi and hapū having control of the databases, the councils to hold 'silent files', and for councils to

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291. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 35

292. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 36, 38

293. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 36–37

294. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 37, 39

## 4.4.2.2.3

consult with local Māori groups as to how their information should be stored and handled.<sup>295</sup>

Finally, councils and electricity companies wanted the Crown's proposals to be carried out through central government guidance, and not by way of legislative requirements.<sup>296</sup>

## 4.4.2.2.3 PARTICIPATION IN FRESHWATER DECISION-MAKING

The Crown's first reform proposal under this heading was the enabling of iwi and councils to work together through a formal agreement as to how they would do so (the mana whakahono a rohe agreement). Some individual submitters opposed this proposal as 'race-based preferential treatment'. A 'small number' of the 'business/industry/electricity generator submitters' were concerned that conflicts of interest would not be managed appropriately, and that the Crown should not delegate its own Treaty responsibilities to local government. On the other hand, 'councils, iwi/Māori and central government submitters supported the [mana whakahono a rohe] proposal as a formalisation of engagement and an opportunity for iwi to act as kaitiaki in their rohe'.<sup>297</sup> Submissions from Māori groups argued that the agreements would only work, however, if they had statutory recognition. In their view, the current arrangements for involving iwi were 'litigious and short sighted'.<sup>298</sup>

There were also concerns about the need for funding and to enhance capacity and capability (concerns which arose constantly in the various consultation rounds, and also earlier as we discussed in chapter 2). There was also the oft-repeated request for central government guidance and training to ensure that the proposal was implemented effectively. Māori groups supported the initiation of these agreements by local iwi and hapū, but councils were concerned about the complications that might arise if there were already Treaty settlement arrangements, agreements, and working relationships in a district. Councils were also worried that they might have to resolve disputes about rohe boundaries, which iwi should be involved, or who represented those iwi.<sup>299</sup>

In terms of business groups, some welcomed the proposal as a way of reducing costs later in the consenting process. Others worried about extra costs and delays if the proposed agreements did not result in clear timeframes and processes.<sup>300</sup>

The Crown's second set of proposals under the heading 'Participation in freshwater decision-making' had related to Water Conservation Orders.<sup>301</sup> As will be recalled, the ILG had not supported this part of the Crown's proposals because iwi leaders had concerns about the whole water conservation order process, and

295. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 37–38

296. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 38

297. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 41

298. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 42

299. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 41–42

300. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 42

301. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 30

not just the lack of iwi involvement in the process. The Ministry's summary of submissions stated:

Iwi generally supported the proposals relating to iwi involvement, and were neutral regarding the rest of the changes. Some iwi (Te Roroa and Te Rūnanga o Ngāi Tahu), however, noted they did not request these changes or perceive wcos 'to be a critical or necessarily important issue for iwi rights and interests in fresh water'.<sup>302</sup>

The third reform proposal related to 'implementation support', involving a proposal that the Ministry would resource and facilitate programmes to support effective iwi-council engagement. This would provide 'training and guidance' to enhance capacity and capability (for both iwi and councils). Again, there were some individual submissions opposed to any specific provisions for Māori. Most of the submissions in support came from Māori, local authorities, and NGOs, who considered such support 'vital' to the success of the Crown's proposed reforms. Some submitters, however, wanted more or different forms of support. Māori submitters argued that 'funding would also be required, in addition to guidance and training, to support effective iwi/hapū engagement in freshwater planning'.<sup>303</sup> As noted, this had been a consistent theme in earlier consultation rounds.

#### 4.4.2.2.4 CLEAN, SAFE DRINKING WATER FOR MARAE AND PAKAKĀINGA

Some individuals opposed the proposal for the Crown to consider if additional funding was needed to 'develop or improve water infrastructure at marae or papakāinga'. They opposed any proposals specifically relating to Māori. But submissions by organisations and groups, including Māori, mostly supported the proposal. Submitters gave examples of marae without safe water in Auckland, Hawke's Bay, the Far North, and the Western Bay of Plenty. Ngāti Ruanui in Taranaki reported that they had '10 marae struggling with compliance and upgrade costs'. Ngāti Tūwharetoa in the Taupō region 'highlighted limited access to reticulated drinking water'.<sup>304</sup>

Local councils and primary industry groups wanted to extend the proposal to include small rural communities that had limited access to safe water supplies. Submitters also wanted the proposal extended to wastewater treatment systems and to small, 'predominantly Māori communities which do not qualify as papakāinga or those living near their marae but not on papakāinga whose drinking water is unsafe or unreliable'.<sup>305</sup> The Ministry identified another 'strong theme' in submissions as the need for the Crown to conduct national research and determine which marae and papakāinga need this help. Some councils were anxious that the costs be funded centrally and not by ratepayers. Many of the Māori submitters asked for the Ministry of Health's 'Drinking Water Assistance Programme' to be reinstated.

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302. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 44

303. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 45

304. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, pp 46–47

305. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 47

Another potential source of assistance was the Kāinga Whenua Infrastructure Grant, which would need to be extended.<sup>306</sup>

#### 4.4.2.3 *The New Zealand Māori Council submission*

The New Zealand Māori Council made a very brief submission, which stated:

New Zealand Māori Council submits that the Government policies and proposals do not provide adequately for Māori proprietary water interests, and advises that the Council wishes to be heard further on the suite of policies required towards the end of the consultation when the options have been explored further with the Tribunal.<sup>307</sup>

As far as we are aware, the Crown did not consult the Council further, although it remained in discussions with the ILG.

The council appended a number of documents from the Tribunal's stage 2 inquiry to its submission for the Crown's consideration. These documents showed that the Māori Council's position (as relevant to the reform proposals) was:

- ▶ a right to participate in management processes was not a sufficient recognition of Māori proprietary rights in water; and
- ▶ where 'participatory' rights were given, there was a need to ensure that Māori groups had the resources to use those rights effectively.

The council intended to provide 'case examples' in the stage 2 inquiry to support this position. Some interested parties also supported that position.<sup>308</sup>

#### 4.4.2.4 *Other issues arising from the submissions*

##### 4.4.2.4.1 VARYING EXPERIENCES AND UNEQUAL ARRANGEMENTS

In our view, the *Next Steps* submissions highlighted the varying and sometimes unequal arrangements that had developed in freshwater and natural resource management. The Patuharakeke hapū of Whangarei summarised their dire experience of the RMA:

To date, there have been virtually no opportunities for the active involvement of tāngata whenua in decision-making, policy development and monitoring in relation to the management of the quality and quantity of water. There has been minimal utilisation of tikanga, mātauranga Māori and cultural indicators in the management of water resources to ensure that adverse impacts on culture and traditions are avoided.<sup>309</sup>

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306. New Zealand Government, *Next Steps for Fresh Water: Summary of Submissions*, p 47

307. New Zealand Māori Council, submission, 22 April 2016 (Crown counsel, disclosure documents (doc D90), p 3112 [3156])

308. Claimant counsel (NZMC), memorandum, 13 April 2016 (paper 3.1.264), pp 2–3 (Crown counsel, disclosure documents (doc D90), pp 3143–3144; Waitangi Tribunal, memorandum-directions, 22 April 2016 (Crown counsel, disclosure documents (doc D90), pp 3116, 3118; Waitangi Tribunal, decision on application for adjournment, 10 June 2015 (Crown disclosure documents (doc D90), p 3134)

309. Patuharakeke Trust Board, submission, 22 April 2016 (Crown counsel, discovery documents (doc D90), p 3177)



Their experience was similar to those discussed in chapter 2. At the other end of the participation scale, some iwi described their co-governance and co-management arrangements, achieved through Treaty settlements. Ngāti Kahungunu called for such arrangements to be made available for all iwi through the RMA:

At present Councils are required to provide iwi with 'opportunities to contribute to' decision making [a Local Government Act 2002 requirement] and this has manifested in a number of ways, but for a wide array of reasons in many respects the 'opportunities' are woeful. This is confirmed by the current proposal and the demand driving improvement.

For the iwi authority the best opportunity to participate in decision making is through enabling iwi and hapū into co-governance and co-management arrangements respectively.

Any reference in the NPS-FM to improve the status quo should reflect stronger emphasis than the current RMA i.e. 'opportunities to contribute to' decision making.<sup>310</sup>

#### 4.4.2.4.2 MANY IWI AND OTHER MĀORI GROUPS SOUGHT AN ALLOCATION

We have already described the NZMC's submission on proprietary rights. Some of the groups that made submissions were comfortable with the term 'ownership', others were not. But there was a more unified position on allocation. Many iwi and other Māori organisations wanted an allocation of water for economic purposes and they made that clear to the Crown.<sup>311</sup> This was a very important signal for the ongoing allocation reforms.

#### 4.4.3 What did the Crown decide?

At the beginning of June 2016, officials advised Ministers about the outcomes of the consultation and recommended further action.<sup>312</sup> As discussed above, officials considered that there was broad support for all of the proposed reforms relating to Māori rights and interests in water. For the matters which concern us here, officials suggested three pathways forward: developing specific amendments to the NPS-FM for consultation; amending the RMA reform Bill (the Resource Legislation Amendment Bill 2015) while it was before Parliament; and establishing a 'longer-term work programme' for reform options which needed more development. All three pathways would involve additional consultation, including initial collaboration with the IAG and ILG.

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310. Ngāti Kahungunu Iwi Inc, submission, 22 April 2016 (Crown counsel, discovery documents (doc D90), p 3066)

311. See Crown counsel, discovery documents (doc D90), pp 3024, 3044–3045, 3057, 3102, 3188, 3200, 3210, 3219–3220, 3228, 3251, 3257, 3271, 3291, 3300, 3304–3305, 3321–3322. The groups were: Moriori, Auckland Mana Whenua Kaitiaki Forum, Ngāti Tamawera, Ngāti Ranginui, Tauranga Moana Hapu Collective, Te Korowai o Ngaruahine Trust, Te Roroa, Te Runanganui a Iwi o Ngāpuhi, Te Runanga o Ngāti Awa, Te Wai Māori Trust, Ngāti Tuwharetoa, and Waikato Tainui.

312. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), p 682[29])

**4.4.3.1 Te Mana o te Wai in freshwater management**

The reform proposals under this heading were:

- ▶ *Include a purpose statement in the National Policy Statement for Freshwater Management which provides context about the meaning of Te Mana o te Wai and its status as the underpinning platform for community discussions on freshwater values, objectives and limits.*
- ▶ *Require regional councils to reflect Te Mana o te Wai in their implementation of all relevant policies in the National Policy Statement for Freshwater Management.*<sup>313</sup>

The Crown decided that the consultation showed enough support for these reform proposals to proceed. Officials would therefore work with the IAG to develop ‘specific wording’ for the two proposed changes to the NPS-FM.<sup>314</sup> The Ministry provided the IAG with a report summarising the submissions, and officials met nine times with the IAG to discuss and refine the exact nature and wording of the requisite changes.<sup>315</sup> We examine the outcomes of this work in section 4.6 below.

**4.4.3.2 Recognition of iwi and hapū relationships with, and values for, water bodies**

The reform proposals under this heading were:

- ▶ *Councils must, at the outset of their freshwater planning process, engage with iwi and hapū to ensure all iwi and hapū relationships with water bodies in the region are identified in regional planning documents.*
- ▶ *Councils must, when identifying values and setting objectives for particular freshwater management units, engage with any iwi and hapū that have relationships with water bodies in the freshwater management unit.*<sup>316</sup>

The proposals under this heading arose from the Crown–IAG ‘recognition’ work stream. Officials suggested that most of the ‘in-scope’ submissions supported these proposals. They noted, however, a concern that this kind of engagement should already be happening under current legislation. The most common submission was that funding, training, and guidance were necessary for the iwi–council engagement to occur. The Ministry proposed to put these reforms in the longer-term work programme. Further analysis and policy development would take place ‘in collaboration with IAG.’<sup>317</sup>

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313. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 27

314. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), pp 683 [30], 688–689 [35–36])

315. Gerard, brief of evidence (doc F7), p 6

316. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 28

317. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), pp 685 [32], 694 [41])

In February 2017, the Crown decided not to continue with the 'recognition' reforms. The 'mana whakahono a rohe' mechanism was 'intended to provide a platform to facilitate improved working relationships between local authorities and iwi in resource management'. For that reason, Cabinet decided 'not to amend the Freshwater NPS to require councils to identify relationships with water bodies in regional plans as proposed in *Next Steps*'.<sup>318</sup> In other words, the Crown expected that increased recognition would happen anyway as a result of councils and iwi forging mana whakahono a rohe agreements. The IAG supported this decision.<sup>319</sup>

In our view, the intensive work to produce the *Next Steps* proposals had already involved many compromises in order to reach a short-list of actual reform proposals. The 'recognition' proposals were important and would most likely have been implemented through a more specific direction in the NPS-FM. We note two points. First, the 'recognition' reforms seem to have been aimed at a very specific part of the freshwater planning process, to ensure that iwi and hapū relationships with freshwater bodies were recognised, and that values and objectives were set for those water bodies within the larger 'unit'. This would be an important and necessary step because of the emphasis on planning for catchment-scale 'units', which could include numerous waterways, instead of for particular water bodies. It was also important to keep the scale at the waterway-specific level so that the values and objectives could be set by hapū as well as iwi. Mana Whakahono a Rohe were mainly aimed at the iwi level. Secondly, no iwi in the country had a Mana Whakahono a Rohe at the time, it would take some time for these to be established (if iwi chose to take them up), and it was by no means sure that they would be widely established. In the meantime, the freshwater planning and objective-setting would continue without them.

We do not accept that the potential establishment of Mana Whakahono a Rohe was a substitute for carrying out these reform proposals via the NPS-FM.

#### **4.4.3.3 Participation in freshwater decision-making**

The three reform proposals under this heading were:

- ▶ *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:*
  - *be initiated by iwi through notice to the councils;*
  - *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;*

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<sup>318</sup>. Cabinet paper, 'Fresh water – proposals following *Next Steps*', no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p 20)

<sup>319</sup>. Cabinet paper, 'Fresh water – proposals following *Next Steps*', no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p 20)

- *provide for multiple iwi involvement where appropriate and agreed;*
- *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;*
- *include review and dispute resolution processes.*
- ▶ *The Government will amend the Resource Management Act to:*
  - *require water conservation order (wco) applications to provide evidence of consultation with relevant iwi and have one person nominated by the relevant iwi represented on the Special Tribunal convened to hear the application;*
  - *require the Special Tribunal for a wco (and, where relevant, the Environment Court) to consider the needs of iwi/tāngata whenua;*
  - *require wco applications to consider any planning processes already underway;*
  - *allow the Minister for the Environment to delay an application if there will be a conflict with a regional planning process;*
  - *allow councils to recommend to the Minister for the Environment that a wco be created over an outstanding water body that has been identified through regional planning, and allow the Minister to consider recommendations under a streamlined procedure.*
- ▶ *The Ministry for the Environment will facilitate and resource programmes to support councils and iwi/hapū to engage effectively in freshwater planning and decision-making, including collaborative planning.*<sup>320</sup>

According to Tania Gerrard, the consultation showed that councils and Māori supported the mana whakahono a rohe proposal as a ‘formalisation of engagement and an opportunity for iwi to act in their role as kaitiaki.’<sup>321</sup> In June 2016, the Ministry’s plan was to ‘refine elements of the proposal based on feedback’ (officials did not specify which ‘elements’ would be refined). The mana whakahono a rohe agreements would then be introduced to the Resource Legislation Amendment Bill while it was at the select committee stage.<sup>322</sup> The success of this plan depended on further discussions with the IAG, the ILG, and National’s support parties in Parliament.<sup>323</sup> We return to this process in section 4.5 below.

In June 2016, the Ministry recommended that options for iwi involvement in the wco process should also be dealt with in amendments to this Bill. The Ministry suggested that iwi and councils showed ‘strong support’ for such amendments (although the ILG had not supported the proposal prior to *Next Steps*).<sup>324</sup> The Crown ultimately decided, however, not to proceed with wco reforms. According

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320. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), pp 29–31

321. Gerrard, brief of evidence (doc F7), p 9

322. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), pp 684 [31], 690–691 [37–38])

323. Gerrard, brief of evidence (doc F7), p 9

324. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), p 691 [38])

to Martin Workman, '[f]eedback on the proposals providing an enhanced role for iwi was generally positive'. But the other wco reform proposal was 'designed to provide for greater integration with regional planning'. This largely received 'negative feedback' so the wco reforms were transferred to the Ministry's longer-term work programme to 'look at what changes are required'.<sup>325</sup> It is not clear to us why changes to provide an 'enhanced role for iwi' (as Mr Workman put it) could not have proceeded in the meantime through the RMA reform. At the time of our hearings in 2018, no further progress had been made.

On the issue of increasing capacity and capability, officials noted the high importance which Māori submitters placed on getting resources for that purpose. Indeed, Tania Gerrard observed that 'the strongest theme of all submissions related to the need for additional resourcing'.<sup>326</sup> The Crown's reform proposal, however, had been limited to the provision of guidance and training programmes to support iwi-council engagement. The Ministry suggested that 80 per cent of the relevant submissions supported the Crown's proposal and considered it vital to the effectiveness of all the other reform proposals. The Ministry's plan was to set up a new work programme in 'collaboration' with the IAG to develop the 'appropriate guidance and training'.<sup>327</sup>

#### 4.4.3.4 *Clean, safe drinking water for marae and papakainga*

The reform proposal under this heading was:

- ▶ *The Government will consider if additional funding is required to develop or improve water infrastructure at marae and papakainga.*<sup>328</sup>

Officials noted that there was significant support for this proposal although there were also requests for it to be extended to include wastewater and to cover other small, rural communities. In June 2016, officials recommended that this reform proposal should be 'progressed as intended' as part of the Ministry's longer-term work programme. 'Further analysis', they suggested, 'should begin to assess how best to fund the development of improvement of water infrastructure at marae and papakainga'.<sup>329</sup> Again, this policy development would be done 'in collaboration with IAG'.<sup>330</sup>

It is not clear to the Tribunal whether there was any further collaboration with the IAG on this matter. Ms Gerrard advised that there was a delay of a year or so, while further research was conducted. Officials were ready to begin work on developing policy options by August 2017. Between September 2017 and May 2018,

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325. Workman, brief of evidence (doc F6), p 34

326. Gerrard, brief of evidence (doc D88), p 18

327. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), pp 685 [32], 693–694 [40–41])

328. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 31

329. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), p 694 [41])

330. Briefing to Ministers, 1 June 2016 (Workman, sensitive papers in support of brief of evidence (doc F6(b)), pp 685 [32])

MFE led ‘cross-agency’ work with the Ministry of Health, TPK, the Treasury, the Department of Internal Affairs, and the Ministry of Education. The Ministry got as far as developing a bid for the 2018–19 budget. The aim was to establish a contestable grants scheme to fund ‘capital investment, technical assistance and other associated costs.’<sup>331</sup> The scheme would cover small rural communities, including marae and papakainga.<sup>332</sup>

This budget bid was turned down. As a result, the Ministry has pursued the issue as part of the Department of Internal Affairs’ ‘Three Waters’ review. The review is focused on drinking water, storm water, and waste water for all communities. It was initially concerned with local government water infrastructure, partly in response to the Havelock North outbreak of gastroenteritis in 2016. Marae that are ‘self-suppliers’ were not included within its scope.<sup>333</sup> Ms Gerrard advised, however, that it will encompass the delivery of safe drinking water to marae and papakainga. MFE officials, she said, are ‘engaging with the review process on marae and papakainga access to water.’<sup>334</sup>

We must conclude, therefore, that the *Next Steps* process has not resulted in funding to assist marae and papakainga with access to clean drinking water. It may do so in the future, and we address this further in our recommendations (see chapter 6). As Tania Gerrard noted, the research and hui ‘consistently identified a lack of access to, and affordability of, drinking water as a primary issue for iwi and hapū.’<sup>335</sup>

#### 4.4.4 Conclusions

##### 4.4.4.1 Was the co-design process compliant with the Treaty?

In our view, the process of co-design with a national Māori body, followed by wider consultation with Māori and the public, was compliant with the principles of the Treaty. The Crown is to be congratulated on this innovation, which we think should become a standard part of government policy-making.

On a practical level, the co-design process could have benefitted from other perspectives, including those of the New Zealand Māori Council. Because the ILG advised the Crown both before and after the consultation rounds, there was a risk that this body would come to dominate too much in presenting a Māori voice to the Crown in its reforms. This risk was all the greater over the long lifetime of the reforms. On the other hand, there are efficiencies and other benefits from working with the same group to evolve policies over a period of time. There was also a risk that the views of settled iwi would predominate, as they were predominant in the ILG and were comparatively better-resourced to make submissions during the

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331. Tania Gerrard, answers to questions in writing, no date (doc F18(d)), p11

332. Cabinet paper, ‘Government Response to Havelock North Drinking-Water Inquiry’, no date (2018), p [16]

333. Cabinet paper, ‘Review of three waters infrastructure: key findings and next steps’, no date (released under the Official Information Act), p3

334. Tania Gerrard, answers to questions in writing, no date (doc F18(d)), p12

335. Tania Gerrard, answers to questions in writing, no date (doc F18(d)), p5

consultation rounds. Many of the witnesses in our inquiry came from iwi or hapū who did not have Treaty settlements and felt unrepresented by the ILG.

We have spent some time in this and previous chapters, therefore, in examining the submissions that were made during the various consultation rounds, because that was the opportunity for a wider Māori view to be put to the Crown: SWPOA in 2005 (section 2.8.3); the board of inquiry in 2010 (section 3.4); RMA reforms in *Improving our Resource Management System* in 2013 (section 3.6.2); *Freshwater Reform 2013 and Beyond* in 2013 (section 3.6.3); the consultation on proposed changes to the NPS-FM in 2013–14 (section 3.7.3); and *Next Steps for Fresh Water* in 2016 (section 4.4.2). We will also consider the submissions in consultation rounds in the following sections of this chapter.

Without the co-design option used in 2014–16, or the earlier collaboration with the ILG and the Land and Water Forum (in 2009–13), these formal consultation rounds were almost the only opportunity for Māori to influence the Crown's water reforms. There is no doubt, in our view, that the co-design model is the superior one, and more akin with the Crown's duty of partnership. Moreover, the *Next Steps* consultation round showed that Māori broadly supported the co-designed reforms as far as they went but, importantly, wanted *more* on a range of matters. In every consultation round, Māori told the Crown that the reforms to address their rights and interests did not go far enough. The ILG's position on this was that 'compromises have to be made in politics,'<sup>336</sup> but the evidence shows that the ILG worked very hard with the Crown and in the Land and Water Forum in an attempt to obtain Treaty-compliant reforms. We discuss the extent to which they succeeded in *Next Steps* below.

In terms of a national Māori body for the crucial co-design phase, the Crown had a number of choices available to it in the mid-2000s, reflecting the complexity of Māori representation and communities of interest at the national level. These included:

- ▶ the Iwi Chairs Forum, made up of the chairs of around 70 iwi organisations in 2016,<sup>337</sup> most of which are Treaty settlement governance entities or mandated organisations under the Māori Fisheries Act 2004;
- ▶ the Māori Womens' Welfare League, made up of Māori womens' welfare committees from around the country;
- ▶ the Federation of Māori Authorities (FOMA), consisting of Māori land trusts and 'Māori Authorities' as constituted under Te Ture Whenua Māori Act 1993, mostly with a commercial or industry focus;
- ▶ the National Urban Māori Authority, whose affiliates deliver community-based services to Māori in urban areas; and
- ▶ the NZMC, which consists of representatives of District Māori Councils (and ultimately of flax-roots Māori committees in the districts), and has

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336. Freshwater ILG, 'Freshwater Iwi Leaders Group welcomes changes to the RMA', press release, 25 March 2017 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 63)

337. Solomon and Flavell, brief of evidence (doc D85), p 4

statutory responsibilities to advise the Crown under the Māori Community Development Act 1962.<sup>338</sup>

The Freshwater Iwi Leaders Group was appointed by the wider Iwi Chairs Forum. The Crown argued that it was the appropriate body to work with because the Māori interest in freshwater bodies comes from the customary rights of iwi and hapū.<sup>339</sup> The Crown and the ILG both emphasised that the iwi leaders were not negotiating a settlement or usurping the mana or autonomy of any individual iwi. From the Crown's point of view, the ILG brought to the table 'the views, grievances and issues of over 60 iwi'.<sup>340</sup> As we explained in chapter 3, engagement with iwi leaders was seen as the best way to ascertain the interests of iwi and hapū in fresh water, and to develop reform options to address those interests. This would then be followed by wider consultation with Māori more generally.<sup>341</sup> In its stage 2 submissions, the NZMC did not argue that the Crown's choice to work with the ILG was "wrong" or "inappropriate",<sup>342</sup> but argued that it, too, should have been included in the co-design work.<sup>343</sup>

It seems to us that the NZMC's perspective on water reform was also highly representative. The Māori Council repeated a call that has been made ever since the RMA was in the planning stage in the late 1980s. As we discussed in chapter 2, the NZMC and a broad range of Māori leaders had asked the Crown to recognise their proprietary rights in the RMA. The Crown declined to do so and has declined ever since. The ILG decided to sidestep this issue in their co-design work. This is exemplified in the joint Crown-ILG objective for the 'economic development' workstream: 'Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests.'<sup>344</sup> The two perspectives may not be so far apart in reality. Both the NZMC and the ILG have considered the allocation of a quantum of water to Māori as a solution – from the one side, as a method of recognising proprietary rights, from the other side, as a means of recognising the economic interests of Māori in their water bodies.<sup>345</sup> At the very least, we think the Crown could have considered including the NZMC in the co-design of allocation reforms in 2015 (and beyond).

Our finding is that the concept of co-design is a Treaty-compliant one, and the Crown did not breach the principle of equal treatment in its choice to work with the ILG and its advisers prior to wider consultation with Māori.

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338. For a more detailed discussion on the Māori representational landscape at the national level, see *Whaia Te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 177–181

339. Crown counsel, closing submissions (paper 3.3.46), p 77

340. Gerrard brief of evidence (doc D88), p 3

341. Gerrard, brief of evidence (doc D88), pp 2–4

342. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 8

343. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 7–8; claimant counsel (NZMC), opening submissions (paper 3.3.21), p [5]

344. Gerrard, brief of evidence (doc D88), p 10

345. See, for example, claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 20, 21, 23



Having said that, we do think that the need for other perspectives in the co-design process became clearer as time went on. When the NZMC filed its claim in 2012, it presented itself as a national body with a particular and contrasting view to that of the ILG – a view that was also widely supported by a number of interested Māori parties. We think it was evident to the Crown that it ought to have broadened its co-design programme to include the NZMC.

#### **4.4.4.2 How effective was the Next Steps process in developing and progressing reforms to address Māori rights and interests in water?**

In our view, the results of the *Next Steps* reform programme were disappointing. This happened largely because the Crown reserved the final power of decision-making to itself alone.

In section 4.3.6, we set out in some detail the many reform options discussed by the Crown and the ILG in 2015. Those options were significantly reduced when Cabinet selected a small number of proposals for public consultation in 2016. The 40 iwi and other Māori groups who made submissions were all in support of these proposals to address Māori rights and interests, although many argued that the proposals should go further. After the consultation, the Crown narrowed the reform options even further. Despite all the work and option-development in the 'co-design' phase, there were really only three outcomes: the insertion of Mana Whakahono a Rohe arrangements in the RMA; amending the NPS-FM to strengthen Te Mana o te Wai; and an agreement that MFE would provide a guidance programme on Mana Whakahono a Rohe (capacity and capability building).

We do not dispute that two of these three outcomes have the potential to make a significant difference for Māori in the exercise of authority and kaitiakitanga over their freshwater bodies. Te Mana o te Wai in the NPS-FM has the potential to alter the manner of achieving the purpose of the RMA in a way that better protects Māori interests. The Mana Whakahono a Rohe arrangements have the potential to improve iwi-council relationships and the way they work together. But the list of omissions is so crucial that, in our view, the Crown squandered a real opportunity to make the RMA and its freshwater management regime Treaty-compliant. Māori have been prejudiced by the following omissions:

- ▶ No amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism;
- ▶ No amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism;
- ▶ No alternative co-governance or co-management mechanisms inserted in the RMA or the NPS-FM (to make these mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi);
- ▶ No amendments to enhance the legal weight of iwi management plans;
- ▶ No mechanisms for formal recognition of iwi and hapū relationships with – and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream;

- ▶ No strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori in freshwater decision-making;
- ▶ No recognition of proprietary rights (ruled out by the Crown's bottom line that 'no one owns water');
- ▶ No commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle during the ongoing work on the allocation regime;
- ▶ No funding as yet for water infrastructure and supply on marae and papakainga; and
- ▶ No funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation.

We are left with the conclusion that 'co-design' of reforms by the Crown and iwi leaders did not fulfil its potential. The Crown selected only a small number of options for consultation in early 2016. It further narrowed the scope of the reforms after the *Next Steps* consultation in mid to late 2016. The Crown's omission of so many important options to address Māori rights and interests has seriously limited the value of its reforms in Treaty terms. In particular, the Crown's *Next Steps* reforms did not enhance the ability of Māori to participate in freshwater management and decision-making in any significant way, other than providing a mechanism to improve relationships. The argument was that Mana Whakahono a Rohe arrangements could result eventually in section 33 transfers, JMAs, or a co-management agreement of some kind. That seems doubtful to us. The great majority of JMAs and co-management arrangements to date have resulted from the Crown's role in negotiating Treaty settlements, and the statutory barriers to the use of section 33 and section 36B have still not been fixed.

We turn next to consider the reform pathways created by the Crown's *Next Steps* decisions:

- ▶ The strengthening of Te Mana o te Wai provisions in the NPS-FM;
- ▶ The insertion of the Mana Whakahono a Rohe mechanism in the RMA; and
- ▶ The provision of guidance and training (limited to this new RMA mechanism).

We address each of these in turn. The reform programme for allocation in 2016–17, in which there was no Crown–ILG co-design, is considered in chapter 6.

## 4.5 'NEXT STEPS' REFORM PATHWAY 1: AMENDING THE RMA, 2016–17

### 4.5.1 Introduction

After the National-led Government won the election at the end of 2008, it set out to significantly reform the RMA. This resulted in three pieces of legislation: the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the Resource Management Amendment Act 2013, and the Resource Legislation Amendment Act 2017. The 2017 Act included the most important (and some of

the more controversial) reforms. Crown counsel advised that the new Labour-led Government intends to repeal or amend some of the 2017 changes.<sup>346</sup>

We are not concerned here with most aspects of the 2017 Act. The issue relevant to our inquiry is the three sets of participation reforms, two of which were directly intended to address Māori rights and interests in freshwater management. We have already discussed the Mana Whakahono a Rohe model developed by the ILG in 2015, and its broad acceptance by Māori and local government submitters in the *Next Steps* consultation in 2016. The Mana Whakahono a Rohe is a participation arrangement that councils and iwi (or in some cases hapū) can use to negotiate an agreement on how they will work together on the matters specified in the relevant provisions. This participation model was one of the most important outcomes of the *Next Steps* co-design process. In this section of our chapter, we focus on that model and how it was adapted by the Crown for insertion into the RMA. Some of the changes were significant.

We also discuss very briefly the two other participation reforms: the introduction of a collaborative planning option and some amendments to the ordinary consultation process for policy statement and plan-making. We begin with these two and then proceed to assess the Mana Whakahono a Rohe provisions.

#### 4.5.2 Participation reforms

The collaborative planning process was inserted into the RMA as Part 4 of Schedule 1. Councils would be able to choose it as an alternative to the regular schedule 1 process. In brief, it involves the appointment of a stakeholder group including at least one person 'chosen by iwi authorities to represent the views of tangata whenua'.<sup>347</sup> The key feature of this planning process was that the initial ideas for a regional or district plan would be worked out by this stakeholder group, after which the council would draft its plan. During the drafting of the plan, the council would consult iwi authorities as usual. The council was to have 'particular regard to' the advice of iwi authorities but only 'if, and to the extent that, the advice is not inconsistent with the consensus position' of the stakeholder group. This clause did not apply if the iwi had a Mana Whakahono a Rohe agreement (this read IPA in the original Bill).<sup>348</sup> After consulting iwi, the plan would be notified, a review panel would hear submissions and make recommendations to the council which had to be consistent with the consensus position, and the council would then finalise its plan. Appeal rights would be very limited after this initial collaborative process had been undertaken.<sup>349</sup>

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346. Crown counsel, memorandum, 15 November 2018 (paper 3.2.326)

347. Resource Management Act 1991, sch 1, cl 40(1)(a)

348. Resource Management Act 1991, sch 1, cl 47

349. Ministry for the Environment, 'Resource Legislation Amendment Bill: Initial Briefing to the Local Government and Environment Committee on the Resource Legislation Amendment Bill', 31 March 2016, pp 16–17; Resource Management Act 1991, sch 1, pt 4; Resource Legislation Amendment Bill 2015, 101–1

This new process was not the subject of any detailed evidence or submissions in our inquiry. Nor was it the subject of consultation in the *Next Steps* process. Crown counsel simply noted in their submissions that the process required Māori representation, although they also pointed out that the Land and Water Forum was not actually able to reach a consensus on whether such a process was fair or workable.<sup>350</sup> The Crown provided us with the submissions that Māori entities made to the select committee. We note that many of these submissions opposed the collaborative planning model because it provided minimal iwi representation, under-resourced groups would struggle to participate, there were limited appeal rights, and they did not see it as a Treaty-consistent model. There was some support for collaboration per se but not for the model as inserted into the RMA in 2017.<sup>351</sup>

The second set of participation reforms involved minor changes to the consultation requirements for plan-making in schedule 1. The first of these changes provided for a hearing commissioner to be appointed with knowledge of tikanga and the ‘perspectives of local iwi or hapū’, if the council consulted iwi authorities and decided that it was appropriate to do so. This provision was restricted to hearing commissioners in a policy or plan-making process, not any other RMA process.<sup>352</sup> The second change required councils to provide iwi authorities with a draft copy of proposed policies or plans before notification, and to have ‘particular regard’ to the ‘advice’ received back from an iwi authority.<sup>353</sup> In order to increase transparency and accountability, the council would also have to summarise the advice of iwi in its section 32 reports, and explain its response to the advice, including ‘any provisions of the proposal that are intended to give effect to the advice.’<sup>354</sup>

These amendments have provided greater specificity about how councils should consult iwi in plan-making, thus giving added depth to the RMA’s already existing requirement to consult iwi about policy statements and plans. Crown counsel said that the revised section 32 reports ‘may be one source that central government refers to when it considers the effectiveness of the RMA system and its implementation at the local level.’<sup>355</sup> But in terms of accountability, the main emphasis is on monitoring the implementation of the NPS-FM.<sup>356</sup>

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350. Crown counsel, closing submissions (paper 3.3.46), pp 45, 85 (footnote 380); Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Wellington: Land and Water Trust, October 2012), pp 101–102 (Workman, papers in support of brief of evidence (doc F6(a)), pp 435–436)

351. See Crown counsel, document bundle (doc F14(a)), pp 894, 904, 918–920, 938–939, 942, 956, 972, 977, 995–996, 1010).

352. Resource Management Act 1991, s 34A(1A). It only applied to schedule 1, part 1 (the ordinary process) and schedule 1, part 5 (the streamlined process).

353. Resource Management Act 1991, sch 1, cl 4A; Gerrard, answers to questions in writing (doc F18(d)), p 11

354. Resource Management Act 1991, s 32(4A); Crown counsel, memorandum, 21 December 2018 (paper 3.2.342), pp 4–5

355. Crown counsel, memorandum (paper 3.2.342) p 5

356. Crown counsel, memorandum (paper 3.2.342) p 5; transcript 4.1.5, pp 595–596

#### 4.5.3 The original IPA proposals in the Resource Legislation Amendment Bill 2015

It had always been the Crown's intention since at least 2013 to provide for '[e]ffective and meaningful iwi/Māori participation' as one of six key goals in its earlier RMA proposals (see chapter 3).<sup>357</sup> Initially, this had taken the form of Iwi Participation Arrangements (IPAs), which were a cornerstone of the 2015 RMA reform Bill. The IPA would require councils to enter into discussions with iwi and agree how they would work together during the planning process. Councils would then be required to 'take into consideration all advice from iwi/hapū on draft plans and policy statements'.<sup>358</sup> As we see it, this was no more than the RMA already required councils to do in the preparation of regional and district plans. What was new was the particular mechanism through which iwi and councils would engage.

The Cabinet Business Committee initially agreed that the IPAs would cover iwi advice on resource consents as well as plans. Councils would have to seek iwi advice on consent applications at the pre-notification stage. In late 2015, however, the Minister for the Environment put up a Cabinet paper which explained that this was an error: 'The policy intent is to confine the scope of iwi participation arrangements to plan development processes only'.<sup>359</sup> This was an important reduction in the scope of the proposed arrangements, and is in fact consistent with the Crown's whole approach to RMA reform since 2009. In keeping with this focus on plans, the proposed changes that we discussed above were also focused on the plan-making part of RMA processes.

The Resource Legislation Amendment Bill was introduced in November 2015. Clause 38 proposed to create IPAs, under which councils and iwi would agree on how they would carry out the new schedule 1 requirements (consultation of iwi about plans and policy statements). After a local body election, councils would have 30 days to invite 'iwi authorities representing tangata whenua' to enter into an IPA. While the requirement to make the invitation was mandatory (unless an arrangement already existed), iwi could choose whether or not to accept the invitation. They would have 60 days to make their decision. If they decided to decline, the council would have to try again after each triennial election until an IPA was established. The IPAs could provide for dispute resolution, delegation by the iwi to a smaller group, and arrangements for iwi to work collectively, but these matters were not compulsory. If other forms of dispute resolution failed, clause 38 included an opportunity to appeal to the Minister for assistance.

#### 4.5.4 The ILG and Māori submitters seek broader arrangements

By the time that the Crown had made its decision to include Mana Whakahono a Rohe arrangements in the RMA, Māori and the wider public had already made

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357. Ministry for the Environment, *Improving our Resource Management System: A Discussion Document* (Wellington: Ministry for the Environment, February 2013), pp 76–78

358. New Zealand Government, *Resource Management: Summary of Reform Proposals 2013* (Wellington: Ministry for the Environment, August 2013), p 8

359. Cabinet paper, 'Resource Legislation Amendment Bill', no date (November 2015), pp 8–9 (Ministry for the Environment website)

their submissions on the Resource Legislation Amendment Bill. The post-settlement governance entity for the Whanganui River called for existing mechanisms to be used:

Joint Management Agreements already exist within the RMA and those provisions should be amended to provide for iwi participation across a range of matters. This would avoid confusion and duplication across a number of processes that already provide for iwi engagement.<sup>360</sup>

Some submissions called for the IPAs to be broadened in their scope and function or for Mana Whakahono a Rohe provisions to be inserted instead, with the necessary funding for these arrangements to come from the Crown. There was also a request for the arrangements to include hapū as well as iwi.<sup>361</sup>

In April 2016, Ministers agreed that ‘officials, the Māori Party and IAG could work together on the co-drafting of the MWAR proposals.’<sup>362</sup> The ILG’s purpose at this point was to enhance Māori participation with a mechanism that would be available to all iwi regardless of Treaty settlements:

The proposal for Mana Whakahono a Rohe agreements was developed and advanced by the Freshwater ILG in response to much narrower iwi participation arrangements that were included in the RLAB when first introduced in 2015. In this regard, the ILG was particularly aware of the need to increase opportunities for the involvement of iwi in local government decision-making processes under any future freshwater management regime. In addition, the ILG was also conscious that while some iwi have been able (through both negotiation and Treaty settlements) to secure co-management and co-governance arrangements that advance certain of their aspirations, for many other iwi it has been challenging to achieve even the most basic of relationships with local government. Accordingly, the ILG considered it was essential to amend the Resource Management Act to provide for structured and resourced relationships to be established between Councils and all iwi.<sup>363</sup>

In May 2016, the IAG gave the Crown a revised Mana Whakahono a Rohe proposal. According to Donna Flavell and Gerrard Albert, this proposal was significantly different from either the *Next Steps* version, which was confined to

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360. Ngā Tāngata Tiaki o Whanganui, submission to select committee, 14 March 2016 (Crown counsel, document bundle (doc F14(a)), p 902)

361. Ministry for the Environment, ‘Require Councils to Invite Iwi to Engage in Voluntary Iwi Participation Agreements (IPA) and Enhance Consultation Requirements’, draft Māori participation speaking notes (advice to select committee on the Resource Legislation Amendment Bill 2015), 1 December 2016, pp 1–2, 4–9 [https://www.parliament.nz/en/pb/submissions-and-advice/document/51SCLGE\\_ADV\\_OODBHOH\\_BILL67856\\_1\\_A53989/draft-maori-participation-speaking-notes-161117](https://www.parliament.nz/en/pb/submissions-and-advice/document/51SCLGE_ADV_OODBHOH_BILL67856_1_A53989/draft-maori-participation-speaking-notes-161117)

362. Tania Gerrard, answers to questions in writing, no date (doc F18(d)), p 9

363. Flavell and Albert, brief of evidence (doc G22), p 21

freshwater management, or the version which eventually made it into the Bill.<sup>364</sup> It resembled the original ILG proposal back in November 2015, which had been included in the *Next Steps* document but not without significant amendments.

In essence, the IAG wanted a mechanism that was 'broader and focused more on providing for decision-making and co-governance opportunities within the RMA and other relevant legislation (ie the Local Government Act 2002), than the version that was ultimately passed'.<sup>365</sup> In particular, the IAG wanted the Act to state that the purpose of the new mechanism was:

to provide an opportunity for increased co-governance and co-management between tangata whenua, acting through an iwi authority, and a local authority in the relation to the exercise of certain duties, functions and powers.<sup>366</sup>

The IAG's intention was to make it compulsory for councils and iwi, in establishing their Mana Whakahono a Rohe, to agree that iwi would be involved in (and how they would be involved in):

- ▶ The exercise of duties, functions, and powers in respect of resource consents;
- ▶ The appointment of all hearing committees and other decision makers;
- ▶ A process to recognise and provide for Te Mana o te Wai;
- ▶ Monitoring and enforcement;
- ▶ Preparing and changing bylaws: and
- ▶ The exercise of various other duties, functions and powers under the RMA.

The ILG also wanted to include section 33 transfers and JMAs as options within the Mana Whakahono a Rohe for delivering this level of iwi involvement in decision-making. Any disputes which arose during the operation of a council-iwi agreement would be referred to the Māori Land Court. There would also be an annual report to the Minister on how well the agreement was achieving its purpose; that is, the development of co-governance and co-management. Hapū could be involved if iwi authorities decided to delegate responsibilities to them.<sup>367</sup>

If the Mana Whakahono a Rohe provision had passed in this form, it would have been a more powerful mechanism for the exercise of tino rangatiratanga and kaitiakitanga in freshwater management. There was no guarantee, of course, that councils would agree to Māori having a high level of decision-making over resource consents or for any of the other compulsory matters. That still had to be negotiated between iwi and councils.

In any case, the Crown rejected most of these recommendations.

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364. Donna Flavell, Gerrard Albert, and Tina Porou, answers to questions in writing, 12 October 2018 (doc G22(f)), pp 3-5

365. Flavell, Albert, and Porou, answers to questions in writing (doc G22(f)), p 4

366. Flavell, Albert, and Porou, answers to questions in writing (doc G22(f)), p 5

367. Flavell, Albert, and Porou, answers to questions in writing (doc G22(f)), pp 5-6; IAG, 'Mana Whakahono a Rohe Agreements', May 2016 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), pp 55-61)

#### 4.5.5 The Mana Whakahono a Rohe arrangements in the RMA

According to Tania Gerrard, the final version of Mana Whakahono a Rohe in the Resource Legislation Amendment Bill was the result of negotiations between Ministers, the Māori Party, and the ILG.<sup>368</sup> In the Cabinet paper about changes to the Bill, Minister Nick Smith stated that the purpose of the new arrangements was to:

- ▶ enhance Māori participation in RMA processes;
- ▶ facilitate ‘improved working relationships’ between councils and iwi; and
- ▶ ‘enhance iwi/hapū participation at all levels of freshwater decision-making’.<sup>369</sup>

This emphasis on enhanced participation had been a theme in the Crown’s reforms from the beginning.

The Mana Whakahono a Rohe agreements were inserted into the RMA by the Resource Legislation Amendment Act 2017. The provisions for establishing a Mana Whakahono a Rohe are:

- ▶ Iwi have the power to initiate a Mana Whakahono a Rohe, after which councils *must* negotiate an agreement with them (unless the iwi decides to discontinue the process). We note that the Wai 262 Tribunal recommended this kind of compulsion for sections 33 and 36B but those sections were not amended. The Act requires councils and iwi to complete their negotiations within 18 months, unless they decide on a different time frame by mutual agreement. Thus, as the ILG sought, councils will not be able to opt out; the Act requires them to negotiate a relationship agreement with an agreed process for Māori participation in RMA processes.<sup>370</sup> If iwi and councils are unable to reach agreement, they can initiate a dispute resolution process and, in the final instance, appeal to the Minister for assistance.<sup>371</sup>
- ▶ There is flexibility in the Act to establish a multi-party Mana Whakahono a Rohe involving more than one iwi and/or council. If an iwi wants to establish an agreement after one already exists with another iwi, the second iwi must first consider joining the existing arrangement. These provisions seem designed to streamline the process and stop the proliferation of agreements.<sup>372</sup>
- ▶ Existing participation arrangements can be designated a Mana Whakahono a Rohe. Importantly for those iwi with co-management arrangements in their Treaty settlements, the Act stipulates that a Mana Whakahono a Rohe does not limit any relevant provision of any ‘iwi participation legislation’ (mostly arising from Treaty settlements).<sup>373</sup>
- ▶ Although iwi have the power to initiate compulsory negotiations for a Mana Whakahono a Rohe, the Act also allows councils to initiate negotiations with

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368. Gerrard, answers to questions in writing (doc F18(d)), pp 9–10

369. Cabinet paper, ‘Policy decisions for Resource Legislation Amendment Bill Departmental Report’, [November 2016], p14

370. Resource Management Act 1991, ss 58O, 58Q

371. Resource Management Act 1991, s58S

372. Resource Management Act 1991, ss 58O, 58P

373. Resource Management Act 1991, ss 58O(7), 58U



either an iwi authority or with one or more hapū.<sup>374</sup> This important provision arose because of the need to include hapū as well as iwi, but it does not allow hapū to initiate the process. An existing arrangement with a hapū, however, could be designated a Mana Whakahono a Rohe by agreement. Officials advised the select committee that 'a large number of submitters expressed concern' at the potential to 'preclude groups representing different levels of Māori authority'. Although the Crown was not prepared to change the definition of 'iwi authority' in the Act, this provision was an attempt to include hapū if the *council* decided that that was appropriate.<sup>375</sup> If a council does begin the process to establish a Mana Whakahono a Rohe, then the iwi or hapū must agree on the process for negotiation, a time frame, and how the agreement is to be implemented.<sup>376</sup>

- ▶ A Mana Whakahono a Rohe agreement could not be altered or terminated without the agreement of all parties.<sup>377</sup> This was an important requirement, and it was introduced partly because of the way that councils could unilaterally terminate other arrangements such as a section 33 transfer of powers or a section 36B JMA.<sup>378</sup>

Section 58M sets out the dual purpose of a Mana Whakahono a Rohe arrangement. First, this was for iwi and councils to agree on how iwi authorities may participate in resource management and decision-making processes. Secondly, it would assist councils to 'comply with their statutory duties' in the implementation of sections 6(e), 7(a), and 8. As will be clear, this was not the purpose for which the ILG had advocated; that is, that Mana Whakahono a Rohe would be entered into with the explicit intention of establishing co-governance and co-management arrangements.

The compulsory provisions for the content of an agreement also set the bar much lower than the ILG had requested. Section 58R(1) required councils and iwi authorities (or hapū) to agree on certain matters:

- ▶ Councils and iwi had to agree on how an iwi authority may participate in the preparation or change of a policy statement or plan, including the use of the processes set out in schedule 1 for that purpose. This provision was focused on how to do something that was already required, but obviously there were differing degrees of involvement and influence that could be negotiated.
- ▶ Councils and iwi had to agree on how consultation on that matter would take place. Again, the RMA already required consultation on plan-making (but not the granting of consents). This new participation arrangement would establish a binding agreement for *how it would happen* and thus ensure that it did happen. MFE advised the select committee that 'the lack of any requirement to establish effective working relationships with iwi has led to inconsistent

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374. Resource Management Act 1991, s58P

375. Ministry for the Environment, 'Require Councils to Invite Iwi', advice to select committee, p 2

376. Resource Management Act 1991, s58P

377. Resource Management Act 1991, s58R

378. Section 36B also allows an iwi authority to terminate a JMA but this does not change the fact that there is no recourse for an iwi authority if the council chooses to do so (and vice versa).

engagement across the country and in some regions this has meant that Māori have not been engaged in resource management processes.<sup>379</sup> This was the problem – the lack of any Māori participation at all in some regions – that the Mana Whakahono a Rohe arrangement was designed to correct.

- ▶ Iwi and councils were required to agree on how they would work together and agree on ‘methods for monitoring’ under the Act. This was an important provision, especially because the NPS-FM would be amended later in the year to include mātauranga Māori as a monitoring method for freshwater management (see section 4.6).
- ▶ Finally, iwi and councils had to agree on three process matters. First, they had to agree on how they would ‘give effect to’ any requirements in iwi participation legislation (arising from Treaty settlements). Secondly, they had to agree on how to manage any conflicts of interests that occurred during the operation of the agreement. Thirdly, they had to resolve on a dispute resolution process for any future disagreements about the implementation of the Mana Whakahono a Rohe. Section 58R(2) specified that a dispute resolution process could not stop a council from acting on something in the meantime.

Thus, the compulsory parts of a participation agreement applied to the development of plans, consultation, and council monitoring under the Act. In addition to the compulsory matters, section 58R provided scope for the parties to raise and agree on certain other matters, although the Act did not require them to do so. Section 58R(4) stated that a Mana Whakahono a Rohe arrangement could extend the agreement to include two resource consenting matters. The first was ‘[h]ow a local authority is to consult or notify an iwi authority on resource consent matters, *where the Act provides for consultation or notification* (emphasis added)’. As we noted in chapter 2, section 36A stated that there was no requirement to consult about resource consents, unless some other legislation (such as settlement legislation) requires it. Section 36A(1)(c) stated that the applicant or council *may* consult if they chose to do so. It seems that the effect of this voluntary part of the Mana Whakahono a Rohe would be to prescribe a process for how iwi would be consulted if the council chose to consult them. The second voluntary agreement about resource consents could specify the circumstances in which ‘an iwi authority may be given limited notification as an affected party’.

The most significant voluntary agreement permitted by the Act came under section 58R(4)(c), which allowed the parties to specify ‘any arrangement relating to other functions, duties or powers under this Act’. This was very broad. It could provide space for councils and iwi to discuss and agree on a section 33 transfer or a JMA, for example, and also provided iwi with a guarantee that the council would at least have to sit down and discuss it during the formation of a Mana Whakahono a Rohe if the iwi raised it. But this part of the Mana Whakahono a Rohe was purely permissive, whereas the ILG had wanted a compulsory agreement on these matters (see section 4.5.2). We discuss this further below.

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379. Ministry for the Environment, ‘Require Councils to Invite Iwi’, advice to select committee, p 1

The final two voluntary aspects of a Mana Whakahono a Rohe arrangement related to how iwi and/or hapū would work together. These groups could specify in the agreement how any two or more iwi would work collectively, and whether an iwi authority had delegated a particular role under the agreement to hapū. The ILG had intended that iwi authorities could delegate to hapū, and the Crown had preserved this aspect as another way of involving hapū in the arrangement.<sup>380</sup>

It will be recalled that, in the *Next Steps* consultation document, the Crown proposed that Mana Whakahono a Rohe agreement

will . . . 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 . . .<sup>381</sup>

It seems to us that the final product in 2017 fell well short of the substance and intent of this proposal.

Finally, as we noted above, the Mana Whakahono a Rohe agreement could not be terminated other than by mutual agreement. If a dispute arose while the agreement was in force, section 58R(2) required the agreement to specify whether a dispute resolution process was allowed to result in changing or terminating the agreement, or in a delay to certain aspects of the agreement. The Mana Whakahono a Rohe also had to specify that each side would pay its own costs in a dispute resolution process, which was probably meant as an incentive to compromise. In any case, a council could not be stopped from any particular action while a dispute resolution process was contemplated or in progress. This was an important limitation on the effectiveness of a dispute process since it could not be used as a kind of injunction while the parties tried to reach agreement.

The ILG had hoped that the effectiveness of the agreements would be monitored by the Minister. Section 58T provides for them to be self-monitored by the parties through a six-yearly review, with a possibility of 'additional reporting' (presumably to the Minister).

#### **4.5.6 How significant is the Mana Whakahono a Rohe arrangement as a partnership mechanism?**

##### **4.5.6.1 Our conclusions**

Counsel for the ILG submitted that, although the iwi leaders agreed to the Mana Whakahono a Rohe mechanism in 2017, it did not take the form that had been 'initially advocated for by the Freshwater ILG'.<sup>382</sup> Counsel also submitted that 'further reform is needed to complete the package; to both strengthen the existing (including the new) tools and ensure that they are appropriately resourced to be

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380. Mana Whakahono a Rohe Agreements', May 2016 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 57; Ministry for the Environment, 'Require Councils to Invite Iwi', advice to select committee, p 2

381. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 29

382. Counsel for the Freshwater ILG, closing submissions (paper 3.3.41), p 13

as effective as possible'.<sup>383</sup> The NZMC and its co-claimants argued that the Mana Whakahono a Rohe arrangements are to be 'applauded' as an improvement, but 'they are too little, too late, and do not go anywhere far enough'. In particular, the claimants noted that these new arrangements have not removed the statutory barriers to section 33 transfers or JMAs, and that Māori utilisation of these arrangements is 'constrained by the same resourcing problems that inhibit effective Māori participation in RMA processes more generally'.<sup>384</sup>

The Wai 262 Tribunal had recommended that sections 33 and 36B be amended along similar lines to the requirements of a Mana Whakahono a Rohe arrangement; that is, that an element of compulsion be introduced to ensure that these mechanisms be used, that councils should not be able to terminate them unilaterally, and that any statutory barriers to their accessibility be removed (see chapter 2). The ILG went into the *Next Steps* co-design process with the aim of securing compulsory JMAs, an enhanced legal weighting for iwi management plans, and arrangements that would make the degree of governance achieved by some iwi in settlements available to other iwi under the RMA. All of these goals were given up or modified during the co-design phase, as we described above in section 4.3. Crown officials and the Minister did recommend that the statutory barriers to section 36B JMAs should be removed but this, too, was given up when Cabinet made its decisions in early 2016 (see section 4.3.7).

Why were all these necessary reforms, recommended by the Wai 262 Tribunal, not progressed in the reform of the RMA? The answer is that the Crown decided to pin everything on Treaty settlements and the new Mana Whakahono a Rohe arrangements. We have already addressed the issue of Treaty settlements in chapter 2 (see sections 2.5.3, 2.5.4, and 2.5.9).

From the beginning of the co-design phase, the Crown believed that strong iwi-council relationships were necessary if Māori participation was to be improved, and that something would have to be done to establish those strong relationships. Once that was done, the Crown would need to look at incentivising councils to take up options like section 33 or JMAs, and to strengthen those tools (including by resourcing for iwi). Other models such as the Waikato River and Whanganui River arrangements might also be explored.<sup>385</sup>

During the design phase in 2015, officials and the IAG seem to have agreed that a participation agreement could be the baseline model for the reforms, and that it could potentially result in co-management:

Since Ministers' last meeting with the ILG, the IAG appears to have resiled from their earlier proposals on compulsory Joint Management Agreements (JMA). Based on recent engagement, officials consider the IAG is receptive to the Freshwater-specific IPA approach for the 'baseline model' option. They consider that sufficient 'certainty'

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383. Counsel for the Freshwater ILG, closing submissions (paper 3.3.41), p14

384. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 15–16, 27

385. Tania Gerrard, memo to Minister for the Environment, 19 June 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1201)

for iwi can be achieved by explicitly specifying the range of points on which councils and iwi must engage.<sup>386</sup>

Officials noted, however, that a two-step reform would still be required. Mana Whakahono a Rohe and the original IPAS were limited because they 'leave open-ended the outcome of iwi-council discussions'. Neither proposal '*requires the parties access any particular mechanism in the RMA by which iwi participation can be given effect*' (emphasis added).<sup>387</sup> MFE officials advised the Minister that if any 'council-iwi discussions' did 'yield agreement that iwi will be involved in the preparation or change of a regional plan (or other council function), existing mechanisms in the RMA are a primary means by which such arrangements can be given effect'.<sup>388</sup> These included JMAs but, as has been pointed out many times, there were barriers to the use of that mechanism. Officials noted that the unwillingness of the parties to work together was an important obstacle, but it was the only one that a strengthened relationship (through a Mana Whakahono a Rohe) would remove. There were still statutory barriers, such as the efficiency requirement, before a participation agreement could lead iwi and councils to use section 36B of the Act.<sup>389</sup> We discussed those barriers in chapter 2 (see section 2.5.3). Officials recommended that the barriers be removed so that iwi and councils could use JMAs to give effect to their participation agreements.

Further, officials concluded that neither change (a participation agreement or the removal of barriers to establishing a JMA) would be sufficient on its own, but together they might provide a 'package of options to enhance iwi/hapū participation in freshwater decision-making'. 'In particular', they said, 'it will assist councils and iwi that seek to access a JMA as a means of giving effect to an IPA (or other agreement) to do so'.<sup>390</sup> This recommendation made it all the way through to the Cabinet paper but was removed from the final version in early 2016 (see sections 4.3.6 and 4.3.7).

According to the Crown's evidence, the decision not to amend section 33, section 36B, or the legal weighting of iwi management plans, was ultimately made because the Mana Whakahono a Rohe was 'intended to be a partnership agreement and

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386. Briefing to Minister, 'Fresh water: Options for addressing iwi/hapū rights and interests', no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1030)

387. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1069)

388. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1069)

389. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp1069–1070)

390. Briefing to Minister, 'Fresh Water: Further Detail on Options to Enhance Iwi/Hapū Participation in Freshwater Decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p1070)

an engagement process throughout the entire RMA process, rather than just the decision making.<sup>391</sup> Tania Gerrard explained:

My understanding is that the Crown and ILG considered that the Mana Whakahono a Rohe (‘Mwar’) proposal had the potential to go beyond what section 36B offered. My understanding from discussions with political advisors was that Ministers felt that Mwar was a robust mechanism that could deliver many of the things sought through amendments to ss 33, 36B and iwi management plans. It was a more attractive option that overtook the earlier work on those sections.<sup>392</sup>

This was partly because the Mana Whakahono a Rohe arrangement was seen at the time as having a much wider scope than the Crown’s original IPAS, as we discussed above. It had a ‘wider scope in terms of the local authority duties, functions and powers on which the parties to the arrangement would engage.’<sup>393</sup>

Crown counsel stressed that Mana Whakahono a Rohe offered the possibility of ‘formal and permanent relationships’ between councils and iwi, a possibility that had not been present before in the RMA. They represent a significant step forward in the RMA’s ability to give effect to the Māori role as kaitiaki.<sup>394</sup> In terms of the particulars, the Crown relied mainly on the voluntary aspects of the participation agreements and only one of the compulsory requirements (a role in monitoring):

During these discussions, Māori may demand more meaningful involvement in resource management processes, either through agreements to transfer local authority powers to an iwi authority, or in other forms, such as the co-management of resources. The agreements may include involvement in decision-making through the appointment of iwi commissioners on hearing panels, establishing joint management agreements or other mechanisms, and environmental monitoring. They can also be used to develop monitoring methodologies so that mātauranga Māori and Māori measurements can be consistently used in regional council processes.<sup>395</sup>

The key point here is that if Māori *may* demand greater co-management and the agreements *may* include it, the council does not have to agree or even seriously contemplate it. This is because many of the points which the ILG wanted councils and iwi to have to reach agreement upon were repositioned in the voluntary part of the Mana Whakahono a Rohe.

In our view, the Mana Whakahono a Rohe mechanism in its final form in the 2017 Act was important but limited. The ILG press release stated that ‘these changes [in the RMA] put our people in a strong position to advocate for their own

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391. Tania Gerrard, answers to questions in writing (doc F18(d)), pp 3–4

392. Tania Gerrard, answers to questions in writing (doc F18(d)), p 2

393. Tania Gerrard, answers to questions in writing (doc F18(d)), p 3

394. Crown counsel, closing submissions (paper 3.3.46), p 30

395. Crown counsel, closing submissions (paper 3.3.46), p 29

views around the council table.<sup>396</sup> This is a fair point. In negotiating agreement on the compulsory parts of the Mana Whakahono a Rohe, there is an opportunity for iwi or hapū to seek co-management agreements, joint planning committees, or some other mechanism not provided for in the Mana Whakahono a Rohe itself. We also accept that a relationship/participation agreement is a vital step towards councils and iwi or hapū working together in freshwater management. Without the establishment of some kind of improved and enduring relationship, it is difficult to imagine a council agreeing to a JMA, for example, without the intervention of the Crown via a Treaty settlement.

The fact that a Mana Whakahono a Rohe can be initiated by iwi, and councils are compelled to negotiate and reach agreement if they do, is an important improvement over other RMA mechanisms. In addition, the Act states that a council cannot unilaterally end the arrangement. Again, we accept that this is an improvement over the provisions in sections 33 and 36B. Although it is too early to be sure how the Mana Whakahono a Rohe mechanism will be taken up, it appears to us that the new participation agreement is a useful starting point for iwi–council engagement.

Indeed, it may prove to be more than a starting point, depending on what the parties are able to win during the mandatory negotiation process. There are weaknesses in the dispute resolution provisions. A council does not have to wait for a dispute resolution to be completed before carrying out any particular action or function, which may allow councils to frustrate or defeat the resolution process. The Act does not lay down any particular form of process to be followed, leaving this to the parties to the agreement, nor does it include a role for the Minister if a dispute resolution fails. It is not clear how well this aspect of the arrangement will work.

But for us, the key problem with the Mana Whakahono a Rohe arrangements is that the compulsory matters to be agreed are very limited. Apart from an increased role in monitoring, which does now have to be agreed upon, the mandatory parts of the agreement relate to the consultation required by the Act (which is limited to policy statements and plans) and the participation of iwi in plan preparation or changes. In reality, what this does is provide a mechanism for councils and iwi to do the things that schedule 1 of the Act already required them to do. Anything extra comes under the parts that the parties *may* discuss and agree but there is no requirement for them to do so.

The Crown's reasoning is that a relationship has to be forged and a discussion has to be had, and that these two things may overcome previous obstacles to co-management arrangements in the RMA. Those obstacles are large. Councils have been able to make section 33 transfers to iwi for 28 years and have never done so. Alternatively, councils have been able to establish JMAs for 14 years and have only done so twice without Crown intervention through Treaty settlements. The Crown can rightly argue that one-off co-governance and co-management arrangements

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396. 'Freshwater Iwi Leaders Group Welcomes Changes to the RMA', press release, 25 March 2017 (Flavell and Gerrard, papers in support of brief of evidence (doc G22(a)), p 63)

have been made for some iwi in Treaty settlements. The claimants are equally correct when they point out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown. Further, even if relationships are improved and discussions are held through a Mana Whakahono a Rohe, statutory barriers still inhibit section 33 transfers and JMAs. The evidence of the Crown was clear on that point. In all these circumstances, it is at best unlikely that Mana Whakahono a Rohe will result in a greater decision-making role for Māori in freshwater management, such as co-governance and co-management, without further statutory amendment.

The issue of resourcing is also crucial. We discuss this in more detail below but, in essence, the only resourcing provided for Mana Whakahono a Rohe has been some guidance and training. The Iwi Leaders Group's view is that 'both local authorities and iwi must be resourced to ensure that the establishment and implementation of Mana Whakahono a Rohe agreements is as successful as possible'.<sup>397</sup> We agree. The evidence in this chapter and chapters 2–3 has shown that the lack of resources has prevented effective Māori participation in RMA processes. We have seen no reason to think that Mana Whakahono a Rohe arrangements will be different.

#### 4.5.6.2 Our findings

The Mana Whakahono a Rohe mechanism is one of two major achievements of the freshwater reform programme. In chapter 3, we saw how the impetus began with a dual approach in *Improving our Resource Management System* in 2013: new Iwi Participation Arrangements paired with statutory reforms to section 33, section 36B, and the provisions for iwi management plans. The period of Crown–ILG co-design in 2015 resulted in a renewed effort towards Iwi Participation Arrangements – in the form of the broader Mana Whakahono a Rohe – and reform of section 36B JMAs. But the necessary link between these two things was severed in 2013 and again in 2016, with the result that the Crown pinned everything on the new participation arrangements alone.

The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. This is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty.

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397. Flavell and Albert, brief of evidence (doc G22), pp 22–23



We are not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found. We accept that the Mana Whakahono a Rohe has the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans. We hope that it will result in an enhanced role for Māori in decision-making at the front-end, planning stage of the RMA. But the range of matters iwi and councils are compelled to negotiate and agree on is very limited. In our view, the Mana Whakahono a Rohe provisions do not make the RMA Treaty-compliant.

We turn next to the other major achievement of the reform programme: the strengthening of Te Mana o te Wai in the NPS-FM.

#### 4.6 'NEXT STEPS' REFORM PATHWAY 2: AMENDING THE NPS-FM, 2016–17

##### 4.6.1 The Crown's decision to proceed with additional reforms

In mid-2016, Ministers asked officials to begin policy work on four additional matters to those proposed in *Next Steps*. This was in response to some of the submissions made during the *Next Steps* consultation. The four matters were:

- ▶ addressing iwi/hapū and community aspirations to work towards improving the suitability of lakes and rivers for swimming;
- ▶ managing nutrients in rivers (in addition to managing periphyton); and
- ▶ more consideration of economic factors in fresh water planning decisions; and
- ▶ who should decide whether an objective for a water body is allowed to be set below a national bottom line in relation to Policy CA3(b).<sup>398</sup>

The Land and Water Forum recommended that swimmability could be achieved through strengthening the provisions of the NPS-FM, adding a new compulsory value for swimming, and inserting an *E coli* attribute table in the NOF.<sup>399</sup> These matters will be considered further in the following chapter. In this section, we are concerned mainly with the Crown's decision to strengthen the place and meaning of Te Mana o te Wai in the NPS-FM, which could also – it was feared – be undermined by additional 'consideration of economic factors'.

In July 2016, the Crown carried out a targeted consultation of councils and iwi organisations about 'amending the Freshwater NPS to include direction on these matters'. The email simply listed the four subjects as quoted above and asked for views on them.<sup>400</sup> It was sent to about 158 iwi and other Māori organisations with which the Crown had Treaty relationship agreements or which had previously

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398. Workman, brief of evidence (doc F6), pp 30–31

399. Workman, brief of evidence (doc F6), p 31

400. Peter Brunt, email, 'Seeking Your Views on Freshwater Reforms', 18 July 2016 (Workman, papers in support of brief of evidence (doc F6(a)), p 701)

made submissions on (or been involved in) freshwater reforms.<sup>401</sup> The Ministry did not send this consultation email to the NZMC or any District Māori Councils. Officials were not able to provide an explanation as to why the Wai 2358 claimants were left off the consultation list.<sup>402</sup>

Mr Workman explained that only 10 iwi responded to this email. Eight of those groups supported rivers being at least swimmable or ‘preferably improved further’. The response on giving additional weight to economic matters was ‘mixed’, with ‘three in support or partial support’, one opposed, and one ‘wanting economic factors more explicitly linked to Māori rights and interests’.<sup>403</sup> The Mana Whenua Kaitiaki Forum, a Tāmaki Makaurau organisation, suggested that additional consideration of economic factors would have to include Māori ownership of waterways.<sup>404</sup> Another group, Te Arawa River Iwi Trust, specifically applied the idea to considering ‘the economic benefit to the country, of water allocation for under-developed Māori land’.<sup>405</sup> Te Rungana o Ngāi Tahu opposed adding further weight to economic considerations – as well as RMA amendments that would do so – and argued that this was not an anti-development stance but rather ‘recognition that any development should be environmentally sustainable’.<sup>406</sup> The Waikato River Authority argued that any consideration of economic matters should not take precedence over others such as environmental and cultural matters, but agreed that economic modelling could be a useful planning tool.<sup>407</sup>

#### 4.6.2 The Crown and the ILG work together on NPS-FM amendments

While the Crown progressed its work on the four additional matters, it also worked to develop other amendments to the NPS-FM. The changes we are concerned with here related to strengthening and clarifying the reference to Te Mana o te Wai and the issue of cultural monitoring, both of which had been significant concerns for Māori during consultation on the NPS-FM 2014 (see the previous chapter). Also, as part of the ‘Next Steps’ consultation in early 2016, the Crown had proposed a number of reforms under the heading ‘iwi rights and interests in fresh water’. Those proposals included amending the NPS-FM by:

- ▶ inserting a ‘purpose statement’ that better explained the meaning of Te Mana o te Wai and ‘its status as the underpinning principle for community discussions on freshwater values, objectives and limits’; and

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401. List of email recipients, no date (Workman, papers in support of brief of evidence (doc F6(a)), pp 704–710); transcript 4.1.4, pp 704–705

402. Transcript 4.1.4, pp 704–705

403. Workman, brief of evidence (doc F6), p 31

404. Chair of Mana Whenua Kaitiaki Forum, email, 20 July 2016 (Crown counsel, document bundle (doc F14(a)), p 844)

405. Acting CEO of Te Arawa River Iwi Trust, email, 20 August 2016 (Crown counsel, document bundle (doc F14(a)), p 857)

406. Manager – Environment/Strategy and Influence, Te Runanga o Ngāi Tahu (Crown counsel, document bundle (doc F14(a)), p 864)

407. Chief Executive of Waikato River Authority, email, 4 August 2016 (Crown counsel, document bundle (doc F14(a)), pp 882–883)

- ▶ requiring councils to 'reflect' Te Mana o te Wai when implementing 'relevant' NPS-FM policies.<sup>408</sup>

After the consultation, the Crown decided to go ahead with these reforms to strengthen the place of Te Mana o te Wai in the national policy statement. The IAG supported and cooperated in this approach.<sup>409</sup>

According to the evidence of Tania Gerrard, officials and the IAG had nine meetings to develop the specific amendments.<sup>410</sup> The IAG wanted the NPS to ensure that the 'health and wellbeing of freshwater bodies is at the forefront of all discussions and decisions on freshwater values, objectives and limits'.<sup>411</sup> To do this, they wanted to make the body of the NPS-FM consistent with the initial statement about Te Mana o te Wai, and to tidy up the 'Māori references scattered throughout the NPS-FM . . . to ensure they are effective and valuable for Māori'.<sup>412</sup>

The iwi advisors also wanted to integrate Te Mana o te Wai more effectively with the National Objectives Framework (NOF) (see chapters 3 and 5 for a discussion of the NOF). They sought to include cultural 'attributes'<sup>413</sup> as well as 'western science attributes', and they wanted all the attributes in the NOF to be consistent with Te Mana o te Wai. As part of this, the IAG wanted to insert specific Te Mana o te Wai attributes and objectives in the NOF. The intention was to begin with 'mahinga kai', one of the existing national objectives, which had no table of measureable attributes for assessing its state.<sup>414</sup> The IAG was unsuccessful in achieving these changes to the 2017 version of the NOF, although a project team and an iwi science panel were established to develop cultural attributes and advise on 'the interface of mātauranga Māori, policy planning and science'.<sup>415</sup> This did not occur, however, until after the *Clean Water* consultation document was released in February 2017, and did not result in any amendments to the national policy statement. We discuss that development later in section 4.6.5.

Ms Gerrard explained that 'there were compromises made' throughout the Crown-IAG engagement over the revision of the NPS-FM. The IAG, for example, advocated for Te Mana o te Wai to be given a 'stronger legal weighting' in the proposed text of the new objective and policy (AA1), which is discussed further below. The IAG also wanted to put more 'prescriptive obligations on decision-makers' to ensure they would really prioritise Te Mana o te Wai as intended. The Crown did not accept those proposed amendments. According to Ms Gerrard, this was partly

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408. Gerrard, brief of evidence (doc F7), p 6

409. Gerrard, brief of evidence (doc F7), p 6; Solomon and Flavell, brief of evidence (doc D85), pp 13–14

410. Gerrard, brief of evidence (doc F7), p 6

411. Solomon and Flavell, brief of evidence (doc D85), pp 12–13

412. Solomon and Flavell, brief of evidence (doc D85), p 13

413. An 'attribute' in the NPS-FM is a 'measurable characteristic of fresh water'. The 'attributes' play a key role in describing the values for which a freshwater body type must be managed, and at what level (or 'attribute state').

414. Solomon and Flavell, brief of evidence (doc D85), p 13

415. Flavell and Albert, brief of evidence (doc G22), p 20

because the Crown did not consider this an appropriate way to balance national direction and local decision-making.<sup>416</sup>

The ILG ‘made its view clear’ to the Crown that the proposed amendments to the NPS-FM did not go far enough.<sup>417</sup> The Crown considered nonetheless that the IAG and officials had ‘reached agreement on the policy intent and the amendments proposed for Te Mana o Te Wai’.<sup>418</sup> As we discuss in the next chapter, some of the disagreements focused on other planned reforms such as what had to be done to make 90 per cent of water bodies swimmable by 2040.

By February 2017, the Crown had drafted a consultation document entitled *Clean Water: 90% of Rivers and Lakes Swimmable by 2040*, which included both a summary of its reform proposals and a marked-up version of the NPS-FM 2014, which showed the text of the proposed changes.<sup>419</sup>

### 4.6.3 What did the Crown propose in respect of Māori rights and interests in *Clean Water*?

#### 4.6.3.1 Cabinet's decisions

In February 2017, Cabinet agreed to the release of the *Clean Water* consultation document. The purpose of the consultation was not just to seek feedback on proposed amendments to the NPS-FM. The Crown also wanted to consult on its proposals for ‘swimmable’ (instead of wadeable) lakes and rivers. It proposed a target of 80 per cent of lakes and rivers to be swimmable by 2030, which would increase to 90 per cent by 2040. In addition to setting this target, the consultation document ‘sets out related policies that collectively would advance the recognition of iwi rights and interests in fresh water, contribute to water quality improvements, and improve the way in which our freshwater resources are used economically.’<sup>420</sup> Those policies included how applications to the new Freshwater Improvement Fund should be made, and ‘policy proposals for regulations to exclude stock from waterways.’<sup>421</sup> In this chapter we are concerned with the amendments to the NPS, and the other three matters will be considered primarily in the following chapter. It is important to note here, however, that the *Clean Water* document proposed a suite of inter-related regulatory reforms.

Cabinet’s statement about ‘iwi rights and interests’ echoed the evidence given to the Supreme Court in 2012 by the Deputy Prime Minister, Bill English (see the

416. Gerrard, brief of evidence (doc F7), p 8

417. Gerrard, brief of evidence (doc F7), p 5

418. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p 19); Cabinet minute of decision, ‘Freshwater: Proposals Following Next Steps’, 13 February 2017 (Workman, sensitive papers in support of brief of evidence (doc F21(b)))

419. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (Wellington: Ministry for the Environment, February 2017) (paper 3.2.6o(a))

420. Cabinet paper, ‘Fresh water – Proposals Following *Next Steps*’, no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p 1)

421. Workman, brief of evidence (doc F21), pp 3–4

previous chapter). Under the heading 'Addressing iwi/hapū rights and interests', the Cabinet paper stated:

The Government has acknowledged in the Courts and to the Waitangi Tribunal that Iwi and hapū have rights and interests in fresh water. The Government's position has been that the recognition of Iwi/hapū rights and interests in fresh water must involve mechanisms that relate to the on-going use of those resources, and may include participation in freshwater decision-making processes. The Government has committed to considering how to provide appropriately for these rights and interests through freshwater reform.

We have previously advised Cabinet on the connection between the recognition of Iwi and hapū rights and interests and the freshwater work programme [with references].<sup>422</sup>

#### **4.6.3.2 Proposals to strengthen Te Mana o te Wai**

In terms of Te Mana o te Wai, the relevant proposals to amend the NPS-FM were to:

- ▶ move the section 'National significance of fresh water and Te Mana o te Wai' to the body of Freshwater NPS under 'Commencement';
- ▶ include the text used in *Next Steps* to describe Te Mana o te Wai (with some changes recommended by the IAG) in the section 'National significance of fresh water and Te Mana o te Wai';
- ▶ add a new objective requiring councils to consider and recognise Te Mana o te Wai in the management of fresh water;
- ▶ add a new policy directing councils to ensure policy statements and plans consider and recognise Te Mana o te Wai, while noting the connection between fresh water and the broader environment and the need to inform the setting of freshwater objectives and limits through engagement with the community, including tāngata whenua;
- ▶ clarify within Policy CA2 how councils are to consider and recognise Te Mana o te Wai in the objective setting process;
- ▶ add a requirement to recognise the interactions, ki uta ki tai (from the mountains to the sea) between fresh water, land, associated ecosystems, and the coastal environment;
- ▶ amend Policy CB1 to include mātauranga Māori as an established monitoring method that is appropriate for monitoring progress towards, and the achievement of, freshwater objectives that are set in line with the concept of Te Mana o te Wai;
- ▶ amend the names and order of the national values in Appendix 1 of the Freshwater NPS so they can more easily be linked to Te Mana o te Wai by associating each value with te hauora o te wai (health of the water), te hauora o te taiao (health of the environment), and te hauora o te tangata (health of the people);

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422. Cabinet paper, 'Fresh water – Proposals Following *Next Steps*', no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p18)

- ▶ amend the description of the compulsory value ‘human health for recreation’ so that it removes the emphasis on boating and wading and provides a more positive explanation of what a healthy water body means for human health; and
- ▶ amend the description of the additional value ‘natural form and character’ so that it provides clearer links to Te Mana o te Wai.<sup>423</sup>

In our view, these were significant proposals to weave Te Mana o te Wai through the main body and appendix 1 of the national policy statement. The vehicle for this was mainly the insertion of new sentences or bullet points under existing objectives and policies. At the beginning of the main body, however, the Crown proposed to insert a new explanation of Te Mana o te Wai (drawn from *Next Steps* and amended by the IAG) and a new objective and policy specifically for Te Mana o te Wai. These changes were designed to meet previous criticisms that the statement about Te Mana o te Wai was confined to the preamble (which had less weight than the main body), that there was no clear description of Te Mana o te Wai, and that it was not tied to any specific objectives or policies – and thus overall its role in freshwater decision-making would be weak and ineffective. We described these criticisms in chapter 3 (see section 3.7.3).

After the title and commencement, the Crown proposed to insert new text under the heading ‘National significance of fresh water and Te Mana o te Wai’:

**National significance of fresh water and Te Mana o te Wai**

The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management.

The health and well-being of our freshwater bodies is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) and our communities.

Te Mana o te Wai is the integrated and holistic well-being of a freshwater body.

Upholding Te Mana o te Wai acknowledges and protects the mauri of the water. This requires that in using water you must also provide for Te Hauora o te Taiao (health of the environment), Te Hauora o te Wai (health of the water body) and Te Hauora o te Tangata (the health of the people).

Te Mana o te Wai incorporates the values of tangata whenua and the wider community in relation to each water body.

The engagement promoted by Te Mana o te Wai will help the community, including tangata whenua, and regional councils develop tailored responses to freshwater management that work within their region.

By recognising Te Mana o te Wai as an integral part of the freshwater management framework it is intended that the health and well-being of freshwater bodies is at the forefront of all discussions and decisions about freshwater, including the identification

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423. Gerrard, brief of evidence (doc F7), pp 7–8; Cabinet paper, ‘Fresh water – Proposals Following *Next Steps*’, no date (February 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p19)

of freshwater values and objectives, setting limits and the development of policies and rules.

This is intended to ensure that water is available for the use and enjoyment of all New Zealanders, including tāngata whenua, now and for future generations.<sup>424</sup>

This explanation restated the Crown's original intention for Te Mana o te Wai as a vehicle for the whole community's values to be incorporated into freshwater management, but placing the health of the water body first.

The proposed addition of a new Te Mana o te Wai objective and policy in the NPS was also very important. The national policy statement was divided into a series of objectives (and policies to implement those objectives) as follows:

- ▶ A: water quality;
- ▶ B: water quantity;
- ▶ C: integrated management (which included objectives and policies for the NOF (CA), monitoring plans (CB), and accounting for freshwater takes and contaminants (CC));
- ▶ D: tāngata whenua roles and interests (addressed in the previous chapter); and
- ▶ E: a progressive implementation programme.

The *Clean Water* document did not propose any amendments to section D. Instead, the Crown proposed to associate Te Mana o te Wai with water quality (section A). Under the heading 'Te Mana o te Wai', the Crown proposed to insert objective AAA1,<sup>425</sup> which would require councils to 'consider and recognise Te Mana o te Wai in the management of fresh water'. There was one policy to implement this objective and it was limited to planning documents. Regional councils would be required to 'consider and recognise' Te Mana o te Wai in the making or changing of regional policy statements and plans.<sup>426</sup> The IAG had objected to the wording 'consider and recognise' as not giving sufficient legal weight to the councils' obligations.<sup>427</sup> On the other hand, inserting Te Mana o te Wai as an objective with a supporting policy was itself a proposal that would strengthen councils' obligations. This was no small thing considering the Crown's objection to going this far in 2014 when Te Mana o te Wai was first added to the NPS (see previous chapter).

To assist councils in implementing this requirement (to consider and recognise), the proposed text of policy AAA1 noted:

- a) Te Mana o te Wai recognises the connection between water and the broader environment – Te Hauora o te Taiao (health of the environment), Te Hauora o te Wai

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424. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [42]

425. AAA1 became AA1 in the final, published version of the NPS-FM 2014 as updated in 2017.

426. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [45]

427. Flavell and Albert, responses to questions deferred to Te Pou Taiao by Tania Gerrard, 2 August 2018 (doc G22(b)), pp 5, 8

(health of the waterbody) and Te Hauora o te Tangata (the health of the people); and

- b) local and regional values identified through engagement and discussion with the community, including tangata whenua must inform the setting of freshwater objectives and limits.<sup>428</sup>

The ILG had proposed stronger, more specific wording here to require councils under Policy AAA1 to:

- ▶ explicitly determine how tangata whenua and the community viewed the present health of freshwater management units, and how those units should then be maintained or improved in a ‘manner that recognises and provides for Te Mana o te Wai’; and
- ▶ record explicitly in their policy statements and plans how they have done so when setting limits, objectives, and monitoring requirements.<sup>429</sup>

The Crown was not prepared, however, to insert these more powerful provisions in the draft for consultation in February 2017. Tania Gerrard advised that the final text was a compromise between the Crown and the IAG.<sup>430</sup>

In addition to proposing the new policy and objectives (AAA1), the Crown proposed that ‘[c]larification of how to implement Te Mana o Te Wai will be provided within Policy CA2.’<sup>431</sup> Section C of the NPS-FM was entitled ‘Integrated Management’, and subsection CA provided the objectives and policies for the NOF. The Crown proposed to amend policy CA2 to state that councils would apply the NOF ‘following discussion with communities, including tangata whenua’, and that councils would consider ‘in particular’ objective AAA1 at all relevant points during the process.<sup>432</sup> Here, the ILG had wanted a more joint or collaborative process but the Crown had insisted that final decisions must remain with councils.<sup>433</sup>

In addition to these changes in respect of Te Mana o te Wai to the main body of the NPS-FM, the Crown proposed to insert a new monitoring requirement in section CB. Policy CB1(aa) would now require every council’s monitoring plan to include methods for monitoring the extent to which the NOF values were being provided for in each freshwater management unit. These monitoring methods would have to include mātauranga Māori.<sup>434</sup> As we discussed in the previous chapter, the insertion of this kind of monitoring had been a major objective of the Māori groups which made submissions on the 2014 version of the NPS-FM.

428. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [45]

429. Tania Gerrard, answers to questions in writing, no date (doc F18(d)), pp 6–7

430. Gerrard, answers to questions in writing (doc F18(d))

431. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040*, p 21 (paper 3.2.60(a)), p [21]

432. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), pp [52–53]

433. Flavell and Albert, brief of evidence (doc G22), p 19

434. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [55]



The ILG also wanted to integrate the application of Te Mana o te Wai with the appendices as well as the main body of the NPS-FM. Appendix 1 set out the national values for the NOF, two of which were compulsory for communities and councils to use in setting objectives and limits (see chapter 3). The 2014 version of the NPS-FM had used 'Te Hauora o te Wai' ('the health and mauri of water') as the heading for the compulsory value 'ecosystem health'. It had also used 'Te Hauora o te Tangata' ('the health and mauri of the people') as the title for the second compulsory value, 'human health for recreation'. Thirdly, the national value 'natural form and character' was given the heading 'Te Hauora o te Taiao' ('the health and mauri of the environment'). The original intention had been to link these to Te Mana o te Wai but the final version in 2014 had no explanation of these terms or how they were related to Te Mana o te Wai.<sup>435</sup>

In the proposed amendments, the 'hauora' values were now explained as part of Te Mana o te Wai in the revised 'National significance' statement and in Policy AAA1. This meant that using these headings in Appendix 1 would explicitly link those national values to Te Mana o te Wai. In doing so, the English translations were deleted from the titles in the appendix. 'Te Hauora o te Wai' and 'Te Hauora o te Tangata' remained the headings for 'ecosystem health' and 'human health' (although the description of the 'human health' value was rewritten to include fitness for mahinga kai and for swimming).

Having made these changes, the order, titles, and content of the non-compulsory values would also be changed and reordered. First would come 'Te Hauora o te Wai' for a second time, and under that heading were the values of 'Wai Tapu' (sites where rituals like tohi were performed) and 'mahinga kai' (the mauri of the sites where food is taken). Then, under the heading 'Te Hauora o te Taiao' came 'natural form and character', and the text of this value would be significantly expanded to include the presence of 'culturally significant species' and other matters. This was followed by a second use of the heading 'Te Hauora o te Tangata', including the values of 'fishing', 'mahinga kai' a second time (safe to eat), and 'transport'.

Next would come 'Extractive uses'. This would have no Māori title and was not linked to Te Mana o te Wai. The national values under this heading were: 'water supply', 'animal drinking water', 'irrigation and food production', 'hydro-electric power generation', and 'commercial and industrial use'.<sup>436</sup>

#### 4.6.3.3 Other proposed amendments

The Crown also proposed changes to the NPS-FM with which the IAG was in strong disagreement. Some of those related particularly to aspects of the swimability and stock exclusion proposals, and will be discussed in the next chapter, but we note here that the Crown sought to re-introduce an emphasis on economic

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435. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, pp 20–23 (Workman, papers in support of brief of evidence (doc F6(a)), pp 20–23)

436. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), pp [59]–[64]

matters in councils' freshwater decision-making. Arising out of the consultation on *Next Steps* (see above), the Crown explained in *Clean Water*:

Fresh water is vital to New Zealand's economy. It is critical to the success and future of our primary industries and tourism sector. Concerns have been raised that the Freshwater NPS does not specifically oblige councils to consider implications for economic well-being before they establish environmental limits. Meeting the requirements of the Freshwater NPS has substantial economic impacts and it is important community discussions are open and transparent about the costs and benefits.

To address these concerns, we propose amending the Freshwater NPS to make clear that regional councils must consider the community's economic well-being when making decisions about water quantity, deciding what level or pace of water quality improvements will be targeted, and when establishing freshwater objectives.<sup>437</sup>

The IAG opposed this proposal because 'they consider[ed] it would pit water quality against economic objectives and could result in further degradation to water quality'.<sup>438</sup> This had also been a concern for some of the iwi groups which responded to the Ministry's email consultation in mid-2016.

Finally, as noted above, the Crown proposed amendments to the NPS-FM to replace wadeability with swimmability as a target (which Māori groups had strongly supported in 2016), and stock exclusion regulations to assist in achieving this target. These important matters are discussed in the next chapter.

#### 4.6.4 What were the Māori Treaty partner's responses?

##### 4.6.4.1 The submissions

The *Clean Water* consultation document was released on 23 February 2017. The Crown allowed two months for submissions, which were due on 28 April 2017. By late April, the Ministry for the Environment was concerned about the small number of submissions from Māori groups and organisations. Martin Workman told us that he emailed the Ministry's Māori contacts list (discussed above) on 21 April 2017, seeking a submission and offering 'further information or explanation'.<sup>439</sup> As a result of this approach, the Ministry received an additional five submissions.<sup>440</sup> A total of 21 submissions were filed by Māori groups and organisations. The Green Party, Forest and Bird, and Greenpeace New Zealand circulated form submissions, of which a total of 6,586 were received. In addition, the Crown received 684 unique submissions, including from environmental or community groups, the primary

437. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040*, p 20 (paper 3.2.60(a)), p [20]

438. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', no date (August 2017) (doc F10), p 13

439. Workman, brief of evidence (doc F21), p 6; Martin Workman, email, 21 April 2017 (Workman, papers in support of brief of evidence (doc F21(a)), p 324)

440. Workman, brief of evidence (doc F21), p 6

sector (17), and business or industry groups (19). Nineteen regional councils made submissions.<sup>441</sup>

The ILG did not make a submission but we have explained the co-design work of the IAG in some detail in the previous section. A number of iwi with membership on the ILG did make their own submissions. There were no submissions from the NZMC or any District Māori Councils. As noted above, the councils were not on the Ministry email list.<sup>442</sup> Nor were there any consultation hui, although Crown officials did attend three of the ILG's regional hui to 'present the *Clean Water* proposals to attendees.'<sup>443</sup> Almost all of the submissions came from iwi bodies or organisations created as a result of Treaty settlements, which probably reflects both the need for resources when preparing written submissions and the absence of consultation hui.

In our view, the limited number of submissions probably indicates some consultation fatigue on these issues, with many groups having already put in their views on the *Next Steps* proposals the previous year.

#### 4.6.4.2 *The submissions on Te Mana o te Wai*

Martin Workman provided the Tribunal with the Ministry's summary of submissions and recommendations.<sup>444</sup> According to this report, the *Clean Water* submissions were strongly in favour of the changes to clarify and strengthen Te Mana o te Wai in freshwater management:

There was unanimous support for adding clarity to Te Mana o te Wai. There was strong support for the amendments as drafted, with the exception of some hydro-electric power generators and some in the primary sector. The inclusion of mātauranga Māori in Policy CB1(aa)(v) and the reference to ki uta ki tai in Policy C1(b) were supported.

The Iwi Leaders Group were 'particularly pleased that the national significance of Te Mana o te Wai has been recognised'. All council submissions were strongly supportive of the proposed Te Mana o te Wai amendments and indicated that they were useful in directing the implementation of Te Mana o te Wai.<sup>445</sup>

Officials also suggested that the strengthening of Te Mana o te Wai would address the Treaty principle of active protection 'by putting the river first.'<sup>446</sup>

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441. Ministry for the Environment, *Submissions Report and Recommendations on Proposed Amendments to the National Policy Statement for Freshwater Management* (Wellington: Ministry for the Environment, August 2017) (Workman, papers in support of brief of evidence (doc F21(a)), p 334)

442. For the 2017 list of email recipients, see Workman, papers in support of brief of evidence (doc F21(a)), pp 325–328

443. Workman, brief of evidence (doc F21), p 6

444. Ministry for the Environment, *Submissions Report and Recommendations* (Workman, papers in support of brief of evidence (doc F21(a)))

445. Ministry for the Environment, *Submissions Report and Recommendations*, p 11 (Workman, papers in support of brief of evidence (doc F21(a)), p 339)

446. Ministry for the Environment, *Submissions Report and Recommendations*, p 57 (Workman, papers in support of brief of evidence (doc F21(a)), p 385)

The Ministry's report noted what it considered 'two less substantial concerns', which were the need to strengthen the language of 'consider and recognise' (objective AAA1); and the need to ensure that the objective-setting process for freshwater bodies came as part of the discussion with communities, not afterwards by the councils alone.<sup>447</sup> Both of these concerns had been raised by the IAG (see above), and were raised in the consultation by Māori submitters. They objected that the wording 'consider and recognise' was too vague, 'open to interpretation and litigation, and may have little effect on regional freshwater planning'.<sup>448</sup> A 'substantial' number of submitters wanted to use the words 'recognise and provide for' (the wording in section 6 of the RMA), because it was already well understood and its meaning had been addressed in case law. The Ministry, however, argued that the intention was not to create a new section 6 matter, the term 'consider' was used for other national values in the NPS-FM, and the current wording provided sufficient direction to councils for their regional policy statements and plans. Officials recommended against making this change.<sup>449</sup>

On the other hand, some primary sector submitters, electricity generators, and district health boards objected to the association of some NOF values in appendix 1, such as the compulsory value 'ecosystem health', with Te Mana o te Wai. The proposal to do this had been jointly agreed by the Crown and the ILG. These submitters argued that linking a subset of national values with Te Mana o te Wai gave them a stronger weighting (because of the new objective AAA1) than other values such as extractive uses and production. The Ministry considered that if a council decided to give weight to extractive uses, then that would happen during the objective-setting process anyway because all national values had to be considered for their relevance to particular freshwater 'units'. The Ministry also noted that hydro-electric power already had extra weight in decision-making through its own national policy statement and section 7 of the RMA.<sup>450</sup>

#### 4.6.4.3 *Setting objectives 'following' discussion with communities and tāngata whenua*

Māori submitters objected to the proposed wording of policy CA2 that councils would define objectives for freshwater units *following* 'discussion with communities, including tāngata whenua'. According to the Raukawa Charitable Trust, for example, this could end up being a 'tick-box exercise' instead of the fundamental engagement necessary to set objectives, especially for those iwi who

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447. Ministry for the Environment, *Submissions Report and Recommendations*, p 11 (Workman, papers in support of brief of evidence (doc F21(a)), p 339)

448. Ministry for the Environment, *Submissions Report and Recommendations*, p 12 (Workman, papers in support of brief of evidence (doc F21(a)), p 341)

449. Ministry for the Environment, *Submissions Report and Recommendations* p 12 (Workman, papers in support of brief of evidence (doc F21(a)), pp 341–342)

450. Ministry for the Environment, *Submissions Report and Recommendations*, pp 11–13 (Workman, papers in support of brief of evidence (doc F21(a)), pp 338–341)

had co-governance and co-management agreements.<sup>451</sup> Officials argued that the intention was for the community and tāngata whenua to be involved in identifying values for their freshwater resources and setting objectives for them. The Ministry agreed that the word 'following' should be replaced by 'through'.<sup>452</sup> This was a change that the IAG had been unable to secure from the Crown during the drafting of the NPS-FM amendments (see above).<sup>453</sup>

#### 4.6.4.4 Economic impacts and wellbeing

The Crown proposed to amend parts of the NPS-FM to 'strengthen the requirement to consider economic impacts' when setting freshwater objectives and limits.<sup>454</sup> As noted above, the ILG had opposed these proposals. The vast majority of all submissions were also opposed to these amendments and wanted to ensure that environmental matters would be prioritised. There was a concern that councils already gave too much weight to economic considerations, and that the proposed changes would make this situation worse. Māori submitters wanted these amendments rejected altogether. As an alternative, the submissions from Māori were almost unanimous in arguing that the other two wellbeings mentioned in section 5 of the RMA – social and cultural – would have to be added to the NPS-FM as well.<sup>455</sup>

This question was taken very seriously by Māori because the new additions were seen as undermining what the NPS-FM and the strengthening of Te Mana o te Wai were supposed to achieve. The Ministry's report on the submissions noted:

The 12 iwi that provided comment unanimously argued that the health of freshwater ecosystems should be prioritised and that creating frameworks where economic benefits were traded off against environmental wellbeing was inappropriate.<sup>456</sup>

Officials expressed some concern that the amendments could impede progress towards the new swimmability target, and recommended that they either be abandoned or redrafted as separate objectives (rather than inserted into, and changing the meaning of, existing objectives).<sup>457</sup>

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451. Raukawa Charitable Trust, submission, 28 April 2017 (Crown counsel, document bundle (doc F14(a)), p 1089)

452. Ministry for the Environment, *Submissions Report and Recommendations*, p 14 (Workman, papers in support of brief of evidence (doc F21(a)), p 342)

453. Flavell and Albert, brief of evidence (doc G22), p 19

454. Ministry for the Environment, *Submissions Report and Recommendations*, p 19 (Workman, papers in support of brief of evidence (doc F21(a)), p 347)

455. Ministry for the Environment, *Submissions Report and Recommendations*, p 20 (Workman, papers in support of brief of evidence (doc F21(a)), p 348)

456. Ministry for the Environment, *Submissions Report and Recommendations*, p 21 (Workman, papers in support of brief of evidence (doc F21(a)), p 349)

457. Ministry for the Environment, *Submissions Report and Recommendations*, pp 20–22 (Workman, papers in support of brief of evidence (doc F21(a)), p 348–350)

**4.6.4.5 The addition of mātauranga Māori to monitoring**

Most submissions addressed the issue of adding the macroinvertebrate community index to the NPS-FM as a monitoring tool, and how this should be done. Martin Workman described the other changes to the monitoring section as ‘non-controversial’.<sup>458</sup>

Several Māori submissions addressed the addition of mātauranga Māori to the monitoring requirements. They were strongly supportive. This was something which Māori had sought in 2014 when the NPS-FM was last amended (see chapter 3). Many expressed concerns, however, about how this would be resourced, how councils would ensure that it was local Māori groups who devised the monitoring according to their mātauranga, and the absence of cultural health indicators from the NOF to facilitate this kind of monitoring. Te Rūnanga o Ngāti Ruanui and the Ngāti Rangi Trust, for example, suggested that the Cultural Health Index should be added as a monitoring tool.<sup>459</sup> We discussed this index in chapter 2 (see section 2.7.2).

Ngāti Tūwharetoa agreed with other iwi that the proposed revisions to the NPS-FM would not provide sufficient direction. They sought the ‘provision of national direction on the compulsory use of mātauranga Māori indicators to measure and monitor water quality’.<sup>460</sup> They also submitted to the Crown:

We note the proposed amendments to Policy CB1(aa) has methods that include Mātauranga Māori, however there is no clarification as to how Mātauranga Māori methods will be developed. The Trust Board recommends that these be developed with and by iwi and hapū and that there must be sufficient resources and funding provided to iwi and hapū to enable meaningful collaboration. Councils must also be resourced to upskill in Mātauranga Māori. In addition to funding the development, there must be sufficient funding for the implementation of any Mātauranga Māori methods developed.<sup>461</sup>

**4.6.4.6 Other matters**

Māori submitters expressed views on other parts of the NPS-FM, including the new swimmability proposals, water quality measures, stock exclusion, and the NOF. Those issues will be dealt with in chapter 5.

**4.6.5 What did the Crown decide?****4.6.5.1 Te Mana o te Wai**

The Crown rejected submissions that the weighting accorded Te Mana o te Wai should be increased by changing the wording from ‘consider and recognise’ to

458. Workman, brief of evidence (doc F21), p 12

459. Te Rūnanga o Ngāti Ruanui, submission, no date (April/May 2017); Ngāti Rangi Trust, submission, 28 April 2017 (Crown counsel, document bundle (doc F14(a)), pp 1066, 1069, 1148)

460. Tūwharetoa Māori Trust Board, submission, 5 May 2017, app A (Crown counsel, document bundle (doc F14(a)), p 1192)

461. Tūwharetoa Māori Trust Board, submission, 5 May 2017 (Crown counsel, document bundle (doc F14(a)), p 1179)

'recognise and provide for'. In addition, the Crown accepted the submissions from power companies and other industry groups that there should be no specific link between Te Mana o te Wai and the national values in the NOF. This meant that the proposed headings in appendix 1, intended to provide this link, were dropped from the final version. We discuss the changes to the appendix further below.

Otherwise, the new text for Te Mana o te Wai was included as planned in the revised 'National significance' statement and in an objective and two policies within the main body of the NPS-FM. The Minister agreed to change the wording of policy CA2 along the lines recommended by officials, that freshwater objectives and limits should be set *through* discussions with the community and tāngata whenua, not *following* (as had been proposed in *Clean Water*).<sup>462</sup>

The 2017 version of the NPS-FM had an entirely new 'National significance' statement to replace the very brief one that was included in 2014 (see section 3.7.4 for the contents of the earlier statement). The replacement statement was moved from before to after the title and commencement sections. This was very important because it made the statement part of the body of the NPS-FM, whereas previously it had had less force as a kind of second preamble.

The 'National significance' statement is quoted in full above in section 4.6.3. Its title was 'National significance of fresh water and Te Mana o te Wai'. It stated that the 'management of fresh water through a framework that considers and recognises Te Mana o te Wai' was a matter of national significance. Te Mana o te Wai was defined as the 'integrated and holistic well-being of a freshwater body', along with the statement that the health and well-being of waterways was vital for the 'health and well-being' of land, resources, and communities. Upholding Te Mana o te Wai in freshwater management would acknowledge and protect mauri. This required providing for 'Te Hauora o te Taiao (health of the environment), Te Hauora o te Wai (health of the water body) and Te Hauora o te Tangata (the health of the people)'.<sup>463</sup>

The statement then went on to say that 'Te Mana o te Wai incorporates the values of tāngata whenua and the wider community in relation to each water body'. The engagement on Te Mana o te Wai between councils and 'the community, including tāngata whenua, would help develop 'tailored responses to freshwater management that work within their region'.<sup>464</sup> The final paragraph of the statement reinforced this point:

By recognising Te Mana o te Wai as an integral part of the freshwater management framework it is intended that the health and well-being of freshwater bodies is at the forefront of all discussions and decisions about fresh water, including the identification of freshwater values and objectives, setting limits and the development of policies

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462. Ministry for the Environment, *Submissions Report and Recommendations*, p7 (Workman, papers in support of brief of evidence (doc F21(a)), p 422)

463. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [42]

464. New Zealand Government, *Clean Water: 90% of Rivers and Lakes Swimmable by 2040* (paper 3.2.60(a)), p [42]

and rules. This is intended to ensure that water is available for the use and enjoyment of all New Zealanders, including tāngata whenua, now and for future generations.<sup>465</sup>

This part of the statement reflected the Crown's view that Te Mana o te Wai was not intended to be 'Māori-centric' but 'water-centric';<sup>466</sup> in other words, Te Mana o te Wai was a vehicle for the whole community's value for healthy water bodies. It also underlined the Crown's view that Te Mana o te Wai had a crucial role to play in the setting of values, objectives, and limits in RMA plans; that was the core function of the NPS-FM.

Following the 'National significance' statement, a section AA was inserted entitled: 'Te Mana o te Wai'. This was inserted before section A (Water Quality). The text of Objective AA1 and its accompanying policy have already been set out above (see section 4.6.3). In brief, the objective was expressed as 'to consider and recognise Te Mana o te Wai in the management of fresh water'. Policy AA1 required councils to do this in making or amending their policy statements and plans. In setting forth this requirement, Policy AA1 noted two points. The first was the connection between water and the 'broader environment', explained as 'Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the water body) and Te Hauora o te Tangata (the health of the people)'. The second point to note was the values that would be identified 'through engagement and discussion with the community, including tāngata whenua', which had to *inform* 'the setting of freshwater objectives and limits'.<sup>467</sup>

As noted earlier, the text of Objective AA1 and its policies did not go far enough for the IAG, especially when the weight of economic matters was to be enhanced in the 2017 version of the NPS-FM.

#### 4.6.5.2 *Economic impacts and wellbeing*

The Crown decided that two new objectives and policies would be inserted to 'signal to regional councils that they should also provide for economic well-being when giving effect to the Freshwater NPS'.<sup>468</sup> Cabinet noted the concerns expressed about the proposed amendments, including the IAG's view that the proposal would 'pit water quality against economic objectives and could result in further degradation to water quality'. Nonetheless, the Crown considered that it was necessary to

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465. New Zealand Government, *National Policy Statement for Freshwater Management 2014 Updated August 2017 to Incorporate Amendments from the National Policy Statement for Freshwater Management Amendment Order 2017*, p7 (Workman, papers in support of brief of evidence (doc F21(a)), p 691)

466. Ministry for the Environment, 'Regulatory Impact Statement: Amendments to the National Policy Statement for Freshwater Management 2014', 26 July 2017 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 576)

467. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p11 (Workman, papers in support of brief of evidence (doc F21(a)), p 695). In the final version, 'AA' was used instead of 'AAA'.

468. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', p 2 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 435)



strengthen the consideration of economic matters, and that this was aligned to the purpose of the RMA (section 5).<sup>469</sup>

#### 4.6.5.3 *The use of Mātauranga Māori in monitoring*

The Crown decided to go ahead with the change to Policy CB1. This would require councils to develop a monitoring plan that 'establishes methods for monitoring the extent to which' the values that had been identified using the NOF were 'being provided for in a freshwater management unit'. These monitoring methods had to include the monitoring of macroinvertebrate communities, measuring the health of indigenous flora and fauna, and mātauranga Māori.<sup>470</sup>

Although the Crown did not consider additional amendments at that time, such as inserting the Cultural Health Index as a monitoring tool, it did establish a new work programme with the ILG to develop some cultural attributes for the NOF. We discuss that further below.

#### 4.6.5.4 *National values*

As we discussed above, the ILG had proposed to link some of the national values in the NOF more clearly with Te Mana o te Wai. The 2014 version of the NPS-FM had included the headings 'Te Hauora o te Wai', 'Te Hauora o te Tangata', and 'Te Hauora o te Taiao'. But, as we explained in chapter 3, the 'National significance' statement was so watered down in the 2014 version that no one reading the NPS-FM would have known that those three titles referred to components of Te Mana o te Wai. Councils and other RMA decision makers would only have discovered that link by consulting MFE's guide to the NPS-FM, which provided more explanation of Te Mana o te Wai and the link between the national values in appendix 1 and the 'National significance' statement.

The guide stated:

For the purposes of the NPS-FM, Te Mana o te Wai represents the innate relationship between te hauora o te wai (the health and mauri of water) and te hauora o te taiao (the health and mauri of the environment), and their ability to support each other, while sustaining te hauora o te tāngata (the health and mauri of the people).

The recognition and expression of the national significance of fresh water and Te Mana o te Wai is reflected in the national values contained in Appendix 1 of the NPS-FM. The national values incorporate tāngata whenua values at a high level, and the National Objectives Framework (NOF) process set out in Policy CA2 allows for regional flexibility in the way tāngata whenua values are defined and expressed by each iwi and hapū. The aggregation of community and tāngata whenua values and

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469. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', p 13 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 446)

470. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 21 (Workman, papers in support of brief of evidence (doc F21(a)), p 705)

the ability of fresh water to provide for those values over time recognises the national significance of fresh water and Te Mana o te Wai.<sup>471</sup>

The guide, of course, had no official status and was not to be understood as altering the official requirements of the NPS-FM.<sup>472</sup>

The ILG, therefore, had wanted to make the link explicit in the NPS-FM itself. As we set out above, this involved explaining the concepts in the ‘National significance’ statement, including them in Policy AA1, and reordering and vamping up the headings and text of the national values in appendix 1 (see section 4.6.3). The Minister agreed with his officials – and some hydroelectricity and primary industry submitters – that this link could be perceived as creating a hierarchy in the national values.<sup>473</sup> The Land and Water Forum also objected, arguing that ‘[t]here should be no priority between competing values.’ The forum continued to oppose these amendments after the consultation round but could not agree on a position. Officials advised:

Since the consultation period LAWf members have not been able to arrive at an agreed LAWf position. Proceeding with the amendments as proposed will be strongly opposed by some LAWf members (particularly some hydroelectric power generators, Horticulture NZ and Federated Farmers). Changing the proposals as they request will not be supported by the Iwi Advisors Group.<sup>474</sup>

The Crown decided to remove the headings altogether, including the pre-existing references to te hauora in the 2014 version. In making the links clear between the national values and the ‘three healths that make up Te Mana o te Wai’, it had *not* been intended to create a hierarchy or priority between different values – at least, not by the Crown.<sup>475</sup>

The result of this decision was that Te Mana o te Wai was no longer integrated with the NOF’s national values, although the expanded description of some values was still included in the final version of the NPS-FM. This change potentially weakened the significance of Te Mana o te Wai and Māori values in freshwater

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471. Ministry for the Environment, *A Guide to the National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2015), p 27 (Workman, papers in support of brief of evidence (doc F6(a)), p 61)

472. Ministry for the Environment, *A Guide to the National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2015), p 2 (Workman, papers in support of brief of evidence (doc F6(a)), p 36)

473. Ministry for the Environment, *Summary of recommendations and the Minister for the Environment’s decisions*, pp 26–29 (Workman, papers in support of brief of evidence (doc F21(a)), pp 710–713)

474. Briefing to Ministers, ‘Fresh Water: Summary of submissions and recommendations on proposed amendments to the Freshwater NPS (and swimming proposals)’, no date (June 2017) (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 407)

475. Cabinet paper, ‘Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014’, p 17 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 450)

management and decision-making. In our view, however, the link between Te Mana o te Wai and the substance of the two compulsory values was implicit even without the headings. Similarly, the new text of the 'natural form and character' value had obvious relevance to 'Te Hauora o te Taiao' even after the removal of that heading.<sup>476</sup> The question remains as to how much weight would be accorded certain values in freshwater decision-making, after the specific connection between Objective AA1 and appendix 1 had been removed. The lack of any cultural attributes in appendix 2, where numerical measures were assigned to national values so that they could be monitored and bottom lines met, was still a crucial weakness in the 2017 version of the NPS-FM.

#### 4.6.6 Follow-up work in 2017

##### 4.6.6.1 Cultural indicators for the NPS-FM

After the *Clean Water* consultation document was issued in February 2017, MFE and the ILG established a new work programme to develop cultural attributes for the NOF. A project team was set up to do that work, and to recommend 'supporting and complementary measures to strengthen the implementation of the NPS-FM.'<sup>477</sup> Te Kahu o te Taiao, the iwi science panel, was also set up to 'assist the work programme and to provide expertise at the interface of mātauranga Māori, policy planning and science.'<sup>478</sup> This was part of the Ministry's plan to develop new attributes for sediment, macroinvertebrates, and other matters, and to 'investigate attributes for temperature, benthic cyanobacteria (toxic algae), wetlands, physical habitat, fishing, and cultural indicators.'<sup>479</sup>

The iwi science panel concluded that cultural monitoring tools were essential for Te Mana o te Wai under the NPS-FM. It examined the use of various tools that had already been developed, including Te Kēpa Morgan's mauri model, the cultural health index, and the mauri compass (these are described in chapter 2). The panel noted that the common features were: 'measurements of mauri using attributes, combinations of Mātauranga and science, use of scales, collation and assessment of mauri in relation to sites and or specific activities remains in the hands of hapu and iwi.'<sup>480</sup>

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476. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, pp 26–27 (Workman, papers in support of brief of evidence (doc F21(a)), pp 710–711)

477. Flavell and Albert, brief of evidence (doc G22), p 20; Te Runanganui o Ngāti Porou, 'National Policy Statement Freshwater – National Objectives Framework Summary Report', 30 November 2017 (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 5)

478. Te Runanganui o Ngāti Porou, 'National Policy Statement Freshwater – National Objectives Framework Summary Report', 30 November 2017 (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 5)

479. Workman, brief of evidence (doc F6), p 20

480. Te Runanganui o Ngāti Porou, 'National Policy Statement Freshwater – National Objectives Framework Summary Report' (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 43)

The panel also concluded that there had not been ‘widescale acceptance of these methods.’<sup>481</sup> Nonetheless, it was essential to have national guidance and a tool that could be applied and interpreted by the appropriate tribal group at the local level.<sup>482</sup> This was especially the case because, ‘in the absence of clarity, councils are ignoring the requirements of the NPSFM saying that there is no way to measure TMTW [Te Mana o te Wai] or a lack of understanding in how to operationalise it.’<sup>483</sup> The panel’s view was that a ‘measure that determined very simply and in narrative form, what Mauri looked like in a healthy state, and what it looked like when it was failing, could be universal for iwi and hapu to use.’<sup>484</sup>

The result was the mauri scale, a table of descriptors for tāngata whenua to assess and decide whether the mauri of a freshwater management unit or catchment met a national bottom line. This bottom line was set on the second of five levels in the table, and was described as ‘mauri piki’. The bottom line would be met if Māori were able to carry out specific customary practices ‘most of the time’, and the state and flow of the water and its aquatic species were in certain described states ‘most of the time.’<sup>485</sup>

According to Donna Flavell and Gerrard Albert, the mauri scale was supposed to be added to the NOF to ‘enable a mauri based, holistic measure of water quality and quantity as it related to Te Mana o te Wai.’<sup>486</sup> But, they said, the Ministry considered this a ‘step too far and just before the elections decided not to include it in the NOF and had suggested inclusion as guidance notes.’ The work was ‘shelved’ by MFE after the election.<sup>487</sup> Martin Workman stated in his evidence that the iwi science panel’s report was still being reviewed, and that the Ministry’s longer-term work programme would ‘continue investigation into the feasibility of developing cultural attributes.’<sup>488</sup>

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481. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 43)

482. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), pp 36–38)

483. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 37)

484. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 38)

485. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 40)

486. Flavell and Albert, answers to questions in writing (doc G22(f)), p 9

487. Flavell and Albert, answers to questions in writing (doc G22(f)), p 9

488. Workman, answers to questions in writing (doc F21(d)), pp 7–8

In the meantime, there are no cultural attributes or monitoring tools in a policy statement that councils have to implement by 2025. The Crown acknowledged that this is a significant issue in its review of how the NPS-FM is being implemented.<sup>489</sup>

#### **4.6.6.2 What still needed to be done for iwi and hapū engagement in freshwater management**

The Ministry published a national review of the implementation of the NPS-FM in 2017. In order to achieve iwi and hapū engagement in freshwater management, the review found that further work would be needed over the next five years as follows:

- ▶ Develop and support formal relationship agreements between councils and tāngata whenua.
- ▶ Work with iwi and hapū to encourage, resource and upskill under-represented iwi groups.
- ▶ Work with iwi and hapū to further regional council and central government staff understanding of te ao Māori and develop methods to ensure tāngata whenua views are reflected more accurately in plans.
- ▶ Work with iwi and hapū to develop and make available measures of Māori cultural values and input of mātauranga Māori.<sup>490</sup>

The need to enhance Māori participation in freshwater management had been a priority reform for the Crown since 2004. Yet, as at 2017 (and six years after the first version of the NPS-FM was issued), this was clearly still a significant problem in need of a remedy. There was also an important gap between the requirements and the execution of the NPS-FM. In our view, these recommendations underlined the relative weakness of section D of the NPS-FM, the lack of effective mechanisms for council-iwi engagement, and the failure to use those available under the RMA (that is, sections 33 and 36B). Officials also stressed the problems created by the under-resourcing of Māori bodies. The lack of cultural indicators in the NPS-FM was also an issue. These matters were highlighted in the 2017 report as requiring further work by the Crown and councils.

We consider relationship agreements in section 4.5 (mana whakahono a rohe), and under-resourcing in the following section (4.7).

On the issue of Māori rights and interests in fresh water, the review reported that the unresolved issue of Māori proprietary rights was still a burning issue that had 'complicate[d]' council-iwi engagement:

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489. Ministry for the Environment, *National Policy Statement for Freshwater Management: Implementation Review: National Themes Report* (Wellington: Ministry for the Environment, 2017), pp 40–41 (Workman, papers in support of brief of evidence (doc F21(a)), pp 771–772)

490. Ministry for the Environment, *National Policy Statement for Freshwater Management: Implementation Review: National Themes Report*, p 13 (Workman, papers in support of brief of evidence (doc F21(a)), p 743)

## 4.6.7

Councils have been required to approach the involvement of iwi and hapū in new ways and to address perspectives that they may not previously have considered their responsibility. An overarching theme from councils and iwi was that differing understandings of water ownership have complicated engagement on NPS-FM implementation. Some hui participants contend that the Waitangi Tribunal ruled that Māori have a proprietary right to water and that the Government has a responsibility to address this that cannot be delegated to councils. Unresolved grievances and historic disputes – although not necessarily related to water – nonetheless shape how iwi and councils relate.

Hui participants felt that the wider community does not understand or appreciate iwi rights and interests. They also said that council diversity (elected and staff) is an issue in terms of understanding rights and interests.<sup>491</sup>

#### 4.6.7 Conclusion and findings

Alongside Mana Whakahono a Rohe, the strengthening of Te Mana o te Wai was the second major achievement of the *Next Steps* reform process.

In 2017, the new ‘National significance’ statement and section AA provided a much-needed explanation of Te Mana o te Wai, and of the requirements that councils must meet in order to ‘consider and recognise’ it in their policy statements and plans. The inclusion of mātauranga Māori in the monitoring requirements was also a major improvement, and one which Māori had sought in their submissions on the 2014 version of the NPS-FM. In our view, all of this has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (D1), then Te Mana o te Wai is a platform for achieving this (‘National significance’ statement, AA1, and CB1), and mātauranga Māori must now be used to measure its success. The potential for Te Mana o te Wai to have a significant impact is likely reflected in the submissions of those who tried in 2017 to disconnect it from the national values in appendix 1.

In our view, there is a particular strength in the way that the Crown and ILG have defined Te Mana o te Wai as a vehicle that can provide for both Māori and wider community values. The 2017 version has integrated it in the main body of the NPS-FM. Even though it is not mentioned explicitly in section D, Te Mana o te Wai clearly provides a platform for Māori values to be identified and reflected in freshwater planning. At the same time, it is – as officials noted – water-centric. At its most fundamental, it puts the health of the water first. As is stated in the ‘National significance’ statement, it relates to the ‘integrated and holistic well-being of a freshwater body’. It will require ‘the health and well-being of freshwater bodies’ to be at the ‘forefront of all discussions and decisions about fresh water’, mainly

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491. Ministry for the Environment, *National Policy Statement for Freshwater Management: Implementation Review: National Themes Report*, p37 (Workman, papers in support of brief of evidence (doc F21(a)), p768)

in the policy and planning stage.<sup>492</sup> This shows the particular value of co-design by the Crown and Māori, which has provided for the values of both peoples in the NPS-FM while allowing for them to act together to achieve those values. Te Mana o te Wai was clearly intended by both parties to provide the vehicle for partnership in the essential task of deciding objectives and setting limits for freshwater bodies.

There are, however, some weaknesses in the tools for giving effect to Te Mana o te Wai in the way in which the 'National significance' statement had envisaged (the 2017 version).

The first is the relative weakness of section D. This section ought to have required a co-governance and co-management approach to identifying Māori values and setting freshwater objectives, as we set out in chapter 3. It ought also to have required councils to promote and explore opportunities to enter into section 33 transfers and Joint Management Agreements. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership.

The second is the relative weakness of section AA. We agree with the claimants that greater legal weighting was needed for this section, and that the requirement should have been for Te Mana o te Wai to be 'recognised and provided for' in regional policy statements and plans.<sup>493</sup> It was also necessary to clarify that councils must recognise and provide for Te Mana o te Wai in the consenting as well as the planning process. The policies under objective AA1 only referred to the setting of objectives and limits in policy statements and plans, whereas the objective itself referred to 'the management of fresh water'.<sup>494</sup> Additional policies were clearly required. We also agree that the objective and policies in section AA would have been more effective if councils were required to explicitly record how they had provided for Te Mana o te Wai in their policies and plans.

The third weakness comes from the successful attempt to sever Te Mana o te Wai in the main body of the NPS-FM from the national values of the NOF in appendix 1. We do not agree with the idea that the specific links included in the *Clean Water* proposals (and the 2014 version of the NPS-FM) created a hierarchy in the national values. Instead, those links provided a means for more integrated freshwater planning and a tool for tāngata whenua values to be better reflected in the setting of objectives and limits, which was one of the purposes of the NPS-FM. The removal of those links does weaken the effectiveness of the Te Mana o te Wai provisions in the NPS-FM, although we think that the revised text of some values in appendix 1 provides greater clarity and implicit connections between the national values and Te Mana o te Wai.

The fourth weakness relates to the lack of tools provided in the NPS-FM for:

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492. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 7 (Workman, papers in support of brief of evidence (doc F21(a)), p 691).

493. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 16

494. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 11 (Workman, papers in support of brief of evidence (doc F21(a)), p 695)

- ▶ using mātauranga Māori to monitor progress towards achieving the freshwater objectives set by plans (CB1); and
- ▶ cultural indicators for the national values in the NOF.

It is essential that tāngata whenua be the ones who devise and conduct the mātauranga monitoring, and it is also essential that cultural attributes be set for the national values in the NOF. While we agree that no one methodology should be prescribed, we also think that the NPS-FM should include tried-and-tested cultural indicators that are explicable to councils and that local Māori can use in their monitoring and to describe and enforce bottom lines in the NOF. A balance can and should be struck between providing for the autonomy of tribal groups in the catchments and tools that they (and councils) can use. It is not necessary for the wheel to be reinvented in every catchment.

Under-resourcing clearly remains a problem, as the MFE review in 2016 revealed. We accept that a national policy statement is not necessarily the right instrument to deal with funding. But by now it is well known that Māori may not be able to take full advantage of the opportunities under the revised NPS-FM, if they lack the resources to participate effectively in the process of value identification and objective setting. We return to the issue of resourcing in the next section.

It is important to note that we are not assessing the NOF and the NPS-FM as a tool for addressing water quality per se and the degraded state of many taonga water bodies. That will be addressed in chapter 5. Here, we are assessing the NPS-FM as a mechanism for partnership and the exercise of tino rangatiratanga and kaitiakitanga in freshwater management. In particular, we are considering how far the NPS-FM has redressed deficiencies or omissions in the RMA, and the extent to which it provides specifically for Māori rights and interests.

We have already made our findings about section D in chapter 3. We reiterate that partnership mechanisms are required for the intent of the 'National significance' statement and the NPS-FM as a whole to be carried out in a Treaty-compliant manner.

We also reiterate our finding that the co-design of policy options before wider consultation is an important and Treaty-consistent innovation. In this case, the Crown and the ILG worked together on parts of the NPS-FM, not the whole, and the ILG did not succeed in obtaining all that it wanted in the Te Mana o te Wai provisions. Importantly, councils strongly supported the Te Mana o te Wai amendments during the 2017 consultation.<sup>495</sup> Māori submitters also supported the amendments but argued that they did not go far enough; in particular, they called for stronger Te Mana o te Wai requirements throughout the NPS-FM.

Our finding on this matter is that the strengthening of Te Mana o te Wai in 2017 was a matter of paramount importance for the Treaty consistency of the NPS-FM and freshwater management under the RMA. This strengthening was essential for increasing the influence of iwi and hapū, and of kaitiakitanga, in freshwater

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495. Ministry for the Environment, *Submissions report and recommendations on proposed amendments to the National Policy Statement for Freshwater Management*, p 11 (Workman, papers in support of brief of evidence (doc F21(a)), p 339)



management decision-making, and thereby enabling greater active protection of freshwater taonga. As we found in chapter 3, the 2014 version of the NPS-FM inserted Te Mana o te Wai in such an obscure fashion that no RMA decision maker could reasonably have been expected to know what it meant or what to do about it. In our view, the amendments have created an opportunity for greater partnership in freshwater plan-making and for Māori values, especially the mauri and health of water bodies, to be better reflected in freshwater plan making. This is an important and necessary opportunity, which demonstrates the value of co-designing such important instruments with high Treaty implications.

But the 2017 amendments fall short of complying fully with the principles of the Treaty, for the following reasons:

- ▶ The relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and Policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. This is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management.
- ▶ The severing of Te Mana o te Wai from appendix 1 reduces its utility as an over-arching principle in freshwater plan making.
- ▶ The failure to include tools for cultural monitoring (CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and freshwater management more generally.

Further, and outside of the NPS-FM itself, the ongoing problems with resourcing and effective participation mean that some Māori groups will be unable to take proper advantage of this new mechanism in the NPS-FM – as the Ministry's 2017 review acknowledged.

On balance, the 2017 amendments have improved the NPS-FM in Treaty terms but the amendments have some significant weaknesses. We find that the NPS-FM is not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management.

We address the active protection of taonga again in chapter 5, where we examine the effectiveness of the water quality measures in the NPS-FM.

#### **4.7 'NEXT STEPS' REFORM PATHWAY 3: CAPACITY AND CAPABILITY PROGRAMMES**

##### **4.7.1 The issue of under-resourcing as dealt with in *Next Steps***

Under-resourcing prevents effective Māori participation in RMA processes. As we discussed in chapter 2, it has inhibited effective participation through the inability to contract technical and legal advice, and it has sometime prevented any participation at all. Planning processes require participation over a long period of time (sometimes years) while resource consents can also be very time-consuming and costly. Engaging with and calling technical evidence, which is crucial in water quality and quantity cases, is an important and resource-intensive matter. Appeals

are very expensive. Even the process of receiving and reading the huge volume of resource consent applications, as well as the heavy documentation assessing environmental effects, is a lengthy one and can require considerable expertise.

We acknowledge that some councils provide funding to assist iwi authorities at the plan formulation stage. The majority do so: 58 per cent of councils as at 2015. This meant that 42 per cent of councils still provided no funding for that purpose. At the consenting stage, a minority of councils (42 per cent) had a 'budgetary commitment' to assist participation in resource consent processes.<sup>496</sup> At the national level, the Environmental Legal Assistance fund is available to assist with funding for appeals. Claimant counsel described its contribution to Māori for litigation as 'pitiful'.<sup>497</sup> The evidence suggests that even if funding is acquired, it is still mostly pro bono work that enables Māori to pursue an appeal in the Environment Court.<sup>498</sup>

The resourcing issue and the need for Crown assistance has been pointed out by Māori at every stage of the freshwater reform programme. In the consultation on *Freshwater Reform 2013 and Beyond*, for example, the ILG submitted:

Improving the capacity and capability of both iwi and councils will be critical to meeting the expected outcomes for freshwater. This will require a dedicated Crown strategy to support both the implementation of the reforms and developing the capacity and capability of iwi and councils to effectively engage in the new structures and processes. There has been no indication from the Crown how it intends to develop capacity and capability to enable effective participation.<sup>499</sup>

The same point has been raised by many witnesses in our inquiry. Counsel for interested parties submitted:

Our clients' evidence shows that although the RMA provides mechanisms to allow Māori participation in decision-making, they are predominantly unable to have their voices heard in the face of competing interests, particularly where those interests are better resourced.<sup>500</sup>

The Crown has been very aware of this fact for many years. A number of Tribunal reports have addressed the point. The Te Tau Ihu Tribunal, for example, found in 2008 that the Crown had 'failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner'. At the very least, the Tribunal suggested, iwi organisations should have fulltime resource management

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496. Brian Cox, brief of evidence, 2 September 2016 (doc D24), pp 15–16

497. Transcript 4.1.5, pp 36–37

498. Ministry for the Environment, 'Table of Environmental Legal Assistance Funding awarded to iwi/hapu groups over the past 5 years', 2016 (Ceridwen Elizabeth Bulow, papers in support of brief of evidence (doc D25(a)), pp 186–187); Toro Bidois, brief of evidence, 25 August 2016 (doc D13), pp 2–4; Jenny Winipere Hina Taranga Mauger, brief of evidence, 2 September 2016 (doc D32), p 9

499. ILG, submission, 28 March 2013 (Crown counsel, document bundle (doc F14(a)), p 104)

500. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 95

professionals with 'access to legal and other expertise as necessary', if there was to be a more level playing field in RMA processes.<sup>501</sup>

During the co-design of the *Next Steps* reforms, it seemed as though the Crown would have to act on this issue of under-resourcing. In March 2015, as the Crown prepared to work with the ILG on the task of agreeing joint workstreams, officials advised that the Crown and iwi leaders could 'consider ways to build iwi and hapū capability and resourcing to enable effective participation in freshwater decision-making'.<sup>502</sup> Later in the year, one of the agreed Crown-ILG objectives was to '[b]uild capacity and capability amongst iwi/hapū and councils, *including resourcing*' (emphasis added).<sup>503</sup>

As we discussed in sections 4.3.6–4.3.7, the Crown eventually dropped the phrase 'including resourcing' from its reform proposal on this matter. The Crown decided that its function in terms of resourcing would be limited to resourcing training programmes. The eventual result was a proposal for the Crown to support councils and iwi to 'build capacity and capability by providing training and guidance'.<sup>504</sup> The final wording of the proposal in the *Next Steps* consultation document was: 'The Ministry for the Environment will facilitate and resource programmes to support councils and iwi/hapū to engage effectively in freshwater planning and decision-making, including collaborative planning'.<sup>505</sup>

This decision resulted in a strong and predictable response from Māori. Tania Gerrard reported that the issue of under-resourcing was very prominent in the *Next Steps* consultation round. She stated:

On the proposals to increase the recognition of iwi/hapū rights and interests in fresh water, the strongest theme of all submissions related to the need for additional resourcing. It was submitted, primarily by iwi/Māori and local government, that there are already intensive resource requirements as a result of existing consultative processes required under the Resource Management Act and Treaty settlements, and that additional resources will be required to support local government and iwi/hapū to implement the additional requirements proposed in the discussion document.<sup>506</sup>

Despite these submissions, the Crown did not change its mind (see section 4.4.5).

We turn next to consider the Crown's training and guidance programmes.

501. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wellington: Legislation Direct, 2008), vol 3, p 1223

502. Briefing to Ministers, 'Freshwater Programme: Managing within Limits Work Programme and Addressing Iwi/Hapū Rights and Interests', 27 March 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1253)

503. Gerrard, brief of evidence (doc D88), p 10

504. Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 882)

505. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 31

506. Gerrard, brief of evidence (doc D88), p 18

#### 4.7.2 The Mana Whakahono a Rohe guidance programme

Following the passage of the Resource Legislation Amendment Act in 2017, the Crown and the IAG held a series of separate workshops with councils and local Māori. These workshops were held in 11 centres, and the aim was to ‘provide a brief training’ on the new Mana Whakahono a Rohe provisions and obtain feedback for a guidance manual.<sup>507</sup> The manual was published in April 2018.<sup>508</sup> The ILG sought funding for a pilot programme and to resource the establishment of Mana Whakahono a Rohe more generally but the Crown preferred to restrict its role to the provision of guidance.<sup>509</sup>

The joint preparation of the guidance manual by officials and the IAG was an important step, and it provides useful advice for both councils and Māori. In terms of resourcing for iwi or hapū to participate in a Mana Whakahono a Rohe arrangement, however, the manual threw the problem back on to councils.<sup>510</sup> As Crown counsel noted: ‘The new Mana Whakahono provisions provide a further avenue for Māori to negotiate funding and resourcing for RMA functions. The guidance document clearly contemplates the formalisation of funding commitments.’<sup>511</sup>

With regard to the voluntary matters in section 58R(4), the manual advised that JMAs and section 33 transfers could be considered by iwi and councils during their negotiations. It noted that the provision for JMAs had only been used twice and that the ‘tests set out in section 36B would need to be met’. It also pointed out the ‘limitations on JMAs in sections 36C and 36D of the RMA.’<sup>512</sup> We have already discussed these statutory defects and barriers in chapter 2, and the Crown’s failure to amend them has been set out above in sections 4.3.7 and 4.5.5.

The advice on section 33 transfers noted that these had never been used for iwi, that the statutory process and tests in section 33 would need to be met, and that councils and iwi ‘should also have a robust discussion about the rationale for transfer and the resources required to undertake the transferred power.’<sup>513</sup> Again, we have already discussed the statutory barriers to section 33 and the Crown’s failure to introduce the required amendments.

The guidance manual, therefore, could hardly be considered as encouraging councils and iwi to take up these little or never used options, nor did it offer any solutions to the admitted difficulties in doing so.

507. Tania Gerrard, brief of evidence, no date (February 2018) (doc F18), pp1–4

508. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance* (Wellington: Ministry for the Environment, April 2018) (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), pp 64–133)

509. Flavell and Albert, brief of evidence (doc G22), pp 22–23

510. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance*, pp 19, 23, 55 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), pp 82, 86, 118)

511. Crown counsel, closing submissions (paper 3.3.46), p 78

512. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance*, p 54 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 117)

513. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance*, p 54 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 117)

The other suggestions in the guidance manual for section 58R(4) included a possible agreement that consent applicants should consult iwi (though they could not be compelled to do so because of section 36A) or the parties could agree that applicants should have to produce Cultural Impact Assessments. The guide noted that these things should already be done as 'best practice'. The guide also suggested that councils and iwi could agree on training opportunities and seconding staff to one another. Finally, the guide noted that iwi and councils could consider agreeing on a funding arrangement, such as paying iwi for the time spent on assessing consent applications.<sup>514</sup> This point underlined that funding was not part of the compulsory matters for agreement under a Mana Whakahono a Rohe, and nor was it being supplied by the Crown.

In respect of iwi management plans, the guide encouraged councils and iwi to consider these plans as one of the standard tools for council plan-making. The Mana Whakahono a Rohe agreement could outline how councils would 'support the development of and/or use of' iwi plans, including by incorporating them in planning before consulting Māori so as to reduce 'consultation fatigue'.<sup>515</sup>

We accept that the workshops and guidance manual have likely been useful, although the timing of matters meant that we have no definite evidence on that point. But it seems that this has been the only capacity and capability programme to come out of the *Next Steps* reforms. In our view, this aspect of the Crown's reforms has been woefully inadequate. For many groups, the initiation of a mana whakahono a rohe agreement will likely fail at this very first hurdle.

More broadly than the Mana Whakahono a Rohe mechanism, numerous studies, reports, and submissions from Māori in consultation rounds, have shown that a lack of capacity has constrained Māori participation in resource management. Workshops and a guidance manual will not change that fact.

#### 4.7.3 Conclusion and findings

The issue for our inquiry is not really the quality of the Mana Whakahono a Rohe guidance manual and training, important though that is for councils and iwi. The Māori Treaty partner has made repeated appeals to the Crown to assist with funding and resourcing over many years, and these appeals have not been adequately met. The Crown's stated objective to enhance Māori participation in freshwater management and decision-making will not be achieved unless an answer is found to the problem of under-resourcing. Many Crown documents have admitted that Māori participation in RMA processes is variable and sometimes non-existent. The Crown-ILG objective to '[b]uild capacity amongst iwi/hapū and councils, including resourcing' has not been fulfilled, and it needs to be if the Crown's reforms are to be Treaty compliant.

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<sup>514</sup>. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance*, p 55 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 118)

<sup>515</sup>. Ministry for the Environment and Pou Taiao ILG, *Mana Whakahono a Rohe Guidance*, p 40 (Flavell and Albert, papers in support of brief of evidence (doc G22(a)), p 103)

We accept that the Crown's reform programme is not complete, and that there is still opportunity to address this long-standing problem more effectively, so we make no finding of Treaty breach at present. We simply reiterate its crucial importance and the need for it to be addressed if the Crown's reforms are to be Treaty compliant. In the meantime, Māori continue to suffer long-term prejudice.

## CHAPTER 5

## WATER QUALITY REFORMS

## 5.1 INTRODUCTION

In this chapter of our report, our focus moves away from reforms that were specifically intended to address Māori rights and interests in fresh water. The claimants and interested parties agreed that the Crown's reforms must be aimed at improving the health of freshwater bodies. We focus in this chapter on water quality reforms, especially those of a technical nature which were designed to 'maintain or improve' water quality (the standard set by the National Policy Statement for Freshwater Management (NPS-FM)). Crown counsel argued that the Crown's role was to establish pollution controls and standards, which would then be implemented by regional councils. The Crown also argued that it had performed this role in a Treaty-compliant manner, by working in partnership with the Iwi Leaders Group (ILG), consulting more broadly with Māori, and developing tools for the active protection of freshwater taonga. The claimants and interested parties, however, denied that the Crown's water quality reforms met the Treaty standard of active protection. They argued that the reforms have been too slow, that the NPS-FM offers too little, too late, and that freshwater quality will continue to decline in many treasured ancestral water bodies unless urgent new reforms are introduced.

It is now generally accepted that forest clearance, intensification of land-use, and urban development have resulted in degraded water bodies in urban and pastoral catchments. There has been progress in reducing the water pollution from point sources (pipes), although poor waste water infrastructure still contributes to low water quality in urban catchments. Sediment and the diffuse discharge of nutrients, such as the leaching of nitrogen from animal urine, have become the main causes of freshwater pollution. The freshwater taonga of claimants and interested parties have become degraded, with high *E coli* counts, algal blooms, and declining native fish species. We heard evidence about many such taonga, including Lake Horowhenua, Lake Ōmāpere, the Waipaoa River, the Tarawera River, the Tukituki River, the Rangitikei River, the Kaeo River, the Oroua River, and the Manawatū River.<sup>1</sup> But even for such a 'very unhealthy' river as the Manawatū, water quality

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1. Rudy Taylor, brief of evidence (doc D26); Ian Mitchell, brief of evidence (doc D62); Ani Taniwha, brief of evidence (doc D49); Dennis Emory, brief of evidence (doc D35); Jonathan Procter, brief of evidence (doc D67); Vivienne Taueki, brief of evidence (doc D51); Philip Taueki, brief of evidence (doc D75); Jordan Winiata-Haines, speaking notes (doc D48(b)); Jenny Mauger, brief of evidence (doc D32); Keith Katipa, brief of evidence (doc D81); David Potter, brief of evidence (doc E20); Maanu Paul, brief of evidence (doc E1)

can be improved through such reforms as '[i]mprovements to waste discharges, nutrient budgeting, fencing stock out of waterways, and better management of the banks of rivers and streams'.<sup>2</sup>

Although they were often under-resourced, some hapū and iwi have attempted to carry out these kinds of reforms, often in conjunction with local communities, local government, or the Crown. Reuben Porter of Ngāpuhi and Te Rarawa, for example, told us about one such effort in Hokianga:

Our whānau and hapū have done what we can to fix up the Wairoa awa. In 2004, when we were first told that this awa was unsafe to swim and drink from, we held a hui at Roma Marae in Ahipara to discuss what can be done to improve its condition. At the hui we suggested the planting of native trees along the riverbank. A number of the kaumatua were against this action. They believed that we shouldn't plant any trees because when those trees grew old, they would fall into the awa and clog it up. However, we went back through the NRC's records to see what had historically caused the clogging of the awa. What we found was that it was the poplar, the pine, and the willows that caused these sorts of issues. It was the exotic tress that fell over and clogged the awa. The native trees on the other hand knew the soil. They helped to maintain the river banks and the river beds. They wouldn't cause the same issues the exotic trees did. So, we replanted native trees along the river. The Ahipara School supported us a lot with these efforts . . .

We did this work to rejuvenate the awa. We hoped that the planting of the native trees would filter out some of the toxicity of the Stream so that it could be returned to its previous state, so that it would once again be safe to swim and drink from. Our mahi hasn't resulted in this happening yet, but maybe if we continue to do the work, one day soon it will happen. The planting of the native trees has resulted in the cessation of the erosion of the awa's banks. We put fencing along the awa to prevent stock having access to it. Today, the hapū, the whānau and the local community are proud of the work we have done and how it shows our attempts to fix up our awa. We have continued to do this work. It wasn't just a onetime thing.<sup>3</sup>

Whatatiri hapū, the kaitiaki of Porotī Springs in Northland, said that they had

driven the Waipao catchment rehabilitation project which was initiated by resource consent conditions from water allocation permits in 2004. Mana Whenua have engaged with the community to fence and protect waterways from stock, sought funding, implemented monitoring strategies, community education, and have set up a marae based nursery to propagate native plants and undertake riparian planting.

The hapū have worked fervently to improve water quality in the area and our strong commitment to our lands and waters stems from our duty as kaitiaki to preserve the

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2. Roger Young, Cawthron Institute, 'Ecosystem metabolism in the Manawatu River', [2010] (Mike Joy, papers in support of brief of evidence (doc D20(a)), p 11)

3. Reuben Taipiri Porter, brief of evidence, 23 September 2016 (doc D68), pp 26–27



resource for generations to come. Without appropriate management of water the legacy for our mokopuna does not bear thinking about.<sup>4</sup>

Another example is the Horowhenua lake trustees, who have worked with local government (assisted by Crown funding) to improve water quality in the highly degraded lake. This has involved lakeside planting, boat washing facilities, the purchase of a weed harvester to control the lakes' 'prolific' exotic weeds, and other measures, but Matthew Sword and Jonathon Procter of the Muaūpoko Tribal Authority cautioned that this is only the *beginning* of the work necessary to clean up the lake.<sup>5</sup>

These kinds of initiatives are undeniably important but voluntary effort alone will not suffice to improve water quality in the ways and to the degree sought by the kaitiaki of freshwater taonga. Mr Sword commented:

we're still hamstrung by the need to seek resources, the need to seek permissions to do the sorts of things that we know work in terms of rehabilitating our lake and in terms of future proofing, and then there are wider impacts [on water quality] that we can't touch because we don't have that ability, and I'm referring to powers that regional councils and others are able to exercise.<sup>6</sup>

Fonterra has also attempted reforms on a voluntary basis. In 2003, through the Dairying and Clean Streams Accord, Fonterra undertook that its dairy farmers would exclude dairy cattle from waterways, build bridges or culverts for frequent crossing-points, and establish farm nutrient plans to manage diffuse discharges.<sup>7</sup>

As we explained in chapter 2, the Crown was aware by 2003 (at the latest) that neither regional councils nor good farm management practice could deal with the scale of the problem. Regional councils were unable or unwilling to tackle the economic drivers that led to more land-use intensification and diffuse discharges. They had concentrated on education and financial incentives to promote better environmental outcomes. Several indicated that a 'whole of government' approach was now essential. The 'conflicting issues (at this scale) of economic development and natural resource management' had to be resolved in 'a wider national context'.<sup>8</sup> The Crown embarked on a programme of freshwater management reforms in 2003, to provide the necessary regulatory reforms and direction to regional

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4. 'Whatitiri Resource Management Plan', 7 March 2016 (Millan Ruka, papers in support of brief of evidence (doc D18(a)), p145)

5. Matthew Sword, brief of evidence, 23 September 2016 (doc D66); Jonathan Procter, brief of evidence, 23 September 2016 (doc D67)

6. Transcript 4.1.4, p 242

7. Russell Harding, 'Muddying the Waters: managing agricultural water quality in New Zealand', *Policy Quarterly*, vol 3, no 3, 2007, p18

8. Hill Young Cooper Ltd, *Improving the Management of Freshwater Resources: Issues and Opportunities*, report prepared for Ministry for the Environment, August 2006, pp8–9. See also Parliamentary Commissioner for the Environment, *Growing for good: Intensive farming, sustainability and New Zealand's Environment* (Wellington: Parliamentary Commissioner for the Environment, 2004), p174.

councils. But finding the right balance between economic growth and water quality reforms has proven very challenging even for the Crown.

We have already discussed aspects of the relevant reforms in previous chapters, including the various iterations of the NPS-FM, the National Objectives Framework, and the development of Te Mana o te Wai as an overarching concept in freshwater planning. We have also discussed the role and reports of the Land and Water Forum, the Crown's engagement with the ILG and Iwi Advisors Group (IAG), and the various consultation documents released between 2013 and 2017. These matters need little introduction here.

The Crown's collaboration with the ILG, especially the co-design of reforms in 2014–17, was focused on matters specifically intended to address Māori rights and interests. There were some overlaps, notably the introduction of Te Mana o te Wai into the NPS-FM, but it would be fair to say that the Crown–ILG engagement had less influence in the water quality reforms covered in this chapter. To some extent, the IAG's role in the Land and Water Forum was more important. As will become evident, the claimants and interested parties in our inquiry, the ILG in its engagement with the Crown, and Māori submitters in the consultation rounds, all wanted more stringent controls and standards than the Crown was prepared to accept.

The question for this chapter is what reforms the Crown has adopted for the improvement of water quality (and with what degree of speed and effectiveness), and whether those reforms have been sufficient for the active protection of freshwater taonga. The NPS-FM was the Crown's primary instrument for setting water quality controls and standards. Regional councils were required to implement all national policy statements in their regional policy statements and plans. The Crown considered using National Environmental Standards as an additional way to impose water quality standards but opted not to do so.

The first NPS-FM was issued in 2011, after the Crown made significant changes to the version recommended by the board of inquiry. The NPS-FM 2011 set in place a national framework for freshwater management. Its key requirements were that water quality must be 'maintained or improved' across a region, and that councils must set limits to deal with over-allocation and water quality decline. A new version was issued in 2014. The major reform at that time was the introduction of the National Objectives Framework (NOF). This established a set of national values which councils, iwi and hapū, and communities would use to set regional limits and objectives. The NOF imposed national bottom lines for two compulsory values, Ecosystem Health and Human Health. The NPS-FM and the NOF were then refined in 2017, including by strengthening the role of Te Mana o te Wai and requiring councils to make larger rivers and lakes swimmable by 2040. All parties in this inquiry agreed that further water quality reforms are still needed.

Discussion of these issues has involved consideration of scientific and other technical evidence. We have relied in particular on the claimants' witness, Dr Mike Joy, the Crown's witnesses (Dr Clive Howard-Williams, Kenneth Taylor, and Sheree DeMalmanche), and the many technical reports in our documents or located on the Ministry's website. But the prominence of the scientific evidence

should not disguise the fact that we are assessing the Crown's acts and omissions against the principles of the Treaty of Waitangi. The first point to make in this respect is that we have relied on points which officials and the scientists from both sides broadly agreed, such as the absence of crucial attributes from the NOF. The second point to note is that scientists made reports and recommendations which *informed* the Crown's decisions on what reforms should be introduced and when, but those decisions were made by Ministers after advice from officials, and sometimes in response to consultation with Māori, stakeholders, and the public. In particular, the Crown's decisions were informed by what the stakeholders in the Land and Water Forum could agree on. Considerations of economic growth were influential, as were the financial costs of reforms. In the case of making more lakes and rivers swimmable, for example, issues included how much the necessary measures would cost, who would bear the cost, and what effects it would have on economic growth.

This chapter should be read in conjunction with chapter 2 (section 2.7.1), in which we provided background on the development and scale of the problem, some of the taonga water bodies affected, and the science of water quality. In that discussion, we also described the roles and effects of sediment, nutrients (nitrogen and phosphorus), and pathogens (especially *E coli*) in the decline of water quality in some freshwater ecosystems.

We begin our analysis in this chapter with a summary of the parties' arguments in respect of water quality reforms.

## 5.2 THE PARTIES' ARGUMENTS

### 5.2.1 The case for the claimants and interested parties

#### 5.2.1.1 *National Policy Statement for Freshwater Management*

The claimants and interested parties were highly critical of the Crown's freshwater reforms. In their view, the Crown has created weak controls and standards for water pollution. There is an urgent need for new measures to prevent further degradation and to restore the quality of water in their tribal freshwater bodies.<sup>9</sup> Counsel for the claimants and interested parties argued that there are crucial flaws in the technical provisions and scope of the NPS-FM. They made the following submissions:

- ▶ The Crown has failed to include bottom lines for sedimentation in the NOF, and has not included 'other key water quality attributes such as dissolved oxygen and heavy metals, or allocation of water or nutrient discharges'.<sup>10</sup>
- ▶ The NOF is fundamentally flawed because compulsory Māori values were not included (which interested parties considered was essential for those values

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9. Counsel for interested parties (Gilling and Davidson), submissions by way of reply, 22 March 2019 (paper 3.3.60), pp 6–7, 12); claimant counsel (NZMC), closing submissions, 26 October 2018 (paper 3.3.33), p14

10. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 4–5

to affect water quality decisions).<sup>11</sup> Further, the national bottom lines for water quality have been set too low (at the bottom of the C and top of the D bands for the compulsory national values of ‘ecosystem health’ and ‘human health’). The IAG had noted in 2016 that the proposed bottom lines were well below what iwi might accept in terms of water quality.<sup>12</sup> The NPS-FM also allows for water to deteriorate from the top to the bottom of a band, and to deteriorate from a higher band to the bottom line, if councils decided to set their objectives accordingly.<sup>13</sup> Counsel for interested parties argued that the change from ‘wadeable’ to ‘swimmable’ in 2017 was cosmetic only. Even if the national bottom lines were to be set higher as a result of that change, the NPS-FM requires water bodies to be managed within freshwater management units. Depending on the size of any particular unit, this enables councils to take an ‘unders and overs approach’ within or between catchments, allowing an improvement in one place to offset a decline in another.<sup>14</sup>

- ▶ The NPS-FM allows water quality to be set below bottom lines where existing, ‘significant’ infrastructure contributes to poor water quality, but there is no definition of significant infrastructure in appendix 3 of the NPS-FM. Appendix 3 has not been filled, and the Crown’s intention is to allow infrastructure owners and councils to apply to the Minister to include specified infrastructure in the appendix, with no role for Māori in that crucial decision-making process.<sup>15</sup>
- ▶ In terms of existing discharges, any new limits set under the NPS-FM cannot be enforced until consents come up for review. At that point, there will be difficulties in doing so, especially since the effects of individual consents may be cumulative and the RMA protects existing investments.<sup>16</sup>
- ▶ Estuaries and lagoons are not sufficiently protected from upstream sediment and nutrients in the NPS-FM. A fully integrated catchment approach requires amendments; objectives and limits ‘above bottom lines’ must be set for estuaries and lagoons.<sup>17</sup>

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11. Counsel for interested parties (Naden, Dhaliwal, Pukepuke, Hill, Zareh, Deobhakta, and Loa), closing submissions, 12 November 2018 (paper 3.3.45), pp 133–136

12. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), pp 134–146; counsel for interested parties (Bennion), closing submissions, 9 November 2018 (paper 3.3.37), p 5; counsel for interested parties (Gilling and Davidson), closing submissions, 9 November 2018 (paper 3.3.35), p 6

13. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 27; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 138

14. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 5

15. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 6

16. Counsel for interested parties (Bennion), submissions by way of reply, 22 March 2019 (paper 3.3.61), pp 1–4

17. Counsel for interested parties (Sykes, Jordan, and Bartlett), submissions by way of reply, 22 March 2019 (paper 3.3.59), pp 6–10; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 139

- ▶ The NPS-FM has ‘hopelessly long lead in times.’<sup>18</sup> Many councils have indicated that they will not meet the 2025 deadline.<sup>19</sup> This means that the ‘timetable to introduce even the minimum changes required by the NPS-FM can be extended until 2030,’ and the appeals process ‘may take years beyond that.’<sup>20</sup> Further, there are no sanctions if councils do not change their plans in accordance with the NPS-FM beyond 2030.<sup>21</sup>
- ▶ Regardless of whether the NPS-FM will prevent further decline in water quality (which the claimants and interested parties say it will not), it does not contain objectives for reversing past damage. A recent Crown publication (which included a Cabinet paper) has stated that a new NPS-FM will be required to promote restoration.<sup>22</sup> Counsel were relying on the Crown’s document *Essential Freshwater: Healthy Water, Fairly Allocated*, which stated that, in order to reverse past damage within a generation, ‘restoration activity’ would be promoted through a new NPS-FM and other legal instruments.<sup>23</sup>
- ▶ The new emphasis on economic matters in the 2017 version of the NPS-FM will weaken the water quality objectives, including Te Mana o te Wai (this issue was addressed in chapter 4).<sup>24</sup>
- ▶ The NPS-FM has not amended or replaced the first-in first-served system of allocation. The Crown’s reforms rely on flushing effects to remove or dilute contaminants, but over-allocation has made this a flawed approach, alongside seasons of drought and low rainfall.<sup>25</sup>

### 5.2.1.2 Land use intensification and agriculture

In addition to the criticisms of the NPS-FM, the claimants and interested parties argued that the Crown has failed to address the intensification of land use and the sustainability of agriculture. In their view, the approach in the NPS-FM of setting nitrogen limits is not enough on its own.<sup>26</sup> The owners of Lake Ōmāpere, for example, argued that higher water quality requires a reduction of land-use intensification, and the establishment of some constraints on economic development and growth.<sup>27</sup> Indeed, a number of parties argued that the Crown has acted to promote

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18. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 14

19. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 14

20. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 5

21. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), p 5; counsel for interested parties (Sykes, Jordan, and Bartlett), closing submissions, 12 November 2018 (paper 3.3.39), p 37

22. Counsel for interested parties (Stone, Leauga, and Hopkins), closing submissions, 9 November 2018 (paper 3.3.36), p 14

23. New Zealand Government, *Essential Freshwater: Healthy Water, Fairly Allocated* (Wellington: Ministry for the Environment and MPI, 2018) (doc F29), pp 7, 26

24. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 16

25. Claimant counsel (6th claimants), closing submissions, 14 November 2018 (paper 3.3.40), pp 13–16

26. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), pp 2–5, 9

27. Claimant counsel (6th claimants), closing submissions (paper 3.3.40), pp 2–3, 6

intensification instead of reducing it. They pointed to various policies, including recent Crown schemes to fund a massive growth in irrigation.<sup>28</sup> Further, the claimants and interested parties argued that the Crown's reforms have not dealt adequately with diffuse discharges. Better mechanisms are necessary to regulate farm pollution and minimise its effects, including compulsory Farm Environment Plans (FEPs), greater council funding and assistance, increased monitoring, and enforcement of standards.<sup>29</sup>

The claimants and interested parties also submitted that the Crown has failed to carry out reforms if they conflicted with farming interests. The proposed stock exclusion regulations were abandoned in 2017, for example, despite the clear explanation of their necessity in the Crown's 2016 consultation document. In the claimants' view, the failure to exclude stock from waterways has exacerbated the flaws in the NPS-FM.<sup>30</sup>

In oral closing submissions, claimant counsel quoted a June 2018 Cabinet paper,<sup>31</sup> which stated:

Some limited progress has also been made on initial steps for improving water quality . . . though considerably more effort is needed. For example, ecosystem health and reducing sedimentation are not adequately addressed in the national direction framework under the RMA. Fencing regulations were not progressed by the previous government, and there are still too many high-risk land management practices being used. Intensification of agriculture may be insufficiently controlled in some areas, and estuaries continue to decline and wetlands continue to be lost.<sup>32</sup>

### 5.2.1.3 *Slow pace of reform*

According to the claimants and interested parties, the Crown has been slow to address the deterioration of water quality, and its reforms have taken far too long to be timely or effective (and are still not complete).<sup>33</sup>

### 5.2.1.4 *Restoration funding*

Counsel for interested parties argued that the Crown's funding for restoration work has been largely restricted to settled iwi and had omitted catchments in need of clean up. They submitted that the Crown's decision-making for funding should

28. Counsel for interested parties (Bennion), closing submissions (paper 3.3.37), pp 2–3, 7, 9; claimant counsel (Wai 2601), supplementary closing submissions, 26 November 2018 (paper 3.3.38(c)), pp 19–21, 24, 36–37

29. Counsel for interested parties (Sykes, Jordan, and Bartlett), submissions by way of reply (paper 3.3.59), pp 3–5; counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 154; claimant counsel (6th claimants), closing submissions (paper 3.3.40), pp 14–16

30. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 28

31. Transcript 4.1.5, p 84

32. (Cabinet paper, 'A new approach to the Crown/Māori Relationship for Freshwater', [June 2018], p 24 (claimant counsel (NZMC), papers in support of closing submissions (paper 3.3.33(c)), p 925)

33. See, for example, claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 5, 9, 10–11; counsel for interested parties (Sykes, Jordan, and Bartlett), closing submissions (paper 3.3.39), p 24

be made in partnership with Māori and not by the Crown alone.<sup>34</sup> Further, counsel submitted that the one-off Te Mana o te Wai Fund was too small.<sup>35</sup> This was also the only funding specifically for Māori to restore their taonga and it has now been closed.<sup>36</sup>

## 5.2.2 The case for the Crown

### 5.2.2.1 *The National Policy Statement for Freshwater Management*

In the Crown's submission, one of the roles of central government is to 'provide pollution controls and standards'.<sup>37</sup> The Crown's main instrument for this has been the NPS-FM, which provides national guidance and standards or bottom lines, while retaining flexibility and decision-making at the local level.<sup>38</sup> In the Crown's view, this approach is 'consistent with international law and best practice'.<sup>39</sup> Also, the NPS-FM and other freshwater management reforms have been developed through a process of collaboration with iwi leaders and stakeholders. It has been a process of 'highly collaborative, face-to-face, consensus-driven policy development'.<sup>40</sup> This process has resulted in the centrality of Te Mana o te Wai – the 'integrated and holistic well being of the water' having been placed at 'the heart of the freshwater planning process'.<sup>41</sup>

In the Crown's view, objective AA1 (added in 2017) will require councils to change their regional policy statements and plans to 'consider and recognise Te Mana o te Wai'.<sup>42</sup> Crown counsel submitted:

The failure of councils to deliver on Objectives D1 and AA1 in their limit setting, planning or decision-making may lead to the invalidation of their plans and policies. The repositioned and strengthened version of Te Mana o te Wai after the 2017 amendments should provide an even stronger platform for Māori to have their interests, and their priorities for water, placed at the forefront of decisionmaking. The changes bring Māori values and world views into the heart of the freshwater management regime, putting the health and wellbeing of water at the forefront of all decision-making, and empowering Māori to articulate how to best protect and preserve the waters in their rohe.<sup>43</sup>

Crown counsel denied that the addition of a new policy for economic wellbeing in 2017 gave increased weight to economic considerations. Rather, the Crown

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34. Counsel for interested parties (Sykes, Jordan, and Bartlett), submissions by way of reply (paper 3.3.59), pp15–16, 24

35. Counsel for interested parties (Sykes, Jordan, and Bartlett), submissions by way of reply (paper 3.3.59), p 24

36. Claimant counsel (Wai 2601), supplementary closing submissions (paper 3.3.38(c)), p 21

37. Crown counsel, closing submissions, 20 November 2018 (paper 3.3.46), p 64

38. Crown counsel, closing submissions (paper 3.3.46), pp 19, 21

39. Crown counsel, closing submissions (paper 3.3.46), p 19

40. Crown counsel, closing submissions (paper 3.3.46), pp 34–35

41. Crown counsel, closing submissions (paper 3.3.46), p 23

42. Crown counsel, closing submissions (paper 3.3.46), p 24

43. Crown counsel, closing submissions (paper 3.3.46), p 70

argued that the NOF process provides for communities to identify their priorities, values and objectives, and in expressing those the full scope of Te Mana o te Wai will need to be considered and recognised.<sup>44</sup>

In terms of time frames, Crown counsel submitted that the implementation deadlines for the NPS-FM are 'reasonable and realistic'.<sup>45</sup>

In particular, Crown counsel made the following submissions about the NOF:

- ▶ Development of the NOF was led by experts and the 'scientific underpinning of the NOF is robust and credible'.<sup>46</sup> Attributes and national bottom lines were developed through input from the NOF Reference Group, which was advised by scientists. These included the science review panel, which consisted of 'reputable scientists from a range of agencies'.<sup>47</sup> The science review panel only chose attributes with 'clear thresholds', and which had supporting data on a national scale. If there was no clear threshold, then attributes were set aside for future development.<sup>48</sup>
- ▶ Issues of practical implementation and 'policy balances' were valid considerations for the Crown in this (as in all regulation), but the NOF process nonetheless shows 'scientific engagement properly informing policy development'.<sup>49</sup>
- ▶ Where water quality attributes were not included specifically in the NOF, councils must set their own objectives and thresholds for those attributes.<sup>50</sup>
- ▶ The omission of some water quality attributes from the NOF does not necessarily mean that they have been 'ignored' – some attributes 'have been, or are being, actively considered for inclusion in the NPS-FM attribute tables'.<sup>51</sup>
- ▶ Māori perspectives were included in the development of the NOF through IAG nominees on the NOF reference group and the iwi science panel, which advised the Crown and the science review panel about 'potential attributes' in 2013.<sup>52</sup>
- ▶ Te Mana o te Wai in the NPS-FM is a lens through which the NOF and attributes will be interpreted by councils: 'Giving priority to the health and wellbeing of the water through Te Mana o te Wai will also help councils manage the compulsory values and National Objectives Framework'.<sup>53</sup>

Crown counsel concluded their arguments on the NOF by submitting: 'The Crown says the NOF is a powerful and important mechanism in freshwater management. The Crown has acted reasonably, in good faith, and with sound information to populate the NOF'.<sup>54</sup>

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44. Crown counsel, closing submissions (paper 3.3.46), p 46 n

45. Crown counsel, closing submissions (paper 3.3.46), p 66

46. Crown counsel, closing submissions (paper 3.3.46), p 72

47. Crown counsel, closing submissions (paper 3.3.46), p 72

48. Crown counsel, closing submissions (paper 3.3.46), pp 72–73

49. Crown counsel, closing submissions (paper 3.3.46), p 72

50. Crown counsel, closing submissions (paper 3.3.46), p 73

51. Crown counsel, closing submissions (paper 3.3.46), p 73

52. Crown counsel, closing submissions (paper 3.3.46), p 72

53. Crown counsel, closing submissions (paper 3.3.46), p 24

54. Crown counsel, closing submissions (paper 3.3.46), p 74



### 5.2.2.2 *The careful, iterative development of water quality reforms*

In the Crown's submission, its reforms have not been too slow, and the impact of its reforms will not be too little, too late (as the claimants submitted). Crown counsel submitted:

The Crown has implemented a number of reforms over time, each of which has sought to cumulatively develop and improve the regulatory regime. An initial emphasis was on information gathering and standards, to provide a platform for more detailed change. That process of staged development was a reasonable and active response to policy issues.<sup>55</sup>

In the Crown's submission, the NPS-FM 2011 was a 'significant step in providing national direction to local authorities'.<sup>56</sup> In accordance with the recommendations of the Land and Water Forum, it established a policy framework for defining freshwater objectives and setting standards and limits that would eliminate over-allocation and result in the maintenance or improvement of water quality.<sup>57</sup> The Crown's aim was to 'follow [this] foundational reform' with 'more detailed developments of the system'.<sup>58</sup> The Crown, therefore, asked the forum to consider methods and tools for how to set limits, and established processes to define attributes and set bottom lines. The result, along with the addition of Te Mana o te Wai, was the insertion of the NOR, compulsory values, and numeric bottom lines for those values, into the NPS-FM in 2014. Commentators considered this the most comprehensive reform of freshwater management in a generation.<sup>59</sup>

In the Crown's submission, this careful, iterative, highly consultative process continued to refine and improve the policy framework from 2014 to 2017. The *Next Steps for Fresh Water* consultation in 2016 proposed to:

- ▶ clarify the obligation to 'maintain or improve' water quality by confining it to freshwater management units (not whole regions, as previously);
- ▶ adopt the Macroinvertebrate Community Index as a monitoring tool;
- ▶ strengthen the role of Te Mana o te Wai; and
- ▶ improve best management practices.<sup>60</sup>

Crown counsel argued that the *Next Steps* consultation raised further issues, which the Crown duly acted upon in 2017, leading to the *Clean Water* additional reforms. Those included a 'clearer direction' to councils to 'improve water quality in their rivers and lakes' (to make them swimmable), managing nitrogen and phosphorus in rivers, and the necessity of considering economic wellbeing in freshwater planning decisions. The Crown argued that it engaged with the appropriate

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55. Crown counsel, closing submissions (paper 3.3.46), p 32

56. Crown counsel, closing submissions (paper 3.3.46), p 36

57. Crown counsel, closing submissions (paper 3.3.46), pp 35–36

58. Crown counsel, closing submissions (paper 3.3.46), p 36

59. Crown counsel, closing submissions (paper 3.3.46), pp 36–37

60. Crown counsel, closing submissions (paper 3.3.46), pp 41–42

groups that raised concerns about the reform proposals, which included the stock exclusion proposal.<sup>61</sup>

Finally, the Crown noted that the reforms (including for water quality) have not been completed. Further reforms are planned to ‘better enable regional councils to review consents, and to more quickly implement water quality and quantity limits as required in the NPS-FM’.<sup>62</sup>

In sum, the Crown’s view was that its reforms must be assessed on the basis of the complex, changing situation of fresh water in New Zealand, necessitating foundational reforms followed by ‘[m]ore sophisticated and focused interventions’.<sup>63</sup> An aspect of the careful, iterative process was the time taken for consultation, for developing buy-in and stakeholder consensus, and for scientific research and information-gathering. The Crown asked the Tribunal to assess its reforms in that light.

### 5.2.2.3 Restoration funding

Crown counsel submitted that, alongside the NPS-FM, the Ministry has ‘develop[ed] funding initiatives for fresh water throughout the reform process’.<sup>64</sup> These included:

- ▶ Community Environment Fund in 2010 – funding for projects for community-based advice, education, and public awareness.
- ▶ Fresh Start for Fresh Water Clean-Up Fund in 2012 – funding to assist councils clean up historical pollution. The Crown submitted that ‘[a]ll of these clean-up initiatives were developed and implemented in collaboration with iwi and with other Māori organisations.’
- ▶ Irrigation Acceleration Fund – funding to ‘assist rural freshwater infrastructure’.
- ▶ Te Mana o te Wai Fund – \$5 million for Māori to improve the water quality of freshwater bodies.
- ▶ Funding in 2014 to retire ‘farmland next to important waterways’.<sup>65</sup>

Having summarised the parties’ arguments on the main issues, we turn next to consider the Crown’s early reform proposals and the development of the NPS-FM.

## 5.3 EARLY REFORM PROPOSALS, 2003–08

### 5.3.1 Sustainable Water Programme of Action, 2003–06

The Water Programme of Action (which subsequently became the Sustainable Water Programme of Action) was one of four workstreams created when the Labour Government launched the Sustainable Development Programme of Action (SDPOA) in January 2003. We discussed this programme in chapter 2, where we

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61. Crown counsel, closing submissions (paper 3.3.46), pp 43, 46

62. Crown counsel, closing submissions (paper 3.3.46), pp 52–53

63. Crown counsel, closing submissions (paper 3.3.46), p 71

64. Crown counsel, closing submissions (paper 3.3.46), p 44

65. Crown counsel, closing submissions (paper 3.3.46), p 44

focused on the need for reform and the Crown's early proposals to address Māori rights and interests. In this chapter, we provide a brief overview of the Crown's water quality proposals.

The SDPOA followed on from New Zealand's participation in the World Summit for Sustainable Development, held at Johannesburg in 2002.<sup>66</sup> Earlier consultations by the Ministry for the Environment, associated with the National Agenda for Sustainable Water Management in the late 1990s, had shown the impacts of abstraction on instream values and the condition of lowland streams to be pressing concerns.<sup>67</sup> Moreover, during 2002 the public spotlight had been thrown on diffuse discharges into waterways by Fish and Game's 'Dirty Dairying' campaign. New Zealand's largest dairy company, Fonterra, was prompted by this campaign to enter into the Dairying and Clean Streams Accord with regional councils and the Ministers for the Environment, and for Agriculture and Forestry in May 2003. This voluntary, self-regulated accord set targets for stock exclusion from waterways and likewise the exclusion of dairy shed effluent from waterways.<sup>68</sup>

The workstream's stated goal was to ensure that 'freshwater quality is maintained to meet all appropriate needs,' while the broader policy principle which was aspired to was of 'adequate, clean freshwater available for all.'<sup>69</sup> As with other SDPOA workstreams, a 'whole of government' approach was deemed appropriate.<sup>70</sup> An interdepartmental working group was set up, which reported to the Ministers for the Environment, and of Agriculture and Forestry.<sup>71</sup> To support the policy evaluation undertaken by the interdepartmental working committee, three working groups had prepared separate technical papers by July 2004 on (a) the effects of rural land use on water quality, (b) water allocation and use, and (c) potential water bodies of national importance. No technical paper was prepared on urban water quality issues, as these were seen as being on a much lesser scale than those in rural areas, and their omission made the timely completion of the workstream more manageable.<sup>72</sup>

The land use paper observed that considerable progress had been made reducing point source discharges of pollutants into waterways over the last 15 to 20 years.

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66. Department of Prime Minister and Cabinet, *Sustainable Development for New Zealand: Programme of Action* (Wellington: Department of Prime Minister and Cabinet, 2003), pp 6, 12–15

67. Ministry for the Environment, 'Making Every Drop Count: the National Agenda for Sustainable Water Management – Action Plan', 1999, pp 2–3

68. Parliamentary Commissioner for the Environment, *Water Quality in New Zealand: Understanding the Science*, March 2012, p 20; Ministry for the Environment, *Environment New Zealand 2007* (Wellington: Ministry for the Environment, 2007), p 306

69. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use on Water Quality* (Wellington: Ministry for the Environment, 2004), p 1

70. See Department of Prime Minister and Cabinet, *Sustainable Development for New Zealand*, January 2003, pp 22 & 23, in relation to the workstreams 'Sustainable Cities' and 'Child and Youth Development'.

71. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, p i

72. Ministry of Agriculture and Forestry and Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options* (Wellington: Ministry for the Environment, 2004), p 7; Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, pp 1, 23

Now, however, economic conditions were driving the intensification of farming and changes in rural land use (and in particular conversions to dairy farms). There was 'a lack of effective action in the management of diffuse discharges of contaminants on water quality, in some catchments', and this was emerging as the critical problem to be tackled.<sup>73</sup> Indeed, it reported in an appendix that half of the lowland stretches of New Zealand rivers (which made up 44 per cent of the length of New Zealand's river systems) were already regularly failing guidelines for *E coli*, nutrients (nitrogen, phosphorus, ammonia), and clarity (except in extremely wet areas).<sup>74</sup>

The paper went on to discuss the competing values which freshwater managers would need to try to satisfy in judging what levels of diffuse discharges and water quality should be accepted, and the options for managing water quality (such as the setting of contaminant and flow limits) using the mechanisms provided by the RMA.<sup>75</sup> Some practical considerations, such as technical challenges for measuring diffuse discharges, and the lack of opportunities hitherto provided by councils to Māori for participating in water quality management, were also described, with the report observing that Māori participation was an issue being looked at as part of the review of the RMA.<sup>76</sup>

### 5.3.2 The Crown decides on a reform package, 2006

In 2004–05, the Crown released a consultation document with a series of possible actions that the Crown could take to deal with the various problems of declining water quality and over-allocation.<sup>77</sup> Following the consultation in 2005, the Ministry for the Environment reported that what 'people wanted to see' from the reforms were:

- ▶ greater strategic planning for water, nationally and regionally
- ▶ clearer direction and guidance from central government
- ▶ greater consistency in the way increasing demands on water resources are managed across the country
- ▶ a better framework for deciding between conflicting demands for water
- ▶ more effective Māori participation in water management
- ▶ better management of the impacts of diffuse discharges on water quality.<sup>78</sup>

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73. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, pp 3, 7, 25

74. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, p 24

75. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, pp 9–12

76. Ministry for the Environment, *Water Programme of Action: The Effects of Rural Land Use*, pp 7, 10

77. Ministry of Agriculture and Forestry and Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options – a public discussion paper on the management of New Zealand's freshwater resources* (Wellington: Ministry for the Environment, 2004)

78. Ministry for the Environment, *Freshwater for the Future* (Wellington: Ministry for the Environment, 2006), infosheet 158, <https://www.mfe.govt.nz/publications/fresh-water/freshwater-future/freshwater-future>

In response, the Ministry identified three national outcomes which it wanted to achieve in the paper it presented to Cabinet in April 2006:

- ▶ Improve the quality and efficient use of freshwater by building and enhancing partnerships with local government, industry, Māori, science agencies and providers, and rural and urban communities.
- ▶ Improve the management of the undesirable effects of land use on water quality through increased national direction and partnerships with communities and resource users.
- ▶ Provide for increasing demands on water resources and encourage efficient water management through increased national direction, working with local government on options for supporting and enhancing local decision making, and developing best practice.<sup>79</sup>

In order to bring about these outcomes, the Ministry proposed a package of specific actions. The part of the package connected with the second outcome consisted of looking into the potential of a national policy statement on nutrients, microbial contaminants and sediment, and the national priority of identifying catchments currently at risk from discharges. The Ministry also intended to work with landowners and industry sectors by providing targeted advisory services, and seeking further agreements for managing rural land practices.<sup>80</sup>

A much wider range of actions were put together with the third outcome in mind, with central government direction coming in the form of a second national policy statement, which would focus on managing increasing demands for water. Alongside this policy framework, there would be a National Environmental Standard (NES) on methods and devices for measuring water take and use, and a second NES on methods for establishing environmental flows. The Ministry also planned to work with regional councils on investigating and developing a variety of allocation-related tools; some were designed for improving economic efficiency, but ecological concerns were the driving factor behind two of these actions:

- ▶ ‘Improve methodologies for applying environmental flows to water bodies’; and
- ▶ ‘Develop improved methods for identifying and protecting natural character and biodiversity values.’<sup>81</sup>

The Ministry was aware that this reform package had a number of risks associated with it. The April 2006 Cabinet paper noted:

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79. Ministry for the Environment, *Freshwater for the Future* (Wellington: Ministry for the Environment, 2006), infosheet 158, <https://www.mfe.govt.nz/publications/fresh-water/freshwater-future/freshwater-future>

80. Ministry for the Environment, *Freshwater for the Future: A supporting document* (Wellington: Ministry for the Environment, 2006), pp 8–10, 20

81. Cabinet paper, ‘Sustainable Water Programme of Action – Implementation Package’, April 2006, para 16, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>; Ministry for the Environment, *Freshwater for the Future: a supporting document*, pp 11–18 & 20

Environmental and recreational groups may view the package as providing insufficient action to address the declining water quality of some water bodies. There was a strong call from many groups during the March 2005 consultation process to address declining water quality.<sup>82</sup>

It was also observed that agricultural and industry users might react negatively to potential increases in compliance costs, and regional councils might view the proposed national instruments as encroachments on their authority.<sup>83</sup> Lastly, in relation to Treaty-based rights to water, it was commented that while 'the actions proposed do not represent a substantial change to the existing rights regime, or preclude any future changes, Māori may consider that their interests need further recognition.'<sup>84</sup> We address the issue of Māori rights and interests in chapters 3–4.

Notwithstanding these risks, Cabinet approved the package of actions in April 2006, and drew up a draft timeline for implementation. In brief, it was expected that the scoping and drafting of national policy statements and national environmental standards, together with the implementation of the national priorities, would be completed within 12 months.<sup>85</sup> The key reform which concerns us here is the proposed national policy statement (the Crown decided to combine the two in late 2006). As we set out in chapter 3, the Labour Government's national policy statement for freshwater management (NPS-FM) was ready by mid-2008. It was referred to a board of inquiry but a new, National-led Government was in power by the time the board had prepared its report. The 2008 draft of the NPS-FM, therefore, was subject to significant changes by both the board and the new Minister for the Environment before it was finally promulgated in 2011. For that reason, we only provide a brief description and analysis of the original text in the next section. We do note, however, that the absence of national direction since 1991 had been a crucial omission of the Crown, which had contributed to the deterioration of water quality in some freshwater taonga in the interim (see chapter 2).

### 5.3.3 The 2008 draft of the National Policy Statement for Freshwater Management

The preamble of the draft NPS-FM explained that:

New Zealand now faces real challenges, of varying degrees and causes across regions, in ensuring there is sufficient water in our lakes, rivers, and aquifers; protecting freshwater ecosystems, in limiting and remediating degradation of water

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82. Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package', para 56

83. Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package', paras 57–58

84. Cabinet paper, 'Sustainable Water Programme of Action – Implementation Package', para 59

85. Ministry for the Environment, *Freshwater for the Future: A supporting document*, pp 1, 20

quality; and in ensuring that society gains the greatest benefit from the allocation of available water.<sup>86</sup>

The essential goal of the NPS-FM was to address constraints on the availability of fresh water and the effects of discharges on freshwater quality. It was hoped that doing so would increase benefits for competing users, including recreational users (who would benefit from swimmable water bodies).<sup>87</sup> The Crown's expectation was that water quality and quantity problems could be solved within 27 years. The NPS-FM set 2035 as the target for the achievement of its goals. By then, the quality of freshwater resources would need to 'meet the recreational aspirations of all New Zealanders'. The preamble described this as 'an ambitious yet achievable target, setting a balance between the need to make changes in a timely manner and the cost incurred by making those changes'.<sup>88</sup>

The draft NPS-FM had nine objectives and nine supporting policies. Objectives 2–5 focused on water quality:

*Objective 2 – Ensuring integrated management of effects on fresh water*

To ensure effective integrated management (including by the co-ordination and sequencing of Land-use Development with investment in infrastructure for supply, storage and distribution of fresh water) of the effects of Land-use Development and discharges of contaminants on the quality and available quantity of fresh water.

*Objective 3 – Improving the quality of fresh water*

To ensure the progressive enhancement of the overall quality of Freshwater Resources, including actions to ensure appropriate Freshwater Resources can reach or exceed a swimmable standard.

*Objective 4 – Recognising and protecting life supporting capacity and ecological values*

To ensure the life supporting capacity and ecological values of Freshwater Resources are recognised and protected from inappropriate—

- a. taking, use, damming or diverting of fresh water; and
- b. Land-use Development; and
- c. discharges of contaminants.

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86. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management* (Wellington: Board of Inquiry, 2010), app A, p 49)

87. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, p 50)

88. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, p 50)

*Objective 5– Addressing freshwater degradation*

To control the effects of Land-use Development and discharges of contaminants to avoid further degradation of Freshwater Resources.<sup>89</sup>

When read together, objectives 2 and 5 required enhancement of water quality on the one hand, and no further degradation on the other. These two objectives were thus a powerful statement of what regional councils must achieve in their integrated management of the effects of land use on fresh water. We note that it was a significantly higher standard than that set in the eventual NPS-FM in 2011 (and its successors). Water allocation issues were addressed in objectives 6–7, which required councils to ensure that demands for water were sustainable, avoided wastage, and were resilient against climate change.<sup>90</sup>

The objectives were supported by a series of policies which set out how councils should fulfil the objectives. In terms of water quality, key policies included for councils to:

- ▶ set water quality standards, environmental flows, and lake levels within two years of the NPS-FM becoming operational;
- ▶ impose conditions on discharge permits and resource consents to protect water quality; and
- ▶ promote the use of industry good practice as a minimum for achieving some of the policies and objectives.<sup>91</sup>

Thus, the Crown's proposal was that water quality standards would be set at the regional level, although the NES on ecological flows would do part of the work. In carrying out the objectives, some policies required councils to consider a number of matters first. These included the sensitivity of particular freshwater resources to land development, transition costs, the value of swimmability to the community, the avoidance of over-allocation, and efficiency. The infrastructure for water supplies, wastewater, and stormwater needed to keep up with land development.<sup>92</sup> In terms of costs, the section 32 report argued that they would fall mostly on the users and/or polluters of the freshwater resource, whereas the benefits would be widespread.<sup>93</sup>

The Freshwater Iwi Leaders Group (ILG) and its advisors, the Iwi Advisory Group (IAG), were consulted about the draft. The IAG recommended a number of wording changes.<sup>94</sup> In terms of water quality, the main change was to objective 3,

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89. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, p 51)

90. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, pp 51–52)

91. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, pp 52, 54)

92. Draft NPS-FM, July 2008 (Board of Inquiry, *Report and Recommendations of the Board of Inquiry*, app A, pp 55–56)

93. Ministry for the Environment, *Proposed National Policy Statement for Freshwater Management: Section 32 Evaluation*, July 2008, pp 47–48, 52–53, 57–58, 61–62, 65, 67, 71

94. Gerrard Albert and Donna Flavell, answers to questions in writing, 12 October 2018 (doc G22(f)), pp 10–11



with the addition of the words ‘or exceed’, which reflected iwi views as the kai-tiaki of freshwater bodies: ‘To ensure the progressive enhancement of the overall quality of Fresh Water Resources, including actions to ensure appropriate Fresh Water Resources can reach *or exceed* a swimmable standard.’<sup>95</sup> Gerrard Albert and Donna Flavell, in their evidence for the ILG, told us: ‘Overall, the ILG and the IAG were happy with the intention of the NPS-FM and the views provided were taken on board.’<sup>96</sup>

We consider the board of inquiry’s changes to this draft in section 5.4.3 below.

## 5.4 THE DEVELOPMENT OF THE NPS-FM 2011

### 5.4.1 Introduction

The Crown’s national policy statement for freshwater management was the crucial mechanism for achieving its water quality reforms. During the period from 2009 to 2011, the development of the first NPS-FM was subject to various processes and policy changes. These included:

- ▶ the policy work and preferences of a new Government;
- ▶ the first report and subsequent advice of the Land and Water Forum;
- ▶ the investigation and recommendations of the board of inquiry; and
- ▶ the views of the forum, the Freshwater Iwi Leaders Group, officials, and the new Minister on the original text and the board’s changes.

We deal with each of these intersecting developments in this section of our chapter, after which we examine the main features and content of the NPS-FM 2011. This was an important period for water quality reform because the fundamental principles and policy framework were set in place.

### 5.4.2 The Crown adopts a new approach to freshwater reform

A new, National-led Government was elected in late 2008. Dr Nick Smith was appointed as Minister for the Environment. The officials’ briefing to the incoming Government advised that it was ‘imperative to take further action to address both quality and allocation issues’ if increased growth was not to compromise environmental outcomes. Public anxiety over privatisation, and aversion to the prospect of legal challenges, had intimidated councils from adopting new approaches. Central government policy development had also been ‘hampered by delays in dealing with Māori rights and interests in water.’<sup>97</sup> The briefing proposed that the Crown

build on existing work programmes by putting more focus on central government leadership and powers; development of interventions tailored to local quality, allocation, efficiency or governance issues; support for local government through

95. Albert and Flavell, answers to questions in writing (doc G22(f)), p 10

96. Albert and Flavell, answers to questions in writing (doc G22(f)), p 11

97. ‘Briefing to the Incoming Government 2008: Environmental Sustainability’, [2008], paras 39–40

[www.mfe.govt.nz/publications/about-us/briefing-incoming-government-2008-environmental-sustainability](http://www.mfe.govt.nz/publications/about-us/briefing-incoming-government-2008-environmental-sustainability)

development of coherent national outcomes and policy, and ‘off-the-shelf’ management tools; and development of new models (including economic instruments) for allocation and re-allocation of water.<sup>98</sup>

Much of the subsequent ‘New Start for Fresh Water’ Cabinet paper in 2009 reflected this thinking. Cabinet committed to the setting of resource limits on water bodies which would ‘recognise and protect basic ecological, social and cultural values in all water bodies’. Its position was that most would provide for mixed use (that is, public values and economic use), while ‘relatively few’ water bodies would be protected in a pristine state, and ‘very few’ would be allowed to degrade if it was agreed that the economic benefits were ‘sufficient to outweigh other costs’.<sup>99</sup>

As we discussed in chapter 3, the Crown established collaborative processes for policy development in 2009, in order to ensure buy-in and build the consensus necessary for major change (see section 3.3.2).

We have already described the Government’s agreement to work intensively with the ILG and IAG. This included a commitment to ‘discuss the draft National policy on Water with the Iwi Leaders group prior to the policy going to Cabinet’.<sup>100</sup> The agreement led to the co-design of reforms to address Māori rights and interests in freshwater resources. We have covered that issue in chapters 3–4 so we do not repeat that material here. One of the ILG’s primary concerns was the ‘protection of the health and wellbeing of waterways’, which was of course very relevant to the Crown’s water quality reforms.<sup>101</sup> It should be noted here, however, that the water quality reforms were not co-designed with iwi leaders – with the exception of Te Mana o te Wai, which we discussed in chapter 4. Rather, the ILG and IAG had input to the Crown’s decision-making on these particular reforms.

In addition to its collaborative work with the ILG, the Crown relied on the Land and Water Forum, which had been created by the merger of the Sustainable Land Use Forum and Water New Zealand’s Turnbull Group).<sup>102</sup> From 2009 to 2018, the stakeholder-led process in the forum was used to design or advise on reform options. For the most part, it did so by reaching a consensus among a wide range of industrial, environmental, recreational, agricultural, and iwi groups, advised by local and central government officials. It would be difficult to exaggerate some of the differences between these varied and sometimes competing interests. Members of the IAG were key players in the forum’s deliberations (see chapter 3). In respect of the technical reforms to address water quality issues, the IAG’s involvement in

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98. ‘Briefing to the Incoming Government 2008: Environmental Sustainability’, [2008], para 40

99. Cabinet paper, ‘New Start for Fresh Water’, June 2009 (Guy Beatson, brief of evidence (doc A3), attachment 3, para 79, recommendation 7

100. Prime Minister to ILG, 1 May 2009 (Beatson, brief of evidence (doc A3), attachment 2, pp 1–3

101. Sir Mark Solomon and Donna Flavell, brief of evidence, 7 October 2016 (doc D85), p 7

102. Cabinet paper, ‘New Start for Fresh Water’, June 2009 (Beatson, brief of evidence (doc A3), attachment 3, footnote to para 55. The Turnbull Group was made up of representatives from organisations interested in water policy.

the forum was in some ways more important than the Crown–ILG dialogue on Māori rights and interests.

In total, the forum had 58 constituent organisations, but the main work of thrashing out issues and preparing reports was carried out by the ‘Small Group’. The 21 representatives on this group included the five iwi advisors,<sup>103</sup> together with six from primary industry bodies, four from environmental organisations, two from power companies, two from the water industry, and two from the tourism and recreation sector. The ‘Small Group’ was also assisted by six ‘active observers’ from central and local government, and one technical advisor from each of NIWA, Federated Farmers, and Fish and Game.<sup>104</sup>

In addition to the forum’s design of reform options, Cabinet approved an officials’ work programme, which was to be the subject of collaboration between officials and the IAG.<sup>105</sup> The programme included a project on ‘Water Quality limits’. Its aim was to ‘provide options for a robust, consistent framework first to determine how water quality objectives can be defined and agreed; and then to translate these objectives into a quantifiable figure to enable management.’<sup>106</sup> This foreshadowed the later development of the National Objectives Framework (which we discussed in chapter 4). Cabinet noted that legislative work might be needed to enable local government to ‘carry out their water quality functions more efficiently’, but this would take ‘more than three years to complete, due to incomplete science.’ Furthermore, it observed that ‘significant value judgements are required’ for setting water quality limits, with ‘direct economic consequences’ being likely where there had been changes to water quality standards, and this was why defining the processes and methodology to be used was so important.<sup>107</sup>

During the course of the officials’ work, the IAG ‘continually conveyed the importance of the water quality project to Crown officials. In particular, any new policy framework developed to improve freshwater management must be underpinned by robust water quality outcomes.’<sup>108</sup>

This stressing of the importance of water quality was in keeping with the feedback from the national hui on fresh water, which had been held in December 2009. The consensus of a workshop on water quality at the hui had been that Māori were facing a ‘sliding baseline of ever-decreasing water quality’ and that

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103. They were from the Te Arawa Lakes Trust, Te Rūnanga o Ngāi Tahu, Tuwharetoa Māori Trust Board, Waikato-Tainui Te Kauhanganui Inc, and Whanganui River Māori Trust Board respectively: Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, September 2010 (Martin Workman, papers in support of brief of evidence (doc F6(a)), pp 135, 212)

104. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, September 2010, p 66 (Workman, papers in support of brief of evidence (doc F6(a)), p 212)

105. Cabinet paper, ‘Implementing the New Start for Fresh Water’s Proposed Officials’ Work Programme’, [September 2009], paras 22–23

106. Cabinet paper, ‘Implementing the New Start for Fresh Water: Proposed Officials’ Work Programme’, [September 2009], paras 33

107. Cabinet paper, ‘Implementing the New Start for Fresh Water’s Proposed Officials’ Work Programme’, [September 2009], paras 33–35

108. Billy Brough (on behalf of the Iwi Advisors on Freshwater), ‘Freshwater Management’, no date [June 2010], p 6

‘standards must be raised as an imperative’. In particular, it was noted that whereas their tūpuna had been able to drink water from waterways, this was no longer possible in many cases. To achieve these ends, it was concluded that water quality standards needed to be developed between the Crown and iwi, with mātauranga Māori being utilised in developing these standards, and further that there must be community buy-in for the water quality indicators chosen, as well as recognition for iwi participation in future freshwater management.<sup>109</sup>

#### 5.4.3 The board of inquiry’s recommended changes to the draft NPS-FM

The board of inquiry was chaired by Judge David Sheppard, an Environment Court judge. The other members were Jon Harding, a water quality scientist, Jenni Vernon, a dairy farmer and former chair of the Waikato Regional Council, and Kevin Prime of Ngāti Hine, an RMA commissioner.<sup>110</sup> In January 2010, the board of inquiry delivered its final report to the Minister for the Environment. At this stage, the officials’ work programme was still ongoing and the forum had not yet produced its first report. The board suggested wide ranging amendments to the 2008 draft. Its goals were to ‘phase out over-allocation’, ‘phase out contamination’ (no further degradation would be allowed), protect wetlands, and ensure that the management of land and water was properly integrated.<sup>111</sup> The board’s report proved to be out of step with the new Government’s policies, as we discuss further below.

The objectives were significantly revised or restructured. In chapter 3, we addressed the objective for Māori involvement in freshwater management. Here, we focus on those objectives that related to water quality improvement. The board’s version of the NPS-FM proposed to begin with a ‘general objective’, A1:

To manage fresh water in a way and at a rate that—

- 1) maintains, and to the extent practicable, restores and enhances the intrinsic values of fresh water:
  - a) in the interdependence of the elements of the freshwater cycle; and
  - b) in the natural form, character, functioning and natural processes of water bodies; and
  - c) in natural and healthy conditions free from alterations resulting from human activity; and
  - d) in healthy ecosystem processes functioning naturally; and
  - e) for safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
  - f) for providing healthy ecosystems supporting the diversity of indigenous species in sustainable populations; and

109. Sacha McMeeking, ‘Background Paper 6: Freshwater Management’ (report to National Iwi Leaders’ Forum), February 2010, pp 36–37

110. Jim Sinner, *Implications of the National Policy Statement on Freshwater Management*, Cawthron Report 1965 (commissioned research report, Nelson: Cawthron Institute, 2011), p 2

111. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 14

- g) for sustaining cultural and traditional relationships of Māori with fresh water; and
  - h) for sustaining the potential for fresh water to meet the reasonably foreseeable needs of future generations; and
- 2) (while not detracting from attaining clause 1), enables people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety.<sup>112</sup>

Objective C1 was a brief statement that integrated management of land and water should be improved. Its supporting policy (C1), required every regional council to control activities and land-use 'so as to avoid adverse cumulative effects anywhere in the catchment'.<sup>113</sup> The use of the word 'avoid', without the addition of 'remedy and mitigate' (as in the RMA), set a high standard. Section D related to water quantity. The objectives stated:

*Objective D1*

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and their associated ecosystems of fresh water from the adverse effects of taking, using, damming, or diverting of fresh water or of draining of wetlands.

*Objective D2*

To phase out over-allocation of fresh water.<sup>114</sup>

Objectives D1 and D2 had 10 supporting policies designed to end or prevent future over-allocation and to protect wetlands from drainage.

Section E dealt specifically with water quality. The objectives stated:

*Objective E1*

To protect the quality of outstanding fresh water, to enhance the quality of all fresh water contaminated as a result of human activities, and to maintain the quality of all other fresh water.

*Objective E2*

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and associated ecosystems of fresh water from adverse effects of the use or development of land, and of discharges of contaminants.<sup>115</sup>

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112. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 65

113. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 66

114. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 66

115. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 68

As we discussed in section 5.3.3, the key water quality objectives in the 2008 draft had been objectives 3 ('improving the quality of fresh water') and 5 ('avoiding freshwater degradation'). When considering objective 5, the critical issue for the board had been whether to uphold the zero tolerance for adding to existing freshwater pollution. This had been dictated by the requirement in objective 5 that 'further degradation' was to be avoided. Many submitters had protested that objective 5 was counter to the concept of 'reasonable mixing' (allowed for by sections 69, 70, and 107 of the RMA), in which a water body was regarded as having a capacity to assimilate small levels of discharge without being significantly degraded. Other submitters had variously advocated for new contamination to be permitted on the basis of a 'polluter-pays' principle, or for short-term contaminant discharges to be allowed, or for exceptions to be made in the case of urban streams.<sup>116</sup>

The board, however, was sceptical about the assumptions used by regional councils in determining the assimilative capacity of waterways. It pointed out that if this approach had worked, then New Zealand waterways would not have become so polluted. The board was similarly unwilling to entertain the 'polluter-pays' principle, observing that a polluter could bypass any restrictions by simply buying up the discharge rights of other river users. It also rejected the notion of any exemption for urban streams, or any explicit allowance for short-term contamination. These were considered inconsistent with a 'national goal of phasing out contamination of fresh water'. Instead the board opted to maintain a strong stance against pollution, stating that 'a national policy should not recognise any right to contaminate fresh water, nor to use its supposed assimilative capacity'.<sup>117</sup>

When it came to objective 3, the main points of contention had been whether the objective should seek to do more than require that the 'overall quality' of freshwater be improving, and whether the 'swimmable standard' should be applied to 'appropriate freshwater resources' or more generally (or, indeed, if a 'drinking water' standard should be used instead).<sup>118</sup> The stipulation that the 'overall quality' be progressively improved was rendered redundant though, because of the board's determination in relation to objective 5, that no new deterioration of water quality should be allowed anywhere. The board decided to adopt the suggestion of some submitters that water bodies should be treated differently according to their contamination status. The board's objective E1 (reproduced above) set out that the quality of 'outstanding' freshwater was to be protected, the quality of 'all fresh water contaminated as a result of human activities' was to be enhanced, and the quality of 'all other fresh water' was to be maintained. The board had also dropped the 'swimmability standard' from the objective (and the preamble). It did not want

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116. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 36

117. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 36–37

118. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 35

this to be a target at which the progressive improvement of water quality should be allowed to stop.<sup>119</sup>

The remaining differences between the draft NPS-FM and the Board's version were essentially matters of degree. For instance, the board's suggested rewording of objective 2 ('ensuring integrated management of effects on fresh water') meant that regional councils would be required to improve their integrated management of land use and freshwater resources, rather than just settling for ensuring that it was effective.<sup>120</sup> Similarly, the board had recommended that the substance of objective 4 ('recognising and protecting life supporting capacity and ecological values') be reproduced in a different form. This consisted of replacing the phrase 'ecological values' with 'ecosystem processes and indigenous species and their associated ecosystems',<sup>121</sup> and dividing it between water quantity and water quality objectives.<sup>122</sup> One important change, however, was a new requirement that wetlands be protected from drainage. This was inserted in objective D1. The change reflected both the concerns of submitters, and the board's determination, which was indicated in the preamble, that the loss of wetlands was a nationally important freshwater issue.<sup>123</sup>

In terms of implementation, the board noted a number of concerns about the 2008 version:

The Preamble to the proposed NPS states a goal that, by 2035, the quality of fresh water is to meet the aspirations of all New Zealanders. Policies 1, 2 and 3 of the proposed NPS specify that local authorities are to take stipulated actions by prescribed times. A number of submitters questioned those provisions.

Some submitters argued that the goal of 2035 is too far away, others expressed concern about whether the objectives of the proposed NPS would be able to be achieved within that time. Many submitters requested an extension of the time limit for regional and district planning instruments to give effect to the proposed NPS, particularly the 40-day timeframe for amending regional and district plans. Other submitters requested the time limits be shortened, particularly the two-year time limit for regional policy statement changes to be notified.<sup>124</sup>

The board's view was that many regional councils should be able to implement the policies of the NPS-FM by 2014. For the remainder, the option of a longer

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119. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 35, 44

120. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 39, 43, 51

121. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 13, 30 & 44

122. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 44

123. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 14 & 38

124. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 42

timeframe (through to 2030 at the latest) should be available if absolutely necessary.<sup>125</sup> In order to prevent further degradation of waterways in the meantime, the board had also come up with two new transitional policies (policies D10 and E4), one affecting water allocation and the other water quality. This action was based on the board's understanding that section 55(2A)(b) of the RMA would allow them to be inserted as interim measures into regional plans without the need to go through the processes set out in Schedule 1 of the RMA.<sup>126</sup> We described the schedule 1 processes in chapter 2 (see section 2.5.6).

The board's proposed supporting policies for water quality were as follows:

*Policy E1*

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- a) set freshwater quality standards for all bodies of fresh water in their regions; and
- b) by rule, prescribe attainment of those standards (except in respect of contaminants that do not result from human land use or activity).

*Policy E2*

By every regional council avoiding any decision and any other action that results in future contamination of fresh water.

*Policy E3*

By regional councils imposing conditions of discharge permits requiring adoption of best practicable options to protect against contamination of fresh water.

*Policy E4 and direction (under section 55) to regional councils*

By every regional council making or changing regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to take effect immediately, and to continue in effect until changes required by Policy E1 (freshwater quality standards) of this national policy statement have been given full effect:

- “1. This policy applies to any change in the character, and to any increase in the intensity or scale, of any land use or activity—
  - a) that is not of the same or similar character, intensity or scale as that which immediately preceded it; and
  - b) that involves any discharge (by any person or by any animal) of any contaminant or water into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of

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125. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 43

126. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 9, 47–48



- any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.
2. Any change or increase in intensity of land use or activity to which this policy applies requires resource consent (as a discretionary activity), and any application for consent is to be decided by criteria that include:
    - a) the extent to which the land use or activity would avoid contamination of, and any other adverse effect on, freshwater
    - b) the extent to which it is feasible and dependable that any adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the use or activity would be fully avoided.<sup>127</sup>

In sum, the board's recommendations set high water quality standards: the quality of pristine waterways was to be protected; the quality of degraded water bodies was to be enhanced; and the quality of all other water bodies was to be maintained. Further water pollution must be avoided, and the existing contamination had to be phased out. The board deliberately prioritised water quality over economic uses. Its reasoning on this point was critical to the approach in its revision of the NPS-FM.

Some submitters had 'argued that favouring economic well-being, at the cost of declining quality and quantity of fresh water in the environment, would not be balanced.'<sup>128</sup> In the board's view, its task was to articulate the national priorities and goals for freshwater management, and in doing so it was sometimes necessary to 'place emphasis on particular elements of sustainable management' (as defined in section 5 of the RMA). This was because the management of natural resources is 'constrained by the sustaining, safeguarding, and effects-based elements' in section 5.<sup>129</sup> In that context:

Improvements in fresh water by phasing out over-allocation and contamination require that fresh water is used for enabling economic wellbeing only while, and to the extent that, the life-supporting capacity of water and its associated ecosystems is fully safeguarded, and the potential to meet reasonably foreseeable needs of future generations is fully sustained. In this way the requests for setting national priorities for the most important issues would be met.<sup>130</sup>

The board's report plays a crucial role in our analysis because it provides the alternative to the reforms actually chosen by the Crown in 2011. The board's

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127. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 69

128. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 10

129. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, pp 10–11

130. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 12

reasoning as to why higher standards should have been adopted remains important in Treaty terms (as we discuss later in the chapter).

#### 5.4.4 The Land and Water Forum's first report, September 2010

The Crown did not respond immediately to the board of inquiry's report. Indeed, the Minister had initially hoped that the Land and Water Forum's conclusions would inform the board's report, but had subsequently decided that he could not intervene by putting the board's work on hold. As he stated in a May 2011 Cabinet paper, he had remained 'reluctant to make a decision on the NPS' until the forum completed its stakeholder-led exploration of policy options and the ILG had given its feedback.<sup>131</sup> With respect to the latter, it appears to have been focused on the board's removal of 'a number of the Iwi Māori matters that the Freshwater ILG and IAG had advocated to be included.'<sup>132</sup> We discussed those matters in chapter 3.

The forum's first report, *A Fresh Start for Fresh Water*, took a different approach from that of the board. The Minister relied on the forum's analysis and recommendations in the final version of the NPS-FM in 2011, and in the policy development that followed. The forum's key point was that development and growth could continue within limits, which must be set by regional councils in collaboration with communities and iwi. This was quite different from the board's view that water quality limits had already been exceeded, and no further pollution should be permitted. The forum's report stated:

A central difficulty is that as a nation we have found it hard to set or manage limits. Without limits it is hard to manage diffuse discharges – nutrients, microbes, sediment and other contaminants that wash into water from the land – and impossible to deal with the cumulative effects on water bodies of water takes on the one hand and diffuse and direct discharges to water on the other.<sup>133</sup>

The report also pointed to economic consequences arising from poor quality and overallocated freshwater. These included inefficiencies from unexercised water rights, litigation costs, and the risk of environmental brand damage to New Zealand producers.<sup>134</sup>

In order to address degraded water quality in some catchments, and at the same time identify catchments where greater use could be made of the freshwater resource, the forum 'propose[d] the adoption of a standards framework for New Zealand'. Using the mechanisms of a National Policy Statement and/or National Environmental Standards, this would define 'national objectives for the

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131. Minister for the Environment, to Alistair Bisley, Chair, Land and Water Forum, 18 February 2010 (Workman, papers in support of brief of evidence (doc F6(a)), p 207); Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 3

132. Albert and Flavell, answers to questions in writing (doc G22(f)), p 11

133. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p viii (Workman, papers in support of brief of evidence (doc F6(a)), p 138)

134. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p ix (Workman, papers in support of brief of evidence (doc F6(a)), p 139)

environmental state of our water bodies' to be achieved in given timeframes, and in addition require regional councils to engage with stakeholders and iwi in setting limits and targets for local catchments, bearing in mind the biophysical variation of these catchments.<sup>135</sup> This proposal was more formally set in the first five of the 53 recommendations made in the forum's report:

*Set Limits for Quantity and Quality*

1. Central government should define national objectives for the state of our waterbodies and set an overall timeframe within which they will be achieved, through instruments (National Policy Statements and National Environmental Standards) made under the Resource Management Act.
2. Regional councils must give effect to these national objectives at catchment level taking into account the spatial variation in biophysical characteristics of their waterbodies and their current state, and by expressing objectives at a regional level as measurable environmental states, and linking these to standards and limits.
3. Regional councils must engage with communities including iwi about the way their waterbodies are valued, and work collaboratively with relevant land and water users and interested parties throughout the catchment to set specific targets, standards and limits through their Regional Plans, including timeframes for meeting them.
4. Catchment standards and limits must at least meet national level objectives.
5. Central government should establish uniform processes for accounting for spatial variation of waterbodies, defining objectives and standards setting, and implementation by regional councils.
6. Both processes and outcomes should be monitored and regularly reported on.<sup>136</sup>

Once these targets and limits had been set, the forum suggested that a mix of regulatory approaches, industry standards, and market mechanisms should be used to uphold them, in combination with investment in cleaning up water bodies that were already contaminated.<sup>137</sup> It had also recommended that 'effective riparian management, including stock exclusion where topography allows' should be prioritised by the pastoral sector.<sup>138</sup>

The forum's report also proposed major changes to water governance and allocation regimes. Its allocation recommendations included having an allocation threshold set for each catchment, and the implementation of new allocation

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135. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p x (Workman, papers in support of brief of evidence (doc F6(a)), p 140)

136. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 1 (Workman, papers in support of brief of evidence (doc F6(a)), p 147)

137. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, pp 22–23, 28, 30–33 (Workman, papers in support of brief of evidence (doc F6(a)), pp 168–169, 174, 176–179)

138. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, pp 25, 33 (Workman, papers in support of brief of evidence (doc F6(a)), pp 171, 179)

mechanisms (to replace the first in, first served model), which emphasized efficiency of use, once exceedance of the threshold was threatened.<sup>139</sup>

The forum's report also addressed the issue of wetland preservation, recommending that the Government review the incentives provided in legislation for drainage.<sup>140</sup> Its recommendation stated: 'The government should review legislation relating to drainage to ensure that it is consistent with the need to protect wetlands and biodiversity, and the recommendations contained in this report.'<sup>141</sup> As discussed above, the board of inquiry had recommended a requirement in the NPS-FM that wetlands be protected from drainage. The Crown rejected this specific form of protection for wetlands in 2011 when it finalised the NPS-FM. We note that, according to a forum analysis of its recommendations in 2016, the Crown did not act on its suggestion that statutory incentives for drainage be reviewed.<sup>142</sup>

With respect to the NPS-FM, the forum had been asked to comment on whether the board of inquiry's NPS would enable the forum's recommended outcomes to be delivered. It responded by stating that a national policy statement should be promulgated quickly, to which end it saw the board's version as a starting point.<sup>143</sup> The forum also suggested some minor amendments to the board's draft. In particular, the transitional measures proposed by the board (see the text of policy E4 above) might actually be ultra vires (that is, unlawful under the scope of what a national policy statement could do under the RMA). The forum also recommended that the Minister 'consider promptly a set of issues' that needed further work. These were the addition of 'specific measures dealing with use and development', recognition of the 'benefits of significant infrastructure', adding an objective to protect fishing, swimming, and mahinga kai, and 'providing for allocation efficiency.'<sup>144</sup> Some forum members wanted these things to be dealt with in the current NPS-FM, whereas others thought they could be dealt with outside of that policy framework.<sup>145</sup>

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139. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, pp 39–40 (Workman, papers in support of brief of evidence (doc F6(a)), pp 185–186)

140. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 57

(Workman, papers in support of brief of evidence (doc F6(a)), p 203)

141. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 57

(Workman, papers in support of brief of evidence (doc F6(a)), p 203)

142. Land and Water Forum, 'LAWF Recommendation Implementation Status', May 2016, p 4, <http://www.landandwater.org.nz>

143. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 5

(Workman, papers in support of brief of evidence (doc F6(a)), p 151)

144. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 5

(Workman, papers in support of brief of evidence (doc F6(a)), p 151)

145. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Fresh Water*, September 2010, p 5

(Workman, papers in support of brief of evidence (doc F6(a)), p 151)

Producing the report was not the end of the forum's work. The Small Group conducted a series of 18 regional engagements over the course of October to November 2010 and February to March 2011.<sup>146</sup> It was reported that 'Māori have a clear concern over declining water quality in New Zealand', which included 'the decline in the mauri of water bodies, mahinga kai, and native fish species'.<sup>147</sup> There were differing views over the extent of the decline and its causes, but 'participants generally agreed that standards, limits and targets were needed and provided certainty and clarity'.<sup>148</sup> At the various meetings, the relative priority of economic and environmental values for determining limits had been regularly debated. The situation with allocation was much the same, in that there was general agreement that the first-in, first-served system 'no longer worked for a growing number of catchments' and that 'there is a need to set quantity limits to protect instream values – the importance of ecological and minimum flows for the habitat of both native and introduced fish species, and for recreational users, was recognised'. However, beyond this agreement the discourse was described as 'fractured', with the Small Group suggesting that this might be 'because of the absence of more fully developed options'.<sup>149</sup> Opinions were also divided over the forum's proposals for water governance (see chapter 3), and the role that good management practices should play, relative to regulatory measures, for achieving quality and efficiency targets.<sup>150</sup>

#### 5.4-5 The Crown's decisions on the NPS-FM 2011

Before proceeding to deal with the NPS-FM, the Minister obtained Cabinet approval for two freshwater initiatives which were not included in the proposed NPS-FM, but which carried out two of the forum's recommendations. This was the establishment of the Irrigation Acceleration Fund and the Fresh Start for Fresh Water Clean-up Fund. The former fund went on to be voted \$35 million, covering the years 2011 to 2016, and subsequently another \$25 million in 2016 for a further five years. Approximately \$14.5 million was allocated to seven clean-up fund projects.<sup>151</sup>

At the start of May 2011, seven weeks after Cabinet had signed off on the irrigation and clean-up funds, the Minister presented it with a new version of the National Policy Statement for Freshwater Management. This was much altered from the one that the board of inquiry had come up with back in January 2010.

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146. Alistair Bisley, Chair, Land and Water Forum, to Minister for the Environment and Minister of Agriculture and Forestry, 5 April 2011, p 1, <http://www.landandwater.org.nz/Site/Resources.aspx>

147. Land and Water Forum, 'Land and Water Forum: Summary of points raised at regional engagements', 5 April 2011, p 3, <http://www.landandwater.org.nz/Site/Resources.aspx>

148. Land and Water Forum, 'Land and Water Forum: Summary of points raised at regional engagements', 5 April 2011, pp 4–5

149. Land and Water Forum, 'Land and Water Forum: Summary of points raised at regional engagements', 5 April 2011, p 7

150. Land and Water Forum, 'Land and Water Forum: Summary of points raised at regional engagements', 5 April 2011, pp 6, 10–11

151. Peter Brunt, brief of evidence, [October 2016] (doc D89), pp 12–13; Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), p 24

As the Minister explained, he had amended the board's 'objectives and policies to reduce the likely cost of implementation and align more closely with the government's overall policy approach.'<sup>152</sup> This included a 'better recognition of people's economic well-being within the environmental context.'<sup>153</sup> The Minister had clearly adopted the forum's key point, advising Cabinet: 'The underlying issue is that effective limits for water quantity and especially quality are not being adequately set and managed to.'<sup>154</sup> This had to be done in such a way that 'opportunities for improved productivity are not lost or constrained.'<sup>155</sup>

In respect of water quality, the Minister described the fundamental principles of his revised NPS-FM in this way:

The NPS includes objectives that set a bottom line for water quality: that water quality should be maintained or improved within a region, while providing for economic growth, social and cultural well-being.

The objective recognises that there are a small number of outstanding water bodies that should be protected. It recognises that degraded water bodies should be enhanced, although the quantum of enhancement and the timeframe involved will vary. This will be identified by regional councils in a target setting process at a catchment scale. The objective also recognises that a bottom line of at least maintaining water quality everywhere is not possible. It allows for some variability in terms of water quality as long as the overall water quality is maintained in a region. Essentially it allows for offsets within a region, including between catchments.<sup>156</sup>

The key changes from the board's version included:

- a. The Board's recommended NPS would likely have come at a very significant cost to the primary sector and local government. I have made changes to objectives and policies to provide for a better balance of environmental and economic outcomes.
- b. I decided to remove the Board's recommended general objective (A1) which was designed to give biophysical, intrinsic and other instream values precedence over other uses of fresh water. The objectives in the final NPS provide a better balance of all values, which is in line with the sustainable management principles of the RMA and the government's strategic direction on water policy agreed in June 2009.
- c. The focus of some of the Board's recommended objectives and policies has been amended from 'avoid' to the 'avoid, remedy or mitigate' requirements of the RMA.

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152. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 2

153. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, pp 2, 15

154. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 4

155. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 4

156. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p 6

- d. I have also made changes to the ‘transitional provisions’. The policies recommended by the Board were considered to be ultra vires because they attempted to insert provisions which amounted to rules directly into regional plans. A NPS is only able to insert objectives and policies into a plan. The intent of the amended policies is that while the planning required by the NPS is undertaken by local authorities, the adverse effects of activities are explicitly considered by consent authorities.<sup>157</sup>

The Cabinet paper was accompanied by a regulatory impact statement (RIS), which included a series of five national maps (respectively showing the trophic level index for major lakes, groundwater nitrate levels for 1995–2008, river nitrate levels for 1998–2007, percentage surface water allocation in 2010, and groundwater allocation pressure) to reinforce the need for action, as well as a tabular analysis showing the degree of current regional plan compliance with the proposed National Policy Statement.<sup>158</sup> This analysis (which was also provided as a standalone appendix to the Cabinet paper) showed that 6 out of 17 regions were currently non-compliant with the water quality limit setting provisions in the NPS, and the other 11 were only partly compliant, and it was a similar story when it came to the provisions for managing waterbodies which had degraded beyond these limits, with 7 out of 17 regions being non-compliant and the rest only partially compliant.<sup>159</sup> While noting that many of the costs were uncertain, it projected quantified benefits of the NPS of between \$15 and \$396 million, and costs (about half of which would fall on regional councils) of between \$68 and \$101 million.<sup>160</sup>

Out of the eight objectives and 16 policies that had been in the board’s 2010 version, only the implementation programme’s timetable had been left unchanged. In the Minister’s 2011 version, the water quality objectives were numbered ‘A’ instead of ‘E’, and read as follows (juxtaposed to the relevant ‘E’ objective):

*Objective A1* [Minister’s version]

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.<sup>161</sup>

157. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 11

158. Ministry for the Environment, *Regulatory Impact Statement: National Policy Statement for Freshwater Management*, April 2011, pp [18]–[21], apps 3–4, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search/regulatory-impact-statements/ris-national-policy>

159. Regulatory Impact Statement, ‘National Policy Statement for Freshwater Management’, April 2011, [p 18], appendix 3

160. Regulatory Impact Statement, ‘National Policy Statement for Freshwater Management’, April 2011, pp 11–12

161. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, 12 May 2011, p 6 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 567)

*Objective E2* [Board's version]

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and associated ecosystems of fresh water from adverse effects of the use or development of land, and of discharges of contaminants.<sup>162</sup>

*Objective A2* [Minister's version]

The overall quality of fresh water within a region is maintained or improved while:

- a) protecting the quality of outstanding freshwater bodies;
- b) protecting the significant values of wetlands; and
- c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.<sup>163</sup>

*Objective E1* [Board's version]

To protect the quality of outstanding fresh water, to enhance the quality of all fresh water contaminated as a result of human activities, and to maintain the quality of all other fresh water.<sup>164</sup>

The differences between these objectives encapsulates the differences between the board's water quality standards in 2010 and the Minister's in 2011. The 2008 draft of the NPS-FM had established a zero tolerance for further pollution of water, and had required that 'appropriate' water bodies be enhanced to reach or exceed a swimmable quality standard. The board's version had retained the ban on further contaminants in freshwater bodies (diffuse and point-source discharges). It had also sought to phase out all contamination by 2035 through a requirement that the quality of all contaminated freshwater bodies be progressively enhanced, and the quality of all non-contaminated water bodies be maintained in that state. These were high standards, which the Crown in 2011 simply could not accept. In its view, the RMA's purpose of sustainable management did not require such standards, economic growth would become stalled, and the costs on councils and communities would be too high.

Objective A1, therefore, changed the avoidance of adverse effects of land use and discharges to the 'sustainable management' of land use. Objective A2 retained the board's intent to protect 'outstanding fresh water', and extended this to the significant values of wetlands. The board, however, had rejected the idea that regional councils should continue to manage fresh water on the basis of its assimilative capacity. This position was rejected by the Crown. Objective A2 allowed a level of contamination, provided that it did not exceed the limits that councils would now have to set. Because there were no bottom lines in the NPS-FM (at this stage), councils would have free rein to set the water quality limits as they saw fit within its

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162. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 68

163. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, 12 May 2011, p 6 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 567)

164. Board of Inquiry, *Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management*, p 68



broad parameters. The Minister's intention was that further work would be done after the NPS-FM was issued, to provide guidance on how to set limits, 'detailed work on the nature of limits, technical methods for describing limits, and ways to implement limits to reduce the potential cost of the NPS'.<sup>165</sup>

In a move that would prove to be a longstanding bone of contention, the obligation in E1 to 'maintain the quality of all other fresh water' was replaced with an obligation to maintain or improve 'overall quality' within a region. The Department of Conservation had expressed the view that individual catchments would be the more appropriate management unit for an 'unders and overs' approach (in which improvement in one location and degradation in another were traded off), as it argued that the use of the region would mean that some communities might experience water degradation without any compensating benefits. The Minister, however, had responded that 'I have considered these matters and do not agree'.<sup>166</sup> As we quoted above, the Cabinet paper stated that it was not possible to maintain (let alone improve) water quality *everywhere*, and therefore the wording allowed for 'offsets within a region, including between catchments'.<sup>167</sup>

The extent of changes made by the Minister to the NPS-FM was a matter of some risk to the integrity of the board of inquiry process. Under section 52 of the RMA, the Minister had to consider the board of inquiry's report and recommendations first, but could then make any changes 'as he or she thinks fit', withdraw all or part of the proposed NPS, or promulgate it without any changes. The NPS-FM would be issued by the Governor-General in Council on the Minister's recommendation.<sup>168</sup> The Minister noted in the Cabinet paper, however, that:

While this might appear to allow a free hand, the scope for change is constrained by the RMA and principles of administrative law, including ensuring fairness to the general public and submitters. My ability to make changes does not extend to making changes beyond the scope of the Board process.

The NPS has therefore been drafted with considerable care to ensure all policy changes that differ from the recommendations of the Board are within scope. Given the extent of the changes I have made, however, a challenge cannot be ruled out.

Changes made to the objectives and policies to provide for a better balance of environmental and economic outcomes could be perceived by some, including environmental groups, as having weakened the NPS. Others will consider the revised version to be a more balanced and fair approach.<sup>169</sup>

As for the changes to the policies, those which most affected water quality were the replacement of policies E2, E3 and E4 with the new policies A2, A3 and A4:

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165. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p16

166. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p13

167. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p6

168. RMA 1991, s52

169. Cabinet paper, 'National Policy Statement for Freshwater Management', 4 May 2011, p12

*Policy A1*

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:
  - i) the reasonably foreseeable impacts of climate change
  - ii) the connection between water bodies
- b) establish methods (including rules) to avoid over-allocation.

*Policy A2*

Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.

*Policy A3*

By regional councils:

- a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met and
- b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

*Policy A4 and direction (under section 55) to regional councils*

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:

- “1. *When considering any application for a discharge the consent authority must have regard to the following matters:*
  - a) *the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
  - b) *the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*
2. *This policy applies to the following discharges (including a diffuse discharge by any person or animal):*
  - a) *a new discharge or*
  - b) *a change or increase in any discharge—*

*of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.*

3. *This policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management takes effect on 1 July 2011.*<sup>170</sup>

As noted above, the concern with policy E4 was that it might be *ultra vires* in seeking to insert an interim rule for controlling discharges directly into regional plans; this was resolved in policy A4 by reducing the obligation on councils, in terms of meeting the conditions for limiting contamination, to the phrase ‘must have regard to’. It was also spelt out in the new policy that these conditions were not to apply where discharge consents had been sought before the NPS-FM, although we note that most diffuse discharges did not require a resource consent anyway. In addition, policy E4 had required a resource consent for any change to the intensity of land use, and this requirement was not replicated anywhere in the final version of the NPS-FM 2011.

The relationship between former policies E2 and E3, and new policies A2 and A3, was more complex, in that there was not a simple correspondence between them. Policy A3 relied on regional councils not granting discharge permits once contamination limits had been reached, for it replicated the previous policy E3, which had dictated that councils make rules requiring permit applicants to adopt the ‘best practicable option’ for preventing or minimising the adverse effects of their discharges, but unlike E3 did not itself apply where contamination limits were not being achieved. Once contamination limits had been exceeded, the more stringent policy A2, which required every council to ‘specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality . . . within a defined timeframe’, applied instead. However, the previous policy E2, which had set out that councils should avoid ‘any decision and any other action that results in future contamination of fresh water’, had been more stringent still, and had applied everywhere.

In terms of implementation, the final version of the NPS-FM 2011 retained the board’s targets of implementation by 2014 or – if impracticable to do so – the NPS-FM should be ‘fully implemented by 31 December 2030’.<sup>171</sup>

The potential for further decline in water quality before the NPS-FM was implemented, especially now that irrigation projects were to be given a fresh boost, was one of the two key complaints in a notable critique produced by Jim Sinner of the Cawthron Institute for Fish and Game in June 2011.<sup>172</sup> This observed that the transitional policies for water quality and water quantity limits, while seeming to

170. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, 12 May 2011, pp 6–7 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 567–568)

171. New Zealand Government, *National Policy Statement for Freshwater Management 2011*, 12 May 2011, p 11 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 572)

172. J Sinner, *Implications of the National Policy Statement on Freshwater Management*, p 1

bring parts of the NPS-FM into force straight away, only applied to activities which already required a resource consent, and since most regional councils did not insist that diffuse discharges from livestock were consented, these would likely continue unabated until regional plans were altered (which on past experience, was likely to take three to five years). This was contrasted with the board of inquiry's planned transitional provision which would have made any new discharge or increase in land intensity subject to a consent.<sup>173</sup>

The second major complaint of the Cawthron report concerned the issue that the Department of Conservation had raised, namely the requirement to maintain or improve the overall water quality in a region. Again this was contrasted unfavourably with the board of inquiry's recommendation, which had been to protect outstanding water bodies, enhance those contaminated by human activities, and maintain all other water bodies.<sup>174</sup> The discussion of this drew on the experience of Environment Waikato, which had already been applying a policy of 'net improvement in water quality', but even so had been left with a progressive decline in water quality. In explaining why this was likely to occur, the report cited a 2009 review, which had remarked that '[t]ypically, development proceeds while offsets fall short of goals or are never implemented.'<sup>175</sup> A third and related cause of complaint concerned the way in which the NPS-FM contained no obligation or incentive to improve water quality, provided it did not fall below any limits that had been set.<sup>176</sup> Of course, this requirement only to maintain quality would be exacerbated if there was a sliding baseline in the meantime, before limits were set, as the first complaint about the NPS-FM was predicting.

More recently, the Crown has criticised the decision in 2011 to reject or adapt the board's version of the NPS-FM. In its public paper *Essential Freshwater*, issued in 2018, the current Government stated:

The damage caused to freshwater by intensification of agriculture has been known since 2004, when it was highlighted by Parliamentary Commissioner for the Environment Morgan Williams in the report *Growing for Good* [see chapter 2 for this report].

Measures to stop this trend were considered in 2008 when the then Minister for the Environment set up a Board of Inquiry, chaired by former Principal Environment Judge David Sheppard. The principles proposed by the Sheppard Inquiry were not adequately reflected in the Freshwater NPS issued in 2011 (with revisions in 2014 and 2017) or in any other national instrument . . .

The Sheppard principles required strong action to stop clean rivers being made dirty, and to clean up dirty rivers over a generation. Instead agricultural intensification

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173. J Sinner, *Implications of the National Policy Statement on Freshwater Management*, pp 1, 8–9

174. J Sinner, *Implications of the National Policy Statement on Freshwater Management*, pp 1, 6–8

175. S Walker, A Brower, T Stephens, and W Lee, 'Why Bartering Biodiversity Fails', *Conservation Letters*, vol 2, no 4 (2009), pp 149–150 (J Sinner, *Implications of the National Policy Statement on Freshwater Management*, pp 6–7)

176. J Sinner, *Implications of the National Policy Statement on Freshwater Management*, pp 1, 3

continued, ruminant stock numbers increased, and significant deforestation occurred.<sup>177</sup>

The Crown also announced in 2018 its intention to issue a new NPS-FM 'based on the Sheppard principles'.<sup>178</sup>

We asked Crown counsel to clarify what was meant by the 'Sheppard principles'? In response, the Crown highlighted points in the preamble and main body of the board of inquiry's version, including:

- ▶ the goal of phasing out contamination;
- ▶ the management of fresh water and the control of activities and land use so as to 'avoid adverse cumulative effects anywhere in the catchment' (policy C1);
- ▶ the protection of outstanding fresh water, enhancement of 'the quality of all fresh water contaminated as a result of human activities', and the maintenance of quality in all other fresh water (objective E1);
- ▶ every regional council 'avoiding any decision and any other action that results in future contamination of fresh water' (policy E2);
- ▶ councils imposing conditions on discharge permits to protect against contamination (policy E3);
- ▶ any 'change or increase in intensity of any land use or activity' would require a resource consent (policy E4); and
- ▶ prompt implementation.<sup>179</sup>

Crown counsel submitted that the Crown 'does not necessarily adopt or endorse' all of the board's analysis or wording. Rather, 'the reference in the Cabinet paper is intended to point to the underlying concerns identified in those sections of the Report, and the need for "strong action" to address issues regarding freshwater management'.<sup>180</sup>

We note the Crown's use of the Sheppard principles and its critique of the NPS-FM 2011 in *Essential Freshwater*. We are not in a position to draw conclusions at this point in our chapter, however, as further work was already planned in 2011 to expand the Crown's national direction on freshwater management. The final iteration of this NPS-FM was not issued until 2017. The 2011 version remains important as the 'foundational' document for all the Crown's water quality reforms, but it was not considered at the time as an end-point in the process of reform. Crown counsel submitted that the Crown's aim had been to follow 'foundational reforms with more detailed developments of the system'.<sup>181</sup>

We turn next to discuss the work which resulted in the crucial addition of the National Objectives Framework and water quality bottom lines to the NPS-FM.

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177. New Zealand Government, *Essential Freshwater: Healthy Water, Fairly Allocated* (Wellington: Ministry for the Environment and MPI, 2018) (doc F29), pp 8–9

178. New Zealand Government, *Essential Freshwater* (doc F29), p 13

179. Crown counsel, memorandum, 17 October 2018 (paper 3.2.289), pp 1–2

180. Crown counsel, memorandum, 17 October 2018 (paper 3.2.289), p 2

181. Crown counsel, closing submissions (paper 3.3.46), p 36

## 5.5 THE DEVELOPMENT OF THE NATIONAL OBJECTIVES FRAMEWORK

### 5.5.1 Introduction

As we have discussed, the establishment of the NPS-FM 2011 required councils to set objectives for freshwater bodies in a region, which involved setting water quality and quantity limits. The standards set in 2011 were at a high level. They included objectives such as maintaining or improving overall water quality in a region, and protecting the significant values of wetlands (objective A2). These were broad prescriptions, capable of varying interpretations at the regional level. What was needed was a more specific and detailed framework that would clarify how objectives and limits should be set, and provide councils with more specific direction on water quality standards. This would enable national consistency on the basis of scientific work at the national level (to assist the regions), including the introduction of some water quality bottom lines that would apply in all regions.

Cabinet summarised the problems in this way:

A number of implementation issues have been identified with the existing National Policy Statement. All regional councils say they face difficulties defining life supporting capacity and half of them have issues with resourcing the technical investigations and science needed. Some regional councils are setting objectives and limits without sufficient information and transparency of decision-making. Regions are duplicating freshwater science and may set objectives that are not clearly defined and are either ineffective in improving water quality or unnecessarily constrain economic growth. The result is an inefficient and litigious process under the RMA, with decision-making that is removed from the local council and community [to the Environment Court].<sup>182</sup>

The Crown's solution was the National Objectives Framework (NOF), which was inserted in the NPS-FM in 2014. It established a process for how to set objectives and limits, and provided specific water quality standards for ecosystem health and human health. It also carried with it various monitoring requirements. Where there were gaps in the NOF, however, the work would still need to be done at the regional level.

The creation of the NOF was the single-most important reform to the NPS-FM 2011, and its potential significance was enormous. But the development of water standards at the national level was not without its scientific controversies, and many of the necessary attributes (such as sediment) were still not in the NOF by the time it was inserted in the NPS-FM. Similarly, the introduction of more specific and detailed standards necessitated a process for exceptions, but this too remained unspecified in 2014.

In this section (5.5), we explore the development of the NOF, and in the following section (5.6) we address its introduction to the NPS-FM, as well as other changes to the NPS-FM in 2014.

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182. Cabinet paper, 'Freshwater programme: amendments to the National Policy Statement for Freshwater Management', 23 May 2014 (Crown counsel, sensitive discovery documents (doc D92), p168)

### 5.5.2 Starting on the second and third tranches of 'Fresh Start for Fresh Water'

When, in May 2011, Cabinet proceeded to issue the NPS-FM, and launch both the Irrigation Acceleration Fund and Fresh Start for Fresh Water Clean-up Fund, it had also set in motion the process for the next two phases of freshwater reform. The second tranche of the freshwater reforms amounted to a work programme investigating options for setting water quality and quantity limits, while the third tranche in the sequence was to investigate how flow allocations and discharge consents could be utilised for managing the effects of land use, and for keeping the condition of watercourses in line with their specified limits.<sup>183</sup> It was intended that the second tranche should be completed by February 2012, and the third tranche by October 2012.<sup>184</sup>

Outlining the case for ongoing reform, the Cabinet paper 'Fresh Start for Fresh Water – forward work programme' stressed that if no further action was taken to deal with water quality and quantity issues, existing problems would 'become increasingly difficult and expensive to address', in addition to which new problems would emerge. By way of example, it was noted that nitrate and phosphate levels had 'reached trigger values for action in over half the monitored river sites in Northland, Waikato, Canterbury and Southland', and that the Crown had committed \$318 million in Treaty settlements just for cleaning up Lake Taupo, the Rotorua lakes, and the Waikato River. Similarly, the full allocation of water in ten catchment zones in Canterbury was cited, together with the figure of NZ\$11.9 billion over 10 years which the Australian government was having to spend to repurchase water licences in the overallocated Murray-Darling Basin.<sup>185</sup> The paper also observed that there was 'a lack of regulatory control over many diffuse discharges from land use activities (as most land uses are permitted activities under the Resource Management Act unless a regional plan has set rules to control the activity)'.<sup>186</sup>

Building on the findings of the Land and Water Forum's first report, the Cabinet paper went on to argue that the 'existing legislative framework' could 'support a strengthened limits-based regime, but stronger direction and guidance from central government' would 'be needed to support regional councils in setting well-specified limits for water quality and quantity, and to guide the processes by which the limits should be set'. This, the paper asserted, was likely to involve using a greater range of RMA tools, such as national environmental standards.<sup>187</sup> A new work programme was called for, which would consider:

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183. In full, the second tranche was described as 'a broad programme of work on setting limits on water quality and quantity, including governance arrangements, aimed at delivering policy options to Cabinet', and the third tranche as work on 'managing to limits, including more efficient allocation mechanisms and additional tools to manage the effects of land use' (Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, p 2)

184. Cabinet paper, 'Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report, 8 August 2011, pp 2, 10

185. Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, pp 3–4

186. Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, p 4

187. Cabinet paper, 'Fresh Start for Fresh Water – forward work programme', 4 May 2011, p 7

5-5-3

- ▶ measures for providing any further guidance (if needed in addition to the NPS) on national interests and values that must be reflected in decisions at the regional or catchment levels
- ▶ efficient and improved governance structures for limit-setting (eg, committees at regional or catchment levels to advise regional councils, and/or to advise the Minister for the Environment on issues as they arise), including provision for stakeholder involvement
- ▶ specific provisions for iwi/Māori participation in limit-setting processes and decisions at catchment, regional and national levels
- ▶ information, research and modelling tools that are required to understand the economic, environmental, social and cultural consequences of limits, to enable well-informed decision making
- ▶ training, funding, and support for those involved in setting limits
- ▶ means for incorporating limits, and methods for managing to them, into regional plans (which might include the development of national environmental standards or similar regulatory tools, in the interests of consistency and efficiency)
- ▶ monitoring and auditing provisions for limit-setting processes
- ▶ step-in provisions, and criteria for triggering them, to allow Ministers to intervene where limit-setting processes stall.<sup>188</sup>

Officials were also to work on potential interim measures which could be brought in at short notice. This was because it was recognised that it might be ‘some years before limits are fully in place’, and that consequently there was ‘a risk of further over-allocation of water quantity and quality over this period – particularly from unregulated diffuse discharges from land use.’<sup>189</sup> The Cabinet paper also recommended a continuing role for the forum in progressing the reforms, and also noted that Cabinet had agreed to keep the ILG and IAG involved in the scoping of policy options.<sup>190</sup>

### 5.5.3 The Land and Water Forum’s second and third reports

#### 5.5.3.1 ‘Setting Limits’: the forum’s second report

In August 2011, the Minister for the Environment and the Minister of Agriculture reported back to Cabinet on the role proposed for the forum. The report emphasised the ‘need for continuing the momentum gained through the LAWf process and to develop stakeholder buy-in.’ The Ministers wanted the forum to develop policy options for ‘the setting of limits, decision-making structures for limit-setting, managing to limits (including land use), and allocation.’<sup>191</sup> Other than

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188. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, pp 7–8

189. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, p 8

190. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, pp 10–11 & 13

191. Cabinet paper, ‘Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report’, 8 August 2011, pp 6, 10



ongoing engagement with the ILG, further freshwater consultation would be put on hold until the forum had delivered its second report on limit-setting.<sup>192</sup>

The second report of the Land and Water Forum, entitled *Setting Limits for Water Quality and Quantity: Freshwater Policy- and Plan-making through Collaboration*, was delivered to the Crown at the end of April 2012.<sup>193</sup> In order to progress the second tranche of freshwater reform, the forum had been asked to report on two questions:

- ▶ What is needed to effectively implement the limit-setting approach to water management (currently reflected in the NPS-FM), including consideration of what central government needs to do versus what local government needs to do, the role and responsibilities of water users, and nature and scope of limit-setting tools
- ▶ What efficient and improved decision-making structures for limit-setting might look like, including provision for stakeholder involvement, specific provisions for iwi participation in limit-setting processes and decisions at catchment, regional and national levels and how those limit-setting processes interact with broader resource management processes<sup>194</sup>

In response, the forum made 38 recommendations; 14 of these related to setting objectives and limits, 14 to collaborative decision-making (addressed in chapters 3–4), and seven to ‘plan agility’ (what needed to be adaptable as circumstances changed). There were also three recommendations about ‘transition, capacity and implementation’ (what should be done in the interim).<sup>195</sup> We note that the report’s coverage of Māori rights and interests has already been addressed in chapter 3, and that material will not be repeated here.

The first of these objective- and limit-setting recommendations called for a significant change to the NPS-FM 2011. The final version had referred to ‘life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water’ in its objectives. The forum, however, recommended that managing the risk to human health from micro-organisms and toxic contaminants should be added as a second compulsory objective for all water bodies.<sup>196</sup> This was an important recommendation which was later included in the NPS-FM 2014.

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192. Cabinet paper, ‘Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report’, 8 August 2011, pp 7–8

193. Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making through Collaboration* (Wellington: Land and Water Forum, 2012) (Beatson, papers in support of brief of evidence (doc A93(a)))

194. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 4)

195. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 57–68)

196. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 9–11)

The next six recommendations all concerned what was to become the National Objectives Framework, although the Forum, not knowing in what form the government might implement it, simply referred to it as a national instrument.<sup>197</sup> Recommendation 4 stated that the national framework should:

- ▶ define minimum numeric state objectives (bottom lines) for a limited range of freshwater state parameters
- ▶ provide narrative objectives and technical guidance on all other parameters for which regional councils are to set numeric objectives
- ▶ calibrate parameters as a series of bands (fair, good and excellent) above bottom lines, to support regional decision-making in balancing local values for waterbodies
- ▶ provide guidance and options for regional councils to set numeric objectives within the fair, good and excellent bands for particular waterbody types and situations.<sup>198</sup>

As an example of how this might work in practice, the forum illustrated how dissolved oxygen, dissolved nitrate, sediment load and water temperature (which were four of the thirteen parameters that the forum expected to be reflected in regional plans),<sup>199</sup> might be used as the measured parameters which defined whether the objective of ecosystem health was being achieved.<sup>200</sup> Collectively these parameters would then provide a replacement for schedule 3 of the RMA.<sup>201</sup> As some parameters were subject to biophysical variations (such as where geology affected sediment load), and equally some objectives had greater significance for some regions, the forum considered that councils should select:

- ▶ the non-compulsory objectives;
- ▶ the parameters for assessing the achievement of objectives; and
- ▶ the band thresholds for those objectives (provided these thresholds were above national bottom lines).<sup>202</sup>

Nevertheless, by making the guidance to regional councils more specific, the Forum considered that the goals of the NPS-FM were more likely to be achieved 'in a nationally consistent and administratively efficient manner'.<sup>203</sup>

197. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 13–14, 16

198. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 16–17

199. The 13 parameters were: suspended sediment and/or sedimentation levels and/or clarity; algae; macrophytes; micro-organisms; temperature; dissolved oxygen; toxic contaminants; habitat space; macro-invertebrate health; fish productivity index; river connectivity; channel morphology and processes; and salt water intrusion into aquifers (Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 15)

200. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 72)

201. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 12–14)

202. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 12–14, 17–18)

203. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 12)

The forum also considered the issue of whether exceptions should be allowed to the bottom lines. It argued: ‘The wide variation in conditions around the country mean that there may well be a situation where it is just not possible or practical to manage a waterbody to the standard set in a national instrument.’<sup>204</sup> One such variation was the ‘large-scale’ dam infrastructure that had modified catchments, including dams for hydroelectricity, water supplies, and irrigation. The forum’s view was that such catchments would be classified at the national level, and a different set of objectives would apply to them.<sup>205</sup> Otherwise, the forum sought to constrain the ability of regions to make exceptions to the water quality objectives, recommending that these would have to be authorised by a national authority, and should only be permitted where there was

- a. the inability to meet a minimum state objective due to natural conditions of a waterbody; OR
- b. regional decision to set a numeric state objective in a water quality band lower than the current state because:
  - i. an exceptional economic benefit will result from the relevant activity AND
  - ii. a net environmental gain will result, taking into account compensatory actions.<sup>206</sup>

With the concept of setting ‘fair’, ‘good’ and ‘excellent’ bands, the forum had also addressed the contentious requirement in the NPS-FM that water quality be ‘maintained or improved’ within a region. It suggested that ‘maintaining’ the water quality would mean that the level of a given parameter ‘cannot be set in a band lower than that of its current state except by way of an exception.’ Once that level was set, ‘improving’ would mean raising the parameter into a higher band and ‘setting a limit based on that objective.’<sup>207</sup>

Of the remaining limit-setting recommendations, the most far reaching was recommendation 13. One of its provisions was that ‘once a limit is fully allocated, additional resource use (i.e. discharges of contaminants and the taking of water) should be a prohibited activity.’<sup>208</sup> As the report explained, discharges or takings beyond full allocation were generally being treated as non-complying activities, which meant that a consent could still be granted if the adverse effects were only minor. Such water bodies would degrade because of the cumulative effect of add-

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204. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 20)

205. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 21)

206. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 20, 22). An example of a ‘compensatory action’ is that more hydroelectric power might allow a coal-fired power station to be closed.

207. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 19–20, 22)

208. Land and Water Forum, *Setting Limits for Water Quality and Quantity* (Beatson, papers in support of brief of evidence (doc A93(a)), p 27)

ing more and more discharges and takes beyond the point of non-compliance (the so-called 'death by a thousand cuts'). Prohibited activities, in contrast, could not be allowed without a plan change.<sup>209</sup> The forum had also sought to provide a way forward for those regions where the limits were already being breached. This was for them to adopt a higher interim limit, and set out a timeframe for reaching their target limit.<sup>210</sup>

Collaboration in objective-setting was the other main theme of the report – this is addressed in chapters 3 and 4.

Responding to the Land and Water Forum's second report, the Cabinet paper 'Progressing Water Reform' summed up the practical effect of the Forum's proposals with respect to objectives and limits as follows:

*central government* would decide on and set some national objectives and bottom lines that apply to all water bodies. The science to support the development of bottom lines for these matters is already available. How the science is best used would be agreed at a national level, through scientific consensus, rather than through continued litigation at the regional level.

*regions* would need to set their own objectives in addition to objectives set nationally, to address matters other than human health and life-supporting capacity (eg they may want to ensure that particular water bodies have water quality suitable for swimming or fishing). In setting objectives, regions will need to balance their economic objectives with the environmental outcomes sought. Regions would then set enforceable, binding, local limits to achieve all these objectives. While binding limits are implicit in the NPS-FM, the Forum's recommendations would ensure national consistency and reduce the risk of councils being legally challenged. [Emphasis in original.]<sup>211</sup>

The Ministries for the Environment and Primary Industries accepted the broad thrust of the forum's proposals, namely that 'greater central government direction' should be provided to regional councils 'on the setting of freshwater objectives and limits', and that a 'collaborative planning' alternative should be offered to the existing RMA process for developing freshwater plans.<sup>212</sup> However, there was concern that more work needed to be done to assess both the economic and environmental implications of the proposals, and to this end officials were directed to undertake 'further design and analysis' on both the collaborative planning model and a 'national objectives framework' (NOF), although for the latter at least

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209. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), pp 25, 27–28)

210. Land and Water Forum, *Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (Beatson, papers in support of brief of evidence (doc A93(a)), p 26)

211. Cabinet paper, 'Progressing Water Reform – The Second Report of the Land and Water Forum', 28 June 2012, p 7, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

212. Cabinet paper, 'Progressing Water Reform – The Second Report of the Land and Water Forum', 28 June 2012, pp 1–2

they would continue to engage with the forum and the IAG.<sup>213</sup> In the meantime, the forum would carry on with its third report on the third tranche of freshwater reform, that is, keeping waterways within their water take and discharge limits through the use of allocation and land management tools.<sup>214</sup>

### 5.5.3.2 *Managing water quality and quantity: the forum's third report*

In October 2012, the Land and Water Forum completed its third report, *Managing Water Quality and Allocating Water*.<sup>215</sup> The focus of this report was on integrated catchment management, and more especially on the practical methods which regional authorities could employ to get the most sustainable benefit from the allocative and discharge loads being borne by individual catchments.<sup>216</sup>

The forum envisaged the application of a stepped process, so that for discharges, the first step was to identify the load of each contaminant within the catchment, while distinguishing between the natural background and human-induced contributions. Spatial and temporal factors in contaminant generation and transport (such as the time lag from seepages) also needed to be considered. Land use models were regarded as necessary for estimating diffuse discharges, since these were impractical to measure.<sup>217</sup> One such model was OVERSEER (see box).

The next step was deciding on what combination of tools (such as consent conditions, farm nutrient management plans, and riparian planting) was most likely to deliver cost-effective compliance with the prescribed limits. The forum considered that the balance should shift from voluntary to regulatory tools for those catchments which were almost or already overallocated. It was also recommended that good management practices be defined for each region.<sup>218</sup> Subsequent steps were the procedures for implementing the tools, and lastly monitoring to determine whether limits were being met.<sup>219</sup>

The forum also made recommendations about a new system for allocation of water takes and uses but – given that the Crown's policy never reached the point of adopting a new allocation system – we take that matter no further. We simply note

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213. Cabinet paper, 'Progressing Water Reform – The Second Report of the Land and Water Forum', 28 June 2012, pp 2, 14–15

214. Cabinet paper, 'Progressing Water Reform – The Second Report of the Land and Water Forum', 28 June 2012, pp 2, 15

215. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Workman, papers in support of brief of evidence (doc F6(a)))

216. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water*, pp 6–8, 21–22 (Workman, papers in support of brief of evidence (doc F6(a)), pp 340–342, 355–356)

217. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Workman, papers in support of brief of evidence (doc F6(a))), pp 19–22

218. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Workman, papers in support of brief of evidence (doc F6(a))), pp 20–23 & 25–27

219. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Workman, papers in support of brief of evidence (doc F6(a))), p 20

that the forum considered the transfer of rights between existing users and new users to be a necessary feature for any new allocation model.<sup>220</sup>

#### 5.5.4 The Crown develops its position on water quality reforms for consultation

Having received the forum's third report, the Ministries for the Environment and Primary Industries set out their freshwater reform programme over the course of November and December 2012 in a series of seven Cabinet papers, starting with the papers 'Water Reform: third report of the Land and Water Forum' and 'Water Reform: Overview'.<sup>221</sup> The first paper noted that the 'general direction of the overarching management framework' proposed by the forum was consistent with the Government's strategic direction since 2009, and that the consensus reached between stakeholders through the forum's collaborative approach 'presented an opportune platform to progress the Government's freshwater reform agenda'.<sup>222</sup>

The second paper outlined the core policy elements of a reform package which was intended to be put out for public consultation in early 2013.<sup>223</sup> It pointed to the widespread deterioration of water quality, noting by way of example that 46 per cent of monitored recreation sites were either generally unsuitable or to be avoided for swimming. However, it also revealed concern that some regional councils were 'setting limits without sufficient information, particularly economic analysis, or transparency of decision-making', and that 'in some instances', transition timelines might 'be restrictive and unnecessarily constrain growth'. This was seen as an ongoing risk if further reform did not go ahead.<sup>224</sup>

Four parallel Cabinet papers which expanded on the reform package were presented three weeks later. These covered governance, objective and limit setting, managing quality within limits, and managing quantity within limits respectively. The National Objectives Framework (NOF) was the main focus of the objective and limit setting paper. Progress had already been made by the NOF reference group, which had been set up in July 2012 in response to the forum's second report.<sup>225</sup> Kenneth Taylor, who chaired the reference group, said that its members had a 'broad ranging skill set with an emphasis on experience as practitioners, primarily in implementing science-informed policy'.<sup>226</sup> A number of the group's members

220. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Workman, papers in support of brief of evidence (doc F6(a))), pp vii & 36–37

221. Cabinet paper, 'Water Reform Overview – Implementing the Water Reform Strategy', 6 December 2012, p 12, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

222. Cabinet paper, 'Water Reform – The Third Report of the Land and Water Forum', 8 November 2012, p 9, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

223. Cabinet paper, 'Water Reform – Overview', 8 November 2012, pp 9–11, 14, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

224. Cabinet paper, 'Water Reform – Overview', 8 November 2012, p 5

225. Cabinet paper, 'Water Reform Paper Two – Objective and Limit Setting under the National Policy Statement for Freshwater Management 2011', November 2012, pp 6, 20, [25] (annex D) and 30–49 (annex E), <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

226. Kenneth Taylor, brief of evidence, [May 2016] (doc F4), pp 6–7

### OVERSEER Nutrient Budgets

Models which measure the flows of nutrients on farms have become an important tool for farmers and resource managers. 'OVERSEER Nutrient Budgets' is the most widely used by New Zealand farmers and farm consultants. It is owned by two fertiliser companies, the Ministry for Primary Industries, and the Crown-owned AgResearch.

OVERSEER was initially developed in the 1980s to ensure that artificial fertilisers were applied in the most effective manner and to make sure that fertilisers were not lost as a result of run-off. OVERSEER uses readily available data to estimate nutrient flows around the farm, including nitrogen and phosphorus losses in drainage and run-off. Successive versions of OVERSEER have been developed and used, with varying degrees of reliability, to model pastoral, horticulture, arable, and vegetable farm systems.<sup>1</sup>

A number of regional councils, recognising that OVERSEER measures nutrient flows on farms and nutrient losses from farms, have incorporated it into their environmental management procedures. They see it as a means to reduce nutrient losses by run-off, leaching, and greenhouse gas emissions.<sup>2</sup>

The OVERSEER models, however, assume that good management practices have been introduced. Where such practices are not being followed, OVERSEER is likely to underestimate nutrient losses to water. The Parliamentary Commissioner for the Environment has alerted regional councils to the limitations of OVERSEER as a regulatory tool. The risks can be minimised by a requirement that nutrient budgets are prepared by certified nutrient budget advisers, who also observe field evidence and check that best management practices are being applied.<sup>3</sup>

1. Natalie Watkins and Diana Selbie, *Technical Description of OVERSEER for Regional Councils* (commissioned research report, Christchurch: AgResearch, 2015), pp 1–2, 5–9, 15–17

2. *Ibid*, p 1

3. *Ibid*, p 36; Parliamentary Commissioner for the Environment, *Overseer and Regulatory Oversight: Models, Uncertainty and Cleaning up our Waterways* (Wellington: Parliamentary Commissioner for the Environment, 2018), pp 6, 23, 83–84, 117–124

were also forum members, including five who had served on the 'Setting Limits' working group.<sup>227</sup> The reference group had 14 members:

- ▶ five primary industries representatives;
- ▶ one representative from the electricity sector (from Mighty River Power);
- ▶ four regional council staff;
- ▶ two NGO representatives (one from Fish and Game and one from Whitewater New Zealand);

227. Taylor, brief of evidence (doc F4), p 5

- ▶ one scientist from NIWA; and
- ▶ one member of the IAG.<sup>228</sup>

The NOF reference group was supported by a series of ‘topic focused expert panels’ and a science review panel, which advised the reference group and officials. Almost 80 scientists were involved in this work.<sup>229</sup> One of the expert panels was the iwi science panel, tasked with (among other things) advising on Māori values for the NOF.<sup>230</sup> A member of the iwi science panel sat on every other panel, including the science review panel.<sup>231</sup> The reference group’s task was to “road test” the science and the application of other components of the NOF from a practitioner’s perspective.<sup>232</sup> They were assisted in this task by officials from both Ministries, who provided administrative services, drafted discussion papers, and supported the writing of reports. Mr Taylor stressed, however, that the reference group was independent from the Crown.<sup>233</sup>

In keeping with the forum’s recommendations, a potential framework, including three compulsory values (Ecosystem Health, Indigenous Species, and Human Health) and 11 optional values (Ceremonial Uses, Food Gathering/Mahinga Kai, Drinking, Swimming, Natural State, Wild and Scenic, Boating and Navigation, Fishing, Stock Watering, Irrigation, and Electricity Generation) had already been drawn up. At least two potential attributes had been identified for each value.<sup>234</sup> Potential band thresholds had been developed for nitrate and ammonia toxicity, periphyton cover, and *E coli*, in rivers and lakes, and total nitrogen, total phosphorus, chlorophyll-a, and dissolved oxygen, in lakes only.<sup>235</sup> We note that secondary contact recreation such as wading, was favoured as the objective for the compulsory Human Health value, because a swimming objective would apply to a smaller number of locations. Many shallow streams were wadeable only and a swimming standard would not apply to them.<sup>236</sup> Advice on these attributes and objectives was being provided by a mix of individual experts and expert panels.<sup>237</sup>

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228. Briefing note, ‘Freshwater Reform: Progressing a National Objectives Framework and other Amendments to the National Policy Statement for Freshwater Management’, June 2013, p 14, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search/>

229. Clive Howard-Williams, brief of evidence, [May 2017] (doc F5), pp 2–3, 14

230. Briefing note, ‘Freshwater Reform: progressing a National Objectives Framework and other amendments to the National Policy Statement on Freshwater Management’, June 2013, p 4

231. Kenneth Taylor, answers to questions in writing, no date (doc F4(c)), p 6

232. Taylor, brief of evidence (doc F4), p 5

233. Taylor, brief of evidence (doc F4), pp 8, 11

234. Cabinet paper, ‘Water Reform Paper Two – Objective and Limit Setting under the National Policy Statement for Freshwater Management’, November 2012, annex D

235. Cabinet paper, ‘Water Reform Paper Two – Objective and Limit Setting under the National Policy Statement for Freshwater Management’, November 2012, annex E, pp 45–49; ‘Report of the National Objectives Framework Reference Group’, October 2012, pp 16–20, <https://www.mfe.govt.nz/publications/fresh-water-rma/report-national-objectives-framework-reference-group>

236. Cabinet paper, ‘Water Reform Paper Two – Objective and Limit Setting under the National Policy Statement for Freshwater Management’, November 2012, p 9

237. Briefing note, ‘Freshwater Reform: Progressing a National Objectives Framework and other Amendments to the National Policy Statement for Freshwater Management’, June 2013, pp 3–4. The membership of each expert panel is reported on pp 11–14.



Out of the various attributes which were selected by the NOF reference group, it was the one for nitrate, based on its toxicity, which was to prove the most contentious. In basing the NOF measures for ammonia and nitrate on their toxicity rather than on the capacity to act as noxious nutrients, the reference group was following the traditional practice described in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality produced in 2000 by the Australian and New Zealand Environment and Conservation Council (ANZECC). This cautioned against measuring nutrient concentrations in water columns as indicators of algal biomass, noting that rapid cycling of nutrients could generate high levels of biomass when nutrient concentrations were relatively low.<sup>238</sup>

There was, however, a significant departure from the ANZECC guidelines when it came to the level of species protection to be provided for in the toxicity measures. When setting a 'trigger value' for checking adverse effects, the ANZECC guidelines had suggested that a 95 per cent species protection 'should apply to ecosystems that could be classified as slightly–moderately disturbed, although a higher protection level could be applied to slightly disturbed ecosystems where the management goal is no change in biodiversity.'<sup>239</sup>

This meant that the benchmark would be set so that 95 per cent of aquatic species did not suffer adverse effects from the contaminant. The NOF nitrate and ammonia 'bottom lines', however, were set at 80 per cent for the whole of New Zealand,<sup>240</sup> even though the ANZECC guidelines had recommended that this extent of protection only be used for 'highly disturbed ecosystems.'<sup>241</sup> In other words, 80 per cent was not supposed to have been the bottomline for *all* ecosystems, only for those which had been 'highly disturbed', such as 'urban streams receiving road and stormwater runoff, or rural streams receiving runoff from intensive horticulture.'<sup>242</sup>

When nitrate toxicity was studied in relation to New Zealand species, kōura were assessed as being among the 20 per cent of fauna most affected. Whereas 95 per cent species protection, which became the lower boundary of the 'A' band for nitrate, should have provided New Zealand's taonga species with protection from adverse effects from nitrate, setting the 'bottom line' based on the 80 per

238. Australian and New Zealand Environment and Conservation Council, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality: The Guidelines* (October 2000), p 3.3–20 (Sheree De Malmanche, papers in support of brief of evidence (doc D87(a)), p 884)

239. Australian and New Zealand Environment and Conservation Council, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality*, p 3.4–3 (De Malmanche, papers in support of brief of evidence (doc D87(a)), p 897)

240. Cabinet paper, 'Water Reform Paper Two – Objective and Limit Setting under the National Policy Statement for Freshwater Management', November 2012, app E, pp 45–46

241. Australian and New Zealand Environment and Conservation Council, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality*, pp 3.4.3–3.4.4 (De Malmanche, papers in support of brief of evidence (doc D87(a)), pp 897–898)

242. Australian and New Zealand Environment and Conservation Council, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality*, pp [2–9]–[2–10], [3.1–10] (De Malmanche, papers in support of brief of evidence (doc D87(a)), pp 809–810, 830)

cent species protection would not.<sup>243</sup> Koura (freshwater crayfish) are an important species for many of the claimants and interested parties that appeared before us. Koura were among the valued customary food sources to be found in wetlands as well as rivers and lakes.<sup>244</sup> Freshwater crayfish and freshwater mussels have been classified as threatened with extinction.<sup>245</sup>

The 'Objective and Limit Setting' paper argued that prompt action was needed to progress the NOR, as regional councils were in the process of deciding on objectives and limits under the NPS-FM 2011, and so delay would require this process to be unnecessarily repeated at a much later date.<sup>246</sup> However, there was some anxiety about the potential economic implications of implementing the NOR; the paper noted, as an example, that modelling was showing that 15 per cent of rivers (measured by length) were in danger of failing to meet the periphyton bottom-line for Ecosystem Health, and that 46 per cent of the dairy sector output came from these catchments. To this end, officials had initiated work with regional councils to study the potential economic impacts.<sup>247</sup>

The remainder of the policy programme, as far as it related to water quality, was also based largely on the Land and Water Forum's recommendations. The 'Managing within Limits – Water Quality' paper emphasised the need for regional councils to account for all contaminants, to which end it discussed the use of the AquiferSim, CLUES and OVERSEER models for estimating the extent of diffuse discharges, and the need for the development of good management practice toolkits.<sup>248</sup> Similarly the 'Managing within Limits – Water Quantity' paper emphasised that regional councils would have to account for all water takes and identify areas of over-allocation.<sup>249</sup>

In December 2012, Cabinet gave its final approval for the combined reforms package, which would be outlined for the public in a white paper in early 2013. A

243. CW Hickey, 'Updating nitrate toxicity effects on freshwater aquatic species', prepared by NIWA for the Ministry of Building, Innovation, and Employment, 2013, p 8

244. See, for example, Sir Edward Taihakurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti, 'Ngā Wai o te Māori, Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori, Māori and State Law, a paper prepared for the NZMC', 23 January 2017 (doc E13), p15; Maanu Cletus Paul, speaking notes, 27 June 2017 (doc E1(b)), p [7]; Rihari Richard Takuiria Dargaville, brief of evidence, 23 December 2016 (doc E9), p5; Dr Benjamin Frank Pitman, brief of evidence, 23 December 2016 (doc E10), p19; Priscilla Pihitahi Niwha Sandys, brief of evidence, 23 September 2016 (doc D55), p4; William James Taueki, brief of evidence, 23 September 2016 (doc D57), pp8–9, 42; Merle Maata Ormsby and Tiaho Pillot, 27 September 2016 (doc D79), pp6, 9–10

245. Mike Joy, brief of evidence, 31 August 2016 (doc D20), p 24

246. Cabinet paper, 'Water Reform Paper Two – Objective and Limit Setting under the National Party Statement for Freshwater Management', November 2012, p 2

247. Cabinet paper, 'Water Reform Paper Two – Objective and Limit Setting under the National Party Statement for Freshwater Management', November 2012, p 3

248. Cabinet paper, 'Water Reform Paper Three – Managing within Water Quality Limits under the National Policy Statement for Freshwater Management', November 2012, pp12–13, 17–18, 20–22, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

249. Cabinet paper, 'Water Reform Paper Four – Managing within Limits – Quantity', 29 November 2012, pp12–14, 18, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

reform timeline running through until 2015–16 was also presented. At this point, the timetable required:

- ▶ by 30 December 2013 – all regional councils to implement the NOF;
- ▶ by 30 June 2014, all regional councils to account for all water takes and discharges, as well as having standardised processes; and
- ▶ by 30 June 2015, central government to provide direction and tools for managing ‘outstanding water bodies and wetlands’.<sup>250</sup>

We note that this pace of reform was clearly considered possible as at 2012, but progress has lagged in many crucial areas.

### 5.5.5 ‘Freshwater reform 2013 and beyond’

The white paper, *Freshwater reform 2013 and beyond*, was duly released to the public in early March 2013. In chapter 3, we discussed this paper in respect of how it addressed Māori rights and interests. Using a series of tables, the paper listed the proposed immediate reforms and next step reforms in relation to ‘planning as a community’, a ‘National Objectives Framework’, and ‘managing within quality and quantity limits’ respectively.<sup>251</sup> It also put the case for immediate action (which was supported by two New Zealand maps, the first highlighting the high levels of nitrate in Canterbury rivers, and the second highlighting the over-allocation of catchments in Otago, Canterbury, Marlborough and Hawke’s Bay).<sup>252</sup> The rationale for each of the elements of the reforms was then discussed in more detail. In all, 11 separate reforms were described.

For our purposes in this chapter, the most important proposal was the NOF. The Crown explained in the paper that greater national direction was required on how to set limits under the NPS-FM. The method for doing so would be for Māori, communities, and councils to set objectives ‘for each water body’, taking into account the national values in the NOF, local values, and the water body’s existing condition. The objectives would then be achieved by setting quantity and quality limits, such as on the discharge of contaminants. In addition to setting limits, councils would need to identify ‘mitigating actions’ such as the planting of riparian margins. Where the limits would affect existing uses, a suitable timeframe would then need to be set for achieving the objective. The NOF would guide this process by defining ‘what state of water is needed to provide for a particular value’.<sup>253</sup>

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250. Cabinet paper, ‘Water Reform Overview – Implementing the Water Reform Strategy’, 6 December 2012, p 3, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

251. New Zealand Government, *Freshwater reform 2013 and beyond* (Wellington: Ministry for the Environment, March 2013), pp 10–12 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 606–608)

252. New Zealand Government, *Freshwater Reform 2013 and Beyond*, pp 15–17 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 611–613)

253. New Zealand Government, *Freshwater reform 2013 and beyond*, pp 28, 34 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 624, 630)

The NOF would contain a list of possible values which councils could select from when setting objectives.<sup>254</sup> Each value in the NOF would have prescribed attributes. Each attribute would have descriptions of a series of environmental states (the attribute states) from high water quality down to low, which – where possible – would also be expressed numerically in four bands (A–D). Each attribute would also have a minimum acceptable environmental state, which would be the bottom line for the attribute. Councils could choose values and set objectives resulting in the management of water at the A, B, or C bands for the chosen value, but not the D band (which would be below the bottom line). Doing this work at the national level would reduce the costs and potential conflicts at the local level, and ensure that the best science was applied in the regions. Two of the NOF values – ecosystem and human health – would be compulsory. Water bodies could not be managed so as to drop below the minimum attribute states for those two values, apart from ‘justified exceptions’. The minimum states for those objectives, therefore, were described as national bottom lines. The ‘justified exceptions’ were not described or defined in the paper. In terms of the the human health objective, it was described as ‘Human Health for secondary contact’ (that is, for wading or boating, not for swimming).<sup>255</sup> This was to prove controversial, as we discuss further below.

The ‘ecosystem health’ value had 10 proposed attributes: temperature, periphyton (slime), sediment, flows, connectivity, nitrate (toxicity), ammonia (toxicity), fish, invertebrates, and riparian margins. Most of these attributes did not actually end up in the NOF. For human health (secondary contact), the proposed attributes were *E coli* and cyanobacteria.<sup>256</sup>

The Crown allowed four weeks for consultation on the white paper, ending on 8 April 2013. More than than 50 public meetings, hui, stakeholder meetings and meetings with councils were held during this period; thirteen of these were regional hui, held between 13 and 27 March. Collectively, these were attended by more than 2,000 people. A total of 368 written submissions were also received, 36 of which were from Māori groups and organisations.<sup>257</sup>

The ILG’s submission gave tentative support to the NOF. In their submission, the iwi leaders referred to their Ngā Mātāpono ki te Wai model (see chapter 3 for a description of this model). They stated:

As a standalone component, the NOF has the potential to deliver positive outcomes for iwi, if appropriately implemented. Establishing some consistency in describing various states of freshwater values, and interpreting these into objectives with specific

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254. Fourteen non-compulsory values were listed in the paper: electricity generation; irrigation; stock watering; fisheries; fish spawning; boating and navigation; natural form and character; indigenous species; swimming; drinking water; food gathering / mahinga kai; food production / freshwater aquaculture; and ceremonial uses.

255. New Zealand Government, *Freshwater reform 2013 and beyond*, pp 29, 31 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 625, 627)

256. New Zealand Government, *Freshwater reform 2013 and beyond*, p 30 (Brunt, papers in support of brief of evidence (doc D89(a)), p 626)

257. Martin Workman, brief of evidence (doc F6), p 15

numerical values, will benefit all water stakeholders. The draft objectives include several of specific importance to iwi, including indigenous species, mahinga kai, and ceremonial uses. Iwi will have an interest in many of the other draft objectives identified as well.

The challenge for iwi with the NOF will be in the implementation by local authorities. While the description of the various freshwater values will be set nationally as individual (or sometimes collective) objectives, it will remain up to local communities to decide what values, and what level within each subset of values, they wish to set for the local region or catchment. The issue for iwi will be ensuring their values, interests and aspirations are visible through the NOF and, ultimately, provided for among the competing values of other water stakeholders. Many iwi continue to express concern over the ability of local authorities to give effect to the Treaty partnership and to appropriately articulate iwi values, interests and aspirations into resource management policy generally.

These iwi concerns could be addressed, at least in part, by ensuring iwi values are given sufficient weighting [in the NOF] consistent with the status of iwi as Treaty partners.

Overall, the introduction of a limit-setting framework, providing the process to set limits is transparent and robust, and the limits themselves are enforced, has the potential to deliver some of the outcomes the ILG expects and reflected in Nga Matapono ki te wai.<sup>258</sup>

The NOF also received widespread support from the other Māori submitters, at least in principle.<sup>259</sup> The only firm opposition to the NOF came from Te Rūnanga o Ngāti Whatua, whose submission called for its replacement by a stronger NPS-FM based on the board of inquiry's recommendations.<sup>260</sup>

The status of tangata whenua values was a key concern for many submitters, with several groups arguing that they should be given priority over other values in the NOF to reflect the Treaty partnership, while some went further in requesting that they be made compulsory.<sup>261</sup> However, many submissions expressed anxiety as to whether councils could be trusted to properly implement them,<sup>262</sup> with greater training for council being pointed to as a possible remedy in some submissions.<sup>263</sup>

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258. ILG submission, [March–April 2013] (Crown counsel, document bundle (doc F14(a)), p100)

259. See, for example, the submissions of the Tūwharetoa Māori Trust Board, Te Rūnanga o Iwi o Ngāpuhi, Kahungunu Ki Wairarapa, Te Wai Māori Trust, and Te Rūnanga o Ngāi Tahu (Crown counsel, document bundle (doc F14(a)), pp 282–283, 388, 399–400, 411 & 438)

260. Submission of Te Rūnanga o Ngāti Whatua (Crown counsel, document bundle (doc F14(a)), pp196–197)

261. Submissions of the Ngāti Rangi Trust, Maniapoto Māori Trust Board, Tūwharetoa Māori Trust Board, Ngāti Koroki Kahukura Trust, Kahungunu Ki Wairarapa, and Te Rūnanga o Ngāi Tahu (Crown counsel, document bundle (doc F14(a)), pp 216, 228, 281, 330, 400 & 438)

262. See, for example, the submissions of Waikato-Tainui Te Kauhanganui, Ngāti Tūwharetoa, Tūwharetoa Māori Trust Board, Raukawa Charitable Trust, and Ngāti Kahungunu (Crown counsel, document bundle (doc F14(a)), pp 237, 271, 283, 302, 316)

263. Submissions of the Maniapoto Māori Trust Board, Tūwharetoa Māori Trust Board, and Ngāti Koroki Kahukura Trust (Crown counsel, document bundle (doc F14(a)), pp 230, 284 & 330)

Threshold levels also came in for comment, with three of the submissions emphasising the need for levels that would support swimming and/or fishing.<sup>264</sup> Others expressed concerns that ‘bottom lines’ might become default standards.<sup>265</sup> The Raukawa Charitable Trust, for example, submitted to the Crown: ‘Raukawa also has some reservations regarding the minimum bottom line provisions of the NOF, particularly to ensure this is not used as a default position in place of more proactive limit setting for specific catchments.’<sup>266</sup>

Some Māori submissions rejected particular aspects of the NOF, most notably the concepts of ‘averaging out’ water quality and allowing exceptions to bottom lines. There was concern about how the requirement to maintain and improve water quality ‘overall’ within a region would interact with the NOF and its bottom lines.<sup>267</sup>

Based on the Ministry for the Environment’s overview of submissions, the views of other submitters had much in common with those expressed by Māori groups and organisations. The Ministry reported that the NOF and the national ‘bottom lines’ had been ‘generally strongly supported, including by the agriculture sector’. The main concerns relating to the NOF had been that estuaries and lagoons were not included, that water bodies might be allowed to degrade to bottom lines, and that the NOF bands were weaker than those in some existing plans, or conversely, that the NOF bands might unreasonably restrict water usage. The ‘averaging’ of water quality – maintain or improve across a region – had drawn negative comments. It should be recalled that this was the first opportunity for the public to comment on the NPS-FM in its 2011 form. A range of views were also expressed on whether modified waterbodies (such as lakes created for hydroelectric power generation) should be given exceptions to the bottom lines.<sup>268</sup>

With respect to managing water quality and quantity within limits, there had been ‘widespread recognition of the need for better water accounting’, but submitters had wanted more detail on management tools before giving their support to them. A number of submissions had also advocated for a National Environmental Standard to be included amongst these tools.<sup>269</sup>

### 5.5.6 Progressing the National Objectives Framework

As we discussed in chapter 3, the RMA reforms – including a collaborative plan-making process – were put on hold until after the election. Amendments

264. Submissions of the Ngāti Rangi Trust, Raukawa Charitable Trust, and Te Wai Māori Trust (Crown counsel, document bundle (doc F14(a)), pp 215, 298 & 412)

265. Submissions of Te Rūnanga o Ngāti Manawa, Tūwharetoa Māori Trust Board, and Raukawa Charitable Trust (Crown counsel, document bundle (doc F14(a)), pp 188, 283 & 303)

266. Raukawa Charitable Trust, submission, 8 April 2013 (Crown counsel, document bundle (doc F14(a)), p 303)

267. Submissions of Te Roopu Kaitiaki o te Wai Māori, Tūwharetoa Māori Trust Board, Raukawa Charitable Trust, Te Rūnanga a Iwi o Ngāpuhi, and Te Rūnanga o Ngāi Tahu (Crown counsel, document bundle (doc F14(a)), pp 277, 283, 303, 389 & 438)

268. Ministry for the Environment, ‘Feedback on freshwater reform proposals – 2013 and beyond’, [www.mfe.govt.nz/consultation/feedback-freshwater-reform-proposals-2013-and-beyond-0](http://www.mfe.govt.nz/consultation/feedback-freshwater-reform-proposals-2013-and-beyond-0)

269. Ministry for the Environment, ‘Feedback on freshwater reform proposals – 2013 and beyond’

to the NPS-FM, however, did not face the same political constraints. The Crown proceeded with consultation on the proposed amendments. The discussion document, and to some extent the accompanying regulatory impact statement and Section 32 report, relied on a combination of scientific research and economic modelling studies, much of it commissioned over the previous 18 months. As noted above, the NOF reference group had supplied potential band thresholds by December 2012, covering:

- ▶ nitrate and ammonia toxicity in rivers and lakes;
- ▶ periphyton cover in rivers and lakes;
- ▶ *E coli* in rivers and lakes; and
- ▶ total nitrogen, total phosphorus, chlorophyll-a, and dissolved oxygen in lakes only.

By October 2013, the framework had been further populated by cyanobacteria thresholds for lakes and rivers, and by dissolved oxygen thresholds for rivers below point pollution sources. The thresholds for nitrate and ammonia toxicity had also been adjusted, while the periphyton cover attribute for rivers had been replaced as a measure by chlorophyll-a. The NOF Periphyton Panel's rationale for switching from periphyton cover to chlorophyll-a was that the latter is a long-established measure in both New Zealand and overseas, and that statistical relationships between water chemistry and chlorophyll-a had proved stronger than those for periphyton cover.<sup>270</sup>

As a result, the new NOF had six attributes for measuring the value Ecosystem Health:

- ▶ chlorophyll-a (rivers and lakes);
- ▶ total nitrogen and total phosphorus (lakes only);
- ▶ nitrate toxicity (rivers and lakes);
- ▶ ammonia toxicity (rivers and lakes); and
- ▶ site-specific dissolved oxygen (rivers only).<sup>271</sup>

The other compulsory value in the proposed NOF, Human Health, would have two attributes (*E coli* and planktonic cyanobacteria). These would provide a measure of the fitness of rivers and lakes for secondary contact (wading).<sup>272</sup>

An examination of the supporting research studies shows that several other measures had also been considered as potential attributes within the NOF. The absence of the Macroinvertebrate Community Index (MCI) or one of its variants for measuring in-stream species diversity was to prove particularly contentious. As Sheree De Malmanche explained, macroinvertebrates include kōura

270. T Snelder, B Biggs, C Kilroy, and D Booker, 'National Objective Framework for Periphyton', November 2013, p7, <https://www.mfe.govt.nz/sites/default/files/national-objective-framework-periphyton.pdf>

271. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, app 2, pp 24–27 (Crown counsel, sensitive discovery documents (doc D92), pp 541–544)

272. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, app 2, pp 27–28 (Crown counsel, sensitive discovery documents (doc D92), pp 544–545)

(freshwater crayfish), insects, snails, and worms, and their presence is a good indication of a water body's health.<sup>273</sup> Reporting on the MCI, the Macroinvertebrate Expert Group had observed that it was a suitable attribute for use in assessing Ecosystem Health in wadeable rivers and streams because it was 'widely used and understood by management agencies, consultancies and research institutes', and there were already four recognised classes which could be replicated as NOF bands.<sup>274</sup> Officials, however, considered it less useful for setting limits, because any cause- and-effect management response would be hindered by the number of human-induced stressors that could influence it.<sup>275</sup> It would be possible, therefore, to take action to remedy the first three out of five drivers, when in reality it could be the fourth or fifth driver that was causing the problem.

A shortage of research data was a problem for other attributes, with the Diurnal Water Quality Expert Group observing that there were 'numerous limitations of current scientific understanding of New Zealand temperature, dissolved oxygen and pH regimes in our rivers and streams, and on tolerance of New Zealand indigenous animals to temperature, dissolved oxygen and pH extrema.'<sup>276</sup> As a result, the dissolved oxygen bands had been based on a mixture of local indigenous fish research and research on salmonids in the United States.<sup>277</sup> Similarly, the cyanobacteria panel had been asked to contribute thresholds supporting both the Ecosystem Health and Human Health (Secondary Contact) values, but it had concluded that there was not enough information to determine the Ecosystem Health bands.<sup>278</sup>

Once the thresholds for bands A to D had been established for the various attributes, modelling of the economic impacts of implementing the NOF was able to start. Early results, which revealed the attributes most likely to end up in Band D (that is, below the 'bottom line'), and so require compulsory mitigation, were available by the time the Minister for the Environment held a briefing for other Ministers in January 2013. The briefing notes observed that periphyton

273. Sheree De Malmance, brief of evidence, [October 2016] (doc D87), pp18–19

274. KJ Collier, J Clapcott, and M Neale, *A Macroinvertebrate Attribute to Assess Ecosystem Health of New Zealand Waterways for the National Objectives Framework – Issues and Options*, Environmental Research Institute report 36 (Hamilton: University of Waikato, 2014), p 7

275. Cabinet paper, 'Freshwater Programme: Amendments to the National Policy Statement for Freshwater Management', 23 May 2014, pp6–7 (Crown counsel, sensitive discovery documents (doc D92), pp173–174; KJ Collier, J Clapcott, and M Neale, *A Macroinvertebrate Attribute to Assess Ecosystem Health*, pp 8–9, 22

276. R Davies-Colley, P Franklin, B Wilcock, S Clearwater, and C Hickey, 'National Objectives Framework – Temperature, Dissolved Oxygen and pH: Proposed Thresholds for Discussion', November 2013, p72, <https://www.mfe.govt.nz/publications/fresh-water/national-objectives-framework-temperature-dissolved-oxygen-ph>

277. R Davies-Colley, P Franklin, B Wilcock, S Clearwater & C Hickey, 'National Objectives Framework – Temperature, Dissolved Oxygen and pH: proposed thresholds for discussion', November 2013, pp 53–55

278. SA Wood, RJ Mallet, and D Hamilton, 'Cyanobacteria Band Testing: Examining Applicability for the National (NZ) Objectives Framework', ERI Report 12, October 2013, p7, <https://www.mfe.govt.nz/publications/fresh-water/cyanobacteria-band-testing-examining-applicability-national-nz-objectives>



cover would be the most non-compliant attribute, with 7–8 per cent of river length expected to have greater periphyton cover than the band D threshold of 55 per cent of the river bed. Moreover, most regional councils had adopted a more stringent measure for acceptable periphyton cover of 30–45 per cent. The situation was apparently less dire for phosphorus and nitrogen, with the presentation stating that on-farm nutrient management could bring about most of the required national discharge reduction for phosphorus and about half of the equivalent reduction for nitrogen.<sup>279</sup>

Further results on the modelling of ‘bottom lines’ were included in an October Cabinet paper, and in the draft RIS that accompanied it. The latter shows that officials had investigated the feasibility of having a primary contact (swimming) ‘bottom line’ for *E coli*. However, modelling had revealed ‘that approximately 62% of water bodies nationally would fail at the 95th percentile’ (that is, 19 times out of 20). The draft RIS remarked that ‘the impact of improving those water bodies was thought to be unacceptably high, given that not all water bodies are used for swimming, and even those that are, are generally used only for parts of the year.’<sup>280</sup> The Cabinet paper did not mention this finding, stating merely that ‘[p]rimary contact recreation is not proposed as a compulsory national value as not every water body is valued for swimming and applying the value nationwide would come at great cost.’<sup>281</sup>

In comparison, a secondary contact (wading and boating) ‘bottom line’ was much more achievable, with only 6 per cent of monitored river sites likely to fail the threshold for a one per cent risk of *E coli* infection, and only 2 per cent of river sites failing the ‘bottom line’ based on a 5 per cent risk of infection. In order to help justify the use of this ‘bottom line’, the draft RIS cited Federated Farmers’ endorsement of a secondary contact objective for the Human Health value during the March 2013 consultation.<sup>282</sup> Dr Joy was critical of the proposed 5 per cent in the threshold because it was out of step with the Health Department’s position on safety (see below).

As well as having the secondary contact figures for *E coli*, the October 2013 Cabinet paper reported that more than 99 per cent of river sites were compliant with the nitrate and ammonia toxicity ‘bottom lines’; the thresholds for both were set at the level where it impacted on populations of 20 per cent of aquatic species. Much the same results were obtained for the periphyton bottom line

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279. Briefing note, ‘Water Reform: Objectives and Limits – Presentation on National Objectives Framework’, January 2013, appended presentation, p 11, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search/briefing-notes>

280. Ministry for the Environment, ‘Draft Regulatory Impact Statement on Proposed Amendments to the National Policy Statement for Freshwater Management’, November 2013, p 30, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search/regulatory-impact-statements>

281. Cabinet paper, ‘Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management’, October 2013, p 9, <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search>

282. Ministry for the Environment, ‘Draft Regulatory Impact Statement: Proposed amendments to the National Policy Statement for Freshwater Management 2011’, November 2013, p 31

in Wellington and Southland, but the third region examined for periphyton, Horizons (Manawatū–Whanganui), was non-compliant for 10 per cent of sites.<sup>283</sup> The analyses were less meaningful for lakes, for while 18, 24, and 26 of the 110 lakes monitored were in Band D for chlorophyll-a, total phosphorus, and total nitrogen respectively, these were 110 lakes out of a possible 3,800 which were seen as being most vulnerable to contamination. A similar lack of monitoring data hampered the appraisal of the cyanobacteria bottom line, with six out of 16 lakes, and six out of 68 river sites, being in band D.<sup>284</sup>

Four more detailed regional case studies on the potential impacts had also been carried out. It was noted in the October 2013 Cabinet paper that the respective study areas (Southland, the Hinds and Selwyn-Waihora catchment zones in Canterbury, and Upper Waikato) were selected for the study because they:

- ▶ face challenges with water quality
- ▶ are at an appropriate stage of developing regional plan changes
- ▶ have significant dairy expansion underway
- ▶ are likely to be the most impacted by proposed national bottom lines.<sup>285</sup>

In the Southland study, eight different scenarios, which varied according to the extent of nutrient discharge caps for nitrogen and phosphorus, and the extent of adoption of mitigation measures, were modelled to test how many monitoring sites would comply with NOF 'bottom lines' for nitrate toxicity, slime / periphyton, and *E coli* in 2037.<sup>286</sup> The mitigation measures started with nutrient and farm dairy effluent management, before stepping up to include stock exclusion from streams and reduced stocking rates, and lastly the establishment of grass buffer strips.<sup>287</sup> According to the model results, *E coli* improved under every scenario, with the number of monitored sites which failed to meet the 'bottom line' decreasing from 5 to 4 even under Scenario A (do nothing). However, it was only under Scenarios F and H (in which mitigation measures such as stock exclusion were combined with non-uniform discharge caps) that all sites would meet the *E coli* 'bottom line' by

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283. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, p 28 (appendix 7)

284. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, p 28 (appendix 7)

285. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, p 12

286. Cabinet paper, 'Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management', October 2013, pp 12, 26 (appendix 6); Ministry for the Environment, *Southland: Overview of Studies assessing the Potential Impacts of Scenarios for Setting Water Quality Objectives* (Wellington: Ministry for the Environment, 2013), p 43 (Crown counsel, discovery documents (doc D91), p 1847)

287. New Zealand Institute of Economic Research, 'Potential Impacts of Water-Related Policies in Southland on the Agricultural Economy and Nutrient Discharges', May 2013, pp 80–85 (Crown counsel, discovery documents (doc D91), pp 1223–1228)

2037.<sup>288</sup> Similarly, no Southland sites failed the ‘bottom line’ for nitrate toxicity or periphyton under any scenario, although the numbers of sites in the c-band for both measures increased slightly under Scenarios A (do nothing) and B (which had only partial adoption of mitigation measures and the least stringent of the nutrient discharge caps).<sup>289</sup>

The results from the Canterbury studies were less encouraging, for while the current plan proposals for the Selwyn–Waihora catchment zone were consistent with meeting nitrate toxicity bottom lines, it was calculated that a 45 per cent reduction in nitrate leaching was needed for compliance with ‘bottom lines’ in the Hinds catchment, which would come at a projected cost of \$22 million per annum. At the time, the Hinds catchment had accounted for four of the monitored sites within New Zealand not meeting the nitrate toxicity threshold.<sup>290</sup>

Lastly, in the case of the Upper Waikato, the proposed ‘bottom lines’ were not identified to be a problem, as those for ecosystem health were already being met, and there was only one site which failed in terms of *E coli* levels. Instead it was the requirement in the NPS-FM that overall water quality be maintained or improved that posed the difficulty. Estimates put the cost of doing so, and thereby combatting seepage from earlier discharges through the groundwater, at up to \$71 million per year. The ramifications of implementing the NOF in the Upper Waikato were somewhat moot though, as the Crown had already committed to the long-term swimmability and mahinga kai objectives included in the Waikato River Vision and Strategy as part of its Waikato River Treaty settlement in 2010.<sup>291</sup>

In addition to the draft RIS on the proposed amendments to the NPS-FM, there was a second RIS on objectives and limit setting. The first question to be addressed by both was whether there was a problem with the status quo, and if so, whether regulation was needed, or simply guidance from central government. In answering this question, the officials drew extensively on a 2012 review of the experience of councils who were starting to implement the NPS-FM 2011. They found that the interpretation of the objectives in the NPS-FM was uncertain. Much was also made of the tremendous cost and delay caused to all parties when planning matters concerning fresh water had ended up being settled by the Environment Court.<sup>292</sup>

288. Cabinet paper, ‘Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management’, October 2013, p 26 (app 6); Ministry for the Environment, *Southland*, pp 43, 96 (Crown counsel, discovery documents (doc D91), pp 1847, 1900)

289. The nutrient discharge caps in scenario B were 45–60 kilograms of nitrogen per hectare, and 1.5–2.0 kilograms of phosphorus per hectare: Ministry for the Environment, *Southland*, pp 43, 96 (Crown counsel, discovery documents (doc D91), pp 1847, 1900)

290. Cabinet paper, ‘Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management’, October 2013, pp 12–13, 27 (app 6)

291. Cabinet paper, ‘Freshwater Reform: Consultation on Amendments to the National Policy Statement for Freshwater Management’, October 2013, p 13

292. Ministry for the Environment, ‘Regulatory Impact Statement: Fresh Start for Fresh Water – Objective and Limit Setting’, December 2013, pp 3–6; Ministry for the Environment, ‘Draft Regulatory Impact Statement: Proposed amendments to the National Policy Statement for Freshwater Management 2011’, November 2013, pp 4–6

The introduction of the NOF via regulation was thus presented as optimal, in that it provided a consistent and enforceable process for implementing freshwater management, while also allowing for a degree of stakeholder participation in the choice of optional objectives and target bands. It was also observed that the NOF was backed by a common pool of scientific research. Importantly, this would save councils the time and expense of carrying out research specific to their area, and, when compared to the status quo, would also help to promote greater recognition of Māori values in freshwater management, and in standardising freshwater accounting and monitoring regimes.<sup>293</sup>

## 5.6 THE NPS-FM 2014

### 5.6.1 The Crown's proposed amendments to the NPS-FM 2011

In November 2013, Cabinet agreed to release the discussion document *Proposed Amendments to the National Policy Statement for Freshwater Management*. The RIS and Section 32 Evaluation were released at the same time. According to its foreword, the discussion document was 'another critical milestone in the Government's drive to obtain the very best value from our water resources while safeguarding water quality, to provide for the well-being of all New Zealanders and to recognise all of the values we hold for fresh water.'<sup>294</sup>

Drawing on many of the same arguments which had been raised in the draft RIS, the executive summary stated that the implementation of the present NPS-FM had been compromised by decisions being made with insufficient information, a lack of clarity among councils as to how to manage water to protect community and iwi values, the unnecessary duplication of scientific research, a lack of national consistency in defining minimum water quality states, and the poor articulation of tangata whenua values. The proposed amendments, of which the NOF was the main focus, were presented as a means of addressing these problems, as well as being a continuation of the freshwater reforms suggested by the reports of the Land and Water Forum.<sup>295</sup>

The amendments were summarised as follows:

1. Requirement to account for water takes and all sources of contaminants (section CC in the proposed NPS-FM)
2. Addition of the NOF including:

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293. Ministry for the Environment, 'Regulatory Impact Statement: Fresh Start for Fresh Water – Objective and Limit Setting', December 2013, pp12–15; Ministry for the Environment, 'Draft Regulatory Impact Statement on Proposed Amendments to the National Policy Statement for Freshwater Management 2011', November 2013, pp15–19, 24–26, 31–32

294. New Zealand Government, *Proposed Amendments to the National Policy Statement for Freshwater Management 2011: A Discussion Document* (Wellington: Ministry for the Environment, 2013), p3

295. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p4

- ▶ a menu of values that are important to communities and tāngata whenua (appendix 1 in the proposed NPS-FM)
  - ▶ the associated attributes and attribute states incorporating the science associated with setting freshwater objectives based on the chosen values (appendix 2 in the proposed NPS-FM)
  - ▶ a process for how to use the NOF tables in setting freshwater objectives (policy CA1 in the proposed NPS-FM).
3. Compulsory values of ecosystem health and human health for secondary contact (policy CA1 and appendix 1 in the proposed NPS-FM).
  4. 'National bottom lines' for the compulsory values (section CA and appendix 2 in the proposed NPS-FM).
  5. An exceptions framework (policy CA2 in the proposed NPS-FM).
  6. Clearer articulation of tāngata whenua values for fresh water (preamble and appendix 1 in the proposed NPS-FM).<sup>296</sup>

Each of these amendments, together with proposals for monitoring, was discussed in turn. In the case of the NOF, the objective and limit setting process were described in detail for the first time. The version of the NOF in *Freshwater reform 2013 and beyond* had proposed the setting of objectives (and limits) for each water body but the consultation document introduced a new variable: the 'freshwater management unit'. A freshwater management unit (FMU) could be a catchment, a number of catchments, or part of a catchment, depending on a council's choices as to the appropriate scale for managing freshwater bodies.<sup>297</sup>

The objective setting process was described as follows:

- ▶ consider all the values or uses that the freshwater management unit should be managed for (eg, mahinga kai, swimming, irrigation), using the set of national values in the NPS-FM as a starting point, and choose the desired values
- ▶ identify the appropriate attributes (eg, *E coli*, periphyton, dissolved oxygen, etc) that must be managed to achieve the chosen value. Some may be in the NPS-FM, and the council may have to identify others that are not yet in the NPS-FM (eg, sediment, heavy metals, pH, temperature, invertebrates, etc)
- ▶ choose a desired attribute state for the attributes in the NPS-FM
- ▶ develop numeric freshwater objectives for the freshwater management unit at the chosen attribute state, and for any other relevant attributes that are not in the NPS-FM. Numeric freshwater objectives for each attribute allow councils to develop limits to achieve the freshwater objectives. If numeric freshwater objectives cannot be developed, then set narrative freshwater objectives
- ▶ as part of an iterative process, consider the following matters when developing freshwater objectives:

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<sup>296</sup>. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p 13

<sup>297</sup>. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 14–15

## 5.6.1

- the current and anticipated future state of the freshwater management unit on the basis of past and current resource use
- the spatial scale at which freshwater management units are defined (ie, a single water body, part of a water body, or a group of similar water bodies)
- the limits that would be required to achieve the freshwater objective
- any choices between the values that the formulation of freshwater objectives and associated limits would require (ie, balancing divergent values or uses)
- any implications of freshwater objectives (and the associated limits) for resource users and communities, including the actions they take, their investments, ongoing management changes and social and economic outcomes
- the timeframes for achieving the freshwater objectives (to allow for adjustment), including the ability of regional councils to set long timeframes for achieving targets
- such other matters necessary to giving effect to the NPS-FM, including the requirement to maintain or improve the overall quality of fresh water within a region.<sup>298</sup>

Similarly, the discussion of values and attributes documented all the attributes that had been chosen as measures for the two compulsory values (Ecosystem Health and Human Health (secondary contact)), and those being considered in the future in relation to these values and one of the optional values (Mahinga kai). The attributes which the discussion paper said would be developed in the future included sediment in rivers and wetlands, benthic cyanobacteria in rivers, heavy metals, and salt intrusions in groundwater.<sup>299</sup>

The practical implications of the bottom lines of some of the chosen attributes were also described. In relation to nitrate toxicity, for example, it was noted that the bottom line had been set at the nitrate concentration at which one fifth of freshwater species might be expected to experience impaired growth. Tables listing the thresholds for each band for the selected attributes were also listed in an appendix.<sup>300</sup> No comment was made on why primary contact (swimming) was not made the required objective for Human Health, even though this had been called for in numerous submissions in the earlier *Freshwater reform 2013 and beyond* consultation.

The consultation document explained why certain attributes were missing from the proposed NOF, and that further research was needed:

The NOF attribute tables are only partly populated at this stage, with the intention that further additions are made in the future through an amendment to the NPS-FM,

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298. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 18–19

299. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 20–21

300. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 20–21, 69–73

possibly in 2016 and 2019. Scientists have agreed on a number of attributes and associated numbers that can currently be applied nationally for ecosystem health, human health for secondary contact recreation, and contact recreation (eg, swimming). Attributes have only been proposed where the science is well developed and scientists agree that they are applicable nationwide. Councils should also set freshwater objectives for attributes that are not yet in the NOF (eg, sediment, heavy metals, pH, temperature, invertebrates, etc.), as these will be important for safeguarding the life-supporting capacity of fresh water.<sup>301</sup>

In terms of Māori values in the NOF, the ILG wanted to insert Te Mana o te Wai as an overarching principle and objective in the NPS-FM (see chapter 3). In addition, the discussion paper proposed to add Te Mana o te Wai to the NOF as a national value in appendix 1. This would be done by using the titles ‘Te Hauora o te Wai / the health and mauri of water’ for the compulsory value Ecosystem Health, and ‘Te Hauora o te Tangata / the health and mauri of the people’ for Human Health. These two compulsory values would be described as contributing to Te Mana o te Wai in their respective headings in appendix 1.<sup>302</sup> This proposal would have gone some way to allay the concerns expressed by Māori in the 2013 consultation on *Freshwater reform 2013 and beyond* (see section 5.5.5). Iwi and other Māori bodies had called for Māori values to be made compulsory in the NOF.

In addition to the compulsory values, the menu of optional values would include mahinga kai (which some Māori submitters in 2013 had wanted to be compulsory), and wai tapu (‘the places where rituals and ceremonies are performed’).<sup>303</sup> We note that the iwi science panel had recommended that Māori access to relevant sites be included as a part of these two values.<sup>304</sup> Accessibility (physical and legal) was included in the proposed description of wai tapu but not of mahinga kai, although it was not actually included in the NPS-FM 2014.<sup>305</sup>

Another aspect of the NOF proposal was the introduction for the first time of exceptions to the limits which councils were required to set under the NPS-FM 2011. The introduction of compulsory bottom lines for Ecosystem Health and Human Health raised the question: what if freshwater management units in band D could not be improved to meet the bottom line? As we discussed in section 5.5.3, the Land and Water Forum had recommended that exceptions be allowed. The Crown acted on that advice, proposing exceptions ‘where it is not feasible or possible to

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301. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p 19

302. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 29–30, 65

303. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 66–67

304. Taylor, answers to questions in writing (doc F4(c)), p 7

305. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p 67

improve water quality to the required level.<sup>306</sup> Councils would be able to include two kinds of exceptions in their regional plans: natural contamination (for example, from birds); and the irreversible effects of historical activities. The Crown also proposed to allow exceptions for infrastructure like hydro dams, where ‘most or all of the water’ was taken from a stretch of river. Infrastructure exceptions would be decided by the Crown, not regional councils. The process for that would be an amendment to the NPS-FM, inserting the relevant infrastructure and FMU in a new appendix of the NPS-FM (appendix 3). Further consultation would take place before any amendments were made to include specific infrastructure in the appendix.<sup>307</sup>

## 5.6.2 Consultation on the proposed amendments

### 5.6.2.1 Māori responses to the Crown’s proposals

The public notification of the proposed amendments was followed by a consultation period running through to 4 February 2014. Fourteen consultative hui were held in regional centres between 15 November and 16 December 2013. These were attended by a combined total of 214 people.<sup>308</sup> In terms of written submissions, some 6426 form submissions and 725 individual submissions were received by the Crown, including 35 individual submissions from Māori organisations.<sup>309</sup>

As had been the case with *Freshwater reform 2013 and beyond*, there was broad support among Māori organisations for the principles and processes set out in the NOF.<sup>310</sup> However, few of the submissions were satisfied with the proposed compulsory values.<sup>311</sup> Ecosystem Health seemed essentially to be a restatement of the requirement in objective A1 that the ‘life-supporting capacity, ecosystem processes and indigenous species’ should be safeguarded. The benchmark for Human Health was making water bodies safe for secondary contact (wading and boating). The ILG’s view was that primary contact (swimming) should be the bottom line, as Hannah Rainforth advised the hui at Whanganui. The ILG was, however, prepared to accept a long transition time.<sup>312</sup> Most of the submissions adopted this

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306. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p 27

307. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, pp 27–28

308. Aggregated hui notes (Crown counsel, document bundle (doc F14(a)), p 450

309. New Zealand Government, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions* (Wellington: Ministry for the Environment, 2014), p 8

310. See, for example, the submissions of the Maniapoto Māori Trust Board, Te Rūnanga o Ngāi Tahu, Te Rūnanga o Ngāti Kūia, and the Federation of Māori Authorities (Crown counsel, document bundle (doc F14(a)), pp 507, 525–526, 589 & 703. The only outright opposition to the NOF from Māori submitters seems to have come from the related submissions of Ngā Marae o Heretaunga, Mangaroa Marae, and Te Roopu Kaitiaki o te Wai Maori (Crown counsel, document bundle (doc F14(a)), pp 510, 701 & 750

311. Submissions of Ngāti Whatua o Kaipara, Raukawa Charitable Trust, and Taiao Raukawa Environmental Resource Unit (Crown counsel, document bundle (doc F14(a)), pp 608, 650, 682)

312. Aggregated hui notes (Crown counsel, document bundle (doc F14(a)), p 473)



position.<sup>313</sup> In this regard, it is worth noting that a speaker at the Hamilton hui cited the Crown's commitment, under the terms of the Waikato River Vision and Strategy, to make the length of the Waikato River swimmable within 20 years. This commitment was also referred to in the submission of the Raukawa Charitable Trust.<sup>314</sup> Some of the submissions advocating for the primary contact bottom line also called for Mahinga kai to be made a compulsory rather than optional value.<sup>315</sup> A few submissions went still further by arguing that making water safe to drink should be the aspiration of the Human Health value.<sup>316</sup> One submission, from Ngāti Kahungunu, requested that Natural Character be made a compulsory value as well.<sup>317</sup>

Among Māori submitters, opinion was more divided about the status and definition of Te Mana o te Wai (or as Ngāti Whatua preferred it, Te Mauri o te Wai).<sup>318</sup> Several submissions requested that it (or at least 'Tangata Whenua' values) be made a compulsory value in the NOF, and/or be added to Objective A1.<sup>319</sup> The argument offered by these submissions was that formalising it in this way would compel councils to recognise Māori water quality concerns in their freshwater management decisions.<sup>320</sup> Other submissions, however, preferred the option favoured by the ILG, which considered that it should be made an overarching value or national outcome.<sup>321</sup> The question about how it might be defined, and the role that councils and the Environment Court might play in interpreting it, was also one that was raised by several speakers at the hui.<sup>322</sup>

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313. Te Rūnanga o Ngāi Tahu, Ngāti Rangī, the Raukawa Charitable Trust, and Waikato Tainui Te Kauhanganui, among others, all backed the later adoption of primary contact (swimming) as a compulsory value ((Crown counsel, document bundle (doc F14(a)), pp 527, 625, 650 & 793), whereas other submitters such as Ngāti Whātua Ōrākei Whai Maia, the Ngāti Wai Trust, and Te Ao Marama were not prepared to wait (Crown counsel, document bundle (doc F14(a)), pp 612, 619–620 & 721).

314. Aggregated hui notes, and submission of the Raukawa Charitable Trust ((Crown counsel, document bundle (doc F14(a)), pp 473 & 643)

315. Submissions of Ngāti Kahungunu, Ngāti Whātua Ōrākei Whai Maia, Ngāti Rangī, Tapuika Iwi Authority, and Te Rūnanga o Ngāti Whātua (Crown counsel, document bundle (doc F14(a)), pp 576, 612, 621, 713 & 762)

316. Submissions of Te Rūnanga o Ngāti Whakaue ki Maketu, Te Ao Marama, and Waahi Pa Marea (Crown counsel, document bundle (doc F14(a)), pp 676, 721 & 770)

317. Submission of Ngāti Kahungunu (Crown counsel, document bundle (doc F14(a)), p 576)

318. Submissions of Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei Whai Maia, and Te Rūnanga o Ngāti Whātua (Crown counsel, document bundle (doc F14(a)), pp 609, 613 & 760)

319. For example, the submissions of the Federation of Māori Authorities and Te Arawa Lakes Trust sought to have Te Mana o te Wai made a compulsory value, the Maori Party and Taiao Raukawa submissions sought to include it in Objective A1, while the Maniapoto Māori Trust Board and Ngāti Koroki Kahukura advocated for both changes (Crown counsel, document bundle (doc F14(a)), pp 508, 671, 683, 689, 704, 730)

320. Submissions of Maniapoto Māori Trust Board, Māori Party, and the Tapuika Iwi Authority (Crown counsel, document bundle (doc F14(a)), pp 508–509, 692–693 & 715)

321. Submissions of Te Rūnanga o Ngāi Tahu, Te Rūnanga o Ngāti Kuia, Ngāti Rangī, Raukawa Charitable Trust, and Waikato Tainui Te Kauhanganui (Crown counsel, document bundle (doc F14(a)), pp 530, 596, 622, 646–647, 786)

322. Aggregated hui notes (Crown counsel, document bundle (doc F14(a)), pp 456–458)

Aside from the widely expressed view that the wadeable ‘bottom line’ for the Human Health compulsory value was too low, the main complaint of submitters in terms of attributes was that several important indicators of water quality had been left out of the NOF. In particular, they referred to the omission of:

- ▶ the quantity of sediment;
- ▶ the macroinvertebrate diversity (as measured by the Macroinvertebrate Community Index (MCI)); and
- ▶ dissolved oxygen concentrations (other than those proximate to point-source discharges).<sup>323</sup>

A smaller number of submissions had also advocated for the inclusion of cultural health indicators within the NOF.<sup>324</sup> The discussion document had made it clear, however, that more attributes could be added over time. Māori submissions were split on the matter, with some favouring the implementation of an unfinished NOF now, while others advocated delaying its implementation to some future date.<sup>325</sup>

Several submissions had also repeated the concern from the March 2013 consultation that there was a danger of councils using ‘bottom lines’ as default management levels.<sup>326</sup> The Crown’s response to this concern, as explained at the consultative hui at Whangarei, was that councils were still obliged (by objective A2) to ensure that overall water quality was ‘maintained or improved’.<sup>327</sup> This ostensible safeguard, however, had itself come in for considerable criticism from submitters, who worried not just that averaging of ‘unders and overs’ would obscure ongoing water degradation in some places,<sup>328</sup> but also that considerable decline could happen within water quality bands.<sup>329</sup>

We note that the NOF reference group had recommended amending the NPS-FM to restrict ‘maintain or improve’ to FMUs, not to whole regions. It had also recommended that, for each FMU, ‘maintain’ be defined as keeping within an attribute band and ‘improve’ as progressing up to the next band. For this to be effective, it would also require narrower bands than those proposed by the Crown, which Mr Taylor pointed out were too broad, and allowed water quality to decline within a band. These recommendations were not accepted by the Crown.<sup>330</sup>

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323. See, for example, submissions of Te Rūnanga o Ngāi Tahu, Te Rūnanga o Ngāti Kūia, and Te Wai Māori Trust (Crown counsel, document bundle (doc F14(a)), pp 526, 589, 789

324. Submissions of Maniapoto Māori Trust Board, Ngāti Koroki Kahukura, Te Rūnanga o Toa Rangatira, Waahi Pa Marae (Crown counsel, document bundle (doc F14(a)), pp 503, 664, 685, 768

325. The submissions of Ngāti Rangī, Taiao Raukawa, and Tapuika Iwi Authority all favoured delayed implementation ((Crown counsel, document bundle (doc F14(a)), pp 624, 681, 710), while among those submissions favouring immediate implementation were those of Rangitane o Tamaki nui a Rua, Ngāti Koroki Kahukura, and the Waahi Pa Marae ((Crown counsel, document bundle (doc F14(a)), pp 637, 665, 769

326. See, for example, submissions of the Maniapoto Māori Trust Board, Māori Party, Te Arawa Lakes Trust (Crown counsel, document bundle (doc F14(a)), pp 502, 699, 730)

327. Aggregated hui notes (Crown counsel, document bundle (doc F14(a)), p 524)

328. See, for example, submissions of Ngāti Kahungunu, Ngāti Rangī, and Te Ao Marama (Crown counsel, document bundle (doc F14(a)), pp 573, 623, 724)

329. Submission of Te Rūnanga o Ngāi Tahu (Crown counsel, document bundle (doc F14(a)), p 524)

330. Taylor, brief of evidence (doc F4), p 14; transcript 4.1.4, pp 627–628

About a third of the submissions from Māori groups also addressed the question of what circumstances, if any, justified exceptions to the NOF's 'bottom lines'. A few iwi submitters reluctantly accepted that exceptions may be needed for historical damage or the effects of existing infrastructure.<sup>331</sup> The prevailing view, however, was that neither should be tolerated as justifications for continued poor water quality.<sup>332</sup> Iwi were more accommodating when it came to exceptions where water quality was below the bottom line because of natural causes, although they specified that the 'natural' causes should not have occurred as a result of human activity – for example, birds all congregating on one water body because the others had been drained.<sup>333</sup> A smaller number of submissions from Māori groups had responded to the question of transitional provisions. Almost all opposed the staggering of compliance with 'bottom lines'.<sup>334</sup> In terms of the timeframe for implementation, they all sought that the NPS-FM be implemented sooner. A number asked that the deadline for councils to implement the NPS-FM be brought forward to 2020.<sup>335</sup>

It was clear from these submissions that Māori sought more stringent water quality standards, and a significantly shorter time frame for them to be implemented, than the Crown had proposed for the NPS-FM in 2014.

### 5.6.2.2 Submissions from stakeholders and the general public

In respect of submissions in general, there was wide support for including the NOF in the new NPS-FM, and for making Ecosystem Health and Human Health compulsory values.<sup>336</sup> However, the majority of submissions had opposed secondary contact (wading) as the basis for the Human Health bottom line, with the favoured alternative being primary contact (swimming).<sup>337</sup> Concerns had also been expressed about the levels at which bottom lines had been set for the Ecosystem Health attributes, and about the absence of some measures from the NOF, such as macroinvertebrate populations and sediment. Opponents of the nitrate 'bottom

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331. See the submissions of the Maniapoto Māori Trust Board, Ngāti Rangī, Ngāti Koroki Kahukura, Te Rūnanga o Ngāti Whakaue ki Maketu (Crown counsel, document bundle (doc F14(a)), pp 507, 622, 668–670, 677)).

332. See, for example, the submissions of Te Rūnanga o Ngāi Tahu, Tapuika Iwi Authority, and Te Wai Māori Trust (Crown counsel, document bundle (doc F14(a)), pp 528, 714, 772).

333. See, for example, the submissions of the Maniapoto Māori Trust Board, Te Rūnanga o Ngāi Tahu, Ngāti Whātua Ōrākei Whai Maia, and Taiao Raukawa (Crown counsel, document bundle (doc F14(a)), pp 506, 516, 612, 682).

334. See, for example, the submissions of Te Rūnanga o Ngāi Tahu, Te Rūnanga o Ngāti Kuia, The Proprietors of Taheke 8c (Crown counsel, document bundle (doc F14(a)), pp 516, 590, 631).

335. See, for example, the submissions of Ngāti Kahungunu, Taiao Raukawa, and the Te Arawa Lakes Trust (Crown counsel, document bundle (doc F14(a)), pp 570, 679, 730).

336. Cabinet paper, 'Freshwater programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014], appendices, p 2 (Crown counsel, sensitive discovery documents (doc D92), p 1624). The Cabinet paper date is derived from another copy which is missing its appendices (see Crown counsel, sensitive discovery documents (doc D92), p 168).

337. Ministry for the Environment, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, pp 8–9

line', for example, had observed that the proposed level was around 10 times the median value in the Lower Waikato River.<sup>338</sup>

Issues of interpretation had also been highlighted by the Parliamentary Commissioner for the Environment, who worried that localised or seasonal effects might be missed or obscured if the freshwater management units were too large, and questioned whether councils could genuinely balance out a deterioration in one measure and an improvement in another when assessing whether overall quality had been improved. To this end, she recommended that 'maintaining or improving' be defined as attribute measures within an FMU as being no worse than they had been previously. The commissioner was also frustrated that the NOF did not go far enough 'to address the most widespread, pervasive and immediate pressure – rapidly increasing nutrient loads from land use change'.<sup>339</sup>

The remaining elements of the NOF had garnered varying levels of support, with submissions backing the need for both the proposed freshwater accounting regime and the need for monitoring plans, whereas there were mixed views on whether exceptions should be granted (where natural processes or infrastructure were contributing to water quality levels which were non-compliant), and on whether transitional provisions should be allowed for those waterbodies whose conditions were already below bottom lines. Most submitters who accepted a need for exceptions and/or transitional provisions had done so on the basis that they were only used sparingly.<sup>340</sup> Apart from the NOF, the other main proposal was the insertion of Te Mana o te Wai, and in its case there was little consensus among general submitters as to how it should be reflected within the NPS-FM.<sup>341</sup>

### 5.6.3 The Crown's decisions on the proposed amendments

Two months after the consultation finished, officials made recommendations to the Minister for the Environment on any changes that seemed necessary. We have already discussed the decisions that were made about Te Mana o te Wai in chapter 3.

Most of the officials' recommendations resulted in clarifications of existing policy rather than policy revisions. When it came to the question of a Human Health bottom line, officials had recommended against making it primary contact (swimming). Cabinet agreed on the grounds that it 'would not be technically

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338. Ministry for the Environment, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions*, p 9; submission of Parliamentary Commissioner for the Environment, 'Proposed Amendments to the National Policy Statement for Freshwater Management', February 2014, p 3, <https://www.pce.parliament.nz/media/1270/pce-nof-2014.pdf>

339. Submission of Parliamentary Commissioner for the Environment, 'Proposed Amendments to the National Policy Statement for Freshwater Management', February 2014, pp 5–7, 10

340. Ministry for the Environment, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions*, pp 44–47

341. Cabinet paper, 'Freshwater programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014], appendices, p 4 (Crown counsel, sensitive discovery documents (doc D92), p 1626)

possible' to have a swimming bottom line, and 'the costs would be significant'.<sup>342</sup> Nevertheless, as a compromise, the safe swimming threshold for *E coli* was made one of the *E coli* band boundaries, thereby allowing the Crown to state that the single attribute table provided 'a scale for recreation from wading through to swimming'.<sup>343</sup>

The target date for implementing the NPS-FM was brought forward from 2030 to 2025, although councils could seek an extension through to 2030 if they could show that the earlier date was impractical or would lead to poorer quality decision-making.<sup>344</sup>

The remaining changes to the proposed NPS-FM in the consultation document were all of a technical nature, although one omission from the document's proposed attribute tables had important ramifications for water quality in rivers. This was the added instruction that three years of monthly sampling would be needed before rivers could be graded according to their levels of periphyton (chlorophyll-a) and planktonic cyanobacteria. Six regional councils had already imposed limits on periphyton which were closer to the proposed B/C band boundary than the bottom line. But for those councils which were not actively monitoring periphyton already, it would take three years to establish in what condition nitrate contamination (and ensuing periphyton growth) had left their waterways.<sup>345</sup>

There were also alterations to the statistical measurements being made. For ammonia, the ninety-fifth per centile was replaced by an annual maximum, given the lethal risk to aquatic wildlife that sudden spikes in ammonia levels might pose. Conversely, the two-year average for planktonic cyanobacteria was replaced by the eightieth percentile, because of concerns that the measure might not reflect prolonged periods of levels being harmful to human health. Also, its application was limited to lakes and lake-fed rivers to reflect the data on which it was based. On the basis of advice from the science review panel, a distinction was also made between

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342. Cabinet paper, 'Freshwater Programme: Amendments to the National Policy Statement for Freshwater Management', p 7 (Crown counsel, sensitive discovery documents (doc D92), p 1610)

343. Ministry for the Environment, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions*, pp 34–36; Ministry for the Environment, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and the Minister for the Environment's Decision* (Wellington: Ministry for the Environment, July 2014), p 13; Cabinet paper, 'Freshwater Programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014], p 7

344. Ministry for the Environment, *National Policy Statement for Freshwater Management 2014: Summary of Recommendations and the Minister for the Environment's Decision*, p 10; New Zealand Government, *National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment, 2014), p 19 (Workman, papers in support of brief of evidence (doc F6(a)), p 19)

345. Ministry for the Environment, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions*, p 36; New Zealand Government, *Proposed Amendments to the National Policy Statement for Freshwater Management 2011: A Discussion Document*, pp 72–73; 'National Policy Statement for Freshwater Management 2014, 4 July 2014, *New Zealand Gazette*, no 71, pp 2011, 2016; Ministry for the Environment, 'Proposed Amendments to the National Policy Statement for Freshwater Management 2011: Section 32AA Evaluation', revised draft, [May 2014], pp 33–34 (Crown counsel, discovery documents (confidential) (doc D92), pp 1784–1785)

productive and non-productive rivers in the measurement of chlorophyll-a, on account of the natural growths of periphyton in the former. Some redundancy was also removed from the attributes by removing the nitrate toxicity measure relative to lakes (as lakes already had a total nitrogen measure).<sup>346</sup>

In the wake of the consultation, decisions were also made on two other potential NOF elements. The first was on the use of the MCI. In May 2014, Cabinet had agreed that officials should investigate whether it could be made a mandatory indicator in the future. As a result, the only mention of macroinvertebrates in the NPS-FM was as a matter to be taken account of in the definition of Ecosystem Health.<sup>347</sup> The other loose end from the NPS-FM, apart from attributes that needed more research, was the question of what exceptions needed to be granted in terms of water quality (or in other words, what should go in appendix 3). No exceptions for water bodies on the basis of historic uses had been suggested in the consultation, and so this provision was removed. The Minister also decided that more consultation was needed before a list of justified infrastructure exceptions could be compiled. Appendix 3 was left empty.<sup>348</sup>

Cabinet went on to approve the final text of the NPS-FM on 16 June 2014, and it was duly gazetted on 4 July 2014. The insertion of the NOF resulted in three new sections and three appendices, in addition to the new appendix 3 for significant infrastructure. The sections were CA (NOF), CB (monitoring plans), and CC (accounting for freshwater takes and contaminants). The appendices set out the menu of national values (appendix 1), attribute tables (appendix 2), and transition times for the purposes of policy CA4, which allowed a regional council to set exceptions to national bottom lines for a specified period of time.<sup>349</sup>

A diagram appended to the Cabinet paper presented in May 2014 had explained how the new policies contained in these sections were meant to work together:

1. Group all water bodies in their regions into appropriate *freshwater management units* (Policy CA1)
2. Undertake *freshwater accounting* to establish the available resource and the source contaminants entering each freshwater management unit (Policy CC1)
3. Consider all the *values* in the NOF reference tables listed in Appendix 1 (Policy CA2)
4. Using the appropriate attributes for each value in the NOF reference table to formulate *freshwater objectives* (Appendix 2)

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346. Ministry for the Environment, *Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions*, pp 24–27, 36

347. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, pp 20, 30 (Workman, papers in support of brief of evidence (doc F6(a)), pp 20, 30)

348. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 33 (Workman, papers in support of brief of evidence (doc F6(a)), p 33)

349. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, p 2 (Workman, papers in support of brief of evidence (doc F6(a)), p 2)

5. Consider the impacts (*environmental and economic*) and choose either, a long timeframe, exception or transitional arrangement where bottom lines are not met (Policy C A1(f))
6. Set freshwater objectives for two compulsory values to achieve the NPS objectives of safeguarding Ecosystem Health and Human Health and any other national values selected (Policy A1 and B1)
7. Establish a monitoring plan for the purpose of monitoring progress towards freshwater objectives (Policy C B1).<sup>350</sup>

The addition of Human Health as a compulsory value was further reflected in alterations to objective A1, and policy A4 (which concerned interim limits), and the revised implementation was set out in a new policy E1.<sup>351</sup> Otherwise, the objectives and policies in sections A to D were more or less unchanged by the 2014 amendments. The NOF had simply been grafted onto the NPS-FM 2011, a statement about Te Mana o te Wai had been added, and a policy of exceptions for significant infrastructure had been introduced.

#### **5.6.4 Did the Crown establish adequate controls and standards in the NPS-FM 2014?**

##### **5.6.4.1 The claimants' concerns**

As will be clear from the previous sections, the consultation showed that the ILG and Māori submitters had a number of concerns about the proposed amendments. Their views included the following points:

- ▶ The compulsory value of Human Health was set too low – it should require water quality adequate for swimming or even drinking, not secondary contact;
- ▶ Te Mana o te Wai and other Māori values, including mahinga kai, should be made compulsory values in the NOF, which would in turn require attributes for the setting of compulsory national bottom lines for those values;
- ▶ Crucial attributes were missing from the NOF, especially sediment, macroinvertebrates, dissolved oxygen, and cultural indicators; and
- ▶ The requirement to maintain or improve water quality across a region allowed for water bodies to be degraded, and may result in bottom lines becoming default limits (where higher quality water was allowed to degrade until it reached the bottom line).
- ▶ The exceptions policy had to be very limited in its scope, and the owners of infrastructure needed to take responsibility for whatever could be done to improve water quality affected by that infrastructure.

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350. Cabinet paper, 'Freshwater Programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014], appendix 6. This cabinet paper was published on the Ministry for the Environment website but with appendix 1 removed.

351. New Zealand Government, *National Policy Statement for Freshwater Management 2014*, pp 9–19, 19 33 (Workman, papers in support of brief of evidence (doc F6(a)), pp 9–10, 19)

## 5.6.4.2

The Crown did not act upon these concerns in its decisions on the NPS-FM 2014. Indeed, Te Mana o te Wai was removed from appendix 1 altogether (see section 5.6.3). Dr Adele Whyte, chief executive of Ngāti Kahungunu Inc, who gave evidence on behalf of the claimants, summed up the situation as follows:

We do not consider the issues raised in our submissions relating to the National Policy Statements for Freshwater have been addressed. They do not seek to maintain, enhance or restore water quality and quantity, and do not provide for safe and reliable drinking water across our entire takiwa. We consider that if the direction of the National Policy Statements for Freshwater fails to fulfil the Crown's obligations in respect of the Treaty of Waitangi then regional councils within our takiwa are not being satisfactorily directed to manage freshwater resources to protect water quality and quantity in the spirit of the Treaty of Waitangi.

The inadequate direction provided by the Crown in its National Policy Statements for Freshwater places a significant pressure on our whānau, hapū and iwi to continually monitor and confront the practices, policy setting and decisions made by our regional councils. Ngāti Kahungunu Iwi continues to spend its own resources and time to arrest the managed decline in the water quality within our takiwa.<sup>352</sup>

In their evidence and submissions for our inquiry, the claimants and interested parties echoed many of the concerns expressed during the consultation. As we discussed in section 5.2.1, they were highly critical of the NOF. In their view, the bottom lines were too low, crucial attributes were missing, water quality would be allowed to degrade further (including within a band), the exceptions had not been defined, past damage would not be restored, and the long lead-in time would allow further decline in the meantime. In addition, the claimants and interested parties argued that the Crown did not deal adequately with the effects of intensified land use in the NPS-FM and its other freshwater reforms (see section 5.2.1).

**5.6.4.2 Science and policy: the NOF attributes and bottom lines**

In 2014, the Crown's amendments to the NPS-FM were designed to 'assist councils to achieve environmental goals while enabling economic growth.'<sup>353</sup> Cabinet considered that the amendments would meet that objective:

We have carried out economic case studies that indicate economic growth can still be achieved, though in some catchments the future growth opportunities are likely to be reduced or come with higher costs. The majority of water bodies are above national

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352. Adele Whyte, brief of evidence, 7 September 2016 (doc D40), p 6

353. Cabinet paper, 'Freshwater programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014] (Crown counsel, sensitive discovery documents (doc D92), p169)



bottom lines therefore, the impact of bottom lines will be limited to a small number of catchments.<sup>354</sup>

Water quality standards were thus designed and set within the context of not constraining economic growth, or constraining it as little as possible.

Within those parameters, the Crown considered the insertion of the NOF into the NPS-FM as a crucial step to enable the broad prescriptions of the 2011 version to be carried out. As the 2013 consultation document stated, councils were struggling to set limits and were having to duplicate ‘costly scientific effort’. There was no national consistency in ‘defining minimum acceptable states for water quality’.<sup>355</sup> But how successful was the effort to introduce national controls and standards for water quality in the NOF?

Dr Mike Joy, a freshwater ecologist, gave evidence on behalf of the claimants. He argued that the 2014 version of the NPS-FM had serious shortcomings, the principal ones being that the NOF was lacking many of the attributes needed to sustain Human and Ecosystem Health. Further, the water quality benchmarks for the attributes that had been included were lower than some measures previously in use. The effect, he said, would be to permit (and obscure) further deterioration of fresh water.<sup>356</sup> These criticisms were responded to in the evidence of the Crown witnesses, Dr Clive Howard-Williams, chief science adviser – natural resources at NIWA (and Adjunct Professor at the University of Canterbury), and Sheree De Malmanche, manager of the Evidence and Information Team in the Water Directorate at the Ministry for the Environment.

Dr Joy stated in his evidence:

The narrative of the NPS-FM raises ambitious expectations for maintaining or improving freshwater quality, but the numbers and limits prescribed in the NOF are insufficient to achieve them. Rather, they allow for still greater deterioration. And notably most of the parameters previously used to measure the health of freshwaters are not included in the NOF. Thus, instead of supporting the NPS-FM to achieve its goals, the NOF in practical terms does the opposite, permitting further deterioration of our freshwater.<sup>357</sup>

With respect to the make up of the NOF, Dr Joy challenged the restricted use of dissolved oxygen as an attribute for Ecosystem Health, and the complete omission of attributes for water temperature, water clarity, sediment, and the MCI (or

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354. Cabinet paper, ‘Freshwater programme: Amendments to the National Policy Statement for Freshwater Management’, [23 May 2014] (Crown counsel, sensitive discovery documents (doc D92), p169)

355. New Zealand Government, *Proposed amendments to the National Policy Statement for Freshwater Management 2011*, p 4

356. See Mike Joy, brief of evidence, 31 August 2016 (doc D20)

357. Joy, brief of evidence (doc D20), p 45

some alternative bioindicator). In the case of dissolved oxygen, he noted that the Hopelands Road site on the Manawatū River, which had produced extreme variation in dissolved oxygen, was many kilometres from a point source. This meant that confining measurements to immediately below point sources, as was proposed in the NPS-FM 2014, would not reveal the true extent of the problem.<sup>358</sup>

Dr Joy was unconvinced that insufficient scientific knowledge was as much a barrier to inclusion in the NOF as the Crown had suggested (in the discussion paper proposing the amendments). Citing research papers from the 1990s, he asserted that enough was already known about the effects of water temperature, as well as noting that considerable regional and central government resource had been put into developing the national guidelines for sediment in rivers which the Cawthron Institute issued in 2011.<sup>359</sup> As for the MCI, he described this as a 'well-accepted and nationally-used bioindicator of ecosystem health'.<sup>360</sup>

Dr Joy also criticised the adoption of chlorophyll-a as an attribute instead of percentage cover of periphyton (slime), arguing that this choice undermined community monitoring efforts (as well as requiring unnecessary expense), and was less indicative of effects on ecosystems than periphyton cover. To this end, he recommended the use of a new combined guideline, the PeriWCC.<sup>361</sup> Lastly, he noted that the attributes had no measure of physical impediments to ecosystem processes. He was especially concerned about barriers to fish migration for indigenous species.<sup>362</sup>

When it came to the Human Health value, Dr Joy identified another attribute that was missing, namely benthic cyanobacteria in rivers (although concentrations were being measured in lakes). Benthic cyanobacteria are toxic algae located on river beds, which have killed dogs and horses. Again, Dr Joy suggested that scientific data was available for an attribute, pointing to guidelines issued in 2009 – this time jointly developed by the Ministry for the Environment and Ministry of Health – which had not been adopted in the NOF.<sup>363</sup>

Finally, Dr Joy pointed out that the attributes in the NOF only covered lakes and rivers, and there were no attributes for aquifers, especially in light of their connectedness to surface water bodies. Nor are there any attributes for estuaries.<sup>364</sup> He argued:

Effects on estuaries from the NOF attributes applied to rivers should be a key management consideration, given the crucial role estuaries play in assimilating nutrients, sediment and other contaminants, as pathways and nurseries for native fish and as the interface between freshwater and coastal ecosystems.<sup>365</sup>

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358. Joy, brief of evidence (doc D20), pp 7–9, 45–57

359. Joy, brief of evidence (doc D20), pp 48–49

360. Joy, brief of evidence (doc D20), p 49

361. Joy, brief of evidence (doc D20), p 50

362. Joy, brief of evidence (doc D20), p 48

363. Joy, brief of evidence (doc D20), pp 32, 47–48

364. Joy, brief of evidence (doc D20), p 51

365. Joy, brief of evidence (doc D20), p 51

The Crown's position in our inquiry was that the NOF only contained attributes where the scientific evidence showed clear thresholds, that the scientific underpinnings of the NOF were sound, and that the Crown's policy decisions on the NOF were properly informed by expert advice via the NOF reference group. If the scientific knowledge did not allow for clear thresholds, then potential attributes were set aside for further development. Where the NOF did not include attributes, it would be up to regional councils to develop numeric tables and thresholds for their regions.<sup>366</sup> Crown counsel submitted: 'Practical issues of implementation, and issues of policy balances to be struck, are valid considerations in all regulation by the Crown. However, the NOF process shows scientific engagement properly informing policy development.'<sup>367</sup>

Dr Clive Howard-Williams, the chair of the Science Review Panel, responded to Dr Joy's evidence. Importantly, he 'agreed with Dr Joy on his list of attributes missing from the NOF and that Government direction is required on how these should be managed'. On the other hand, he rejected the assertion that attributes had been ignored or discounted, stating that 'all the attributes listed by Dr Joy have been, or are being, actively considered for the NOF as it develops further.'<sup>368</sup>

In relation to percentage of periphyton cover and chlorophyll-a, Dr Howard-Williams stated:

Biomass as Chlorophyll-a per unit area was chosen as the metric because it is a more accurate measure of abundance than percentage cover and it was the only measure of periphyton where quantitative relationships had been developed between environmental factors (flow, nutrients) and periphyton that might allow for management considerations.<sup>369</sup>

In his view, the Ministry's draft guide to the new NPS-FM addressed Dr Joy's concern on this point, and also the issue of dissolved oxygen. It advised regional councils of the need for continuous oxygen monitoring to counter the problem of diurnal variation.<sup>370</sup>

When it came to benthic cyanobacteria, as well as the lack of attributes relating to estuaries, Dr Howard-Williams accepted Mike Joy's criticisms, but argued these areas were still the subject of ongoing work, with a core component being the development of attributes for sediment.<sup>371</sup>

With respect to the use of a macroinvertebrate index (or some equivalent), Kenneth Taylor advised that there was a strong majority in the NOF reference group for its inclusion in the NOF, but it was 'not taken up, either by officials or at a political level.'<sup>372</sup> Dr Howard-Williams commented that 'in 2015 the Science Review

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366. Crown counsel, closing submissions (paper 3.3.46), pp 72-73

367. Crown counsel, closing submissions (paper 3.3.46), p 72

368. Howard-Williams, brief of evidence (doc F5), pp 9-10

369. Howard-Williams, brief of evidence (doc F5), p 10

370. Howard-Williams, brief of evidence (doc F5), p 10

371. Howard-Williams, brief of evidence (doc F5), p 11

372. Taylor, brief of evidence (doc F4), p 13

Panel agreed that there should be further work on the use of macroinvertebrates as indicators of ecosystem health given their importance in freshwater ecosystems.<sup>373</sup> We discuss this further in later sections of this chapter.

In respect of attributes for wetlands and aquifers, Dr Howard-Williams noted that the science review panel had considered the information that was available, and ‘did not believe that there was sufficient information to proceed at that time with the immediate development of attributes for wetlands, groundwater and estuaries’. He agreed with Dr Joy that attributes would be required for the NOF.<sup>374</sup>

With so many clearly necessary attributes missing from the NOF, and – as Dr Joy pointed out – relevant national guidelines for some of those attributes in existence, the question has to be asked: why was such an extremely cautious approach taken? One point to note is that the final decisions on attributes were not made by the science review panel or even by the reference group, but by officials and Ministers who were responsible for striking what Crown counsel called ‘policy balances’ (see above). Another point was made by Kenneth Taylor, who noted that the reference group discussed issues with the science review panel, and emphasised the need for science that was ‘robust and defensible’. In other words: ‘would the breakpoints and bottom lines recommended by the experts stand up to technical scrutiny in a formal regional council hearing process?’<sup>375</sup> Clive Howard-Williams underlined this point, stating:

First, to be clear, the ANZECC Guidelines are guidelines not regulations. Councils are not required to have any regard to them. As a result the numbers in the Guidelines have not had to be subject to the same level of scrutiny that is statutorily required for the development of regulations.<sup>376</sup>

The focus on only using attributes with clear thresholds in the NOF must have come partly from the knowledge that these attributes would become part of political and legal processes, and would be contested by experts in both. While this is an understandable limitation, the degree of caution exceeded even that in the next two attributes that we consider.

Mike Joy’s most important criticism of the NOF, perhaps, was his argument that two of the NOF’s bottom lines were set far too low to control the effects of growing land intensification on freshwater bodies. The first of these was the choice of wading as the benchmark for Human Health, which he said would result in limits that are unacceptably low. The bacteria *E coli* are the ‘indicator of faecal contamination’, and the Ministry of Health’s ‘existing safe measure [for *E coli*] for bathing’ was 260 coliforms per 100 millilitres. The threshold in the NOF, based on ‘secondary contact’ (wading), was 1000 coliforms per 100 millilitres. Dr Joy commented that this threshold, ‘in practical terms means that swimmers are no longer protected

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373. Howard-Williams, brief of evidence (doc F5), p 9

374. Howard-Williams, brief of evidence (doc F5), pp 6–7

375. Taylor, brief of evidence (doc F4), p 9

376. Howard-Williams, brief of evidence (doc F5), p 12

from waterborne health risks.<sup>377</sup> He reinforced the potential danger by pointing to the finding, referred to in the draft RIS, that 62 per cent of monitored river sites would fail the *E coli* threshold for 'primary contact'.<sup>378</sup>

In her evidence for the Ministry for the Environment, Sheree De Malmanche did not comment on the risk of infection, other than acknowledging that campylobacter infection became more likely as *E coli* levels increased. She also noted that 98 per cent of monitored sites were meeting the 'secondary contact' (wading) standard.<sup>379</sup>

The choice of wading for the compulsory Human Health value was, of course, a policy decision. The minimum state for this was described as: 'no more than moderate risk to people when they came into contact with the water while wading or boating'.<sup>380</sup> Due to the likely significant costs involved, officials did not recommend that the compulsory value be upgraded to primary contact (immersion or swimming).<sup>381</sup> Cabinet's view in 2014 was that it was neither technically possible nor affordable to impose a swimmable standard for councils' objective setting.<sup>382</sup> As we discuss below, this position had changed by 2017.

The second bottom line that Dr Joy considered too low was the limit set for nitrogen in rivers, which treated nitrates in terms of their toxicity (and not in terms of their role in nutrient enrichment and algal blooms). Fundamentally, his position was informed by his ecological observations of the Manawatū River, and he observed that the median nitrate concentration found by river sampling was 0.51 milligrams of nitrogen per litre, which would place it well inside in the NOF's 'A band' for nitrate toxicity (<1 mg N per litre). Yet, he said, the diurnal depletion of dissolved oxygen occurring in the river was far in excess of international comparisons. To this end, Dr Joy observed that oxygen depletion caused by nitrate-fed algal growth was likely to prove fatal for aquatic fauna long before the nitrate toxicity bottom line of 6.9 milligrams of nitrogen per litre was reached.<sup>383</sup>

Moreover, Dr Joy observed that only one per cent of waterways were non-compliant with the NOF bottom line, and that this was giving regional councils and the primary sector a false notion that there was headroom for the extra nitrate contamination that would result from further agricultural intensification.<sup>384</sup>

In response to the first criticism, Dr Howard-Williams accepted that for 75 per cent of waterways, the nitrate toxicity measure in the NOF was not appropriate as a limit for nitrogen, and that it should have only been employed as a limit where

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377. Joy, brief of evidence (doc D20), pp 33–34, 54–55

378. Joy, brief of evidence (doc D20), p 55

379. Sheree De Malmanche, brief of evidence (doc D87), p 18

380. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions* (Wellington: Ministry for the Environment, July 2014), p 29

381. New Zealand Government, *Report and recommendations on the proposed amendments to the National Policy Statement for Freshwater Management and public submissions*, p 32

382. Cabinet paper, 'Freshwater programme: Amendments to the National Policy Statement for Freshwater Management', [23 May 2014], p 7

383. Joy, brief of evidence (doc D20), pp 6, 9, 47, 56–57

384. Joy, brief of evidence (doc D20), pp 47, 52

## 5.6.4.3

other factors (such as high velocity flushing flows) constrained algal growth.<sup>385</sup> Dr Joy's second point also seems to be borne out, at least in part, by the review of NPS-FM implementation, which accompanied Martin Workman's evidence. This found that regional councils were putting undue emphasis on the numerical attributes included so far in appendix 2, such as nitrate toxicity, because councils' performance would be measured on *those* attributes for the compulsory national values. This 'pressure inevitably shifts the focus of actions to these attributes, which may not be the most effective use of resources or achieve the best outcomes for the region.'<sup>386</sup>

Dr Howard-Williams observed in his evidence:

To date, it has not yet been possible to allocate river nutrient concentrations in national regulation. Regional councils are required to set objectives to manage periphyton in the NOF and the setting of appropriately low nutrient levels is the key to doing this. In the case of nitrogen, these levels may be at least an order of magnitude less than the toxicity levels for nitrogen in the NOF.<sup>387</sup>

This was clearly a crucial flaw in the NOF, and we consider it further in the following sections. It is difficult to escape the conclusion that the NPS-FM 2014 was too cautious in dealing with the crucial problem of nutrients and diffuse discharges, which had been acknowledged as an increasingly urgent matter since the Crown launched its Sustainable Development programme in 2003.

#### 5.6.4.3 *Non-scientific issues*

As we discussed above, the Crown's decisions in 2014 left many matters unresolved. Concerns remained about how many exceptions to national bottom lines would be allowed, and about the trade-offs that occurred when water quality was maintained or improved 'overall' in a region. There was also the issue of whether national bottom lines might become default limits, allowing further water quality decline in some areas. The Crown's position was that this could not happen because councils had to set objectives that either maintained or improved water quality.

#### 5.6.4.4 *Interim conclusions*

Because the NPS-FM 2014 was amended in 2017, it is only appropriate to draw interim conclusions at this point.

The Crown and claimant evidence agreed that several essential attributes, such as sediment and the MCI, were missing from the NOF in 2014. Although Crown counsel argued that these would nonetheless have to be managed for at

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385. Howard-Williams, brief of evidence (doc F5), p 11

386. Ministry for the Environment, 'National Policy Statement for Freshwater Management Implementation Review: National Themes Report', August 2017, p 27 (Martin Workman, papers in support of brief of evidence (doc F21(a)), p 758)

387. Howard-Williams, brief of evidence (doc F5), p 13

the regional level, we think that misses the point. The NOF was supposed to set national standards, to enable consistency, and to reflect the necessary scientific expertise that had proven too difficult and costly for the regions. The Crown and claimant evidence also agreed that the NOF attributes only covered lakes and rivers, and that it was essential to define attributes for wetlands, estuaries, and aquifers.

The Crown acknowledged that the NOF was incomplete and that further work on it was required. We accept that some scientific information was insufficient even at the national level in 2014, but this also reflects the failure to commission some of the necessary research and to set essential standards prior to then. The question of whether various official guidelines could have been used to set NOF attribute states is not one that we can answer with any degree of certainty, and we note that there was scientific evidence both for and against. We also note that some regional councils were in fact using those guidelines.

The bottom line for Human Health was set unacceptably low, reflecting the Crown's decision that the minimum state for water quality would be safety for wading. The nitrate bottom line for rivers did not impose controls on nitrogen as a nutrient, which both Crown and claimant evidence accepted was a serious issue. Further, the bottom line for nitrate toxicity would allow impacts on 20 per cent of freshwater species, including kōura (freshwater crayfish).

The absence from the NOF of Te Mana o te Wai, and of compulsory Māori values and bottom lines, meant that specifically Māori standards were not adequately acknowledged and provided for in 2014. By comparison, the iwi co-governance body for the Waikato River required the improvement of water quality to a state that would be suitable for swimming and mahinga kai. In 2013, *Freshwater reform 2013 and beyond* had proposed attributes for mahinga kai and ceremonial uses (wai tapu), but these were not included in the NOF in 2014.

A further consideration is the interplay between national standards and regional decision-making. The NPS-FM required councils, communities, and Māori to decide upon values for their FMUS (which could be large or small) and set objectives based on how those water bodies were valued and for what purposes. The non-compulsory national values, however, had only brief descriptors and no attribute tables. Except for the two compulsory values, appendix 2 was essentially empty. This meant that there were in fact no national standards or bottom lines for those values. Regional councils would have to continue to interpret the prescriptions of the NPS-FM without the standard-setting which the Crown had acknowledged was necessary when it developed the NOF.

In light of the fact that essential attributes were omitted and some deficient bottom lines had been set, we conclude that the controls and standards in the NOF were not adequate as at 2014.

Further, the requirement to maintain or improve water quality 'overall' in a region was a clear flaw which enabled what the Minister in 2011 had called 'offsets' (and thus allowed continued decline for some water bodies).

On the positive side, we note that the NOF had a large degree of support in principle. Māori, councils, primary producers, environmental groups, and the general public all welcomed the idea of compulsory national bottom lines, and

the provision of much-needed direction on how to set the objectives and limits required by the NPS-FM 2011.

In the rest of the chapter, we address the question of whether the Crown rectified the failings in the NPS-FM 2014, either by further amendments or by other reforms, and whether the Crown has set adequate controls and standards for freshwater management in the regions.

## 5.7 THE 'NEXT STEPS' AND 'CLEAN WATER' REFORMS, 2014–17

### 5.7.1 Introduction

The water quality reforms covered in this section built on the foundations established in the NPS-FM 2014 (especially the NOF), the reports of the Land and Water Forum, and the collaboration of the Crown and the ILG. There was a significant degree of good will and buy-in among all the parties concerned, although their divergent interests were becoming clearer as the details of the freshwater management framework were discussed and developed. The engagement between the Crown and the ILG, as well as the consultation rounds covered in this section, showed that Māori advocated for stronger reforms and higher water quality standards.

In February 2016, the Crown consulted on a series of further freshwater reforms in its consultation document, *Next steps for fresh water*. The *Next Steps* consultation was the result of more than a year's intensive work to develop new reform options or to progress existing measures. The Crown and the ILG collaborated to 'co-design' some of the reforms in 2015–16, which were intended specifically to address Māori rights and interests (see chapter 4). At the same time, the Crown worked with the forum and stakeholders to develop technical water quality reforms. This included targeted engagements with the primary and electricity sectors.

The *Next Steps* document put forward 23 reform proposals under four headings: 'Fresh water and our environment'; 'Economic use of fresh water'; 'Iwi rights and interests in fresh water'; and 'Freshwater funding'. These proposals were wide-ranging. As we discuss below, the water quality proposals included clarifying the obligation to 'maintain or improve' overall water quality, introducing the MCI into the NOF, establishing an exceptions policy for significant infrastructure, and national regulations for excluding stock from waterways. The 'economic use' section contained proposals for the more efficient use of water, tradeable water takes, tradeable discharge allowances, and the development of guidance on how to reduce over-allocation. The consultation on *Next Steps* showed that Māori had a number of concerns about the specifics of the Crown's water quality reforms. One of the key questions for this section is the extent to which those concerns were addressed.

Following the consultation, the Crown decided to consult further on three matters that had been raised by submitters in response to *Next Steps*. These were: the general desire of Māori and many others to have a higher Human Health standard than secondary contact; the concern raised by primary industry in particular that



economic considerations were not being given enough weight; and the inadequate direction on nutrient discharges (nitrogen and phosphorus) in the NPS-FM. For the remainder of 2016, the Crown worked with the forum and stakeholders to develop proposals for those three matters, and to progress the other *Next Steps* reforms, such as the stock exclusion regulations. The Crown also worked with the ILG, mainly on strengthening the place of Te Mana o te Wai in the NPS-FM, which had been one of the *Next Steps* proposals.

By February 2017, the Crown was ready to release the second discussion paper covered in this section, *Clean Water: 90% of rivers and lakes swimmable by 2040*. This document included a number of reform proposals as well as a draft of the NPS-FM with marked-up amendments. Again, Māori expressed a number of significant concerns during the consultation on *Clean Water*, although the participation by iwi bodies and other Māori organisations was significantly lower in this final consultation round.

We finish this section by discussing the decisions made by the Crown in 2017, following the submissions on *Clean Water*. These included the amendments to the NPS-FM and the completion of draft regulations for excluding stock from waterways, although the latter were eventually dropped due to primary sector opposition. We then proceed to make our conclusions and findings on water quality reforms in section 5.8.

## 5.7.2 After the NPS FM 2014 – stock exclusion and the fourth LAWf report

### 5.7.2.1 Initial decisions on the priorities for further reforms

From July 2014 onwards, the focus of the Crown's freshwater reforms switched towards developing policies and management tools for maximizing the value of the water resource (the purpose of tranche three of the post-2009 reforms), together with iwi and hapū interests in water.<sup>388</sup> As we discussed in the previous section, there were also matters left from the NPS-FM 2014 to progress, such as adding to the attributes included in the NOF.

One of the most important reforms at this point was the development of regulations to exclude stock from waterways. The then Prime Minister, John Key, had promised action on stock exclusion during the 2014 election campaign. When Parliament sat in October 2014, the Governor-General's speech from the throne stated that the Government was 'committed to improving water quality and the way fresh water was managed'. This included a promise to 'introduce a requirement for dairy cattle to be excluded from waterways by 1 July 2017', as well as setting aside \$100 million to voluntarily buy and retire areas of selected farm land adjacent to significant waterways for use as riparian buffers.<sup>389</sup> At the time, the Ministry for the Environment was also considering the need for two NOF-related consultations, the first on whether coastal lakes and lagoons intermittently open to the sea should be subject to the lake water quality attributes in Appendix 2, and

388. Briefing note, 'Freshwater Programme: Managing within limits, pressures and opportunities', 13 November 2014, pp 3–4 (Crown counsel, sensitive discovery documents (doc D92), pp 1348–1349)

389. Speech from the throne, 21 October 2014, *New Zealand Parliamentary Debates*, no 701, p 12

the second on what, if any, infrastructure might be allowed to operate under the exceptions provided for in appendix 3.<sup>390</sup>

A series of three briefing notes, one on excluding dairy cattle from waterways, and the other two on 'Managing within limits', and 'Addressing iwi/hapū rights and interests' respectively, had been prepared for the Ministers for the Environment and Primary Industries by early November 2014. The first briefing note advocated a cautious approach. It recommended that dairy cows not in milk should be exempt from the 2017 deadline. Officials also recommended that the Crown obtain an amendment to section 360 of the RMA, which prescribed the specific matters on which the Crown could issue regulations. In their view, regulations should be issued that required Fonterra and Westland Milk dairy farmers to abide by the Sustainable Dairying Water Accord (this agreement with suppliers obliged them to fence off streams more than one metre wide and more than 30 centimetres deep). Fonterra were reporting that 96 per cent of such water bodies on its suppliers' farms were already fenced.<sup>391</sup>

The officials' briefing noted rising public concern, which meant that more action was needed in the longer term. Stock exclusion would help reduce sediment and *E coli*, but 'fencing alone does little to reduce nitrogen', which was becoming the focus for public complaint.<sup>392</sup> To this end, officials suggested that the Government back voluntary sector initiatives, such as the current tax incentives for riparian planting, but also look to involve a primary sector reference group to investigate further actions.<sup>393</sup>

The briefing note 'Managing within Limits' argued that economic growth could continue with few constraints as a result of water quality limits. While it acknowledged that 'water quantity and quality limits will constrain growth in some places', preliminary results from NIWA research were indicating that 'mitigation may create headroom for land use intensification in many parts of the country'. This finding was seen as significant because continued growth from the primary sector was needed if the Government's 'Business Growth Agenda' of increasing the values of exports to 40 per cent of GDP was to be achieved by 2025.<sup>394</sup> However, it should be noted that the NIWA results, recorded in Table 3.5 of the accompanying report, were based only on the analysis of *E coli* and nitrate toxicity, and it was observed in the report itself that some of the headroom might be cancelled out once an

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390. File note, 'The Freshwater Reform Programme', 21 October 2014, pp 2, 5 (Crown counsel, sensitive discovery documents (doc D92), pp 1311, 1314)

391. Briefing note, 'Requirement to Exclude Dairy Cattle from Water Bodies by 2017', 6 November 2014, pp 1–3 (Crown counsel, sensitive discovery documents (doc D92), pp 1303–1305)

392. Briefing note, 'Requirement to Exclude Dairy Cattle from Water Bodies by 2017', p 2 (Crown counsel, sensitive discovery documents (doc D92), p 1304)

393. Briefing note, 'Requirement to Exclude Dairy Cattle from Water Bodies by 2017', pp 2–3 (Crown counsel, sensitive discovery documents (doc D92), pp 1304–1305)

394. Briefing note, 'Freshwater Programme: Managing within limits, pressures, and opportunities', 13 November 2014, p 5 (Crown counsel, sensitive discovery documents (doc D92), p 1350)

equivalent analysis had been carried out for periphyton.<sup>395</sup> In its more in-depth consideration of water quality issues, the briefing note elaborated on its earlier point about mitigation measures creating headroom for intensification:

Although some areas currently fail to meet bottom lines, clean-up projects, upgrades to municipal infrastructure, and uptake of mitigation practices in the agricultural sector are expected to improve water quality, allowing some areas to meet bottom lines and creating headroom for land use intensification in others.<sup>396</sup>

It then went on to discuss the form this mitigation might take. One option was input or practice-based rules, such as limits on fertilizer application, but it reported that councils were favouring nutrient discharge allowances for overallocated catchments. Another alternative which was suggested was enabling trading of discharges, in which low-efficiency producers could transfer their discharge allowance to higher-efficiency producers.<sup>397</sup>

The final briefing note was on iwi and hapū rights. This issue became a major focus for the freshwater reform programme in 2015. The Crown and ILG embarked on a collaborative effort to 'co-design' reforms that would address Māori rights and interests (see chapter 4). The briefing note recorded observations from the recent hui that the ILG had held with iwi and hapū. One of the common themes had been 'concerns about freshwater quality and the need for monitoring.'<sup>398</sup> Māori were far from satisfied by the water quality reforms to date.

By late January 2015, Cabinet had settled on a broad suite of reforms to progress:

- ▶ assist regional councils to phase out the over-allocation of water takes or contaminants in catchments where this a problem;
- ▶ support more efficient use of freshwater resources to create opportunities for increased use and growth;
- ▶ enable freshwater resources to be allocated in ways that encourage their highest value use and for new users to gain access;
- ▶ enhance the ability of regional councils and resource users to manage within quantity and quality limits;
- ▶ appropriately provide for iwi/hapu rights and interests.<sup>399</sup>

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395. Appendix to Briefing note, 'Freshwater Programme: Managing within limits, pressures and opportunities', 13 November 2014, pp 83–85 (Crown counsel, sensitive discovery documents (doc D92), pp 1447–1451)

396. Briefing note, 'Freshwater Programme: Managing within limits, pressures, and opportunities', 13 November 2014, p 12 (Crown counsel, sensitive discovery documents (doc D92), p 1357)

397. Briefing note, 'Freshwater Programme: Managing within limits, pressures, and opportunities', 13 November 2014, pp 13–14 (Crown counsel, sensitive discovery documents (doc D92), pp 1358–1359)

398. Briefing note, 'Managing within limits, pressures, and opportunities: Addressing iwi/hapū rights and interests', 13 November 2014, pp 4–5 (Crown counsel, sensitive discovery documents (doc D92), pp 1320–1321)

399. Cabinet minute (CAB Min (15) 1/9), 'Freshwater Reform: Next Steps and Discussions at Waitangi 2015', 27 January 2015, p 1 (Crown counsel, sensitive discovery documents (doc D92), p 166)

**5.7.2.2 The Land and Water Forum's fourth report**

The Land and Water Forum's fourth report was completed in November 2015. The Crown had asked the forum to address:

- ▶ Advice on managing within limits including maximising the economic benefit of freshwater while managing within water quality and quantity limits that are set consistent with the National Policy Statement for Freshwater Management 2014 (NPS-FM 2014). This work should take into account other measures to improve freshwater availability (quantity and quality) and engage with the experience of regional councils in implementing the new water management regime, including through collaborative processes. Areas of focus could include how the resource is allocated, how water resources can better move between users to higher valued uses, and enabling new users to access the resource.
- ▶ Regulatory requirements to fence streams to exclude dairy cattle, focusing on the policy design.
- ▶ Mechanisms to manage the transition from the current regime to effectively manage within limits. For example, ways to create headroom, other tools such as land retirements (in addition to freshwater clean-ups and other initiatives already underway) and timeframes to transition.<sup>400</sup>

On the basis of this mandate, the forum came up with 60 recommendations, but this time there was a lack of consensus among the forum members. The disagreement was focused on the issue of making discharge allocations to existing users, and ultimately Fish and Game opted to withdraw from the forum on this issue during October 2015.<sup>401</sup> Gregory Carlyon, who gave evidence for the claimants, suggested that Fish and Game also left the forum because of the Crown's '[c]herry-picking of the original recommendations and the subsequent ignoring of concerns/advice.'<sup>402</sup>

In the sections of its report devoted to managing water quality within limits and integrated catchment management, the forum emphasised the need for high quality information gathering (including mātauranga Māori, and results from modelling) at the catchment level. This was essential in order to prioritise areas of significant ecological value and critical contaminant source areas for mitigation and management activities.<sup>403</sup> Given the existing use of OVERSEER, the forum also called for work to enhance its predictive power for discharges below the root zone

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400. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Wellington: Land and Water Trust, 2015), pp 3–4 (Workman, papers in support of brief of evidence (doc F6(a)), pp 460–461)

401. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp vi, 45–47, 80–90 (Workman, papers in support of brief of evidence (doc F6(a)), pp 453, 502–504, 537–547)

402. Gregory Carlyon, brief of evidence, 2 June 2017 (doc G5), p 11

403. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp viii, 81–82 (Workman, papers in support of brief of evidence (doc F6(a)), pp 455, 538–539)

and so that it could apply to a greater range of farming types.<sup>404</sup> Infrastructure such as storage reservoirs, aquifer recharge, and artificial or restored wetlands were also seen by the forum as having a potentially valuable role in augmenting instream flows and assimilative capacity.<sup>405</sup>

In terms of the management of discharges from individual properties, the forum stressed that good management practice should be the minimum standard for all industries. As an example, it pointed to the *Industry Agreed Good Management Practices related to Water Quality* framework that was used for estimating nitrogen and phosphorus losses from farms in Canterbury.<sup>406</sup> Notwithstanding the lack of agreement over initial discharge allocations referred to above, the forum also saw economic benefits in the development of transferable discharge allowances.<sup>407</sup> It also recommended that the Crown establish processes for auditing industry self-management schemes, on the basis that industry might be better positioned to provide oversight of supplier actions than many councils were.<sup>408</sup> At the same time, however, the forum concluded that even permitted activities should be required to have discharge consents if councils were not able to show that permitted activity rules were keeping discharges within limits, or would be able to do so within agreed timeframes.<sup>409</sup> Discharges from urban areas also came under scrutiny, with the report pointing to the need for more to be done to prevent contaminants, including trade wastes, from entering waterways through stormwater discharge.<sup>410</sup>

Thirteen recommendations were made by the Forum on options for excluding livestock from waterways and riparian strips.<sup>411</sup> Compared to the existing Government proposal, the forum had opted to:

- ▶ require a wider range of livestock types to be excluded
- ▶ require exclusion from a greater range of waterbodies
- ▶ allow more flexibility in how stock are excluded
- ▶ allow more time for a stock exclusion regulation to come into effect in more difficult farming contexts.<sup>412</sup>

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404. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 29–30 (Workman, papers in support of brief of evidence (doc F6(a)), pp 486–487)

405. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 18–20, 23 (Workman, papers in support of brief of evidence (doc F6(a)), pp 475–477, 480)

406. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 32–34 (Workman, papers in support of brief of evidence (doc F6(a)), pp 489–491)

407. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp viii–ix, 84 (Workman, papers in support of brief of evidence (doc F6(a)), pp 455–456, 541)

408. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 34–36 (Workman, papers in support of brief of evidence (doc F6(a)), pp 491–493)

409. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, p 83 (Workman, papers in support of brief of evidence (doc F6(a)), p 540)

410. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 38–40 (Workman, papers in support of brief of evidence (doc F6(a)), pp 495–497)

411. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 84–86 (Workman, papers in support of brief of evidence (doc F6(a)), pp 541–543)

412. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 48–49 (Workman, papers in support of brief of evidence (doc F6(a)), pp 505–506)

Since livestock farming was most intensive on the plains, the forum's plan was to retain the proposed exclusion of milking cows and pigs by 2017, but then add non-milking dairy cows by 2020 or 2025 (based on whether dairy farmers or third parties owned the land). This would be followed by beef cattle and deer in 2025 or 2030 (based on whether the land was on the plains or rolling hill country).<sup>413</sup> Due to the cost of deer fencing, the forum had also concluded that constructing artificial wallows should be allowed as an alternative. Temporary fencing would be sufficient for beef cattle on infrequently grazed land. Conversely, the forum believed there should be more protection of waterways on the plains, and that fencing regulations should apply to all permanent streams as well as natural wetlands.<sup>414</sup> Lastly, the forum also advocated for riparian buffer strips as a further mitigation measure against overland transport of contaminants into waterways, and consequently argued that these should be included among the required good management practices where they were appropriate.<sup>415</sup>

### 5.7.3 Developing the 'Next Steps' reforms

#### 5.7.3.1 Challenges to the NPS-FM 2014

In June 2015, the IAG provided its report on water quality to the Crown (as part of the four workstreams underway to address Māori rights and interests).<sup>416</sup> The report was entitled 'Mechanisms to give effect to iwi and hapū values in Freshwater Quality Management'. It highlighted the need for much greater integration of land and water management, and of a whole-of-catchment approach, including the need to have attributes for estuaries and lagoons. Freshwater management needed to reflect the principle of 'ki uta ki tai' (from the mountains to the sea).<sup>417</sup> As an example of what might be put in place, the report cited the example of Te Ture Whai Mana o Te Awa Waikato (the Vision and Strategy for the Waikato River), which was able to override some sections of the RMA and National Policy Statements, and the Canterbury Land and Water Regional Plan, in which land use, water use and quality, and groundwater use and quality were all considered as interrelated.<sup>418</sup>

The IAG's report also advocated for a series of amendments to the NPS-FM 2014. Te Mana o te Wai should become an overarching objective, or, failing that, a compulsory objective with the same weighting as Ecosystem Health and Human

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413. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, p 51 (Workman, papers in support of brief of evidence (doc F6(a)), p 508)

414. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 49–50 & 52 (Workman, papers in support of brief of evidence (doc F6(a)), pp 506–507 & 509)

415. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 55–58 (Workman, papers in support of brief of evidence (doc F6(a)), pp 512–515)

416. Tania Hiria Gerrard, brief of evidence (doc D88), p 12

417. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', June 2015, pp 9–11 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 697–699)

418. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', pp 11–14 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 699–702)

Health. The next recommendation was for the values contained in Ngā Mātāpono ki te Wai in Appendix 1 to be made default compulsory national values, although these could be substituted with alternative values that tangata whenua suggested.<sup>419</sup> This was supported by an example of how Mahinga kai, Mauri, and Taonga species could work as compulsory values. Their attributes would include migration pathways, dissolved oxygen, sediment, the MCI, *E coli* and other pathogens, algal cover, clarity, and minimum flows.<sup>420</sup>

The report commented that some of the existing bottom lines in the NOF were 'at levels that many iwi and hapū consider inadequate to cater for their values and interests', and noted that some ecologists and freshwater scientists had also objected to these levels.<sup>421</sup> The remaining two recommendations relative to the NPS-FM were that Section D (Tangata whenua values) be reworded so that councils had to take into account iwi planning documents and/or Treaty settlements, and that the demarcation of freshwater management units (FMUS) involve iwi and hapū so that the mana of the tangata whenua could better be recognised.<sup>422</sup>

Parts of the NPS-FM were also challenged by both the courts and the Parliamentary Commissioner for the Environment. In March 2015, the Environment Court set aside a plan change sought by the Hawke's Bay Regional Council, following an appeal by Ngāti Kahungunu. Part of the reasoning behind the decision had been that the 'unders and overs' approach adopted in objective A2 – the overall quality of fresh water in a region should be 'maintained or improved' – was inconsistent with the RMA. In particular, the decision questioned how degradation could be allowed in some places, when section 30(1)(c)(ii) suggested otherwise:

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region
- . . . . .
- (c) The control of the use of land for the purpose of—
- . . . . .
- (ii) The *maintenance and enhancement* of the *quality* of water in *water bodies* . . . [Emphasis in original.]<sup>423</sup>

It had also seemed incompatible with section 69(3):

419. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', pp 17–18, 47 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 705–707, 735)

420. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', p 47 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), p 737)

421. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', pp 16–17 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 704–705)

422. IAG, 'Mechanisms to give effect to Iwi and Hapū Values in Freshwater Quality Management', pp 19–21 (Gerrard, sensitive papers in support of brief of evidence (doc D88(b)), pp 707–709)

423. *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50, 27 March 2015, paras 28, 56

Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council *shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.* [Emphasis in original.]<sup>424</sup>

Three months later, the Parliamentary Commissioner for the Environment issued a report expanding on the concerns she had raised during the consultation on the amendments to the NPS-FM the previous year.<sup>425</sup> This welcomed the introduction of the NOF, describing it as ‘a major step forward for the management of water quality in New Zealand’, but also stated: ‘As it stands, key elements of the NPS are absent or unclear. This makes it difficult for regional councils who must implement the NPS. It is also difficult to know whether better water quality will actually result.’<sup>426</sup>

The report went on to make six recommendations to the Minister for the Environment which were presented as remedies to shortcomings in the NPS. In relation to the first, the PCE observed that balancing out ‘unders and overs’, had been ‘found by the Environment Court to be at odds with the law on several grounds’. She recommended that the word ‘overall’ be deleted, and that the requirement to ‘maintain or improve’ water quality be defined in terms of staying in or moving up a contaminant band in the NOF.<sup>427</sup>

The second recommendation, namely that criteria be given to councils for defining freshwater management units (FMUs), was intended to aid implementation, whereas the third recommendation on exceptions for infrastructure, was designed to make the NOF more stringent; in short, the PCE argued that if an exception was to be granted, the infrastructure must be responsible for the water quality being below the bottom line, rather than ‘simply contributing to it’. The fifth and sixth recommendations were aimed at expanding the NOF’s scope, the former being that the Macroinvertebrate Community Index be included as an attribute, while the latter was for the necessary work to be done to bring estuaries into the NPS-FM. The remaining recommendation (the fourth) was a plea that councils be directed to use the NPS strategically, by prioritising for action the catchments which were the most vulnerable to water degradation when it came to setting objectives and limits.<sup>428</sup>

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424. *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50, 27 March 2015, para 57

425. Parliamentary Commissioner for the Environment, *Managing Water Quality: Examining the 2014 National Policy Statement*, June 2015, pp 3–4

426. Parliamentary Commissioner for the Environment, *Managing Water Quality: Examining the 2014 National Policy Statement*, June 2015, p 19

427. Parliamentary Commissioner for the Environment, *Managing Water Quality: Examining the 2014 National Policy Statement*, June 2015, p 20

428. Parliamentary Commissioner for the Environment, *Managing Water Quality: Examining the 2014 National Policy Statement*, June 2015, pp 20–22



### 5.7.3.2 Development of reform proposals

All these criticisms seem to have played at least a part in the ‘Next Steps’ reform proposals that the Crown had begun piecing together from April 2015 onwards. In chapter 4, we discussed the Crown and ILG’s intensive work to develop reforms to address Māori rights and interests. Towards the end of 2015, there was a degree of agreement between the IAG and officials, and a menu of reform options had been put to the Minister for the Environment. In the water quality work stream, the key reform proposal was described as: ‘Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve water quality’. Essentially, the view was that more weight must be given to Māori values in freshwater plan making, and that the place and effect of Te Mana o te Wai in the NPS-FM must be strengthened. These proposals dovetailed into revamping Te Mana o te Wai as an overarching purpose of the NPS-FM, to be woven through all objectives and policies (including in section C, which contained the NOF).<sup>429</sup>

Officials advised the Minister, however, that if Te Mana o te Wai was to be referred to in some or all NPS-FM objectives and policies, then it must be done ‘without imposing any additional requirement on councils beyond the existing provisions for maintaining or improving water quality’. For that reason, officials really preferred that Te Mana o te Wai should become the ‘frame for community discussions on freshwater values, objectives, and limits’, which would effectively confine its effects to the *input* councils received when setting limits.<sup>430</sup> This was obviously a much more limited reform than the IAG had envisaged.

Outside of the Crown–ILG engagement process, the first reforms to be considered were amendments which would allow the option of exceptions to bottom lines for infrastructure (such as hydroelectric dams). The electricity sector and the Ministry of Business, Innovation, and Employment wanted the Crown to insert some or all of the hydro dam infrastructure in appendix 3, leaving it to councils to then decide what exceptions would be made in practice. We note that this change did not actually happen in the 2017 reform of the NPS-FM. The other reform under consideration was a clarification that the NPS-FM applied to ‘intermittently closing and opening lakes and lagoons’ (ICOLLS).<sup>431</sup>

In July 2015, Cabinet noted that work was underway to ‘provide further guidance and support to assist councils’ in implementing the NPS-FM, develop more attributes for the NOF, and ‘support further infrastructure development’, as well as

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429. ‘Potential approach to addressing iwi/hapū rights and interests through freshwater reform, [October 2015], appendix to briefing to Minister, 9 October 2015; briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp1032, 1113)

430. Briefing to Minister, ‘Fresh water: Options for addressing iwi/hapū rights and interests’, no date (response needed by 11 November 2015) (Crown counsel, sensitive discovery documents (doc D92), p1032)

431. Briefing note, ‘Freshwater: Meeting to discuss progressing consultation on amending the Freshwater NPS in relation to exceptions for infrastructure and ‘intermittently closing and opening lakes and lagoons’’, 24 April 2015, pp1–2, 5–6 (Crown counsel, sensitive discovery documents (doc D92), pp1207–1208, 1211–1212)

the identification of infrastructure exceptions referred to above.<sup>432</sup> By September, officials were exploring options for allocating \$100 million for restoring water-course margins, and how objective A2 might be altered now that the ‘unders and overs’ approach was vulnerable to legal challenges.<sup>433</sup> Interestingly, officials had sought feedback from several primary sector organisations (such as Beef and Lamb NZ, Federated Farmers, Fonterra, and Horticulture NZ) on the latter question, who stressed the need for community flexibility to be retained.<sup>434</sup> There is no evidence that the views of others (including Māori organisations) was sought on this question.

Officials were concerned that the decision in *Ngāti Kahungunu Iwi Inc* might have under-estimated the assimilative capacity of waterways, and that it might constrain economic development. The primary sector groups were also concerned that ‘issues with Objective A2 will drive planning decisions that unnecessarily constrain economic growth and development by maintaining water quality attributes everywhere in their current state.’<sup>435</sup> Ministers were advised:

Officials are considering how regional councils can better implement Objective A2, and how the Freshwater NPS can provide for desired outcomes within the existing RMA framework, ie:

- a) to enable regional councils to maintain overall water quality, without unnecessarily constraining economic growth and development; and
- b) give regional councils and communities the practical means to allow resource use, while improvements elsewhere mean that the overall water quality in their region is not compromised.<sup>436</sup>

Importantly, primary sector groups sought a decision that objectives should be expressed in relation to a band, ‘rather than to specific numbers within a band,’<sup>437</sup> which was later to prove controversial given the width of the bands in the NPE.

All of these potential amendments, as well as canvassing of opinions on stock exclusion and on making the Macroinvertebrate Community Index a compulsory

432. Cabinet paper, ‘Freshwater reform: Next steps in policy development work’, 21 July 2015, p 3 (Crown counsel, discovery bundle (doc D92), p140)

433. Aide-memoire, ‘Freshwater Funding Options for 2016 Freshwater Discussion Document’, 7 September 2015, pp1–3; Briefing note, ‘Fresh Water: NPS requirement that overall water quality within a region is maintained or improved’, 9 September 2015, pp1–3 (Crown counsel, sensitive discovery documents (doc D92), pp 1153–1155, 1161–1163)

434. Briefing note, ‘Fresh Water: NPS requirement that overall water quality within a region is maintained or improved’, 9 September 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 1163, 1165)

435. Briefing note, ‘Fresh Water: NPS requirement that overall water quality within a region is maintained or improved’ (Crown counsel, sensitive discovery documents (doc D92), pp 1162–1163)

436. Briefing note, ‘Fresh Water: NPS requirement that overall water quality within a region is maintained or improved’ (Crown counsel, sensitive discovery documents (doc D92), p 1163)

437. ‘Summary of primary sector response’, appendix 1 to briefing note, ‘Fresh Water: NPS requirement that overall water quality within a region is maintained or improved’ (Crown counsel, sensitive discovery documents (doc D92), p 1165)

monitoring measure, were brought together in a draft 'Next Steps' discussion document in mid-September 2015.<sup>438</sup>

Attention then turned to the recommendations of the Land and Water Forum after its report was released in November. An initial appraisal by officials concluded that these were largely in line with Crown policy, and that two-thirds of the recommendations would be implemented or progressed by the new reform proposals.<sup>439</sup> The Crown was now in a position to set out a new reform package:

- ▶ address iwi/hapū rights and interests in fresh water
- ▶ maximise the economic benefits of freshwater resources while managing within quantity and quality limits set under the National Policy Statement for Freshwater Management (Freshwater NPS)
- ▶ exclude stock from waterbodies
- ▶ amend the Freshwater NPS to remove uncertainties about its interpretation and implementation
- ▶ improve the process for Water Conservation Orders.
- ▶ introduce the new *Next Steps for Freshwater Improvement Fund*.<sup>440</sup>

A provisional consultation timetable was also proposed, with a discussion document being planned for release in late February 2016, which would allow for consultation with the ILG in the meantime, followed by public consultation that would run through to the start of May.<sup>441</sup> As has been described in chapter 4, the Crown and the ILG had agreed that the place of Te Mana o te Wai should be significantly strengthened as part of these reforms. It would be 'embedded as the overarching framework for councils and communities to discuss freshwater management'.<sup>442</sup> But the ILG did not agree that the reform proposals went far enough, and was not prepared to support the consultation document as a joint document (see section 4.3.7).

Finally, approval for the release of the reform package as a whole, and the release of the consultation document *Next Steps for fresh water* was given by Cabinet on 10 February 2016.<sup>443</sup>

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438. Briefing note, 'Fresh Water: Outline of 'Next Steps for Fresh Water' discussion document', 18 September 2015, pp 1–4, and 'Next Steps for Fresh Water: outline of consultation document', pp 12–20, 28–30 (Crown counsel, sensitive discovery documents (doc D92), pp 1115–1118, 1130–1138, 1146–1148)

439. Briefing note, 'Fresh Water: Initial response to the Land and Water Forum's fourth report', 19 November 2015, pp 1–2 (Crown counsel, sensitive discovery documents (doc D92), pp 1074–1075)

440. Draft Cabinet paper, '2016 Freshwater reform: Policy proposals and consultation process', [17 November 2015], p 1 (Crown counsel, sensitive discovery documents (doc D92), p 958)

441. Draft Cabinet paper, '2016 Freshwater reform: Policy proposals and consultation process', [17 November 2015], p 15 (Crown counsel, sensitive discovery documents (doc D92), p 972)

442. Cabinet minute (CAB-16-MIN-0027), 'Freshwater Reform 2016: Discussion with Iwi Chairs of 5 February', 2 February 2016, p 1 (Crown counsel, sensitive discovery documents (doc D92), p 95)

443. Cabinet Economic Growth and Infrastructure Committee minute (EGI-16-MIN-0006), 'Freshwater Reform 2016: Policy Proposals for Public Consultation', pp 1–4, 6 (Crown counsel, sensitive discovery documents (doc D92), pp 75–78, 80)

### 5.7.4 The proposals in the 'Next Steps' consultation document

Despite being only 45 pages in length, *Next Steps for fresh water* contained some 23 proposals. The key proposals in terms of water quality were the eight found in the chapter 'Fresh water and our environment', which were as follows:

- 1.1 Amend Objective A2 of the National Policy Statement for Freshwater Management so that it applies within a freshwater management unit, rather than across a region.
- 1.2 Clarify that councils have flexibility to maintain water quality by ensuring water quality stays within an attribute band, where it is specified in the National Objectives Framework, or demonstrating that the values chosen for a freshwater management unit are not worse off, where an attribute band is not specified in the National Objectives Framework.
- 1.3 Require the use of Macroinvertebrate Community Index as a measure of water quality in the National Policy Statement for Freshwater Management by making it a mandatory method of monitoring ecosystem health.
- 1.4 Work with the Land and Water Forum on the potential benefits of a macroinvertebrate measure for potential inclusion into the National Objectives Framework as an attribute.
- 1.5 Provide further direction on providing evidence when councils or infrastructure owners request that the Government include specific significant infrastructure in Appendix 3 of the National Policy Statement for Freshwater Management.
- 1.6 Amend the attribute tables in Appendix 2 of the National Policy Statement for Freshwater Management so that attributes clearly apply to intermittently closing and opening lakes and lagoons, with the same band thresholds and national bottom lines as lakes.
- 1.7 Provide direction to councils on how to request that, after meeting evidential thresholds, a freshwater management unit be allowed to use a transitional objective under Appendix 4 of the National Policy Statement for Freshwater Management.
- 1.8 Create a national regulation that requires exclusion of dairy cattle (on milking platforms) from water bodies by 1 July 2017, and other stock types at later dates . . .<sup>444</sup>

In addition, the Crown intended in proposal 4.1 to establish a new restoration fund (the Freshwater Improvement Fund), which is discussed further in section 5.9.2 below.

The remaining fourteen proposals were divided between allocation (six) and addressing iwi rights and interests (eight). Some of the key ones in terms of water quality reforms were:

- ▶ the package of measures for allowing the transfer of allocated water and discharge allowances (2.4);

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<sup>444</sup> New Zealand Government, *Next steps for fresh water: consultation document*, February 2016 (paper 3.1.255(a)), p 40

- ▶ the development of guidance on methods for addressing over-allocation of water quality [diffuse discharges] and/or quantity (2.5); and
- ▶ a requirement that councils ‘reflect’ Te Mana o te Wai in implementing all ‘relevant’ NPS-FM policies, and that Te Mana o te Wai underpin community discussions on values, objectives, and limits (3.1)-(3.2).<sup>445</sup>

Looking more closely at the water quality proposals, it was very evident that the Crown had followed the forum’s lead when it came to stock exclusion. The proposed schedule for progressively fencing off waterways from different kinds of livestock, and on differently sloped land, replicated that developed by the forum; indeed, readers were even advised to look up the forum’s recommendations. The only element that was missing from the forum’s prescription was the obligation for landowners to set aside riparian margins, which we view as a significant omission.<sup>446</sup>

In other respects, the Crown had been less keen to follow external advice. When it came to objective A2, the Crown proposed that water quality would be ‘maintained or improved’ within an FMU rather than across a whole region. But it still proposed that water quality levels be flexible within bands, and the use of ‘overall’, which had originally been inserted to allow the ‘unders and overs’ approach, had been retained. Much would depend, therefore, on the width of the bands and the size of the FMUs.<sup>447</sup> Similarly, the Crown defended its position of making the MCI a compulsory monitoring measure rather than a NOF attribute. The *Next Steps* document stated that, while a ‘wide range of submitters on previous consultations’ had supported the idea of the MCI as an attribute, ‘in its current form the MCI does not lend itself to this.’ However, the Crown did propose to work with the forum and ‘the science community to investigate how measures of macroinvertebrates could be included as an attribute.’<sup>448</sup>

Elsewhere in the document it was reported that new attributes were being developed, including ‘sediment, temperature, benthic cyanobacteria (toxic algae), and wetlands’, and that there were also plans to ‘develop attributes for water supply, fishing and for cultural indicators.’<sup>449</sup> This was an important statement, given the critical omissions from the NOF in 2014. Sir Mark Solomon and Donna Flavell confirmed in their October 2016 evidence that the IAG was working with the NOF reference group, the forum’s Small Group, and the Science Review Panel. They were focused on ‘establishing objectives and attributes for the mahinga kai stream’, ‘developing Te Mana o Te Wai attributes and objectives’, and ‘ensuring the western science attributes are consistent with Te Mana o Te Wai and, where required,

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445. New Zealand Government, *Next steps for fresh water: consultation document*, February 2016 (paper 3.1.255(a)), pp 40–41

446. New Zealand Government, *Next Steps for fresh water* (paper 3.1.255(a)), pp 19–20

447. New Zealand Government, *Next Steps for fresh water* (paper 3.1.255(a)), pp 12–13

448. New Zealand Government, *Next Steps for fresh water* (paper 3.1.255(a)), p 14

449. New Zealand Government, *Next Steps for fresh water* (paper 3.1.255(a)), p 12

establish the cultural attributes within those streams.<sup>450</sup> Importantly, as we discuss further below, none of this work resulted in amendments to the NPS-FM in 2017.

### 5.7.5 Māori responses to the 'Next Steps' proposals

The *Next Steps* consultation ran from 20 February to 22 April 2016. During this period, a total of around 1050 people attended public meetings and hui on the reforms, while written feedback was supplied in the form of 3966 individual submissions. This included 220 institutional and corporate submissions, of which 40 came from Māori organisations.<sup>451</sup> This was the largest public response for a freshwater consultation process to date,<sup>452</sup> as well as being the largest number of submissions from Māori organisations.

Most of these Māori organisations had responded to the proposals regarding objective A2. Overwhelmingly they had supported the proposed change from regions to FMUS as the scale for assessing water quality,<sup>453</sup> but feedback was much more varied on the question of maintaining water quality 'overall'. Many had expressed opposition to the notion of averaging out water quality, with some referring to the Environment Court's decision in favour of Ngāti Kahungunu.<sup>454</sup> There was also considerable concern that the NOF bands were too wide to give a correct picture of whether water quality was declining or not.<sup>455</sup> Several of their submissions advocated for water quality to be measured using attributes based on mātauranga Māori rather than those that had been included in the NOF.<sup>456</sup>

Notwithstanding the absence of pertinent proposals in the discussion document, a number of the submissions from Māori groups reiterated the complaint made during consultations on the NPS-FM in 2014, that the NOF bottom lines had been set too low.<sup>457</sup> They also submitted that the Human Health goal should be swimmability (as opposed to secondary contact).<sup>458</sup> The question of how the MCI should be used – as a monitoring tool or an attribute – generated a range of

450. Mark Wiremu Solomon and Donna Liarne Arihia Flavell on behalf of the Freshwater Iwi Leaders Group, joint brief of evidence (doc D85), p 13

451. Martin Workman, brief of evidence (doc F6), p 28

452. Ministry for the Environment, 'Next Steps for Freshwater: Summary of Submissions', June 2016, ME 1248, p 4, <https://www.mfe.govt.nz/publications/fresh-water/next-steps-fresh-water-summary-submissions>

453. See, for example, the submissions of the Ngāti Makino Heritage Trust, Ngāti Pikiao Environmental Society, Te Roroa, Te Wai Maori Trust, Te Whakakitenga o Waikato (Waikato-Tainui) (Crown counsel, discovery documents (doc D90), pp 3033, 3080, 3217, 3288, 3318)

454. See, for example, the submissions of Ngāti Kahungunu Iwi, Te Rūnanga A Iwi o Ngāpuhi, and Te Rūnanga o Ngāti Rūanui Trust (Crown counsel, discovery documents (doc D90), pp 3062, 3226, 3265)

455. See, for example, the submissions of Te Roroa and Te Rūnanga A Iwi o Ngāpuhi (Crown counsel, discovery documents (doc D90), pp 3217, 3226)

456. See, for example, the submissions of the Ngāti Makino Heritage Trust, and Te Wai Māori o Te Teko (Crown counsel, discovery documents (doc D90), pp 3034, 3283)

457. See, for example, the submissions of Ngāti Ranginui Resource Management Unit, and the Tūwharetoa Māori Trust Board (Crown counsel, discovery documents (doc D90), pp 3103, 3302).

458. See, for example, the submissions of Ngāti Rangī, and Te Rūnanga o Ngāi Tahu (Crown counsel, discovery documents (doc D90), pp 3098, 3238).

views. Some submissions agreed that it should be a mandatory part of monitoring, whereas others still preferred it to be made a NOF attribute. There were also numerous submissions asking that the Cultural Health Index (or its equivalent) be developed to complement or replace the MCI (see chapter 2 for a description of the Cultural Health Index).<sup>459</sup>

In comparison, there was much more uniform support from Māori organisations for the proposals relating to ICOLLS and stock exclusion regulations. In both cases, however, this support was often given subject to provisos being met. Mindful of arrangements such as Ngāi Tahu's for Waihora and Waiwera, submitters argued that the NOF should only apply to ICOLLS where tangata whenua agreed (and had not already arranged higher standards with local authorities).<sup>460</sup> The position of many regarding stock exclusion was that the timeframes for implementation (which extended out to 2030) ought to be shortened.<sup>461</sup> Several Māori submitters were also disappointed that the package of measures did not include setting aside riparian margins, a crucial tool in preventing sediment and phosphorus from entering lakes and rivers.<sup>462</sup>

The other proposals in the water quality set, regarding exceptions for infrastructure and for transitional objectives, had elicited less of a response; there was a fairly even split between submissions calling for no infrastructure exceptions (in appendix 3), and those willing to accommodate exceptions in limited circumstances.<sup>463</sup> The prevailing view in terms of transitional objectives was that tangata whenua should be consulted before a transitional exception was allowed.<sup>464</sup>

In terms of the allocation proposals, the transfer of consents remained contentious, with some submissions arguing that iwi must be allocated water rights

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459. Those submitters wanting it made a NOF attribute included the Maungaharuru-Tangitū Trust and Ngāti Kahungunu Iwi (Crown counsel, discovery documents (doc D90), pp 3049, 3063), those wanting it made a mandatory monitoring tool included the Hauai Ahu Whenua Trust and Ngāti Pahauwera Development Trust (Crown counsel, discovery documents (doc D90), pp 3018, 3076), while those preferring it to be replaced or used alongside the Cultural Health Index (or similar measures) included Ngāi Tamawera hapū, Ngāti Rangī, and the Pirikawau Incorporated Society (Crown counsel, discovery documents (doc D90), pp 3057, 3093, 3185).

460. See, for example, the submissions of Te Rūnanga o Ngāti Ruanui and Te Whakakitenga o Waikato (Waikato-Tainui) (Crown counsel, discovery documents (doc D90), pp 3267, 3320).

461. See, for example, the submissions of Ngāti Rangī, the Tauranga Moana Tangata Whenua Collective, and Te Rūnanga o Ngāti Ruanui (Crown counsel, discovery documents (doc D90), pp 3094, 3200, 3268).

462. See, for example, the submissions of Te Korowai o Ngāruahine Trust, Te Rūnanga-A-Iwi o Ngāpūhi, and the Tūwharetoa Māori Trust Board (Crown counsel, discovery documents (doc D90), pp 3206-3207, 3228, 3303).

463. Those submitters opposing exceptions for infrastructure included Ngāti Rangī, Ngāruahine, Rangitāne, (Crown counsel, discovery documents (doc D90), pp 3093, 3193, 3206), while those prepared to allow infrastructure under strict conditions included Ngāi Tahu, Te Wai Māori, and Waikato-Tainui (Crown counsel, discovery documents (doc D90), pp 3241, 3288, 3319); Tūwharetoa adopted a position of opposing exceptions, but also proposing conditions if the Crown went ahead with the proposal (Crown counsel, discovery documents (doc D90), p 3302).

464. See, for example, the submissions of the Mokai Marae Trust, Ngāti Pīkiao Environmental Society, and Te Rūnanga o Ngāti Awa (Crown counsel, discovery documents (doc D90), pp 3053, 3083, 3250)

first.<sup>465</sup> The Crown's suggestion that guidance would suffice for tackling over-allocation was challenged by numerous submissions, which asserted that regulatory measures were needed.<sup>466</sup> The Crown did find favour with its encouragement of good management practices in catchments nearing complete allocation, although submitters wondered why these should not be promoted in all catchments.<sup>467</sup>

The IAG's response was presented at hui, and the Crown has supplied us with a copy of the paper. The IAG emphasised that effective limits must be set for water takes and diffuse discharges, especially given the Crown's promotion of irrigation and further intensification of land use. In the IAG's view, the actual setting of limits was falling well short of the NPS-FM's objectives, while the NOF's bottom lines for Ecosystem Health and Human Health were too low.<sup>468</sup> The IAG told the consultation hui: 'Certainly from an iwi perspective the minimum levels required for these values (National Bottom Lines) are well below what iwi are likely to accept as satisfactory.'<sup>469</sup> The IAG argued that the national bottom line for Human Health must be raised to a level suitable for swimming. The attribute states and numerical bands for each value in the NOF needed to incorporate mātauranga Māori, to have cultural indicators, and to reflect iwi values and interests. With that proviso, the iwi advisors supported the inclusion of the MCI as an attribute in the NOF. Also, the IAG did not agree with the proposal that 'maintaining' water meant keeping it within the same band, because the bands were broad and this could allow significant degradation while still ostensibly meeting the standard.<sup>470</sup>

In respect of appendix 3, the IAG argued that higher standards were required for infrastructure to qualify for an exception, and that iwi and hapū should be involved in the decision-making over any exceptions.<sup>471</sup>

We heard evidence from Adele Whyte, chief executive of Ngāti Kahungunu, who explained the criticisms that her iwi had raised with the NPS-FM and the *Next Step* proposals. These included:

- ▶ The NOF bottom lines were too low, and the Hawke's Bay Regional Council had used them to justify 'setting sub-standard policy or managing with a "hands-off" approach'.

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465. See the submissions of Te Roroa and Te Rūnanga o Ngāti Ruanui Trust (Crown counsel, discovery documents (doc D90), pp 3220, 3270).

466. See, for example, the submissions of Ngāti Kahungunu Iwi, and Te Roroa (Crown counsel, discovery documents (doc D90), pp 3065, 3220).

467. See, for example, the submissions of Ngāti Rangi, Te Rūnanga o Ngāi Tahu (Crown counsel, discovery documents (doc D90), pp 3095, 3241).

468. 'Next Steps for fresh water – consultation document: Freshwater Iwi Advisers Group Analysis', [2016] (paper 3.2.312(a)), pp [1]–[2], [4], [15]

469. 'Next Steps for fresh water – consultation document: Freshwater Iwi Advisers Group Analysis', [2016] (paper 3.2.312(a)), p [4]

470. 'Next Steps for fresh water – consultation document: Freshwater Iwi Advisers Group Analysis', [2016] (paper 3.2.312(a)), pp [4]–[6]

471. 'Next Steps for fresh water – consultation document: Freshwater Iwi Advisers Group Analysis', [2016] (paper 3.2.312(a)), pp [7]–[8]



- ▶ It was pointless to measure nitrate toxicity for Ecosystem Health while excluding the MCI, which was a 'valid and widely used tool as an indicator for ecosystem health'.
- ▶ Exceptions to bottom lines must not be granted automatically, even if the particular infrastructure meets a set of criteria.
- ▶ Immersion for spiritual purposes was a more appropriate aspiration than swimmability, and more in keeping with section 6(e) of the RMA.
- ▶ The change in scale to maintaining or improving 'overall' water quality (from a region to a FMU) would not be sufficient to ensure that water quality was in fact maintained.
- ▶ Delaying implementation (to 2025 and 2030) meant that water quality will continue to decline and may make it too costly or even impossible to improve.
- ▶ The Te Mana o te Wai amendments did not suffice to do the concept justice, or to require that the mana and mauri of the water be maintained 'first and foremost'.
- ▶ Clean drinking water for all communities should be a mandatory Human Health objective.<sup>472</sup>

### 5.7.6 The Crown's decisions on the 'Next Steps' water quality reforms

The Crown's response to the *Next Steps* submissions was outlined in the briefing note 'Fresh Water: Summary of consultation submissions and next steps' at the start of June 2016. This note was prepared by officials, and it contained their recommendations on how the Crown should (or should not) proceed with the reforms.

In the case of objective A2, officials advised that the Crown should continue with the proposal that 'maintain and improve' apply to FMUs, not regions. There was mixed support, however, for the proposal that maintaining water quality should be understood to mean keeping the level of the attribute concerned within the same band as before. This had been recommended by the Land and Water Forum and the Parliamentary Commissioner for the Environment, but it failed to address the concern of many Māori and NGOs that the bands were too wide. Officials recommended proceeding with this change, but would give further advice on whether the word 'overall' should be removed from objective A2. Councils were concerned about 'to what extent [objective A2] allows them to trade-off water quality between different attributes or places within the same FMU'.<sup>473</sup>

There was widespread support for the MCI to be made a mandatory monitoring tool, but many wanted other indicators such as fish, sediment, and 'natural character' to be included as well. Iwi submissions had stressed that there must be cultural as well as scientific indicators in the NOF. There was also support for the MCI to be added as attribute, but further work was needed on how MCI trends should

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472. Adele Whyte, brief of evidence (doc D40), pp 4–7

473. Briefing note, 'Fresh Water: Summary of consultation submissions and next steps', 1 June 2016, p 5 (Crown counsel, sensitive discovery documents (doc D92), p 803)

be used to set objectives for Ecosystem Health. This would await the feedback of the NOF reference group and the forum on whether the MCI should be made an attribute.<sup>474</sup>

On the issue of exceptions, the Crown had sought feedback on what kinds of evidence should be required for including infrastructure in appendix 3. According to officials, most submitters ignored this question and attacked the policy of exceptions itself or called for a definition of 'significant' infrastructure. Three large power companies had opposed the specifics of the proposals, and the decision was that officials would work with 'key submitters' to develop the criteria and process for deciding on exceptions.<sup>475</sup> We note that, despite these intentions, no changes were made to the NPS-FM in 2017, and no infrastructure has been listed in appendix 3. This leaves the matter uncertain for all involved, including RMA decision makers, infrastructure-owners, and the hapū and iwi with kaitiakitanga responsibilities for the affected water bodies.

More work was seen as necessary when it came to the stock exclusion proposals, in order to address landowner concerns that a lack of flexibility might impose unreasonable costs on some individuals. On the other hand, many submitters wanted the regulations to be 'more stringent and the deadlines earlier'. Officials noted the forum's concern that riparian margins had been left out, and that the Crown should 'produce a consolidated riparian assessment tool'.<sup>476</sup> The Crown's decision was that officials would work with stakeholders (councils and primary industry) to define slope requirements and an exceptions regime, with the intention of having the stock exclusion regulations ready in 2017 to accompany the NPS-FM amendments.<sup>477</sup>

The inclusion in the NPS-FM of water bodies that were intermittently open to the sea (ICOLLS) was broadly supported. The proposal there was for the lake attributes in the NOF to apply to them. Environment Canterbury had been concerned that the proposal was in conflict with the hard-won agreement over Lake Ellesmere (Waihora), the largest New Zealand water body that would be affected, which had included bottom lines more stringent than those in the NPS-FM.<sup>478</sup> There was no mention, however, of the development of attributes and numerical thresholds for estuaries, wetlands, and aquifers, which was a crucial gap in the NPS-FM. Māori had been particularly concerned that estuaries had been excluded.

We have already discussed the Te Mana o te Wai proposals in some depth in chapter 4. Here, we simply note that the Māori proposal for compulsory Te Mana

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474. Briefing note, 'Fresh Water: Summary of Consultation Submissions and Next Steps', 1 June 2016, p 6 (Crown counsel, sensitive discovery documents (doc D92), p 804)

475. Briefing note, 'Fresh Water: Summary of Consultation Submissions and Next Steps', 1 June 2016, p 6 (Crown counsel, sensitive discovery documents (doc D92), p 804)

476. Briefing note, 'Fresh Water: Summary of Consultation Submissions and Next Steps', 1 June 2016, p 7 (Crown counsel, sensitive discovery documents (doc D92), p 805)

477. Briefing note, 'Fresh Water: Summary of Consultation Submissions and Next Steps', 1 June 2016, p 7 (Crown counsel, sensitive discovery documents (doc D92), p 805)

478. Briefing note, 'Fresh Water: Summary of Consultation Submissions and Next Steps', 1 June 2016, pp 5-7 (Crown counsel, sensitive discovery documents (doc D92), pp 803-805)

o te Wai attributes and bottom lines in the NOF was not a matter on which the Crown intended to act.

The briefing note, however, did cover three matters raised in the submissions that had not been included in the *Next Steps* reform proposals. These were:

- ▶ *Swimmability*: This was the subject of ‘significant public interest’. In response to the clamour for improving on the existing ‘wadeable’ bottom line for the compulsory Human Health value, it was observed that work had started on developing ‘policy options on how to take this forward, including changes to the NPS-FM and providing better information on water quality to communities’.<sup>479</sup>
- ▶ *Dissolved Inorganic Nitrogen (DIN)*: The second matter was the need to regulate nutrient discharges (which had also been raised by many submitters in 2014). The Crown had already asked the Land and Water Forum to ‘consider how the NPS-FM should address nitrate as a nutrient’. The NOF reference group had also been consulted, and its preferred option was to give direction on setting limits for DIN when councils established freshwater objectives for periphyton, and make it ‘explicit [that] the nitrate toxicity attribute [of Ecosystem Health] only applies to rivers that do not support conspicuous periphyton growth’. Officials were already working with the forum and the reference group to develop a reform option on DIN.<sup>480</sup>
- ▶ *Economic wellbeing*: Some submitters, especially Dairy NZ, had said that there was a need for greater recognition of economic wellbeing in the NPS-FM.<sup>481</sup> One of Dairy NZ’s arguments was that the NPS-FM was never intended to constrain growth. Nonetheless, poorly worded requirements like ‘maintain or improve’, and the requirement to maintain water quality within its existing attribute band, would in fact constrain development.<sup>482</sup> The Crown’s response was that every national instrument needs to recognise both environmental and economic goals, and that the establishment of environmental limits under the NPS-FM had to take the economic impacts and costs into account. Officials would explore ‘whether the NPS-FM gives appropriate consideration to economic wellbeing’. To this end, options for achieving greater economic efficiencies, such as those suggested in the Land and Water Forum’s fourth report, would continue to be investigated.<sup>483</sup>

479. Briefing note, ‘Fresh Water: Summary of Consultation Submissions and Next Steps’, 1 June 2016, p 8 (Crown counsel, sensitive discovery documents (doc D92), p 806)

480. Briefing note, ‘Fresh Water: Summary of Consultation Submissions and Next Steps’, 1 June 2016, pp 8–9 (Crown counsel, sensitive discovery documents (doc D92), pp 806–807)

481. Briefing note, ‘Fresh Water: Summary of Consultation Submissions and Next Steps’, 1 June 2016, p 9 (Crown counsel, sensitive discovery documents (doc D92), p 807)

482. Dairy NZ, submission on *Next Steps for Fresh Water*, 22 April 2016 (Crown counsel, discovery documents (doc D90), pp 3982–3984)

483. Briefing note, ‘Fresh Water: Summary of Consultation Submissions and Next Steps’, 1 June 2016, p 9 (Crown counsel, sensitive discovery documents (doc D92), p 807)

**5.7.7 Developing the 'Clean Water' reforms, 2016–17****5.7.7.1 Engagement with iwi**

Section 46(a) of the RMA required the Minister to seek and consider comments on any proposed changes to the NPS-FM, before proceeding to full consultation. Since the *Next Steps* consultation round had not included the three additional matters discussed above, the Crown engaged in a limited consultation with iwi and regional councils. In July 2016, the Crown sought feedback on four issues:

- ▶ addressing iwi/hapū and community aspirations to work towards improving the suitability of lakes and rivers for swimming
- ▶ managing nutrients in rivers (in addition to managing periphyton); and
- ▶ more consideration of economic factors in fresh water planning decisions; and
- ▶ who should decide whether an objective for a water body is allowed to be set below a national bottom line in relation to Policy CA3(b).<sup>484</sup>

The fourth of these issues arose because the *Next Steps* submissions had focused on the exceptions concept itself, rather than on the process for granting exceptions.

Only ten iwi responded to the consultation email, which had contained no detail on these matters other than listing them and asking for feedback.<sup>485</sup> Martin Workman, head of the Ministry's Water Directorate, described the iwi responses as follows:

Of the ten iwi who responded to the letter, eight commented on the question about swimmable rivers, wanting rivers to be at least suitable for swimming or preferably improved further, six supported more direction on nutrients with the rest not commenting on these two proposals. On the question of more direction for economic consideration, the response was mixed with three in support or partial support, one opposed, and one (the Mana Whenua Kaitiaki Forum) wanting economic factors more explicitly linked to Māori rights and interests. Generally, the responses supported further direction in the NPS-FM on swimming.<sup>486</sup>

Some iwi respondents objected to consultation by email (which may, perhaps, account for the limited number of responses). On the issue of exceptions to bottom lines, most of the iwi preferred that there be no exceptions at all, or – if there had to be exceptions – that these should be decided in partnership with iwi.<sup>487</sup> Their submissions also repeated other concerns that had been raised in the *Next Steps* consultation, including the need for cultural attributes in the NOF and the need for higher bottom lines for Ecosystem Health.

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484. Workman, brief of evidence (doc F6), pp 30–31

485. Ministry for the Environment, email, 'Seeking your views on Freshwater Reforms (sent to iwi)', 18 July 2016 (Workman, papers in support of brief of evidence (doc F6(a)), pp 698–699)

486. Workman, brief of evidence (doc F6), p 31

487. See the responses of the Mana Whenua Kaitiaki Forum, Te Runanga o Toa Rangatira, Raukawa Charitable Trust, Te Arawa River Iwi Trust, Te Rūnanga o Ngāi Tahu, and Waikato River Authority (Crown counsel, document bundle (doc F14(a)), pp 844, 850, 855, 857, 866, 883).

### 5.7.7.2 *The views of the Land and Water Forum*

Back in April 2016, the Minister had written to the Land and Water Forum for stakeholder views on the suitability of the MCI as an attribute for Ecosystem Health, and how the NOF should address nitrate as a nutrient. In May, he and the Minister for Primary Industries sent a follow up letter asking if the forum could explore how the NPS-FM might reflect a new focus on swimmability.<sup>488</sup>

The forum was assisted by the NOF reference group and the science review panel in its work. It combined its response to these three requests in nine pages of comments, together with four pages of appendices. With respect to the MCI, the forum noted that it was already being used by most regional councils, and recommended that it be made a monitoring tool rather than a NOF attribute. While it *could* be used as an attribute, the forum considered that ‘the links between what affects MCI scores and what is required to improve them is not straightforward or predictable at a broad regional or national scale’. The forum proposed a MCI flow chart with a critical score of 80 – if a water body scored below 80 on the MCI, then councils would need to develop an action plan to improve its health. Further, the forum clarified that the MCI does not work for non-wadeable streams, lakes, and wetlands.<sup>489</sup>

In respect of managing nutrients (dissolved inorganic nitrogen (DIN) and dissolved reactive phosphorus (DRP)), the forum stressed that councils needed to set local limits for these, based on their potential to promote periphyton growth; no national trigger level was suggested, since their impact on plant growth was affected by other factors such as water temperature and flow. The NPS-FM, therefore, would need a new requirement for councils to set ‘maximum in-stream concentrations’ for DIN and DRP, along with policy direction as to how those limits should be set. The nitrate toxicity attribute would also need to be amended to clarify that it did not apply in situations where problematic algae (such as periphyton) might grow.<sup>490</sup>

Lastly, the forum’s recommendation for swimmability was to have a second Human Health attribute table, based on an *E coli* reading of 550 per 100 millilitres (the maximum allowable for swimming, and the bottom of the ‘B’ band in the secondary contact attribute table). In the new table, the grading would be based on how often the water bodies in an FMU were swimmable (by a time percentage). This would require an assessment of the times when people actually wanted to swim. When the water bodies were not swimmable, then their quality would continue to be assessed against the existing secondary contact attribute table.<sup>491</sup>

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488. Minister for the Environment to the Chair, Land and Water Forum, 16 April 2016; Minister for the Environment and Minister for Primary Industries to the, Chair, Land and Water Forum, 12 May 2016, <http://www.landandwater.org.nz/Site/Resources.aspx>

489. Advice from Forum to Ministers on NOF Development, 19 August 2016, pp 1–3, <http://www.landandwater.org.nz/Site/Resources.aspx>

490. Advice from Forum to Ministers on NOF Development, 19 August 2016, pp 4–5

491. Advice from Forum to Ministers on NOF Development, 19 August 2016, pp 5–8

### 5.7.7.3 *The development of stock exclusion regulations*

Following the forum's August 2016 report and the feedback from iwi and councils, officials worked on a new swimmability policy and on stock exclusion. By December 2016, the Crown had prepared a draft RIS on stock exclusion regulations, informed by research prepared for the Ministry of Primary Industries. The basis of the stock exclusion proposal was only slightly amended from that put forward in *Next Steps*. There would now be a single year (2022) for excluding dairy support cattle from waterways.<sup>492</sup> The RIS observed that there was already a high rate of compliance among dairy farmers, as a result of Fonterra's Sustainable Dairying Water Accord. Also, 11 out of 16 regional councils had some form of stock exclusion rules proposed or in force. The RIS also noted, however, that the rules of nine regional councils only applied in certain situations. Officials concluded that it would take many years before a comprehensive stock exclusion regime applied nationwide without national regulation.<sup>493</sup>

The draft RIS also argued that farmers who were not under any obligation to fence waterways were unlikely to do so, since they would carry the costs whereas the public would receive most of the benefits. This reasoning was backed up by research that showed that, for regions that did not require stock exclusion, only one in eight farmers was planning to fence off their stock in the next two years. From this evidence, it was also concluded that non-regulatory methods were unlikely to produce a much better outcome than the status quo.<sup>494</sup> Officials also concluded that it was best to have regulations that encompassed all cattle, pigs and deer, because this would have the greatest environmental impact in terms of the reduction of *E coli* and sediment.<sup>495</sup>

Another important issue was the question of whether the regulations should require a riparian margin; that is, a certain distance between the fence and the waterway that could be planted and form a riparian buffer. Although such a margin had important environmental benefits, including for aquatic species, officials considered that it was too expensive and difficult to standardise in national regulations. Also, they thought that it would be unfair to enforce riparian margins on farmers, since doing so could potentially penalise the farmers who had fenced their waterways already.<sup>496</sup> The Land and Water Forum had recommended that riparian setback rules should be put in place in catchments with specific water

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492. Ministry for the Environment, 'Draft Regulatory Impact Statement: Stock Exclusion', December 2016, p 14, <https://www.mfe.govt.nz/regulatory-impact-statements/stock-exclusion>

493. Ministry for the Environment, 'Draft Regulatory Impact Statement: Stock Exclusion', December 2016, pp 4–6

494. Ministry for the Environment, 'Draft Regulatory Impact Statement: Stock Exclusion', December 2016, pp 8–10

495. Ministry for the Environment, 'Draft Regulatory Impact Statement: Stock Exclusion', December 2016, pp 10–11

496. Ministry for the Environment, 'Draft Regulatory Impact Statement: Stock Exclusion', December 2016, pp 16–17

quality issues, where they were an effective way of managing a particular issue, and otherwise that they should be part of good management practice requirements.<sup>497</sup>

#### 5.7.7.4 *Populating the NOF*

As we discussed earlier, a key flaw in the NPS-FM 2014 was the omission of essential attributes in its freshwater quality standards. Peter Brunt, a former director at the Ministry, explained that councils would need to choose attributes for the national values in appendix 1, because the tables in appendix 2 only identified some attributes for the two compulsory values (and none for the optional values). He noted:

After identifying attributes, councils are directed to assign an ‘attribute state’ at or above the minimum acceptable state/national bottom line for the attributes specified in Appendix 2. This requires councils to choose a state, at or above the national bottom line.

After identifying the attributes and the attribute states for the compulsory values, the NPS-FM requires regional councils to set freshwater objectives. This involves selecting an attribute state or level for each attribute that will achieve the value held by the community and tāngata whenua. Attribute states must be at or above the bottom lines where provided in the NPS-FM and must maintain or improve water quality. Regional councils must also set limits on resource use to meet those objectives.<sup>498</sup>

The purpose of the NOF, however, was to set national standards for water quality, as well as to enable communities to select the values most appropriate for their water bodies (or FMUs) at the local level. Kenneth Taylor, chair of the NOF reference group, answered a question on whether the NOF attributes would be defined and included at the national or regional level, as follows:

Attribute definition (and inclusion) is to be done nationally, to ensure consistency. One of the drivers for the NOF was a concern that the expression of a value (via attributes and objectives) should be the same everywhere, irrespective of whether a community might want to actually provide for a ‘non-compulsory’ value in its plan. It is unlikely that attributes will need to be developed for all values, as other regulatory mechanisms (including but not limited to the NPS-FM) may be more appropriate. Examples of this include hydroelectric power generation which is also impacted by the NPS for renewable energy. Commercial and industrial use is also impacted by the wider provisions in the RMA and other relevant legislation. Aspects of fishing are managed under the fishing regulations, etc. The NES for drinking water and the Health Act cover drinking water supplies.<sup>499</sup>

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497. Land and Water Forum, *The Fourth Report of the Land and Water Forum*, pp 56–58 (Workman, papers in support of brief of evidence (doc F6(a)), pp 513–515)

498. Peter Brunt, brief of evidence (doc D89), pp 18–19

499. Kenneth Taylor, answers to questions in writing, [October 2018] (doc F4(c)), p 5

The Crown was certainly very aware of the need to develop further attributes following the consultation on the NPS-FM 2014, especially those which both iwi and scientists considered crucial for freshwater management (see sections 5.6.3–5.6.4). Work began on this following the gazetting of the NPS-FM.<sup>500</sup> As noted in section 5.7.4, progress was reported in the *Next Steps* consultation document, although no new attributes were ready as at that date (February 2016): ‘We are developing new attributes including sediment, temperature, benthic cyanobacteria (toxic algae), and wetlands. We also plan to develop attributes for water supply, fishing and for cultural indicators.’<sup>501</sup>

Peter Brunt repeated this statement in his evidence eight months later (October 2016), stating that work was ongoing on sediment, temperature, benthic cyanobacteria, and wetlands, with plans to develop attributes for water supply, fishing, and cultural indicators.<sup>502</sup> Sheree De Malmanche stated in her evidence of the same month that research was ‘underway or planned to inform future attributes’ in the NOF, including sediment and wetlands, and on ‘additional water quality measures such as temperature and dissolved oxygen, fish abundance and habitat, and toxic algae in rivers.’<sup>503</sup> As we discussed above, the forum advised against using the MCI as an attribute. It had also said that further national direction was required for managing nitrogen and phosphorus as nutrients, and had developed a new *E coli* bottom line for swimming. The NOF reference group had been diverted to this work with the forum’s Small Group, and took no further part in the development of attributes for the NOF.<sup>504</sup> The science review panel also stopped operating, with its last meeting held in September 2016.<sup>505</sup>

Unfortunately, the ‘ongoing’ work on attributes was still ongoing by February 2017, when the Crown was ready to release its consultation paper on further reforms and amendments to the NPS-FM 2014, and thus too late for inclusion in the 2017 version of the NPS-FM.

In May 2017, Martin Workman told us:

Work is ongoing in the Ministry’s water directorate on developing new attributes regarding sediment, copper and zinc, and macroinvertebrates. There are also plans to investigate attributes for temperature, benthic cyanobacteria (toxic algae), wetlands, physical habitat, fishing and cultural indicators. There is an existing attribute for dissolved oxygen below point sources in the NPS-FM. There is ongoing work investigating a dissolved oxygen attribute for all stream reaches. There is also a work programme to better understand the effects of fresh water contaminants on estuaries. This could assist councils in their objective-setting.<sup>506</sup>

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500. Briefing note, ‘Freshwater Programme: Managing within Limits, Pressures and Opportunities’, 13 November 2014, p 4 (Crown counsel, sensitive discovery documents (doc D92), p 1349)

501. New Zealand Government, *Next Steps for fresh water* (paper 3.1.255(a)), p 12

502. Peter Brunt, brief of evidence (doc D89), p 19

503. Sheree De Malmanche, brief of evidence (doc D87), p 28

504. Kenneth Taylor, speaking notes, 18 August 2018 (doc F4(b)), p 3

505. Briefing note, ‘Freshwater: Resolving NPS-FM science differences’, 25 April 2018, pp 4–5

506. Workman, brief of evidence (doc F6), p 20



In fact, it seems that matters may have gone backwards because, as at that time, there were only plans to develop attributes for temperature, benthic cyanobacteria, and wetlands (which had previously been described as underway in 2016). Ms De Malmanche explained in her March 2018 update that further research had been completed by then, and a tentative attribute for sediment was ready for testing its preliminary national bottom lines. These bottom lines would ‘define the thresholds at which sediment adversely affects aquatic insects and fish, leading to a loss of species and reduced biodiversity.’<sup>507</sup> Ms De Malmanche stated that further work was still necessary to test the bottom lines with ‘a broader range of scientists’, regional councils, and stakeholders, before sediment could be added as an attribute for Ecosystem Health.<sup>508</sup> The Ministry’s review of the NPS-FM in 2016 had suggested that for some regions, such as Northland, Gisborne, Hawke’s Bay, and Marlborough, erosion and sediment were the main issue for water quality, but that the requirements of the NOF had distracted efforts away to the attributes currently in appendix 2 of the NPS-FM.<sup>509</sup> The absence of attribute states and bottom lines for sediment remained a crucial problem for the effectiveness of the NOF.

In terms of cultural indicators for the NOF, the iwi science panel came up with descriptions of four different states of Te Mana o te Wai, using mauri as its attribute measure. We described that work in chapter 4. The iwi science panel recommended setting a national bottom line for Te Mana o te Wai, using their mauri scale:

The National Bottom Line for the Mauri Measure is . . . described as Mauri Piki. It is envisaged that this must be the limit setting for all waterways. After much consideration, the focus of the measure is to ensure that the mauri of the waterways are thriving, that our connections with the waterways are enhanced and a core part of our relationships, and we are carrying out all of our customary and contemporary practices most of the time. Iwi will expect that this will be part of the limit setting activities and that other attributes would need to meet this level also.<sup>510</sup>

The iwi science panel’s view was that, without bottom lines in the NPS-FM, councils were ‘ignoring the requirements of the NPSFM saying that there is no way to measure TMOtw [Te Mana o te Wai] or a lack of understanding in how to operationalise it.’<sup>511</sup> Although no numerical tables accompanied the mauri scale,

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507. Sheree De Malmanche, brief of evidence (doc F22), pp 6–10

508. Sheree De Malmanche, brief of evidence (doc F22), p 10

509. Ministry for the Environment, *National Policy Statement for Freshwater Management: Implementation Review: National Themes Report*, p 27 (Workman, papers in support of brief of evidence (doc F21(a)), pp 758)

510. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’, 30 November 2017 (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 39)

511. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), p 37)

there were descriptors of five bands (A–E), with the national bottom line being fixed at the B band (Mauri Piki). The descriptors for this band, which councils would be compelled to recognise in setting limits, were:

- ▶ safe to eat and drink from the water most of the time;
- ▶ tikanga and customary practices can be exercised most of the time;
- ▶ ‘Water flows sustain all ecosystems, taonga species and customary uses, and are seasonally appropriate while enabling passage Mai uta ki tai’ most of the time;
- ▶ ‘Tangata whenua are accessing safe and preferred hopua wai and tauranga waka [anchorages and landing places]’ most of the time;
- ▶ fishing places are uncontaminated, and access by iwi and hapū is possible, most of the time; and
- ▶ the ‘valued features, taonga and unique properties of the water are maintained’ most of the time.<sup>512</sup>

As we noted in chapter 4, this work was completed by November 2017, and could not have been inserted in the amendments as specified in *Clean Water* (see the next section). According to ILG witnesses Gerrard Albert and Donna Flavell, the Ministry considered its inclusion in the NOF a ‘step too far’ in any case, and ‘just before the [2017] elections decided not to include it in the NOF’. The work, they said, was ‘shelved’ by the Ministry after the election.<sup>513</sup>

What this means is that by February 2017, when the Crown was ready to put out its next set of freshwater reforms (including marked up amendments to the NPS-FM), most of the essential attributes were still not ready to go into the NOF. In addition to those that applied to lakes and rivers, there would also be no specific attributes or bottom lines for wetlands, aquifers, and estuaries. Nor would cultural indicators be added, although the Crown did plan to link some national values more directly to Te Mana o te Wai, as we discuss further in the next section.

### 5.7.8 The ‘Clean Water’ reform proposals

The new policy package of freshwater reforms was presented to Cabinet for approval in February 2017. It outlined four key actions, the first of which was to set national swimmability targets. At the time, 72 per cent of rivers and lakes were considered swimmable at least 80 per cent of the time. This statistic was arrived at using rivers that were fourth order and above (a NIWA classification based on the number of tributaries) and lakes that had a perimeter of more than 1,500 metres. For these large rivers and lakes, the new plan was to have the figure of 72 per cent grow to 80 per cent by 2030, and 90 per cent by 2040. The Crown’s intention was to jettison the debate over whether water bodies were swimmable or not, and refocus it on ‘the *amount of time* they are suitable for swimming (emphasis added)’.

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512. Te Runanganui o Ngāti Porou, ‘National Policy Statement Freshwater – National Objectives Framework Summary Report’ (Flavell and Albert, document in support of brief of evidence (doc G22(d)), pp 40–41)

513. Donna Flavell and Gerrard Albert, answers to questions in writing (doc G22(f)), p 9

According to preliminary costings, based on the experience of the Manawātū River, the new policy would cost about \$880 million by 2030, and a further \$1.16 billion between 2030 and 2040.<sup>514</sup>

This was a major policy change for the Crown, which had previously argued that a swimmability target was unaffordable. In part, the Crown hoped to reverse the negative publicity its previous ‘wadeable’ standard had provoked:

The Freshwater NPS currently sets the national bottom line for human health for recreation at a moderate level of risk when boating or wading. We want to address the ongoing mistaken public perception that the national bottom line is a ‘goal’ which rivers and lakes can be degraded down to, and shift the public discussion towards making feasible improvements to water quality that mean more rivers and lakes will be swimmable more often.<sup>515</sup>

The Ministry had gone against the advice of the ILG and the Land and Water Forum on this occasion by proposing to scrap the *E coli* attribute table for secondary contact altogether. Instead, there would be a single immersion-based *E coli* table. The Crown’s view was that keeping both tables would be inconsistent with its ‘desire to shift the public conversation to more swimmable rivers and lakes.’<sup>516</sup> While this simplified the attribute tables, the downside to this step was that non-swimmable rivers and lakes were no longer subject to the ‘bottom line’ that the previous *E coli* attribute table had contained. The IAG had opposed this part of the changes, but the Crown disagreed:

The Freshwater Iwi Advisors Group, while supporting the direction to improve rivers and lakes to a swimmable quality, were concerned that focussing on rivers greater than fourth order and removing the national bottom line for *E coli* could mean many smaller rivers need only be maintained at their current quality. Modelling shows that about 90% of catchments in New Zealand flow into rivers that are fourth order or more. We have decided to focus on improving these rivers, recognising that councils may decide to require improvements for smaller streams flowing directly to the sea if that is what their communities want.<sup>517</sup>

Making more rivers swimmable meant dealing with cyanobacteria (toxic algae) as well as *E coli*. The simplified attribute table would include cyanobacteria in lakes but not in rivers. The need to include such an attribute for rivers (benthic cyanobacteria or toxic algae on river beds) was a point on which the scientists had agreed but the Crown had been unable to do so in the 2014 version of the NPS-FM.

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514. Cabinet paper, ‘Fresh Water – Proposals following *Next Steps*’, [16 February 2017], pp1–3, 6, 14, <https://www.mfe.govt.nz/more/briefings-cabinet-papers-and-related-material-search/cabinet-papers>

515. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], p 5

516. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], p14

517. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], pp13–14

This was still the case in 2017, despite the new swimmability targets.<sup>518</sup> Hence, the national ‘safe to swim’ target would exclude ‘factors that can affect safety’, such as ‘access, flow rates, adverse weather, or cyanobacteria in rivers for which there is insufficient data for modelling to map reliably’.<sup>519</sup> Local monitoring would therefore be essential in identifying whether a water body was safe for swimming, and the Crown would now introduce ‘mandatory [monitoring] requirements during the swimming months at popular swimming sites’.<sup>520</sup>

The second of the Crown’s four actions was to finalise the criteria for the \$100 million Freshwater Improvement Fund and to invite applications (see section 5.9.2). The third was the schedule for implementing the stock regulations. As with the swimmability policy, a preliminary economic analysis of the stock regulations was included, which showed the estimated cost of excluding all dairy and beef cattle, pigs, and deer to be \$367 million over 25 years, while the total benefits were estimated to amount to \$983 million over the same period.<sup>521</sup> The Crown’s view was that excluding stock from waterways would help to improve water quality while also addressing ‘some of the negative public perceptions around the environmental performance of farming’.<sup>522</sup> The Crown had, however, decided to vary the *Next Steps* proposals by giving more time to fence off dairy support cattle (2022) and beef cattle and deer (2025 for stock on plains and 2030 in the case of undulating or rolling lands). The deadline for pigs and for dairy cattle on milking platforms would remain 2017 (although exactly when would depend on the passage of the Resource Legislation Amendment Bill, after which regulations could be promulgated).<sup>523</sup>

The final action was for Cabinet to agree that consultation should occur on eight amendments to the NPS-FM 2014. In brief, these were:

- ▶ amending objective A2 to clarify that overall water quality is to be maintained in a FMU, not a region, and that ‘maintain’ means keeping water quality within an attribute band;
- ▶ clarifying when infrastructural needs could justify exceptions to the NPS-FM;
- ▶ applying the NPS-FM to intermittently closing lakes and lagoons (ICOLLS);
- ▶ strengthening the role of Te Mana o te Wai;
- ▶ requiring councils to monitor macroinvertebrates (which most did already);
- ▶ directing councils to make water bodies swimmable more often;
- ▶ directing councils to manage the potential of nitrogen and phosphorus to act as nutrients for periphyton; and
- ▶ directing councils to consider economic wellbeing in their freshwater management decision-making.

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518. New Zealand Government, *Clean Water: 90% of rivers and lakes swimmable by 2040* (Wellington: Ministry for the Environment, February 2017) (paper 3.2.60(a)), pp 10–11, 14; transcript 4.1.4, pp 579–580

519. New Zealand Government, *Clean Water* (paper 3.2.60(a)), p 11

520. Transcript 4.1.4, pp 581–582

521. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], pp 3, 7

522. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], p 10

523. Cabinet paper, ‘Fresh water – proposals following *Next Steps*’, [16 February 2017], pp 11–13

The first five of these amendments closely matched what had been proposed in the *Next Steps* consultation, while the remaining three amendments had been prompted by the consultation feedback, as discussed in previous sections.<sup>524</sup>

One of these amendments, regarding objective A2 (maintenance of overall water quality) was still opposed by the IAG. The Cabinet paper noted that by defining movement within an attribute band as maintaining water quality, the Ministry was concurring with the opinion of the forum and the Parliamentary Commissioner for the Environment. The IAG, however, was still concerned that the water quality bands were so wide they could hide significant degradation.<sup>525</sup> Where there were no attribute bands, maintaining freshwater would be defined as setting limits so that the values identified by councils, communities, and iwi *'are not worse off'* when compared to existing water quality (emphasis in original).<sup>526</sup> This was important because so many attributes would still not be included in the revised NOF.

The infrastructure exceptions proposal in *Next Steps* had been opposed by power companies, so the Crown decided not to include any infrastructure yet in appendix 3. Instead, the amendments would authorise councils to set objectives below the national bottom lines *'if that is necessary to realise the benefits provided by infrastructure'* (emphasis in original). This could only be done if the water quality was *'affected'* by the infrastructure. Infrastructure owners, however, would first need to demonstrate to the Crown that there was a water quality problem in a water body containing infrastructure before it would consider amending the NPS-FM to list the infrastructure concerned in appendix 3.<sup>527</sup> But, since this had to be done before councils could make exceptions, the exceptions policy would effectively remain in abeyance for the foreseeable future. This in turn would make it impossible for councils to decide what standards to apply to FMUs affected by hydro dams and the like.

In respect of Te Mana o te Wai, we have already addressed the proposed changes in some detail in chapter 4. We reiterate here that the Crown intended to amend the descriptions and titles of some values in the NOF to connect them to Te Mana o te Wai, but there would still be no cultural indicators in the NOF.<sup>528</sup>

The *Clean Water* discussion document was released later in February 2017. Its full title showed the key message: *Clean Water: 90% of rivers and lakes swimmable by 2040*. The paper included the policy amendments approved by Cabinet: the eight proposed amendments to the NPS-FM, the new swimming policy, and the revised stock exclusion schedule. Natural wetlands were covered by the stock exclusion proposal, which would be the first specific reform aimed at protecting wetlands (an objective in the NPS-FM).<sup>529</sup> The 96-page document also included a set of region-by-region swimmability maps to underscore how the Ministry hoped

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524. Cabinet paper, 'Fresh water – proposals following *Next Steps*', [16 February 2017], pp 3–4

525. Cabinet paper, 'Fresh water – proposals following *Next Steps*', [16 February 2017], p 15

526. Cabinet paper, 'Fresh water – proposals following *Next Steps*', [16 February 2017], p 15

527. Cabinet paper, 'Fresh Water – Proposals following *Next Steps*', [16 February 2017], pp 15–16

528. Cabinet paper, 'Fresh water – proposals following *Next Steps*', [16 February 2017], p 19

529. New Zealand Government, *Clean Water* (paper 3.2.60(a)), p 28

the new approach would serve the public, together with a marked-up version of the NPS-FM 2014, showing each individual addition and deletion to the text.

The swimmability policy required a number of changes to the NPS-FM 2014. These included amending the preamble to insert the national swimming targets of 2030 and 2040, and a new appendix (6) which showed these targets in graph form. In the main body of the NPS-FM, there would be new or amended objectives and policies, which we consider further when we assess the Crown's decisions. The insertion of the MCI was done in a brief form, although considerable additions were made later, following consultation. In brief, the *Clean Water* discussion document stated that policy CB1 would be amended to require councils to monitor how the values chosen from the NOF were being provided for in an FMU. The mandatory methods would include macroinvertebrate communities and mātauranga Māori (the latter of which had been added as a result of the work by the IAG). Councils would have to set action plans if this monitoring indicated that freshwater objectives would not be met.<sup>530</sup>

Te Mana o te Wai would be associated with water quality by the insertion of an objective and policies in the A section (AA1), as well as the use of certain titles and text to describe national values in the NOF. The 'national significance' statement would establish the health and wellbeing of freshwater bodies at the centre of community discussions in freshwater planning (see chapter 4 for the details).<sup>531</sup>

The insertion of a requirement to manage nutrients (rather than just nitrate toxicity) took the form of a brief footnote to the attribute table for periphyton, stating that councils must set maximum instream concentrations of nitrogen (DIN) and phosphorus (DRP). This would need to be done with sensitivity to downstream environments.<sup>532</sup>

## 5.7.9 Consultation on the *Clean Water* proposals

### 5.7.9.1 Māori responses to *Clean Water*

The *Clean Water* consultation period commenced on 23 February 2017 and was due to close on 28 April. The deadline for submissions on the swimmability proposals was extended for a further month, due to the late completion of a NIWA report. This report provided technical background on the swimmability measures. During this period, over 9000 submissions were received. These included 6591 template submissions, 1787 submissions compiled by Action Station, and 684 submissions from institutional and private submitters. The response from Māori was low, so on 21 April 2017, Martin Workman emailed the Ministry's list of iwi and Māori organisations. As a result, the deadline was extended for a few groups (resulting in 5 more submissions). Iwi and Māori organisations made 21 submissions in total.<sup>533</sup> The relatively low response may partly have been because most of the *Clean Water* changes had already been consulted upon in 2016, in the *Next*

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530. New Zealand Government, *Clean Water* (paper 3.2.60(a)), pp18, A21

531. New Zealand Government, *Clean Water* (paper 3.2.60(a)), p 21

532. New Zealand Government, *Clean Water* (paper 3.2.60(a)), pp 19, A34

533. Martin Workman, brief of evidence, [March 2018] (doc F21), pp 5–7

Steps consultation document, and in the email consultation with iwi in August 2016. The main focus of the Māori submissions was on the new proposals concerning swimming and contact recreation.

The ILG did not make a submission but its views on the water quality proposals were put to the Crown during the direct dialogue over Te Mana o te Wai and related amendments, and also through meetings and a marked-up copy of the NPS-FM following the release of *Clean Water*.<sup>534</sup> The ILG was unhappy with the stock exclusion proposals. It did try to have a hui with affected Māori landowners but this was cancelled due to weather. In any case, the ILG supported stock exclusion, but considered the proposals were too limited, both in terms of the 'scope of exclusions' and the 'timeliness of those exclusions'. As a result, water quality improvements would likely be limited, and the ILG opposed the stock proposals.<sup>535</sup>

The ILG also opposed three changes (all of which were eventually made in 2017):

- ▶ the proposal to add economic considerations to water quality decisions;
- ▶ the restriction of swimmability bottom lines to rivers and lakes that were fourth order (for rivers) or at least 1.5 kilometres in perimeter for lakes; and
- ▶ the removal of the existing secondary contact bottom line, which 'has the effect of there being no *E coli* bottom line for smaller waterways'.<sup>536</sup>

In terms of the submissions from Māori, there was broad support for the target of '90 percent swimmable by 2040', although some submissions called for an earlier deadline.<sup>537</sup> Nonetheless, many were opposed to other aspects of the swimmability package. The most frequent concern, which echoed the position of the ILG, was its limitation to 'large rivers and lakes', rather than extending to all water bodies.<sup>538</sup> Several submissions also expressed a common concern with the ILG about the disappearance of the secondary contact bottom line.<sup>539</sup> Still more challenged the proposition contained in the attribute table, which allowed for a 20 per cent chance of the *E coli* count being above the safe swimming threshold, as representing an acceptable level of risk.<sup>540</sup> As noted above, the Crown's proposal was not that water bodies would be swimmable or not, but that they would be swimmable for about 80 per cent of the time.

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534. Gerrard Albert, Donna Flavell, and Tina Porou, answers to questions in writing (doc G22(f)), p3

535. Gerrard Albert, Donna Flavell, and Tina Porou, answers to questions in writing (doc G22(f)), pp 2-3; Gerrard Albert and Donna Flavell, brief of evidence (doc G22), p 18

536. Gerrard Albert and Donna Flavell, brief of evidence (doc G22), p 19

537. See, for example, submissions of Ngāti Te Wai, Ngāti Kahungunu Iwi, Rangitāne o Tamaki nui a Rua, and Waikato Tainui (Crown counsel, document bundle (doc F14(a)), pp 1055, 1057, 1075-1076, 1167).

538. See, for example, submissions of Ngāti Rangi Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust, and Tūwharetoa Māori Trust Board (Crown counsel, document bundle (doc F14(a)), pp 1066, 1120, 1179).

539. See, for example, submissions of Te Rūnanga o Ngāi Tahu, Te Rūnanga-A-Iwi o Ngāpuhi, and Waikato Tainui (Crown counsel, document bundle (doc F14(a)), pp 1106, 1154, 1171).

540. See, for example, submissions of Ngāti Kahungunu Iwi, Ngāti Kuia Te Iwi Pakohe Taiao, and Rangitāne o Tamaki nui a Rua (Crown counsel, document bundle (doc F14(a)), pp 1057, 1063, 1076).

The proposals concerning ‘economic wellbeing’, and for treating dissolved inorganic nitrogen and phosphorus as nutrients, were the other new issues that generated considerable feedback from Māori submitters. The specific requirement to deal with nutrients obtained widespread support,<sup>541</sup> whereas the introduction of a new emphasis on ‘economic wellbeing’ did not. There was in fact strong opposition to any moves to prioritise economic impacts over environmental ones.<sup>542</sup>

Among the issues raised in earlier consultations, the greatest response consisted of a reiteration of support for the proposed stock exclusion regulations.<sup>543</sup> One of those submissions came from Environment River Patrol Aotearoa, and Millan Ruka also gave evidence during our hearings about the lack of fencing and its impacts in Northland.<sup>544</sup> Several submissions praised the greater significance being accorded to Te Mana o te Wai, which had long been worked for by the ILG and IAG.<sup>545</sup> Numerous other points, such as opposition to averaging water quality, concerns with attribute band widths and thresholds, and support for use of the MCI and/or Cultural Health Index (CHI) as monitoring tools, were also made by smaller numbers of submitters.<sup>546</sup> Concerns were again expressed at the absence of sediment from the NOF.

Customary fishing rights were also a concern for some groups. The Federation of Māori Authorities, Ngāti Kuia, and Te Wai Māori Trust all sought sufficient improvement in both water quality and fish stocks to allow for cultural practices to be safely and sustainably observed.<sup>547</sup>

### 5.7.9.2 Public and stakeholder submissions

In June 2017, officials prepared a briefing note for Ministers about the submissions. It was clear that other groups of submitters shared many of the same misgivings

541. See, for example, submissions of the Federation of Māori Authorities, Tapuika Iwi Authority, and Te Rūnanga o Ngāti Awa (Crown counsel, document bundle (doc F14(a)), pp 1050–1051, 1093, 1127).

542. See, for example, submissions of Raukawa Charitable Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust, and Te Rūnanga o Ngāti Ruanui Trust (Crown counsel, document bundle (doc F14(a)), pp 1082, 1087–1088, 1118–1119, 1143).

543. See, for example, submissions of Te Rūnanga-A-Iwi o Ngāpuhi, Te Wai Māori Trust, and Wellington Tenths Trust – Te Atiawa/Taranaki Whanui ki Te Whanganui-a-Tara (Crown counsel, document bundle (doc F14(a)), pp 1155, 1162, 1196).

544. See Millan Ruka, brief of evidence, 21 September 2016 (doc D50).

545. See, for example, submissions of the Federation of Māori Authorities, Raukawa Charitable Trust, and Te Arawa River Iwi Trust (Crown counsel, document bundle (doc F14(a)), pp 1051, 1082, 1095).

546. In their submissions, Waikato Tainui and Tūwharetoa Māori Trust Board had opposed averaging water quality (Crown counsel, document bundle (doc F14(a)), pp 1170, 1178). Ngāti Kuia Te Iwi Pakohe Taiao, Ngāti Rangi Trust, and Ngāti Kea Ngāti Tuara Trust were among those who had concerns about the NOF bands (Crown counsel, document bundle (doc F14(a)), pp 1063, 1068, 1134). Te Rūnanga o Ngāi Tahu, Te Rūnanga o Ngāti Awa and Te Rūnanga o Ngāti Ruanui Trust supported adding the MCI and/or the cultural health index (Crown counsel, document bundle (doc F14(a)), pp 1100, 1127, 1148).

547. See the submissions of the Federation of Māori Authorities, Ngāti Kuia Te Iwi Pakohe Taiao, and Te Wai Māori Trust (Crown counsel, document bundle (doc F14(a)), pp 1050, 1063, 1160).



about the swimming package. In relation to limiting the policy's application, the paper observed that a 'common theme was support for focussing on waterbodies/sites valued for swimming irrespective of size'. On the question of the secondary contact bottom line, many submitters thought that its removal 'would allow waterbodies to be maintained in a degraded state'. Regional councils also 'considered the existing national bottom line was an important safeguard'.<sup>548</sup> Similarly, submitters in general had considered the proposed *E coli* attribute table to be too lenient in its thresholds, and to be misleading to the public in its description of risk.<sup>549</sup>

Opinions had been split about whether the Land and Water Forum's suggested way of incorporating the MCI was the best one. There were also diverse views about whether the proposals for DIN and DRP were workable, but it was again objective A2 that prompted the most notable division. Dairy NZ, Beef and Lamb, and Local Government New Zealand were amongst the supporters of the proposal. Fish and Game and various other environmental organisations offered more qualified support. NIWA and the Freshwater Sciences Society opposed it for having bands that were too wide (as did Māori).<sup>550</sup> In contrast, consensus had been reached on adding clarity to Te Mana o te Wai, for which support was reportedly unanimous. At the opposite end of the spectrum, the 'economic well-being' proposal had met with 'strong criticism from nearly all submitter types'.<sup>551</sup>

A number of groups supported stock exclusion, including NGOs, science providers, and territorial authorities, but – as did Māori – some wanted the regulations to be 'more stringent or implemented sooner'. Primary industry groups and some regional councils opposed the proposal, largely due to how it had panned out in detail, and many individual submitters were also concerned.<sup>552</sup>

## **5.7.10 The Crown's decisions on *Clean Water* and on amendments to the NPS-FM 2014**

### **5.7.10.1 Amendments to the NPS-FM 2014**

Most of the amendments discussed in section 5.7.8 were included in the revised version of the NPS-FM, which was formally issued in August 2017. There were, however, a number of changes as a result of consultation.

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548. Briefing note, 'Fresh Water: Summary of Submissions and Recommendations on Proposed Amendments in the Freshwater NPS (and Swimming Proposals)', June 2017, pp 13, 18 (Workman, sensitive papers in support of brief of evidence, 6 March 2018 (doc F21(b)), pp 399, 404)

549. Briefing note, 'Fresh Water: Summary of submissions and recommendations on proposed amendments in the Freshwater NPS (and swimming proposals)', June 2017, pp 17–18 (Workman, sensitive papers in support of brief of evidence) (doc F21(b), pp 403–404)

550. Briefing note, 'Fresh Water: Summary of submissions and recommendations on proposed amendments in the Freshwater NPS (and swimming proposals)', June 2017, pp 4, 6, 8 (Workman, sensitive papers in support of brief of evidence) (doc F21(b), pp 390, 392, 394)

551. Briefing note, 'Fresh Water: Summary of submissions and recommendations on proposed amendments in the Freshwater NPS (and swimming proposals)', June 2017, pp 7, 20 (Workman, sensitive papers in support of brief of evidence) (doc F21(b), pp 393, 406)

552. Workman, brief of evidence (doc F6), p 29; Cabinet paper, 'Approval of the Resource Management (Stock Exclusion) Regulations 2017', p 1 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 797)

In terms of the swimmability proposals, officials recommended that the target percentage of swimmable rivers and lakes, together with the timeframes, should remain as proposed. They did, however, take on board the criticism that it should not just be limited to ‘large rivers and lakes’. The solution in this case was to adopt the forum’s suggestion that councils identify sites commonly used for swimming and other forms of immersive recreation, as well as large lakes and rivers. This in turn required changes to the current monitoring regime.<sup>553</sup> The revised NPS-FM required surveillance monitoring of the identified sites for swimming so that ‘timely advice’ could be provided on health risks.<sup>554</sup>

Objective A3 stated:

The quality of fresh water within a freshwater management unit is improved so it is suitable for primary contact more often, unless:

- a) regional targets established under Policy A6(b) have been achieved; or
- b) naturally occurring processes mean further improvement is not possible.<sup>555</sup>

This was accompanied by policies A5 and A6 which respectively required councils to amend their regional plans to support new regional swimming targets, and devise strategies as to how these targets would be achieved. Policy A5 made it clear that, in addition to fourth order rivers and large lakes, councils had to identify ‘primary contact sites’ to which the swimmability targets would also apply.<sup>556</sup> This still left smaller lakes and rivers without that level of protection unless councils specified them (or places along them) as primary contact sites. According to Martin Workman, the tributaries that flowed into large rivers would also need to be of a ‘standard to contribute to the standard of that fourth order’ because of their downstream effects, but this was not specified in the NPS-FM.<sup>557</sup> The remaining elements of the swimming package were brought into the NPS-FM through the substitution of the *E coli* attribute table in appendix 2, the new regional targets set out in appendix 6, and the new monitoring conditions for swimming sites set out in appendix 5.<sup>558</sup>

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553. Briefing note, ‘Fresh Water: Summary of submissions and recommendations on proposed amendments in the Freshwater NPS (and swimming proposals)’, June 2017, pp 11, 13–16 (Workman, sensitive papers in support of brief of evidence) (doc F21(b), pp 397, 399–402); Ministry for the Environment, ‘Summary of recommendations and the Minister for the Environment’s decisions on amendments to the National Policy Statement for Freshwater Management 2014’, ME 1328, September 2017, p 8

554. Workman, brief of evidence, (doc F21), p 21

555. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017 to incorporate amendments from the National Policy Statement for Freshwater Management Amendment Order 2017*, p 12 (Workman, papers in support of brief of evidence (doc F21(a)), p 696)

556. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 14 (Workman, papers in support of brief of evidence (doc F21(a)), p 698)

557. Transcript 4.1.4, p 670

558. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 39–40, 44–46 (Workman, papers in support of brief of evidence (doc F21(a)), pp 723–724, 728–730)

The submissions had also highlighted problems caused by the modified *E coli* attribute bands, such as the adequacy of protection offered and the loss of the former national bottom line. The officials' answer to these problems had been to suggest adding an additional band at the top, and making it mandatory to maintain or improve *E coli* readings once they were in the bottom band.<sup>559</sup>

In terms of costs, the Crown was now prepared to agree that the benefits of improving water quality outweighed the expense – a point that the Crown had not been prepared to accept in 2014. Much of the cost would arise from excluding farm animals (and thereby *E coli*) from water bodies in pastoral catchments, and was therefore bound up with the stock exclusion regulations.<sup>560</sup> Sir Peter Gluckman, the Prime Minister's chief science advisor, suggested that the swimability proposals in 'intensively farmed areas' would need 'a commitment to changing farming practices and implementing mitigations', but even then 'there still may be times (eg, after rains) when it may not be safe to swim.'<sup>561</sup> For urban areas, improvements to infrastructure would be required.<sup>562</sup>

Cabinet estimated the costs, and the necessary methods of implementation, as follows:

We have estimated the costs of meeting the swimming targets at \$2 billion. This breaks down to just under \$100 million a year. We do not think that this figure, relative to the importance of improving water quality for human health, is a disproportionate expense. Also, improving water quality for human health is bound up with other actions to achieve better water quality. By doing this we achieve spin-off benefits for reducing other contaminants ie heavy metals and nutrients and, in the longer term protect the NZ Inc brand.

The costs will vary depending on the individual council response and over the timeframe it is applied. The cost of improving water quality for swimming will differ between rural and urban catchments because of the different pressures on water quality. Costs in rural catchments will arise from excluding stock from waterways, planting riparian buffers and upgrading stock and sewage effluent treatment systems. Costs in urban catchments will arise from improving stormwater and wastewater infrastructure.<sup>563</sup>

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559. Briefing note, 'Fresh Water: Summary of Submissions and Recommendations on Proposed Amendments in the Freshwater NPS (and Swimming Proposals)', June 2017, pp17–19 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), pp 403–405)

560. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', [August 2017] (doc F10), p1

561. PD Gluckman, *New Zealand's fresh waters: Values, state, trends and human impacts* (Wellington: Office of the Prime Minister's Chief Science Advisor, 2017), p20 (Clive Howard-Willimas, papers in support of brief of evidence (doc F5(a)), p 62)

562. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', [August 2017] (doc F10), p2

563. Cabinet paper, 'Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014', [August 2017] (doc F10), pp1–2

Suggestions from the Land and Water Forum featured prominently in the case of the other proposed changes to the NPS-FM. In answer to the concerns about the way in which nutrients were covered (the proposed note on the periphyton attribute table), the Crown decided to adopt more of the specifics from the forum's advice in August 2016 (see section 5.7.7.2). Officials agreed that simply requiring councils to identify maximum nutrient concentrations was not sufficiently explicit direction to councils, so that they could 'manage nutrient loads for ecosystem health'.<sup>564</sup> Martin Workman explained:

LAWF recommended that a 'decision support tool' be adopted that would show councils what factors to consider when managing dissolved inorganic nitrogen and dissolved reactive phosphorus in a Freshwater Management Unit. The flow chart recommended by LAWF was used as the basis for the narrative adopted in the NPS-FM amendments.<sup>565</sup>

Officials also recognised that further important work would need to be done to 'guide councils on how to determine appropriate nutrient thresholds for the various river types and various climates around New Zealand'.<sup>566</sup> This would have to take place after the NPS-FM was amended. As part of the new material on nutrients, we note that estuaries were mentioned in the NPS-FM for the first time, with the statement that if there were 'nutrient sensitive downstream environments', such as an estuary, instream limits would need to take account of the 'outcomes sought for those sensitive downstream environments'.<sup>567</sup>

With respect to the MCI, there had been a lot of concern among submitters that the proposed amendments only referred to monitoring the macroinvertebrate community and did not actually require councils to use the index itself or take action if macroinvertebrate scores fell below a specified bottom line.<sup>568</sup> Based on the forum's August 2016 advice, the Minister agreed to introduce a new policy (CB3) that required councils to use the MCI. A score of 80 or a declining trend would then require councils to develop an action plan that would seek to halt a declining trend or raise the MCI score above 80 (unless there was a naturally occurring cause for the decline).<sup>569</sup>

When it came to the 'economic wellbeing' proposal, the Minister decided to retain it in the form of new objectives and policies. Previously, the proposal had been to introduce it as an amendment to the 'maintain or improve' water quality objective (A2). The Crown's view was that having a separate new objective would

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564. Workman, brief of evidence (doc F21), p 11

565. Workman, brief of evidence (doc F21), p 11 n

566. Workman, brief of evidence (doc F21), pp 11–12

567. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 34 (Workman, papers in support of brief of evidence (doc F21(a)), p 718)

568. Workman, brief of evidence (doc F21), p 12

569. Ministry for the Environment, *Summary of Recommendations and the Minister for the Environment's Decisions on Amendments to the National Policy Statement for Freshwater Management 2014* (Wellington: Ministry for the Environment), p 15

‘better express the balance of considerations intended to be part of the values and freshwater objective setting process.’<sup>570</sup> The new objective A4 stated: ‘To enable communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quality, within limits.’<sup>571</sup> This was accompanied by policy A7, which required councils to consider how to ‘enable communities to provide for their economic well-being, including productive economic opportunities, while managing within limits.’<sup>572</sup>

In respect of infrastructure exceptions, the Crown decided not to include a stipulation that councils would decide whether to exclude infrastructure from bottom lines, based on whether that was necessary so as to realise its benefits. The phrase ‘benefits of infrastructure’ was removed, and councils would simply rely on ‘benefits’ as defined in the RMA. Otherwise, the Ministry would work with the Ministry for Business, Innovation and Employment on a timetable for populating appendix 3, which was to be published in September 2017.<sup>573</sup>

Of the remaining amendments, the application of the NOF to intermittently closed coastal lakes was relatively straightforward. There was concern, however, from the primary and electricity sectors that the headings in appendix 1 of the NPS implied that some of the national values had priority over ‘extractive uses’, and to this end they were seeking to get this altered.<sup>574</sup> As we discussed in chapter 4, the result was the removal of all headings related to Te Mana o te Wai, effectively severing this supposedly overarching concept from the NOF. Given that there were no compulsory Māori values and no cultural attributes or indicators in the NOF, this was a very significant decision.

As for objective A2, the change from regions to FMUs was also clear cut. The Crown decided not to accept the concerns about maintaining water quality within a broad band.<sup>575</sup> Objective A2 was thus changed to read:

The overall quality of fresh water within a freshwater management unit is maintained or improved while

- a) protecting the significant values of outstanding freshwater bodies;

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570. Ministry for the Environment, *Summary of Recommendations and the Minister for the Environment’s Decisions on Amendments to the National Policy Statement for Freshwater Management 2014*, p 13

571. ‘National Policy Statement for Freshwater Management Amendment Order 2017’, 9 August 2017, *New Zealand Gazette*, no 79, p 6

572. New Zealand Government, *National Policy Statement for Freshwater Management 2014 updated August 2017*, p 12 (Workman, papers in support of brief of evidence (doc F21(a)), p 696)

573. Ministry for the Environment, *Summary of Recommendations and the Minister for the Environment’s Decisions on Amendments to the National Policy Statement for Freshwater Management 2014*, p 14

574. Ministry for the Environment, *Summary of Recommendations and the Minister for the Environment’s Decisions on Amendments to the National Policy Statement for Freshwater Management 2014*, p 7; Workman, supplementary brief of evidence (doc F21), pp 9–10

575. Briefing note, ‘Fresh Water: Summary of submissions and recommendations on proposed amendments in the Freshwater NPS (and swimming proposals)’, June 2017, p 8 (Workman, sensitive papers in support of brief of evidence) (doc F21(b), p 394)

## 5.7.10.2

- b) protecting the significant values of wetlands; and
- c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.<sup>576</sup>

An FMU was defined as a water body, multiple water bodies, or part of a water body, depending on what councils considered the ‘appropriate spatial scale’ for setting objectives and limits, and for ‘freshwater accounting and management purposes.’<sup>577</sup> The claimants in our inquiry remained concerned that FMUs could be defined on a scale that still allowed for offsets in water quality – one water body might be allowed to degrade if another was improved, so long as the FMU was maintained or improved overall.

**5.7.10.2 Stock exclusion**

At the same time as the *Clean Water* consultation had been going on, the Crown had completed another milestone towards implementing the stock exclusion regulations. Parliament agreed to amend section 360 of the RMA as part of the changes brought in by the Resource Legislation Amendment Act.<sup>578</sup> This empowered the Minister to make regulations for excluding stock from waterways.

In June 2017 approval was given for the regulations to be drafted, and by 17 July a provisional version was ready for discussion by Water Directorate officials, the Land and Water Forum working group, and regional council staff.<sup>579</sup> The Crown did not engage with the IAG on the draft regulations or on any modifications that might be required to them.<sup>580</sup>

In the discussions, the sticking point was the question of how to assess farms occupying several slope categories for compliance with the regulations. Primary sector representatives later took their technical concerns directly to the relevant Ministers. Although not opposed to stock exclusion per se, they were concerned about the degree to which the regulations would include steep country that was harder and more expensive to fence, while also carrying less stock. The regulations stated that dairy support cattle, beef cattle, and deer did not have to be excluded on steep paddocks. Officials proposed that steep paddocks be defined as those in which 80 per cent of land had a slope in excess of 15 degrees. Federated Farmers, however, wanted to define paddocks as steep if only 20 per cent of the land had a slope above 15 degrees (a position that they later changed to 40 per cent), which would mean that less stock would have to be excluded. Federated Farmers was

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576. Ministry for the Environment, ‘Section 32 Evaluation Report’, p 11 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 631)

577. Cabinet paper, ‘Freshwater: Amendments to the National Policy Statement for Freshwater Management 2014’, appendix 1: ‘Changes made to the National Policy Statement for Freshwater Management 2014 in the 2017 Amendment’, p 8 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 467)

578. Resource Legislation Amendment Act 2017, s 114

579. Workman, brief of evidence (doc F21), pp 18–19

580. Martin Workman, answers to questions in writing, no date (doc F21(d)), pp 11–12

also concerned about the requirement that, if stock crossed a waterway more than 24 times a year, it would have to have a bridge or culvert. In their view, this requirement should be removed, and the regulations should only apply to waterways that were more than a metre wide, and to wetlands that support *native* plants and animals (with those indigenous species dominating an area larger than 0.5 hectares).<sup>581</sup>

From July to August 2017, Ministry officials and members of the Ministers' staff met with primary industry groups to discuss their concerns. Agreement could not be reached, however, and Cabinet decided not to proceed with any stock regulations for the time being.<sup>582</sup> No further work was done on the regulations before the 2017 election, and so even though the draft RIS in December 2016 had identified the pitfalls of the status quo, New Zealand continued to lack a comprehensive national stock exclusion regime. In his March 2018 evidence, Martin Workman advised that officials were at that time 'preparing advice to the new Ministers on options to keep stock out of waterways'.<sup>583</sup> Future reforms may take place but the decision in 2017 was a disappointing end to the intensive work preparing the stock exclusion policy (as discussed in previous sections). We note that the exclusion of stock from water bodies (including wetlands) and the planting of riparian margins are crucial for the compulsory Human Health and Ecosystem Health values in the NOR. The fencing and planting of riparian margins helps to prevent erosion, the entry of sediment and phosphorus to waterways, and high *E coli* levels.

### 5.7.11 The need for further reforms

By the end of 2017, the need for further freshwater quality reforms was clearly evident to all parties. After the election of the new, Labour-led Government in September 2017, the Ministry for the Environment provided the incoming Minister with a briefing. This gave a snapshot on the current state of water quality, citing the 2017 freshwater domain report, *Our Freshwater*. Three-quarters of native fish, one third of aquatic invertebrates, and one third of aquatic plants were all threatened with extinction. Between 1994 and 2013, levels of nitrate-nitrogen had only improved at 28 per cent of monitored river sites, whereas it had worsened at 55 per cent of sites. Conversely, the figures for dissolved reactive phosphorus over the same period showed 42 per cent of sites had improved and only 25 per cent had worsened, while water clarity had improved at two-thirds of monitored sites between 1989 and 2013.<sup>584</sup> Using maps with a striking red-blue colour gradient, the

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581. Workman, brief of evidence (doc F21), pp18–19; transcript 4.1.4, pp707–708; Chris Allen, Federated Farmers, to the Ministers for the Environment and Primary Industries, 14 July 2017 (Crown counsel, discovery documents (doc F11), pp[2]–[4]); 'Cabinet talking points for Stock Exclusion', [2017] (Crown counsel, sensitive discovery documents (paper 3.2.215(a)), pp40–41)

582. Workman, brief of evidence (doc F21), p19; transcript 4.1.4, p708

583. Workman, brief of evidence (doc F21), p19

584. Ministry for the Environment, 'Briefing to the Incoming Minister for the Environment: Water Issues', [October 2017], pp6–7

close correlation between pasture cover and water quality for swimming was also demonstrated.<sup>585</sup>

The briefing recommended that the Crown establish an oversight process to monitor progress in the setting of water quality limits under the NPS-FM. It also stated that more work was needed in relation to the NOF attributes, with sediment and heavy metals being seen as the top priority. Stock exclusion regulations and the long-stalled NES for Ecological Flows and Water Levels were also priorities.<sup>586</sup>

In December 2017, the Land and Water Forum listed a number of priorities, including measures to:

- ▶ protect waterways from sediment and from nutrient leaching;
- ▶ keep stock out of waterways;
- ▶ require better farming practices;
- ▶ separate urban stormwater and sewage;
- ▶ strengthen national water quality standards;
- ▶ ensure that water quality did not deteriorate prior to the introduction of limits under the NPS-FM; and
- ▶ resolve iwi rights and interests in water.<sup>587</sup>

The forum observed that significant work had already been carried out on some of these potential measures, such as the Ministry's research to support a sediment attribute, and the forum's own development of stock exclusion proposals. The forum also identified three further priorities which it thought that the Crown should adopt: addressing the exceptions for infrastructure which were meant to be listed in appendix 3 of the NPS-FM; investigating national regulations for brake pads and building materials (in order to reduce contamination from copper and zinc); and enabling regional collaborative processes. An additional plea was for better communication about potential changes to the NPS-FM, as regional councils had been frustrated by the need to keep altering regional plans.<sup>588</sup> We note that a new or revised NPS-FM had been issued every three years since 2011, whereas plan preparation, consultation, submissions hearings, and appeal processes usually take longer than three years.

There was also an informal meeting in March 2018 between NIWA scientists and Professor Russell Death and Dr Joy, two of the greatest critics of the NPS-FM (we discussed Dr Joy's criticisms earlier).<sup>589</sup> In January 2018, Dr Joy had pointed out that under the current NOF, river sites in certain circumstances could be in the A band for their measured attributes, but could be in a poor state of Ecosystem

585. Ministry for the Environment, 'Briefing to the Incoming Minister for the Environment: Water Issues', [October 2017], p 6

586. Ministry for the Environment, 'Briefing to the Incoming Minister for the Environment: Water Issues', [October 2017], pp 16–17

587. Land and Water Forum, 'Better Freshwater Management: A Land and Water Forum Report to the Minister for the Environment and Minister of Agriculture', December 2017, pp 3–5, <http://www.landandwater.org.nz/Site/Resources.aspx>

588. Land and Water Forum, 'Better Freshwater Management: A Land and Water Forum Report to the Minister for the Environment and Minister of Agriculture', December 2017, pp 5–6, 11, 14

589. Briefing note, 'Freshwater: Resolving NPS-FM science differences', 25 April 2018, p 3



Health.<sup>590</sup> At the meeting, it was agreed that the NOF was lacking in attributes specifically tied to Māori values, and that there would need to be additional attributes if it was to be effective for managing ecosystem health. It was recognised, however, that some of the new attributes, such as sediment, would be more complex to include in the NOF, given that they would vary naturally based on the make up of the catchment.<sup>591</sup> Consequently, there might be a matrix of band thresholds based on river environment classifications rather than a single set that was valid for the whole country.

The key point of difference remaining from the meeting was over the management of nitrate levels. In reply to Dr Joy's complaint that nitrate toxicity had little value as a measure because of the damage nitrogen does to ecosystems by promoting rank algal growth, NIWA scientists observed that councils were being directed to manage nitrate with respect to periphyton growth. This did not resolve the counter-argument that the high nitrate levels could manifest themselves in other adverse effects.<sup>592</sup>

In addition, the claimants and interested parties in our inquiry made their closing submissions in 2018. In their view:

- ▶ the NOF bottom lines were too low;
- ▶ crucial attributes such as sediment were missing from the NOF;
- ▶ the NOF had no compulsory Māori values (with attributes and bottom lines) or cultural indicators;
- ▶ water quality can still degrade within an FMU and within broad bands;
- ▶ the process for decision-making about appendix 3 (including the role of Māori in the decision-making) has not been decided;
- ▶ estuaries and wetlands are not sufficiently protected by the NPS-FM;
- ▶ the Crown has failed to reform the consents and allocation regimes;
- ▶ the NPS-FM has long lead-in times (allowing degradation in the meantime) and does not provide for restoration of degraded taonga;
- ▶ the addition of economic objectives and policies in 2017 weakened the NPS-FM; and
- ▶ the Crown's reforms have failed to address the effects of land-use intensification, for example in the failed stock exclusion regulations (see section 5.2.1 for these submissions).

We did not receive evidence from the Crown or claimants or interested parties about the Labour-led Government's reforms, so we can take this discussion no further. We simply note that, although there was a clear need for further reforms, the position reached at the end of 2017 was the conclusion of the National-led Fresh Start for Freshwater reform process. We made interim conclusions about the NPS-FM 2014 in section 5.6, and we next proceed to make our final conclusions and findings about the water quality reforms. The question posed at the end of our

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590. Briefing note, 'Freshwater: Resolving NPS-FM science differences', 25 April 2018, p 5

591. Briefing note, 'Freshwater: Resolving NPS-FM science differences', 25 April 2018, pp 5-7, & appended notes [pp 5-6]

592. Briefing note, 'Freshwater: Resolving NPS-FM science differences', 25 April 2018, p 7

interim conclusions was: did the Crown's post-2014 reforms address the problems and omissions in the NOF and the wider NPS-FM?

### 5.8 CONCLUSIONS AND FINDINGS ON WATER QUALITY REFORMS

Crown counsel submitted that the 'role of central government is to provide pollution controls and standards', and that New Zealand was further along in that respect than Australia and Canada in setting 'national pollution standards to underpin local management'.<sup>593</sup> The Crown also argued that many of the issues raised by the claimants were problems of implementation and not problems with the RMA itself. The Crown was acting in compliance with the Treaty by taking 'adaptive steps' to fix those problems by providing 'targeted reform, clarification, guidance, and improved enforcement'.<sup>594</sup> In its conclusion, the Crown stated:

The Crown says that throughout the reform process, the Crown has acted consistently with Treaty principles. The Crown has engaged with the ILG and with Māori more generally over reforms, and all parties have kept an open mind and acted in good faith throughout. This process has developed and improved tools for the active protection of taonga waters, and has extended the authority of Māori over waters throughout New Zealand.<sup>595</sup>

The claimants and interested parties agreed that the Crown owes a Treaty duty of active protection of their taonga waters, but denied that the Crown's reforms have met this Treaty standard. Counsel argued that the Crown's freshwater reforms have created weak, inadequate standards and controls that are insufficient for the active protection of their freshwater taonga.<sup>596</sup> This included the NPS-FM, of which counsel for interested parties stated:

the levels set by the NPS-FM 2017 for the various characteristics of water quality are contrary to the aspirations that would be put forward by matāuranga Māori and are therefore inconsistent with Tiriti principles of active protection for taonga as envisioned by Māori.<sup>597</sup>

The claimants and interested parties also argued that the Crown had failed to act in partnership with Māori in the way that it carried out its freshwater quality reforms.

In the Ministry's report on the *Clean Water* submissions and recommendations to the Minister, it was argued that the revised NPS-FM would be compliant with the Treaty because the proposed amendments were developed 'in conjunction with

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593. Crown counsel, closing submissions (paper 3.3.46), p 64

594. Crown counsel, closing submissions (paper 3.3.46), pp 64–65

595. Crown counsel, closing submissions (paper 3.3.46), p 90

596. Counsel for interested parties (Gilling and Davidson), submissions by way of reply (paper 3.3.60), pp 6–7

597. Counsel for interested parties (Gilling and Davidson), closing submissions (paper 3.3.35), p 15

the Freshwater Iwi Leaders Group and as such fulfil the Treaty of Waitangi principle of “partnership”. The Ministry also stated that the ‘proposed objective and policy of Te Mana o te Wai addresses the Treaty principle of “active protection” by putting the river first’. It was further stated that addressing tangata whenua values across all the RMA wellbeings, and including them in the ‘overall management of fresh water’, was key to meeting the Crown’s Treaty obligations. But no changes were recommended to section D of the NPS-FM.<sup>598</sup> We have already addressed the issues of tino rangatiratanga in freshwater management and the Treaty compliance of section D of the NPS-FM in chapters 3–4. In this section, we are concerned with whether the Crown’s freshwater quality reforms, and in particular the controls and standards introduced in the NPS-FM, did meet the Crown’s duty of active protection of freshwater taonga.

We note that there has been a difficult issue of balancing interests throughout the reforms. This was exemplified in the Crown’s decisions about the board of inquiry’s report in 2011, the introduction of the economic wellbeing objectives in 2017, and the failure to issue stock exclusion regulations in the same year. In our view, Treaty principles were a necessary guide for how to balance the varied interests, including the interests of the economy and the environment, in the hard decisions that the Crown had to make. This balancing of interests in the political sphere partly accounts for why the Crown’s reforms have taken such a lengthy, cautious approach (as will be very evident by this point). It is also partly why the Crown brought Māori (via the ILG) and stakeholders (via the forum) in with it to collaborate, create solutions, and develop buy-in and consent step by step. As part of this process, a reform which seemed impossible to the Crown in 2014 – swimability – was gradually worked through until it was finally introduced into the NPS-FM in 2017.

The 2008 version of the NPS-FM proposed a zero-tolerance policy towards further contamination of fresh water. The board of inquiry not only agreed with that but took it further. The standard it proposed was that outstanding fresh water must be protected, the quality of all fresh water contaminated by human activity must be enhanced, and the quality of all other fresh water must be maintained. At the time, the Crown considered that this was out of balance with section 5 of the RMA. The purpose of the RMA was sustainable management, which enabled the use, development, and protection of resources in such a way that it provided for social, economic, and cultural wellbeing, while sustaining the life supporting capacity of the resource for the future. The board’s view was that fresh water was in such a state that environmental protections had to take priority over economic considerations, at least for a generation or so. The Crown’s view in 2011, on the other hand, was that freshwater quality standards must not be too costly or controversial for councils and the primary sector to accept. Nor should such quality

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598. Ministry for the Environment, *Submissions Report and Recommendations on Proposed Amendments to the National Policy Statement for Freshwater Management 2014*, p 57 (Workman, sensitive papers in support of brief of evidence (doc F21(b)), p 562)

standards constrain economic growth (or should do so as little as possible). The Crown had a major business growth agenda to deliver.

In revising the board's version of the NPS-FM to lower costs to the primary sector and local government, the Crown was essentially trading off the benefit to be gained from stakeholder buy-in with less stringent controls on water quality. It was certainly urgent to get strong national direction in place, and the Crown had been attempting to do so since 2003–04. But we cannot know whether seeking to implement the board of inquiry's version would have been as costly and contentious as the Crown had anticipated. What was particularly regrettable was that the Crown altered the board's transitional provisions (so that they no longer applied to permitted activities), and allowed only a test of overall quality across a region, a move that went against the advice of the Department of Conservation. In doing so, the Crown reduced the requirement that councils control the adverse effects of farming intensification, which was recognised at the time as the leading source of nitrate contamination, the very measure which was causing the greatest water quality concern at the time.

Further, the fundamental principle of the NPS-FM 2011, 'maintain or improve', would potentially lock in any additional degradation that occurred by the time councils set limits – which could potentially not occur until 2030 or even later (depending on appeals to regional plan changes).

In our view, the NPS-FM 2011 did not provide adequate controls and standards for the active protection of freshwater taonga, and it was not consistent with the principles of the Treaty of Waitangi. On the other hand, the Crown had finally provided some belated direction to regional councils. Ministers and officials were aware at the time that further reforms would be required (including improvements to the NPS-FM), but significant parts of that foundational document remain in force today.

In terms of water quality standards, the key reform came in 2014 with the establishment of the NOF. First, the NOF provided guidance on how to set objectives and limits. Māori, communities and councils would first choose what they valued their water bodies for, using a menu of two compulsory and several optional national values. They would then set objectives and limits so that their values for the water bodies would be given effect. When Te Mana o te Wai was strengthened in 2017, the health of water bodies was supposed to be placed at the centre of all such discussions. Secondly, the NOF set freshwater quality standards. Water bodies would have to be improved if they fell below the national bottom lines of Ecosystem Health and Human Health, as set in attribute tables (appendix 2 of the NPS-FM). Further, as clarified in 2017, the requirement to 'maintain' water quality meant keeping it within its current attribute bands. At the time, the Crown acknowledged that it was essential to set standards in the NOF to ensure national consistency, avoid duplication of effort, and assist councils (many of which were finding the scientific work for limit-setting to be a very costly and difficult exercise). Where attributes were missing from the NOF, however, the Crown directed that the regions must fill the gaps.

As we discussed in our interim conclusions in section 5.6.4, the scientific evidence agreed that crucial attributes were omitted from the NOF in 2014. This significantly weakened the value of the standards set by the NOF, including the national bottom lines. Also, there were no compulsory Māori values, with attributes and national bottom lines attached to them. Te Mana o te Wai was not made a compulsory value, and the Crown decided not to retain Te Mana o te Wai as an overall title for the two compulsory values in the NOF. Indeed, there were no cultural attributes at all in the 2014 version of the NOF.

Further, it was argued by Māori and many others that the bottom lines were set too low. In particular, the setting of a bottom line for nitrate toxicity (instead of nitrogen as a nutrient) was controversial. It was understood at the time that 20 per cent of freshwater species, including kōura (freshwater crayfish), would be affected by nitrate at the relatively high concentration set for the nitrate toxicity bottom line. Although the Ecosystem Health bottom lines have not changed, the Crown did later amend the Human Health bottom line that water quality should (in its minimum acceptable state) be mostly safe for wading or boating (discussed further below).

Added to the weaknesses of the NOF, previous failings, such as the ‘unders and overs’ approach to managing water across a region, had not been remedied.

We have already found in previous chapters that the process of setting objectives and limits should have been conducted on a co-governance basis with iwi and hapū. We need not say more on that here. In this chapter, we accept that the addition of the NOF to the NPS-FM 2014 was a necessary improvement on the 2011 version, but we do not think that the standards set by the NOF were consistent with the Treaty principle of active protection. All parties – the Crown, the ILG, the Māori submitters in 2013 and 2014, the Land and Water Forum, and the freshwater scientists involved – knew that further attributes had to be added to the NOF. Sediment was one of the most important. Others included temperature, copper and zinc, macroinvertebrates, and benthic cyanobacteria (toxic algae). Further, the NOF’s standards only applied to lakes and rivers. The Crown thus failed to set water quality standards for wetlands and aquifers, despite acknowledging in the NPS-FM the need to protect wetlands as a priority. Māori submitters (and our claimants) were also concerned about the exclusion of estuaries from the NPS-FM. Standards and national bottom lines were needed for lagoons, estuaries, and aquifers.

We accept that a huge effort went into developing the NOF between 2012 and 2014, as we have shown in section 5.5, and that the Crown’s collaboration with the Land and Water Forum and the ILG had laid the basis for strong national support, at least in principle. This was shown in the consultation that took place on *Freshwater reform 2013 and beyond* and on the proposed amendments to the NPS-FM 2014. The Crown, however, was unprepared to use the MCI even for monitoring, despite its widespread use by regional councils, and was unwilling to accept a bottom line higher than ‘wadeable’, despite the health risks that such a standard posed for human health. Certainly, both the MCI and a swimmable bottom line could have been inserted in the NOF in 2014.

The question then becomes: to what extent were the significant defects and omissions in the NOF – and the NPS-FM more broadly – rectified in 2017, after further intensive work by the Crown, the ILG, and the forum, as developed in the *Next Steps* and *Clean Water* consultations.

As we have set out in section 5.7, some significant improvements were made in 2017 that affected water quality standards:

- ▶ Te Mana o te Wai was significantly strengthened, including by adding objective AAI and supporting policies, which would increase the weighting given to the health of water bodies in freshwater plan-making;
- ▶ intermittently closing and opening lakes and lagoons were added to the NPS-FM, applying the lake attributes to their situation, and nutrient limits would need to take estuaries into account if the estuaries were ‘nutrient sensitive’;
- ▶ the ‘unders and overs approach’ was changed to the level of the freshwater management unit;
- ▶ specific direction on nutrients was added to the NOF, including requiring councils to set ‘exceedance criteria’ for DIN and DRP, if councils set an objective relating to periphyton;
- ▶ monitoring would require the use of both mātauranga Māori and the MCI, with the necessity of an action plan should a water body fall below a score of 80 on the MCI, and monitoring requirements were set for swimming sites; and
- ▶ swimmability (on a frequency basis) was introduced as a new Human Health requirement for large rivers and lakes, and also for any other sites identified by councils as primary contact sites, which was a highly significant policy change for the Crown.

Although these were significant amendments, some defects had either not been rectified or had been introduced with the new amendments:

- ▶ no more attributes were added to the NOF in 2017, even though the Crown had been working on several since 2014, which meant that the NOF still lacked some essential water quality standards, including bottom lines for attributes such as sediment;
- ▶ Te Mana o te Wai was not made a compulsory national value in the NOF, with attributes and national bottom lines, and the remaining link between Te Mana o te Wai and the titles of some values was severed (as discussed in chapter 4);
- ▶ no other compulsory Māori values were inserted in 2017, no cultural attributes were assigned to the compulsory values, and no cultural indicators were added to the NOF;
- ▶ the ‘maintain or improve’ requirement would still allow water quality to degrade until limits were set (by 2030 at the latest but with opportunity for appeals), although that would be less of an issue for attributes with a compulsory national bottom line;
- ▶ water could potentially still degrade from the top to the bottom of wide bands and yet be ‘maintained’;

- ▶ in replacing the previous *E coli* attribute table, the Crown scrapped the previous band thresholds with the exception of the maximum safe concentration for swimming (which had been the boundary of the B and C bands), which removed any bottom line for Human Health in water bodies that were not fourth order rivers, large lakes, or identified as sites for swimming;
- ▶ the targets for swimmability would take a long time to reach (until 2040 to reach 90 per cent) and did not apply to smaller rivers and lakes unless identified by councils as swimming sites;
- ▶ no attributes or bottom lines were added for wetlands and aquifers; and
- ▶ the nitrate toxicity bottom line would still allow impacts on 20 per cent of aquatic species, and direction on nutrient enrichment was acknowledged as incomplete (with further work planned).

The claimants and interested parties also argued that the addition of economic wellbeing objectives in 2017 increased the already high weighting given to economic as opposed to environmental matters in freshwater management. We do not necessarily agree, but we do think that the Crown's failure to issue stock exclusion regulations weakened the freshwater quality reforms, and that an unwillingness to constrain economic growth remained an important factor in the Crown's decisions about the reforms. The board of inquiry certainly found that the environment ought to be prioritised over other section 5 matters until the serious problems with freshwater quality had been ameliorated. Diffuse discharges remain a fundamental problem, and we are not convinced that the reforms have yet developed a sufficient response to either quality or quantity over-allocation.

Although there are defects in the NPS-FM, we acknowledge that the Crown has made a significant effort to address the pressures on fresh water and provide national water quality standards for regional councils to implement. The Crown has worked collaboratively and has attempted to gain widespread buy-in for its reforms, which will likely assist their success in the long run. Nonetheless, the freshwater quality standards set in the NPS-FM, as amended in 2017, are not yet adequate to provide for the Crown's Treaty duty of active protection of freshwater taonga. The failure to provide for stock exclusion compounds the breach. In chapter 2, we described the prejudice experienced by iwi and hapū whose spiritual and cultural relationships with their freshwater taonga have been profoundly harmed by degraded water quality.

We note further that, with three-quarters of indigenous fish species threatened with or at risk of extinction (it was only one-fifth when the RMA was passed),<sup>599</sup> the fishing rights guaranteed in the Treaty have been significantly infringed, and Māori have been prejudiced in the exercise of their customary, inter-generational fishing rights.<sup>600</sup> Counsel for interested parties argued that the protection of water

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599. Mike Joy, brief of evidence (doc D20), p 24

600. For example, in their submissions on the 'Clean Water' discussion document, the Federation of Māori Authorities, Ngāti Kūia Te Iwi Pakohe Taiao, and Te Wai Māori all sought sufficient improvement in both water quality and fish stocks to allow for cultural practices to be safely and sustainably observed: Crown counsel, document bundle (doc F14(a)), pp 1050, 1063, 1160.

quality is essential for the protection of fishing rights,<sup>601</sup> and we agree with that submission.

More reforms were under consideration even as the NPS-FM was issued in 2017. The present Government has also planned to undertake significant freshwater management reforms, but those were at an early stage when our hearings ended. The freshwater quality standards and controls in the NPS-FM 2014 (as amended in 2017) are still currently in force.

We turn next to consider the Crown funding that has been made available for restoration of water bodies as part of the freshwater reform programme.

## **5.9 CROWN FUNDING TO IMPROVE WATER QUALITY**

### **5.9.1 Introduction**

In and amongst these reforms, claimants have described the need for ‘committed long term funding’ to improve water quality throughout the country.<sup>602</sup> They noted that the current ‘[o]ccasional contestable funds that focus on specific aspects of our vision’ are inadequate and that the Crown must instead provide funding to address both the current water quality of freshwater bodies as well as to ensure that future issues can be properly addressed, particularly at a local level.<sup>603</sup>

Addressing these concerns in its closing submissions, the Crown outlined five of its funding initiatives for improving water quality as part of the reform process.<sup>604</sup> It pointed to the Community Environment Fund (2010), the Irrigation Acceleration Fund (2011), the Fresh Start for Fresh Water Clean-Up Fund (2011–12), the Te Mana o te Wai Fund (2014), as well as the Government’s announcement in 2014 that it would allocate funds to purchase and retire areas of lands adjacent to significant waterways to improve water quality (the funding for which was broadened and recast as the Freshwater Improvement Fund in 2016). It later produced a list detailing 100 projects in which these initiatives have been implemented across the country, as well as figure 5.1, which outlines some ‘significant’ examples of its investment in freshwater protection and clean ups.<sup>605</sup>

In this section, we discuss the proposed purposes for each of these funds and detail some of their applications before drawing conclusions on the Crown’s funding efforts to improve water quality of freshwater bodies.

### **5.9.2 Crown funding initiatives**

#### **5.9.2.1 The Community Environment Fund**

The Community Environment Fund was established in 2010 to ‘provide funding to projects that support partnerships between parties and increase community-based

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601. Counsel for interested parties (Lyll and Thornton), closing submissions, 14 November 2018 (paper 3.3.43), p 8

602. Matthew Sword, brief of evidence, 16 November 2015 (doc D1), p 7

603. Brief of Evidence of Matthew Sword, D001, p 7.

604. Crown counsel, closing submissions (paper 3.3.46), p 44

605. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), pp 1–27.



advice, educational opportunities, and public awareness of environmental issues.<sup>606</sup> Since then, the fund has allocated some \$14.5 million to more than 90 projects, addressing a range of issues including water quality issues.<sup>607</sup>

The diversity of the individual projects, even amongst those relating to water quality, demonstrates the broad range of issues that the fund sought to address. Many projects focused on improving the water quality of specific water bodies through riparian planting or developing community-led action plans, while others produced resources and other practical tools, such as internet resources and monitoring systems, that could be employed on a national scale.

Funding from round six of the Fund, which was released in May 2014, was ‘targeted at fresh water management projects that will assist the implementation of the NPS-FM 2014’ and included ‘supporting community participation in fresh water management.’<sup>608</sup> In this round, funds were distributed to the Auckland, Greater Wellington, Hawke’s Bay, Otago, Waikato, and West Coast regional councils and the Gisborne, Marlborough, and Tasman district councils.<sup>609</sup>

### 5.9.2.2 *The Irrigation Acceleration Fund*

The Irrigation Acceleration Fund was established partly in response to recommendations from the Land and Water Forum (in tranche 1 of the Fresh Start for Fresh Water programme), and partly as a result of a 2010 programme for increasing Crown investment in irrigation infrastructure.<sup>610</sup> The Forum had recommended, under the heading of rural water infrastructure, that public funding of ‘rural infrastructure projects should be targeted to early stages of such projects, and linked to the use of collaborative approaches for the proposal design.’<sup>611</sup>

The Fund consisted of \$35 million over five years, beginning from 1 July 2011. Its intention was not to fund irrigation schemes directly but to provide assistance at the start to get ‘appropriate irrigation infrastructure proposals to the “investment-ready” prospectus stage.’<sup>612</sup> The goal was to unlock the economic potential of water for farming, but to do so under new management practices that were more efficient and careful of environmental limits.<sup>613</sup>

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606. Workman, brief of evidence (doc F6), p 23

607. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), page 12

608. Workman, brief of evidence (doc F6), p 23

609. Workman, brief of evidence (doc F6), pp 23–24; Crown counsel, memorandum (paper 3.2.342(b)), app A, pp 20–21

610. Cabinet Economic Growth and Infrastructure Committee, minute of decision, ‘Driving Economic Growth by Delivering on the Potential of Irrigation’, March 2011 (Brunt, papers in support of brief of evidence (doc D89(b)), pp 3–6)

611. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, p 3 (Brunt, papers in support of brief of evidence (doc D89(a)), p 149)

612. Cabinet paper, ‘Fresh Start for Fresh Water – High Level Government Response to the Land and Water Forum Report’, 8 August 2011, p 12; Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, pp 6–7

613. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, pp 6–7

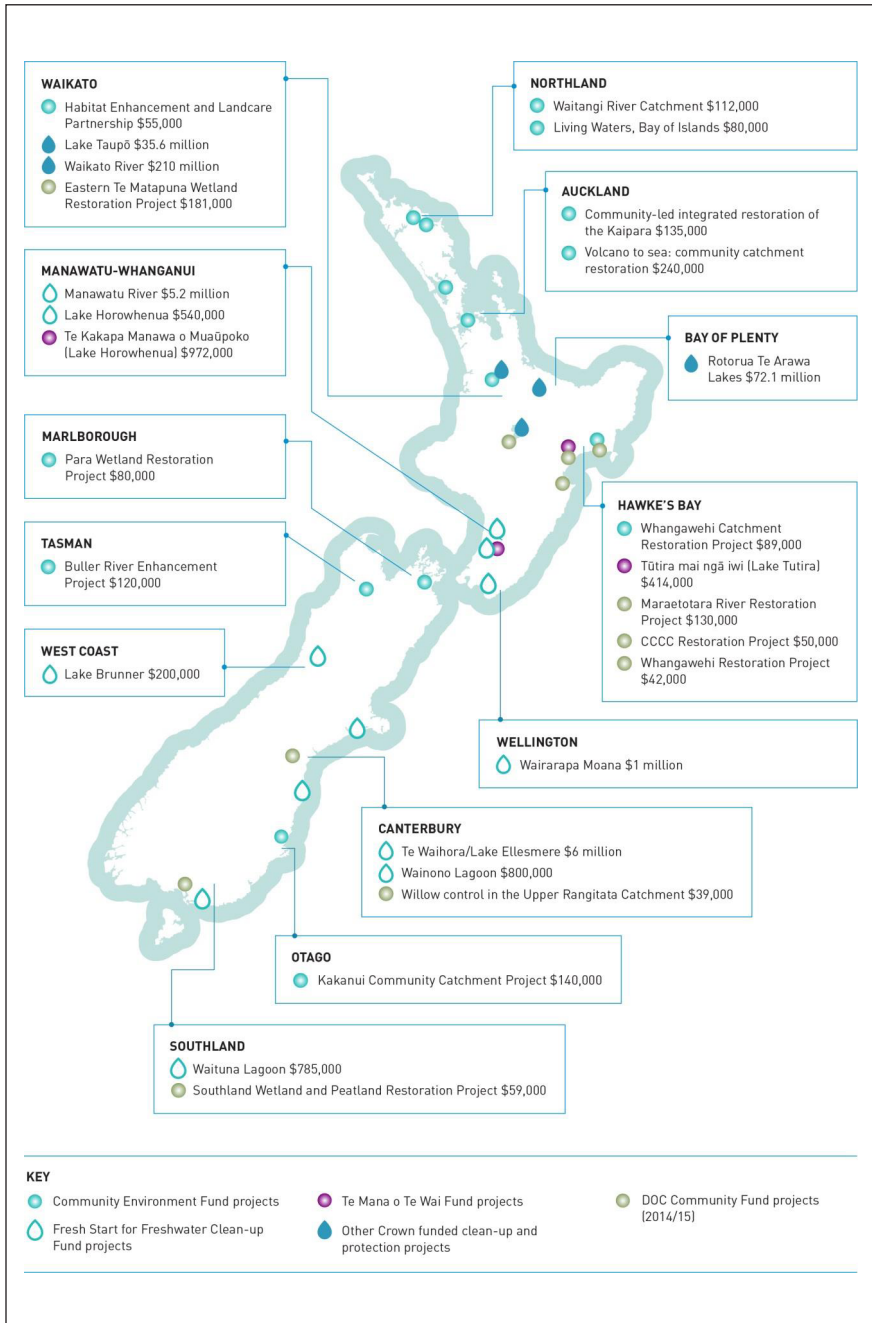


Figure 5.1: Map of examples of significant Government Investment in freshwater protection and clean ups

Source: New Zealand Government, *Next Steps for Fresh Water: Consultation Document* (paper 3.1.255(a)), p 34.

In practice, the Irrigation Acceleration Fund provided money for scoping and feasibility studies, and regional water management strategies. One example of the latter was ‘managed aquifer recharge investigations.’<sup>614</sup>

In 2016, at the end of the five-year period, the fund was renewed for a further five years with an increase of \$25 million. This meant a contribution of \$60 million in total was voted to get irrigation projects ready for private sector investment.<sup>615</sup> We do not have evidence as to how the planned safeguards were introduced to this scheme to ensure increased irrigation did not result in degraded water quality.

### 5.9.2.3 *The Fresh Start for Fresh Water Clean-up Fund*

The second fund established under the Fresh Start for Fresh Water programme was the ‘clean-up’ fund. The purpose of the fund was to ‘assist councils in cleaning up historic pollution problems.’<sup>616</sup> It was the Crown’s intention for both the irrigation and clean-up funds that stakeholders would be able to get some ‘early and visible “wins”’, along with incentives to improve water management. If regional councils could not show, for example, that they had a robust planning framework in place, which would prevent future pollution, they would not win a bid for assistance from the clean-up fund.<sup>617</sup>

The process for assessing applications was given to a panel composed of three members of the Land and Water Forum (including Roku Mihinui, chair of the IAG) and an MFE official.<sup>618</sup> The criteria included:

The Government needs to be satisfied that a water body is nationally significant, that rules are in place to prevent ongoing pollution, that cleanup plans have wide community engagement and that the Regional Council is also financially committed to support the clean up.<sup>619</sup>

This differed from the recommendation of the Land and Water Forum, which had suggested a clean-up fund to operate within a strategic framework set by the Land and Water Commission, though the Crown had not yet decided whether such a commission should be established.<sup>620</sup>

The Crown spent about \$14.5 million on the Fresh Start for Fresh Water Clean-up Fund. In all, seven projects received funding, five of which were completed by March 2016.<sup>621</sup> These five projects were:

614. Brunt, brief of evidence (doc D89), p 13

615. Brunt, brief of evidence (doc D89), p 13

616. Brunt, brief of evidence (doc D89), p 12

617. Cabinet paper, ‘Fresh Start for Fresh Water – forward work programme’, 4 May 2011, p 6

618. Nick Smith, press release, ‘Funding available to clean up rivers and lakes’, 14 September 2011 (Brunt, papers in support of brief of evidence (doc D89(a)), p 661)

619. Nick Smith, press release, ‘Funding available to clean up rivers and lakes’, 14 September 2011 (Brunt, papers in support of brief of evidence (doc D89(a)), p 661)

620. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, p 2 (Brunt, papers in support of brief of evidence (doc D89(a)), p 148)

621. Brunt, brief of evidence (doc D89), pp 12–13

## 5.9.2.3

- ▶ Lake Brunner – \$200,000 contribution to a \$440,000 project to create ‘buffer strips’ (fencing and riparian planting) and environmental farm plans to reduce run-off into streams which flow into the lake. The project involved three parties: the regional council, Westland Milk Products, and Ngāti Waewae.<sup>622</sup>
- ▶ Manawātū River – \$5.2 million contribution to a \$30 million project for riparian planting, stream fencing, fish and whitebait habitat restoration by improving fish passages, nutrient management plans for dairy farms, and upgrades to six sewage treatment plants. A number of iwi organisations were involved in the project.<sup>623</sup>
- ▶ Wairarapa Moana (Lake Wairarapa and Lake Onake) – \$1 million contribution to a \$2.2 million project for riparian planting and fencing, the use of earthworks to create five wetlands, weed and pest control work, and environmental farm plans. Ngāti Kahungunu and Rāngitane were involved in the project.<sup>624</sup>
- ▶ Wainono Lagoon – \$800,000 contribution to \$2.1 million project for stream planting and fencing, erosion control works, and sediment traps. Te Rūnanga o Waihao and Te Rūnanga o Ngāi Tahu were involved.
- ▶ Waituna Lagoon – \$785,000 contribution to a \$1.6 million project for the reconstruction of eroded stream banks, the construction of artificial wetlands, and an opening of the lagoon to the sea. Planned riparian planting and fencing did not take place. A local tribal organisation, Te Ao Marama Inc, was involved.<sup>625</sup>

In addition to these five projects completed by 2015, two additional projects were finished in mid-2017.<sup>626</sup> These were:

- ▶ Lake Horowhenua – \$540,000 contribution to a \$1,270,500 project with many objectives, including lake weed harvesting, boat washing facilities, riparian fencing and planting, a sediment trap, treatment of Levin’s stormwater, dairy farm plans, a fish pass on the Hōkio weir, and habitat improvement for the Hōkio Stream. The lake’s Muaūpoko owners, the Lake Horowhenua Trustees, were a party to the project.<sup>627</sup>

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622. Ministry for the Environment, ‘Lake Brunner Project’, <https://www.mfe.govt.nz/fresh-water/clean-projects/lake-brunner>

623. Ministry for the Environment, ‘Manawatu River Project’, <https://www.mfe.govt.nz/fresh-water/clean-projects/manawatu-river>

624. Ministry for the Environment ‘Wairarapa Moana Project’, <https://www.mfe.govt.nz/fresh-water/clean-projects/wairarapa-moana>

625. Ministry for the Environment, ‘Wainono Lagoon Project’, <https://www.mfe.govt.nz/fresh-water/clean-projects/wainono-lagoon>

626. Martin Workman, brief of evidence, 1 May 2017 (doc F6), p14; Martin Workman, Written answers to questions from the Tribunal (Doc F21(d)), p 4

627. Ministry for the Environment, ‘Lake Horowhenua Project’, <https://www.mfe.govt.nz/fresh-water/clean-projects/lake-horowhenua>

- ▶ Lake Ellesmere/Te Waihora – \$6 million contribution to a \$11.6 million project to restore cultural sites, mahinga kai, lake margin wetlands, and tributary and riparian habitats, and ensure sustainable land use practices in the catchment. Te Rūnanga o Ngāi Tahu was a party to the project.<sup>628</sup>

Thus, the clean-up fund assisted projects for seven nationally important waterways before it was wound up. It is by no means clear that the Land and Water Forum envisaged a temporary fund but the Crown's view in 2011 was that it was necessary to make a start, provide some early wins, and incentivise better water quality management. The Crown never intended the clean-up fund to be a long-term or permanent means of assisting local efforts to rescue degraded water bodies.

#### 5.9.2.4 *The Te Mana o te Wai Fund*

In 2014, in conjunction with the inclusion of Te Mana o te Wai in the NPS-FM, the Government established the one-off Te Mana o te Wai Fund, allocating \$5 million over two years to 'provide funding to enable Māori to improve the water quality of freshwater bodies (including lakes, rivers, streams, estuaries and lagoons) that are of importance to them by:

- ▶ supporting iwi/hapū to play an active part in improving the water quality of their local freshwater bodies;
- ▶ enabling iwi/hapū to actively participate in managing their local freshwater bodies;
- ▶ developing partnerships and working in collaboration with others;
- ▶ assisting iwi/hapū and the wider community recognise the importance of fresh water in supporting a healthy ecosystem, including supporting human health.<sup>629</sup>

Ministers noted that the fund would 'support restoration initiatives such as riparian planting, projects to reduce nitrate levels, and community-run water restoration efforts for local waterways' and empower iwi to act as kaitiaki.<sup>630</sup>

\$4.6 million of the fund was allocated to nine iwi-led projects to monitor and restore their local water bodies, as well as develop connections between these bodies and the local communities.<sup>631</sup> These projects included restoration and clean-up efforts in Northland, Taranaki, Taihape, Tamaki Nui a Rua, Tolaga Bay, Hawke's Bay, Manawatu-Whanganui, and Canterbury. The remaining \$400,000 was awarded to four regional case studies 'to research freshwater iwi rights and

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628. Ministry for the Environment, 'Lake Ellesmere/Te Waihora Project', <https://www.mfe.govt.nz/fresh-water/clean-projects/lake-ellesmerete-waihora>

629. Peter Brunt, brief of evidence (doc D89), p 20

630. Nick Smith, Te Ururoa Flavell, release, 'Fund for iwi freshwater improvement projects opens', 10 February 2015 (Brunt, papers in support of brief of evidence (doc D89(a), p 655)

631. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), pp 1-4

interests and identify how indigenous rights and interests were considered in local freshwater management plans.<sup>632</sup>

In 2017, Te Puni Kōkiri transferred a further \$1 million for use in the Te Mana o te Wai Fund, which the Crown intended to use to develop a national freshwater cultural monitoring programme.<sup>633</sup>

### 5.9.2.5 *The Freshwater Improvement Fund*

In 2014, in addition to establishing the Te Mana o te Wai Fund, the Government announced that it would designate \$100 million over a 10-year period to purchase and retire riparian farmland ‘to create an environmental buffer that helps improve water quality.’<sup>634</sup> As we noted in Chapter 4, the Government announced its plan to establish the Freshwater Improvement Fund in 2016, as one of its proposals in the consultation document *Next steps for fresh water*. At this point, the Crown still proposed to use the funds to purchase and retire farmland but also to broaden their use to include freshwater management projects as well.<sup>635</sup> The ILG supported the proposal but wanted the fund to have a focus on Māori issues. The iwi leaders argued that the \$250,000 threshold would be too high for many Māori groups to participate, and they also sought the reactivation of the Te Mana o te Wai Fund.<sup>636</sup>

The Crown consulted on this fund as part of the *Next Steps* process, the first time it had consulted on any of the funds discussed in this section. More than 20 Māori organisations gave feedback on the proposed fund before it was approved as part of the ‘Next Steps’ consultation in early 2016. There was concern from some that a large proportion of the funding would go to councils and be used to help meet water quality limits that they were already required to meet.<sup>637</sup> Many argued that the ‘fund is therefore effectively compensating existing users for having to meet new rules’ and that the funding should instead go towards achieving ‘environmental improvements over and above what existing users will already be required to achieve by new limits.’<sup>638</sup>

There were also concerns that the scale of funding, which had a \$250,000 minimum, would lock out hapū and smaller iwi.<sup>639</sup> On this matter, Ngāti Rangī outlined the need for a two-tier system of funding:

Ngāti Rangī support the idea of restructuring the fund into 2 brackets that have different minimum contribution limits. The 1st bracket will have the lowest fund and will

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632. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), p 4

633. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), p 1

634. New Zealand Government, *Next steps for fresh water* (paper 3.1.255(a)), p 36

635. New Zealand Government, *Next steps for fresh water* (paper 3.1.255(a)), pp 36–37

636. Albert and Flavell, brief of evidence (doc G22), pp 19–20

637. See submissions from Ngāti Ranginui, Te Roroa, Te Korowai o Ngāruahine Trust, Te Rūnanga-A-Iwi o Ngāpuhi, and Ngāti Ruanui (Crown counsel, discovery documents (doc D90), pp 3105, 3222, 3214, 3229–3230, 3273).

638. Te Rūnanga-A-Iwi o Ngāpuhi and Te Wai Maori Trust made the same point in different words (Crown counsel, discovery documents (doc D90), pp 3229–3230, 3290).

639. See submissions by Ngāti Ranginui, Ngāti Rangī, Te Roroa, and Ngāti Ruanui (Crown counsel, discovery documents (doc D90), pp 3105, 3098, 3222, 3273).

be for local level remediation projects. The second bracket will be for regional level projects that require significantly more funding. In addition to this it is important that the local iwi/hapu are included in the decision-making process when considering applications from their rohe.<sup>640</sup>

Ngāti Pīkiao and Ngāti Makino described the need for a more transparent process, 'which can be scrutinised by the public as to why a potential investment was made'. They also expressed concerns that councils were only concerned with economic criteria and were not considering the importance of social and cultural well-being. Any investment in water sustainability, they claimed, should take into account 'the four well-beings' (as per section 5 of the RMA).<sup>641</sup>

Mana Whenua Kaitiaki Forum and Maungaharuru–Tangitū Trust both detailed the importance of Te Mana o te Wai.<sup>642</sup> They urged that projects should have to demonstrate how they could enhance Te Mana o te Wai, and that funding should require a framework that ensured this concern remained central across all applications and decision making.

Te Rūnanga o Ngāi Tahu supported the fund and, in particular, the benefits of purchasing and retiring riparian farmland. They encouraged the Government to 'establish a targeted programme to support capacity and capability building based on the needs identified by iwi', as well as 'a sustainable fund to support iwi participation in fresh water management'.<sup>643</sup>

The Whatitiri Māori Reserve Trust submitted that very little funding has gone into direct monitoring solutions:

It is time to set by-laws in place and establish direct and practical monitoring. Iwi and in particular local hapu should be funded to monitor and report on adverse effects to their respective rohe awa. It is time to share the monitoring funding that has for most been only for Regional Councils staff to use and apply. Hapu environmental monitoring units can function the same as other Council / Contractor relationships that are commonly used such as Dog Rangers, Noise Control Officers, Wandering Stock officers, Parking Wardens and even building Inspectors.<sup>644</sup>

It is unclear if, or to what extent, feedback from the Next Steps consultation was considered when the Freshwater Improvement Fund was launched. The ILG's issues were certainly not addressed.<sup>645</sup>

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640. Submission of Ngāti Rangi (Crown counsel, discovery documents (doc D90), p 3098)

641. See submissions of Ngāti Pīkiao Environmental Society and Ngāti Makino Heritage Trust (Crown counsel, discovery documents (doc D90), pp 3089, 3036).

642. See submissions of Mana Whenua Kaitiaki Forum and Maungaharuru–Tangitū Trust (Crown counsel, discovery documents (doc D90), pp 3045, 3049–3052).

643. Submission of Te Rūnanga o Ngāi Tahu (Crown counsel, discovery documents (doc D90), p 3235)

644. Submission of Whatitiri Māori Reserves Trust (Crown counsel, discovery documents (doc D90), p 3335)

645. Albert, Flavell, and Porou, answers to questions in writing (doc G22(f)), p 2

## 5.9.2.6

The Crown advised that the fund has contributed towards 34 projects throughout the country.<sup>646</sup> Four projects were in Northland and two were awarded to the Northland Regional Council. These funds went to cleaning up and protecting the Northern Dune Lakes and to reducing sediment and bacterial levels in the Wairoa River and its tributaries.<sup>647</sup> Other partners, including Te Roroa, Te Uri o Hau, Fonterra, DOC, and Manaaki Whenua, have since joined the project and signed a Mana Enhancing Agreement in 2017 and 2018.<sup>648</sup>

The two other projects in Northland were run by Māori groups: Waimahae Marae and Te Roroa Centre of Excellence. Funding went towards restoring freshwater quality of local creeks and the Waipoua awa respectively.<sup>649</sup>

A further 20 projects throughout the rest of the North Island received funding, which ranged from \$6.5 million for the Lake Tarawera Sewage Reticulation and Treatment system in the Bay of Plenty to \$200,000 for the Onoke Saltmarsh Restoration.<sup>650</sup>

Another eight projects in the South Island were funded as well. These included \$7 million for the Waimea Water Augmentation project, designed to service the Waimea Plains and adjacent areas, and \$5 million for the Whakamana Te Waituna project in Southland.<sup>651</sup>

### 5.9.2.6 Other Crown funding initiatives

We note that the Crown has a number of other initiatives for funding the improvement of freshwater resources, which were not filed as part of its closing submissions. These include the Contaminated Sites Remediation Fund operated by the Ministry for the Environment and the Pūtea Tautiaki Hapori Community Fund and Ngā Whenua Rāhui Fund run through the Department of Conservation.<sup>652</sup>

## 5.9.3 Conclusion

The Crown has clearly made a commitment to addressing water quality issues and the range of issues this entails. The variety of funding available, allowing different

646. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), p 4

647. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)) pp 4–5

648. Living Water, 'Wairoa Freshwater Improvement Project', <https://www.livingwater.net.nz/catchment/wairua-river/wairoa-freshwater-improvement-project/>

649. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), p 5

650. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), pp 5–10. The total cost of the Lake Tarawera Sewage Reticulation and Treatment system was estimated at \$17.8 million. The Government was following a long-established pattern of co-funding expensive sewage plants in local authority districts: Scoop.co.nz, [http://img.scoop.co.nz/media/pdfs/1708/FIF\\_Project\\_Summaries.pdf](http://img.scoop.co.nz/media/pdfs/1708/FIF_Project_Summaries.pdf).

651. Crown counsel, memorandum, 21 December 2018, app A (paper 3.2.342(b)), pp 10, 12. The Tasman District Council estimated the total cost of the Waimea Water Scheme to be \$22.5 million and Environment Southland estimates to cost of the Waituna lagoon project to be \$14.7 million: Scoop.co.nz, [http://img.scoop.co.nz/media/pdfs/1708/FIF\\_Project\\_Summaries.pdf](http://img.scoop.co.nz/media/pdfs/1708/FIF_Project_Summaries.pdf).

652. Ministry for the Environment, 'Contaminated Sites Remediation Fund', <https://www.mfe.govt.nz/more/funding/contaminated-sites-remediation-fund/>; Ministry for the Environment, 'Other Government Environmental Funding', <http://www.mfe.govt.nz/more/funding/sources-funding/funding-other-government-departments>



types of water bodies and different methods of addressing their water quality issues to receive funding, is a positive first step. The recognition of capacity building within organisations and partnerships across organisations, particularly by Māori-led organisations, is another positive step. However, we do not think that this commitment, this first step, is enough and are left with two pressing concerns that we still do not feel have been addressed in their entirety.

First, the scale of clean-up resources does not match the scale of damage done, and still being done, to our waters. We find that the Crown's funding efforts are not yet sufficient to deal with the damage that occurred prior to the establishment of the NPS-FM. Nor are these funding efforts sufficient to counterbalance the nutrients and contaminants still being released into our soils, wetlands, streams, rivers, and lakes.

Secondly, some iwi and hapū have applied for, received, and matched funds to assist them in monitoring water quality and engaging with others to participate in clean-up endeavours. While their kaitiaki role is recognised and their kaitiakitanga is being exercised, there are a much larger number of iwi and hapū who exercise kaitiakitanga but do not have the funding to carry out these necessary tasks.

We agree with the claimants in this inquiry that, despite the Crown's current funding regime, there remains a clear need for committed, long-term funding to address water quality issues on a local and national scale. The Treaty standard of active protection will not be met until such larger-scale, longer-term funding has been dedicated to restoration of these highly vulnerable taonga. Further, decisions around exactly how funds are designed and distributed need to be made in partnership with Māori, rather than resting solely within the purview of the Crown.



## CHAPTER 6

**ALLOCATION REFORM OPTIONS, 2016–17****6.1 INTRODUCTION**

The need for allocation reform had been evident to the Crown since the early 2000s. Many of New Zealand's catchments had become fully or over-allocated under the first-in first served principle, and Māori rights and interests were not provided for in the RMA's allocation regime (see chapter 2).

The Crown and the Freshwater Iwi Leaders Group (ILG) were unable to reach agreement about reforms to the RMA's allocation regime during the co-design period in 2015–16 (see chapter 4). Also, officials had not completed the broader work necessary to design a new allocation system. As a result, the *Next Steps for Fresh Water* consultation document was released in February 2016 without any allocation reform proposals. A new work programme was set up in mid-2016 to develop reform options that would address both the need to replace the first-in first-served system, and the need to address the economic dimension of Māori rights and interests in fresh water. In this chapter, we do not examine the broader options developed to reform the allocation regime. Our focus is on the options to address Māori rights and interests in fresh water, as that is the key issue for this part of our inquiry. As we explained in chapter 2, the Māori rights at issue in the allocation system were proprietary and development rights, and the interest was the securing of an economic return from their water bodies.

Māori always wanted the health of the water body to come first before any allocations occurred. We have already discussed kaitiakitanga, Te Mana o te Wai, and the setting of limits in earlier chapters. It is necessary to keep in mind throughout this chapter that the health of the water body and its aquatic species was the primary concern for Māori in all freshwater management reforms.

We begin our discussion in this chapter with a brief summary of the parties' arguments, and a section on the background to the allocation reform programme. As we explain in that section, the need for equity in allocation regimes was already a guiding principle for the Crown by the time the allocation team began developing options in 2016. We then examine Cabinet's parameters for the allocation reform programme, the nature of engagement between the Treaty partners in the work of the programme, and the options that were developed by the team to address Māori rights and interests. In brief, the team proposed options which provided access to water and discharge rights (diffuse discharge of nutrients) for both Māori land development and for iwi and hapū more broadly. It rejected options for a national percentage allocation to iwi and hapū, perpetual allocations, and the payment of royalties or levies to Māori (section 6.7). We then set out Cabinet's interim view of

those options as at December 2016, and the further work that was undertaken in 2017 before the election brought work on it to a halt later in that year.

Finally, we provide our conclusions and Treaty findings on the allocation reform options, and the question of what reforms are needed to make the regime Treaty compliant.

## 6.2 THE PARTIES' ARGUMENTS

### 6.2.1 The case for the claimants and interested parties

For many of the claimants and interested parties, their concerns about proprietary rights were focused on the allocation of water to 'third parties' for economic use without (a) allocation of a fair share to iwi and hapū; (b) a financial return from the allocation of use rights to third parties; or (c) protection of the Māori position while consents for third parties continue to be granted or renewed. These parties had a shared view that Māori proprietary and development rights should be recognised through allocations to iwi and hapū and/or payment of fees by third party commercial users. The Crown, they told us, has declined to have either of these measures in its reforms.<sup>1</sup>

Counsel for the NZMC conceded that the 'recognition of a property right in flowing water is not the only way to recognise the customary right of *control* (emphasis added).'<sup>2</sup> In terms of the use and economic benefits that come from ownership, however, the claimants argued that the RMA at present allows 'significant alienation of freshwater resources . . . to the detriment of Māori through the first-in first-served rule.'<sup>3</sup> Claimant counsel submitted that the Crown's bottom lines for reform – 'no one owns water' and 'no generic share of water resources to Māori' – disregarded Māori proprietary rights. The result, in their submission, was the continued aggregation of use rights amounting almost to ownership in the hands of consent holders, while Māori have been (and still are) denied any benefit from the wealth generated by the free use of their water by others. The NPS-FM and RMA reforms have failed to address the ongoing allocation of water through this first-in first-served system, and many catchments are also over-allocated.<sup>4</sup> This over-allocation has in itself shut out Māori (and other new users) from obtaining the equitable share to which they said they were entitled.<sup>5</sup>

In the claimants' view, the Crown's failure to reform the allocation system and to recognise their proprietary rights through such a reform is in breach of Treaty principles, with cumulative prejudice to Māori as water continues to be allocated to others.<sup>6</sup> Also, in the ILG's submission, Crown proposals to restrict an allocation

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1. The fees have been characterised variously as, for example, levies, resource rentals, or royalties (among others).

2. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 3

3. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 4

4. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 5, 11, 13, 14–15, 16, 21, 27–28

5. Counsel for the Freshwater ILG, closing submissions (paper 3.3.41), pp 9–10

6. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 27

for Māori to the development of under-developed land would be in breach of the Treaty.<sup>7</sup>

The claimants argued, however, that their proprietary rights could still be recognised through the allocation system. Counsel for the NZMC submitted:

[T]he form of proprietary right that the New Zealand Māori Council seeks . . . requires that quantities of water are made and remain available to tangata whenua, to support the various activities envisaged in Te Tiriti compact – including domestic/personal, cultural and economic activities. Inherent in that is the allocation of quantities of water to Māori and for Māori purposes (or compensation as an alternative to the allocation of a quantity of water, where hapū are not in a position to use an allocation of water or where the quantity of water allocated is less than Te Tiriti entitlement).<sup>8</sup>

In claimant counsel's submission, a number of mechanisms could bring about a Treaty-compliant allocation system which (among other things) recognised and provided for proprietary rights. The NZMC and ILG agreed that these included the creation of headroom for gradual re-allocation to Māori,<sup>9</sup> allocating a generic percentage of water to Māori, and/or imposing royalties on commercial use by third parties.<sup>10</sup> But the claimants stressed that water quality and a healthy mauri must be the first priority. Further, as part of recognising their tino rangatiratanga, co-management arrangements must give Māori a decision-making role in 'applications for water related resource consents' as well as in other aspects of freshwater management.<sup>11</sup>

In the ILG's submission, the Crown's freshwater reforms were slow and fragmentary, with the highly politicised issue of allocation left too late and still unresolved.<sup>12</sup> Nonetheless, a substantial amount of work was done on allocation models, and counsel for interested parties submitted:

While water quality is of high priority to our clients, so too is their ability to benefit economically from their waterways for the development of their hapū and whānau. The Crown's continued deferral of this priority project, coupled with its refusal to budge from its bottom line that 'no one owns freshwater', creates a breach of the Treaty principles of partnership, self-determination and the right to development.<sup>13</sup>

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7. Counsel for the Freshwater ILG, closing submissions (paper 3.3.41), pp 16–17

8. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 20

9. Described as the reverse-grandparenting of existing resource consents.

10. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21; counsel for the Freshwater ILG, closing submissions (paper 3.3.41), p 20

11. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

12. Counsel for the Freshwater ILG, closing submissions (paper 3.3.41), pp 4, 6–7

13. Counsel for interested parties (Naden et al), closing submissions (paper 3.3.45), p 146

### 6.2.2 The case for the Crown

Crown counsel relied on the statements of the Supreme Court in *Mighty River Power* in respect of our stage 1 report and our findings about proprietary rights. The Crown cited the Court's observation that we had described the 'ownership interest guaranteed by the Treaty in terms of use and control'. The Supreme Court suggested that 'use and control' could for the most part be delivered by regulatory reforms as supplemented by Treaty settlements.<sup>14</sup> Crown counsel also noted assurances made to the Supreme Court in *Mighty River Power* that 'the recognition of Māori rights and interests in freshwater must "by definition" involve mechanisms that relate to the on-going use of those resources'. Such mechanisms could include decision-making roles and charges or rentals for use (by others).<sup>15</sup>

In the Crown's submission, co-governance and co-management arrangements address the 'control' interest. The Crown argued that Treaty settlements and RMA mechanisms also address 'use', but accepted that 'delivering economic benefits from water is necessary'.<sup>16</sup> In the Crown's submission, 'improved access' for Māori through its yet-to-be decided allocation reforms is the right vehicle.<sup>17</sup> There are ways other than a 'form of title' to deliver 'economic benefits and development opportunities to Māori through water allocation that do not require ownership interests'.<sup>18</sup>

Crown counsel argued that its allocation reforms thus represent a 'good faith "exercise in rights definition, rights recognition, and rights reconciliation"', as called for in our stage 1 report.<sup>19</sup> Further, the Crown submitted that allocation reform is a complex task; the 'fact that the system of allocation has not yet been reformed should not, of itself, render the Crown's reforms inconsistent with the Treaty'.<sup>20</sup> Crown counsel stated:

The allocation work programme has been exploring how to redesign the allocation of water to provide economic benefits to Māori, and opportunities for economic development through improved access. Throughout, the Crown has remained open to exploring the options sought by the claimants, and has not foreclosed or precluded their adoption. The work is incomplete, owing in large part to its complexity and importance to all sectors of New Zealand society. The economics evidence at Stage 2 underscores this complexity, and the reasonableness of a careful and cautious approach to system design. The delay is unfortunate, but it does not show bad faith.<sup>21</sup>

The Crown's view is that it is thus possible to avoid the question of proprietary rights through 'alternate ways of achieving allocation and economic benefits for

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14. Crown counsel, closing submissions (paper 3.3.46), pp 12–13, 54

15. Crown counsel, closing submissions (paper 3.3.46), p 4

16. Crown counsel, closing submissions (paper 3.3.46), pp 3, 53–54, 78–79

17. Crown counsel, closing submissions (paper 3.3.46), p 79

18. Crown counsel, closing submissions (paper 3.3.46), p 7

19. Crown counsel, closing submissions (paper 3.3.46), pp 7–8

20. Crown counsel, closing submissions (paper 3.3.46), p 9

21. Crown counsel, closing submissions (paper 3.3.46), p 79

Māori.<sup>22</sup> Further, the Crown submitted that its bottom lines did not preclude a Treaty-compliant mechanism from being developed. Crown counsel argued: ‘The evidence from the Crown witnesses is clear that while the Crown’s position was that “no one owns water” it was willing to discuss ways of delivering use and control to Māori.’<sup>23</sup> Economic benefits (the ‘use’ element of Treaty rights) could still be delivered through catchment-by-catchment rather than national-level settlements and through changes to the water allocation system.<sup>24</sup>

Finally, the Crown addressed the claimants’ concerns about the continued operation of the first-in first-served system in the meantime. Crown counsel submitted that this did not preclude the Crown’s ability to ‘provide future options for redress.’<sup>25</sup> Nor did the Crown accept that any kind of legislative intervention or moratorium to stop allocation was appropriate or feasible.<sup>26</sup> The Crown also argued that waters were shared under the Treaty, as per our stage one findings, and the ability of non-Māori ‘third parties’ to generate value from water under the first-in first-served system is not in itself a Treaty breach.<sup>27</sup>

Having provided a brief introduction to the parties’ main arguments, we now proceed with our analysis of the evidence and submissions in the following sections.

## 6.3 BACKGROUND TO THE ALLOCATION WORK PROGRAMME

### 6.3.1 Co-design: allocation reform and the *Next Steps* process

As noted above, allocation reforms had been part of the process which resulted in the *Next Steps* discussion document in 2016. But the development of those reforms was not close to being finished by February 2016, and the Crown and the ILG were in complete disagreement about how to recognise Māori rights and interests in a new or revised allocation system. The *Next Steps* document stated, therefore, that work on a new allocation regime would continue, but that this need not delay the other water management reforms:

New Zealand needs to increase the productivity of the way we use our natural resources, including for continued regional and national economic development. The Government is still finalising the package of allocation policy proposals that will fully address the range of interests of those wishing to access freshwater resources, including iwi/hapū, as further work is required to develop options that the Government and stakeholders can support. These will be progressed over the coming months with a technical advisory group. At this stage, however, it is still useful to consult on the

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22. Crown counsel, closing submissions (paper 3.3.46), p 50

23. Crown counsel, closing submissions (paper 3.3.46), p 80

24. Crown counsel, closing submissions (paper 3.3.46), pp 53–54, 80

25. Crown counsel, closing submissions (paper 3.3.46), p 81

26. Crown counsel, closing submissions (paper 3.3.46), pp 81, 83; transcript 4.1.5, pp 500–503, 578–586

27. Crown counsel, closing submissions (paper 3.3.46), pp 84–85

other elements of reform as foundation measures that would support any future water allocation proposals.<sup>28</sup>

At the time, the Crown saw the problem largely in terms of economic development. The *Next Steps* consultation document stated that the allocation of water on a 'first in, first served' basis only worked if there was enough water to 'meet the needs of all users'. The way in which regional councils allocated water was no longer 'serving New Zealand well', especially since environmental limits on water use and discharges now had to be introduced through the NPS-FM. According to the Crown, the allocation system was 'not flexible or effective enough'. It did not allow scarce water resources to be allocated to the highest value and most efficient uses. New users were simply shut out once catchments became fully allocated.<sup>29</sup> Successive governments have been trying to solve these problems and reform the allocation system since at least 2004, so far without success.<sup>30</sup>

As we discussed in chapter 4, the main sticking point between the Crown and the ILG over allocation reforms was fairly clear during the lead up to the *Next Steps* consultation document. At a general level, the Crown and iwi leaders agreed that providing an economic benefit from water was essential to addressing Māori rights and interests in fresh water. The Crown's preferred method for doing so, however, was to provide access to water for the development of Māori land, or – due to some uncertainty about showing a preference for Māori – the development of under-developed land more generally. The Crown did not propose that the vehicle for this would be a direct allocation. Rather, this would become one of several criteria that councils would have to consider when making their allocation decisions.<sup>31</sup>

The ILG, on the other hand, wanted an allocation for iwi and hapū over and above any allocation for Māori land development.<sup>32</sup> Sir Mark Solomon and Donna Flavell explained:

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28. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 22

29. New Zealand Government, *Next Steps for Fresh Water: Consultation Document*, February 2016 (paper 3.1.255(a)), p 22

30. Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options: A Public Discussion Paper on the Management of New Zealand's Freshwater Resources* (Wellington: Ministry for the Environment, 2004), pp 7, 9, 14–16, 18, 20–24; Guy Beatson, brief of evidence, 24 February 2012 (doc A3), pp 3–6, 12; Brunt, brief of evidence (doc D89), pp 29–31

31. Draft Cabinet paper, '2016 Freshwater Reform: Policy Proposals and Consultation Process', no date, appendix to briefing to Ministers, 'Fresh water: Cabinet paper on 2016 Freshwater reform, policy proposals and consultation process', 18 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 965); Cabinet paper, 'Freshwater Reform 2016: Policy Proposals and Discussions with Iwi Chairs', no date (December 2015) (Crown counsel, sensitive discovery documents (doc D92), p 879)

32. Donna Flavell and Gerrard Albert, answers to questions deferred to the ILG by Tania Gerrard (doc G22(b)), pp 3–4



[T]he ILG's overarching objective in relation to allocation is to identify and develop options for the allocation of fresh water (and discharges into fresh water) which, when implemented, will maximise the sustainable availability of water (within environmental limits) to enable an equitable allocation to iwi as well as other users.<sup>33</sup>

The allocation for iwi would be for 'customary and commercial purposes'.<sup>34</sup>

Officials described the impasse that had been reached by December 2015, at least from their point of view:

The economic development workstream has focused on how to introduce a more equitable method for allocation of water use than the historic first-in first-served method. Discussions with the IAG have been contentious and there remains a significant gap between what officials have proposed and what the IAG has proposed. The IAG wishes to see the allocation of freshwater resources to iwi/hapū whether they have land to develop or not. In their view, this would address the disadvantage iwi/hapū have experienced over time through raupatu (confiscation), as well as ensure they could realise the full economic development potential of land now under their ownership . . .

In summary, it is difficult to generically define land to provide unambiguous recognition of the full range of iwi/hapū- and Māori-owned land without specific reference to how ownership was acquired. Should the option ultimately put forward fail to provide certainty that Treaty settlement land and lands administered under Te Ture Whenua Māori Act 1993 are able to access freshwater resources, this is likely to put significant strain on the Government's relationship with the Iwi Chairs. It is also likely to be tested in the courts.<sup>35</sup>

It is important to note these positions as we go on to consider the options developed by the Allocation Work Programme in 2016–17.

### 6.3.2 The third and fourth reports of the Land and Water Forum

In the meantime, the Crown had consulted the Land and Water Forum (LAWF) on how water could or should be allocated in a reformed system. The analyses of the Crown and the LAWF were largely in synch that the primary focus of allocation questions was economic (once environmental limits had been set), and that market mechanisms ought to be used to ensure efficiency and highest-value uses.

In brief, the LAWF's third report in October 2012 recommended that limits set by councils should establish an allocable quantum. Within that quantum, water should be transferable to its highest value uses through tradable consents. The Crown should provide national-level guidance as to methods of allocation (including the current administrative mechanism of consents), and the system should be

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33. Mark Solomon and Donna Flavell, brief of evidence, 7 October 2016 (doc D85), p14

34. Solomon and Flavell, brief of evidence (doc D85), p10

35. Briefing to Ministers, 'Fresh Water: Material to Support Further Discussions on the Reform Proposals', 19 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p 897)

flexible enough to cope with periods of drought and scarcity. The LAWf's view was that existing rights should be protected as far as possible in fully or over-allocated catchments, and that the system of first-in, first-served could continue in catchments that were not fully allocated.<sup>36</sup>

In March 2015, during the development of the *Next Steps* reform proposals, the Crown reconvened the Land and Water Forum and asked it for a further report on, among other things, '[t]ools and approaches to managing within limits that may assist the Crown and iwi/hapū in their engagement.'<sup>37</sup> The Crown expected that the forum would focus on allocation and economic issues, and it would not directly address the issue of Māori rights and interests. The Minister for the Environment commented:

By the end of September [2015], we want the LAWf to provide advice on how freshwater resources should be allocated; how water can move between users or to higher value uses; how to transition from over-allocated catchments to limits; and how to provide access for new users.

While the LAWf's recommendations will not specifically address iwi/hapū rights and interests, they may assist in providing new users (including iwi/hapū) access to freshwater resources in areas that are fully allocated.<sup>38</sup>

There was, however, a clear connection between the LAWf process and the IAG-officials process during the lead up to *Next Steps*, especially because some officials and IAG members were part of the LAWf. The IAG sought to make progress through the LAWf when officials seemed reluctant to agree to certain policy options for an iwi allocation. This proved to be a successful strategy. The iwi advisors were 'successful in advocating for their proposals in LAWf', which resulted in a number of forum recommendations which went beyond what Ministers were prepared to consider in the Crown-ILG policy options process and the *Next Steps* consultation document.<sup>39</sup>

The forum was still a large-scale collaborative exercise in 2015, bringing together representatives of primary industry groups, electricity generators, the IAG, recreational NGOs, environmental organisations, and other freshwater 'stakeholders' (see chapter 2). It had also increased its representation from local government (regional and territorial councils). One member, the Fish and Game Council,

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36. Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Wellington: Land and Water Trust, October 2012), pp 84–88 (Workman, papers in support of brief of evidence (doc F6(a)), pp 418–422)

37. Workman, brief of evidence (doc F6), p 25

38. Cabinet paper, 'Freshwater Reform: Next Steps in Policy Development', 21 July 2015 (Crown counsel, sensitive discovery documents (doc D92), p 138)

39. Briefing to Minister for the Environment, 'Fresh Water: Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015', 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1099)

withdrew towards the end of the forum's 2015 deliberations.<sup>40</sup> According to Gregory Carlyon's evidence, Fish and Game left the forum because of the Crown's '[c]herry-picking of the original recommendations and the subsequent ignoring of concerns/advice'.<sup>41</sup>

In respect of iwi rights and interests, the forum's fourth report concentrated on maximising the economic benefits of fresh water, allocation of water and of nitrogen discharge rights, over-allocation, and 'tools and approaches to managing within limits [which] may assist the Crown and iwi/hapū in their engagement'.<sup>42</sup> Its recommendations were underpinned by several fundamental ideas: that limits on uses and discharges would be robust; that users should be able to transfer their allocations commercially; that a system of individual, transferable discharge allocations is required, which would gradually result in highest-value uses; and that good management practice and technically efficient water use would reduce over-allocation. Importantly, the forum could not reach agreement on the issue of whether there should be charges or taxes for water use, but did agree that water should be metered so that takes can be measured.<sup>43</sup>

The first four recommendations were the most relevant for our purposes. The forum's first recommendation reiterated earlier statements that the Crown should give effect to *all* its recommendations. Its second recommendation stated:

The responsibility for reaching agreement on how to recognise iwi rights and interests in water rests with the Crown and iwi, including agreed allocable quantum and discharge allowances. The responsibility for giving effect to those agreements lies with the Crown. When reaching and giving effect to these agreements the Crown's approach should have regard to the Forum's previous statement on iwi rights and interests in fresh water.<sup>44</sup>

The forum's third recommendation anticipated that the Crown and iwi would reach agreements that involved an iwi allocation of water and/or of nitrogen discharge rights. It stated that the Crown should require and enable councils to 'reserve for iwi unallocated portions of the allocable quantum and discharge allowances in under-allocated catchments'. Then, in fully or over-allocated catchments, the Crown should require and enable councils to provide iwi access to water 'over

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40. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Wellington: Land and Water Forum, 2015) (Workman, papers in support of brief of evidence (doc F6(a)), p 453)

41. Gregory Carlyon, brief of evidence (doc G5), p 11

42. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 452–453, 460–461)

43. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 454–457, 529)

44. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 466)

time' (as re-allocation became possible).<sup>45</sup> In doing so, the Crown would need to ensure that 'existing holders of authorisations are fairly compensated should their rights be adversely affected by any agreements made between the Crown and iwi'.<sup>46</sup> This was because the forum viewed the satisfaction of iwi rights as a matter for the Crown, not other users, and also that a win-win solution required payment of compensation to anyone who lost out.<sup>47</sup> Finally, the Crown would need to support councils to 'make any necessary changes to their planning frameworks to accommodate any agreements made between the Crown and iwi'.<sup>48</sup>

The forum's fourth recommendation listed a number of tools or mechanisms that the Crown could use to give effect to any agreements between the Crown and iwi on allocation. Iwi could be given 'priority access' to:

- i. unallocated water and discharge allowances in catchments that have not yet reached full allocation
- ii. allocable quantum that is created through application of the "reasonable technical efficiency test" on transition to the new freshwater management regime
- iii. discharge allowances or load for unallocated contaminants that are created through the application of good management practice requirements on transition to the new freshwater management regime
- iv. water, discharge allowances or additional contaminant load created through government investment in infrastructure to generate 'new water' or 'headroom' in quality limits
- v. water or discharge allowances that are voluntarily surrendered[.]<sup>49</sup>

The forum also recommended tools for the Crown itself to directly facilitate the involvement of iwi in the water economy. One tool for this was the 'facilitating [of] commercial partnerships and joint ventures between iwi and incumbent holders of authorisations to take water and discharge contaminants'.<sup>50</sup> Another mechanism was for the Crown to acquire part of the 'allocable quantum, total available discharge allowance or total contaminant load' for the purpose of transferring it to iwi. There were two suggestions as to how this could be done. The Crown could negotiate commercial agreements with users to transfer their water 'authorisations'

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45. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 466)

46. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 466–467)

47. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 455, 465–466)

48. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 467)

49. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 467)

50. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 467)

to iwi. It could also run a ‘voluntary reverse auction’ to ‘find the most efficient way for the Crown to access authorisations to transfer to iwi’.<sup>51</sup>

So long as the rights of others were not injured,<sup>52</sup> the forum hoped that its recommendations would allow iwi to contribute economically by bringing them more fully into the ‘water economy’. This might include the development of ‘under-utilised land and resources’ and partnering with others in the ‘growing of the water economy’.<sup>53</sup> The forum explained that the benefits would be felt more widely than just by Māori themselves:

Bringing iwi more fully into the water economy through the resolution of their rights and interests in water should not only strengthen our society, but also help maximise economic growth by allowing iwi to fulfil their economic potential. Resolving iwi rights and interests will also provide more certainty for land and water users and regulators.<sup>54</sup>

In his evidence for the claimants, civil engineer Brian Cox stressed these statements and recommendations, noting the forum’s increasing frustration that its recommendations on iwi rights and interests had still not been addressed. This issue, according to Mr Cox, was perceived as a stumbling block by bodies representing all of New Zealand’s water users; until it was addressed, other issues could not be resolved.<sup>55</sup> The question for this section of our chapter is how far the forum’s ideas, analysis, and recommendations influenced the work of the Allocation Team in 2016–17.

### 6.3.3 ‘Managing within limits, pressures, and opportunities’: a 2014 report

The other background document which is important to mention here is a report prepared for the Ministry for the Environment and the Ministry of Primary Industries during the information-gathering phase in 2014, which was made available to both the LAWf and the IAG.<sup>56</sup> The report was entitled ‘Freshwater Programme: Managing within limits, pressures, and opportunities’, and it was provided on a sensitive basis to the Tribunal.

There are two key points that we need to note here. The first is that this report considered the question of whether a lack of access to water was (in actuality) inhibiting Māori land development. The initial result of this research was

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51. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 467

52. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 453, 455)

53. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), pp 454, 462, 464, 465)

54. Land and Water Forum, *The Fourth Report of the Land and Water Forum* (Workman, papers in support of brief of evidence (doc F6(a)), p 464)

55. Brian Cox, brief of evidence (doc D24), pp 25–27; transcript 4.1.2, pp 312–323

56. Peter Nelson, answers to questions in writing, no date (October 2018) doc F28(d), p1. It was also made available to the Water Allocation Programme TAG.

that ‘access to water quantity may not be a common constraining factor on the development of Māori owned land’, which is not the view taken in almost all of the subsequent documentation. The researchers’ view was based on the national statistic that ‘[o]nly 8% of Māori owned land that is suitable for intensive farming development is in areas that have water shortages and/or a current high demand for water.’<sup>57</sup> The Crown was unable to supply us with more developed research or information on this point.<sup>58</sup>

The second key point from this report is that it sounded a caution about the usefulness of market mechanisms in New Zealand. Theoretically, tradable water rights allow the transfer of water from users who are not using it effectively to ‘someone who values it more highly’, thus leading to water being used more efficiently and for its highest value uses. Efficiency is encouraged when water is tradable because users have an incentive to think about the appropriate amount they really need. But the research suggested that markets might not work well in New Zealand because:

- ▶ market sizes are too small, with very few catchments in which there are a large number of water users;
- ▶ changing the point of take for water when it is traded will have a hydrological impact, so there will always be limitations on who users can trade with; and
- ▶ markets work best where there are a range of different farm types in the area (which have different water needs at different times), but in many catchments the majority of irrigated land has the same use.<sup>59</sup>

These are important caveats to consider when assessing the reform options developed by the allocation team in 2016–17.

### 6.3.4 Equity as a key principle in water allocation regimes

#### 6.3.4.1 OECD report

In 2015, the OECD Environment Directorate published a report entitled *Water Resources Allocation: Sharing Risks and Opportunities*. The report did not address the issue of indigenous peoples in any particular way, although it noted that one of the general objectives of allocation regimes should be ‘[e]quity between generations (ensuring sustainable use of the resource) or community groups, including indigenous people.’<sup>60</sup> In the Environment Directorate’s view, equity between groups is in fact one of three key principles for any allocation regime (the others

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57. Ministry for the Environment and MPI, ‘Freshwater Programme: Managing within limits, pressures, and opportunities’, p39 (Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), p146)

58. Peter Nelson, answers to questions in writing (doc F28(d)), p1, referring back to Nelson and Gerrard, answers to questions in writing (doc F28(c)), pp5–6)

59. Ministry for the Environment and MPI, ‘Freshwater Programme: Managing within limits, pressures, and opportunities’, p17 (Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), p124)

60. OECD, *Water Resources Allocation: Sharing risks and opportunities* (Paris: OECD Publishing, 2015), p38 (Nelson, confidential allocation documents in support of brief of evidence (doc F28(b)), p294)

are sustainability and economic efficiency).<sup>61</sup> We note this here because it provides an international context for the re-packaging of Māori access to water as a matter of equity (rather than rights), which began to predominate in the allocation work programme in the following years.

#### **6.3.4.2 The Crown's early thinking on equity and Māori rights and interests**

The release of the Crown's white paper in 2013, *Freshwater Reform 2013 and Beyond*, showed that the Crown was beginning to characterise Māori as 'new users' or users who had been unfairly shut out now that water had become over-allocated in many catchments. The white paper stated: 'New development opportunities should be created for new activities and new or previously excluded users (including iwi/Māori), through efficiency and productivity gains, innovation, dynamic allocation mechanisms, and infrastructure development.'<sup>62</sup>

Policy documents from the co-design phase in 2015 showed that equity and allocation became increasingly linked in the Crown's thinking on Māori rights and interests, and in its reasoning about how to justify addressing those rights and interests to the public. This included the crucial idea that equity required creating 'headroom' to provide access for new and previously excluded users, among whom were iwi and hapū. This was especially the case where historical, statutory, and institutional barriers had prevented Māori from utilising their land in the economy in the past; land that could now be developed by access to water. Māori economic development, it was argued, would be good for the whole economy.<sup>63</sup>

In terms of allocation reforms, therefore, fairness and economic development provided a lens for interpreting the Māori interest:

Ensuring regional councils and resource users have the tools and support to maximise economic benefits within environmental limits (once these have been set) is critical to reduce the costs of a limits-based system and to create more opportunities for economic growth. It also provides the opportunity to rebalance iwi/hapū access to freshwater resources. Although this can be framed as Treaty-based rights and interests, this is also a question of fairness and ensuring we have the right settings for continued economic development in the agricultural sector.<sup>64</sup>

These ideas continued to influence the allocation reform programme in 2016–17.

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61. OECD, *Water Resources Allocation: Sharing risks and opportunities* (Paris: OECD Publishing, 2015), pp 36–38, 53 (Nelson, confidential allocation documents in support of brief of evidence (doc f28(b)), pp 292–294, 309)

62. New Zealand Government, *Freshwater Reform 2013 and Beyond* (Wellington: Ministry for the Environment, 2013), p 21 (Brunt, papers in support of brief of evidence (doc D89(a)), p 617)

63. Briefing for Minister, 28 July 2015, appendix 1; 'Next Steps for Fresh Water – Draft 2016 Consultation Document', 17 November 2015 (Crown counsel, sensitive discovery documents (doc D92), pp 989, 998, 1004, 1175)

64. Draft Cabinet paper, 'Freshwater Reform: Policy Proposals and Consultation Process', no date (November 2015) (Crown counsel, sensitive discovery documents (doc D92), pp 958–959)

**6.4 CABINET'S PARAMETERS FOR OPTION DEVELOPMENT IN MAY 2016**

Cabinet signed off on the allocation work programme in May 2016. It set a three-year programme of option development (to be completed by December 2016); detailed work on a narrowed range of options agreed by Cabinet (to be finished by the end of 2017); and consultation and legislative change in 2018.<sup>65</sup> The Cabinet paper also set three 'bottom lines' for the allocation work programme:

- ▶ 'no one owns fresh water';
- ▶ 'No national settlement favouring iwi/hapū over other users'; and
- ▶ allocation would be determined at the catchment level, based on 'availability, efficiency of use, good industry practice', and a positive contribution to the region's economic development.<sup>66</sup>

One of the five previous bottom lines was not mentioned: 'there will be no generic share of freshwater resources provided for iwi'. Peter Nelson, however, stated:

While the bottom lines the allocation work programme was to take into account were not described identically to the previously-agreed Government bottom lines, we were not aware of any change to the Government's position that 'there will be no generic share of freshwater resources provided for iwi'.

However, in the initial phase of the Allocation Team's work officials did not consider that the then Government's 'bottom lines' constrained the consideration of any possible options. That initial work was intended to be wide ranging. As discussed in my brief of evidence . . . it was intended that officials would consider specific options unconstrained by the bottom lines, and Cabinet would be asked to approve options for more detailed work at the end of 2017. We expected that the five bottom lines would still be a consideration in any final decisions by the Government: they might constrain the approach ultimately adopted by Ministers, but officials might consider a range of options prior to that.<sup>67</sup>

In addition to setting bottom lines, which Peter Nelson said did not in fact constrain the team's initial work, the Cabinet paper reiterated the Crown's commitment to addressing 'iwi/hapū rights and interests in a contemporary system for freshwater management'.<sup>68</sup> This was stated in the context of developing an allocation approach that would be in the best interests of *all* New Zealanders. Also, despite the bottom lines, the Cabinet paper repeated the assurances that Deputy Prime Minister Bill English had given the Supreme Court back in 2012. These assurances were still Government policy:

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65. Cabinet paper, 'Fresh Water: Allocation Work Programme', no date (16 May 2016), p 5 (Crown counsel, sensitive allocation document bundle (doc F25), p 5)

66. Cabinet paper, 'Fresh Water: Allocation Work Programme', no date (16 May 2016), p 1 (Crown counsel, sensitive allocation document bundle (doc F25), p 1)

67. Nelson and Gerrard, answers to questions in writing (doc F28(c)), p 1

68. Cabinet paper, 'Fresh Water: Allocation Work Programme', no date (16 May 2016), p 3 (Crown counsel, sensitive allocation document bundle (doc F25), p 3)



The Crown has stated to the Courts that the recognition of rights and interests in freshwater and geothermal resources must, by definition, involve mechanisms that relate to the ongoing use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use.<sup>69</sup>

The Cabinet paper did not, however, mention the Crown's statement to the court that it was 'open to discussing the possibility of Māori proprietary rights short of full ownership'.<sup>70</sup>

## 6.5 CROWN–MĀORI ENGAGEMENT IN THE ALLOCATION WORK PROGRAMME

### 6.5.1 No co-design for allocation reform options

Following the *Next Steps* consultation, the Crown decided not to develop allocation reforms in collaboration with the ILG. The kind of co-design which was a significant feature of the process up to February 2016 was discontinued here (although it did continue for work on aspects of the NPS-FM and RMA reform, as we discussed in chapter 4).

During the *Next Steps* process, MFE's Water Policy and Strategy Team and the Rights and Interests Team both worked on allocation policy development. Peter Nelson, who gave evidence for the Crown on allocation, worked for the policy and strategy team, heading a workstream on making water allocations more transferable to other users. The Rights and Interests team collaborated with the IAG on the *Next Steps* fourth workstream, Economic Development. This workstream was supposed to develop mechanisms for iwi and hapū to access water for economic purposes.<sup>71</sup> After the *Next Steps* consultation, however, the Government decided not to continue this dual approach. In the Crown's view, a comprehensive programme was necessary to design a new allocation system, and the Government was no longer prepared to have a specific Crown–ILG programme on Māori rights and interests.<sup>72</sup>

Instead, the Crown returned to a more common model: a team of officials advised by a technical advisory group (TAG) with a Māori representative. The ILG nominated two members of the allocation team and one member of the TAG.<sup>73</sup> The allocation team nominees acted as 'MFE team members' without a line of

69. Cabinet paper, 'Fresh Water: Allocation Work Programme', no date (16 May 2016), p 3 (Crown counsel, sensitive allocation document bundle (doc F25), p 3)

70. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 68

71. Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28), pp 1–3

72. Briefing to Ministers, 'Fresh Water: Meeting with Iwi Leaders Group – 18 February 2016', 16 February 2016; briefing to Ministers, 'Fresh Water: 9 March 2016 Meeting with Iwi Leaders Group on Allocation Purpose', 4 March 2016 (Crown counsel, sensitive discovery documents (doc F31), pp 5–6, 17–18)

73. Nelson, brief of evidence (doc F28), pp 3–5

communication to the IAG, but were chosen for their ability to provide an ‘iwi/hapū perspective’.<sup>74</sup>

Although the Crown did not agree to co-design of options or co-governance of the programme, it did establish an extra layer in the form of a Joint Advisory Group (JAG). The JAG was made up of three political advisers (to Ministers) and three IAG members. The role of the JAG was to comment on the allocation team’s advice to Ministers, and to keep their ‘principals’ informed.<sup>75</sup> Peter Nelson told us that the political members of the JAG also advised the team if options might breach the Crown’s bottom lines.<sup>76</sup> The impact and contribution of the JAG is not apparent to the Tribunal on the evidence we have received.

Donna Flavell described the lengthy work of getting Te Mana o te Wai into the NPS-FM and Mana Whakahono into the RMA as ‘easy’ compared to trying to get progress on matters of allocation.<sup>77</sup> Essentially, the allocation team met and had discussions with the IAG, but the two sides (officials and IAG) ended up with ‘parallel’ processes rather than a collaboration or joint process. A Cabinet paper in December 2016 explained that the IAG was dissatisfied with the Crown’s level of engagement and the IAG’s amount of input to the development of reform options so far. As a result, the IAG had decided to undertake a parallel work stream in 2017 to develop what was sought by iwi in respect of the allocation system.<sup>78</sup> We note here that allocation reform options never got to the point of wider consultation with Māori either. The allocation programme, therefore, had the least Māori involvement of any in the freshwater reforms. On the other hand, the programme was never completed and there was *some* IAG input.<sup>79</sup>

### 6.5.2 What did the ILG want?

In respect of an allocation reform process, the ILG wanted to co-design reform options, and to have joint Crown–ILG governance of the programme. The Crown did not accept the ILG’s representations on these points.<sup>80</sup> In terms of the substance of the reforms, the ILG wanted the Crown to provide iwi with an ‘equitable

74. Briefing to Ministers, ‘Fresh Water: Meeting with Iwi Leaders Group – 7 July 2016’, 4 July 2016 (Crown counsel, sensitive discovery documents (doc F31), p 50)

75. Cabinet paper, ‘Fresh Water: Allocation Work Programme’, no date (16 May 2016), p 1 (Crown counsel, sensitive allocation document bundle (doc F25), p 7)

76. Peter Nelson, answers to questions in writing, no date (October 2018) (doc F28(d)), p 13

77. Transcript 4.1.4, p 402

78. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016) (Crown counsel, sensitive allocation document bundle (doc F25), p 52)

79. On IAG input and the ‘parallel’ work programmes, see Nelson and Gerrard, answers to questions in writing (doc F28(c)), pp 6–8; Flavell and Albert, answers to Tribunal questions in writing, 9 November 2018 (doc G22(g))

80. Briefing to Ministers, ‘Fresh Water: Meeting with Iwi Leaders Group – 18 February 2016’, 16 February 2016; extracts from Sir Tumu Te Heuheu to Prime Minister, 15 February 2016; briefing to Ministers, ‘Fresh Water: 9 March 2016 Meeting with Iwi Leaders Group on Allocation Purpose’, 4 March 2016 (Crown counsel, sensitive discovery documents (doc F31), pp 5–7, 10–12, 17–18, 20)

share of allocation for customary and commercial purposes in every rohe (from the water available for use above the limits that are set to maintain and protect Te Mana o te Wai).<sup>81</sup>

Back in 2012, the ILG's expert witness on allocation, Kieran Murray, had investigated how the 'pre-existing proprietary rights and interests of iwi in freshwater might be transformed into modern economic instruments.'<sup>82</sup> In his team's view, the best way to recognise Māori proprietary rights was a permanent, inalienable allocation to iwi for commercial use that could be leased but not sold. Other users would be compensated (and would gain certainty) by having permanent allocations as well but theirs could be sold. As kaitiaki, Māori would also have a voice in the management of water quality and limits in concert with regional councils.<sup>83</sup>

In essence, therefore, the idea was that a permanent allocation would create a form of property right for Māori that was consistent with common law and could be recognised by the Crown.<sup>84</sup> Establishing iwi property rights in this way would 'trigger the need to provide broadly equivalent rights to others with entitlements to the allocable quantum, otherwise it would be difficult for people to understand where they stood in relation to each other.'<sup>85</sup> The allocation right would most likely be a percentage of the allocable water, not an absolute quantity (in contrast to the present system), and would thus be adaptable in response to freshwater limits and dry years.<sup>86</sup>

Without accepting all of the Sapere team's reasoning and conclusions,<sup>87</sup> the ILG supported the concept of a perpetual iwi allocation as an essential part of any new allocation system.<sup>88</sup> The IAG asked Mr Murray's team to investigate the economic benefits to society of an iwi allocation, incentives for other users to accept it, and the question of whether iwi would 'forego commercial opportunities and reduce the potential economic gains from the introduction of a rights regime.'<sup>89</sup> The results of this research were shared with the Crown in 2015. This was done as

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81. Flavell and Albert, brief of evidence (doc G22), p 12

82. Murray, brief of evidence (doc G3), p 3

83. Kieran Murray, Douglas Birnie, and Sally Wyatt, 'Economic analysis of permanent allocation of freshwater to iwi', Sapere Research Group, October 2012 (doc D102), pp 1, 5; Kieran Murray, Douglas Birnie, and Sally Wyatt, 'Transition Options for Recognising Iwi Water Rights', Sapere Research Group, October 2012 (doc D103), pp 30–33

84. Kieran Murray, Douglas Birnie, and Sally Wyatt, 'Economic analysis of permanent allocation of freshwater to iwi' (doc D102), p 5

85. Kieran Murray, speaking notes for hearing, 14 August 2018 (doc G3(b)), p 4

86. Kieran Murray, Douglas Birnie, and Sally Wyatt, 'Transition Options for Recognising Iwi Water Rights' (doc D103), p 4

87. Transcript 4.1.4, pp 413–414; TAG minutes, 6 July 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 21)

88. Flavell and Albert, brief of evidence (doc G22), p 12; 'Nga Matapono ki te Wai', no date (2012) (Solomon and Flavell, papers in support of brief of evidence (doc D85(a)), p 8)

89. Murray, brief of evidence (doc G3), pp 3–6; Preston Davies, Kieran Murray, and Sally Wyatt, 'Incentives on iwi under a rights-based regime', Sapere Research Group, June 2015 (doc D100), p 22

part of the *Next Steps* engagement over the fourth worksteam (developing ‘a range of mechanisms to enable iwi/hapū to access fresh water in order to realise and express their economic interests’).<sup>90</sup> As will be recalled, the Crown and the ILG did not reach agreement on reform options as part of *Next Steps*, but the ILG’s research on allocation was used in the allocation work programme in 2016. This included the ‘Ngā Mātāpono ki te Wai’ model.<sup>91</sup> This model called for an iwi allocation that was:

- ▶ proportional;
- ▶ allocated to iwi within a catchment;
- ▶ perpetual;
- ▶ subject to environmental limits;
- ▶ inalienable but still transferable (presumably by lease); and
- ▶ not seen as ‘ownership’ but rather as a right to access water (discharge rights were not mentioned in the model).<sup>92</sup>

In our inquiry, the economic merits of permanent allocations and of an iwi allocation were debated between the ILG witness, Mr Murray, and the Crown witness, Dr Yeabsley.<sup>93</sup> We do not need to consider that debate in any detail here because the Crown’s allocation team *did* consider and propose an iwi allocation in 2016.

Also, Mr Murray acknowledged that an iwi allocation did not depend on all users having (in effect) property rights, and that an iwi allocation that was perpetually renewable (rather than permanent) could still be leased. But, in his view, this would be a more difficult and less economically rational outcome, and it was better to make all allocation rights permanent.<sup>94</sup> Dr Yeabsley, on the other hand, argued that the best modern form of recognition for proprietary rights would be the payment of a royalty or levy. He suggested that this would be a relatively low cost and simple way to provide an economic return to Māori. It would also, he said, avoid the complexity of iwi ‘taking a water allocation and using it to create value’ because it would simply levy the use of water to provide a direct return. Some potential problems could be avoided by making the charge a flat rate according to the volume of water used (assuming a measurement system was in place).<sup>95</sup>

Many of Dr Yeabsley’s arguments were critical of market mechanisms – such as whether market conditions applied in New Zealand’s small catchments with ‘few potential players’ – but we note that market mechanisms were also considered and recommended by the allocation team in 2016.<sup>96</sup>

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90. Crown counsel, memorandum, 23 February 2016 (paper 3.1.255), p 2

91. TAG minutes, 6 July 2016; ‘Initial Allocation/Transition’, report for 6 July 2016 TAG meeting (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 21, 451)

92. ‘Ngā Matāpono ki te Wai’, no date (2012) (Solomon and Flavell, papers in support of brief of evidence (doc D85(a)), p 8)

93. Yeabsley, brief of evidence (doc F8); Murray, brief of evidence (doc G3);

94. Kieran Murray, answers to questions in writing, 17 September 2018 (doc G3)

95. John Yeabsley, answers to questions in writing (doc F8(d)), pp 3–5

96. Yeabsley, brief of evidence (doc F8), pp 8, 10–11, 12–14, 17

## 6.6 DEVELOPMENT OF OPTIONS BY THE ALLOCATION TEAM IN 2016

### 6.6.1 Initial policy work

After Cabinet set the allocation team's terms of reference, one of the first things that the team did was to examine council practice vis-à-vis Māori rights and interests in water. Officials noted that, 'at a general level, it is expected that' those rights and interests would require:

- ▶ 'input and participation in management decisions, including the setting of limits, and capacity and capability to participate effectively in those processes';
- ▶ 'a quantity allocation'; and
- ▶ 'a quality or assimilative capacity allocation' (that is, discharge rights).<sup>97</sup>

The team's report to the TAG noted the kinds of Treaty settlement or RMA arrangements in place for iwi to participate in freshwater management, such as joint management agreements. More were expected to develop through the planned Mana Whakahono a Rohe arrangements. The officials concluded: 'Although input and participation is an essential component in addressing Iwi/Hapū rights & interests, it is not sufficient as it does not guarantee an actual allocation of the available resource.' They did expect, however, that participatory rights would give iwi some influence over allocation decisions. Nonetheless, under the arrangements already in place, there were only four instances of councils making 'explicit allocations to Iwi/Hapū'.<sup>98</sup> These arrangements are discussed in chapter 2 (section 2.6.4). They were quite limited but showed that councils could be persuaded to provide for an allocation to Māori if the council–Māori relationship was strong enough and if it assisted economic growth. It seemed clear to the allocation team, however, that an attempt to address iwi/hapū rights and interests in the 'allocation space' relied on the Crown 'to resolve and provide clarity on [it] as Treaty partners'.<sup>99</sup>

After reviewing the practice of regional councils and other studies, the allocation team worked through the issue of Māori rights and interests with the TAG. This included developing a 'long list' of potential options that was gradually whittled down by the end of the year.<sup>100</sup> It is probably not necessary here to detail the iterative development of options by the allocation team and the TAG throughout 2016. From the evidence available to us, the team worked well with the TAG and

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97. 'Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft), report prepared for 28 September TAG meeting (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 486)

98. Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft) (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 486)

99. Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater allocation policy' (draft) (Nelson, sensitive documents in support of brief of evidence (doc F28(b)), p 487)

100. Nelson, brief of evidence (doc F28), p 8; 'Options to provide for Iwi/Hapū Rights and Interests through the Allocation System', report for 8 August 2016 TAG meeting (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 496–500)

was guided by its advice. Dr Adele Whyte, the ILG's nominee on the TAG, represented the ILG's views in the advice given.<sup>101</sup>

### 6.6.2 Equity as a guiding principle

During the team's development of reform options, the 'lens of fairness' and the benefit of Māori development for economic growth were principal ways of looking at how to address Māori rights and interests – and how to justify doing so to regional councils and the wider public.<sup>102</sup> Peter Nelson and Tania Gerrard told us that '[e]quity was a key driver of the allocation work programme'.<sup>103</sup> This was in line with some earlier Crown thinking on the issue (see section 6.3.4).

In essence, the allocation team defined the idea of fairness for Māori as having two dimensions. First, a fair allocation system would be fair for all citizens (including as between iwi in different catchments).<sup>104</sup> Secondly, a fair allocation system would enable iwi and hapū to have the same opportunities to access water for development as other users (existing as well as future), and this would include making up for the operation of past barriers to accessing water for economic purposes which had operated unfairly as between Māori and non-Māori.<sup>105</sup> This idea was sometimes conceptualised more generically as a matter of disadvantaged groups rather than as a Māori matter per se. A reformed allocation system, it was argued, would demonstrate equity by treating all users in similar circumstances similarly. This included the recognition that 'there may be some groups in society that are disadvantaged and should be treated more favourably in the design of an allocation system than those who have more resources'.<sup>106</sup>

The allocation team and the TAG then had to work out how this guiding principle might be given effect in different kinds of allocation systems and within the Crown's bottom lines.

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101. See Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)).

102. See, for example, TAG minutes, 2 November 2016; 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016; draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 60, 646–648, 651–652, 821–822)

103. Nelson and Gerrard, answers to questions in writing (doc F28(c)), p 4

104. 'Options to provide for Iwi/Hapū rights and interests within allocation – enhanced access' (draft), report for TAG meeting on 28 September 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 491)

105. 'Options to provide for Iwi/Hapū rights and interests within allocation – enhanced access' (draft), report for TAG meeting on 28 September 2016; 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 814)

106. Draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 651)

## 6.7 THE ADVICE AND RECOMMENDATIONS OF THE ALLOCATION TEAM

By the end of 2016, the allocation team had developed a set of reform options which it recommended should be the subject of further work in 2017. The team also prepared a draft regulatory impact statement which was never finalised or approved. The options were framed as possible components for different kinds of systems. Their eventual adoption, therefore, would depend in part on what kind of allocation system was chosen. The team's analysis recommended (and rejected) several reform proposals of relevance to our inquiry.

### 6.7.1 No national percentage allocation for iwi and hapū

The allocation team argued that each catchment has different challenges and opportunities, therefore a 'one size fits all' arrangement would not work. The team recommended that a 'national percentage allocation in recognition of iwi and hapū rights and interests' should not be considered further in 2017. In any case, Ministers had already 'indicated that they will not pursue a national settlement'.<sup>107</sup> The team also recommended excluding the option of negotiating catchment-specific percentages with iwi and hapū, although the reason for that is not clear.<sup>108</sup> We do know that the political advisers on the JAG 'advised orally that certain options were not to be considered. For example, there would be no fisheries quota management system-style percentage allocation to iwi'.<sup>109</sup>

### 6.7.2 Access to water and discharge rights for Māori land development as a matter of equity and regional development

The claimants argued that the 'first in first served allocation rules disproportionately prejudice Māori'.<sup>110</sup> The allocation team certainly took this view. It acknowledged that many of the challenges for iwi and hapū to obtain access to water had arisen from 'historical, physical, administrative, and/or statutory barriers'. These barriers were not part of the allocation system itself but they had delayed 'effective participation' in it. This in turn had affected the development of Māori land. Partly as a result of the barriers, the team's information was that Māori land generally has had less access to water and discharge rights, and is less developed, than 'other land of comparable quality'. Further, opening up or providing access to water for the development of this land would result in 'regional economic growth benefits' (in addition to recognising Māori rights and interests).<sup>111</sup> This meant that councils would likely see supporting Māori land development as a 'win-win' scenario for

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107. 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 814, 821, 822)

108. 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 824–825)

109. Nelson, answers to questions in writing (doc F28(d)), p 13

110. Claimant counsel, outline of oral closing submissions (paper 3.3.33(b)), p 5

111. 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 821)

regional growth and development, and a small number had already begun to insert it into their plans.<sup>112</sup> Māori could also be characterised as ‘new users’, and the system would need to be fair to new users.<sup>113</sup>

In respect of reform options for Māori land development, the team considered that several mechanisms should be developed further in 2017. These mechanisms included:

- ▶ The potential for some allocation to be reserved for Māori land in catchments that are not fully allocated, or provided for Māori land ‘when/if it becomes available’;
- ▶ Crown purchases (in a transferable market system) could provide for ‘Māori access to fresh water’ in fully or over-allocated catchments;
- ▶ Treaty settlements could ensure that land returned in a settlement could be developed, for example by a right of first refusal (already well-understood by local authorities) to be applied to water or discharge rights as well as to land and housing;
- ▶ Regional councils could have criteria or plan objectives which ‘increase preference to the development of Māori-owned lands’;
- ▶ There could be a ‘land-based initial allocation of discharges and water takes’ attached to all land, but this might only have a minor impact on Māori land.<sup>114</sup>

### **6.7.3 Broader iwi and hapū rights of access to water and discharge rights as a matter of equity**

The team found that, in addition to ‘those situations where iwi and hapū own land in the catchment’, there were also ‘broader iwi and hapū rights to access water and discharge entitlements under Te Tiriti o Waitangi.’<sup>115</sup> It would therefore be necessary to open up access to water quite apart from land ownership to ensure ‘relativity and fairness across iwi and hapū.’ For example, some tribes had their land confiscated and were effectively landless, and so could not benefit in the same way as others by increased access to water for developing land.<sup>116</sup> Similarly, some iwi had received land back in Treaty settlements, but not all iwi had settled their claims yet and received that form of redress.<sup>117</sup> The team considered that many of the same mechanisms used for Māori land development could be used

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112. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

113. Draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 639–640, 648)

114. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 821–822, 824)

115. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

116. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

117. Draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 651)



to provide ‘access beyond land ownership’.<sup>118</sup> These included the recognition of Māori rights and interests in the criteria adopted for a criteria-based system of allocation, reserving allocable water for these ‘broader access issues’ as well as for land development, and (in a market system) Crown purchases of water in fully or over-allocated catchments.<sup>119</sup>

The allocation team did not consider the important point that many hapū and iwi have been rendered effectively landless by Crown acts or omissions, although their land was not taken by confiscation (raupatu). This provides significant further weight to the team’s reasoning that an allocation for Māori land development would not be enough to recognise Māori rights and interests.

#### **6.7.4 Broader rights of access than just for economic purposes**

Finally, the team stated that iwi and hapū rights and interests in water (and nutrient discharges) went beyond land development to include spiritual and cultural purposes, as well as the ‘overall health and wellbeing of waterbodies and affiliated species of cultural importance’.<sup>120</sup> Another important characteristic for an allocation system would therefore be the need for a ‘specific allocation’ of water for ‘in-stream cultural or economic values such as freshwater and estuarine mahinga kai’.<sup>121</sup> This could also involve more consideration of ‘cultural in-stream values’ in consent decisions – statutory weight would be given to ‘tightly defined, spatially precise, cultural in-stream values’ in consent decisions. Nonetheless, this would not be allowed to ‘materially change the objectives and limits in the catchment or FMU’, since these cultural values would already have been considered in the planning phase.<sup>122</sup>

#### **6.7.5 No royalties or perpetual allocations**

The matters discussed above were dealt with specifically as issues concerning Māori rights and interests in freshwater resources. In addition, officials made a number of other relevant recommendations. These included the team’s advice that no further consideration should be given to royalties on ‘fresh water use profits’, or ‘perpetual rights to set quantities of water’. There was ‘little evidence of the practical implications’ of charging royalties. But the team considered that they would create an administrative burden and would also disincentivise efficiency – efficient

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118. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

119. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 822, 824)

120. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 821)

121. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

122. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 824)

use would generate higher profits and therefore a larger royalty payment.<sup>123</sup> It is not clear to us why royalties needed to be considered as a charge on profit – the alternative proposition is that royalties on use could significantly incentivise efficiency as that would reduce the royalty burden.<sup>124</sup>

The team did, however, consider that charges for water use (by volume) could be levied for cost recovery and to fund catchment remediation.<sup>125</sup> The latter point was very close to the view of some interested parties in our inquiry, who argued that ‘all persons who wish to use or take water for private commercial gain, pay a price for that water use and that be used to seed and maintain a fund for the maintenance and restoration of water bodies.’<sup>126</sup> But the team did not recommend charges for payment to Māori, as sought by some claimants.<sup>127</sup>

Although we received extensive documentation, there was only brief consideration given to royalties or other charges for the specific purpose of recognising Māori rights in water bodies.<sup>128</sup> This is where conceptualising Māori as new users who had been shut out in the past worked against a broader consideration of Māori *rights*. Even though the possibility of royalties was mentioned in the Cabinet paper which set the terms of reference for the programme, citing the Crown’s assurances to the Supreme Court in 2012, we cannot see that it was ever seriously contemplated as an option for addressing Māori rights and interests. This may partly be because the ILG did not propose it as part of its representations to the Crown on the reform of the allocation system. What the ILG called for was an ‘equitable share of allocation (ie, the water available for use above any set limits) for customary and commercial purposes in every rohe.’<sup>129</sup> The ILG and the allocation work programme (team and TAG) all favoured an allocation to iwi and hapū rather than some kind of royalty, levy, or resource rental to be paid to them. With that intention, levies or charges were seen as one way to fund the purchase of an allocation for Māori.<sup>130</sup>

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123. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016; draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 656–657, 816–817)

124. Cabinet paper, ‘A new approach to the Crown/Māori relationship for Freshwater’, no date (3 July 2018) (Crown counsel, document bundle (doc F30), p 20)

125. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), pp 827–828)

126. Counsel for interested parties (Sykes), speaking notes for oral closing submissions (paper 3.3.39(b)), p 6

127. Claimant counsel (Wai 2601), submissions on remedies, 3 December 2018 (paper 3.3.38(d)), p 6

128. ‘Options to provide for Iwi/Hapū Rights and Interests through the Allocation System’, report for 8 August 2016 TAG meeting (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 500)

129. Freshwater ILG, ‘Te Mana o Te Wai’, no date (June 2016), p 12 (Flavell and Allbert, papers in support of brief of evidence (doc G22(a)), p 14)

130. See, for example, ‘Water and nutrient allocation reform – Catchment Case Studies’, report for 28 September TAG meeting (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 504)

The ILG did, however, favour perpetual allocations to iwi and this was not an option that officials recommended. According to the evidence of Peter Nelson and Tania Gerrard, it was discussed by the team as an option for recognising and protecting Māori rights and interests in any allocation system.<sup>131</sup> Officials did not, however, recommend it for further policy development in 2017. In a more general sense (rather than as a way of providing for Māori), the allocation team was prepared to consider perpetual allocations if they were proportional rather than an absolute amount.<sup>132</sup> The allocation team noted, however, that ‘perpetual rights to fresh water could indicate “ownership” of fresh water, which is inconsistent with the Government’s bottom line that “no-one owns fresh water”’.<sup>133</sup>

### 6.7.6 Summary

In sum the key points in the allocation team’s thinking were:

- ▶ there should be no national percentage of allocation because the circumstances of catchments and iwi differ;
- ▶ there should be access to water for Māori land development in order to ensure fair access for all (since Māori faced particular historical and other barriers to access) and this would also provide regional economic benefits;
- ▶ fairness as between iwi requires that those which had lost almost all their land and those which had not yet received any land in a Treaty settlement should also have access to water for economic purposes;
- ▶ Māori rights and interests in an allocation system go beyond economic development and should also include access for spiritual, cultural, and other purposes; and
- ▶ royalties and perpetual allocations were not options that should be considered further.

## 6.8 CABINET’S INTERIM VIEW OF THE OPTIONS, DECEMBER 2016

The arguments and recommendations discussed in the previous section had a significant influence on the Cabinet paper that was prepared for December 2016. The draft regulatory impact statement, however, was not completed because it was decided that the Cabinet paper would not ‘seek decisions on options or seek to exclude options’ at this stage.<sup>134</sup> This was a significant departure from the initial intentions in mid-2016 and the advice that the allocation team had prepared. Nonetheless, the Cabinet paper expressed an official Crown position on some of the thinking that had been done to date and is thus worth some detailed consideration. The key point to note is that addressing Māori rights and interests in a new allocation system was framed around equity considerations and redressing

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131. Nelson and Gerrard, answers to questions in writing (doc F28(c)), p 4

132. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 817)

133. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 816)

134. Nelson, brief of evidence (doc F28), p 11

inequities. This was in keeping with the main thrust of the allocation work programme on iwi issues.

The Cabinet paper noted that the systemic flaws in the present mode of allocation were a lack of incentives to use water efficiently, limited access for new users (which created ‘significant equity issues’), insufficient ability to transfer water and discharge rights, and ‘particular inequity of access for iwi and hapū’. With those flaws in mind, the essential elements of a new allocation system (to be further progressed in 2017) would be market mechanisms in combination with more effective monitoring and greater equity. In order to achieve a more equitable system, water and/or discharge rights would be allocated ‘at least partially based on land’, and the existing inequity for iwi and hapū would have to be addressed.<sup>135</sup> In addition, the Cabinet paper drew on the caution given in several LAWf reports, stating that, unless the question of Māori rights was resolved, uncertainty would continue to plague existing and potential new users. This would likely lead to ‘underinvestment and poorer economic outcomes.’<sup>136</sup>

For our purposes, we are interested here in how Cabinet envisaged addressing Māori rights and interests in a new or reformed allocation system. The Cabinet paper reiterated the by now familiar undertakings of the Deputy Prime Minister during the *Mighty River Power* case. It also reiterated the four work streams agreed to with the ILG as part of the *Next Steps* process. As a result of that process, reforms were underway at the time in terms of the NPS-FM and the RMA (see chapter 4).<sup>137</sup> Through the NPS-FM, Te Mana o te Wai was an overarching principle in freshwater management. This meant that in the management and allocation of water, outcomes must provide for the health of the environment, the health of the water body, and the health of the people. The Cabinet paper stated: ‘Upholding Te Mana o Te Wai also means upholding our responsibilities under the Treaty of Waitangi and addressing the current inequity faced by iwi and hapū.’<sup>138</sup>

The existing reforms, it was acknowledged, would not provide a ‘comprehensive solution’ for Māori. During the *Next Steps* engagement, the Crown had agreed that it would ‘develop a range of mechanisms to enable iwi and hapū to access freshwater resources to achieve their economic interests.’ This was stressed as an ‘integral part’ of the allocation work programme.<sup>139</sup> In earlier sections of this chapter, we discussed how the ‘economic development’ work stream operated in 2015–16. In February 2016, when the *Next Steps* consultation document was released without any reform options from that work stream, Ministers made a commitment to

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135. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), pp 1–4 (Crown counsel, sensitive allocation documents bundle (doc F25), pp 42–46)

136. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 5 (Crown counsel, sensitive allocation documents bundle (doc F25), p 46)

137. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 3 (Crown counsel, sensitive allocation documents bundle (doc F25), p 44)

138. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 6 (Crown counsel, sensitive allocation documents bundle (doc F25), p 47)

139. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 3 (Crown counsel, sensitive allocation documents bundle (doc F25), p 44)

‘return to Cabinet in due course on the development of options for allocation and enabling iwi/hapū to access freshwater resources in order to realise and express their economic interests.’<sup>140</sup>

So what form had that commitment taken? As discussed in the previous section, officials and the TAG had devoted considerable time and effort to this question. The essential point picked up and developed in the Cabinet paper was the issue of equity for new users. Through discussions with the TAG, councils, the IAG, and users/dischargers, officials had identified a series of problems with the existing water allocation system, including that limited access for new entrants had created inequity, and that there was ‘particular inequity for iwi and hapū’. Further, ‘the Crown has committed to providing recognition of Māori interests in freshwater and geothermal resources, and to continue to develop mechanisms for redress for breaches of those rights and interests.’<sup>141</sup>

The need for redress arose, in part, from historical problems that had prevented Māori from being able to use or develop their land effectively. The paper stated: ‘the lack of equity for new entrants has impacted particularly strongly on Māori. Many of the challenges for Māori who hold land have arisen due to historical, physical, administrative, and statutory barriers.’<sup>142</sup> These barriers exist even for those who were returned land in a Treaty settlement because the returns have been relatively recent, and because in some cases the catchment was already fully allocated. The Cabinet paper noted that many iwi considered that these barriers had prevented them from participating in the water allocation system in the past, and that this had ‘prevented equitable access to water and associated development opportunities.’<sup>143</sup> As an ‘example of the scale of how much this could have restricted development’, a 2011 report estimated that an additional 32,000 hectares of land could have been in use for dairying if it had been general instead of Māori land.<sup>144</sup>

The Cabinet paper stated that allocation was a ‘social and cultural issue’ as well as an economic and environmental matter. To meet the social and cultural aspects, one of the key features of a new allocation system could be a standard allocation for land.<sup>145</sup> This would create a more equitable system, as well as incentivise transfer to higher value uses via trading, as land users would have needs for different

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140. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b)), p 887)

141. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 4 (Crown counsel, sensitive allocation documents bundle (doc F25), p 45)

142. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 5 (Crown counsel, sensitive allocation documents bundle (doc F25), p 46)

143. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 5 (Crown counsel, sensitive allocation documents bundle (doc F25), p 46)

144. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 5 (Crown counsel, sensitive allocation documents bundle (doc F25), p 46)

145. Although it was not stated in the Cabinet paper, the documentation of the allocation work programme makes it clear that what was meant was an allocation to irrigable land (within pumping distance): draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 656)

levels of water but would get a standard allocation.<sup>146</sup> As the allocation team had recommended, Ministers packaged together the issues of equity for new users, access for land development, regional economic growth, and the rights and interests of Māori. This would involve a new system, with tradable water rights and a base allocation to land that

if implemented, should ultimately see water and discharge use rights distributed more equitably, including to new entrants. As described above the existing system has impacted particularly strongly on iwi and hapū. A shift from the existing system should therefore be considered to address both equity of access to potential new users of the resource, as well as iwi and hapū rights and interests.

Providing use rights attached to land, as well as enhanced market mechanisms to access further allocation, would potentially see undeveloped land benefit significantly; if that land is able to be developed with access to water. Appropriate use rights should also be available to support development of lands returned to iwi and hapū under future Treaty settlements. Any new system could be supplemented by ongoing Crown support for regional economic development, including for the development of Māori land.<sup>147</sup>

We note that the allocation team had expressed some concerns about addressing Māori rights and interests by attaching a water allocation to land generally:

Land based initial allocation of discharges and water takes is a further option that would capture a wider range of land-types and uses. However, it may be considered a weaker option for addressing rights and interests because of the difficulties around the methodologies that would be applied to categorise lands and the potentially minor impact on Maori landowners as a result. This is a key feature that will be tested further for this particular mechanism.<sup>148</sup>

The allocation team had also suggested that access could be provided for cultural purposes but it seems that Ministers thought this would not be necessary as part of these particular allocation reforms. The Cabinet paper stated:

These [land development] benefits need to be seen alongside improved participation of iwi and hapū in governance and decision-making being progressed through the Resource Legislation Amendment Bill and wider freshwater reforms. Measures such as Mana Whakahono a Rohe agreements and improved recognition of iwi and hapū values and relationships with water bodies under the NPS for Freshwater

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146. Cabinet paper, 'Fresh Water: Initial Report Back on Allocation Options', no date (7 December 2016), p 8 (Crown counsel, sensitive allocation documents bundle (doc F25), p 49)

147. Cabinet paper, 'Fresh Water: Initial Report Back on Allocation Options', no date (7 December 2016), p 9 (Crown counsel, sensitive allocation documents bundle (doc F25), p 50)

148. 'Freshwater allocation system options proposed for further analysis in 2017', 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

Management ensure that the spiritual and cultural values, roles and responsibilities of iwi and hapū are better reflected in the system as a whole.<sup>149</sup>

There was no mention of the ‘broader’ allocation to iwi and hapū that the allocation team had recommended.

For 2017, further work would focus on the ‘detailed elements of the new system’ as described in the Cabinet paper, to explore their ‘practicality and impact’, and to develop specific proposals or options by the end of 2017. This would include exploring the

impact of any new system on iwi and hapū, including the degree to which it will uphold Te Mana o Te Wai, address any existing inequity, recognise and provide for iwi and hapū rights and interests, and enable undeveloped land to be developed sustainably.<sup>150</sup>

The Cabinet paper acknowledged that these reform ‘options’ had not yet been ‘explored in any depth’ with iwi and hapū. There would need to be further work with the ILG and IAG, and wider engagement with iwi and hapū, and the options for allocation might change as a result.<sup>151</sup> Nonetheless, the ILG had been consulted about the contents of the Cabinet paper (as per the Crown–ILG protocol). Unsurprisingly, the iwi leaders were not entirely happy with the reform options for further development in 2017, since the idea of restricting Māori rights in allocation to land development had already been disputed back in the *Next Steps* process (see section 6.3.1). The ILG advised Ministers that an allocation would also be necessary for iwi and hapū who had lost land through historical events such as Crown confiscation.<sup>152</sup> At least in part, however, the TAG and the allocation team wanted to get over old hurdles by associating Māori with the needs of a generic class of ‘new entrants’ to the water market (and with the promise of regional growth). It was hoped that this would gain greater support from regional councils and the public.

As Crown counsel has pointed out, the allocation reforms have not been completed. No final options were decided for wider consultation in this Cabinet paper, which noted the position reached so far. We accept this point but we think that the paper was a significant step in policy development nonetheless. It indicated the Government’s interim thinking as to which reform options should continue as the focus of more detailed system design in 2017. Also, as MFE officials stated, each of

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149. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 9 (Crown counsel, sensitive allocation documents bundle (doc F25), p 50)

150. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 9 (Crown counsel, sensitive allocation documents bundle (doc F25), p 50)

151. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 10 (Crown counsel, sensitive allocation documents bundle (doc F25), p 51)

152. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 11 (Crown counsel, sensitive allocation documents bundle (doc F25), p 52)

the allocation Cabinet papers ‘reflected what the Minister of the time wanted to express to his colleagues.’<sup>153</sup> Some options for addressing Māori rights and interests were not considered in this paper (even if, as indicated, the position could change after consultation with Māori). In sum, Cabinet’s interim view on the relevant options to date seems to have been:

- ▶ First, there would be no allocation for cultural purposes (as this would in reality be provided for through NPS-FM processes).
- ▶ Secondly, there would be no allocation specifically for Māori land development.
- ▶ Thirdly, a standard allocation could be attached to land within the new system, and this would address previous inequities, including for Māori (an option which officials had characterised as ‘weak’ in terms of providing sufficient access to water for Māori land development).<sup>154</sup>
- ▶ Fourthly, there would be no allocation for what officials had characterised as ‘broader iwi and hapū rights to access water and discharge entitlements under Te Tiriti o Waitangi’ (over and above any allocation for Māori land).<sup>155</sup> It is clear that the Government *did* reject this reform option because the ILG objected to its exclusion from the Cabinet paper. As noted above, the ILG had ‘advised Ministers that it considers an allocation for those iwi and hapū who have lost significant land through raupatu and other historical events will also need to be addressed.’<sup>156</sup> Despite this objection, Ministers excluded the option of a broader iwi allocation, which – as we discussed above – had been recommended by the allocation team for further work in 2017. Clearly, Ministers were still not prepared to entertain this proposal, which they had rejected at the end of the *Next Steps* engagement with the ILG in February 2016.

In essence, therefore, Cabinet’s position at the end of 2016 seems little different from what it had been at the beginning of the year. On the other hand, there was still the possibility of further ‘give’. The ILG decided to embark on a series of regional hui in the first half of 2017 to ‘test views on Te Mana o te Wai and Ngā Mātāpono ki te Wai with a particular focus on the issue of freshwater allocation.’<sup>157</sup> The ILG had advised the Crown:

the engagement with the IAG has not been adequate in terms of the technical input into options and the development of overarching principles. The IAG is undertaking a parallel work stream over the next 12 months to better provide specific input to the

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153. Ministry for the Environment officials, answers to questions about the evidence of Peter Nelson (doc F28(e), p 2)

154. Draft Regulatory Impact Statement, no date (December 2016) (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 664)

155. ‘Freshwater allocation system options proposed for further analysis in 2017’, 2 November 2016 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)), p 822)

156. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), p 11 (Crown counsel, sensitive allocation documents bundle (doc F25), p 52)

157. Flavell and Allbert, brief of evidence (doc G22), p 12



rights and interests discussions around allocation of freshwater and the management of discharges. They will not be in a position to form a view on the proposals until this work is completed. This work will be closely linked to the timeframes outlined in this [Cabinet] paper and is expected to provide a clearer understanding for the Crown as to what is being sought by iwi and hapū in relation to the allocation system.<sup>158</sup>

The timeframes referred to were: initial decisions on options to be developed more fully (end of 2016); decisions on a narrow, more fully developed range of options (end of 2017); and consultation and enactment (throughout 2018).<sup>159</sup>

## 6.9 FURTHER POLICY DEVELOPMENT IN 2017

### 6.9.1 The Allocation Team develops new system models

In 2016, the focus was on developing components that could be used in various combinations. In 2017, the main emphasis in the allocation team's work was on design and testing of complete system models. As Peter Nelson put it, nothing was 'formally rejected' at the end of 2016, but in 2017 'the more promising components' were incorporated into six possible models for further analysis.<sup>160</sup> In particular, the economic impacts of each model had to be tested. Towards the end of 2017, the Ministry sought additional funds to expand the allocation team and pay for more in-depth economic analysis and modelling.<sup>161</sup>

According to the Crown's analysis in 2016, any new allocation system had to provide for economic growth, efficiency, movement to the highest value uses, and fairness to both existing and new users. It had to be able to operate within environmental limits, solve the problem of scarcity in fully or over-allocated catchments, and address the rights and interests of Māori. This was a difficult, complex task which did not lend itself to easy or straight-forward solutions. As we discussed in the previous section, Cabinet had essentially approved a system that would include market mechanisms for transferring water and discharge rights, a standard allocation to land (to address inequities), and more rigorous measurement and monitoring to facilitate these changes. A number of different allocation systems could meet those requirements. The issue of generating 'head room' in fully or over-allocated catchments was particularly fraught because it involved the interests of existing consent-holders (the most recent of which would hold consents not due to expire for between 10 and 35 years). As well as a new allocation system, the team would need to design a transition process and mechanisms.

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158. Cabinet paper, 'Fresh Water: Initial Report Back on Allocation Options', no date (7 December 2016), p 11 (Crown counsel, sensitive allocation documents bundle (doc F25), p 52)

159. Cabinet paper, 'Fresh Water: Initial Report Back on Allocation Options', no date (7 December 2016), p 1 (Crown counsel, sensitive allocation documents bundle (doc F25), p 42)

160. Nelson, answers to questions in writing (doc F28(d)), p 12

161. Cabinet paper, 'Increasing Resources to Support Fresh Water Reforms, including the Allocation Work Programme', no date (16 August 2017) (Crown counsel, sensitive allocation document bundle (doc F25), p 61)

The team produced six allocation models in 2017. In brief, Peter Nelson summarised those models, and the provision for Māori in them, as follows:

- ▶ Administrative merit – applications for allocation would be assessed and decided by councils according to defined criteria. Peter Nelson advised that ‘[p]roviding for Māori economic development was expected to be one of the criteria.’<sup>162</sup>
- ▶ Land-based to market – an initial allocation of water and discharge rights would be made to all land, based on criteria (such as the characteristics of the land), with a ‘needs based approach for uses not associated with land’. Transfers of water and discharge allocations would then occur in a market designed by councils. This system would, it was suggested, provide ‘better access for historically under-developed Māori land’.<sup>163</sup> Broadly speaking, this was the preferred option as outlined in the Cabinet paper (see above).
- ▶ Auction to auction – regional councils would hold periodic auctions of water and discharge rights, which would be transferable (for the period between auctions). Māori could receive part of the auctions’ proceeds to enable them to participate.
- ▶ Auction to market – the allocation system would be reset by an initial auction in each catchment, after which the water or discharge rights would be transferable through market processes. Again, part of the proceeds from the initial auctions could be paid to Māori to enable them to participate in auctions or buy allocations in the market.
- ▶ Technical Efficiency Standard (TES) to market – a TES would be applied to existing users in fully or over-allocated catchments, requiring them to meet a certain standard of efficiency. This ought to generate headroom in those catchments, part of which could be reserved for or distributed to Māori land-owners. Those owners would then be able to sell or purchase rights through the establishment of a market after the implementation of the TES.
- ▶ Negotiation to user groups allocation – there would be no change to current allocations but user groups would be able to start negotiating with councils for water or discharge allocations. This kind of system favours existing users so they would have to meet criteria set by councils, such as including iwi.<sup>164</sup>

The draft papers prepared by the allocation team, however, did not specify the economic benefits for Māori in quite those terms, so we presume these possibilities were more implicit than explicit in the advice prepared by the team.

In addition to working out the features of the models, the allocation team commissioned economic modelling for the results of using transfer markets, a standard allocation to land, re-allocation for Māori land development, and volumetric

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162. Nelson, answers to questions in writing (doc F28(d)), p 9

163. Nelson, answers to questions in writing (doc F28(d)), pp 9–10

164. Nelson, answers to questions in writing (doc F28(d)), pp 10–11

pricing. A draft report was prepared by LWP at Lincoln but was not (as far as we know) completed.<sup>165</sup>

The allocation team worked on the six models until around August 2017. After this, the approach of the general election caused the cessation of TAG meetings and a slow-down in allocation policy development. No decisions were ever made about the six models for wider consultation, and no work was started on transition and implementation. Peter Nelson told us that the work done by the allocation team was nonetheless an ‘important source of information’ for officials and groups considering freshwater reforms under the new Labour-led Government. Crown counsel made the same point.<sup>166</sup>

### **6.9.2 Crown–Māori engagement on the allocation work programme in 2017**

As noted above, the ILG considered that engagement had been inadequate in 2016. The result was ‘parallel’ work programmes in 2017 rather than collaboration or co-design.

As discussed in the previous chapter, the Iwi Chairs Forum had a number of iwi leaders’ groups which focused on policy development and engagement on particular issues. In February 2017, these groups were amalgamated to form a single group, entitled Te Pou Taiao ILG.<sup>167</sup> This ILG held a series of allocation hui in the first half of 2017 and produced a report for the Crown in June.<sup>168</sup> From the Crown side, the allocation team held a series of meeting with the IAG from March to August 2017. These meetings discussed the six allocation models, the proposed criteria to evaluate those models, and some catchment case studies of how the models might work in practice.<sup>169</sup> Discussions between the Crown and the IAG ceased in August (as did discussions with the TAG and stakeholders).

## **6.10 CONCLUSIONS AND FINDINGS**

### **6.10.1 Proprietary rights and allocation reform**

Clearly, it is extremely urgent to reform the first-in first-served allocation regime. There does not seem to be any question about the necessity to do so in fully or over-allocated catchments. In our view, it is equally important to do so in all catchments because the pressure on water resources will continue to grow, and it should not be necessary to wait for that pressure to reach full allocation before implementing a fairer, more principled system of access.

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165. Land and Water People (LWP), ‘National Allocation Model – Draft’, October 2017 (Nelson, sensitive allocation documents in support of brief of evidence (doc F28(b)))

166. Nelson, brief of evidence (doc F28), pp 12, 14; Crown counsel, closing submissions (paper 3.3.46), p 49

167. Flavell and Albert, brief of evidence (doc G22), pp 5–6

168. Flavell and Albert, brief of evidence (doc G22), p 12

169. Nelson, brief of evidence (doc F28), pp 11–12

The system of allocating on a first-in first-served basis has been unfair to Māori (and other ‘new users’), especially in fully or over-allocated catchments. Cabinet acknowledged in 2016 that Māori landowners faced statutory and other historical barriers to their ability to access water for economic development. Māori have been particularly disadvantaged by the first-in first served system, including iwi who have recently received land as redress in Treaty settlements (see section 2.6.4). This is an important acknowledgement and, as the Tribunal has found in other reports, many of those historical barriers were of the Crown’s making. Māori have been denied a level playing field in the New Zealand economy.<sup>170</sup> It is particularly unfair that iwi who have received redress for past inequities in the form of land are still unable to participate in economic development because the first-in first-served system locks them out of access to water for irrigation.

The NZMC, the ILG, and the Crown seemed to find common ground in the view that the current allocation system is unfair to Māori, and that there should be an allocation of water and discharge rights to Māori. This was the position taken by Cabinet in the 2016 Cabinet paper discussed above,<sup>171</sup> the ILG in its advocacy during the allocation work programme (also discussed above), and the claimants in their closing submissions.<sup>172</sup> We agree that the allocation system is inequitable for Māori. The Treaty principle of equity requires the Crown to act fairly as between Māori and non-Māori. At present, the RMA’s allocation regime is in breach of that principle, as we found in chapter 2.

In the allocation work programme, officials considered that allocation for Māori should take three forms:

- ▶ access to water and discharge rights for the owners of Māori land as a matter of equity and to assist regional development;
- ▶ an allocation for iwi and hapū (but not on the basis of a national percentage); and
- ▶ an in-stream allocation for cultural and economic purposes (see section 6.7).

Although Cabinet did not make any definite decisions on these proposals in December 2016, it expressed a preference for allocation to Māori land development as a matter of equity.<sup>173</sup> A similar preference has been expressed recently by the new Government.<sup>174</sup> This position is not supported by either the ILG or the NZMC as a full solution, which means that although the parties agree on some points, they are still in fundamental disagreement about how the allocation system should be reformed.

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170. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wellington: Legislation Direct, 2008), vol 3, chapter 14.

171. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), pp 1–5, 8–9 (Crown counsel, sensitive allocation documents bundle (doc F25), pp 42–46, 49–50)

172. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 20–23; claimant counsel, oral submissions outline (paper 3.3.33(b)), p 5

173. Cabinet paper, ‘Fresh Water: Initial Report Back on Allocation Options’, no date (7 December 2016), pp 1–5, 8–9 (Crown counsel, sensitive allocation documents bundle (doc F25), pp 42–46, 49–50)

174. See Cabinet paper, ‘A new approach to the Crown/Māori relationship for Freshwater’, no date (3 July 2018) (Crown counsel, document bundle (doc F30)).

One question that arises is whether allocations of water to Māori landowners and tribal groups should be a way for the RMA to recognise Māori rights in their water bodies (as well as correcting a significant inequity). The ILG's witness, Kieran Murray, suggested that allocations can 'mirror' an 'ownership interest' to varying degrees, depending on how close the allocation right comes to the original interest, but it would be possible to do so by:

- ▶ reserving an allocation for iwi and hapū, with consent conditions to be set by councils; or
- ▶ reserving a permanently renewable allocation for iwi and hapū (that they could lease to others), with consent conditions to be set by councils; or
- ▶ reserving an allocation in the form of a property right in which all consents are converted to transferable property rights, with councils still prescribing conditions.<sup>175</sup>

Other mechanisms to recognise Māori proprietary rights through the RMA could include resource rentals, royalties, or levies of some kind. The Crown's witness, Dr Yeabsley, suggested that the simplest modern instrument to reflect Māori rights (treated as a purely economic question) would be royalties, in the form of a levy or excise duty.<sup>176</sup> 'It also avoids,' he said, 'much of the complexity of taking a water allocation and using it to create value.'<sup>177</sup> The allocation team rejected that idea as a means for addressing Māori rights and interests (see section 6.7.5). The Supreme Court noted early in the reform process, in the *Mighty River Power* case in 2012, the position of the Deputy Prime Minister at that time:

Mr English summarised the Crown position as being that it acknowledges that Maori have 'rights and interests in water and geothermal resources'. Identifying those interests is being addressed through the 'ongoing Waitangi Tribunal Inquiry' and a number of 'parallel mechanisms'. The Crown position is that any recognition must 'involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues.' The Court should accept that it is not an empty exercise.<sup>178</sup>

From the evidence available to us, the idea of 'charges/rentals for use' has not been considered seriously by the Crown as a way to address Māori rights and interests. The claimants' position seems to be that a number of mechanisms could provide 'proprietary redress': an allocation on the model of the aquaculture settlement (discussed in chapter 2), a quota management system with a percentage

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175. Kieran Murray, brief of evidence, 2 June 2017 (doc G3); Kieran Murray, answers to questions in writing, 17 September 2018 (doc G3(c))

176. John Yeabsley, answers to questions in writing, no date (October 2018) (doc F8(d)), pp1–5

177. John Yeabsley, answers to questions in writing (doc F8(d)), p 5

178. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, bundle of authorities (3.3.46(c), tab 8)

allocation, royalties, or even compensation if necessary.<sup>179</sup> We note that in oral submissions, however, counsel for the Wai 2601 claimants, the ILG, and a number of interested parties said that their clients view royalties mainly as a way of obtaining funds to pay for the remediation of water bodies.<sup>180</sup>

During the course of the allocation work programme, Cabinet agreed to what the claimants and ILG would consider a minimum requirement: an allocation of water for the development of Māori land. We note that the kind of allocation the Crown was willing to consider at that time was a base allocation to *all* land titles, which Cabinet believed would benefit Māori as well as other ‘new users’. Officials and the ILG had proposed more than that – an allocation to iwi and hapū – but no final decisions had been made on the matter in 2017, and nothing had been definitively ruled out. While we accept that this was the case in the theoretical work of the allocation team, the Crown nonetheless maintained its bottom lines throughout the allocation work programme. The Cabinet paper that set out the terms of reference for the programme stated that the policy proposals would still need to be ‘assessed for how they are consistent with the Government’s fundamental position that no-one owns fresh water.’<sup>181</sup>

Crown counsel submitted that the Crown has been trying to find ways to address the issue of an economic benefit for Māori from their rights and interests in fresh water. The incomplete allocation work programme shows this, they said, and the Crown has not yet precluded any particular mechanism for doing so.<sup>182</sup>

From at least 2015, the Crown has stated repeatedly that it is committed to meeting the objective of the ‘economic development’ workstream, which was established jointly with the ILG. When the *Next Steps* consultation document was released without any reform options from that workstream, Ministers made a commitment to ‘return to Cabinet in due course on the development of options for allocation and enabling iwi/hapū to access freshwater resources in order to realise and express their economic interests.’<sup>183</sup> This has yet to happen. We make no findings of Treaty breach because the allocation reforms did not reach a decision point under the previous Government, and the new Government’s position on allocation is in the course of being decided. We do, however, set out our view of what is required to make the RMA’s allocation system Treaty compliant.

### 6.10.2 What will make the RMA’s allocation system Treaty compliant?

In *Mighty River Power*, the Supreme Court stated:

The Waitangi Tribunal described the ownership interest guaranteed by the Treaty in terms of use and control. In large part, this may be more directly delivered through

179. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

180. Transcript 4.1.5, pp 196, 301, 422, 650

181. Cabinet paper, ‘Fresh Water: Allocation Work Programme’, no date (16 May 2016) (Crown counsel, sensitive allocation document bundle (doc F25), p 2)

182. Crown counsel, closing submissions (paper 3.3.46), pp 85–87

183. Cabinet paper, ‘Freshwater reform 2016: Discussion with Iwi Chairs 5 February’, no date (January 2016) (Gerrard, papers in support of brief of evidence (doc D88(b), p 885)

changes to the regulatory system, augmented by specific settlements, as Crown policy proposes. Regulation of water use and control is under review by the Crown and the settlements have indicated the willingness of the Crown to consider extension of Māori authority in connection with specific waters. There may be some ownership interest insufficiently addressed by regulatory reform, but the significance of the interest needs to be assessed against the opportunities under consideration for real authority in relation to waters of significance. That is the context in which the materiality of the sale of a minority interest in a company [Mighty River Power] using the waters must be considered.<sup>184</sup>

As noted earlier, the Crown relied on this extract from the court's decision in our inquiry.<sup>185</sup> Crown counsel refer to 'use and control' throughout their submissions. This extract does encapsulate the question before us. In previous chapters, we have discussed the issue of whether the Crown's reforms will deliver the kind of governance, co-management, or decision-making role that the control guarantee in article 2 of the Treaty requires. We have already concluded that the Crown's regulatory reforms are currently inadequate in terms of control.

But what about 'use'? Can that dimension of *tino rangatiratanga*, of customary rights akin to 'ownership', be delivered through the Crown's freshwater management reforms or is something more required? In our view, an allocation for Māori land does not satisfy the rights and interests of Māori as guaranteed by the Treaty of Waitangi. If '[r]egulation of water use' is to deliver something approximating the Treaty guarantees in today's circumstances, then an allocation for the exclusive use of *iwi* and *hapū* is also required. That allocation should be inalienable other than by lease, and it should be perpetually renewable (as all consents are in theory, provided there is still allocable water available). We do not see any insuperable obstacle to this, given the arrangements for Māori that the Crown has agreed to in commercial aquaculture and fisheries. It need not take the form of a national Treaty settlement. It is entirely feasible for it to be delivered by way of regulatory reform through the amendment of the RMA and its system for allocating water without the need for a national settlement. We agree with the Crown that the circumstances of catchments must be taken into account, especially where over-allocation has to be addressed as part of the reforms. The details could be worked out by a national water commission if one is established.

From the evidence in our inquiry, some Māori groups will not consider that their proprietary rights are fully satisfied by an allocation of water and/or discharge rights, if allocation reforms of that type do in fact eventuate. The other mechanism which the RMA can offer is, as we have said, a charge or royalty. Since the Crown maintained that no one owns water, and there would be no national settlement or generic share for Māori, that left the RMA as the only practical vehicle for

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184. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, closing submissions (paper 3.3.46), p 54)

185. Crown counsel, closing submissions (paper 3.3.46), pp 12–13. The Crown refers to 'use and control' throughout its submissions.

‘proprietary redress’ (as the NZMC put it). If regulatory reform is the only option, then an allocation or royalties/charges are the potential instruments on the table; that is really all that RMA reform can deliver.

We accept that, if it is necessary to go outside the RMA for solutions, the Crown’s previous bottom lines (2015–17) were not likely to permit a Treaty-compliant outcome. The new Government appears to have developed its own bottom lines in the form of ‘parameters’ for a ‘genuine, good-faith discussion with Māori’, setting out ‘what the Government is prepared to explore.’<sup>186</sup> These parameters fall outside the scope of our inquiry, and we did not receive evidence about them. We note, however, that if the Crown’s decision is still to confine allocation to Māori land development, then that will not produce a result that makes the RMA and its allocation regime compliant with Treaty principles. Too many Māori have lost too much land throughout the country as a result of Treaty breaches for that approach to have any prospect of being compliant with Treaty principles.

We make our recommendations in these matters in chapter 7.

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186. Cabinet paper, ‘A new approach to the Crown/Māori relationship for Freshwater’, no date (3 July 2018), p7 (Crown counsel, document bundle (doc F30))



## CHAPTER 7

### SUMMARY OF FINDINGS AND RECOMMENDATIONS

#### 7.1 INTRODUCTION

In this chapter, we provide a summary of the findings that we have made in chapters 2–6, before proceeding to make our recommendations to the Crown.

Having assessed all the evidence and submissions in our inquiry, it appears to us that there were some broad points of agreement between all the parties:

- ▶ they agreed that Māori rights and interests in freshwater bodies needed to be addressed;
- ▶ they agreed that Māori values were not being reflected in freshwater decision-making, and that the decision-making framework needed to change to better reflect those values;
- ▶ they broadly agreed that the role of Māori in freshwater management and decision-making needed to be enhanced, although they did not agree on how far it should be enhanced or in what ways;
- ▶ they agreed that under-resourcing was preventing Māori from participating effectively (or at all) in many RMA processes;
- ▶ they agreed that national direction to councils was required, and that more water quality reforms were still needed (as at 2017); and
- ▶ they agreed that Māori interests in water entailed economic benefits, but they did not agree in what form or to what extent, including on whether the Crown should recognise Māori proprietary rights, or provide an allocation of water to iwi and hapū, or provide an allocation for Māori land development, or carry out some other reform, such as royalties.

Given these broad points of agreement, it is clear why the Crown and the ILG could collaborate on freshwater reforms, and also why they could not reach agreement on many points.

We begin by congratulating the Crown on its commitment to address Māori rights and interests in a Treaty-compliant manner, and its successful introduction of such reforms as Te Mana o te Wai in the NPS-FM 2014 as amended in 2017. As we explained in chapters 3–6, there have been some positive results from the Crown–ILG co-design of reforms in 2015–17.

Ultimately, however, we found that the RMA had significant flaws in Treaty terms at the time the reform programme began, and that the reforms the Crown has completed are not sufficient to make the RMA and the freshwater management regime Treaty compliant. We also found that the NPS-FM is not yet Treaty compliant, for the reasons summarised in the following sections. We found that Māori

have been prejudiced by these breaches, including the failure to set adequate controls and standards for the active protection of their freshwater taonga.

In the manner and to the extent that we have found breaches and prejudice, the Wai 2358 and Wai 2601 claims are well founded. The breaches and prejudice in respect of the RMA and the Crown's freshwater reforms have also affected those iwi and hapū who were interested parties, and who gave evidence and made submissions in our inquiry.

Having found that the claims are well founded, for the reasons summarised in sections 7.2–7.5 below, we make our recommendations to the Crown in section 7.7. Before making our recommendations, we set out the parties' positions on the proposal for a national co-governance body (the national water commission), and for a separate Water Act, in section 7.6.

## **7.2 THE LAW IN RESPECT OF FRESH WATER**

### **7.2.1 Introduction**

In chapter 2, we assessed the law in respect of fresh water in light of the principles of the Treaty of Waitangi. We began with a brief introduction to the pre-1991 legislation, followed by a fuller analysis of the RMA in respect of its application to freshwater resources. Our analysis was focused mostly on the period between 1991 and 2009, so that matters could be assessed as at the beginning of the Crown's Fresh Start for Fresh Water reform programme in 2009–10. We were primarily concerned with how the Act provided for (or failed to provide for) Māori rights and interests in their freshwater taonga, and whether the RMA regime was compliant with the principles of the Treaty. We made findings on the following issues:

- ▶ whether the purpose and principles in part 2 of the RMA provided sufficient recognition of, and protection of, Māori rights, interests, and values;
- ▶ whether the RMA provided for Māori participation in freshwater management and decision-making in a manner consistent with the partnership principle and the Treaty's guarantee of tino rangatiratanga;
- ▶ why the RMA did not recognise any Māori proprietary rights or provide Māori with any economic benefit from the allocation and commercial use of their freshwater taonga; and
- ▶ the extent to which the Crown and/or the RMA regime were responsible for the increasingly degraded state of many of those taonga.

Our findings on those issues are summarised in this section.

### **7.2.2 The purpose and principles of the RMA**

We discussed part 2 of the RMA in section 2.4 of chapter 2. We agreed with the Crown that sections 6–8 of the RMA introduced tikanga requirements into the statute law for freshwater management for the first time. The legislation prior to that was mono-cultural and did not recognise Māori values or interests. After 1991, RMA decision makers were required to recognise and provide for the relationship of Māori with their ancestral waters, to have particular regard to kaitiakitanga, and

to take account of the principles of the Treaty. This was a significant improvement on the previous situation. But we also agreed with the claimants that there were key weaknesses in the operation of part 2 of the Act. These included the relative weakness of the Treaty clause (section 8), and the potential for Māori interests to be ‘balanced out’ in the hierarchy of matters to be considered by decision makers under sections 6–8.

Previous Tribunal reports have found that a balancing exercise was widely applied under the RMA, which allowed Māori interests to be balanced out altogether in many RMA decisions. Māori have been significantly prejudiced as a result. Professor Jacinta Ruru, David Alexander, and other claimant witnesses confirmed that Māori interests have also been balanced away in freshwater management decisions during the period under review in chapter 2. We noted that this situation may improve to some extent, depending on the application of the Supreme Court’s *King Salmon* decision.<sup>1</sup> We also noted the Crown’s view that there was an ‘increasing sophistication’ in the Environment Court’s treatment of Māori interests. But litigation remained a costly exercise, time and expertise-intensive, which was beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori. In our view, statutory amendments are required to ensure that RMA decision-making on freshwater matters is Treaty compliant.

First, we agreed with many Tribunal reports that section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty. The Petroleum Management Tribunal found that the Crown’s delegation of Treaty responsibilities in resource management must be done in a manner that ensures Treaty compliance.<sup>2</sup> Our view is that section 8 should be amended to state that the duties imposed on the Crown in terms of Treaty principles are imposed on all those persons exercising powers and functions under the Act. Such an amendment would ensure that Māori interests are protected (not balanced out), that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that part 2 of the RMA is Treaty compliant. We make a recommendation to that effect later in this chapter.

Secondly, we agreed with the Petroleum Management Tribunal that amending section 8 will not, on its own, ensure that RMA decision-making is carried out consistently with the principles of the Treaty.<sup>3</sup> Māori must themselves be RMA decision makers for their freshwater taonga, and their role in this respect needs to be enhanced to meet the Treaty guarantee of tino rangatiratanga. We turn to that matter next.

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1. *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38

2. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 156

3. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 169

### 7.2.3 Freshwater management and decision-making

We considered the RMA's provisions for freshwater management and decision-making in section 2.5 of chapter 2.

#### 7.2.3.1 *The Treaty standard for freshwater management and decision-making*

In its 2011 report, the Wai 262 Tribunal found that RMA decision-making for natural resources should be made on a sliding scale, depending on the strength of the kaitiaki interest in the particular resource, the nature and extent of other interests in the resource, and the interests of the resource itself. We agreed with this finding in our stage 1 report, as follows:

The Tribunal found that kaitiaki rights exist on a sliding scale. At one end of the scale, full kaitiaki control of the taonga will be appropriate. In the middle of the scale, a partnership arrangement for joint control with the Crown or another entity will be the correct expression of the degree and nature of Māori interest in the taonga (as balanced against other interests). At the other end of the scale, kaitiaki should have influence in decision-making but not be either the sole decision-makers or joint decision-makers, reflecting a lower level of Māori interest in the taonga when balanced against the interests of the environment, the health of the taonga, and the weight of competing interests.

This scheme is not incompatible with Māori having residual proprietary interests in – or, indeed, full ownership of – water bodies that are taonga. Rather, that would be a factor to be considered in terms of the weight accorded the kaitiaki interest vis-à-vis other interests in the resource.<sup>4</sup>

Having heard the evidence of the claimants and interested parties in both stage 1 and stage 2 of this inquiry, our view is that the Māori Treaty right in the management of most freshwater taonga is at the co-governance/co-management part of the scale. Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga. The exception to co-governance and co-management is that, in some cases, the strength of the Māori interest in a particular freshwater taonga may be such that it requires Māori governance of that taonga. Our view was that the presence of other interests in New Zealand's water bodies will more often require a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga; that is the Treaty standard for freshwater management.

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4. Waitangi Tribunal, *The Stage 1 Report on National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 69

In making this finding in chapter 2, we were not departing from the Wai 262 findings but rather specifying the Treaty standard for one particular resource out of the many that come under the RMA.

### 7.2.3.2 *The RMA's participation mechanisms*

Having set the Treaty standard for freshwater management and decision-making, we assessed the RMA mechanisms against that standard. We also examined the Crown's argument that statutory arrangements and Treaty settlements have created a 'tapestry of co-governance and co-management arrangements for waterways across New Zealand' since 2011.<sup>5</sup> We accepted that the RMA has a number of participation mechanisms for Māori, including section 33 (which enables the transfer of functions and powers to iwi authorities), section 36B (which enables Joint Management Agreements between councils and iwi or hapū), the provision for iwi management plans, and the schedule 1 consultation requirements for regional plan making. The provision for Heritage Protection Authorities, however, does not apply to water and therefore does not provide a mechanism for Māori to participate in freshwater management.

After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows:

- ▶ Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- ▶ Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used. That is, there are high barriers within section 36B itself to its use by councils and iwi or hapū (as the Crown has acknowledged),<sup>6</sup> and the Crown has not provided incentives for its use or any compulsion to actively consider its use.

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5. Crown counsel, closing submissions, 20 November 2018 (paper 3.3.46), p 54

6. See Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, February 2013), p 67; briefing to Minister, 'Freshwater: Further detail on options to enhance iwi/hapū participation in freshwater decision-making', 16 November 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1069); Cabinet paper, 'Freshwater reform 2016: Policy proposals and discussions with Iwi Chairs', [December 2015] (Crown counsel, sensitive discovery documents (doc D92), p 881)

- ▶ Iwi management plans have not been accorded their due weight in RMA planning. The Crown has turned down repeated calls for the enhancement of their legal weight.
- ▶ The consultation requirements of the RMA have been confined to the plan-making phase of freshwater decision-making (consultation is not required for the consenting phase). The consultation requirements have also suffered from under-resourcing and the lack of a clear path for consultation to take place in a meaningful and effective way. Crown counsel argued that the new Mana Whakahono a Rohe mechanism will provide just such a path (our findings on that new mechanism are summarised below).

Alongside these flaws in the RMA mechanisms themselves, we found that under-resourcing has contributed to a lack of capacity and capability for many Māori entities in freshwater management. This has crippled their ability to participate effectively in RMA processes. Examples included the ability to meet the ‘efficiency’ requirements of sections 33 and 36B, to prepare effective iwi management plans, and to participate effectively (or at all) in consultation and RMA hearing processes. The Local Government Act 2002’s requirement that councils must ‘consider ways to foster the capacity of tāngata whenua’ has not sufficiently addressed this crucial problem. The Crown has recognised the existence and importance of this problem in multiple policy and consultation documents since 2004, as we set out in chapters 2–4.

For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making.

We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011.

We accepted, however, that Treaty settlements have delivered co-governance and co-management authority for a limited selection of freshwater taonga. Council practice and iwi-council relationships have also improved in some areas – mostly but not entirely due to Treaty settlements. Some councils have provided limited funding. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making. Our conclusion was that Treaty settlements have provided for the exercise of tino rangatiratanga over selected waterways, such as the Waikato and Whanganui Rivers. But not all iwi who have settled with the Crown obtained those kinds of arrangements, nor will they necessarily be available for groups which are yet to settle. In those cases, Māori participation in freshwater management remains limited in nature. The Crown could not reasonably rely on the Treaty settlement process, therefore, to avoid reforming the participatory arrangements in the RMA.

#### 7.2.4 Proprietary rights, economic benefits, and the RMA allocation regime

During the Resource Management Law Reform (RMLR) project in 1988–90, Māori leaders sought to make the new legislation consistent with the Treaty. In particular, tribal leaders, the NZMC, the Taitokerau District Māori Council, and others wanted the Māori ownership of natural resources (including water) to be recognised and protected in the new Act. The Crown refused to do this on the basis that there would be a separate process to negotiate ownership issues. As far as we were aware, there had been no such process for water, and we noted that Treaty settlement policy excluded ownership of water bodies as an option (with rare exceptions as to the beds of certain waterways). Officials at the time of the RMLR argued that the law reform should focus not on Māori ownership but on Māori ‘participation, control and authority in resource management decision-making.’<sup>7</sup> The Crown’s position 20 years later echoed this thinking, except that the Crown acknowledged in our inquiry that there is also an ‘economic benefit aspect of Māori rights and interests’ in fresh water, and that its reforms must deliver economic benefits to iwi and hapū from their freshwater resources.<sup>8</sup> We agreed with the Crown that Māori are entitled to an economic benefit from their interests in fresh water and, in our view, that right was inextricably linked to rights of property in their freshwater taonga.

An associated issue was the RMA regime for allocating water takes, which has allocated rights to take and use water for commercial purposes on the basis of a first-in, first-served system of applications. The claimants argued that this system had excluded Māori, had resulted in many catchments being over-allocated, and had caused environmental damage – points that have all been conceded in many of the documents placed before us by the Crown.

Our findings on these issues were:

- ▶ the RMA made a proviso for the prior rights of farmers (preserving the effects of section 21 of the Water and Soil Conservation Act 1967), but did not do the same for the prior rights of Māori in section 354 or anywhere else in the Act, and did not otherwise recognise or provide for their rights of a proprietary nature;
- ▶ even if the prior rights of Māori had been provided for in the RMA, the first-in first-served system of allocation did not allow applications for water permits to be compared or prioritised (so that Māori rights could be taken into account);
- ▶ the first-in, first-served system was also unfair to Māori, especially in catchments that had become fully or over-allocated, because of statutory and other barriers that had prevented Māori landowners from participating in it in the past;
- ▶ RMA mechanisms allowed Māori little or no say in the decisions about allocation and use;

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7. ‘RMLR, Report on Phase 1’, July 1988 (Robert McClean and Trecia Smith, *The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98* (Wellington: Waitangi Tribunal, 2001), p 167)

8. Crown counsel, closing submissions (paper 3.3.46), pp 3, 12

## 7.2.5

- ▶ councils very rarely provided an allocation to Māori in the absence of strong national direction; and
- ▶ the first-in first-served system had resulted in over-allocation and environmental problems, and needed urgent reform.

For all those reasons, we found that the RMA and its allocation regime are not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by:

- ▶ the ongoing omission to recognise their proprietary rights;
- ▶ barriers that have prevented their participation in the first-in, first-served allocation system in the past; and
- ▶ the lack of partnership in allocation decision-making.

Economic opportunities have been foreclosed by these barriers to their access to water.

We also noted that Māori had continued to pursue their water claims in the Waitangi Tribunal during the 1990s and 2000s, and had also begun to seek new mechanisms for the recognition of their proprietary rights. In the period from 2003 to 2009, they began to call for an allocation of water to iwi and hapū and/or for the development of Māori land. Councils appeared to be unwilling or unable to make such allocations under the law as it exists at present, pointing to four small exceptions in the practice of regional councils. At the same time, we noted that Māori have not ceased to raise the question of ownership, and it seemed to us that that they will never do so unless some form of recognition is provided.

### **7.2.5 Environmental outcomes and the need for reform: why has the RMA failed to deliver sustainable management of freshwater resources?**

We discussed environmental outcomes and early Crown reforms in sections 2.7 and 2.8 of chapter 2. We set out the concerns of claimants and interested parties in respect of degraded freshwater taonga, including Lake Ōmāpere, the Taumārere River, the Ōroua River, the Manawatū River, Lake Horowhenua, the Rangitikei River, the Tukituki River, the Waipaoa River, and the Tarawera River.

It was clear to the Crown by 2003–04 at the latest that the RMA was failing to deliver the sustainable management of many water bodies, mainly those in urban and pastoral catchments. Sediment and diffuse discharges were prominent causes of a decline in water quality. The RMA's failure was due to a number of causes, including the inability of councils to manage diffuse discharges without Crown intervention, and the exclusion of Māori from freshwater decision-making. In 2004, a Crown consultation document identified the following issues:

- ▶ the Crown had not provided national direction to councils;
- ▶ the Crown had not provided sufficient support to councils;
- ▶ nationally important values had not been identified or prioritised, which could require changes to water conservation orders to protect nationally important water bodies or a new schedule for the RMA;
- ▶ water had become over-allocated, and there was a lack of RMA tools to enable councils to deal effectively with over-allocation and with declines in water quality;



- ▶ diffuse discharges had not been managed effectively, partly because of a lack of RMA tools to do so;
- ▶ there was a need to set environmental bottom lines and allocation limits but there was also a lack of either strategic planning or good scientific information to support this;
- ▶ the definitions for water permits needed to be changed to enable more flexibility in how they were managed; and
- ▶ there had been a failure to engage with Māori in freshwater decision-making because of a lack of resources or any clear process through which to do so.<sup>9</sup> In particular, Māori interests and values needed to be incorporated into regional planning, a need that had been identified in a review of the RMA in 2004.<sup>10</sup>

The Crown argued in our inquiry that the problem was not with the RMA but with its implementation by councils (which are not ‘the Crown’). It also argued that it had acknowledged that there is a problem and has attempted to fix it, but that this acknowledgement of a problem with the regime was not an acknowledgement that the regime and its statute were inconsistent with the Treaty.<sup>11</sup> The claimants and interested parties, on the other hand, argued that the Crown had failed to provide a regime that actively protected their taonga, and that this was a breach of Treaty principles.<sup>12</sup>

We agreed with the claimants that systemic problems with the RMA regime had allowed the situation to develop and worsen, with apparent disregard for the fundamental purpose of the RMA. Councils could not manage the effects of land use on water, or the clash of commercial and environmental imperatives, without a better management framework and strong national direction from the Crown. The Crown has attempted to rectify those problems, however, so our view was that any Treaty findings should await consideration of the Crown’s reforms, and the question of how rapidly and effectively the Crown addressed the acknowledged problems.

We also noted the link between this issue and the earlier breaches found in respect of the RMA. We had already found that section 8 of the RMA was too weak to protect Māori interests, and that the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches.

The Crown instituted the Sustainable Water Programme of Action in 2003–04 but, as explained in chapter 3, the first national direction to councils on these

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9. Ministry of Agriculture and Fisheries, Ministry for the Environment, *Freshwater for a Sustainable Future: issues and options – a public discussion paper on the management of New Zealand’s freshwater resources* (Wellington: Ministry for the Environment, 2004), pp 15–16, 19, 20–23

10. Ministry of Agriculture and Fisheries, Ministry for the Environment, *Freshwater for a Sustainable Future: Issues and Options*, p 9. See also Ministry of Agriculture and Fisheries, Ministry for the Environment, *Freshwater for the Future: A supporting document*, p 5.

11. Crown counsel, closing submissions (paper 3.3.46), pp 64–65

12. See, for example, counsel for interested parties (Gilling), submissions by way of reply, 22 March 2019 (doc 3.3.60), pp 3–4, 6–7, 8–9

matters did not come until 2011. We turn next to summarise our findings on the Crown's freshwater reform programme.

### 7.3 REFORMS TO ADDRESS MĀORI RIGHTS AND INTERESTS

#### 7.3.1 Introduction

From 2009 to 2017, the National-led Government carried out its 'Fresh Start for Fresh Water' and 'Next Steps for Fresh Water' programme of reforms. That programme is assessed in chapters 3–5 of our report. In terms of addressing Māori rights and interests, the reform programme had three major achievements:

- ▶ the inclusion of section D in the NPS-FM 2011;
- ▶ the introduction of Te Mana o te Wai to the NPS-FM in 2014, followed by its significant strengthening in 2017 (with associated amendments to the NPS-FM 2014); and
- ▶ the insertion of Mana Whakahono a Rohe (iwi participation) arrangements in the RMA in 2017.

We have discussed these and other reform proposals in chapters 3–4. Our full conclusions and findings are located in sections 3.8; 4.4.4; 4.5.6; 4.6.7; and 4.7.3. We summarise those findings in this section of our chapter.

#### 7.3.2 The Crown's commitment to address Māori rights and issues

Importantly, the Crown has repeatedly stated its intention to address Māori rights and interests in fresh water since 2009. This undertaking was stated in Cabinet papers, policy documents, consultation documents, and the Deputy Prime Minister's evidence to the Supreme Court in *Mighty River Power* in 2012.<sup>13</sup> In our view, the Treaty principles required the Crown to act on its knowledge that Māori rights and interests were *not* adequately provided for, and urgent action was required to address that matter in partnership with Māori.

During the course of developing its reforms, the Crown developed a number of 'bottom lines' as to what it was prepared to accept in addressing Māori rights and interests, including the position that 'no one owns water'. Crown counsel argued in our hearings that the Crown's reforms could nonetheless deliver 'use and control' to Māori through enhanced decision-making roles and economic benefits, which could be provided through Treaty settlements and regulatory reform. The Crown relied on a statement in the Supreme Court's *Mighty River Power* decision to that effect.<sup>14</sup>

13. Simon William English, affidavit, 7 November 2012 (Tania Gerrard, papers in support of brief of evidence (doc D88(a)), p 918)

14. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, closing submissions (paper 3.3.46), p 54). See also Crown counsel, closing submissions (paper 3.3.46), pp 6–8, 12, 80.

### 7.3.3 Collaboration: 2009–14

During the development and embedding of its reforms, the Crown collaborated with the Freshwater ILG on a number of reform options. It also put its reform proposals out for wider consultation with Māori and the general public. In addition, the ILG had influence as one of the ‘stakeholders’ in the Land and Water Forum, where IAG members were part of the ‘Small Group’, and that influence is clear in some of the forum’s recommendations across its four main reports. The Crown did not, however, accept all the LAWf’s thinking and recommendations, nor did it reach fully agreed positions with the ILG.

Nonetheless, our view was that the joint work of officials and the IAG, the work of the IAG with other stakeholders in the LAWf, and the high-level meetings between Ministers and the ILG, all contributed to a degree of Crown–Māori cooperation in the development of freshwater reforms. We hesitated to characterise this as a partnership model in the period up to 2014, because there was no co-design of the version of the NPS-FM that was issued in 2011, and only limited co-design of the 2014 version. The real co-design phase came later in 2015–17.

The result of the collaboration was a quite limited treatment of Māori rights and interests in the first six years of the Crown’s freshwater reform programme.

#### 7.3.4 Section D of the NPS-FM 2011

In respect of its commitment to address Māori rights and interests, the reforms which the Crown completed in 2011 and 2014 were focused on a single matter: an attempt to ensure that Māori values were better reflected in freshwater management, especially in regional policy statements and plans. The mechanism for this was the NPS-FM. In part, this focus arose from earlier decisions by the Labour-led Government, which had drafted the first version of the NPS-FM in 2008.

The first major reform was the national direction given to councils by section D of the NPS-FM. In 2011, the Crown made some crucial decisions about the content and extent of section D which have not been altered since. Section D remained untouched in the amendments of 2014 and 2017.

The board of inquiry’s consultation revealed that the Māori provisions of the proposed NPS-FM fell well short of what Māori saw as their Treaty rights in freshwater management. Both the IAG and the Māori submitters had called for a governance and decision-making role for Māori. The final text of Objective D1, however, only directed councils to provide for Māori ‘involvement’, and to ensure that their ‘values and interests’ were ‘identified and reflected’ in, freshwater management and decision-making in freshwater planning. Policy D1 required councils to ‘take reasonable steps’ to ‘involve iwi and hapū’ in freshwater management, work with them to identify their values and interests, and reflect those values and interests in freshwater management and decision-making.

We noted two major points about the Crown’s decisions on section D. First, the Crown did not accept the board’s recommendation that councils would have to ‘recognise and provide for’ Māori values and interests in freshwater management

and in decisions about plans. The use of the words ‘identify and reflect’ gave a comparatively lesser degree of protection for Māori interests. Secondly, the Crown inserted a requirement to ‘involve’ Māori, and deliberately omitted to specify a particular form or level of involvement. At the time, the Minister noted that ‘[r]eference to involving tāngata whenua in freshwater “decision-making” generally has been removed’ from the board’s version. The Minister also noted that councils would ‘retain the ability to use existing tools under the RMA, such as joint management agreements, as they wish’, and argued that requiring that Māori have a decision-making role would ‘impact on the resources of both regions and iwi/hapū’.<sup>15</sup> Councils had hitherto failed to use the provision for Joint Management Agreements in the RMA (with two exceptions), and the Wai 262 Tribunal recommended that the Crown direct councils to actively promote and use section 33 and section 36B by including policies to do so in their plans.<sup>16</sup> The Crown chose not to do this in promulgating and amending the NPS-FM.

The effect of the Crown’s decisions about section D was summarised as follows by the relevant Cabinet paper in 2011:

The NPS makes it clear that involvement of iwi and hapū is important in plan making. The related policies do no more or less than what is already provided for in the RMA. Councils will retain the ability to utilise existing tools under the RMA, such as joint management agreements, as they wish. *The real benefit is clarifying that tāngata whenua values and interests should be identified by, or with, iwi and hapū and not just by councils themselves.* [emphasis added]<sup>17</sup>

Section D’s requirement that councils work *with* iwi and hapū to identify their values was an important one. But we found that, overall, this was a very disappointing outcome in terms of the Crown’s stated intention to address Māori rights and interests in fresh water, especially since the section D requirements have not changed in any of the subsequent reforms.

We found that section D is an inadequate mechanism for ensuring the Māori ‘involvement’ in freshwater decision-making required by the Treaty principle of partnership. We found that it is not Treaty compliant, and that Māori have been prejudiced in their exercise of tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga as a result.

We also found that the NPS-FM will not be Treaty compliant until section D is reformed in such a way that it provides more effectively for the tino rangatiratanga of iwi and hapū. Our view was that this required a co-governance level of

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15. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry’s Recommendations and Minister for the Environment’s Decision* (Wellington: Ministry for the Environment, May 2011), p 6 (Crown counsel, attachment to memorandum (paper 3.2.289))

16. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, 3 vols (Wellington: Legislation Direct, 2011), Te Taumata Tuarua, vol 1, p 282

17. Cabinet paper, ‘National Policy Statement for Freshwater Management’, 4 May 2011, p 7

‘involvement’ in decision-making, and national direction for councils to use partnership mechanisms in plan-making and in freshwater management more generally.

### **7.3.5 Te Mana o te Wai in the NPS-FM 2014**

Carrying on the theme of providing better for Māori values in freshwater management, the Crown’s significant reform in 2014 was the introduction of Te Mana o te Wai into the NPS-FM. The ILG sought to integrate Te Mana o te Wai in all parts of the national policy statement by inserting an overarching purpose statement, a new objective A1(c) in section A (the ‘Water Quality’ section), and links to the national values of the NOF in appendix 1.

The Crown, however, was only prepared to agree to a very disjointed and watered-down version of Te Mana o te Wai in the NPS-FM 2014. There was no definition of Te Mana o te Wai or any explanation of it or how councils might provide for it. The overarching purpose statement was not part of the main body of the NPS-FM (and did not explain Te Mana o te Wai). The Crown rejected the ILG’s proposed Objective A1(c). The many submissions from Māori during the consultation process, seeking to strengthen and integrate the Te Mana o te Wai requirements in the NPS-FM, were also rejected. Appendix 1 did use the titles ‘Te Hauora o te Wai’, ‘Te Hauora o te Tāngata’, and ‘Te Hauora o te Taiao’ for three of the national values. But the text of those values did not necessarily identify Māori values or correspond to the titles, nor was there any explanation that these titles were connected to Te Mana o te Wai.

We concluded that the Crown’s inclusion of Te Mana o te Wai in the NPS-FM was weak and ineffective. It did not enhance the Crown’s objective that Māori values would be better reflected in freshwater management and plan-making. We made no Treaty finding, however, because the 2014 version of the NPS-FM did not represent the Crown’s final decision on this issue.

### **7.3.6 RMA reforms: the Crown’s decisions on enhancing participation prior to *Next Steps***

Our findings on RMA reforms were in two parts. In chapter 3, we considered the Crown’s decision in 2013 to exclude certain matters from its RMA reforms, a decision that was partly revisited in the *Next Steps* co-design phase in 2015–16 (but with similar outcomes).

The Crown conducted a major consultation initiative on freshwater reforms in 2013 – the first since 2005. The Crown’s reform proposals were released in two inter-related documents: a consultation document entitled *Improving our resource management system*; and a white paper entitled *Freshwater reform 2013 and beyond*. In these papers, the Crown renewed its commitment to address Māori rights and interests, and acknowledged that there was a problem with ‘effective and meaningful iwi/Māori participation’ in freshwater management (and resource management more generally). In *Freshwater reform 2013 and beyond*, the Crown stated:

Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners.

As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes.<sup>18</sup>

The Crown proposed to amend the RMA to, among other things:

- ▶ create a new mechanism for iwi input at the plan-making stage, called Iwi Participation Arrangements, which would have an advisory and recommendatory role;
- ▶ to remove the statutory barriers for the under-used sections 33 and 36B to ‘facilitate greater uptake of these under-used tools’;<sup>19</sup>
- ▶ to make iwi management plans more effective; and
- ▶ to introduce a new stakeholder-led planning process.

The Crown’s decisions on these matters were initial decisions in the sense that an RMA Bill still needed to be drafted and passed through Parliament, but some of the Crown’s decisions to omit certain matters proved to be long-lasting and we made findings about those decisions in chapter 3.

We noted that the ‘iwi/Māori participation’ issue in these documents was still focused mainly on the more effective reflection of Māori values in RMA plan-making, even if some of the language used in the consultation documents had been broader in scope. The Crown decided in 2013 that it would go ahead with establishing Iwi Participation Arrangements. Our findings on this proposal are summarised below, after it was transformed into the broader Mana Whakahono a Rohe mechanism in 2017.

Importantly, in 2013 the Crown decided not to make any reforms in respect of section 33 transfers, Joint Management Agreements, and iwi management plans. Urgent reforms were needed on these parts of the RMA to remove statutory barriers to their adoption, and to make them more genuinely available to iwi and councils. The Wai 262 Tribunal had recommended significant reforms in its 2011 report. The Crown decided in 2013, however, to limit its enhanced ‘iwi/Māori participation’ in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown’s omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious.

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18. New Zealand Government, *Freshwater reform 2013 and beyond*, p 19 (Brunt, papers in support of brief of evidence (doc D89(a)), p 615)

19. Ministry for the Environment, *Improving our resource management system: a discussion document* (Wellington: Ministry for the Environment, 2013), p 67

It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles.

As summarised earlier (section 7.2.3), the Treaty requires co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership and the Treaty guarantee of tino rangatiratanga. We agreed with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring/enforcing water quality requirements, and thereby protecting the mauri of water bodies.'<sup>20</sup>

### **7.3.7 The 'Next Steps' co-design process**

From 2014 to 2017, the Crown and ILG entered into two phases of 'co-design' of reform options: the first was the 'Next Steps' phase (summarised here); and the second was the work of the officials and the IAG on a revised version of the NPS-FM in 2017 (summarised in section 7.3.10).

In Treaty terms, co-design was probably the most important process innovation of the Crown's freshwater reform programme. Our view was that the process of co-design with a national Māori body, followed by wider consultation with Māori and the public, was compliant with the principles of the Treaty. The Crown is to be congratulated on this innovation, which we thought should become a standard part of government policy-making.

We also found that the Crown did not breach the principle of equal treatment in its choice of the Iwi Chairs Forum (and its appointed iwi leaders group) as the national Māori body with which to work. Having said that, we thought that the need for other perspectives in the co-design process became clearer as time went on. When the NZMC filed its claim in 2012, it presented itself as a national Māori body with a particular and contrasting view to that of the ILG – a view that was also widely supported by a number of interested Māori parties. We think it was evident to the Crown that it ought to have broadened its co-design programme to include the NZMC, and this was a missed opportunity to have included the view that the Māori council represented.

### **7.3.8 The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests**

Although the co-design concept was promising in Treaty terms, we found that its outcomes in 2016 were disappointing. This was primarily because the Crown reserved the final power of decision-making to itself alone, and its decisions were not – for the most part – Treaty compliant.

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20. Claimant counsel (NZMC), closing submissions, 26 October 2018 (paper 3.3.33), p 21

The Crown and the ILG worked together to design reform options across four workstreams, with agreed objectives:

- ▶ Enable formal recognition of iwi/hapū relationships with particular waterbodies
- ▶ Enhance iwi/hapū participation at all levels of freshwater decision-making
- ▶ Build capacity and capability amongst iwi/hapū and councils, including resourcing
- ▶ Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality
- ▶ Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests
- ▶ Address uncertainty of supply of potable water on marae and in papakāinga.<sup>21</sup>

There was certainly potential for significant reforms to meet these objectives. In section 4.3.6, we described the detail of how officials and the IAG worked on 62 possible reform options. Potential reform options included amending sections 33 and 36B of the RMA, enhancing the status of iwi management plans, providing an allocation of water and discharge rights, compulsory Joint Management Agreements in all catchments, and many others. Ultimately, the options were significantly reduced first by officials (sometimes in agreement with the IAG), and again when Cabinet selected a small number of proposals for public consultation in the *Next Steps* consultation document. We noted that amendments to section 36B made it into the December 2015 Cabinet paper but did not make the final cut in 2016. There was no agreement at all in the ‘economic development’ workstream, and no reform proposals were selected for that workstream. The Crown’s bottom line that there would be no generic share of freshwater resources for iwi made reaching agreement impossible. Overall, the ILG did not agree to the issuing of *Next Steps* as a joint consultation document because its reform proposals did not go far enough for the iwi leaders.

The consultation document, *Next steps for fresh water*, was issued in February 2016. Its proposals to address ‘iwi rights and interests in fresh water’ were:

- ▶ strengthening Te Mana o te Wai in the NPS-FM;
- ▶ requiring councils to engage with iwi and hapū to identify all their relationships with water bodies in regional plans, and then to engage with those iwi and hapū when identifying values and objectives for the particular waterways (the recognition workstream);
- ▶ inserting Mana Whakahono a Rohe arrangements in the RMA (the Crown having accepted the ILG’s alternative model to its earlier Iwi Participation Arrangements);
- ▶ giving Māori a greater role in the process for deciding water conservation orders (which was not supported by the ILG as a measure to address rights and interests);

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21. Briefing to Minister, [October–November 2015] (Crown counsel, sensitive discovery documents (doc D92), p1027)



- ▶ the Ministry facilitating and resourcing programmes to support councils and ‘iwi/hapū’ to engage effectively in freshwater management and decision-making; and
- ▶ the Government considering if additional funding was required for marae and papakāinga water infrastructure.

The 40 iwi and other Māori groups who made submissions on *Next Steps* were all in support of these proposals to address Māori rights and interests, although many argued that the proposals should go further. After the consultation, however, the Crown narrowed the reform options instead. As a result, despite all the work and option-development in the ‘co-design’ phase, there were really only three outcomes: the insertion of Mana Whakahono a Rohe arrangements in the RMA; amending the NPS-FM to strengthen Te Mana o te Wai; and an agreement that MFE would provide a guidance programme on Mana Whakahono a Rohe (capacity and capability building).

We agreed that two of these three outcomes had the potential to make a significant difference for Māori in the exercise of authority and kaitiakitanga over their freshwater bodies. Te Mana o te Wai in the NPS-FM had the potential to alter the manner of achieving the purpose of the RMA in a way that better protected Māori interests. The Mana Whakahono a Rohe arrangements had the potential to improve iwi–council relationships and the way they work together, especially by providing a mechanism for the schedule 1 consultation process to occur. But many options that were omitted in 2016 were so crucial that, in our view, the Crown squandered a real opportunity to make the RMA and its freshwater management regime Treaty-compliant.

We found that Māori have been prejudiced by the following omissions from the Crown’s decisions on *Next Steps* reform options:

- ▶ no amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism;
- ▶ no amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism;
- ▶ no alternative co-governance or co-management mechanisms inserted in the RMA (to make these kinds of mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi);
- ▶ no amendments to enhance the legal weight of iwi management plans;
- ▶ no mechanisms for formal recognition of iwi and hapū relationships with – and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream;
- ▶ no strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori as freshwater decision makers;
- ▶ no recognition of proprietary rights (ruled out by the Crown’s bottom line that ‘no one owns water’);
- ▶ no commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle in the *Next Steps* process; and

- ▶ no funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation.

Also, no funding actually materialised as a result of the proposal about water infrastructure on marae and papakāinga.

We concluded that ‘co-design’ of reforms by the Crown and iwi leaders did not fulfil its potential. The Crown’s omission of so many important options to address Māori rights and interests seriously limited the value of its freshwater reforms in Treaty terms. In particular, the Crown’s *Next Steps* reforms did not meet their stated objective of enhancing Māori participation in freshwater management and decision-making, other than providing a new mechanism to improve relationships and schedule 1 consultation. We summarise our view on the Mana Whakahono a Rohe mechanism further when we assess the Crown’s RMA reforms in the next section.

### 7.3.9 RMA reforms: Mana Whakahono a Rohe arrangements

The Mana Whakahono a Rohe mechanism was one of the major achievements of the freshwater reform programme. As summarised above, the impetus for enhancing Māori participation began with a dual approach in *Improving Our Resource Management System* in 2013: new Iwi Participation Arrangements paired with statutory reforms to section 33, section 36B, and the provisions for iwi management plans. The period of Crown–ILG co-design in 2015 resulted in a renewed effort towards Iwi Participation Arrangements – in the form of the ILG’s broader Mana Whakahono a Rohe – and reform of section 36B Joint Management Agreements. But the necessary link between these two things was severed in 2013 and again in 2016, with the result that the Crown pinned everything on the new participation arrangements alone.

The claimants argued that the Mana Whakahono a Rohe arrangements are to be ‘applauded’ as an improvement, but ‘they are too little, too late, and do not go anywhere far enough’. In particular, the claimants noted that these new arrangements have not removed the statutory barriers to section 33 transfers or JMAs, and that Māori utilisation of these arrangements is ‘constrained by the same resourcing problems that inhibit effective Māori participation in RMA processes more generally.’<sup>22</sup> Crown counsel stressed that Mana Whakahono a Rohe offered the possibility of ‘formal and permanent relationships’ between councils and iwi, a possibility that had not been present before in the RMA. According to the Crown, they represent a significant step forward in the ‘RMA’s ability to give effect to the Māori role as kaitiaki.’<sup>23</sup> In terms of the particulars, the Crown relied mainly on the voluntary aspects of the Mana Whakahono a Rohe, and only one of the compulsory requirements (a role in monitoring):

22. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 15–16, 27

23. Crown counsel, closing submissions (paper 3.3.46), p 30

During these discussions, Māori may demand more meaningful involvement in resource management processes, either through agreements to transfer local authority powers to an iwi authority, or in other forms, such as the co-management of resources. The agreements may include involvement in decision-making through the appointment of iwi commissioners on hearing panels, establishing joint management agreements or other mechanisms, and environmental monitoring. They can also be used to develop monitoring methodologies so that mātauranga Māori and Māori measurements can be consistently used in regional council processes.<sup>24</sup>

We noted that key points sought by the ILG to be matters for compulsory negotiation and agreement were relocated to the voluntary parts of the Mana Whakahono a Rohe in the Resource Legislation Amendment Act 2017.

Our view was that this mechanism in its final form (in the 2017 Act) was important but limited. It was important because, in negotiating agreement on the compulsory parts of the Mana Whakahono a Rohe, there is an opportunity for iwi or hapū to seek co-management agreements, joint planning committees, or some other mechanism not provided for in the Mana Whakahono a Rohe itself. Also, a relationship/participation agreement was a vital step towards councils and iwi or hapū working together in freshwater management. Without the establishment of some kind of improved and enduring relationship, it is difficult to imagine a council agreeing to a Joint Management Agreement, for example, without the intervention of the Crown (as has occurred in some Treaty settlements). Further, iwi can initiate a Mana Whakahono a Rohe, councils are compelled to negotiate and reach agreement if iwi initiate one, and councils cannot end the agreement unilaterally; these are all improvements over other RMA participation mechanisms.

But the key problem with the Mana Whakahono a Rohe arrangements is that the compulsory matters to be agreed are very limited. Apart from an increased role in monitoring, which does now have to be agreed upon, the mandatory parts of the agreement relate to the consultation required by the Act (which is limited to policy statements and plans) and the participation of iwi in plan preparation or changes. In reality, what this does is provide a mechanism for councils and iwi to do the things that schedule 1 of the Act already required them to do. Anything extra comes under the parts that the parties *may* discuss and agree but there is no requirement for them to do so.

The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown. Further, even if relationships are improved and discussions are held through a Mana Whakahono a Rohe, statutory barriers still inhibit section 33 transfers and

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24. Crown counsel, closing submissions (paper 3.3.46), p 29

Joint Management Agreements. The evidence of the Crown was clear on that point. In all these circumstances, it is at best unlikely that Mana Whakahono a Rohe will result in a greater decision-making role for Māori in freshwater management, such as co-governance and co-management, without further statutory amendment.

The issue of resourcing is also crucial. The ILG's view was that 'both local authorities and iwi must be resourced to ensure that the establishment and implementation of Mana Whakahono a Rohe agreements is as successful as possible'.<sup>25</sup> We agreed. The evidence in our inquiry was that the lack of resources has prevented effective Māori participation in RMA processes. Mana Whakahono a Rohe arrangements will be no different in that respect unless resources are provided.

The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty.

We were not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found. The Mana Whakahono a Rohe agreements have the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans. They will likely result in an enhanced role for Māori in decision-making at the front-end, planning stage of the RMA. But the range of matters iwi and councils are compelled to negotiate and agree on is very limited. Our finding was that the Mana Whakahono a Rohe provisions have not made the RMA Treaty-compliant.

### **7.3.10 Te Mana o te Wai in the NPS-FM 2014 as amended in 2017**

Alongside Mana Whakahono a Rohe, the strengthening of Te Mana o te Wai was the second major achievement of the *Next Steps* reform process.

In 2017, the new 'National significance' statement and section AA of the NPS-FM provided a much-needed explanation of Te Mana o te Wai, and of the requirements that councils must meet in order to 'consider and recognise' it in their policy statements and plans. The inclusion of mātauranga Māori in the monitoring

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25. Donna Flavell and Gerrard Albert, brief of evidence, 25 July 2018 (doc G22), pp 22–23

requirements was also a major improvement, and one which Māori had sought in their submissions on the 2014 version of the NPS-FM.

Our view was that all of this has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (objective D1), then Te Mana o te Wai is a platform for achieving this (through the 'National significance' statement and objective AA1), and mātauranga Māori must now be used to measure its success (policy CB1). It is also a platform for the whole community's values because it is water-centric. As the Crown and the ILG had intended, Te Mana o te Wai was framed so as to put the health of freshwater bodies first in the discussions necessary to set objectives and limits under the NPS-FM. The potential for Te Mana o te Wai to have a significant impact is likely reflected in the submissions of those who tried in 2017 to disconnect it from the national values in appendix 1. We found, however, that there are some weaknesses in the tools for giving effect to Te Mana o te Wai.

First, as already found in chapter 3, section D of the NPS-FM is relatively weak. It does not provide a co-governance approach to identifying Māori values and setting freshwater objectives. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. Secondly, the relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. Our view was that this is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management. Thirdly, the severing of Te Mana o te Wai from the NOF values in appendix 1 reduces its utility as an over-arching principle in freshwater plan making. Fourthly, the failure to include tools for cultural monitoring (policy CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and freshwater management more generally.

Further, and outside of the NPS-FM itself, the ongoing problems with resourcing and effective participation mean that some Māori groups will be unable to take proper advantage of this new mechanism in the NPS-FM – as the Ministry's 2017 review of the NPS-FM has acknowledged.

On balance, we found that the 2017 amendments have improved the NPS-FM in Treaty terms, but the amendments have some significant weaknesses. We found that the NPS-FM is still not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management.

### **7.3.11 Resourcing for capacity and capability**

The third *Next Steps* reform arose from the Crown's decision on the issue of resourcing for capacity and capability. The Crown and the ILG had agreed to 'consider ways to build iwi and hapū capability and resourcing to enable effective

participation in freshwater decision-making.<sup>26</sup> The result was an objective to ‘[b]uild capacity and capability amongst iwi/hapū and councils, *including resourcing*’ (emphasis added).<sup>27</sup> The Crown dropped the phrase ‘including resourcing’ from its reform proposal on this matter, and the proposal in *Next Steps* was for the Crown to ‘build capacity and capability by providing training and guidance.’<sup>28</sup> In response, the strongest theme in the consultation submissions was the need for additional resourcing to support Māori and councils to carry out the additional requirements on top of the already resource-intensive RMA processes. The Crown did not change its mind, and so the ultimate outcome in this case was a guidance manual and training on Mana Whakahono a Rohe.

We found that the Māori Treaty partner has made repeated appeals to the Crown over many years to assist with funding and resourcing, and these appeals have not been adequately met. The Crown’s stated objective to enhance Māori participation in freshwater management and decision-making will not be achieved unless an answer is found to the problem of under-resourcing. Many Crown documents have admitted that Māori participation in RMA processes is variable and sometimes non-existent. The Crown–ILG objective to ‘[b]uild capacity amongst iwi/hapū and councils, including resourcing’ has not been fulfilled, and it needs to be if the Crown’s reforms are to be Treaty compliant.

We accepted that the Crown’s reform programme is not finished, and that there is still opportunity to address this long-standing problem more effectively. We reiterated its crucial importance and the need for it to be addressed if the Crown’s reforms are to be Treaty compliant. In the meantime, Māori continue to suffer long-term prejudice.

## 7.4 WATER QUALITY REFORMS

### 7.4.1 Introduction

The need for reforms to improve freshwater management and outcomes was clear to all parties. In chapter 2, we described the degraded state of many of the claimants’ and interested parties’ freshwater taonga, and the increasing decline in water quality as a result of diffuse discharges and sediment in particular. The Crown’s water quality reforms were mainly focused on its RMA role of giving national direction to councils, and on the development of other tools such as farm management best practice and stock exclusion regulations. The primary tool was the NPS-FM, which councils were required to implement in their regional policy statements and regional plans. We considered five versions in chapter 5: the Labour-led Government’s draft in 2008, the board of inquiry’s recommendations in 2010, the first formal NPS-FM that was issued in 2011, a second version that was

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26. Briefing to Ministers, ‘Freshwater Programme: Managing within limits work programme and addressing iwi/hapū rights and interests’, 27 March 2015 (Crown counsel, sensitive discovery documents (doc D92), p 1253)

27. Gerrard, brief of evidence (doc D88), p 10

28. Cabinet paper, ‘Freshwater reform 2016: Policy proposals and discussions with Iwi Chairs’, [December 2015] (Crown counsel, sensitive discovery documents (doc D92), p 882)

issued in 2014, and the (currently) final NPS-FM in 2017. We also considered the Crown's attempt to develop stock exclusion regulations, which Cabinet decided not to promulgate in 2017.

In brief, the NPS-FM 2011 required councils to set quality and quantity limits, so that water quality was maintained or improved overall in a region. In 2014, more specific water quality standards were added in the form of the NOF, which included two compulsory values with national bottom lines. Further important amendments were made in 2017, in particular the strengthening of Te Mana o te Wai as an overarching purpose in the discussions for setting objectives and limits. The Crown's view in our inquiry was that the NPS-FM was developed carefully on the advice of scientists and with stakeholder buy-in, and that it met the standard of active protection of freshwater taonga. The claimants and interested parties, on the other hand, were highly critical of the NPS-FM. They considered that the Crown's reforms had been too slow and piecemeal, and that the quality standards in the NPS-FM were inadequate.

For the technical aspects of the reforms, we relied in particular on points of agreement between the scientists on both sides and the Crown's officials. The lack of crucial water quality attributes in the NOF, such as sediment, was one such point of agreement.

In addition to freshwater management reforms, we assessed the Crown's funding initiatives for restoring degraded water bodies.

Our findings on water quality reforms are located in section 5.8 of chapter 5, and our findings on restoration funding are in section 5.9.3.

#### **7.4.2 Active protection of freshwater taonga**

The Crown submitted that 'the role of central government is to provide pollution controls and standards', and that the Crown's reforms had 'developed and improved tools for the active protection of taonga waters'.<sup>29</sup> The claimants and interested parties agreed that the Crown owes a Treaty duty of active protection of their taonga waters, but denied that the Crown's reforms have met this Treaty standard. They argued that the Crown's freshwater reforms have created weak, inadequate standards and controls that are insufficient for the active protection of their freshwater taonga. In assessing the Crown's water quality reforms, we examined whether the reforms, and in particular the controls and standards introduced in the NPS-FM, did meet the Crown's duty of active protection.

#### **7.4.3 Collaboration in developing the reforms**

The Crown's water quality reforms were developed in collaboration with the ILG and IAG, the stakeholders in the Land and Water Forum, and sector interests (through targeted engagement on particular reforms, such as the stock exclusion regulations). The ILG's role was less prominent in this part of the reform programme, although it did play a co-design role in the development of Te Mana o te Wai for the NPS-FM in 2015–17. Otherwise, the Crown's primary collaboration

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29. Crown counsel, closing submissions (paper 3.3.46), pp 64, 90

was with the forum. Alongside the work of the forum, and partly crossing over with it, was the work of the science panels and the NOF reference group, which advised the Ministry on the science of NOF attributes and numerical attribute states. The iwi science panel played a role but its main contribution, a Te Mana o te Wai attribute table for the NOF, came too late for inclusion in 2017, and appears to have been rejected in any case (the Crown did not intend to have a Te Mana o te Wai attribute in the NOF).

Apart from the intensive and contested work of developing technical reforms, the greatest difficulty appears to have been balancing the interests of the environment with the interests of the economy (especially of primary industries). This balancing of interests in the political sphere partly accounts for why the Crown's reforms have taken such a lengthy, cautious approach. It is also partly why the Crown brought Māori (via the ILG) and stakeholders (via the forum) in with it to collaborate, create solutions, and develop buy-in and consent step by step.

#### **7.4.4 The NPS-FM 2011**

Labour's 2008 version of the NPS-FM proposed a zero-tolerance policy towards further contamination of fresh water. The board of inquiry not only agreed with that but took it further. The standard it proposed was that outstanding water must be protected, the quality of all fresh water contaminated by human activity must be enhanced, and the quality of all other fresh water must be maintained.

The Crown made its decisions on the board's recommendations in 2011, with input from the forum and ILG but no wider consultation. The Crown considered that the board's version of the NPS-FM was out of balance with section 5 of the RMA. The board's view was that fresh water was in such a state that environmental protection had to take priority over economic considerations, at least for a generation or so. The Crown's view in 2011, on the other hand, was that freshwater quality standards must not be too costly or controversial for councils and the primary sector to accept. Nor should such quality standards be allowed to constrain economic growth (or should do so as little as possible). The Crown had a major business growth agenda to deliver.

In its 2011 decisions, the Crown altered the transitional provisions (so that they no longer applied to permitted activities), and allowed only a test of overall quality across a region, a move that went against the advice of the Department of Conservation. In doing so, the Crown reduced the requirement that councils control the adverse effects of farming intensification, that was recognised at the time as the leading source of nitrate contamination, the very measure which was causing the greatest water quality concern. The fundamental principle of the NPS-FM 2011 – that water quality be maintained or improved overall across a region (unless it exceeded limits) – would also potentially lock in any additional degradation that occurred by the time councils actually set limits. Under the timeframe set by the NPS-FM, they had until 2030 to do so (or even later, depending on appeals to regional plan changes).

Our finding was that the NPS-FM 2011 did not provide adequate controls and standards for the active protection of freshwater taonga, and it was not consistent



with the principles of the Treaty of Waitangi. On the other hand, we accepted that the Crown had finally provided some belated direction to regional councils. Ministers and officials were aware at the time that further reforms would be required (including improvements to the NPS-FM), but we noted that significant parts of that foundational document remain in force today.

#### **7.4.5 The NPS-FM 2014 and the NOF**

In terms of water quality standards, the key reform came in 2014 with the establishment of the National Objectives Framework (NOF). As well as providing guidance on how to set objectives and limits, the NOF set national water quality standards. Water bodies would have to be improved if they fell below the national bottom lines of Ecosystem Health and Human Health, as set in attribute tables. At the time, the Crown acknowledged that it was essential to set standards in the NOF to ensure national consistency, avoid duplication of effort in the regions, and assist councils (many of which were finding the scientific work for limit-setting to be a very costly and difficult exercise). Where attributes were missing from the NOF, however, the Crown directed that the regions must fill the gaps.

The scientific evidence agreed that crucial attributes such as sediment were omitted from the NOF in 2014. This significantly weakened the value of the standards set by the NOF, including the national bottom lines. Also, there were no compulsory Māori values, with attributes and national bottom lines attached to them. Te Mana o te Wai was not made a compulsory value, and the Crown decided not to retain Te Mana o te Wai as an overall title for the two compulsory values in the NOF. Indeed, there were no cultural attributes at all in the 2014 version of the NOF. Further, attributes and bottom lines had only been developed for rivers and lakes; there were none for aquifers, wetlands, and estuaries. This further weakened the effectiveness of the NOF and the NPS-FM.

Where there were bottom lines, Māori and many others criticised them as too low. The setting of a bottom line for nitrate toxicity (instead of nitrogen as a nutrient) and a bottom line of secondary contact (instead of full immersion) were the most controversial. It was understood at the time that 20 per cent of freshwater species, including kōura, would be affected by nitrate at the relatively high concentration set for the nitrate toxicity bottom line. Also, the 'unders and overs' approach to managing water quality was left unchanged, which weakened the water quality standards in the NOF further.

We accepted that a huge and collaborative effort had gone into the NOF, and that its addition to the NPS-FM 2014 was a necessary improvement on the 2011 version. But our finding was that the standards set by the NOF in 2014 were not consistent with the Treaty principle of active protection.

#### **7.4.6 Stock exclusion and amendments to the NPS-FM in 2017**

Some significant improvements were made to the NPS-FM in 2017, which resulted in stronger water quality standards:

- ▶ Te Mana o te Wai was significantly strengthened, which would increase the weighting given to the health of water bodies in freshwater plan-making;

- ▶ intermittently closing and opening lakes and lagoons were added to the NPS-FM, applying the existing attributes for lakes to them;
- ▶ the ‘unders and overs approach’ was restricted to the level of the freshwater management unit instead of across a whole region;
- ▶ specific direction on nutrients was added to the NOF, including requiring councils to set ‘exceedance criteria’ for nitrogen and phosphorus, if councils set an objective relating to periphyton;
- ▶ monitoring would now require the use of both mātauranga Māori and the Macroinvertebrate Community Index; and
- ▶ swimmability (on a frequency basis) was introduced as a new Human Health requirement for large rivers and lakes, and also for any other sites identified by councils as primary contact sites, which was a highly significant policy change for the Crown.

Although these were significant amendments, we also found that some defects had either not been rectified or had been introduced with the new amendments:

- ▶ No more attributes were added to the NOF in 2017, even though the Crown had been working on several since 2014. This meant that the NOF still lacked some of the most essential water quality standards, including bottom lines for attributes such as sediment. No Māori compulsory values or cultural indicators were added, and Te Mana o te Wai was severed from the NOF. Attributes remained confined to lakes and rivers; no attributes for wetlands or aquifers were added.
- ▶ The nitrate toxicity bottom line would still allow impacts on 20 per cent of aquatic species, and the direction that had been added on nutrient enrichment was acknowledged as incomplete (with further work planned).
- ▶ The ‘maintain or improve’ requirement would still allow water quality to degrade until limits were set (by 2030 at the latest but with opportunity for appeals), although that would no longer be so much of an issue for attributes with a compulsory national bottom line. Also, water quality could potentially still degrade from the top to the bottom of wide bands and yet be ‘maintained’, although it could not be allowed to go down a band.
- ▶ In replacing the previous *E coli* attribute table, the Crown removed any bottom line for Human Health in water bodies that were not fourth order rivers, large lakes, or identified as sites for swimming. Also, the targets for swimmability would take a long time to reach (until 2040 to reach 90 per cent) and did not apply to smaller rivers and lakes unless identified by councils as swimming sites.

Although there are defects in the NPS-FM, we acknowledged that the Crown has made a significant effort to address the pressures on fresh water and provide national water quality standards for regional councils to implement. The Crown has worked collaboratively and has attempted to gain widespread buy-in for its reforms, which will likely assist their success in the long run. Nonetheless, we found that the freshwater quality standards set in the NPS-FM 2014, as amended in 2017, are not yet adequate to provide for the Crown’s Treaty duty of active

protection of freshwater taonga. In chapter 2, we described the prejudice experienced by iwi and hapū whose spiritual and cultural relationships with their freshwater taonga have been profoundly harmed by degraded water quality.

The failure to provide for stock exclusion compounds the breach, because it further weakened the scope and effectiveness of the freshwater quality reforms. The swimmability targets, for example, depend on the exclusion of farm animals to reduce *E coli* levels. Also, diffuse discharges remain a fundamental problem, and we are not convinced that the reforms have yet developed a sufficient response to either quality or quantity over-allocation.

We noted further that three-quarters of native fish species are now threatened with or at risk of extinction, compared to only one-fifth in 1991 when the RMA was passed. The fishing rights guaranteed in the Treaty have been infringed by this loss of fisheries, and Māori have been prejudiced thereby.

More reforms were under consideration even as the NPS-FM was issued in 2017. The present Government has also planned to undertake significant freshwater management reforms, but those were at an early stage when our hearings ended. The freshwater quality standards and controls in the NPS-FM 2014 (as amended in 2017) are still currently in force.

#### **7.4.7 Funding of restoration for degraded freshwater bodies**

During the period of the Crown's freshwater reforms, it has established funding initiatives to address both water infrastructure and the clean-up of degraded water bodies. These included:

- ▶ the Irrigation Acceleration Fund in 2011 (voted \$60 million over 10 years)
- ▶ the Fresh Start for Fresh Water Clean-up Fund in 2011 (\$14.7 million on seven projects);
- ▶ the Te Mana o te Wai Fund in 2014 (\$5 million on iwi-led projects and an additional \$1 million in 2017); and
- ▶ the Freshwater Improvement Fund in 2016 (voted \$100 million over 10 years).

Other Government initiatives have also made contributions, such as the Community Environment Fund in 2014 and the Contaminated Sites Remediation Fund.

We noted the Crown's commitment to funding clean-up of degraded water bodies, and that the initiatives discussed in chapter 5 were an important first step. We also noted that the funding had assisted kaitiaki in projects to begin restoring water quality in some freshwater taonga, and had led to some capacity building and partnerships in the various projects. But our finding was that the Crown's funding efforts were not yet sufficient to deal with the sheer scale of the damage done prior to the first NPS-FM in 2011. Nor were those funds sufficient to counter-balance the nutrients and contaminants still being released into soils, wetlands, streams, rivers, and lakes. We also found that, although some iwi and hapū had applied for, received, and matched funds, many more do not have the funding to carry out the clean-up of degraded freshwater taonga. We agreed with the claimants that there remains a need for committed, long-term funding to address water

quality issues on a local and national scale, and that the Treaty standard of active protection will not be met until such larger-scale, longer-term funding has been dedicated to restoration of these highly vulnerable taonga.

## **7.5 ALLOCATION REFORM OPTIONS**

### **7.5.1 Introduction**

The RMA's allocation regime was urgently in need of reform in the early 2000s. The first-in, first-served approach had resulted in the full or over-allocation of many catchments. During the co-design of the *Next Steps* reform proposals, the Crown and the ILG agreed that providing an economic benefit from water was essential to addressing Māori rights and interests in fresh water. But they could not agree on what form this should take: the ILG wanted an allocation to iwi and hapū; whereas the Crown wanted an allocation for the development of Māori land. The Crown had imposed bottom lines on the co-design of reform options, including that no one owns water and that there would be no generic share of water for iwi. Discussions in the 'economic development' workstream reached an impasse, so no reforms from that workstream were proposed in *Next Steps*. More work was needed to design a whole new allocation system in any case, but, as noted above, the Crown could have decided in principle that there should be an allocation for iwi and hapū.

Following the *Next Steps* consultation, the Crown established a new allocation work programme in 2016, which developed reform options but did not reach the point of decisions prior to the change of government in 2017. We assessed the programme and its options in chapter 6 of our report.

### **7.5.2 Collaboration**

Broadly speaking, the ILG had a minimal role in the allocation work programme. It provided a member of the Technical Advisory Group and nominated two qualified people for the work programme team. There was also a Joint Advisory Group but its role and impact were not clear to us on the evidence we received. The Crown decided there would be no co-design of these reforms, and the ILG considered that its level of engagement with the allocation programme was inadequate. There were some discussions with the IAG as the programme developed.

### **7.5.3 Equity**

Cabinet acknowledged in 2016 that Māori landowners faced statutory and other historical barriers to their ability to access water for economic development. Māori have been particularly disadvantaged by the first-in first served system, including iwi who have recently received land as redress in Treaty settlements. We considered this to be an important acknowledgement, and noted earlier Tribunal inquiries that found many of those historical barriers had been of the Crown's making. Māori have been denied a level playing field in the New Zealand economy. The NZMC, the ILG, and the Crown seemed to find common ground in the view that the current allocation system is unfair to Māori, and that there

should be an allocation of water and discharge rights to Māori. We agreed that the allocation system is inequitable for Māori. The Treaty principle of equity requires the Crown to act fairly as between Māori and non-Māori. At present, the RMA's allocation regime is in breach of Treaty principles (see chapter 2 findings as summarised above).

#### **7.5.4 The work programme's allocation reform options**

Acknowledging that the present allocation system is unfair to Māori, officials developed three significant reform options (all of which they considered were necessary):

- ▶ access to water and discharge rights for the owners of Māori land as a matter of equity and to assist regional development;
- ▶ an allocation for iwi and hapū (but not on the basis of a national percentage); and
- ▶ an in-stream allocation for cultural and economic purposes.

Cabinet made no decisions on these options in December 2016, although it expressed a preference for an allocation to Māori land development on the grounds of equity. A similar preference has been expressed recently by the new Government.

In 2017, officials proceeded to develop system models to incorporate the various options that had been developed in 2016, but this work was not completed, and no decisions were ever made on how the allocation system should be reformed.

#### **7.5.5 Addressing Māori rights and interests**

Over and above the issue of fairness, the Crown was committed to providing for 'use' of freshwater resources in addition to 'control', in recognition of Māori rights (as noted above). A commitment to this effect was made in the Supreme Court in 2012, where the Crown's position was that any recognition of Māori rights and interests 'must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use"<sup>30</sup>.'

As we found at stage 1, Māori rights in their freshwater taonga included proprietary rights in indivisible water resources, of which the water was an integral component. What was necessary, we said, was an exercise in rights recognition and rights reconciliation. The claimants' position in stage 2 of our inquiry was that a number of mechanisms could now provide 'proprietary redress': a percentage allocation through any of a number of models, such as the aquaculture settlement or a quota management system; royalties; or even compensation if necessary. The option that officials have proposed in recognition of Māori rights, whether defined as proprietary (by the NZMC) or economic (by the ILG), is an allocation of water and discharge rights to iwi and hapū as well as a separate allocation for land development. Officials certainly thought that this could be done, in conjunction

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30. *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at 80 (Crown counsel, bundle of authorities (3.3.46(c), tab 8)

with an in-stream allocation for customary purposes, although the Crown to date has made no decisions. The allocation work programme did not really consider other options to address Māori rights, such as the payment of a levy or a royalty on commercial uses.

### **7.5.6 Our view of a Treaty-compliant allocation regime**

We made no findings on the allocation reforms because the Crown did not make any decisions, and the new Government is in the course of deciding its freshwater reforms. We did, however, provide our view of what was necessary to make the allocation regime Treaty compliant (having found that it was not in chapter 2).

Our view was that an allocation of water and discharge rights for Māori land development would not satisfy the rights and interests of Māori as guaranteed by the Treaty of Waitangi. If regulatory reforms are to deliver something approximating the Treaty guarantees in today's circumstances, then an allocation for the exclusive use of iwi and hapū is also required. That allocation should be inalienable other than by lease, and it should be perpetually renewable (as all consents are in theory, provided there is still allocable water available). We did not see any insuperable obstacle to this, given the arrangements for Māori that the Crown has agreed to in the past concerning commercial aquaculture and fisheries. We agreed with the Crown that the circumstances of catchments must be taken into account when the details are decided, especially where catchments are over-allocated. But RMA reform can provide a solution without the need for a national percentage, which was one of the former Government's bottom lines. The details of such a reform could be worked out by a national water commission if one is established.

The evidence suggested that some Māori groups will not consider that their proprietary rights are fully satisfied by an allocation of water and/or discharge rights, if allocation reforms of that type do in fact eventuate. If the Crown is only prepared to consider regulatory reform, the other mechanism which the RMA can offer is a charge or royalty.

We also considered that, if it is necessary to go outside the RMA for solutions, the Crown's previous bottom lines (2015–17) were not likely to permit a Treaty-compliant outcome. We did not consider the new Government's bottom lines (described as 'parameters') because we lacked the necessary evidence. We noted, however, that, if the Crown's decision is still to confine allocation to Māori land development, then that will not produce a result that makes the RMA and its allocation regime compliant with Treaty principles. Too many Māori have lost too much land throughout the country as a result of Treaty breaches for that approach to have any prospect of being compliant with Treaty principles.

We make our recommendations on allocation below.

We turn next to a consideration of the NZMC's proposal for a national water commission, after which we make our recommendations to the Crown.

## 7.6 PROPOSALS FOR A WATER COMMISSION

### 7.6.1 Introduction

In the course of our inquiry, there have been a number of proposals for Māori to have an institutional role in water policy at the national level. There seems to be broad agreement among the claimants and many interested parties that such a role should take the form of a Crown–Māori partnership, although the scope and nature of the partnership differed in the various proposals. We need to explain and assess these proposals before making our recommendations.

### 7.6.2 The Land and Water Forum's proposal

We have already described the iwi membership of the Land and Water Forum in previous chapters, as well as the role of IAG members on the forum's 'Small Group'. The various stakeholders in the Land and Water Forum included environmental groups, primary industries, and hydro power companies. It is significant, therefore, that the first proposal for a national co-governance body in the form of a commission came from them in 2010. The forum recommended that a non-statutory 'National Land and Water Commission' be established on a 'co-governance basis with iwi'.<sup>31</sup> The commission would be serviced by the Ministry for the Environment, and its functions would be as follows:

The Commission would act as a coordinating, leadership and collaborative body, helping ensure consistency and action. Its mission would be to advise Ministers on the management of water resources, and land resources which impact on water, with a view to sustaining the life-supporting capacity of water and its ability to meet the needs of future generations, whilst enabling people and communities to achieve their economic, social, cultural and environmental well-being.

It would:

- ▶ recognise the iwi Treaty relationship with the Crown, including providing an avenue for iwi to express their Treaty partner aspirations
- ▶ continue to foster collaborative relationships between the various sectors and interests concerned with water
- ▶ advise on ways to improve the efficiency and effectiveness of the national water management system
- ▶ develop and oversee the implementation of a National Land and Water Strategy
- ▶ promote best use and practice in water management
- ▶ identify degraded waters for priority restoration
- ▶ identify opportunities and constraints to water storage and reticulation
- ▶ liaise with regional councils about the need for and potential role of restoration funding in each region, including priorities for that funding
- ▶ advise the Ministry for the Environment (which would administer a Water Restoration Fund) on priorities for spending from that fund

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31. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater* (Wellington: Land and Water Forum, 2010), p 4 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), p 150)

## 7.6.3

- ▶ facilitate, promote the development of, and monitor non-statutory regional water strategies and plans
- ▶ work with the Ministry for the Environment, the Environmental Protection Authority and regional councils to ensure that financial and technical skills could be made available to under-resourced regions
- ▶ liaise with the Ministry for the Environment, the Environmental Protection Authority and other relevant government agencies over water management and receive regular reports from the Chief Executives' Forum.

The Commission would stand outside the formal Resource Management Act regime although it would provide advisory input on relevant RMA matters.<sup>32</sup>

The commission's Land and Water Strategy would provide a 'national oversight and integrating function' for non-statutory tools and methods, such as the development of water infrastructure. One of its roles would be 'recognising the relationship between iwi and the Crown, and iwi expectations for water management', on which the commission would advise the Crown.<sup>33</sup>

In a review of its recommendations in 2016, the forum noted that the Crown had decided not to implement its recommendation for a commission. Cabinet had 'agreed that further work was needed on which functions LAWf have proposed for the Commission should be implemented as well as the desirability or otherwise for any of them being performed by an autonomous body or bodies.' The forum commented that it was 'unclear whether that further work has occurred or what the outcome was'.<sup>34</sup> Martin Workman, the head of the Water Directorate in the Ministry for the Environment, told us in 2018 that the Crown had seen a need to investigate 'the rationale for introducing another body into the wider public sector', and to clarify its 'proposed responsibilities'. The forum's recommendation seems to have gone no further by the end of our hearings in 2018.<sup>35</sup>

### 7.6.3 The claimants' proposals

#### 7.6.3.1 *The New Zealand Māori Council's proposal*

The NZMC's proposal for a national water commission has changed and developed since it was first made in 2014. The original proposal was for an independent commission to manage water allocation by setting prices for commercial users, allocating water takes (through a subsidiary mechanism), and using the funds generated by commercial users for monitoring, research, restoration projects, and payments to Māori in recognition of their proprietary interests. The funds for Māori would

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32. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater*, pp 44–45 (Brunt, papers in support of brief of evidence (doc D89(a)), pp 190–191)

33. Land and Water Forum, *Report of the Land and Water Forum: A Fresh Start for Freshwater* (Wellington: Land and Water Forum, 2010), pp 44–46 (Peter Brunt, papers in support of brief of evidence (doc D89(a)), pp 191–192)

34. Land and Water Forum, 'LAWf recommendation implementation status', April 2016, p 3

35. Martin Workman, answers to questions in writing, [September 2018] (doc F21(d)), pp 1–2



be used to secure water supplies for marae and papakāinga, restore waterways, and develop commercial water operations.<sup>36</sup>

In closing submissions for the Wai 2358 claimants, counsel proposed that redress in respect of proprietary rights should be provided through a mechanism such as an allocation of water, royalties, or some other instrument. The claimants also proposed that one item of redress would be an independent national water commission to be established on a partnership basis, with half its membership chosen by Māori and half by the Crown. The commission could work in conjunction with the RMA or a Water Act, but its roles would be to:

- ▶ manage and regulate water;
- ▶ stop further degradation and reverse past damage;
- ▶ establish water quality bottom lines that would protect the mauri of water bodies;
- ▶ determine a fair allocation of water to Māori for customary and economic purposes;
- ▶ enforce council–Māori co-management agreements; and
- ▶ determine compensation (where an allocation to Māori was not possible).<sup>37</sup>

These activities would be funded by charges on the commercial use of water. The claimants argued that the commission's composition, powers, and functions would give effect to the Treaty principles of partnership and active protection.<sup>38</sup>

This submission was supported by a number of interested parties, although they may have had different views as to matters of detail.<sup>39</sup>

In February 2019, the Wai 2358 claimants provided their submissions in reply to the Crown's closing submission. The NZMC took that opportunity to provide an updated and expanded submission on a separate Water Act and national commission. In their view, fresh water must be taken out from under the RMA because there is an 'unresolved binary between economic interests and environmental values in terms of the management of the freshwater resource in New Zealand which has not been solved by the RMA'.<sup>40</sup> We found evidence of such a 'binary' in our analysis of water quality reforms in chapter 5, including the Crown's decisions on the board of inquiry's report in 2011 and the failure to issue stock exclusion regulations in 2017.

In any case, the claimants argued that the Water Act should be guided by the principles of tikanga and should recognise the rights and responsibilities of Māori (tino rangatiratanga and kaitiakitanga). The primary purpose of the Act would be to safeguard the mauri of water bodies, followed by the provision of drinking water, and then commercial uses of water. It would be carried out by a national

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36. NZMC, *Discussion Paper on a Water Policy Framework*, 22 December 2014

37. Claimant counsel (NZMC), closing submissions, 26 October 2018 (paper 3.3.33), pp 22–23

38. Claimant counsel (NZMC), closing submissions (paper 3.3.33), pp 23–24

39. Counsel for interested parties (Gilling and Davidson), closing submissions, 9 November 2018 (paper 3.3.35), pp 2–3; counsel for interested parties (Sykes, Jordan, and Bartlett), speaking notes to accompany closing submissions, 27 November 2018 (paper 3.3.39(a)), pp 16–18; counsel for interested parties (Lyll and Thornton), closing submissions, 14 November 2018 (paper 3.3.43), p 10

40. Claimant counsel (NZMC), submissions by way of reply, 22 February 2019 (paper 3.3.52), p 1

water commission and regional catchment boards. The commission would be appointed by the Crown and Māori on a 50/50 basis, and would be independent of the Government (and the political pressures which the claimants argued had produced such minimally effective reforms). The commission would administer a register of iwi and hapū rights in respect of particular water bodies (there would be a dispute resolution function for contested rights). It would establish charges for commercial uses and the discharge of pollutants and waste water. Those funds would be used by the commission for Māori economic development, the clean-up of degraded water bodies, and compensation (where hapū could not be allocated an appropriate amount of water). The commission would also establish a framework for freshwater management and give direction to regional catchment boards. The Act would specify that the framework must be Treaty compliant.<sup>41</sup>

The claimants proposed that the commission should also establish an allocation framework, which would include limits set by the commission to ensure sustainable flows and ecosystem health. The first priority would be protecting the mauri, the second would be drinking water, the third would be a percentage allocation to Māori for cultural and economic purposes on a quota management basis, and the fourth would be allocation to commercial users. The commission would also monitor, review, and occasionally override regional catchment boards. The new catchment boards would be co-governance bodies with a 50/50 composition. They would enter into Joint Management Agreements with iwi and hapū, and carry out water management and consenting at the regional level. The Māori members of both the national commission and the boards would be appointed by 'major entities within Māoridom, such as the NZMC and the Iwi Leaders Group'.<sup>42</sup>

### **7.6.3.2 The Wai 2601 claimants' proposal**

The Wai 2601 claimants (Maanu Paul and Charles White on behalf of Ngāti Moe, and the Taitokerau District Māori Council) also proposed a national water commission. They were supported by four other District Māori Councils which were interested parties in our inquiry. The claimants suggested the establishment of a Wai Māori Commission/Te Ohu Wai Māori, which would be funded by the Crown and would consist of 15 members appointed by national Māori bodies. This commission would 'co-devise' a new water regulatory regime with an equal number of Crown representatives. That task would include devising regimes and institutions for water management and allocation. The commission on its own, however, would devise the tikanga for the new regime, determine 'which Iwi and Hapū own which Water bodies', and work with them and with water users to set prices for the commercial use of water.<sup>43</sup>

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41. Claimant counsel (NZMC), submissions by way of reply (paper 3.3.52), pp1–6

42. Claimant counsel (NZMC), submissions by way of reply (paper 3.3.52), pp 3, 6–11

43. Claimant counsel (Wai 2601), submissions on remedies, 3 December 2018 (paper 3.3.38(d)), pp6–7

Under the new regulatory regime, the Crown would need to recognise Māori proprietary rights, and all commercial users would pay a levy that would go to the Māori owners. Local authorities which managed water supplies would have to pay a levy as well, to be used for restoring degraded water bodies. Discharge rights would also involve the payment of fees to be used for clean-up funds.<sup>44</sup>

## **7.6.4 The response of the Crown and the Freshwater ILG**

### **7.6.4.1 The Freshwater ILG's view**

Counsel for the ILG submitted that the national model for making water policy should continue to be a partnership engagement between the Crown and iwi leaders, with consultation more widely with Māori. The ILG opposed both the Crown's new consultative body (Te Kahui Wai Māori) and the idea of a national water commission. In respect of the commission, the ILG's view was that 'the relevant iwi authorities in the respective catchments would be the appropriate bodies, alongside the Crown (whether that ultimately be through local authorities or not) to manage and regulate water.'<sup>45</sup> The ILG did, however, agree with the NZMC that remedies should include:

- ▶ some form of allocation, royalty, or compensation;
- ▶ co-management as the benchmark for freshwater management (including at the national as well as regional levels); and
- ▶ that the problem of chronic under-resourcing must be addressed.<sup>46</sup>

Apart from the issue of a national water commission, these other matters have been addressed in earlier chapters (and summarised above).

### **7.6.4.2 The Crown's position**

The Crown's closing submissions stated in a footnote that it had no official position on the claimants' proposal for a national water commission. Crown counsel also confirmed that when the forum proposed a commission, the Crown's view was that 'further work was required to consider exactly what such a commission would do, and whether it would be consistent with the government's goals of "efficient, stream lined and well organised" government administration.'<sup>47</sup>

In response to the claimants' reply submissions, the Crown filed a further memorandum in April 2019. Counsel stated that the Crown 'remains committed to continuing discussions on how to better provide for a Māori-Crown partnership that recognises the tino rangatiratanga guaranteed to Māori under te Tiriti and gives effect to Treaty principles including kawanatanga.'<sup>48</sup> The Crown's view was that the NZMC's revised proposal had some 'underlying objectives' that it would like to explore further, such as a register of Māori rights and interests in

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44. Claimant counsel (Wai 2601), submissions on remedies (paper 3.3.38(d)), pp 4-5

45. Counsel for interested parties (ILG), closing submissions, 14 November 2018 (paper 3.3.41), pp 14-16, 20-21

46. Counsel for interested parties (ILG), closing submissions (paper 3.3.41), pp 20-21

47. Crown counsel, closing submissions (paper 3.3.46), p 74

48. Crown counsel, memorandum, 2 April 2019 (paper 3.4.20), p 1

## 7.6.5

water and funding for Māori capacity to engage in ‘decision-making processes’. But whether a national commission was the correct structure to provide for those kinds of objectives was a ‘difficult question’. The Crown suggested that a fundamental change to freshwater governance would require careful examination of multiple issues, such as how the effects of land-use on water would be included. If water were to be separated out and governed under a commission, there would need to be some integration with land management authorities. Also, the Crown considered that management decisions are best made with local knowledge at the catchment level.<sup>49</sup>

Nonetheless, Crown counsel stated that the Crown is ‘open to exploring all of these issues with Māori’ but is already working on fundamental water reforms in its ‘Essential Freshwater’ programme. It was therefore premature for the Crown to consider particular governance structures at present. Further, Crown counsel submitted that the Tribunal should ‘avoid definitively endorsing one governance structure above others’ in light of the difficult issues raised by the Crown and its ongoing engagement with Māori (through Te Kahui Wai Māori) on freshwater reforms. The Crown also intends to discuss policy options with the ILG and NZMC, primary industry, and others before wider consultation.<sup>50</sup>

### 7.6.5 Our view of the water commission proposals

It seems to us that there are some commonalities in the various approaches that have been put forward so far. The stakeholders of the Land and Water Forum clearly saw that a national commission is necessary, and that it must be established on a co-governance basis (points held in common with the NZMC and the Wai 2601 claimants). The claimants and interested parties also agreed that there needs to be a role for the exercise of tino rangatiratanga at the national level, in partnership with the Crown, although they had differences on what kind of institutional arrangement would best reflect that partnership function. The Crown has said that it is open to exploring such matters but has not endorsed an institutional role for Māori at the national level. In practice, we note that it has developed most of its reforms in collaboration with the appointed representatives of a national Māori body (the ILG and IAG) and more recently with Te Kahui Wai Māori.

In our view, another point of agreement between the forum and the claimants is that there is a significant gap in the freshwater policy and management structure (following the dissolution of the National Water and Soil Conservation Authority); there is no independent national body to oversee the system, monitor performance, develop policy, and conduct research on a national scale. We agree that this is a significant gap. For example, the need to conduct research and to develop and populate the NOF underlines the need for this gap to be filled.

We agree with the forum and the claimants that there should be an independent national body established on a co-governance basis with Māori. At a minimum,

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49. Crown counsel, memorandum (paper 3.4.20), pp 1–2

50. Crown counsel, memorandum (paper 3.4.20), pp 2–3

its role should be to act in partnership to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management. We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with those issues. Either model could work so long as it is institutionalised, but the value of the co-governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori.

In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary.

## **7.7 RECOMMENDATIONS**

### **7.7.1 Introduction**

In this section of our chapter, we make our recommendations for the remedy of the breaches and prejudice summarised above, and to prevent similar prejudice from occurring in the future.

We note that because significant reforms have already been completed or commenced by the Crown, we are in a position to make detailed recommendations on some matters. We do not make any recommendations about specific water bodies, as our focus in stage 2 is on the Crown's freshwater management regime and its reforms to that regime, and some water bodies have been the subject of detailed inquiry in the Tribunal's district inquiries.

### **7.7.2 Purpose and principles of the RMA**

We recommend two specific amendments to part 2 of the RMA:

- ▶ The amendment of section 6 to include Te Mana o te Wai as a matter of national importance that must be recognised and provided for by RMA decision makers.
- ▶ The amendment of section 8 to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the Act.

### **7.7.3 Co-governance and co-management**

We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies:

- ▶ A national co-governance body should be established with 50/50 Crown–Māori representation, to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management. The details should be arranged between the Treaty partners.
- ▶ Sections 33 and 36B of the RMA should be amended to remove statutory and practical barriers to their use, to provide incentives for their use, and to compel councils to actively seek opportunities for their use. Sections 33 and 36B should also be amended so that transfers of power and Joint Management Agreements cannot be revised or cancelled without the agreement of both parties. Section 33 should be amended so that transfers of power in respect of a water body or water bodies may be made to hapū. Joint Management Agreements for water bodies should apply to the whole catchment of a water body, and should include (among other things) ‘a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements’, and a decision-making role in both plan-making and relevant consents.<sup>51</sup>
- ▶ Sections 33 and 36B should also be amended to include a process for iwi authorities to apply to councils for transfers and Joint Management Agreements. A mandatory process of engagement would follow any application, with mediation and the assistance of the Crown (or the co-governance body for freshwater applications) to be available as required.
- ▶ The Mana Whakahono a Rohe provisions of the RMA should be amended to make the co-governance and co-management of freshwater bodies a compulsory matter that must be discussed and agreed by the parties. Other matters could also be made compulsory (as discussed in chapter 4), and the Crown should discuss and agree to any such further proposed amendments with the ILG, which designed the original Mana Whakahono a Rohe proposal.
- ▶ Objective D1 of the NPS-FM should be amended to specify that iwi and hapū must be directly involved in freshwater decision-making, that Māori values, rights, and interests must be recognised and provided for in freshwater decision-making, and that councils must actively seek opportunities to enter into section 33 transfers and section 36B Joint Management Agreements for freshwater bodies (where Treaty settlements have not already established co-governance agreements for freshwater bodies). Consequential amendments should be made in policy D1, and further policies could be inserted as required. These amendments should specify ‘a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements’, and a decision-making role in both plan-making and relevant consents.<sup>52</sup>
- ▶ The RMA provisions for iwi management plans should be amended to provide that, in the case of water bodies where co-governance and co-management has not been arranged, the iwi and hapū management plans filed by kaitiaki

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51. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

52. Claimant counsel (NZMC), closing submissions (paper 3.3.33), p 21

will have greater legal weight in the process of developing or amending regional plans and in consenting processes.

- ▶ The Crown should offer co-governance/co-management agreements for freshwater bodies in all future Treaty settlements, unless sole iwi governance of a freshwater taonga is more appropriate in the circumstances.

We also recommend that the national co-governance body should assess whether a separate Water Act is necessary. Whether such an Act is required or not, we do not recommend the duplication of authorities at the regional level. Land, water, and other natural resources should be managed in an integrated manner by regional councils on a co-governance/co-management basis with iwi and hapū.

#### **7.7.4 Co-design**

We recommend that the Crown continue its approach of co-design of policy options with a national Māori body or bodies and that this should be made a regular feature of government where Māori interests are concerned.

#### **7.7.5 Resourcing**

We recommend that the Crown urgently take such action or actions as are necessary to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes, including freshwater management and freshwater decision-making. We also recommend that, in respect of fresh water, the resourcing measures be developed, and their effectiveness monitored, by the national co-governance body. If the national co-governance body has not been established, that role should be performed by the Crown in partnership with the Iwi Chairs Forum and NZMC. Because this issue of resources is not confined to RMA processes relating to fresh water, we have not specified the ILG and Te Kahui Wai Māori here. Necessarily, this recommendation includes the building of capacity and capability for iwi and hapū to enter into co-governance and co-management arrangements and Mana Whakahono a Rohe arrangements, and support for both councils and Māori to establish those arrangements.

#### **7.7.6 Water quality**

We recommend that water policy (including water quality standards and national bottom lines) be decided by or in conjunction with the national co-governance body, with the details to be arranged between the Treaty partners. We expect that the Crown and Māori representatives would consult with their respective constituencies in carrying out that work, and that the national body would hold an inquiry and receive submissions in the manner of a board of inquiry.

We acknowledge that the national water body may come to alternative views on amendments to the NPS-FM, but if such a body is not established, or agreement cannot be reached between the Crown and Māori representatives, we recommend the following amendments to the NPS-FM:

- ▶ The overall aim of the NPS-FM should be the improvement of water quality in freshwater bodies that have been degraded by human contaminants, so as to restore or protect the mauri and health of those water bodies, while

maintaining or improving the quality of all other water bodies. The board of inquiry's objectives E1 and E2, from the board's report in 2010, should be inserted in the NPS-FM and consequential changes made.

- ▶ The NOF should be fully populated as soon as practicable, including the development and insertion of the attributes that have been omitted (the details are in chapter 5), so that national water quality standards are comprehensive and effective. This should include attributes and bottom lines for wetlands, aquifers, and estuaries, and more effective controls for nutrients.
- ▶ More stringent national bottom lines should be set so as to recognise and provide for Māori values (including Te Mana o te Wai – the health of the water body must come first) and the revised overall aim of the NPS-FM.
- ▶ Te Mana o te Wai, and such other Māori values as the national co-governance body decides or recommends, should be made compulsory national values in the NOF, with national bottom lines. Cultural indicators should also be added to the NOF.
- ▶ Objective AA1 and policy AA1 should be amended to state that Te Mana o te Wai must be recognised and provided for, in conjunction with the amendments to objective D1 as recommended above (a direct involvement of Māori in freshwater decision-making).
- ▶ Timeframes for implementation should be reassessed, and interim measures be arranged (perhaps through National Environmental Standards) to ensure that water bodies are not further degraded in the meantime.

We also recommend that:

- ▶ National stock exclusion regulations should be promulgated urgently.
- ▶ The Crown and the national co-governance body should consider the promulgation of National Environmental Standards, including a standard for ecological and cultural flows (which has been on hold for some years).
- ▶ The Crown and the national co-governance body should devise measures and standards urgently for the absolute protection of wetlands. This may require statutory amendment, regulations, or some other tools, or a combination of all of these.
- ▶ The Crown and the national co-governance body should also take urgent action to develop measures for habitat protection and habitat restoration, and any other measures necessary to save three-quarters of freshwater native fish species from the threat of extinction. The development of attributes and bottom lines for the Mahinga Kai value in the NOF would be one of the necessary actions.
- ▶ The Crown and the national co-governance body should develop measures to encourage and assist councils to dispose of sewage effluent to land wherever feasible.

If the national co-governance body has not been established, these recommendations should be carried out by the Crown in partnership, and on a co-design basis, with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori.

In terms of funding for restoration, we recommend that the Crown provide funding and that, where possible, levies on commercial users also be applied



In respect of our recommendation that the board of inquiry's objectives E1 and E2 should be inserted in the NPS-FM, with consequential changes made as necessary, the text of those objectives was:

*Objective E1*

To protect the quality of outstanding fresh water, to enhance the quality of all fresh water contaminated as a result of human activities, and to maintain the quality of all other fresh water.

*Objective E2*

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and associated ecosystems of fresh water from adverse effects of the use or development of land, and of discharges of contaminants.

for the restoration of water bodies. The co-governance body should design and oversee a programme for restoration of freshwater bodies, which could involve it in considering and deciding applications and monitoring projects. This body should also identify priorities for the restoration of freshwater taonga. While that programme is being developed, we recommend that the Crown continue to fund projects for freshwater quality improvement. We also recommend that the Crown and the co-governance body should consider retaining the Te Mana o te Wai Fund as a long-term fund for the restoration of degraded freshwater taonga.

### **7.7.7 Māori proprietary rights and economic interests vis-à-vis the allocation regime**

We recommend that the Crown recognise Māori proprietary rights and economic interests through the provision of what the NZMC has called 'proprietary redress'. In conjunction with this, we make the following recommendations concerning the RMA's allocation regime:

- ▶ The allocation regime should be reformed so as to recognise and provide for Te Mana o te Wai, and this should be done urgently.
- ▶ The first-in, first-served system of allocation should be replaced, and over-allocation phased out.
- ▶ The Crown should devise a new allocation regime in partnership with Māori, including through the national co-governance body.
- ▶ The Crown should arrange for an allocation of water on a percentage basis to iwi and hapū, according to a regional, catchment-based scheme to be devised by the national co-governance body in consultation with iwi and hapū. If any iwi, hapū, or local authority reports that catchment circumstances do not allow the allocation to be made, the national co-management body should hold an inquiry on that matter, and investigate possibilities for the creation of head room, as well as any alternatives to the allocation (including the possibility of compensation). All allocations to iwi and hapū should be perpetually

renewable and inalienable other than by lease or some other form of temporary transfer.

- ▶ The Crown should also arrange for an allocation of water for the development of Māori land (including land returned in Treaty settlements), where such allocation is sustainable, according to a scheme to be devised by the national co-governance body.
- ▶ The national co-governance body should investigate other possible mechanisms for 'proprietary redress', including royalties, as there is insufficient evidence for the Tribunal to make a recommendation to the Crown. We think this should include leading a wider conversation within Māoridom on proprietary rights and how these might be recognised.

We make no recommendations as to an allocation of discharge rights because it is not yet clear whether such rights will be made transferable or, indeed, will become a general feature of the freshwater management regime. The co-governance body should consider this matter and develop an approach for allocations to iwi and hapū and for the development of Māori land if discharge rights (including transferable discharge rights) become a general feature of freshwater management.

If the co-governance body is not established, then the Crown should carry out these recommendations in partnership (and on a co-design basis) with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori.

Finally, we note that it may now be necessary for a test case to be brought before the courts on whether native title in fresh water (as a component of an indivisible freshwater taonga) exists as a matter of New Zealand common law and has not been extinguished. We have given our view but our jurisdiction is recommendatory only, and the question has not been decided definitively by the courts.

### **7.7.8 Monitoring and enforcement**

We reiterate the recommendations of previous Tribunals that the Crown should monitor the Treaty performance of local authorities. For freshwater matters, this should be carried out by the co-governance body.

We also reiterate the recommendation of the Wai 262 Tribunal, that councils make regular reports on their activities in respect of section 33 and 36B to the Parliamentary Commissioner for the Environment or – in the case of freshwater bodies – to the co-governance body if it is established.

We are aware that monitoring and enforcement of consent conditions is also a significant issue in the freshwater management regime, but we did not receive sufficient evidence to make a recommendation (other than the recommendation made above in respect of Joint Management Agreements).

### **7.7.9 Clean, safe drinking water for marae and papakāinga**

Finally, we make a recommendation that arises from one of the unfulfilled reform options in the *Next Steps* co-design process. We recommend that the Crown provide urgent assistance, including funding and expertise, for water infrastructure and the provision of clean, safe drinking water to marae and papakāinga. This will likely need to include a subsidy scheme to resume the important but

incomplete work of the previous National Drinking Water Assistance Subsidy Scheme (2005–15).<sup>53</sup>

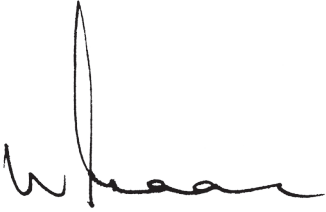
We recommend that the national co-governance body should devise an appropriate water supply and infrastructure scheme for marae and papakāinga, which may need to be developed and implemented with or alongside a scheme for safe, clean rural water supplies. If the national co-governance body is not established, the Crown should develop and implement a scheme in partnership with Māori on a co-design basis and with co-governance of the scheme.

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53. See Pita Paul, brief of evidence, 23 December 2016 (doc E8)



Dated at Wellington this 23<sup>rd</sup> day of August 2019



Chief Judge Wilson Isaac, presiding officer



Dr Robyn Anderson, member



Ron Crosby, member



Dr Grant Phillipson, member



Professor William Te Rangiuā (Pou) Temara, member





## APPENDIX I

### INTERESTED PARTIES

#### **COUNSEL**

Counsel for the Wai 2358 claimants were Martin Taylor, Richard Fowler, Matthew Smith, and Donna Hall.

Counsel for the Wai 2601 claimants was Janet Mason.

Counsel for the sixth claimants was Sophie Dawe.

Counsel for the Crown were Dr Damen Ward and Kevin Hille.

#### **WAI 18**

**Counsel:** HT Nahu

**Parties:** Harvey Karaitiana, for and on behalf of himself and the descendants of Ngāti Hinerau, Ngāti Hineure, Ngāti Tutemohuta, and Ngāti Te Urunga (collectively known as the Tauhara hapū)

#### **WAI 52**

**Counsel:** Tom Bennion and E Whiley

**Parties:** Muaūpoko Tribal Authority

**Claim name:** Muaūpoko land claim

#### **WAI 88**

**Counsel:** Moana Sinclair and C Beaumont

**Parties:** Ani Parata, for and on behalf of the Ati Awa Marae Committee, other whānau and hapū of Ati Awa/Ngāti Awa ki Waikanae, and descendants of Te Kakakura Wi Parata Waipunaahau

**Claim name:** Kapiti Island claim

#### **WAI 89**

**Counsel:** M Sinclair and C Beaumont

**Parties:** Ani Parata, for and on behalf of Ati Awa Marae Committee, other whānau and hapū of Ati Awa/Ngāti Awa ki Waikanae, also the descendants of Te Kakakura Wi Parata Waipunaahau and Te Ati Awa/Ngāti Awa ki Whakarongotai

**App1**

**WAI 108**

**Counsel:** M Sinclair

**Parties:** Tama-i-Uia Ruru, for and on behalf of himself and the descendants of Tanguru a Muaūpoko

**WAI 114**

**Counsel:** HT Nahu

**Parties:** Harvey Karaitiana, for and on behalf of Ngāti Hinerau, Ngāti Hineure, Ngāti Tutemohuta, and Ngāti Te Urunga (collectively known as the Tauhara hapū)

**WAI 120**

**Counsel:** M Sinclair and C Beaumont

**Parties:** Te Raumoia Balneavis Kawiti, for and on behalf of the Kawiti Marae Committee, the Kawiti whānau, and the descendants of Ngāti Hine, Ngāti Manu, Te Kapotai, Ngāti Rahiri, Ngāti Rangī, Ngāitewake, and Nga Puhi iwi

**WAI 125**

**Counsel:** T Wara

**Parties:** Angeline Greensill, for and on behalf of herself and the Tainui hapū of Whaingaroa, including Ngāti Koata (ki Whaingaroa), Ngāti Kahu, Ngāti Tahau, Ngāti Te Kore, Ngāti Pukoro, Ngāti Te Ikaunahi, Ngāti Tira, Ngāti Heke, Ngāti Rua Aruhe, Ngāti Hounuku, Paetoka, and Ngāti Te Karu

**WAI 129**

**Counsel:** T Afeaki

**Parties:** Sue Te Huinga Nikora and Sonny Akuhata of Ruawaipū, Ta Rāwhiti Tairāwhiti

**Claim name:** East Coast lands and waters claims

**WAI 144**

**Counsel:** R Zwaan

**Parties:** Vernon Winitana and others, for and on behalf of the Panekiri Tribal Trust Board, Ngāti Ruapani

**Claim name:** Ruapani lands claim

**WAI 151**

**Counsel:** L Poutu

**Parties:** Ngāti Rangī collective, Ngāti Rangī Trust. Mark Tumanako Gray, Robert Mathew Gray, Toni Waho, and others

**Claim name:** Waiouru to Ohakune lands claim



**WAI 222**

**Counsel:** T Afeaki

**Parties:** Sue Te Huinga Nikora, Te Puia Springs, Te Tai Rāwhiti

**WAI 237**

**Counsel:** D Naden and C Upton

**Parties:** William James Taueki and another, for and on behalf of Muaūpoko

**Claim name:** Horowhenua Upton block claim

**WAI 277**

**Counsel:** L Poutu

**Parties:** The Ngāti Rangi collective, the Ngāti Rangi Trust, Matiu Marino Mareikura, Robert Gray, and others

**Claim name:** Te Puna blocks claim

**WAI 354**

**Counsel:** A Sykes and T Wara

**Parties:** Arapeta Witika Pomare Hamilton and others, for and on behalf of Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, and Ngāpuhi ki Taumarere

**Claim name:** Tai Tokerau land claim

**WAI 377**

**Counsel:** J Mason and P Agius

**Parties:** Michella Marino and Errol Churton, for and on behalf of the descendants of Taringa Kuri (Te Kaeaea), from the Ngāti Wai hapu of Ngāti Tama

**Claim name:** Kaiwharawhara and Hutt Valley lands claim

**WAI 500**

**Counsel:** HT Nahu

**Parties:** Harvey Karaitiana, for and on behalf of Ngāti Hinerau, Ngāti Hineure, Ngāti Tutemohuta, and Ngāti Te Urunga (collectively known as the Tauhara hapū)

**WAI 549**

**Counsel:** Jason Pou

**Parties:** Professor Patu Hohepa and Rudy Taylor, for and on behalf of the whānau and hapū of Hokianga

**Claim name:** Ngāpuhi land and resources Te Mahurehure claim

**Appi**

**WAI 554**

**Counsel:** L Poutu

**Parties:** The Ngāti Rangi collective, the Ngāti Rangi Trust, Hune Rapana, Colin Richards, and Richard Manuate Pirere

**Claim name:** Makotuku and Ruapehu survey districts claim

**WAI 569**

**Counsel:** L Poutu

**Parties:** The Ngāti Rangi collective, the Ngāti Rangi Trust, and Sarah Reo, for and on behalf of the descendants of Amiria Tamehana, Henare Aterea, Mere te Aowhakahinga

**Claim name:** Murimotu 3B1A No 1 block claim

**WAI 575**

**Counsel:** K Feint

**Parties:** Te Ariki Tumu Te Heuheu

**Counsel:** J Ferguson

**Parties:** The Ngāti Tama Manawhenua ki te Tau Ihu Trust

**Counsel:** J Ferguson

**Parties:** Te Rūnanga o Ngāti Whare

**Counsel:** J Ferguson

**Parties:** Sir Tumu Te Heuheu (Ngāti Tuwharetoa), Tom Roa (Waikato-Tainui), Mark Solomon (Ngāi Tahu), Toby Curtis (Te Arawa), and Brendan Puketapu (Whanganui) in their collective capacity as the Freshwater Iwi Leaders Group

**Counsel:** J Ferguson

**Parties:** Waikato-Tainui Te Kauhanganui Inc

**Counsel:** J Ferguson

**Parties:** The Whanganui River Māori Trust Board

**Counsel:** P Harman

**Parties:** The Savage Whānau Trust (Kawerau)

**WAI 619**

**Counsel:** T Afeaki

**Parties:** Waimarie Bruce of Ngāti Kahu o Torongare Te Parawhau, Ngāpuhi

**Claim name:** Ngāti Kahu o Torongare/Te Parawhau hapū claim

**WAI 621**

**Counsel:** S Webster and C Manuel

**Parties:** Rangī Paku, for and on behalf of the Wairoa Waikaremoana Māori Trust

**Claim name:** Kahungunu Ki Wairoa claim

**WAI 647**

**Counsel:** A Sykes

**Parties:** Jordan Haines-Winiata, for and on behalf of the whānau and hapū represented by the Ngāti Hinemanu me Ngāti Paki and Ngāti Paki Heritage Trust

**WAI 662**

**Counsel:** A Sykes

**Parties:** Jordan Winiata-Haines and Peter Steedman, for and on behalf of themselves and the descendants of Winiata Te Whaaro and the hapū of Ngāti Paki

**WAI 691**

**Counsel:** A Sykes and T Wara

**Parties:** Barbara Marsh, Tohe Raupatu, Muiora Barry, and June McTainsh, for and on behalf of all the descendants of the original owners of Part Kaingapipi 9

**Claim name:** Pio Pio stores site claim

**WAI 700**

**Counsel:** Tony Shepherd

**Parties:** The Whirinaki Māori Committee, for and on behalf of the hapū of Whirinaki and others of Hokianga

**Counsel:** M Sinclair

**Parties:** The Tahorakuri A130 Trust, Ohaaki Marae, Reporoa

**WAI 726**

**Counsel:** TK Williams and J Fong

**Parties:** Robert Marunui Iki Pouwhare, for and on behalf of himself and the Fong Ngāti Haka Patuheuheu Trust

**Claim name:** Ngāti Haka and Patuheuheu lands, forests, and resources (Urewera) claim

**WAI 740**

**Counsel:** Unrepresented

**Parties:** Fredrick C Allen

**Claim name:** Protection of indigenous flora and fauna (Allen) claim

**Appi**

**WAI 762**

**Counsel:** D Naden and C Upton

**Parties:** Harry and Evelyn Kereopa, for and on behalf of the Te Ihingarangi hapū of Ngāti Maniapoto

**WAI 774**

**Counsel:** T Afeaki

**Parties:** Kingi Taurua of Ngāti Rahiri, Ngāti Kawa o Ngāpuhi

**Claim name:** Waitangi Lands and Resources claim

**WAI 788**

**Counsel:** A Sykes and T Wara

**Parties:** Atiria Rora Ormsby Takiari and the descendents of the owners of the land

**Claim name:** Mokau Mohakatino and other blocks (Maniapoto) claim

**WAI 795**

**Counsel:** R Zwaan

**Parties:** Anaru Paine, Irene Williams, and Sid Paine, for and on behalf of Ngāi Tūhoe Potiki

**Claim name:** Tumatawhero–Waikaremoana claim

**WAI 824**

**Counsel:** D Naden and C Upton

**Parties:** Marama Waddell, for and on behalf of her whānau and her hapū, who are members of Te Whiu hapū

**Claim name:** Te Uri Taniwha and Ngā Uri o Wiremu Hau raua ko Maunga Tai claim

**WAI 846**

**Counsel:** J Pou

**Parties:** Lynnette Gloria Waitiahoaho Te Ruki and Gary Shane Te Ruki, for and on behalf of the hapū of Ngāti Kahu and Ngāti Unu

**Claim name:** Kakepuku Mountain and Kakepuku block claim

**WAI 861**

**Counsel:** C Hirschfeld and T Sinclair

**Parties:** Richard John Nathan for the Tai Tokerau District Māori Council

**WAI 892**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** David Hawea and Keith Katipa, for and on behalf of the Te Whanau a Kai Trust

**WAI 914**

**Counsel:** C Hirschfeld and T Sinclair

**Parties:** Gilbert Kiharoa Parker, for and on behalf of the descendants of Hare Matenga and Tukariri of Ngā Puhihapu

**Counsel:** J Inns

**Parties:** Te Rūnanga o Ngāi Tahu

**Counsel:** J Mason

**Parties:** Pita Paul

**Counsel:** J Mason

**Parties:** Cletus Maanu Paul, for and on behalf of the Mataatua District Māori Council

**Counsel:** J Mason

**Parties:** Des Ratima, for and on behalf of the Takitimu District Māori Council

**Counsel:** J Mason

**Parties:** Rihari Dargaville, for and on behalf of himself and the Tai Tokerau District Māori Council

**Counsel:** J Mason

**Parties:** Titewhai Harawira, for and on behalf of the Tamaki Makaurau District Māori Council

**Counsel:** J Mason

**Parties:** Willie Jackson, for and on behalf of the Tamaki ki te Tonga District Māori Council

**WAI 937**

**Counsel:** A Sykes and T Wara

**Parties:** Tahuri o Te Rangi, Trainor Tait, and Hinemoa Herewini, for and on behalf of themselves and Ngāti Ruapani

**WAI 964**

**Counsel:** T Afeaki

**Parties:** Tamati Olsen and others , for and on behalf of Te Iwi o Rakaipaaka o Nuhaka, Waikokopu, Te Mahia, Tahaenui, and Morere puia, Te Tai Rāwhiti

**WAI 966**

**Counsel:** M Sinclair and C Beaumont

**Parties:** Gray Theodore, for and on behalf of Ngāpuhi

**App1**

**WAI 973**

**Counsel:** D Naden and C Upton

**Parties:** Phillip Hiroki Ripia, for and on behalf of Hohepa Joseph Ripia and Robert Reginald Ripia Eagle, children of Erana Pera Manene Ripia (née Powhiro) and Manu Frederick Ripia

**WAI 985**

**Counsel:** T Afeaki

**Parties:** Miriama Solomon (née Tuoro) and Graeme Prebble jnr of Te Honihoni, Te Ihutai, Te Mahuruhu o Hokianga, Ngāpuhi

**Claim name:** Hokianga regional lands claim

**WAI 996**

**Counsel:** J Mason and P Agius

**Parties:** David Potter and Andre Paterson, for and on behalf of the Ngāti Tionga hapū of Ngāti Rangitihī

**Claim name:** Ngāti Rangitihī inland and coastal land blocks claim

**WAI 1013**

**Counsel:** R Zwaan

**Parties:** Dr Rangimarie Turuki Rose Pere and Kuini Te Iwa Beattie, for and on behalf of Ngāti Rongo, Ngāti Hingaanga, Ngāti Hinekura, Te Whānau Pani, and Ruapani-Tihoē.

**Claim name:** Pere Kaitiakitanga claim

**WAI 1028**

**Counsel:** T Afeaki

**Parties:** Timothy Waitokia, Tracey Waitokia, Bill Ranginui, and others, for and on behalf of Ngāti Hineoneone o Atene, Whanganui, Te Tai Hauāuru

**WAI 1033**

**Counsel:** R Zwaan

**Parties:** Nicky Kirikiri and another, for and on behalf of the owners and beneficiaries of the Te Heiotakoka 2B To Kopani 36 and 37 Trust.

**Claim name:** Te Heiotakoka 2B To Kopani 36 and 37 Trust claim

**WAI 1072**

**Counsel:** M McGhie

**Parties:** Mathew Haitana, for and on behalf of himself and Ngāti Ruakopiri

**WAI 1073**

**Counsel:** M McGhie

**Parties:** Petuere Awatere Kiwara, for and on behalf of Ngāti Kowhaikura

**WAI 1089**

**Counsel:** D Naden and C Upton

**Parties:** Maggie Ryland, for and on behalf of Te Whānau a te Aotawarirangi of Tokomaru Bay

**WAI 1092**

**Counsel:** R Zwaan

**Parties:** Charles Aramoana and Sandra Jeanette Kari Kari Aramoana, for and on behalf of themselves and Upokorehe hapū, Ngāti Raumoā, Roimata Marae Trust and Upokorehe

**Claim name:** Upokorehe claim

**WAI 1189**

**Counsel:** M McGhie

**Parties:** Kahukura (Buddy) Taiaroa, for and on behalf of Ngāti Kahukurapango and Ngāti Matakaha

**WAI 1196**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Merle Ormsby, Tiaho Pillot, Daniel Ormsby, and Manu Patena, for and on behalf of themselves, their whānau, Ngāti Tamakopiri hapū, and Ngāti Hikairo iwi

**WAI 1197**

**Counsel:** M McGhie

**Parties:** Mathew Haitana, Adam Haitana, and Henry Louis Haitana, for and on behalf of Ngāti Tumanuka

**WAI 1226**

**Counsel:** D Naden and C Upton

**Parties:** Morehu McDonald, for and on behalf of Ngāti Hinerangi and the Ngāti Hinerangi Trust Board

**WAI 1250**

**Counsel:** L Poutu

**Parties:** The Ngāti Rangi collective, the Ngāti Rangi Trust, and Toni James Davis Waho, for and on behalf of the descendants of Lena and Edward Waho and the hapū of Ngāti Rangi that descend from Paerangi-ite-Wharetoka

**Claim name:** Ngāti Rangi (Paerangi-i-te-Wharetoka) claim

**Appi**

**WAI 1272**

**Counsel:** L Thornton

**Parties:** Rapata Kaa, for and on behalf of the Ruawaipu hapū

**Claim name:** Ruawaipu active protection claim

**WAI 1359**

**Counsel:** M Chen

**Parties:** Sir Graham Latimer and Tina Latimer, for and on behalf of themselves and the descendants of Paora (Te Patu), Paerata (Te Patu Koraha), Hare Reweti Hukatere (Te Patu Tere Tere), Ratima Aperahama (Whakakohatu, Tokaawai, Te Uriaranui), and Marara Ratima (Te Patu and Ngaitohianga)

**Counsel:** D Edmonds

**Parties:** Te Atiawa Iwi Authority

**Counsel:** D Edmonds

**Parties:** Ngā Hapū o Ngāruahine Iwi Inc

**Counsel:** D Edmonds and F Wedde

**Parties:** Bevan Taylor and Maungaharuru-Tangitu Inc, for and on behalf of the hapū of Maungaharuru-Tangitu

**Counsel:** D Edmonds and F Wedde

**Parties:** Ranui Toatoa, for and on behalf of Mana Ahuriri Inc

**WAI 1454**

**Counsel:** R Zwaan

**Parties:** Sharon Barcello-Gemmell, Harvey Ruru, and Jane duFeu on behalf of Te Atiawa ki te Tau Ihu

**Claim name:** Water rights claim

**WAI 1455**

**Counsel:** T Afeaki

**Parties:** Hoane Titari John Wi and others of Ngāti Tūtakamoana o Ngāti Maniapoto, Ngāti Rora o Ngāti Maniapoto, Te Rohe Pōtae

**WAI 1467**

**Counsel:** A Sykes and T Wara

**Parties:** Te Hapai Robert Ashby and Gail Rika, for and on behalf of Ngā Uri o Mangakahia

**Claim name:** Pakotai School and Village claim



**WAI 1477**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Emma Gibbs-Smith, for and on behalf of herself, her whānau, and the hapū of Ngāre Raumati, Ngāti Kawa, and Ngāti Rahiri of Ngāpuhi

**WAI 1480**

**Counsel:** D Naden and C Upton

**Parties:** Noeline Tanya Nola Rangitaiapo Henare, for and on behalf of Ngāti Pahere, a hapū of Ngāti Maniapoto

**WAI 1522**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Esther Horton, for and on behalf of herself, her whānau, and the hapū of Ngāti Hineira, Te Uri Taniwha, Te Whanau Whero, and Ngāti Korohue of Ngāpuhi

**WAI 1524**

**Counsel:** David Stone and R Wills

**Parties:** Hineamaru Lyndon and Louisa Collier, for and on behalf of the descendants of Pomare Kingi

**WAI 1526**

**Counsel:** J Pou

**Parties:** Professor Patu Hohepa and Rudy Taylor, for and on behalf of the whānau and hapū of Hokianga

**Claim name:** Te Mahurehure claim

**Counsel:** J Pou

**Parties:** Te Ariki Morehu, kaumatua of Ngāti Makino

**WAI 1531**

**Counsel:** D Naden and C Upton

**Parties:** Te Enga Harris, for and on behalf of herself, her whānau, and members of Ngāti Rangi, Ngāti Here, Ngāi Tupoto, Ngāti Hohaitoko, Ngāti Kopuru, Te Rarawa, and Ngāti Uenuku

**Claim name:** Land alienation and wards of the state (Harris) claim

**WAI 1534**

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Janet Maria (Paki) King, , for and on behalf of the descendants of John Gilbert Paki and Rina Whawhokia Reti

**Claim name:** Okapu c block (King) claim

**Appi**

**WAI 1541**

**Counsel:** T Afeaki

**Parties:** Louisa and Fred Collier, for and on behalf of themselves and the descendants of Hinewhare

**WAI 1623**

**Counsel:** M Sinclair and C Beaumont

**Parties:** Turoa Karatea, for and on behalf of Ngāti Rangatahi kei Rangitikei and Te Hiiri o Mahuta Marae

**WAI 1627**

**Counsel:** Moana Sinclair

**Parties:** Brigitte Te Awe Awe-Bevan, for and on behalf of herself and the Te Awe Awe hapū of Rangimārie Marae, Rangiotū

**WAI 1629**

**Counsel:** L Thornton

**Parties:** Vivienne Taueki, for and on behalf of herself and the descendants of Taueki and Muaūpoko ki Horowhenua

**Claim name:** Muaūpoko (the descendants of Taueki) claim

**WAI 1631**

**Counsel:** L Thornton

**Parties:** Charles Rudd and the beneficial owners of Lake Horowhenua (Te Waipunahau), Hokio Stream, and Hokio Beach

**WAI 1632**

**Counsel:** Moana Sinclair

**Parties:** Hari Benevides, Wilson Ropoama, Graham Smith (Pohe hapū), and the descendants of Ropoama Pohe

**Counsel:** M Sinclair and C Beaumont

**Parties:** Wilson Ropoama Smith and whānau

**Counsel:** R Smail

**Parties:** Trustees of the Ngāti Pāhauwera Development Trust

**Counsel:** Damien Stone

**Parties:** The trustees of Tauhara North 2A, 2B, and 2C and the Tauhara North No 2 Trust

**WAI 1666**

**Counsel:** L Thornton

**Parties:** Ani Taniwha, for and on behalf of herself and Ngā Uri o te Pona, Ngāti Haiti, Ngāti Kawau, Ngāti Kawhiti, Ngāti Kahu o Roto Whangaroa, Ngāti Tupango, Te Uri o Tutehe, Te Uri Mahoe, and Te Uri Tai hapū of Te Tai Tokerau

**WAI 1673**

**Counsel:** T Afeaki

**Parties:** Louisa Collier, for and on behalf of Ani Taniwha and Rihari Dargaville and on behalf of Ngāti Kawau

**WAI 1681**

**Counsel:** T Afeaki

**Parties:** Popi Tahere, for and on behalf of himself and on behalf of Ngā Uri o Te Aho

**WAI 1699**

**Counsel:** J Mason and P Agius

**Parties:** Haami Piripi, for and on behalf of Te Rarawa

**Claim name:** Tangonge (Kaitaia Lintel) claim

**WAI 1701**

**Counsel:** J Mason and P Agius

**Parties:** Haami Piripi, for and on behalf of Te Rarawa

**Claim name:** Te Rarawa (Piripi) claim

**WAI 1716**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Ian Mitchell, for and on behalf of himself, his whānau, and the hapū of Ngāti Hineira and Te Uri Taniwha of Ngāpuhi

**WAI 1722**

**Counsel:** T Afeaki

**Parties:** Iris Niha, for and on behalf of herself and on behalf of Ngā Uri of Te Ururoa, Kawiti, Tirarau, Hoori, and others

**WAI 1738**

**Counsel:** M McGhie

**Parties:** Rufus Bristol, for and on behalf of the non-sellers of the Waimarino stock

**App:**

**WAI 1787**

**Counsel:** R Zwaan

**Parties:** Hinehou Polly Leef, Mekita Te Whenua, Richard Wikotu, Rocky Ihe, and Kahukore Baker, for and on behalf of the Whakatohea hapū, Rongopopoia ki Upokorehe.

**Claim name:** Rongopopoia hapū claim

**WAI 1789**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Bella Savage and Waipae Perese, for and on behalf of themselves, their whānau, and the hapū of Te Whānau ā Te Harāwaka and Te Whānau ā Hine Te Kahu of Te Whānau ā Apanui iwi

**WAI 1826**

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Daniel Toto, his whānau and descendants of his tupuna, Toto Whānau (Wairarapa, East Coast, Waikato, and King Country)

**Claim name:** Tekikiri Meroiti Haungurunguru Toangina Toto Whānau Trust claim

**WAI 1835**

**Counsel:** A Sykes

**Parties:** Lewis Winiata, Ngahapeaparatuae Lomax, Herbert Steedman, Patricia Cross, and Christine Teariki, for and on behalf of themselves and the descendants of Ngāti Paki and Ngāti Hinemanu

**WAI 1857**

**Counsel:** David Stone, Brooke Loader, and Catherine Leauga

**Parties:** Sheena Ross, Vivian Dick, Muriel Faithful, and Miriam Ngamotu, for and on behalf of their whanau, Ngāti Korokoro, and Te Pouka, and Garry Hooker, for and on behalf of his whanau and Ngāti Pou

**WAI 1868**

**Counsel:** A Sykes

**Parties:** Oruamatua Kaimanawa block (Hoet) claim

**WAI 1908**

**Counsel:** R Zwaan

**Parties:** Christine Wallis and others

**Claim name:** Wallis whanau claim

**Counsel:** R Zwaan

**Parties:** Te Atiawa Manawhenua Te Tau Ihi Trust

**WAI 1940**

**Counsel:** B Gilling and A Paterson

**Parties:** Jane Mihingarangi Ruka Te Korako and Robert Kenneth McAnergney, for and on behalf of the Grandmother Council of the Waitaha Nation, Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka

**WAI 1944**

**Counsel:** HT Nahu

**Parties:** Te Kenehi Teira, Michael Whareaitu, Johnny McGregor, Tracey Stretch, Rangitewhiu Jury, Kararaina Te Ira, Heemi Te Peeti, Hinekura Hemi, Huataki Whareaitu, Vance McGregor, Wayne McGregor, Christine Miritana, Pania Taylor, Heta Taylor, Tania Hippolite, Kim Hippolite, Kim Woon, Toha Eparaima, and Puhi-Carlotta Campbell, for and on behalf of themselves and Ngāti Hinemata, Ngā Uri o Tukumarū, Ngāti Ngakohua, Ngāti Wairangi, Ngāti Ira, Ngāti Te Momo, Ngāti Takihiku, Ngāti Ngarongo, Ngāti Te Ringa (collectively known as Takihiku–Ngaronga–Hinemata)

**Counsel:** HT Nahu

**Parties:** Proprietors of Taheke 8c and Adjoining Blocks Inc

**WAI 1962**

**Counsel:** D Naden and C Upton

**Parties:** Mona Thompson and Ron Wi Repa, for and on behalf of themselves, Ngāti Rakai, Ngāti Waimauku, Ngāti Waikorara, Ngāti Mihi, Ngāti Waiora, Ngā Uri o Pehira Keepa, and Ngā Uri o Wi Repa

**Claim name:** Te Kaha hapū (Thompson and Wi Repa) claim

**WAI 1968**

**Counsel:** D Naden and C Upton

**Parties:** Reuben Taipari Mare Porter, for and on behalf of himself, his whānau, and members of the Kaitangata, Ngā Tahawai, and Whānau Pani hapū of Northland

**Claim name:** Tutamoe Pa claim

**WAI 1992**

**Counsel:** D Naden and C Upton

**Parties:** Piriwhariki Tahapeehi, for and on behalf of Ngāti Mahanga, Ngāti Tamaoho, and Ngāti Apakura

**Claim name:** Tahapeehi lands claim

**WAI 2000 (INCL WAI 1886)**

**Counsel:** D Naden and C Upton

**Parties:** Chappy Harrison, for and on behalf of the Harihona whānau and Ngāti Tara, and Robert Gabel, for and on behalf of the descendants of Ngāti Tara, a hapū of Ngāti Kahu

**Claim name:** Ngāti Tara (Gabel) claim

**Appi**

**WAI 2003**

**Counsel:** K Taurau

**Parties:** Cheryl Turner, John Klaricich, Harerei Toia, Ellen Naera, Fred Toi, Warren Moetara, and Hone Taimona, for and on behalf of the hapū of Ngāti Korokoro, Ngāti Wharara, and Te Pouka

**WAI 2006**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Priscilla Sandys, for and on behalf of herself, her whānau, the hapū of Ngāti Raka of Ngāi Tūhoe, and the iwi of Ūpokorehe and Whakatōhea

**WAI 2010**

**Counsel:** L Thornton

**Parties:** Justyne Te Tana, for and on behalf of herself and Pera Tuporo, Henare Tuporo 1, Henare Tuporo 2, Wiremu Tuporo, Winiata Tuporo, Pera Tuporo Taniwha Taipari, Talia Tuporo Taniwha, Cogan Tuporo Taniwha Parslow, Anahera Tuporo Taniwha, and Zavier Tuporo Taniwha Te Tana

**Claim name:** Taniwha and others lands claim

**WAI 2063**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Jasmine Cotter-Williams, for and on behalf of herself, her whānau, and Ngāti Taimanawaiti iwi

**WAI 2139**

**Counsel:** Tom Bennion and E Whiley

**Parties:** Muaūpoko Tribal Authority

**Claim name:** Muaūpoko lands and resources (Greenland) claim

**Counsel:** P Beverley and D Randal

**Parties:** Contact Energy Ltd

**Counsel:** C Bidois

**Parties:** The trustees of Ngāti Tahu Tribal Lands Trust (Rangimarie Ngamotu, Aroha Dawn, Geraldine Campbell, Roger Pikia, and Amanda Forrest)

**Counsel:** R Boast

**Parties:** Ngāti Hineuru Inc

**Counsel:** J Braithwaite

**Parties:** Ian Perry and the trustees of the Ngāti Kahungunu ki Wairarapa-Tāmaki Nui a Rua Trust

**Counsel:** L Burkhardt  
**Parties:** TrustPower Ltd

**WAI 2149**

**Counsel:** L Thornton  
**Parties:** Julie Tamaia Taniwha, for and on behalf of Ngā Uri o te Pona  
**Claim name:** Ngā Uri o te Pona waahi tapu claim

**WAI 2171**

**Counsel:** D Naden, C Upton, and R Autagavaia  
**Parties:** Hori Chapman, for and on behalf of himself, his whānau, and the hapū of Kohatutaka, Ihutai, and Ngāti Kiore of Ngāpuhi

**WAI 2179**

**Counsel:** T Afeaki  
**Parties:** Rihari Dargaville for and on behalf of Ngarui Dargaville, Harry Te Awa, Jan Dunn, Ngā Uri o Tama, and Tauke Te Awa

**WAI 2197**

**Counsel:** T Wara  
**Parties:** Oma Heitia, for and on behalf of herself and the descendants of Hare Reweti Rongorongo

**Counsel:** T Wara

**Parties:** Wairangi Whata and Willie Emery, for and on behalf of themselves and the beneficiaries of the Waitangi No 3 Trust

**WAI 2206**

**Counsel:** D Naden, C Upton, and R Autagavaia  
**Parties:** Charlene Walker-Grace, for and on behalf of herself, her whānau, and the iwi of Te Taou

**WAI 2244**

**Counsel:** R Zwaan  
**Parties:** Merehora and Peter Pokai Taurua, for and on behalf of Ngāti Rahiri, Ngāti Kawa, Ngāti Manu, Ngāti Rangi, Ngāti Rehia, Ngāti Kuri, Ngāti Manu, Ueoneone, Parawhau hapū, and Ngā Puhi iwi

**Counsel:** R Zwaan

**Parties:** Te Rūnanga o Ngāti Manawa

**Appi**

**Counsel:** R Zwaan

**Parties:** Te Upokorehe Treaty Claims Trust

**WAI 2291**

**Counsel:** D Naden and C Upton

**Parties:** Raymond Fenton and Gordon Lennox, for and on behalf of themselves and Ngāti Apakura

**WAI 2306**

**Counsel:** Unrepresented

**Parties:** Philip Dean Taueki

**Claim name:** Arawhata Stream and Lake Horowhenua urgency

**WAI 2340**

**Counsel:** L Thornton

**Parties:** Te Rarua (Kui) McClutchie-Morrell, for and on behalf of the descendants of Uepohatu and Ngāti Hau hapū whānau

**Claim name:** East Coast airing of grievances hearing claim

**Counsel:** B Vertongen and D Edmunds

**Parties:** Te Rūnanga o Toa Rangatira, Ngāti Toa Rangitira

**Counsel:** B Vertongen

**Parties:** Raukawa Settlement Trust

**WAI 2345**

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Verna Tuteao, for and on behalf of herself and uri of Wetini Mahikai

**Claim name:** Descendants of Wetini Mahikai and Hera Parekawa (Tuteao) claim

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Ngāti Paoa (Hauraki)

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Ngā Uri o Hetaraka Takapuna (North Shore, Mahurangi, and the Gulf Islands)

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Ngā Uri o Ngāti Moetara (Pakanae and Waimamaku)

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Te iti o Mahuta (Taharoa and Kawhia)

**Counsel:** M Taia, Q Duff, S Potter, and T Tarawa

**Parties:** Te Mateawa (Horowhenua)



**WAI 2361**

**Counsel:** Unrepresented

**Parties:** Chris Webber, for and on behalf of the descendants of Utauta Parata, Wi Parata, and Te Ati Awa, Ngāti Toa, and Ngāti Raukawa living in the Kapiti district

**WAI 2362**

**Counsel:** Unrepresented

**Parties:** Roimata Minhinnick of Ngāti Te Ata Waiohua

**WAI 2377**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Nuki Aldridge, for and on behalf of himself, his whānau, the hapū of Ngāti Uru, Ngāti Pakahi, and Te Tahawai of Ngāpuhi, and the Lake Omapere trustees

**WAI 2379**

**Counsel:** Unrepresented

**Parties:** Ngahiwi Tomoana, for and on behalf of all iwi, hapū, whānau, marae, and claimant groups of Ngāti Kahungunu, including Ngāti Pahauwera, Te Tira Whakaemi o te Wairoa, Ngāti Hineuru, Mana Ahuriri Inc, He Toa Takitini, Ngai Tumapuhia a Rangi ki Wairarapa, and Maungahauauru Tangitū

**WAI 2394**

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** John Pikari, for and on behalf of himself, his whānau, the descendants of Hone Karahina, and the hapū of Te Uri ō Hua and Ngāti Torehina of Ngāpuhi

**Counsel:** D Naden, C Upton, and R Autagavaia

**Parties:** Jason Koia, for and on behalf of his whānau and Ruawaipu iwi

**Counsel:** D Naden and C Upton and R Autagavaia

**Parties:** Nick Tupara, for and on behalf of his whanau and the Ngāti Oneone hapū of Te Aitanga a Hauiti iwi

**Counsel:** D Naden and C Upton and R Autagavaia

**Parties:** Tui Marino on behalf of his whānau and Te Aitanga a Hauiti iwi

**NO WAI NUMBER**

**Counsel:** Unrepresented

**Parties:** Cherry Nikora, for and on behalf of Te Maru o Ngāti Wahiao

**Counsel:** Unrepresented

**Parties:** David Te Hurihanganui Whata Wickliffe of Ngāti Tamakari

**Appi**

**Counsel:** Unrepresented

**Parties:** John McEnteer

**Counsel:** Unrepresented

**Parties:** Paula Werohia

**Counsel:** Unrepresented

**Parties:** Tarati Teresa Kinita

**Counsel:** Unrepresented

**Parties:** Te Rangikaheke Bidols, for and on behalf of Ngāti Rangiwewehi

**Counsel:** Unrepresented

**Parties:** Tony Paratene Haupapa

**Counsel:** Unrepresented

**Parties:** Walter Pere Rika

**Counsel:** Unrepresented

**Parties:** Zodiac Holdings Ltd