KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA
I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL WAI 2358

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	the National Fresh Water and Geothermal Resources Inquiry – Stage 3

BRIEF OF EVIDENCE OF JANINE MARY SMITH FOR HEARING ON 1-3 AUGUST 2022

Dated 20 July 2022

CROWN LAW
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I, Janine Mary Smith, Deputy Secretary, of Wellington, state:

INTRODUCTION

1. My name is Janine Mary Smith.

2. I am the Deputy Secretary responsible for the Natural and Built System and Climate Mitigation at the Ministry for the Environment (**MFE**), reporting to the Secretary for the Environment. In this role, I lead the resource management reform programme. I, along with my team, am responsible for the Māori representation proposal that is the subject of this hearing.

3. I am authorised by MFE to provide this evidence on behalf of the Crown.

4. Documents that I refer to in this brief are included in a bundle of documents accompanying this brief.

Overview

5. The Crown views this as a constructive inquiry, and it welcomes findings and recommendations that may assist to provide direction on the way forward for selecting Māori representatives on regional planning committees[1] consistent with the Crown's obligations under Te Tiriti o Waitangi[2].

6. At the outset, it may be useful to set out my understanding of some central issues raised by the claimants and interested parties, namely:

   6.1 A collaborative approach was taken to determine an appropriate mechanism for determining Māori representation on regional planning committees. Broad agreement was reached with Te Tai Kaha ("**TTK**") (including New Zealand Māori Council ("**NZMC**")) as to the relevant criteria for representation options. Options were generated collaboratively and a full range of issues and interests (the same range of information and views reflected in evidence for this hearing) were traversed. Full agreement was not able to be reached on preferred options. There will be no perfect solution, but we consider the proposed process meets the criteria agreed

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1 Referred to in discussions and documents variously as NBA committees or joint committees.

2 For the purposes of this brief of evidence, te Tiriti means te Tiriti o Waitangi / Treaty of Waitangi and its principles.

upon. The evidence of Keita Kohere details the engagement that we undertook with TTK and other Māori organisations or representative groups on these matters.

6.2 The representation process is not structured around "Post Settlement Governance Entities ("**PSGE**s") only". Iwi authorities and groups representing hapū (who wish to be involved) are to lead the process. It is up to Māori to determine their process (subject only to three key parameters regarding inclusivity, existing rights and interests, and timing (see paragraph [39] below)). Funding and support will be provided but it is not a Crown-driven or determined process or outcome – nor should it be.

6.3 The premise that it is for Māori to determine how they wish to be represented has been a constant thread throughout this process and is not disputed, there are however multiple views on how that should be implemented. The process proposed is sufficiently flexible that most, if not all, of the scenarios proposed in claimant evidence could occur (for example NZMC or a District Māori Council could form part of an appointing body).

6.4 In having to make a judgement on the mechanism to determine Māori representation on regional planning committee, we sought to strike a balance between providing for self-determination and greater inclusion for Māori groups, while also recognising the need for a low level of prescription to ensure the efficacy of the new system as a whole.

6.5 The Crown has duties to ensure the efficacy of the system as a whole and to uphold the integrity of commitments it has made to Māori (including, but not limited, those made through settlements). I note that much of the claimant evidence does not deny that, along with others, PSGEs have a legitimate role.[3]

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[3] Wai 2358 #H007 Expert Brief of Evidence of Hon Tā Taihākurei Durie on Behalf of the New Zealand Māori Council dated 8 July 2022 at [101].

7. From my perspective, there is substantive agreement on many of the matters covered in the claims and evidence. The key differences in view are:

7.1 Whether it is appropriate for iwi authorities and groups representing hapū to be the starting point for the appointing body discussion (and for wider interest holders or other representative groups' involvement to be facilitated by iwi and hapū rather than led by those representative groups themselves). The proposal locates the starting point at this level for workability reasons and as iwi and hapū are recognised existing representative groupings, along with others. The workability of the proposed options was based on an assessment of the balance sought to be struck between self-determination, greater inclusion of Māori groups, whilst also providing for some regional leadership, and the least amount of prescription required.

7.2 The degree to which that process needs to be prescribed. The proposal is that the process be left to Māori to determine, with minimal prescription (including that iwi authorities and hapū representative organisations leading the discussions must engage with their members and other Māori entities representing rights and interests 'at-place').[4]

7.3 The level of Crown involvement in designing the system. Whilst respecting and enabling rangatiratanga through prescribing processes to the minimal effective level, we have been cognisant that kāwanatanga duties and obligations are not passive and involve responsibility for the efficacy and workability of the natural resources governance system as a whole.

8. I have been briefed on, or read the evidence submitted on behalf of claimants and interested parties. The evidence reflects the discussions that

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[4] See "Agenda: RM Reform Ministerial Oversight Group Meeting #17 — Paper 2: Role, funding and participation of Māori in the RM System" (12 April 2022) at [56] (MFE.001.1252 at MFE.001.1388) (**CB463** at **CB-543**); and "Minute: RM Reform Ministerial Oversight Group Meeting #17" (12 April 2022) at 12, [4] (MFE.002.1202 at MFE.002.1213) (**CB-306 at CB-311**): "note that...there will be a requirement on the iwi and hapū representative organisations to engage with their members and other Māori entities representing rights and interests at place in the region, in determining composition and Maori-appointed membership".

have occurred over time. I welcome that dialogue continuing through this hearing and constructive suggestions the Tribunal can assist in bringing to light. The central importance of the natural resources sector to Māori is recognised. A primary objective of the reforms is to give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.[5] All parties are aware that the reforms are significant; include substantive, meaningful, and much-needed improvements; and are subject to increasingly tight timing.

9. I note that some of the terminology used in my brief is not uniform throughout and instead reflects the policy recommendations or decisions which referred to those terms at that stage of the decision-making process, for example "iwi and hapū" representative organisations or "iwi authority and groups that represent hapū".

Structure of my evidence

10. In this evidence I:

10.1 outline the reform process to date;

10.2 explain the decisions that have been made on the question of Māori representation on Natural and Built Environments Act (**NBA**) regional planning committees;[6]

10.3 set out the reasons for those decisions and how those decisions were informed by reference to engagement with Māori (my evidence touches only lightly on engagement. As previously noted Keita Kohere's evidence addresses engagement in more detail);

10.4 identify decisions yet to be made and the process for updating the Tribunal on them.

11. This evidence focusses solely on Māori representation on the proposed regional planning committees, in accordance with the scope set for this hearing by the Tribunal.

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5 Reform Objective 3.

6 "NBA committees" within this paper refers to the regional planning committees to be established. The term does not include the National Māori Entity that is also being established (which is not in scope for this hearing).

12. I note that:

12.1 The description of the new system that I set out below is based on the policy decisions made (or, in some cases, recommended in advice but not yet decided) by the executive Government. Whether it in fact comes into effect depends of course on it being adopted by Parliament. I note that changes may also be made during the Parliamentary process.

12.2 The policy process is underway in parallel to this litigation. I will update the Tribunal by way of supplementary brief of evidence and/or at the hearing as to further relevant developments since the completion of this brief of evidence.

13. Given the time available for this evidence preparation, I respond generally throughout this evidence to the evidence filed by the claimants and interested parties to these proceedings rather than making specific responses.

PART 1: RESOURCE MANAGEMENT REFORM (OVERVIEW AND BACKGROUND)

Commencement of reform

14. The Government is seeking to reform the resource management system this parliamentary term, based on the review of New Zealand's resource management system by an expert panel (**Panel**) led by the Hon. Tony Randerson QC. The other Panel members were: Rachel Brooking; Dean Kimpton; Amelia Linzey; Raewyn Peart MNZM; and Kevin Prime MBE ONZM. The Panel's report *New Directions for Resource Management in New Zealand* was published in July 2020 (the **Randerson report**).

15. The Randerson report was compiled after extensive engagement with local government, industry, the primary production sector, environmental non-government organisations and Māori organisations. It followed earlier reports into, and commentary, on the Resource Management Act 1991 (**RMA**) including by the Waitangi Tribunal, the Productivity Commission, Local Government New Zealand, Environmental Defence Society, Infrastructure New Zealand, the Employers and Manufacturers Association

and the Property Council. The Minister for the Environment established three reference groups to support the Panel: te ao Māori, Natural and Rural Environments, and Built and Urban Environments. The Panel itself also established a number of working groups, coordinated by MFE officials, to focus on key policy areas: climate change; spatial planning; environmental outcomes and limits; te ao Māori; and economic instruments.

16. The Randerson report recommended that the RMA be repealed and replaced by three new pieces of legislation:

16.1 A Natural and Built Environments Act to provide for land use and environmental regulation;

16.2 A Strategic Planning Act (**SPA**) to integrate with the other legislation relevant to development and require long-term regional spatial strategies; and

16.3 A Managed Retreat and Climate Change Adaptation Act to support New Zealand's response to the effects of climate change.

17. The Report recommended that joint planning committees include appointees from the regional council, constituent territorial authorities and mana whenua within the region. In making this recommendation they acknowledged that, for some regions, having a representative from every iwi or hapū with mana whenua in the region would mean committees are simply too large to function. Where this was the case, they considered that delegates would have to represent the interests and perspectives of more than one group. Because committees could not be fully representative of every iwi and hapū in the region, they considered it important to use consensus-based decision-making, as well as preserve the ability of groups to make submissions and be heard by the Independent Hearings Panel, and have standing to appeal decisions.[7]

18. After the formation of the Government in 2020, Cabinet agreed to proceed with resource management reform on the basis of the Panel's

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7 Randerson Report, p 239.

recommendations in the Randerson report, although noted that further work and refinement would be needed in some areas.

Progress of reform

19. Before turning to the detail of the representation issue, I set out the broad reform process to date as context. In order to pass the NBA in the current term, Cabinet agreed to:[8]

19.1 develop an exposure draft of parts of the NBA for consideration by a select committee inquiry;

19.2 establish a Ministerial Oversight Group (**MOG**)[9] to work through policy details needed to progress the NBA and other legislation; and

19.3 engage with iwi/Māori to refine policy options as proposals are developed.

20. Cabinet agreed to the following objectives to guide the reform process, to:

20.1 protect and where necessary restore the natural environment (including its capacity to provide for the wellbeing of present and future generations);

20.2 better enable development within biophysical limits, including a significant improvement in housing supply, affordability and choice, and timely provision of appropriate infrastructure, including social infrastructure;

20.3 give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori;

20.4 better prepare for adapting to climate change and risks from natural hazards, and better mitigate emissions contributing to climate change;

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8 Cabinet Paper "Reforming the resource management system" (14 December 2020). (MFE.001.0001) (**CB-001**).

9 Chaired by the Hon Grant Robertson, Minister of Finance, the Ministerial Oversight Group comprises Hon David Parker, Minister for the Environment (Deputy Chair); Hon Kelvin Davis, Minister for Maori Crown Relations: Te Arawhiti Hon Megan Woods, Minister of Housing; Hon Nanaia Mahuta, Minister of Local Government; Hon Poto Williams, Minister for Building and Construction; Hon Damien O'Connor, Minister of Agriculture; Hon Willie Jackson, Minister for Maori Development; Hon Michael Wood, Minister of Transport; Hon Kiritapu Allan, Minister of Conservation; Associate Minister for the Environment and Associate Minister for Arts, Culture and Heritage; Hon Phil Twyford, Associate Minister for the Environment; Hon James Shaw, Minister for Climate Change.

20.5 improve system efficiency and effectiveness, and reduce complexity, while retaining appropriate local democratic input.

21. An exposure draft, the part of the Natural and Built Environments Bill broadly equivalent to Part 2 of the RMA, was developed that has been considered by the Environment Select Committee. The exposure draft was premised on the Randerson Report and was necessarily high level (including in reference to regional representation for Māori).[10]

22. On 1 November 2021, the Environment Select Committee reported to the House of Representatives on its Inquiry into the Natural Built and Environments Bill: Parliamentary Paper.

23. In response to the Select Committee Inquiry:

23.1 the Government presented a paper to the House on 17 February 2022 responding to any recommendations of the Committee in the Report;[11] and

23.2 the Report on the Inquiry was debated in the House on 11 May 2022.

24. MFE are working towards September 2022 for introduction of the full Natural Built and Environments Bill, to ensure it is passed in this term of Government. However, the current position is that introduction is more likely to occur in October. There are some policy decisions that are still in the process of being made but drafting instructions are being finalised and drafting is proceeding in parallel. As explained in my earlier affidavit, time is very tight to finalise the last details and ready the Bill for introduction to ensure its passage in this term of Government, and intensive work is underway to achieve this goal.

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10 I note several claimant or interested party witnesses comment adversely on the lack of detail about regional representation appointment processes in the exposure draft. I further note that the exposure draft is currently the only draft available to the public.

11 Office of the Minister for the Environment "Government Response to Report of the Environment Committee on the Inquiry on the Natural and Built Environments Bill: Parliamentary Paper" (J.1, 17 February 2022): available at <https://www.parliament.nz/en/pb/papers-presented/current-papers/document/PAP_119748/government-response-to-report-of-the-environment-committee>.

Treaty settlements and other arrangements

25. Before turning to the decisions that have been made, I wish to address a key premise within the reforms that has relevance to the issues claimants raise.

26. Where existing Treaty settlement mechanisms, or mechanisms for natural resource arrangements under the RMA, enable or provide for joint development of regional and district planning documents, specific arrangements will need to be provided for. This may include direct representation of those parties on NBA or SPA committees, or for direct input into the decision-making processes of those committees. Ongoing work is being undertaken with PSGEs and other groups to ensure the obligations under their existing arrangements are provided for under the new system.

27. Discussions between the Crown and PSGEs as to how treaty settlements may be transitioned to the new system are ongoing. In many cases, it is not possible to identify 'like for like' redress under the new system. In some settlements, further decisions and particular arrangements, including in relation to decision making on plans (and regional planning committees) are likely to need to be provided for. It is expected that this will be done by way of agreed amendments to settlement legislation, although it is possible some further changes to the NBA and SPA may be required. Further decisions will be sought from Ministers on these matters if, and when, agreement is reached with PSGEs.

28. These issues and processes intersect, but do not overlap entirely, with the regional planning committee representation issue. These discussions are running in parallel.

PART 2: DECISIONS – MĀORI REPRESENTATIVES ON NBA REGIONAL PLANNING COMMITTEES

Context: Māori involvement in RM system through the NBA

29. The decisions on Māori representation are part of a broader commitment in the reforms to effective Māori participation across the system, including the

broader objective to give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.[12]

30. Regional planning committees, and Māori representation on them, form only one part of the proposed systemic reform. This brief should be read with awareness that Māori voices and interests are to be reflected in multiple ways across the reform as a whole, not only through the regional planning committees.[13]

31. Under the NBA, both iwi authorities and groups that represent hapū will be entitled to undertake specific roles on behalf of iwi and hapū (this compares to the current legislation where hapū have not had such recognition).

32. There are also instances where it is appropriate to specifically consider and provide for the interests of other Māori groups or interest holders in addition to iwi authorities and groups representing hapū. This is because we recognise the interests held and exercised by them, and have been told through engagement that there is a diverse range of ways in which Māori choose to organise themselves in modern society, and that a one-size fits all approach based only on iwi and hapū will not reflect Māori rights and interests at place. These groups may include but are not necessarily limited to:[14]

    32.1 Whakapapa-based groups (in addition to iwi and hapū) such as whānau, owners of Māori land, and/or customary rights holders.

    32.2 Owners of Māori land.

    32.3 Holders of specific customary rights such as Customary Marine Title and Protected Customary Rights groups.

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12 RMA Reform Objective 3.

13 For example, for context and in brief given these matters are not in scope for this hearing, this includes a National Māori Entity, participation in plan-making and resource consenting under the NBA; and further opportunities for direct participation locally, including through Mana Whakahono ā Rohe and Joint Management Agreements. There will be new participation opportunities for Māori groups with relevant interests 'at place' including participation opportunities for Māori as individuals through public participation processes.

14 See, for example, Briefing to Minister "Delegated Decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192 at 5, [16] (MFE.001.1747 at MFE.001.1751) (**CB-371 at CB-375**).

32.4 Mātāwaka and Māori community groups (e.g. urban Māori, the New Zealand Māori Council).

32.5 Groups, and natural taonga with legal personality who hold rights and interests deriving from the settlement of Treaty of Waitangi claims.

Overview of NBA regional committees

33. MOG Ministers have decided that NBA regional planning committees will be established in all regions, bringing together local government and Māori as decision-makers on plans, consistent with the wider objectives for the reform. They will be autonomous decision-making bodies, tasked with preparing an NBA plan covering every local authority in the region. They will have an enduring role to monitor and support the implementation (including plan changes) of the NBA plans.

34. Appointing bodies are the bodies that will appoint one or more individuals to the regional planning committee. The appointing bodies will be:

34.1 all the local authorities in the region;

34.2 the Minister (who appoints one central government representative for decision-making on SPA matters only) and;

34.3 the groups selected by the iwi authorities and groups representing hapū in the region (after having gone through a process where they must engage with those that affiliate to the iwi and hapū, as well as with other Māori groups with interests whose area of interests overlaps with the region in question).

35. The number and form of the appointing bodies is to be determined regionally (and in the case of Māori, by Māori through the process referenced in the section immediately below).

Representation and appointment of Māori members

36. At a high level, and following careful consideration of policy advice and information received following engagement with Māori, on 12 April 2022 MOG Ministers reached the following decisions in respect of the

appointment process for Māori representation on regional planning committees:[15]

36.1 The process of determining regional representation is initiated by the Local Government Commission ("**LGC**");

36.2 iwi authorities and groups representing hapū are identified as the entities to be engaged with in discussions on representation on regional planning committees – that is, they will lead and facilitate their region's discussion as to how it wishes to appoint its representatives;[16]

36.3 iwi authorities and groups representing hapū must, within their regions, engage with their members and other Māori entities representing rights and interests 'at-place' in agreeing composition and identifying appointing bodies (this would include those listed at paragraph [32] above).

36.4 there will be requirements on iwi and hapū representative organisations to maintain a record of engagement on appointment discussions and to make this record publicly available;[17]

36.5 for the avoidance of doubt, Māori entities, other than iwi and hapū representative organisations, can also be appointing bodies. This could include NZMC or FOMA;[18]

36.6 If iwi and hapū representative organisations cannot agree on appointing bodies, dispute resolution processes and a circuit breaking mechanism will be available. (I note that the Ministers are currently considering options for the circuit breaking mechanism.)[19]

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15 The MOG agreed that the SPA committee and the NBA committee will be two separate committees with different functions: at 13, [4] (MFE.001.1252 at MFE.001.1307) (**CB-426 at CB-453**).

16 MFE.001.1252 at MFE.001.1388 (**CB-426 at CB-506**), [56(a)].

17 MFE.001.1252 at MFE.001.1389 (**CB-426 at CB-507**), [56(c)].

18 MFE.001.1252 at MFE.001.1389 (**CB-426 at CB-507**), [56(d)].

19 Briefing to Minister "Delegated Decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192 Appendix 1, at recommendations 7 – 30 (MFE.001.1747 at MFE.001.1764–MFE.001.1770) (**CB-371 at CB-388–CB-394**).

36.7 appointing bodies must be enduring and capable of developing and executing their own appointment and removal processes.[20]

37. A flow chart setting out the proposed appointment process for Māori representation on the NBA regional planning committees is appended as **Schedule 1** of this brief (noting that some decisions are still pending in relation to aspects of that process).

38. The proposals aim to provide for iwi/hapū/Māori to self-identify who will represent them in resource management processes.[21]

39. Following these MOG decisions, decision-making on the detail was delegated to Ministers Parker, Davis, Mahuta, Jackson and Allan. The following policy recommendations are currently before the Ministers awaiting decision:

39.1 the legislation will not prescribe who, from the notified iwi authorities and groups that represent hapū in the region, will make decisions on appointing bodies or how these organisations decide to organise themselves to make decisions on appointing bodies.[22]

39.2 when determining appointing bodies, iwi authorities and groups that represent hapū in the region must take into account legislative considerations including:[23]

39.2.1 existing arrangements between iwi/hapū/Māori groups and arrangements with local government;

39.2.2 providing for appropriate representation of Māori groups with interests at place (as referred to at para [32] above). The list of entities that could hold interests at place is not

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20 MFE.001.1252 at MFE.001.1389 (**CB-426 at CB-507**), [56(e)] .

21 MFE.001.1252 at MFE.001.1382 (**CB-426 at CB-500)**, [4].

22 BRF 1562 RM Reform 192 "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees", Appendix 1, at recommendation 3 ((MFE.001.1747 at MFE.001.1764–MFE.001.1765) (**CB-371 at CB-388–CB-389**).

23 BRF 1562 RM Reform 192 "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees", Appendix 1, at recommendation 5. (MFE.001.1747 at MFE.001.1765) (**CB-371 at CB-389**).

exhaustive. Who actually holds relevant interests at place will vary between regions;

39.2.3 ensuring that appointing bodies will be able to fulfil their ongoing roles and functions.

39.3 As noted at para [34] above, appointing bodies are tasked with making one or more appointments to regional planning committees. In relation to iwi authorities and groups that represent hapū, the process by which they determine the appointing bodies and make the appointments is self-determined, though there are some requirements. The requirements are that before decisions on composition and appointing bodies are agreed, the iwi authorities and groups that represent hapū must:

39.3.1 engage with those that affiliate to the iwi and hapū, as well as with other Māori groups with interests whose area of interests overlaps with the region in question;[24] and

39.3.2 maintain a record of this engagement and make this record publicly available;[25] and

39.3.3 take into account the considerations in para [39.2] above.[26]

39.4 They are also required to reach a decision on the appointing bodies by the statutory deadline, which will be 10 months prior to the date of committee establishment.[27] This timeframe is designed to allow seven months for any disputes relating to either the composition arrangement or appointing bodies to be resolved and three months for the appointing bodies to make appointments. If any disputes cannot be resolved within the seven month period, the LGC can confirm the composition arrangement for the planning committee,

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24 MFE.001.1252 at MFE.001.1273 (**CB-426 at CB-437**), recommendation [56(b)].

25 MFE.001.1252 at MFE.001.1273 (**CB-426 at CB-437**), recommendation [56(c)].

26 BRF 1562 RM Reform 192 "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees", Appendix 1, at recommendation 4 and 5. (MFE.001.1747 at MFE.001.1765) (**CB-371 at CB-389**).

27 This date will be set out in secondary legislation and will depend on what tranche the region is in. For instance, it allows for phased implementation.

without all the appointing bodies being confirmed (to be clear, this means the committee will begin operating at that point without the involvement of any groups that have not confirmed their appointing body). The confirmed appointing bodies will be able to proceed with their appointments so that the committee can commence the plan making process without any further delay.

39.5 The planning committee may also commence despite some seats remaining vacant and/or appointing bodies not being identified.[28] This can occur in a situation where all of the following circumstances are met:

39.5.1 the deadline for dispute resolution has passed (note instructions not provided for this yet);[29] and

39.5.2 the LGC has received or made a determination in relation to the planning committee composition;[30] and

39.5.3 the 3 month deadline for appointing bodies to make appointments has passed;[31] and

39.5.4 any appeal rights have been exhausted.[32]

39.6 The test for whether a region has successfully agreed to Māori appointing bodies will be that - before the deadline - the regional council receives (and forwards to the LGC) the list of Māori appointing bodies that notes agreement by all notified iwi and hapū groups that participated.[33]

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28 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 recommendation 37 (MFE.001.1747 at MFE.001.1771) (**CB-371 at CB-397**).

29 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 at recommendation 37 (MFE.001.1747 at MFE.001.1771) (**CB-371 at CB-397**).

30 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 at recommendation 38 (MFE.001.1747 at MFE.001.1772) (**CB-371 at CB-398**).

31 MFE.001.1252 at MFE.001.1261 (**CB-426 at CB-435**), [41].

32 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1, page 24, at recommendation 37 (MFE.001.1747 at MFE.001.1771) (**CB-371 at CB-397**).

33 BRF 1562 RM Reform 192 "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees", Appendix 1, page 18, at recommendation 4 (MFE.001.1747 at MFE.001.1765) (**CB-371**

39.7 As noted at subpara [39.4] above, in the event the iwi authorities or groups that represent hapū are unable to reach a decision within the required timeframe, dispute resolution processes and a circuit breaking mechanism will be available.[34]

39.8 Once the Māori appointing bodies are established, there are proposed to be some requirements on how they should operate. The intention of these policies is to ensure that appointing bodies actively protect the rights and interests of all Māori within a region. These requirements are:

39.8.1 Appointing bodies are responsible for representing the views of iwi authorities, groups that represent hapū and Māori groups that hold relevant interests at place in a region generally, rather than just the views of their group or any particular group they might be associated with.[35]

39.8.2 Appointing bodies must undertake processes in a manner that provides for fairness between the iwi authorities, groups that represent hapū and Māori groups that hold relevant interests at place in a region.[36]

39.8.3 In determining appointment processes and appointments, appointing bodies must consult with the iwi authorities, groups that represent hapū and Māori groups that hold relevant interests at place that they represent.[37]

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at CB-389); Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192 at 7, [24] (MFE.001.1747 at MFE.001.1753) (**CB-371 at CB-377**); Officials did not recommend that the legislation prescribe what constitutes agreement, noting that this is something more appropriately left for iwi/hapū/Māori to determine themselves and approaches will likely vary between regions.

34 Briefing paper to Minister–"Delegated Decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees", (14 July 2022) BRF-1562 RM Reform 192 Appendix 1, 19-23 at recommendations 7 – 30 (MFE.001.1747 at MFE.001.1764–MFE.001.1770) (**CB-371 at CB-388–CB-394**).

35 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 at recommendation 40 (MFE.001.1747 at MFE.001.1773) (**CB-371 at CB-397**).

36 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1at recommendation 41 (MFE.001.1747 at MFE.001.1773) (**CB-371 at CB-397**).

37 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 at recommendation 42 (MFE.001.1747 at MFE.001.1773) (**CB-371 at CB-397**).

39.8.4 Appointing bodies must notify iwi authorities, groups that represent hapū and Māori groups that hold relevant interests at place that they represent of upcoming consultation no less than a week before consultation is due to occur and in a manner that is appropriate and consistent with tikanga (noting that this may vary between groups).[38]

40. A committee must be confirmed at least two years prior to the strategy or plan notification. This allows time for:

40.1 Establishment: three months for committee establishments (including agreeing chairing agreements, appointing director of the secretariat, agreeing standing orders and code of conduct)

40.2 Drafting: A minimum of two years for drafting strategies or plans before notification.

41. Also relevant are the following decisions required from the Ministers on describing Māori representative organisations and record keeping requirements, and on regional governance and decision-making arrangements:[39]

41.1 In relation to the descriptions of Māori representative organisations, it is proposed:

41.1.1 as per the status quo, the terms 'iwi' and 'hapū' will not be defined in the SPA and NBA.

41.1.2 the defined term 'iwi authority' in the RMA and the undefined term 'group that represents hapū' in the RMA will be retained for use in the SPA and NBA to describe iwi and hapū representative groups.[40]

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38 Briefing paper to Minister "Delegated decisions on Māori appointment process to Natural and Built Environments and Spatial Planning Committees" (14 July 2022) BRF-1562 RM Reform 192, Appendix 1 at recommendation 43 (MFE.001.1747 at MFE.001.1773) (**CB-371 at CB-397**).

39 Briefing paper to Minister "Delegated decisions for describing Māori representative organisations and record keeping requirements" BRF-1692 RM Reform 189, pages 15-16 at recommendations 1-6 (MFE.001.0120 at MFE.001.0134–MFE.001.0136) (**CB-345 at CB-359–CB-361**).

40 Briefing paper to Minister "Delegated decisions for describing Māori representative organisations and record keeping requirements" BRF-1692 RM Reform 189, pages 15-16 at recommendation 2 (MFE.001.0120 at MFE.001.0134) (**CB-345 at CB-359**).

41.1.3 where Māori groups with interests 'at place' are to be described in the SPA and NBA that the description is broad and non-exhaustive.[41]

41.1.4 Māori representative organisations, for the purposes of the SPA and NBA, must be entities which are authorised to speak and act on behalf of the holders of the holders of relevant interests in relation to resource management.[42]

41.1.5 the Urban Development Act 2020 'Māori entity' definition will be referenced in secondary legislation or guidance as an example of the types of entities which may be considered Māori representative organisations for the purposes of the SPA and NBA.[43]

41.2 In relation to regional governance, it is proposed:

41.2.1 that SPA and NBA committees be established as a single committee responsible for undertaking functions under both the SPA and NBA.[44] This committee will be known as a "regional planning committee".

41.2.2 the LGC will notify local authorities and iwi and hapū representative organisations of the timeframes for committee composition to be agreed and committee establishment as per statutory timeframes.[45]

41.2.3 The Minister/s responsible for the Act (NBA), should have a regulation making power to provide for the following

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41 Briefing paper to Minister "Delegated decisions for describing Māori representative organisations and record keeping requirements" BRF-1692 RM Reform 189, pages 15-16 at recommendation 3 (MFE.001.0120 at MFE.001.0135) (**CB-345 at CB-360**).

42 Briefing paper to Minister "Delegated decisions for describing Māori representative organisations and record keeping requirements" BRF-1692 RM Reform 189, pages 15-16 at recommendation 4 (MFE.001.0120 at MFE.001.0135) (**CB-345 at CB-360**).

43 Briefing paper to Minister "Delegated decisions for describing Māori representative organisations and record keeping requirements" BRF-1692 RM Reform 189, pages 15-16 at recommendation 5 (MFE.001.0120 at MFE.001.0135) (**CB-345 at CB-360**).

44 Briefing paper to Minister "Delegated decisions on regional governance and decision-making arrangements" (13 July 2022) BRF-1716 RM Reform 186, Appendix 1, page 15, at recommendation 2(MFE.001.0146 at MFE.001.0160) (**CB-341 at CB-342**).

45 Briefing paper to Minister "Delegated decisions on regional governance and decision-making arrangements" (13 July 2022) BRF-1716 RM Reform 186, Appendix 1, page 17, at note 11(MFE.001.0146 at MFE.001.0162) (**CB-341 at CB-343**).

statutory deadlines, based on deadlines for notifying strategies and plans:[46]

(a) A deadline by when local authorities and iwi and hapū representative organisations will have to submit their regional proposal via the regional council to the LGC;

(b) A deadline by when the committee must be established by (appointments made and committee operational).

42. As shown in the flow chart at Schedule 1, the process is therefore proposed to be as follows (again noting that these are policy recommendations that have yet to be confirmed by the Ministers):

42.1 Iwi authorities and groups that represent hapū in a region will be notified by the LGC of the deadline for agreeing appointing bodies (this will vary by region).

42.2 Iwi and hapū must within their regions, engage with their members and other Māori entities representing rights and interests 'at-place' in agreeing composition and identifying appointing bodies. Other Māori entities representing rights and interest at place include groups listed at paragraph [32] above. What is relevant and appropriate for each region will vary.

42.3 They can start before formally notified and can seek facilitation at any time.

42.4 If there is agreement to appointing bodies, this is submitted to the regional council to provide to the LGC as part of the regional proposal for committee composition.

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[46] Briefing paper to Minister "Delegated decisions on regional governance and decision-making arrangements" (13 July 2022) BRF-1716 RM Reform 186, Appendix 1, page 18, at recommendation 18 (MFE.001.0146 at MFE.001.0163) (**CB-341 at CB-344**).

43. If iwi authorities and groups that represent hapū cannot agree on appointing bodies, dispute resolution processes and a circuit breaking mechanism will be available.

44. Relatively minimal prescription is applied for the process itself. Subject to three mandatory criteria (at [39.2] above) it is for Māori to determine on a regional basis (through discussions facilitated by iwi authorities and groups representing hapū). Likewise, there is minimal prescription proposed for the dispute resolution processes (see [39.2]). For both processes, Crown support will be provided (including funding).

45. Further details on the Māori appointment process to the NBA regional planning committees, and supporting the Māori role on the secretariat, are still currently being considered by the Ministers (see dispute resolution options discussion at the end of this brief for example).

Summary of participation in process for Māori

46. The legislation for regional planning committee appointment process for Māori representation will provide for:

46.1 iwi and hapū representative organisations to act as the starting point for regional planning committee composition discussions – they will lead and facilitate the regional discussions;

46.2 participation opportunities for other Māori groups with rights and interests related to a particular area, water source, space, and resource 'at place'. For example (and of direct relevance to claims to the contrary):

46.2.1 groups representing hapū hold the same role as iwi in leading/facilitating the process;

46.2.2 requirements on iwi and hapū representative organisations to actively engage with their members and other Māori groups with interests at place during

discussions on composition and appointing bodies for SPA and NBA committees;[47]

46.2.3 the ability for these organisations to request an engagement agreement for an NBA plan process. These groups may include marae-based groups, Māori landowners, whānau, mātāwaka groups or other communities of interest;[48]

46.2.4 roles for expert Māori practitioners. For example, as employees or contributors to NBA regional planning committee secretariats, or as facilitators in dispute resolution processes.

47. The interest holders listed in paragraph [32] will have the opportunity to engage in the regional planning committees appointments process, as above, the legislation will require those leading and facilitating the process to provide that opportunity.

PART 3: REASONS FOR DECISIONS

48. In this section I discuss why the decisions above were made. I accept at the outset that there is no perfect solution, and there are multiple legitimate options. I cover:

48.1 the RMA gaps analysis that informed these proposals;

48.2 the reasons for the balance struck on appropriate level of prescription;

48.3 the criteria applied for developing and deciding on options;

48.4 the reasons for the participation decisions made in relation to;

48.4.1 hapū;

48.4.2 other interest holders; and

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47 MFE.001.1252 at MFE.001.1388 (**CB-426 at CB-506**), [56(a)]–[56(b)]; and MFE.001.1747 at MFE.001.1765 (**CB-371 at CB-389**).

48 MFE.001.1252 at MFE.001.1260–MFE.001.1261 (**CB-426 at CB-434–CB-435**).

48.4.3 PSGEs role;

48.5 relevance of Treaty settlements; and

48.6 decisions currently being made.

49. The Tribunal is well aware of the complexities of developing effective representation systems generally, and specifically in this circumstance for Māori at a regional level. In approaching this task we sought to strike an appropriate respect for, and balance between, Māori determining Māori representation; the range of views we heard and the reasoning behind those views; and the Crown's responsibilities to craft an effective and efficient system that works. On this point, Keita Kohere's evidence traverses the Crown's engagement with Māori. Both of our briefs of evidence traverse the range of views and proposals we heard, and how they are reflected in the decisions made (including the reasoning where particular views did not prevail).

RMA: underlying concerns/considerations including objectives of proposals for who participates from te ao Māori

50. Key issues that have been identified in the current system through engagement with Māori, the Randerson Report and previous findings of the Tribunal and the courts, relating to who "participates" include:[49]

50.1 Ensuring existing rights are recognised;

50.2 Rights and interest holders being excluded: some hapū and other Māori groups who have interests 'at place' (e.g. marae and Māori landowners) continue to be excluded or have participation inappropriately limited;

50.3 Ongoing contests as to rights and interests and the impacts of those contests. For example: claims mana whenua status (without that claimed status necessarily being accepted by others or in accordance with tikanga, leading to uncertainty and creating costs for iwi, hapū and councils);

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[49] MFE.001.1252 at MFE.001.1407 (**CB-426 at CB-521**), [23].

50.4 Government departments and local authorities struggling to strike a balance between providing for effective engagement on national/regional level issues while respecting the mana of iwi and hapū in their rohe;

50.5 Funding arrangements (both centrally and locally) to support Māori participation is varied but generally insufficient, affecting the ability of iwi, hapū and Māori to participate.

51. As part of the policy development process, officials are required to demonstrate how proposals relate to key RM reform objectives. These seek to:[50]

51.1 Give effect to the principles of Te Tiriti and provide greater recognition of te ao Māori, including mātauranga Māori (RM Reform objective 3). To achieve this the future system needs to:

51.1.1 give effect to the principles of Te Tiriti and fully recognise and provide for te ao Māori across all layers of the system;

51.1.2 provide for more effective strategic roles for Māori at every level of the system, consistent with the different rights and interests that Māori have at national, regional and local levels;

51.1.3 uphold Treaty settlements, Takutai Moana rights and other existing natural resource arrangements under the RMA; and

51.1.4 improve the capability and capacity of system actors (including cultural capability).

51.2 improve system efficiency and effectiveness, and reduce complexity, while retaining appropriate local democratic input.[51] To achieve this objective the future system needs to:

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50 MFE.001.1252 at MFE.001.1404 (**CB-426 at CB-518**), [13].

51 RM Reform objective 5.

51.2.1 ensure adequate resourcing is provided for Māori roles and responsibilities;

51.2.2 build in accountability into the system – including system monitoring;

51.2.3 provided for the long-term effectiveness and efficiency of systems and processes by actively supporting implementation.

51.3 ensure the new RM system is implemented as intended and enhance uptake of Māori participation mechanisms

51.4 support system efficiency and effectiveness by:

51.4.1 supporting self-identification processes prior to the commencement of regional planning processes;

51.4.2 removing some of the ambiguity in the system; and

51.4.3 ensuring existing issues are not entrenched through application of the current approach, to new mechanisms.

52. The resource management reforms provide opportunities to address these issues including by:

52.1 expanding participation and collaboration opportunities beyond iwi authorities (with ensuring hapū have an equal role);

52.2 supporting iwi/hapū/Māori to self-identify who represents them and who should be enabled to participate at all levels of the system; and

52.3 provide clarity about the participatory rights of groups and the process to decide who participates or partners at each level of the system.

Striking the balance between more prescription and less

53. As above, a central concern of claimants appears to be the level of Crown involvement in designing the system and in the degree of legislative prescription to be provided. From our perspective, the process towards

determining the appropriate mechanism for Māori representation on regional planning committees as part of the legislative reform has been collaborative albeit, there is always room for improvement. We have also been constrained too by tight timeframes to ensure that the NBA and SPA can be passed in the term of Government, and which inevitably puts pressure on the time for engagement.

54. We started with self-determination as a principle. It has also been guided by the desire for less prescription in developing options. We have also been cognisant that kāwanatanga duties and obligations are not passive and involve responsibility for the efficacy and workability of the natural resources governance system as a whole.

55. The proposal errs on the side of less prescription in accordance with the rangatiratanga and the principle of self-determination.[52]

Initial intent for no prescription

56. Early in the process, officials proposed a guiding principle of "self-determination: enabling tikanga processes to determine representation" be applied to work related to who from te ao Māori would participate in different parts of the system.[53]

57. The policy development process started with the intent to provide for iwi, hapū and Māori to self-determine who represents them, and who should be enabled to participate in the new regional layer in accordance with the exercise of their rangatiratanga.

58. The establishment of a regional layer of decision-making, where the many must be represented by the few, contains inherent tensions with providing for the exercise of rangatiratanga, including rights and interests at place.

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[52] More prescription (e.g. identifying specific groups to participate at different parts of the system and the process by which representatives are selected) could provide for clarity and certainty, with costs falling more in the policy development/legislative design phase. Less prescription would better provide space for the ongoing application of rangatiratanga and tikanga to the determination of representation over the life of the reformed Resource Management system. Less prescription and specificity leads to greater reliance on process to determine the specific participants. Balance of costs therefore falls in the implementation phase.

[53] BRF-937 RM Reform 91 – Final paper, agenda and talking points for MOG Māori interests subgroup meeting on 24 November 2021 (MFE.001.0059 at MFE.001.0062) (**CB-149 at CB-153**).

59. Some of the policy design questions explored regarding iwi, hapū and Māori participation in the new regional layer included:[54]

59.1 What level of prescription might be required in the legislation to ensure successful participation by iwi, hapū and Māori in the composition and appointment processes to regional planning committees.

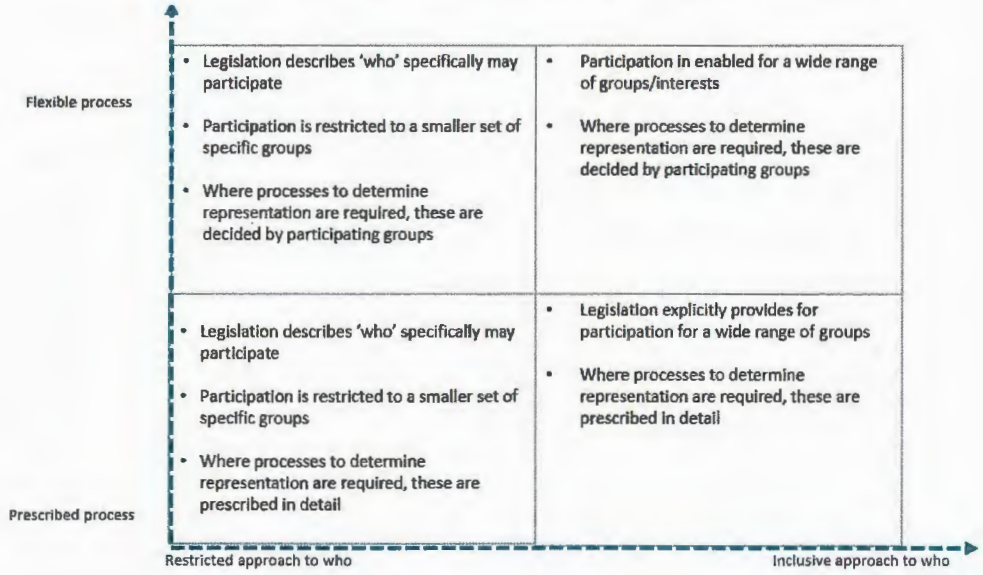
59.2 How to design the regional layer in a way that upholds Treaty settlement arrangements, while not undermining other rights and interests in the region.

60. As set out in Diagram A below, some of the policy design choices included:

60.1 The level of prescription to determine "who" from te ao Māori might participate, and

60.2 The level of specificity about "who" or what types of Māori groupings might participate.

Diagram A: Analysis of Levels of prescription for process and for participants



61. After testing the policy thinking internally, externally and with ILG and TTK, officials came to the view that it was not appropriate for the legislation to have little to no prescription or guidance about which groups should

54 MFE.001.1252 at MFE.001.1467 (**CB-426 at CB-554**), (Option 4 analysis).

participate in the regional layer (and on other parts of the system that are out of scope for this evidence) on the basis that:[55]

61.1 To uphold rangatiratanga does not necessarily mean it is appropriate for the Crown to play an entirely passive role.

61.2 Being too flexible could open up the process to numerous legal challenges and could undermine the principles of partnership and active protection of existing rights and interests, including those established Treaty settlements and other arrangements.

61.3 Active protection requires informed decision making and judgment as to what is reasonable in the circumstances.

61.4 This included being informed and understanding the different claimed interests of groups within a region.

61.5 The objective of ensuring the Crown's actions do not needlessly exacerbate situations of conflict, or undermine customary tikanga rights and interests.

61.6 There is a risk that appointment process discussions will be dominated by certain groups or impact on customary tikanga within a region.

61.7 Insufficient direction could mean the Crown risks being remiss in its duties to enable participation or fails to uphold its obligations under the Treaty.

62. Whilst the objective of as little prescription as is workable was retained, we considered that a level of specificity is required to ensure that:[56]

62.1 the system recognises and provides for rights and interests derived under all three articles of Te Tiriti;

62.2 the Crown meets its responsibility to consider which groups should be represented in decision-making, in terms of where that interest

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55 MFE.001.1252 at MFE.001.1467 (**CB-426 at CB-554**), (Option 4 analysis).

56 MFE.001.1252 at MFE.001.1408–MFE.001.1409 (**CB-426 at CB-522–CB-523**), [29].

lies and to ensure the overall objective of the decision-making body is met;

62.3 processes avoid or resolve conflict (and aim not to exacerbate conflict);

62.4 the system is able to function effectively and efficiently and in accordance with its policy intent;

62.5 Treaty settlement and other existing natural resource arrangements under the RMA are upheld.

63. Providing for iwi/hapū/Māori to determine for themselves who represents them may take time. The timeframe for reaching decisions on appointing bodies needs to be balanced against the need for the other decision-making parties to have certainty that, at a particular point, they can commence the plan development process.

64. As above, the proposal has relatively minimal – but not zero – prescription. (paragraph [39] above).

Assessment criteria

65. Based on the objectives above, and our engagement discussions, the policy assessment criteria we developed and tested with TTK are:[57]

65.1 Giving effect to the principles of Te Tiriti o Waitangi;

65.2 Upholding existing arrangements;

65.3 Efficiency;

65.4 Effectiveness;

65.5 Certainty;

65.6 Equity.

66. These criteria were developed through the policy process, alongside the testing that was being undertaken as to what, if any, level of prescription would be required under the new system. We consider the options decided

[57] MFE.001.1252 at MFE.001.1405 (**CB-426 at CB-519**), [15].

upon reflect these criteria (whilst acknowledging the criteria are at a high level and that reasonable minds may differ on the interpretation or weighting given to them).

Māori participation in appointment processes

67. To summarise the above, the approach to Māori participation in appointment processes was arrived at on the basis that although it is up to Māori to determine for themselves who holds rangatiratanga within a region, the Crown has a responsibility to consider which groups should be represented in terms of where the relevant rights and interests lie and needs to:[58]

    67.1 consider its obligations under Article II of te Tiriti in how rangatiratanga is appropriately provided for and consideration of kaitiaki relationships with taonga, and also that the Crown consider its broader kāwanatanga obligations;

    67.2 recognise its duty of active protection where this is needed and considers its obligations under existing Treaty settlements;

    67.3 provide clear processes and certainty for all parties; and

    67.4 set up processes that avoids and/or resolves conflict.

68. Officials considered that the approach of looking to iwi and hapū to lead the process, but having clear obligations on them to engage with other interest holders at place, strikes an appropriate balance between inclusion and flexibility while also taking into account practical necessities for the overall functioning of the resource management governance system. Also, officials were conscious that although the Crown has a responsibility to consider what rights and interests should be represented, the question of which groups hold rangatiratanga within a region is one for Māori in that region to determine. It also provides an opportunity for a range of Māori entities to be involved in appointment processes and a clear starting point for composition discussions.

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[58] MFE.001.1252 at MFE.001.1458 (**CB-426 at CB-545**), [17]–[20].

69. It also seeks to recognise the variety of potential appointing bodies by clearly enabling other Māori entities to be the appointing bodies if that is what the relevant iwi, hapū and Māori think is the best approach.

70. Officials concluded that this proposed approach strikes an appropriate balance that provides for iwi authorities (including PSGEs) and groups that represent hapū to lead and facilitate the conversations about composition and appointment processes, while also clarifying:

70.1 iwi authorities and groups that represent hapū are not the default appointing bodies, and

70.2 genuine engagement with their members and other Māori entities with rights and interests at place is required before a decision on composition and appointments is reached.

Inclusion of groups that represent hapū

71. Groups that represent hapū have been included alongside iwi authorities to lead the conversations on composition and appointment processes to regional planning committees because:

71.1 Hapū rather than iwi is the terminology used in Te Tiriti.

71.2 Hapū were, and in many places still are, the primary group in Māori society that holds customary rights and responsibilities and exercises rangatiratanga.

71.3 As the panel noted, "engaging at the iwi or iwi authority level does not reflect the reality of kaitiakitanga, which may operate at the hapū or whānau level" and "local authorities can refuse to engage with any other group other than 'iwi authority', even if the appropriate group to engage with on a particular matter is a hapū or whānau".[59]

71.4 The significantly enhanced participation of hapū (when compared to current legislation) responds to Waitangi Tribunal findings and

[59] Randerson Report, at [23] and [24].

recommendations in Wai 262 and Wai 2358 regarding the exercise of kaitiakitanga by hapū.

72. I note the claimant and interested party evidence seems to agree that substantive hapū involvement and leadership is appropriate.

Relative involvement of other Māori entities and groups

73. We have endeavoured to provide a place for all Māori at varying points of the system, and provide a level of participation for other Māori groups with rights and interests at place.

74. I acknowledge provision for the exercise of rangatiratanga and kaitiakitanga by other whakapapa-based or mātāwaka groups, including more contemporary organisation of Māori communities and interests, is more limited in the proposed Māori representation process for NBA regional planning committees than provision for groups representing hapū or for iwi authorities. Rather than a leading role in determining appointing bodies, they have a participation opportunity.

75. The core reasons for this are workability and respect for self-determination. Beyond prescribing that their views must be reflected, the shape and conduct of the process to be led by hapū and iwi is not prescribed.

76. With respect to the appointment processes, the Act will require iwi authorities and groups that represent hapū to engage with Māori entities that have rights and interests at place when making decisions on appointing bodies and in composition discussions with local authorities.[60] This record of engagement will also be made public. The intent of this requirement is to ensure that the views of these groups are considered and included when decisions are being made. This was discussed earlier under the heading 'How this works within the new RM system'.

Participation by iwi authorities, including PSGEs

77. Officials acknowledge that despite the term 'iwi' not appearing in the articles of Te Tiriti, Crown actions, largely through both Treaty settlements and other

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60 MFE.002.1202 at MFE.002.1213 (**CB-306 at CB-311**).

policy, including the RMA, have in many situations encouraged iwi representative organisations to develop and demonstrate mandates for their governance role and to hold primary relationships with the Crown and its agents. The Crown has an obligation to actively protect those existing rights and interests. This does not mean there is a presumption towards PSGE's as being the default appointing bodies – but does mean many will (depending on the circumstances of each region) have an important role to play as iwi authorities (we note also some iwi authorities are not PSGEs).

78. The decisions on Māori participation in composition and appointment processes do not solely provide for participation by iwi authorities, including PSGEs, at the exclusion of other groups. Officials consider that including iwi authorities as one of the groups to lead conversations on composition and appointment processes to regional planning committees is appropriate. Officials consider that this approach is required to actively protect their recognised interests and existing representative roles (without predetermining whether the constituent communities of rights holders will necessarily extend their mandate to the new roles created through the reform). Any decision to limit iwi participation in composition and appointment processes would undermine the Crown's ability to uphold existing natural resource arrangements including Treaty settlements.

Decisions yet to be made

79. As at the time of completing this brief of evidence, decisions are yet to be made on the dispute resolution and circuit breaking processes.

80. The Māori appointment process aims to leave decision-making on appointments self-determined and avoid the need for dispute resolution or circuit-breaking processes. Officials recommend that iwi authorities and groups that represent hapū will be able to ask the Crown for hui to be run by an independent, Crown funded facilitator, to assist them in reaching an agreed position on the identity of appointing bodies within a region well before the deadline for agreeing Māori appointing bodies. This facilitator could be an individual selected by the parties.

81. There are currently two 'circuit breaker' options currently being considered by the Minister.

Option 1:

82. If there is no agreed regional proposal as to appointing bodies for Māori seats, the dispute resolution (a four month mediation process) and (as a last resort) circuit breaking processes for Māori appointing bodies would be triggered.

83. This circuit breaker process would have four months and involves a panel of experts, who make a binding decision as to the appropriate appointing bodies. This panel is appointed by either:

83.1 A standing panel of experts jointly appointed by the Ministers for Environment and Māori-Crown Relations, after a formal mediation process.

83.2 The iwi authorities and groups who represent hapū in the region who are engaged in the decision.

84. Alternatively, the dispute could be decided by the Māori Land Court instead of an expert panel (this is not officials' first choice).[61]

Option 2:

85. A "by Māori for Māori" dispute resolution process. The expert panel would be appointed directly by iwi authorities and groups that represent hapū rather who are party to a dispute than by a Ministerially-appointed appointing body (as in Option 1). Tikanga would guide the establishment and operation of the expert panel based on an arbitration model, where all parties to a particular dispute put up their own expert if they wish to remain included in the decision. The panel would be empowered to use pūkenga and would be required to deliver a binding decision within seven months of

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61 The potential for the Māori Land Court (**MLC**) to decide on appointing bodies for Māori seats was raised at a meeting between Minister Parker and MLC Chief Judge Isaac. Chief Judge Isaac spoke about the procedures in Te Ture Whenua Māori Act 1993 for dispute resolution in the context of fishing, aquaculture and representation in local authority matters. This type of role appears aligned with the current MLC jurisdiction and it is anticipated MLC Judges would be able to take on this sort of work. However, there is a need to understand the scale of workload to understand if additional Judges and administrative staff would be needed.

the initial deadline for identifying appointing bodies (similar to the timeframe in Option 1).

86. I will update the Tribunal and parties prior to, or at, the hearing.

CONCLUSION

87. The same themes that we heard in engagement are reflected in the evidence filed by claimants and interested parties. Much of the evidence is premised on the incorrect understanding that the appointment body discussion would be led "solely" by PSGEs, it won't be – other iwi authorities and groups representing hapū hold an equal role.

88. Evidence alleging that hapū and iwi exercising that role negates or limits the interests and rights held by Māori directly as individuals, whānau or in other capacities (e.g. landowners of ancestral lands, or through other representative entities) is premised on those interest holders not being recognised in the process. This is incorrect, they are recognised (iwi and hapū are required to provide for them in the process).

89. Ms Kohere's evidence sets out in detail the discussions that we had on these issues and how the Crown's thinking evolved in response. It also explains efforts that we made to bring the perspectives together and seek reconciliation.

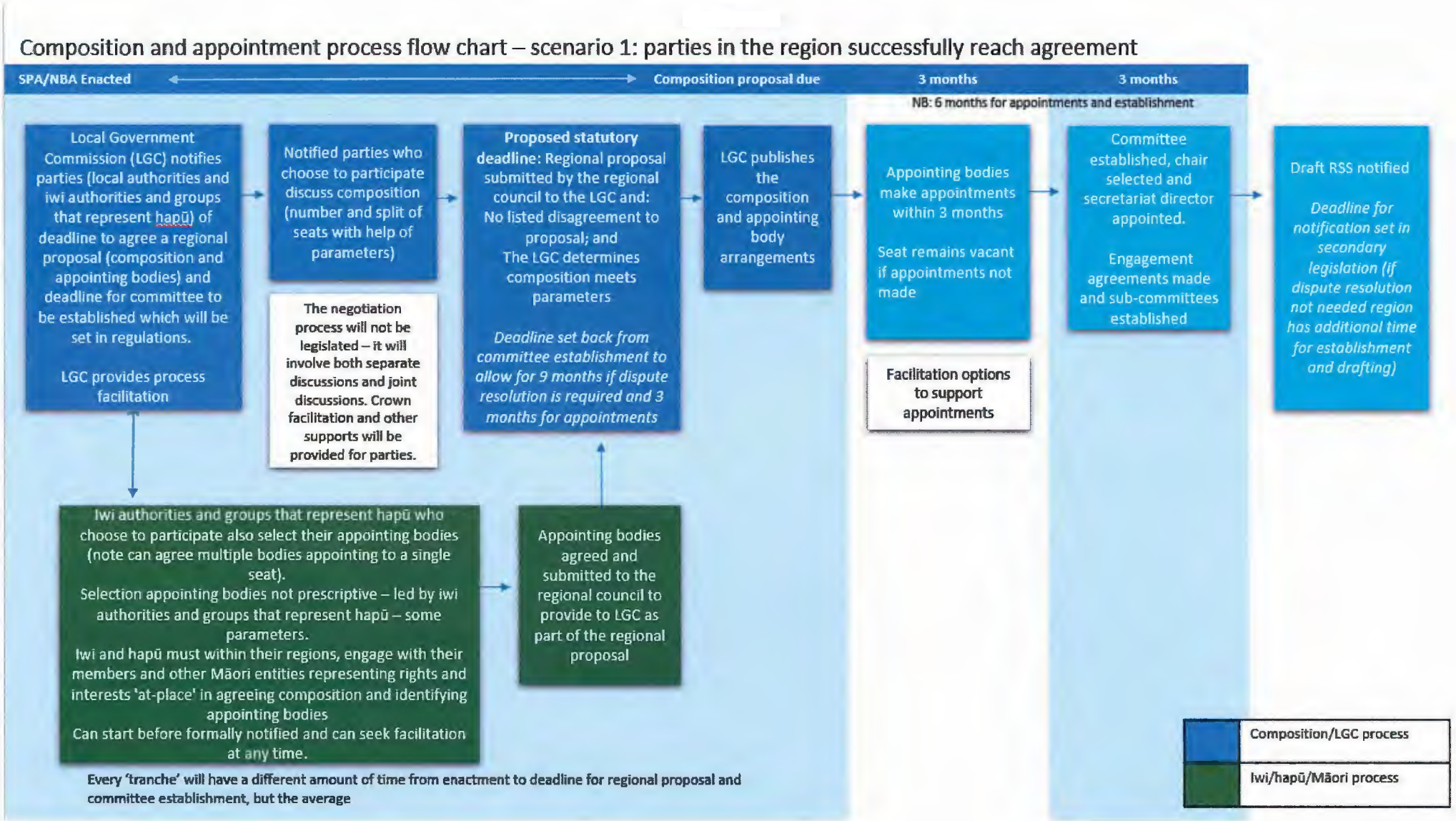
90. The decisions set out at in Part 2 above were made, having carefully considered these perspectives and explored options for reflecting them in the structures for representation.

91. The reasons for those decisions are set out at Part 3 above.

Signed: _____
Janine Mary Smith

Date: 20/7/22.

Schedule 1: Appointment process flow chart



Composition and appointment process flow chart – scenario 2: parties cannot reach agreement, circuit breakers required (MfE Option)