THE INTERIM REPORT ON MĀORI APPOINTMENTS TO REGIONAL PLANNING COMMITTEES

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Pre-publication Version

WAI 2358

WAITANGI TRIBUNAL REPORT 2022

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

The Honourable Willie Jackson
Minister for Māori Development

The Honourable David Parker
Minister for the Environment

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

The Honourable Nanaia Mahuta
Minister of Local Government

The Honourable Kiri Allan
Minister of Justice and Associate Minister for the Environment

Parliament Buildings
WELLINGTON

1 September 2022

Tērā a Waitī me ngā wai tuku kiri hei manapou mo te whenua
ngā wai e pōkarekare ana
ngā wai kōrengarenga
ngā wai piki me ngā wai heke
ngā wai rere ki uta ngā wai rere ki tai hei puna, hei awa, hei ōranga mo te iwi!

E ngā Minita o Aotearoa, e rere ana te aumihi ki a koe e noho mai ana ki te whare Pāremata. Nei rā ngā kōrero motuhake i whakatakotohia e ngā kaikerēme, te rīpoata e whakamana ai i te mauri o te wai me ngā kupu tohutohu mo te Karauna.

We have the honour to present to you our interim report on the priority inquiry into the Crown's proposed process for selecting appointing bodies and appointing Māori representatives to regional planning committees. This

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MINISTRY OF JUSTICE
Tāhū o te Ture

report has been prepared under a very tight timeframe so that it can assist you with your final decisions before the Natural and Built Environments Bill is introduced to Parliament.

We have made suggestions throughout the report, and our conclusions and Treaty findings are to be found in section 2.6.

We have found that the Crown's proposal that iwi and hapū should lead and facilitate the process to decide an appointing body is Treaty compliant at a high level of principle, noting that all the detail had not been decided at the time of the hearing.

We also found that the Crown's proposal for a legislative requirement that iwi and hapū engage with their members and with those groups who hold relevant rights and interests 'at place', and keep a record of the engagement, is Treaty compliant at a high level of principle. Again, the detail is still being worked out, and we have made suggestions as to how aspects of this should be done, including in respect of Māori landowners and urban Māori communities.

In addition, at a high level of principle, we agreed that the proposal for iwi and hapū to lead and facilitate a self-determined process to make the decision about an appointing body would be consistent with the principles of the Treaty. We also found that the Crown as a Treaty partner is required to protect and empower the exercise of tino rangatiratanga, which would entail the Crown providing secretariat/administrative support and funding to enable the proposed self-determined processes to occur and succeed. A lack of capacity and capability due to a crucial lack of resources has hampered the ability of Māori to participate in resource management, and our view is that this should not be repeated in the new system.

We were unable to reach an overall view as to whether the Crown's proposed process is Treaty compliant, however, because the bespoke arrangements negotiated through Treaty settlements and other processes would potentially trump or even displace the proposed appointments process in some regions. This has understandably led to a loss of confidence in the Crown's ability to deliver what is proposed, and most parties expressed misgivings about this situation.

We also considered that the parallel composition process should come first so that the risk identified by the Ministry for the Environment, that disputes over composition could prevent agreement in the process to select an appointing body, would be avoided. We also note that the claimants and interested parties in this inquiry all agreed that the composition of the committees must be set at a co-governance level, but, due to the specific nature of the issues in this priority inquiry, we did not express our own view on this point.

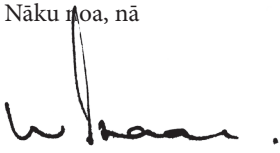
On other issues that arose, such as the dispute resolution and circuit breaker processes and the appointment of the secretariat, we have offered suggestions for the consideration of the Crown.

We have not found any Treaty breaches in this report, and the views and suggestions expressed on various matters for the assistance of the Crown and other parties do not have the status of formal recommendations.

We hope that the Crown's resource management reforms will prove transformational in respect of Māori participation at all levels of the new resource management system, as proposed by the Crown as one of the objectives in the reform.

Finally, we note that the claimants and interested parties disagreed with the Crown's proposal, though for different reasons, and that much disquiet was expressed about the lack of detail. There were calls for a pause and further consultation on a completed proposal. We have not suggested that this take place, but we bring the matter to the Crown's attention.

Nāku noa, nā



Chief Judge Wilson Isaac
Presiding Officer

PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Interim Report on Māori Appointments to Regional Planning Committees*. 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. Additional illustrative material may be inserted. The Tribunal reserves the right to amend the text of these parts in its final report, although its main findings will not change.

ABBREVIATIONS

AGM	annual general meeting
app	appendix
doc	document
ed	edition, editor
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FOMA	Federation of Māori Authorities
GDC	Gisborne District Council
IA	iwi authority
IHP	independent hearing panel
ILG	iwi leaders group
JMA	joint management agreement
LGC	Local Government Commission
ltd	limited
MFE	Ministry for the Environment
MWAR	Mana Whakahono a Rohe agreement
NBA/NBEA	Natural and Built Environments Act
NUMA	National Urban Māori Authority
NZMC	New Zealand Māori Council
p, pp	page, pages
PSGE	post-settlement governance entities
QC	Queen's Counsel
RMA	Resource Management Act 1991
RPC	regional planning committee
RSS	regional spatial strategy
s, ss	section, sections (of an Act of Parliament)
SPA	Spatial Planning Act
TOOTT	Te Oranga o te Taiao
TPK	Te Puni Kōkiri
TTK	Te Tai Kaha
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim
WOCA	Whānau Ora Commissioning Agency

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

CHAPTER 1

INTRODUCTION

1.1 What this Priority Inquiry Is About

1.1.1 The priority inquiry and interim report

On 29 April 2022, the New Zealand Māori Council (NZMC) filed an application for a priority hearing within the National Freshwater and Geothermal Resources inquiry.[1] The NZMC proposed that a discrete component of the Crown's resource management reforms could be the subject of a hearing prior to the introduction of the Natural and Built Environments Bill to Parliament. At that point, stage 3 of the inquiry, which will focus on geothermal resources, had recently commenced. After receipt of submissions from the Crown and other parties, the presiding officer agreed to grant a priority hearing on 27 June 2022.[2] After filing of evidence and opening submissions was timetabled, the earliest the hearing could be held was 1–3 August 2022. Following a judicial conference on 28 July 2022, dates were set for the post-hearing timetable of questions in writing (including for witnesses whose briefs of evidence were to be taken as read), written answers, claimant closing submissions, Crown closing submissions, and claimant reply submissions.[3] By that time, the expectation was that the Bill would be introduced in October 2022.

During the three-day hearing, the Crown informed us that, should the Tribunal be willing to release a report before 2 September 2022, the Crown would still be able to consider recommendations prior to the Bill's introduction to Parliament.[4] Crown counsel clarified in a subsequent memorandum:

> If findings and recommendations are provided in this short-term timeframe (i.e., by 2 September) they will be considered and if agreed to, addressed in the Bill for introduction.
>
> If findings and recommendations are provided later then they will still be considered and, if agreed to, addressed through other means (eg before the select committee, or through SOPs during the House process).[5]

After hearing from the claimants and interested parties, we advised that the report would be issued within the requested time.[6] This necessarily resulted in a

1. Memorandum 3.2.403
2. Memorandum 2.6.83
3. Memorandum 2.6.87
4. Transcript 4.1.6, p 381
5. Memorandum 3.2.469, p 4
6. Memorandum 2.6.88, p 7

very compressed timetable for parties to ask questions in writing (and for witnesses to answer) and for the filing of closing submissions. We therefore inverted the usual order of submissions, with the Crown providing written closing submissions followed very closely by claimant submissions. We did, however, receive thorough and focused closing submissions, and we do not consider that the integrity of the priority inquiry was compromised by the tight timeframes demanded of all parties and of the Tribunal.

Due to the very tight timeframe required for reporting (30 days from the close of the hearing), we decided to issue an interim report in pre-publication format. Our findings and the substance of the views and suggestions that we have made in this report would not change in a final report.

1.1.2 The issue for the priority inquiry

This priority inquiry is focused on the issue of Māori representation on regional planning committees, and more particularly on how the Māori representatives on those committees should be selected. The Crown's proposed process for appointing Māori representatives is set out briefly in section 1.1.5 (see also figure 1).

This issue was a matter of deep concern to the claimants and interested parties in this inquiry, and it raised questions about how hapū, urban Māori, and groups with rights and interests 'at place' (such as whānau and Māori landowners) would participate in decision-making about the selection of representatives. There was little agreement among these parties or with the Crown about who should appoint representatives, how they should be appointed, or how disputes about appointments should be resolved.

As a result of the timing of this inquiry, which occurred alongside final policy development for the Bill that is to be introduced in October 2022, there was a level of uncertainty in some of the details of the Crown's proposal which the claimants and some interested parties considered required further consultation and work with Māori to develop a 'by Māori, for Māori' appointments process. Other avenues for Māori participation in an influential or determinative way in the new resource management system were unclear to many parties, which resulted in more opposition to the appointments process than it might otherwise have drawn. Other issues were raised during the hearing, such as the composition of the committees and the need to address Māori rights and interests in freshwater and other resources. Where relevant, we have treated these issues as matters of context to the primary issue in respect of the appointments process because we have been mindful of the narrow basis on which the priority hearing was granted.

1.1.3 Context: Māori participation in the new resource management system

The Crown's proposed regional planning committees form part of a major reform programme to replace the Resource Management Act 1991 (the RMA) with three new pieces of legislation: the Natural and Built Environments Act (NBA); the Spatial Planning Act (SPA); and the Managed Retreat and Climate Change Adaptation Act. The Crown's intention is to simplify the current resource management planning regime and improve its efficiency by removing district plans

and focusing planning at the regional level. The Crown has proposed to establish autonomous regional planning committees, independent of (but also representative of) local authorities, and to provide a governance role for Māori through representation on these committees. These committees would prepare the regional plan under the NBA and the 30-year regional spatial strategy under the SPA.

Janine Smith, deputy secretary at the Ministry for the Environment, explained that the Crown's resource management reforms have five core objectives:

- protect and where necessary restore the natural environment (including its capacity to provide for the wellbeing of present and future generations);
- 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;
- give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori;
- better prepare for adapting to climate change and risks from natural hazards, and better mitigate emissions contributing to climate change;
- improve system efficiency and effectiveness, and reduce complexity, while retaining appropriate local democratic input.[7]

According to Ms Smith, in her evidence for the Crown, the proposal for Māori representation on regional planning committees is only one example of the Crown's commitment to enhance '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.
>
> Regional planning committees, and Māori representation on them, form only one part of the proposed systemic reform. . . . Māori voices and interests are to be reflected in multiple ways across the reform as a whole, not only through the regional planning committees.[8]

The Crown's proposal for a reformed resource management system includes 'enhanced opportunities for direct [Māori] participation locally'. These would include existing RMA mechanisms such as transfers of power (section 33), which would now become available to hapū as well as iwi, and joint management agreements (section 36B). The 'legislative barriers' to the use of these mechanisms would be removed.[9] The Crown was also considering the inclusion of Māori landowners in the section 33 mechanism for transfers of power.[10] The current

7. Document H37, pp 7–8
8. Ibid, pp 9–10
9. Submission 3.3.78, p 11. The Crown referred us to document H38(a), pp 133–137, 292–294, 513–514 for information on these proposals.
10. 'Paper 2, Role, Funding and Participation of Māori in the RM System', annex 0: 'Purpose, Structure and Summary' (doc H37(a)), p 514

provisions for Mana Whakahono a Rohe would be enhanced and broadened to allow hapū as well as iwi to establish this kind of relationship agreement with councils. Iwi management plans would be given an 'enhanced weighting', requiring the regional planning committees to have 'particular regard to' these planning documents. Hapū as well as iwi would be able to develop a management plan. As well as improvements to the existing mechanisms, the Crown has proposed 'engagement agreements' with the regional planning committees on 'how engagement will be undertaken on RSSs [regional spacial strategies] and NBA plans'. This engagement would be funded.[11]

The Crown's proposal for Māori representation on regional committees, therefore, lies within a context of enhanced measures for Māori participation in resource management, including decision-making roles (membership of the committees, transfers of power, and joint management agreements). The Crown has also proposed a raft of other measures to protect Māori interests and values in the system, including a new Treaty clause, the inclusion of the concept 'Te Oranga o te Taiao' in the purpose provisions, a National Māori Entity for input to the national planning framework and to monitor the system's Treaty performance, provisions for Māori expertise on the committee secretariats, and specific provisions to enable Māori land development. Greater funding and support would facilitate Māori participation across all these areas.[12]

These proposed reforms arose from the recent review of the RMA by an independent panel (the Randerson report),[13] and some of them reflect the findings and recommendations of the Waitangi Tribunal in various reports (including our stage 2 report).[14]

1.1.4 The Tribunal's decision to hold a priority inquiry on Māori representation

As noted above, the New Zealand Māori Council (NZMC) applied for a priority hearing. The issue raised by the NZMC about the resource management reforms related to who should select the Māori representatives for the regional planning committees. The NZMC was concerned that representation would be focused on post-settlement governance entities (PSGEs), which have been established to hold and administer Treaty settlement redress, and that this would not be inclusive of other Māori voices. Counsel for the NZMC submitted in the application:

> [T]he Crown appears to be intent on creating a system of representation that relies on or prefers PSGEs as representing the voice of all Māori within a region. The New Zealand Māori Council is concerned that such an approach, with its practical emphasis on PSGEs, will result in the exclusion of many Māori communities

11. Submission 3.3.78, p 11
12. Ibid, pp 11–12
13. Resource Management Review Panel, *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel* (Wellington: Resource Management Review Panel, 2020) (doc H18(a))
14. See, for example, Resource Management Review Panel, *New Directions for Resource Management* (doc H18(a)), pp 20, 56, 73, 88–90, 100, 102–105, 110, 308, 333

and landowners, particularly customary marae and urban Māori. It will also ignore the fact that almost all relevant rights and responsibilities in respect of geothermal resources and the environment, as a matter of tikanga and Te Tiriti, reside in hapū and not in iwi. It follows, in the New Zealand Māori Council's view, that any approach to partnership bodies whose purpose or effect is to recognise PSGEs or iwi as the exclusive voice for Māori communities at the regional or local/catchment level does not accord with Te Tiriti.

If the issue of inclusive Māori representation on partnership bodies is not determined in a Te Tiriti compliant manner, a critical Te Tiriti mechanism in the future resource management legislation will not be Te Tiriti consistent (and nor will it be consistent with rights guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples.[15]

The NZMC also stressed that the proposed issue for inquiry did not include the 'process the Crown has followed to develop its policy position, but whether that position is consistent with relevant principles of Te Tiriti'. The issue raised questions of substance, therefore, and not process.[16]

In addition to this application from the NZMC, counsel for the Proprietors of Taheke 8C and Adjoining Blocks Incorporation applied to the Tribunal for an early hearing in relation to the NBA Bill before its introduction to Parliament. The Taheke 8C incorporation was focused on aspects of the Bill, especially the references to iwi and hapū in clauses of the Exposure Draft of the Bill. According to counsel for Taheke 8C, whānau and Māori landowners had been wrongly excluded from the purpose provisions of the Exposure Draft, with the result that only the relationships of iwi and hapū with the environment would be protected in the new resource management system.[17]

The presiding officer, Chief Judge Isaac, called for responses from the other parties to the inquiry. The Crown submitted that it had engaged with the NZMC throughout the preparation of the proposed reforms, and only high-level decisions had been made about Māori representation on the regional planning committees. The details were still being worked through, and the preparation of the full Bill had entered a 'particularly time-pressured period when final decisions need to be made in order for a Bill of this size to be introduced and passed in the term of this Government'. As a result, the Crown argued, there would not be time for the Tribunal to hold a hearing and prepare a report, and for the Crown to give consideration to that report, before the Bill was to be introduced in September 2022. In light of the Crown's engagement with the NZMC and the unrealistic timeframe, the Crown opposed a priority hearing. The Crown also submitted that, if a priority hearing was granted, it would need to have a narrow scope and be limited to the specific representation issue raised by the NZMC. The Crown accepted that

15. Memorandum 3.2.403, p 3
16. Ibid, p 5
17. Memorandum 3.2.404, p 2; see also submission 3.3.64, pp 2–6

this issue was discrete and could be inquired into in isolation from the rest of the proposed resource management system.[18]

The other parties who made submissions were in favour of a priority hearing. Some wanted a wider scope.[19]

The presiding officer agreed with counsel for the NZMC that the issue in respect of representation was both significant and discrete, enabling a rapid, priority hearing to be held:

> In my view, the Crown is correct that the representational issue raised by the NZMC is a discrete matter that can be inquired into in isolation from the other matters to be covered in the Bill, and it is also, as the NZMC has argued, a matter of great significance to Māori. The ability of Māori to exercise tino rangatiratanga within the partnership bodies that will make planning decisions is crucial to the Treaty compliance of whatever system is put in place. The NZMC has raised the issue of whether the bodies established under (and the Māori communities represented under) the Māori Community Development Act 1962 will be represented in the new system, and also what weighting will be given within the system to representation of iwi, hapū, urban Māori, and others. The Taheke 8C proprietors have submitted that mana whenua over resources such as geothermal water may be exercised by Māori landholding bodies, and have queried whether there is a place for such bodies in the representation of Māori on the committees to be established in the new system. The issues raised by the NZMC and the Taheke 8C proprietors are clearly connected.[20]

The presiding officer issued his decision on 27 June 2022, granting a priority hearing on the discrete issue of representation, noting that there was not time to 'hear parties on the Bill more broadly prior to its introduction in September 2022 if there is to be sufficient time for inquiry, reporting, and Crown consideration of such recommendations as the Tribunal may decide to make'.[21]

1.1.5 Overview of the Crown's proposed appointments process

In brief, the Crown's proposed appointments process for Māori representatives on regional planning committees is (at a high level):

- Iwi authorities (which could include PSGEs if appropriate) and groups that represent hapū would lead or facilitate a process to select an appointing body or bodies (which could be existing entities).
- Iwi authorities and groups that represent hapū would self-identify to lead the process by registering themselves on some central register.
- The Local Government Commission would notify iwi authorities and groups that represent hapū to start the process, and advise them of the timeframe for completing it.

18. Memorandum 2.6.83, pp 83–84
19. Ibid, pp 3–5
20. Ibid, p 6
21. Ibid, p 7

- Iwi authorities and groups that represent hapū would be required to engage with Māori groups that have relevant rights and interests 'at place', and keep a record of the engagement.
- The decision on an appointing body or bodies would be made by these groups through a self-determined process.
- If agreement could not be reached, there would be a seven-month period for a dispute resolution process and – if that failed – a circuit breaker to determine the appointing body or bodies. If appointments had not been made by the time the committee was established, the committee would commence work without the Māori members.
- The appointing bodies would have three months to consult their people and make appointments to the committee. These bodies would need to have an ongoing existence and be able (as an accountability measure) to remove and replace appointees if necessary.

A parallel process would determine the composition of the committee, including the number of Māori seats vis-à-vis the number of local authority seats. The committee would have a member appointed by the Minister (for SPA matters only), local authority representatives, and Māori representatives. The Crown has not proposed a 50:50 composition of Māori and local authority representatives. Iwi authorities and groups that represent hapū would have to negotiate the number of seats with the local authorities of the region. If agreement could not be reached, a final determination would be made by the Local Government Commission. The minimum number of committee members would be six, and there would be a minimum of two Māori representatives.

1.1.6 Issues that have been excluded from the scope of the priority inquiry

As noted, the NZMC proposed that the process followed by the Crown to reach its position on representation would not be included in the inquiry. The Crown and counsel for the Freshwater Iwi Leaders Group (ILG) also addressed the issue of scope in their closing submissions, in relation to matters that had been raised in evidence and submissions at the hearing. Those matters included the composition of the committees (the number of Māori seats vis-à-vis the number of local authority seats), the Crown's process to transfer RMA-specific Treaty settlement redress into the new system, the issue of whether the Crown should have addressed Māori rights and interests in freshwater resources before carrying out its RMA reforms (and other issues). The question of scope in respect of those matters is addressed in chapter 2 where relevant to the report.

1.1.7 The presiding officer and Māori Land Court issues

On 3 June 2022, the presiding officer, Chief Judge Isaac, issued a memorandum-directions notifying parties that he had met with the Minister for the Environment in his capacity as chief judge of the Māori Land Court. The purpose of the meeting was to discuss the capacity of the court to undertake dispute resolution and certain adjudicative functions being considered as part of the resource management reforms. The chief judge advised the Minister that he is presiding in this

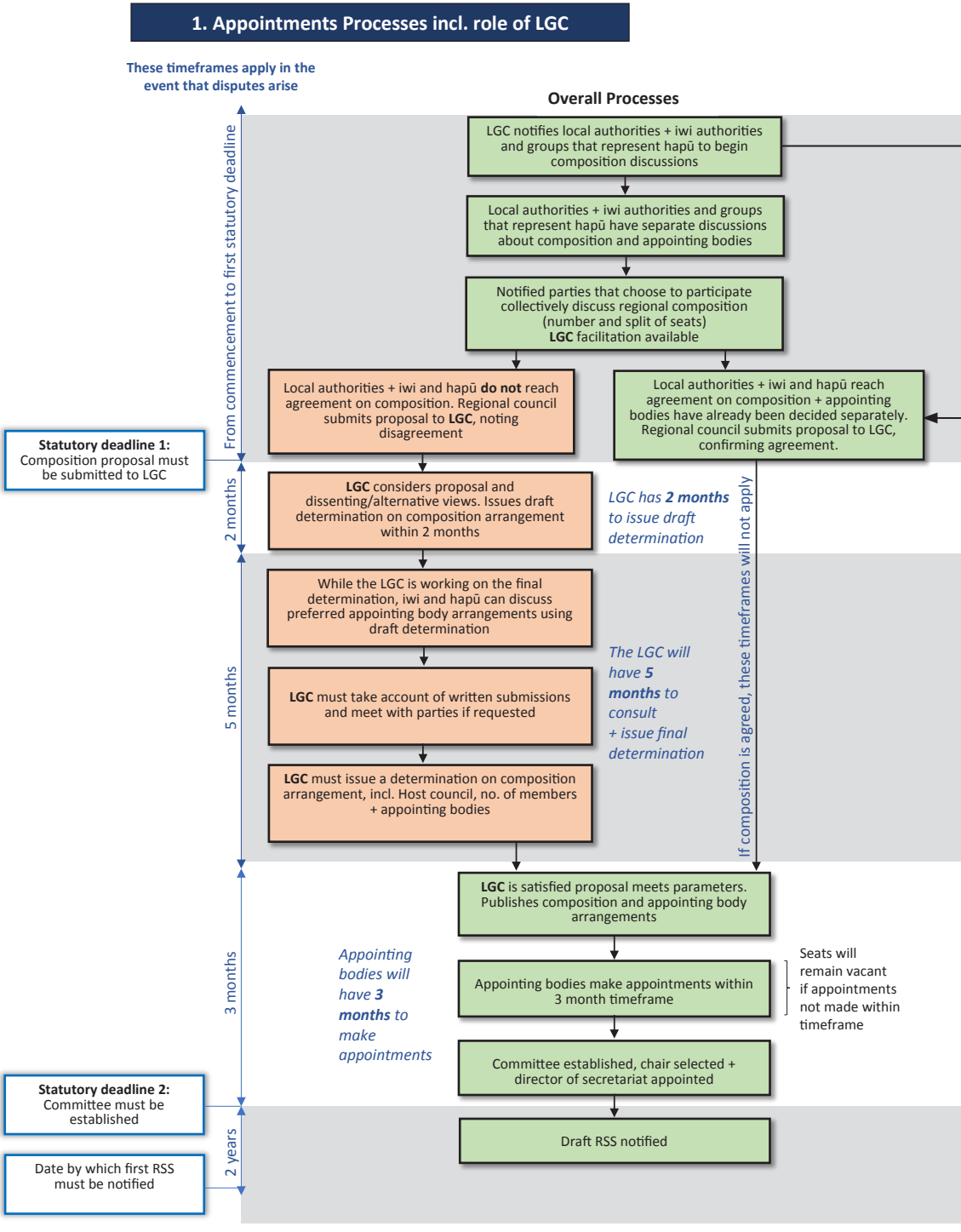
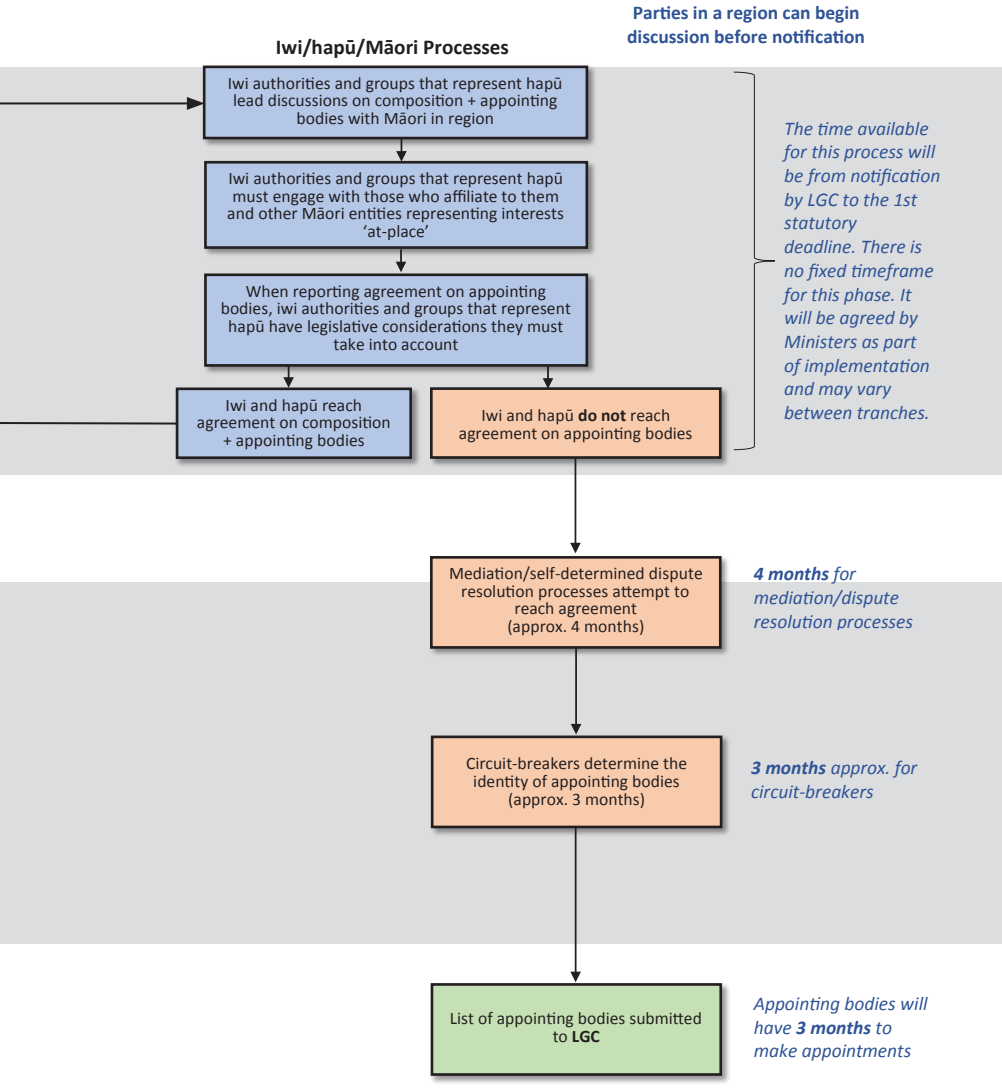


Figure 1: Appointments process, 9 August 2022 (doc H37(p))



inquiry. He also disclosed the meeting to the parties to ascertain whether anyone considered a real or perceived conflict of interest arose as a result of the meeting. Submissions were received from a number of parties, advising that they did not consider any conflict of interests arose from the meeting with the Minister.[22]

We note here that the presiding officer took no part in the deliberations on the dispute resolution and circuit breaker processes, where this issue was relevant.

1.2 The Priority Hearing

The priority hearing was held at the Waitangi Tribunal offices in Wellington on 1–3 August 2022. As the Covid-19 setting remained at Orange at the time of the hearing, some counsel and witnesses were present and others were heard remotely by audio-visual link (by Zoom). Tribunal member Ron Crosby also attended by Zoom.

Due to the nature of the inquiry occurring in tandem with the process of Ministers making decisions about official advice in relation to the new resource management system, the Crown provided the Tribunal and parties with 'current "live" briefing documents to Ministers prior to decisions being made on those papers'.[23] In addition, documentation was provided about the Crown's consultation with Māori, its targeted engagement with various Māori groups,[24] and the details of its policy development with respect to the process for appointing Māori representatives to the regional planning committee. Other relevant details about the reforms were provided in this documentation.[25] At the hearing, Janine Smith (Deputy Secretary at the Ministry for the Environment) and Keita Kohere (Director RM Māori Policy Development/Ringatohu) presented briefs of evidence.[26]

The claimants and interested parties filed 48 briefs of evidence for the hearing (and an additional brief afterwards), some with attached documentation about the reforms. This included documentary material prepared for engagement with the Crown during the policy development process.[27] Due to the timeframe for the priority hearing, some evidence had to be taken as read. The full list of counsel and witnesses involved in the hearing is provided at appendix I.

22. Memorandum 2.6.83, p 2. Submissions on this issue were filed by counsel for the NZMC, counsel for the Ngāpuhi claimants, counsel for Arapeta Hamilton, and counsel for Matiu Haitana. No other parties made submissions.
23. Memorandum 3.2.469, p 3
24. These included the ILG, the Te Wai Māori Trust, the NZMC, the Federation of Māori Authorities, and the Kahui Wai Māori group.
25. Document H37(a)
26. Documents H37, H38
27. See particularly docs H17(a), H18(a)

1.3 The Parties in this Priority Inquiry

1.3.1 Introduction

In this section, we provide a brief introduction to the claimants and interested parties who participated in the priority hearing and a very brief outline of their concerns. Evidence and submissions will be considered more fully in chapter 2. We also outline the Ministers involved in making decisions about the resource management reform issues relevant to this inquiry.

1.3.2 The claimants

1.3.2.1 *The New Zealand Māori Council (Wai 2358)*

The Wai 2358 claim was filed by the late Sir Graham Latimer on behalf the NZMC and other co-claimants on 7 February 2012. The NZMC participated in the priority hearing, producing evidence and submissions.

1.3.2.2 *The Wai 2601 claimants*

The Wai 2601 claimants are Cletus Manu Paul, as a member of Ngāti Moewhare, on behalf of 'himself, and the Māori communities in his District which he represents', and Rihari Dargaville, on behalf of himself, the Tai Tokerau District Māori Council, and 'other Māori communities in his District which he represents'.[28] The Wai 2601 claimants were originally part of the Wai 2358 claim when it was filed in 2012, but they filed a separate claim for participation in stage 2 of the inquiry.

1.3.2.3 *The Ngāpuhi claimants*

The surviving Ngāpuhi claimants are Ani Martin and Natalie Kay Martin, who claim 'on behalf of themselves and as owners of Lake Ōmapere'.[29] These claimants were originally part of the Wai 2358 claim but later obtained separate representation (they did not file their own statement of claim). The late Nuki Aldridge and the late Ron Wihongi were also part of this claim.

1.3.3 The Crown

The Ministry for the Environment is leading the reform process, and the Crown witnesses were senior officials from within that Ministry. A Ministerial Oversight Group has been established to make decisions about aspects of the reform, and decisions about Māori representation on regional committees have been delegated to the Ministers for the Environment (the Honourable David Parker), Māori Crown Relations: Te Arawhiti (the Honourable Kelvin Davis), Local Government (the Honourable Nanaia Mahuta), and Māori Development (the Honourable Willie Jackson), and the Associate Minister for the Environment (the Honourable Kiri Allan).[30]

28. Submission 3.3.85, p 1
29. Submission 3.3.91, pp 21–22
30. Document H37, p 13

1.3.4 Interested parties

Not all of the interested parties in stage 3 of the National Freshwater and Geothermal Resources inquiry participated in the priority hearing. The parties who did file evidence and submissions were:

- the Freshwater Iwi Leaders Group (ILG);
- the Proprietors of Taheke 8C and Adjoining Blocks Incorporation (the Taheke 8C incorporation);
- the Tauhara North No 2 Trust;
- the Tūaropaki Trust;
- Te Rūnanga o Ngāi Tahu;
- Matiu Haitana, on behalf of his whānau and Ngāti Ruakopiri (Wai 1072);
- Evelyn Kereopa, on behalf of herself, the Kereopa whānau, and Te Ihingarangi, a hapū of Ngāti Maniapoto (Wai 762);
- David Hawea, on behalf of Te Whānau a Kai (Wai 892);
- Bryce Peda-Smith, on behalf of Te Whānau o Rātāroa, of Whangaroa (Wai 2377);
- Roger Tichborne, on behalf of Ngā Hapū o Tokomaru Akau (Te Whānau ā Te Aotāwarirangi and Te Whānau ā Ruataupare) (Wai 2604);
- Arapeta Hamilton, on behalf of Ngāti Manu and its constituent hapū, and for Ngāpuhi ki Taumārere tribes (Wai 354);
- Titewhai Harawira, John Tamihere, and Raymond Hall, on behalf of the Māori communities of Tamaki Makaurau;
- Michelle Marino, Errol Churton, and David Churton, on behalf of Ngāti Tama (Wai 377);
- Jane Mihingarangi Ruka Te Korako, on behalf of the Grandmother Council of the Waitaha Nation; and
- David Potter, on behalf of Ngāti Rangitihi.

1.4 The Interim Report

As noted above, this is an interim report which sets out the Tribunal's analysis of the evidence and submissions, and the findings that the Tribunal has reached on the basis of that analysis and by application of the Treaty principles, to the extent possible during the compressed time for reporting. Due to the nature of the inquiry occuring in tandem with the development of detailed decisions on policy options, we have only made findings in respect of the high-level matters on which Ministers had already made decisions by the time of the hearing. The Crown also stated in closing submissions that it would welcome guidance or suggestions from the Tribunal on the parts of the proposals that had not yet been decided.[31] Accordingly, we have stated our view on various issues raised by the parties in chapter 2, and have made suggestions where we have considered it appropriate to do so.

31. Submission 3.3.78, pp 33, 43

CHAPTER 2

THE APPOINTMENTS PROCESS AND ASSOCIATED ISSUES

2.1 Introduction

As discussed in chapter 1, one key purpose of the reforms is to provide for more effective Māori participation across the new resource management 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'. One proposal for achieving these objectives is to provide Māori with a governance role with local authority representatives as decision-makers on autonomous regional planning committees, which would (among other things) set environmental limits under the NBA and develop the 30-year spatial plans to be prepared under the SPA. Membership of the regional planning committees will not be the only mechanism for more effective Māori participation.[1] Janine Smith, deputy secretary at the Ministry for the Environment (MFE), observed 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'. This would include '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 a Rohe and Joint Management Agreements'.[2]

The members of the regional planning committees would be appointed by a number of appointing bodies: local authorities; the Minister (one appointment for SPA planning matters only); and Māori appointing bodies. Ms Smith explained that the 'number and form of the appointing bodies is to be determined regionally (and, in the case of Māori, by Māori)'.[3]

Cabinet has established a Ministerial Oversight Group to 'work through the policy details needed to progress the NBA and other legislation'.[4] The Ministers on this group have made the following high-level decisions on the process to appoint Māori representatives for the regional planning committees:

a. The process of determining regional representation is initiated by the Local Government Commission;

1. See Ministry for the Environment, *Our Future Resource Management System: Materials for Discussion/Te Pūnaha Whakahaere Rauemi o Anamata: Kaupapa Korero* (Wellington: Ministry for the Environment, 2021) (doc H18(a)), pp 970–994, for an overview of the proposed system.
2. Document H37, p 10
3. Ibid, p 11
4. Ibid, p 7

b. 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;
c. 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 . . .
d. 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;
e. 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;
f. If iwi and hapū representative organisations cannot agree on appointing bodies, dispute resolution processes and a circuit breaking mechanism will be available . . .
g. appointing bodies must be enduring and capable of developing and executing their own appointment and removal processes.[5]

Following these broad decisions in April 2022, the further details of the process for selecting Māori appointing bodies were delegated by the Ministerial Oversight Group to the Ministers for the Environment (the Honourable David Parker), Māori Crown Relations (the Honourable Kelvin Davis), Local Government (the Honourable Nanaia Mahuta), and Māori Development (the Honourable Willie Jackson), and the Associate Minister for the Environment (the Honourable Kiri Allan).[6] MFE officials have since been developing a series of further recommendations to flesh out some of the detail required, including wrestling with the appropriate degree of prescription in what is proposed to be a self-determination process. This information is set out in the evidence of Janine Smith and Keita Kohere for the Crown, and in the policy and engagement documentation provided by these witnesses.[7]

Crown counsel acknowledged that there is a 'unique difficulty' for an inquiry that is proceeding in parallel with 'an intense phase of policy development'. Ministers have made high-level decisions (described above in the quotation as points (a)-(g)). According to the Crown, these decisions are 'thus fit for Tribunal scrutiny [that is, Tribunal findings]'. Ministerial decisions on the detailed aspects of the process, however, have not been made and 'remain amendable to revision prior to or following introduction of the Bill', and, according to the Crown, are 'thus difficult to make findings on'.[8] Nonetheless, the Crown submitted, 'the Crown, including responsible Ministers, has committed to closely reviewing any findings or recommendations made by the Tribunal whenever they are received'. Crown counsel submitted in closing submissions that this close consideration

5. Document H37, pp 12–13
6. Ibid, p 13
7. See, in particular, docs H37, H37(a), H37(c), H37(d), H38
8. Submission 3.3.78, p 4

would extend to 'opportunities available to the executive government as the Bill is being considered by Parliament (including its role before the Select Committee or Supplementary Order Papers through the House)'.[9] As discussed in chapter 1, the Crown requested a report by 2 September 2022 so that the Tribunal's guidance and recommendations could be considered 'either in making the final decisions . . . or reconsidering any decisions that have been made'.[10]

In endeavouring to meet the Crown's request in as constructive a manner as possible, this chapter focuses on the Crown's proposed process for selecting appointing bodies and the criticisms of the claimants and interested parties without any concerted distinction between the decisions that the Ministers have already made and the policy recommendations that MFE has made for further Ministerial decisions. Our Treaty findings in section 2.6, however, relate to the decisions that have been made. Our suggestions for amendments or improvements to the process are sometimes broader, taking into account the Crown's submission that suggestions on those matters that have not yet been decided would be welcome.[11] The suggestions that we make in this chapter are based on the evidence and submissions received from the parties and our understanding of the Treaty principles, and are made with the intention of assisting the Crown to avoid Treaty breach.

The proposed process for Māori to select appointing bodies is set out at a very high level in section 1.1.5. In brief, the Crown's proposal is that iwi and hapū would be asked to lead a process to select an appointing body (they cannot be compelled to do so, and the risk that groups would not get involved has been considered by the Crown).[12] Iwi and hapū would self-identify on a central register to carry out that role. The iwi and hapū who self-identified would be asked to lead and facilitate a process, which would include the groups who hold relevant rights and interests 'at place' (meaning that they have rights and interests in a particular area or natural resource). A non-exhaustive list of such groups would include customary rights holders, Māori landowners, groups with existing Resource Management Act (RMA) arrangements and other relevant arrangements, such as Treaty settlements, and mātāwaka communities (Māori communities living outside their traditional rohe). The iwi and hapū leading/facilitating the process would keep a record of this engagement, which could presumably be used in any legal challenge to the decisions reached. The decision to select an appointing body or bodies would be made by Māori through this process according to their own practices. Māori would self-determine how the decision is to be made. A dispute resolution process would be available if disputes could not be resolved, and a circuit breaker if disputes prove to be intractable.

Once the iwi and hapū are satisfied that a decision has been made, they notify the regional council, which in turn notifies the Local Government Commission.

9. Submission 3.3.78, p 5
10. Transcript 4.1.6, p 244; memo 3.2.469
11. Submission 3.3.78, pp 33, 43
12. 'BRF-1562 RM Reform 192 – Delegated Decisions on Māori Appointment Process to Natural and Built Environments and Spatial Planning Committees', 19 July 2022 (doc H37(d)), p 11

The appointing body or bodies need to have an ongoing existence as they are to be the first point of accountability for the representatives appointed to regional planning committees. They will have the power to remove and replace representatives. An appointing body could be an existing body or a new one such as a regional forum. The appointing bodies would have three months to appoint the Māori representatives, and would be required to consult widely in making those appointments.

A process to determine the composition of the regional planning committees, including the number of Māori seats, would occur simultaneously with the process to select an appointing body.

The Crown's view in this inquiry was that a decision-making role on the committees – a seat at the table – would be one element of a transformational reform to enhance Māori participation in resource management at all levels (including the national level) and to make the resource management system Treaty compliant. The claimants and interested parties disagreed, although they had different reasons for their disagreement with various aspects of the proposed process – some disagreed with the process as a whole. Many were concerned that post-settlement governance entities (PSGEs) would lead or dominate the process. The New Zealand Māori Council (NZMC) proposed that they (along with FOMA and PSGEs) should lead a process to identify all Treaty rights-holders and call them to hui to decide the appointing body (or representatives directly). The Freshwater Iwi Leaders Group (ILG) argued that iwi and hapū should simply make the appointments with no prescriptions as to how they should do so. Some interested parties submitted that hapū alone should make the appointments. We also heard the views of those who are to participate (those with rights and interests 'at place'), notably Māori land holding entities and urban Māori authorities, that they should either be involved in leading the process or should make direct appointments to the committees. Ngāti Manu, a Ngāpuhi hapū, proposed that the Crown deal urgently with identifying all rights and interests in water bodies (fresh water and geothermal) so that those with the rights and interests could hold hui and decide on appointments. One thing they all agreed on was that composition of the committees should be on a co-governance (50:50) basis.

Due to the nature of this narrow priority hearing, the Crown and other parties disagreed as to the exact scope of what was at issue, and their various submissions as to scope will be considered in this chapter as issues arise.

In this chapter, we discuss the key elements of the Crown's proposed process. In section 2.2, we consider the Crown's proposal that iwi and hapū would self-identify to lead the process, and we also consider proposals from the NZMC and interested parties that national Māori bodies should lead the process as well as (or instead of) iwi and hapū. We then discuss the role of the other groups with rights and interests 'at place' in section 2.3, including 'whakapapa-based groups' such as customary rights holders in freshwater resources or Māori landowners, and non-kin based urban Māori communities. We also discuss the options currently under consideration by the Crown for a dispute resolution process and circuit breaker.

In section 2.4, we consider two crucial factors that may complicate the process to select appointing bodies. First, Treaty settlement arrangements could trump or displace altogether the Crown's proposed process in some regions, but the extent to which that could occur has not yet been resolved. Secondly, running the selection process and the composition process simultaneously carries the risk of preventing agreement in the selection process, which Ministry for the Environment officials have identified as a risk. Also, as noted, the claimants and interested parties agree that the composition should be arranged on a co-governance basis. We then discuss some issues which arose during the hearing in section 2.5. These include the concern about rights and interests in freshwater bodies and the question of how the committees' secretariat would be appointed. Each committee would have a secretariat, which would have the key role of developing the regional plan, but some parties disagree with the process by which experts in te ao Māori would be appointed to the secretariat. Finally, we consider the question of whether the Crown should pause its reforms and consult Māori on the detail of the proposed appointments process, which was still being worked out at the time of the hearing.

In section 2.6, we set out our conclusions and our findings as to whether the Crown's proposed process is consistent with the principles of the Treaty of Waitangi.

2.2 The Crown's Proposal for Who Should Lead the Process to Select an Appointing Body

2.2.1 The Crown's proposal that iwi and hapū will lead the process to select an appointing body

2.2.1.1 *Evidence and submissions on the role of hapū*

The Crown has proposed that iwi and hapū representative groups will lead the process to select or nominate an appointing body. We discuss the particular organisational structures involved in this proposal further below. In essence, the Crown's position was that the current focus on iwi in the RMA planning process should be broadened to include hapū, as recommended in the Randerson report.[13] Ministry for the Environment (MFE) officials advised:

> Under the RMA, most active engagement requirements and participation opportunities for tangata whenua apply to iwi authorities. Groups that represent hapū may enter Mana Whakahono a Rohe agreements (MWARS) if invited by local authorities to do so and may also be party to joint management agreements (JMAS).
>
> Under the SPA and NBA, both iwi authorities and groups that represent hapū will be entitled to undertake specific roles on behalf of iwi and hapū. This is because:

13. Resource Management Review Panel, *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel* (Wellington: Resource Management Review Panel, 2020), p 92) (doc H18(a)), p 92. The Randerson report also referred to whānau in addition to iwi and hapū.

a. hapū were, and in many places still are, the primary group in Māori society that holds customary rights and responsibilities and exercises rangatiratanga
b. 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 group other than an "iwi authority", even if the appropriate group to engage with on a particular matter is a hapū or whānau.'[14]

MFE's statement that 'hapū were, and in many places still are, the primary group in Māori society that holds customary rights and responsibilities and exercises rangatiratanga' accords with evidence presented in stage 2 of this inquiry as well as other Tribunal inquiries. The customary rights report, for example, which was prepared for stage 2 by Sir Taihakurei Durie, Dr Robert Joseph, Dr Andrew Eruiti, and Dr Val Toki, stated:

> The land and their associated waters were initially occupied by clusters of whānau taking possession of different parts. These were the hapū, which might typically comprise a few hundred persons. The hapū constituted the everyday community. They also operated autonomously. They have been assessed as the primary, political and land-holding unit of Māori society.
>
> As the hapū grew they divided, and in dividing they spread across the district, or typically, along the rivers or around the lakes. Consequentially, the hapū of a district most usually shared a common ancestry. Collectively the people of common ancestry were known simply as the people, or in te reo Māori, the iwi.[15]

They added: 'It is the Treaty itself that provides the conclusion that the governing institution was the hapū, as hapū alone are cited as the tribe.'[16]

Sir Taihakurei Durie's evidence in the priority hearing echoed this position, stating that 'it appears to be generally accepted' that hapū 'hold the customary interest in the natural resources of their area', and that 'hapū autonomy is the customary foundation for the Māori social and political order'.[17] While the widespread loss of Māori land since 1840 has meant the disappearance of many traditional papakainga communities, Sir Taihakurei suggested that hapū communities are represented on the ground by functioning marae committees.[18] He also argued that those communities are characterised by both kin descent (whakapapa) and participation:

> Self-identification and self-determination are fundamental principles that underpin the structure and custom of Māori society. The political authority of the hapū is

14. 'BRF-1692 RM Reform 189 – Delegated Decisions for Describing Māori Representative Organisations and Record Keeping Requirements', 17 June 2022 (doc H37(a)), p 347
15. Document E13, pp 19–20
16. Ibid, p 27
17. Document H7, pp 4, 5
18. Ibid, p 4

dependent on the support of the community. Primary membership of the community is characterised by descent, but defined by participation and contribution. It flows from this that the authority and power held by the hapū, resides at the local community level, with those on the ground.[19]

The need for hapū involvement in a leadership role in the process (and in resource management more generally), whether individually or as a group of hapū, was supported by many witnesses. These included, Natalie Martin, Michelle Marino, Manu Paul, Roger Tichborne, and others.[20] Some also supported direct hapū representation on the regional planning committees.[21] Evelyn Kereopa suggested:

> The hapū representative should be knowledgeable about the whenua and the awa. They will have seen the changes in the environment since the time they were born there. Hapū and kaitiaki information will be invaluable to the RPC if we are to take care of the environment.[22]

Roger Tichborne also considered that his two hapū should be able to appoint a representative to the regional planning committee, using a hui-a-hapū to select the representative. Mr Tichborne explained that the hapū have recently obtained a much better working relationship with the Gisborne District Council.[23] He commented:

> I am very concerned that if the scope of the RPC [regional planning committee] is too broad, the voice of Ngā Hapū will be diminished. We want to continue to be able to dialogue with the GDC [Gisborne District Council] directly and keep the council aware of our interests. We want to stay involved in all matters relating to freshwater, the land, the takutai moana and other resources in Tokomaru Bay, and have a say on how they should be handled. It is our belief that all of the water in our rohe is connected – fresh water, rain, the ocean. This belief needs to be considered too.[24]

The essential problem for those who want their hapū directly represented on the committees in this way is that the proposal is for 14 regions, five in the South Island and nine in the North Island.[25] Crown counsel pointed to the Randerson report, which 'recognised that, in some circumstances, delegates will have to represent the interests and perspective of more than one mana whenua group, and where that is the case, process measures should be used to ensure representation'.[26]

19. Ibid, p 6
20. Document H24, pp 2–6; doc H22, pp 2–3; doc H25, pp 3–4
21. Submission 3.3.89
22. Document H33, p 3
23. Document H30
24. Ibid, p 5
25. 'Map of Regions for Combined Planning' (doc H37(a)), p 243
26. Submission 3.3.78, p 8

In closing submissions, counsel for the NZMC submitted that iwi and hapū should not be involved in leading the process.[27]

2.2.1.2 *Our view*

In the NZMC's application for a priority hearing, counsel expressed concern that reliance on PSGEs to represent Māori in the resource management space would 'ignore the fact that almost all relevant rights and responsibilities in respect of geothermal resources and the environment, as a matter of tikanga and Te Tiriti, reside with hapū and not in iwi'.[28] The NZMC changed this position at closing submissions, arguing that the Crown's proposal to have iwi and hapū lead the process 'unjustifiably sets up a dominant/subordinate relationship between iwi/hapū and other place-based entities that hold Treaty rights'.[29] We address this submission in the section on groups with 'rights and interests at place' (see section 3.3).

In our view, the evidence in the priority inquiry demonstrated that hapū should have a leading role in the process to select either an appointing body or the representatives more directly (as some considered should happen). The real dispute, at least at the start of the hearing, was about the role of iwi. We turn to that next.

2.2.1.3 *Evidence and submissions on the role of iwi*

One of the key disputes between the parties was about the involvement of iwi authorities, more particularly the Post-Settlement Governance Entities (PSGEs) established to receive and administer Treaty settlement redress. Kingi Smiler expressed a typical view of those on one side of the debate when he stated: 'Te Tai Kaha have become increasingly concerned that the new system strongly favours some rights holders over others – particularly PSGEs', adding that 'PSGEs are not a "one-stop" shop, sole voice of Māori expression of rangatiratanga across all kāwanatanga activities'.[30] Many of the New Zealand Māori Council (NZMC witnesses expressed concern that the Crown proposed to use PSGEs to appoint the Māori members of regional planning committees. Sir Taihakurei Durie, for example, stated: 'The New Zealand Māori Council's position regarding Māori representation on regional decision-making bodies under the NBA, is that a system of regional representation focused solely on Post Settlement Governance Entities is inconsistent with the Treaty and Tikanga Māori.'[31] The claimants believed that 'Crown actions in the reform process to date' indicated that the Crown had selected or intended to emphasise PSGEs in the appointment process, as set out in the claimants' memorandum seeking a priority hearing:

> The New Zealand Māori Council is concerned, based on Crown actions in the reform process to date [as at 29 April 2022], that there is a real risk that the Crown

27. Submission 3.3.80, pp 6–8
28. Memorandum 3.2.403, p 3
29. Submission 3.3.80, p 7
30. Document H17, pp 5–6
31. Document H7, p 3

> is erroneously assuming that its Article 1 kawanatanga powers entitle the Crown to decide on the process for how Māori representatives on partnership bodies will be (s) elected. The New Zealand Māori Council is further concerned that the Crown appears to be intent on creating a system of representation that relies on or prefers PSGEs as representing the voice of all Māori within a region. The New Zealand Māori Council is concerned that such an approach, with its practical emphasis on PSGEs, will result in the exclusion of many Māori communities and landowners, particularly customary marae and urban Māori. It will also ignore the fact that almost all relevant rights and responsibilities in respect of geothermal resources and the environment, as a matter of tikanga and Te Tiriti, reside in hapū and not in iwi. It follows, in the New Zealand Māori Council's view, that any approach to partnership bodies whose purpose or effect is to recognise PSGEs or iwi as the exclusive voice for Māori communities at the regional or local/catchment level does not accord with Te Tiriti.[32]

As noted, the NZMC witnesses opposed an exclusive role for PSGEs in the appointment process.[33] It appears that the Crown's discussion document of November 2021, which was the subject of consultation at 36 regional hui,[34] led the NZMC to believe that the system would be dominated by PSGEs. This was partly the result of statements about how Treaty settlement arrangements would need to be translated into the governance arrangements of the new resource management system.[35] Keita Kohere of MFE, in her evidence for the Crown, noted that a key theme arising from the consultation hui and the submissions was that 'there were concerns that the voices of smaller whānau, komiti, hapū and Māori groups might be lost, particularly those not represented by Post Settlement Governance Entities'.[36] The evidence in this inquiry suggests that these concerns remain, at least for some witnesses, and that there were times that MFE officials expressed the view that the iwi authorities involved in the process would mainly be PSGEs.

Janine Smith, the Deputy Secretary responsible for 'Natural and Built System and Climate Mitigation', stated in her evidence that the Crown does not propose to have an appointment process limited to PSGEs:

> The representation process is not structured around 'Post Settlement Governance Entities ('PSGEs') only'. Iwi authorities and groups representing hapu (who wish to be involved) are to lead the process. It is up to Maori to determine their process (subject only to three key parameters regarding inclusivity, existing rights and interests, and timing . . . Funding and support will be provided but it is not a Crown-driven or determined process or outcome – nor should it be.[37]

32. Memorandum 3.2.403, pp 2–3
33. See, for example, doc H7, pp 28–29; doc H12(a)
34. Document H38, pp 36–37
35. Ministry for the Environment, *Our Future Resource Management System* (doc H18(a)), pp 979–980, 988–980; New Zealand Māori Council, submission to the Ministry for the Environment on the discussion document, no date (doc H18(a)), pp 1042–1043; doc H7, p 23
36. Document H38, p 3
37. Document H37, p 2

But every process has to have a starting point, and the Crown's proposal was that the process to determine an appointing body should begin with iwi and hapū, who would be notified to begin by the Local Government Commission. Iwi and hapū would facilitate the involvement of other Māori groups and right-holders in the region in a Māori-led and Māori-determined process. Ms Smith accepted that there were different views as to whether it was appropriate for iwi authorities and groups representing hapū to be 'the starting point', and for the involvement of 'wider interest holders or other representative groups' to be 'facilitated by iwi and hapū rather than led by those representative groups themselves'. She explained that the starting point had been located at the higher level for 'workability reasons' and because iwi and hapū are 'recognised existing representative groups'. For the process to be workable, she said, a balance had to be struck between 'self-determination and the greater inclusion of Māori groups' on the one hand, while also providing for 'some regional leadership, and the least amount of prescription required' so that Māori could determine their own process. Although prescription was intended to be limited, the iwi and hapū organisations 'leading the discussions must engage with their members and other entities representing rights and interests "at-place"'.[38]

We address the involvement of other groups 'at place' in section 2.3. Here, we are concerned with the role of iwi in the process. Ms Smith observed that 'much of the claimant evidence does not deny that, along with others, PSGEs have a legitimate role'.[39] This comment referred to the evidence of Sir Taihakurei Durie at the priority hearing.[40] Sir Taihakurei described the role of iwi in Māori society, arguing that iwi became corporate entities representing hapū in the nineteenth century as a result of Māori responses to the challenges of colonisation:

> Iwi was a term of general description for the people of a locality, district or region and denoted that they generally came from a common source. Iwi also came to be used for the Māori as a people (te iwi Māori). Iwi referred also to the connected hapū of a district. Iwi was also used for a combination of hapū for a particular war or expedition that included some only of the district hapū, or individuals of different hapū. Iwi combinations took various names in the same manner as hapū, but usually from a more remote and common ancestor. Iwi was also applied to unrelated hapū or individuals from several hapū embarked on a common venture. Non-kin combinations became more usual in the 19th century. Hapū could fuse for a combined venture or could retain their separate identities, but they generally divided to their autonomous units when the venture was over. District hapū generally stood united in war but independent in peace. During the 19th century, however, iwi came more regularly to mean the several hapū of a region standing under the name of a common, remote

38. Document H37, pp 2–3
39. Ibid, p 2
40. Ibid; doc H7, p 31

and famous ancestor. This shift was caused or accentuated by unprecedented external pressure.[41]

Sir Taihakurei added that, even though 'iwi as hapū combinations became more regular and settled' in the nineteenth century, and the iwi came to assume 'corporate functions' on behalf of all its members, hapū remained essential political and social units at the local level.[42] He described tikanga as 'pragmatic and receptive' to these kinds of changes so long as the changes remained consistent with whanaungatanga and other fundamental Māori norms. Social structures have changed and there has been a 'shift of corporate functions from small hapū to larger hapū, iwi or waka, as appropriate to the new political age, and with a division of functions between hapū, iwi or waka according to the matter in hand, some matters being local, others requiring regional policy or concerted action'.[43]

It is not necessary for us to determine whether corporate iwi functions emerged in the nineteenth century or earlier. There have always been regional differences but colonisation has had a large impact, especially the corrosive effects of individualisation of title. Individualisation was introduced by the Crown in the nineteenth century with the deliberate purpose of destroying 'the tribe' (among other things), which is well known and has been the subject of numerous Tribunal reports.[44] But iwi have been playing a leading role for their people in resource management since at least the enactment of the RMA in 1991. Tina Porou, a witness for the Freshwater Iwi Leaders Group (ILG), has worked in environmental roles for several iwi organisations over the last 20 years.[45] Ms Porou told us: 'The ILG position has always been that Treaty rights and interests in natural resource and environmental matters rest with iwi and hapū at place.'[46] She objected to Keita Kohere's statement that the ILG 'held concerns that there would be practical difficulties in enabling hapu participation without creating additional complexities and delay or prevent[ing] NBA Committees from being established'.[47] According to Ms Porou's evidence, there was a large number of hapū in some rohe which could create delays and 'lead to a bottleneck in the process', but the ILG technicians 'were not opposed to hapū participation in the process'. Rather, the 'bespoke design of that particular process should be led by iwi and hapū, who can in turn engage with their hapū, marae, rūnanga, hapū collectives etc to design the best fit for the system'.[48]

41. Document H7, pp 8–9
42. Ibid, p 9
43. Ibid, pp 9–10
44. See, for example, Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Waitangi Tribunal, 2008), vol 2, pp 520–521; Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, pp 664–666, 669–671, 683–687
45. Document H53, pp 2–3
46. Ibid, p 8
47. Ibid; doc H38, p 7; see also 'ILG/WMT and MFE Wananga, 26 October 2021: The Who in the System and Joint Committee Appointments' (doc H37(a)), pp 86–87
48. Document H53, p 8

Rikirangi Gage, of Te Whānau a Apanui, gave evidence for the ILG. He stated that Te Rūnanga o Te Whānau, of which he is chief executive, is

> a 'mahi' institution, it does not hold mana in its own right. Hapū remain the mana holding institutions within our iwi. The Rūnanga, and indeed other entities within the iwi, are subject to the overarching, and ultimate, mana of the hapū. Hapū can appoint representative institutions, as they have done in the case of the Rūnanga, and in regards to various other entities serving the iwi, but mana is never relocated away from the hapū collective – this, in our iwi at least, is sacrosanct – an irrefutable truth embedded so deeply that it forms the basis of our self government.[49]

Sir Taihakurei Durie's evidence accepted that iwi organisations, including PSGEs, had a role in leading the process, arguing that the role of representative organisations should be to convene and facilitate community discussions to decide representation.[50] He commented that 'tensions between hapū and iwi, and between individuals and groups therefore exist, as they did traditionally', and the solution 'depends not on finding for one or the other, but upon recognising the status and contribution of each, and upon finding a structure that accommodates the various interests'.[51] Some counsel have suggested excluding iwi bodies altogether from the process unless specifically mandated by hapū to lead them in this particular sphere of activity (as opposed, for example, to representing them in Treaty settlements).[52] According to counsel for Ngāi Tahu, however, the hearing 'revealed a near universal agreement among Māori parties on one issue – that representation must be inclusive of iwi and hapū'.[53]

The question of whether representation of iwi and hapū could default to PSGEs was addressed by MFE in advice to Ministers, although this referred to wider participation in the new resource management system rather than the process to decide an appointing body:

> Practically, officials expect that where PSGEs are the existing primary representative for iwi and/or hapū for resource management purposes that this will continue in the new system with hapū representative groups potentially engaging directly on matters of specific interest to them where appropriate. As discussed in the paper, it is not intended that one organisation must exclusively represent an iwi or hapū for all resource management purposes. Over time, any changes to how any iwi or hapū wishes to be represented for resource management purposes should be up to that iwi or hapū in the context of its own relationships within te ao Māori. It is not intended

49. Document H51, p 3
50. Document H7, pp 30–31
51. Ibid, p 10
52. See, for example, submission 3.3.70, pp 3–9; submission 3.3.89, pp 1–7
53. Submission 3.3.81, p 2

that the SPA nor NBA would restrict Māori, in accordance with tikanga Māori, from organising in any particular way in the future.[54]

In respect of PSGEs, we do not consider that these bodies are unrepresentative of their members, as has been alleged by some parties in this inquiry. In a document entitled 'Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai', by Jacinta Ruru, Andrew Geddis, Mihiata Pirini, and Jacobi Kohu-Morris, the various modes of electing PSGE representatives were set out:

- vote via your marae. Members vote for a representative through their marae. Each marae then appoints a representative on the PSGE.
- vote via your hapū. Members vote for a representative through their hapū. Each hapū appoints a representative on the PSGE.
- vote as an individual. Members vote for their preferred candidate. The highest polling candidates are appointed to the PSGE.
- vote in a takiwā. Members vote through a) their marae and b) their hapū. Each marae and hapū appoints a representative on the PSGE.
- a combination of the above, with many variations.[55]

The exact form of representative model for a PSGE is chosen by the claimant community, usually through an iwi-wide vote during the ratification process, but only after hui and engagement by the mandated entity with the people to select the option that will be put forward in the ratification process.

Officials noted in advice to Ministers that the emphasis on iwi, including in the RMA, has partly arisen from Crown policy and preferences, but the Crown could not now resile from the commitments made as a result of its preference for iwi (albeit speaking of the system generally and not specifically about regional planning committee appointments):

> This analysis acknowledges that, despite the word 'iwi' not appearing in the articles of Te Tiriti, Crown actions, largely through Treaty settlements, have promoted an iwi-based organisation of te ao Māori in its primary interactions with the Crown and its agents in the RM system which may not be fully consistent with tikanga. The proposals do aim to enhance the ability of hapū to exercise rangatiratanga and kaitiakitanga, as they were at the time Te Tiriti was signed (and in some cases remain) the primary political grouping in Māori society. Hence the word 'hapū' was used as well as 'the rangatira of hapū' in the articles of Te Tiriti.
>
> However, the proposals do not propose to 'reduce' the role of iwi representative organisations. The risks to settlement durability, existing natural resource arrangements under the RMA and potentially to Māori-Crown relations more generally are

54. 'BRF-1692 RM Reform 189 – Delegated Decisions for Describing Māori Representative Organisations and Record Keeping Requirements', 17 June 2022 (doc H37(a)), pp 355–356

55. Jacinta Ruru, Andrew Geddis, Mihiata Pirini, and Jacobi Kohu-Morris, 'Further Democratising Māori Decision-Making to Give Effect to Te Mana o te Wai' (doc H18(a)), p 773

too high for the Crown to significantly shift from the position it has established in relation to the role of iwi authorities.[56]

2.2.1.4 *Our view*

The question before the Tribunal is whether it would be reasonable in the circumstances of the twenty-first century to exclude iwi organisations from a role in leading the process to select an appointing body, alongside and in conjunction with hapū. It does not seem to us that it would be possible. There has been a long history by now of iwi organisations representing their people across many areas, including resource management, and that situation is only contrary to tikanga *if it is exclusive to iwi*. We agree with Sir Taihakurei that it is not an issue of finding in favour of either iwi or hapū but rather 'recognising the status and contribution of each'.[57]

We are aware that there are other ways to do it, and we consider the role of those with rights and interests 'at place' – in association with hapū and iwi – in section 3.3.

The question at this point is (a) how do Māori know or decide which iwi and hapū organisations will be involved in leading the process to select an appointing body (including whether it will be limited to PSGEs), and (b) whether other Māori groups and organisations should also be involved in leading the process (as suggested by the NZMC and various interested parties). We turn first to consider part (a) of this question. Part (b) of the question is addressed in section 2.2.3.

2.2.2 The Crown's proposal that 'iwi authorities' and 'groups that represent hapū' will self-identify

The Crown's position in this inquiry was that someone has to start the process to select an appointing body, and that the process should be inclusive and self-determined. Further, the Crown proposed that 'iwi authorities and groups representing hapū who have self-identified as wishing to be involved' would be 'leading discussions facilitating regionally towards agreement (facilitative not determinative role)'.[58] The Ministerial Oversight Group decided in April 2022:

> iwi authorities and groups that represent hapū would be notified by the Local Government Commission to lead discussions on regional composition and in determining appointing bodies. The Local Government Commission will use the information provided through the equivalent of section 35A [of the RMA] in the new system to identify these groups.[59]

56. 'Paper 2: Role, Funding and Participation of Māori in the RM system', no date, annex A, pp 26–27 (doc H37(a), pp 535–536)
57. Document H7, p 10
58. Submission 3.3.78, pp 26–27
59. 'BRF-1562 RM Reform 192 – Delegated Decisions on Māori Appointment Process to Natural and Built Environments and Spatial Planning Committees', 19 July 2022 (doc H37(d)), p 6

Earlier in the reform process, the Crown referred to iwi and hapū 'representative organisations' in this leadership role.[60] By hapū 'representative organisations', the Crown meant either 'an entity which is authorised to speak for and act on behalf of a hapū or collective of hapū' or the provision of an 'authorised view' by hapū members through 'a hui or other process convened in accordance with their tikanga'.[61] Ultimately, however, MFE preferred to use the terms that have already been used in the RMA.[62]

The term 'iwi authority' was used in 1991 when the RMA was enacted, defining it as 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so'.[63] The ILG had recommended retaining this term because 'iwi authority' has been 'used for 30 years and iwi, hapū and Māori have created workable systems with this term'.[64] The term for hapū involvement in RMA processes is 'each . . . group that represents hapū'. This term was inserted into the Act in 2005 when the Crown sought to introduce co-management arrangements into the resource management system. Section 36B provided for councils to enter into joint management agreements with iwi or with a group representing hapū.[65] The latter term has been left undefined in the Act. MFE advised Ministers that there was a risk that the Crown 'usurps rangatiratanga of Māori to self-determine and choose representative bodies' if the new legislation defined the meaning of representative bodies too closely. There was also a further risk of 'inappropriately influencing the application of tikanga Māori within te ao Māori' over time. Officials considered, therefore, that the low level of prescription in the existing RMA terms, 'iwi authority' and 'group that represents hapū', was 'appropriately balanced in giving effect to Te Tiriti principles'.[66] It was not intended that the new legislation would 'restrict Māori, in accordance with tikanga Māori, from organising in any particular way in the future'.[67]

MFE stressed that these existing RMA terms allowed iwi and hapū groups to participate on the basis of self-identification.[68] The term 'self-identifying' was a key term in MFE's proposals because, in the Crown's view, it was the most consistent vehicle for self-determination. As cited above, Sir Taihakurei stated that '[s]elf-identification and self-determination are fundamental principles that underpin the structure and custom of Māori society'.[69] MFE's proposal for self-identification was for iwi authorities and groups that represent hapū to 'register themselves'

60. Document H38, pp 4, 12–14
61. 'Describing Iwi, Hapū and Māori Representative Organisations: For Discussion with Freshwater Iwi Leaders Group/Te Wai Māori Trust', no date (doc H37(a)), p 319
62. 'BRF-1692 RM Reform 189 – Delegated Decisions for Describing Māori Representative Organisations and Record Keeping Requirements', 17 June 2022 (doc F37(a)), p 348
63. Resource Management Act 1991, s 2
64. 'BRF-1692 RM Reform 189' (doc F37(a)), p 352
65. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 74–76
66. 'BRF-1692 RM Reform 189' (doc F37(a)), p 353
67. Ibid, p 356
68. Ibid, p 365
69. Document H7, p 6

in order to be notified to begin the process.[70] The Crown presently is required to 'provide local authorities with information on iwi authorities and groups that represent hapū' under section 35A of the RMA, and this requirement is addressed through Te Kahui Mangai, a website administered by TPK.[71] Te Kahui Mangai, the register that 'central government currently administers', would become the 'model or starting point for the register required', and the Crown acknowledged that it would need 'updates to meet the requirements of the new system'.[72] Crown counsel emphasised the importance of self-registration; no proof of mandate or other authorisation would be required for a group to register. Rather, the register would be maintained by central government and 'be designed to be broad and inclusive'.[73]

In response to questions from the Tribunal, Keita Kohere clarified that the Te Kahui Mangai list consists of legal entities and their contact details, and it will need to be improved for the purposes of this process,[74] including communicating the need for groups to register 'far and wide'.[75] There is an obvious issue as to whether hapū who have not created the usual kind of entity (a charitable trust, an incorporation, a rūnanga, or some other such legal entity) will be able to self-register. In answer to questions in writing, Ms Smith and Ms Kohere noted that Te Kahui Mangai is only a 'model or starting point for the register required', reiterating that the list would not 'presume to determine the mandate or authority of a group and would be designed to be broad and inclusive'.[76]

It appears, therefore, that the new register will be widely communicated among Māori, and 'groups that represent hapū' will not need to set up a legal entity in order to self-identify on the register.

Counsel for Ngāti Manu submitted that unsettled hapū (among others) could be improperly excluded, which would be a breach of tikanga and their Treaty rights.[77] It appears to us, however, that the self-identification and self-registration proposed by the Crown would enable the several hapū involved as interested parties in this inquiry, including, for example, Ngāti Manu or Te Whānau ā Te Aotāwarirangi, to register themselves and be involved in leading the process to select an appointing body. Funding would be available to assist their participation in leadership and facilitation of the process, as we understand the proposal, but implementation decisions were still in the process of being made at the time of the hearing.

Matiu Haitana told us that his hapū would consider the need to register as 'coercion': 'Why should we have to register with anyone', he said, 'in regard to

70. Submission 3.3.78, p 16
71. 'Paper: Identifying Who Partners and Participates in the Resource Management System from te Ao Māori' (doc H37(a)), p 159
72. Submission 3.3.78, p 16
73. Ibid
74. We note that the Randerson report observed there was a lack of confidence in this list on the TPK website: *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel*, p 93 (doc H18(a)), p 93.
75. Transcript 4.1.6, pp 477–478
76. Document H37(l), p 18
77. Submission 3.3.92, p 6

representing our mana for our wai?'[78] As we understand the proposal, no one will be required to register in order to participate in the discussions, but those who have registered will be notified to start the process according to the timetable for establishing the regional planning committees. The Crown stressed in closing submissions that the leadership role envisaged for those who have registered their wish to carry out that role will be to facilitate discussion and agreement on the selection of an appointing body through a process to be determined regionally by tikanga, not to determine the appointing body.[79] This is a crucial point.

Under cross-examination by Janet Mason, counsel for interested parties, Ms Kohere and Ms Smith clarified that a group that represents hapū can self-identify and register for a role in leading the process, even if they have settled their claims and are represented for that purpose by a PSGE. They told us that the exact mechanism for what has been referred to as self-registration has not been decided yet, and Te Kahui Mangai is just a starting point for the register that is needed, but any group that represents hapū will be able to register, including hapū from settled iwi. The Crown acknowledged that there are still a number of unsettled hapū and iwi as well who will need to self-identify and register, although much information about iwi authorities is already held on Te Kahui Mangai. Ms Kohere also stated that the Crown is working through how it might support facilitation of groups to register on the centrally-held list.[80] This point was noted by officials in their advice to Ministers:

> to ensure that the system does not inappropriately exclude groups from discussions, (particularly hapū), implementation support will be required to be provided to iwi and hapū, to ensure that all appropriate 'iwi/hapū representative organisations' are on the list.[81]

Also, in order to prevent groups being left out, there was a proposal that information would be actively solicited by the Local Government Commission. That is because MFE's proposed process for selecting an appointing body would begin with the Local Government Commission, which would notify iwi authorities and groups that lead hapū (on the one hand) and local authorities (on the other hand) to start the selection process, and to advise them of the statutory time frames. As the body that starts the process, the commission would likely be the keeper of the central register of iwi authorities and groups that represent hapū. Officials advised Ministers:

> Notification is a critical step, and ensuring all parties are notified reduces litigation and dispute resolution risk further on in the process.

78. Transcript 4.1.6, pp 149–150
79. Submission 3.3.78, pp 26–27
80. Transcript 4.1.6, pp 458–459
81. 'BRF-1716 RM Reforms 186 – Delegated Decisions on Regional Governance and Decision-Making Arrangements', 13 July 2022 (doc H37(c)), p [3]

> The success of notification relies heavily on the accuracy of the centrally held record of iwi and hapū groups (note advice provided in BRF-1692). *In addition, it is proposed that local authorities be required to share relevant information they hold with the LGC. The LGC will also be able to access other sources of information, such as requesting hapū contact information from an iwi authority. Another protection proposed is to enable notified parties to request that the LGC notify other groups (within 1 month) if they consider they are eligible but were not notified.*
>
> If the LGC has acted in good faith, non-notification (or late notification) of a party would be unlikely in and of itself to invalidate a regional process or determination made by the LGC if challenged through judicial review. [Emphasis added.][82]

According to officials, there would be no need for public notification. A legislative requirement for public notification was considered 'unlikely to mitigate risks of eligible groups being unaware of the process', but nor would the legislation prevent wider public notification if the commission considered it necessary.[83]

Claimant counsel submitted:

> The Crown's proposals are premised on the Crown through its agency, the LGC, having the right/power to maintain the register of who qualifies as the 'iwi authorities' and the 'groups that represent hapū' that are entitled to be 'notified' as the groups that will lead the process to determine the Rangatiratanga Representatives in each region. If and to the extent that the LGC has any discretion to choose whether a Māori community meets this test, a power/discretion will be conferred on the Crown that is not justified by its kāwanatanga responsibilities under Article 1 of Te Tiriti. That is because Māori, not the Crown, should determine whether a group qualifies as an iwi or a hapū in accordance with tikanga. The LGC is not an appropriate body to determine that, as it lacks the institutional legitimacy (in terms of its mandate and history) and competence (in terms of its existing institutional work and experience) to determine the issues of tikanga that will arise in this context.[84]

Setting aside the suggestion that the commission is a Crown agent, we saw no suggestion in the evidence that the Local Government Commission or the central government would have a role of deciding whether a group qualified as an 'iwi authority' or a 'group that represents hapū' before they could register. The essence of the system would be self-identification. The Crown witnesses confirmed in answer to questions in writing that the 'list would not presume to determine the mandate or authority of a group and would be designed to be broad and inclusive'.[85] Crown counsel also submitted in closing submissions that the commission's notification role would be 'administrative only, it has no screening or assessment function'.[86]

82. 'BRF-1716 RM Reforms 186' (doc H37(c)), p [3]
83. Ibid
84. Submission 3.3.80, pp 8–9
85. Document H37(l), p 18
86. Submission 3.3.78, p 37

We turn next to consider the claimants' and interested parties' proposals that pan-Māori organisations should also be involved in leading the process to select appointing bodies.

2.2.3 The claimants' and interested parties' proposals that pan-Māori organisations should lead the process instead of iwi and hapū

2.2.3.1 *NZMC's proposal*

The nub of the debate between the NZMC and the Crown in the priority hearing was whether the NZMC and the Federation of Māori Authorities (FOMA) should also be involved in or, alternatively, *exclusively* involved in leading the process. In evidence for the NZMC, Sir Taihakurei Durie stated:

> The task now is to consider a way forward to deal with the current issue of representation and decision making, that draws upon custom and historical experience.
>
> Broadly I understand the issue to be that Government is proposing the development of regional resource management plans through joint planning committees that will be constituted by members who represent local government and Māori. In the first instance, in each region, local government authorities will undertake an establishment process. Part of that establishment process will require a process for determining Māori representation. This will involve Māori meeting to determine their representation. This could be facilitated by a 'Māori establishment committee' (my own term) to agree upon the Māori composition of the joint planning committee for the region, including how many members there will be, how many will be Māori and who will be the Māori appointing bodies.
>
> I understand that the Government intends that leading the process for Māori will be representative organisations.
>
> What is lacking in my view, is clarity around who are the 'representative organisations', what is the process for Māori, and how will the process be triggered and resolved.
>
> On 'who are the representative organisations' there is not to my knowledge clarity about this, but it appears that the Government may intend it to mean PSGEs or is at least to be inclusive of them. My view is that Māori are entitled to better. I have already given my reasons.
>
> As to 'what is the process' that is not clear either but to me, it must involve at least two steps: (a) a 'talk with Māori stage' and (b) a 'join with the establishment committee stage'. Possibly, there is a third step, to determine the appointing entities, although there are other ways to achieve that.
>
> From the previous discussion I consider the role of the Māori representative organisations should be no more than that of convening and facilitating. Between them they should be able to ensure that all relevant interest groups are engaged with. That includes those Māori organisations with existing arrangements with local authorities and those without them, for the difference between them may have been due to just who had the best access to funds to engage.
>
> It is not a case of consulting with the people. It is rather that the people should decide. The following is an example of a plan that purports to accommodate those

concerns: that the PSGEs, FOMA and NZMC will together convene a process in each district to enable the relevant groups to appoint the Māori representatives to the establishment committee.[87]

Although the distinction was not always clear in the evidence, the NZMC's proposal was not that the NZMC and FOMA would work with each PSGE in a region but rather that PSGEs would be represented by the ILG, which Sir Taihakurei referred to as a 'consortium of iwi leaders'.[88]

According to the claimants, the NZMC was an appropriate national representative institution to play this leadership role. It was established in 1962 as part of a long pattern of Māori setting up self-government institutions and seeking statutory recognition and powers for those institutions, a process which began in the nineteenth century and has not finished yet. The Tribunal has reported in detail on the establishment of the NZMC in its report *Whaia Te Mana Motuhake: In Pursuit of Mana Motuhake*, and the contextual history of Māori self-government institutions was covered briefly in that report and has been addressed more fully in district reports.[89] It would be unfair to the tribal leaders of the day who established the council prior to the legislation, as a result of the Dominion Māori Conference in 1959, to dismiss it simply as a State creation. It has played an important role (then and since) in advocating for policy change and other improvements that would benefit all Māori. The statutory powers that the leaders could obtain in 1962 for the council, the District Māori Councils, and the flax-roots committees, were relatively limited but have proved important to various Māori communities over time and to Māori nationally.[90]

Under section 18 of the Māori Community Development Act 1962, the general functions of the NZMC (which can also be exercised at the district level by the District Māori Councils) are:

> (1) The general functions of the New Zealand Maori Council, in respect of all Maoris, shall be—
>
> (a) to consider and discuss such matters as appear relevant to the social and economic advancement of the Maori race:
>
> (b) to consider and, as far as possible, give effect to any measures that will conserve and promote harmonious and friendly relations between members of the Maori race and other members of the community:
>
> (c) to promote, encourage, and assist Maoris—
>
> (i) to conserve, improve, advance and maintain their physical, economic, industrial, educational, social, moral, and spiritual wellbeing;

87. Document H7, pp 30–31
88. Ibid, pp 23–28; submission 3.3.80, p 14
89. Waitangi Tribunal, *Whaia Te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), ch 3; see also, for example, Waitangi Tribunal, *He Maunga Rongo*, vol 1, chs 3–7
90. Waitangi Tribunal, *Whaia Te Mana Motuhake*, ch 3–5; doc H7, pp 16–20

(ii) to assume and maintain self-reliance, thrift, pride of race, and such conduct as will be conducive to their general health and economic well-being;
(iii) to accept, enjoy, and maintain the full rights, privileges, and responsibilities of New Zealand citizenship;
(iv) to apply and maintain the maximum possible efficiency and responsibility in their local self-government and undertakings; and (v) to preserve, revive and maintain the teaching of Maori arts, crafts, language, genealogy, and history in order to perpetuate Maori culture:

(d) to collaborate with and assist State departments and other organisations and agencies in—
(i) the placement of Maoris in industry and other forms of employment;
(ii) the education, vocational guidance, and training of Maoris;
(iii) the provision of housing and the improvement of the living conditions of Maoris;
(iv) the promotion of health and sanitation amongst the Maori people;
(v) the fostering of respect for the law and law-observance amongst the Maori people;
(vi) the prevention of excessive drinking and other undesirable forms of conduct amongst the Maori people; and
(vii) the assistance of Maoris in the solution of difficulties or personal problems.

(2) The New Zealand Maori Council shall advise and consult with District Maori Councils, Maori Executive Committees, and Maori Committees on such matters as may be referred to it by any of those bodies or as may seem necessary or desirable for the social and economic advancement of the Maori race.

(3) In the exercise of its functions the Council may make such representations to the Minister or other person or authority as seem to it advantageous to the Maori race.

Sir Taihakurei commented that the structure under the 1962 Act was based on the 'customary autonomy of the papakāinga, or community'. To be certain that the Act was 'inclusive of all the communities and to reflect the purpose, the Act became the Māori Community Development Act' (previously it had been the Māori Welfare Act but its title was changed in 1979). Sir Taihakurei added that the Minister does not have power to interfere with the NZMC's operations, but that 'the language and drafting of the Act is embarrassingly dated, expressing the level of enlightenment of the day'.[91]

The NZMC's proposal as to who should lead the selection process (in a facilitative capacity) was supported by FOMA. Traci Houpapa and Rebecca Mellish, the chair and deputy chair of FOMA respectively, stated:

91. Document H7(a), p 5

> FOMA's overarching position on models for Māori representation under the draft Natural and Built Environments Act (NBEA) is that *all* Māori rights holders must be included in the appointments process for Māori representatives. There are three appropriate Māori organisations to oversee and mediate that process at a regional level: FOMA and its regional committees, the New Zealand Māori Council and its District Māori Councils, and the iwi/hapū that are part of PSGEs.[92]

According to Ms Houpapa and Ms Mellish, the three 'key representative organisations' (the NZMC, FOMA, and PSGEs) would 'initiate, establish and oversee the appointments process' so as to ensure that 'the process is fair, equitable and inclusive of all Māori rights holders in the region'. In doing so, these three representative organisations would engage 'widely with Māori communities, organisations, and relevant rights-holders that can appoint representatives onto the Establishment Committee'.[93]

FOMA was established in 1987 'under the guidance of Sir Hepi Te Heuheu' to meet the 'need for a specific body dedicated to Māori economic development and the interests of Māori rights-holders and Authorities when other Māori models of decision-making were unable to take on that work'. Its membership ranges from 'single farm operations to large primary industry enterprises with diverse interests'.[94] FOMA helps its members 'prosper and grow' by 'working with Government and industry to ensure the voice and interests of Maori land owners, land managers and land users are included in decision making on strategy, policy, legislation and regulations affecting our land', to the benefit of all Māori landowners.[95] The entities belonging to FOMA have a collective asset base of $11 billion and so would be financially independent from the Crown in any role in leading the process to select an appointing body.[96]

This proposal from the NZMC (supported by FOMA) was advocated by various witnesses who appeared for the NZMC and some interested parties. The witnesses for the ILG and Ngāi Tahu, however, strongly opposed the proposal as well as allegations that PSGEs were unrepresentative.

Pahia Turia, chair of Te Rūnanga o Ngā Wairiki–Ngāti Apa (a PSGE in the Whanganui region), stated that the NZMC no longer had any visible role or participation in 'regional leadership and activity' in his district: 'The prominence of NZMC in this region has declined to a point where they are no longer relevant.' The reason, he claimed, was that the NZMC's 'significant role' had given way to 'PSGEs and Iwi organisations'. These were now the 'preferred entities' to 'advocate for rights under Te Tiriti o Waitangi; to represent whānau, hapū and iwi interests; and to protect te taiao'. Further, Mr Turia stated that there was 'no room in our world view' for the NZMC to 'assert a right to become involved' in their environmental

92. Document H35, p 1
93. Ibid, pp 3–4
94. Ibid, pp 1–2
95. Ibid, pp 2–3
96. Ibid, p 1

matters.[97] Similarly, Professor Rawiri Te Maire Tau stated that the NZMC did not have rangatiratanga in the Ngāi Tahu takiwā, and could not represent Ngāi Tahu in that takiwā or the 'interests of Treaty partners which are iwi and hapū'.[98] Te Kou Rikirangi Gage stated:

> For any entity, Māori or otherwise, to claim any right to represent Te Whānau a Apanui hapū interests and authority, to represent our mana, to speak on behalf of our lands, waters, forest fisheries and other taonga, without our free, prior and informed – and ongoing – consent, is a nonsense in our tikanga, our law, and a complete (and non consensual) departure from our Treaty guarantees, to which the Crown are legally bound.[99]

In reply evidence, Sir Taihakurei expressed concern that Professor Tau (and presumably others) thought that 'NZMC is treading on the authority of the tribes to govern themselves, including the authority of Ngāi Tahu'. 'I wish to clarify', he stated, 'that NZMC has supported and continues to support the right of Māori to maintain and develop their own decision-making and governance institutions and to do so free from external influence'.[100] Rather, the NZMC was set up to 'promote Māori policy development and so to support the exercise of rangatiratanga by those entitled to do so'.[101]

The role that the NZMC proposed to take in the process to select an appointing body, therefore, was to facilitate the ability of 'Māori communities of all kinds to speak for themselves', including Māori groups and communities that reside within the territory of iwi, such as Ngāi Tahu, but who do not belong to those iwi. Such communities, Sir Taihakurei said, need to be respected as autonomous groups. Custom has changed on its own terms and, in compliance with customary values, '[w]e invented terms like '"taura whiri", "mataawaka", "te herenga waka", "te hono ki mea" to describe the new group formations' of Māori living in someone else's rohe.[102] These groups, he said, share in the interest of all Māori in 'environmental maintenance according to Māori ideals'. They also have an interest in the planning needs of their own communities, especially (in the case of urban Māori) for the built environment. In order to ensure that 'all those with an interest are properly included in the discussions', Sir Taihakurei maintained that 'all three organisations [NZMC, FOMA, and PSGEs] should engage in identifying the groups to be involved in the appointment of persons to engage for us in the proposed planning laws'.[103]

In closing submissions, however, counsel for the NZMC changed the proposal based on the opening submissions of the ILG – which said the ILG did not wish to be involved in the NZMC's process as representing PSGEs – and the evidence

97. Document H47, pp 4–5
98. Document H34, pp 7, 9–11
99. Document H51, pp 3–4
100. Document H7(a), p 1
101. Ibid
102. Ibid, pp 1–2
103. Ibid, pp 3–4, 6; transcript 4.1.6, p 51

presented at hearing.[104] According to claimant counsel, the NZMC and FOMA alone should lead the process in a facilitative capacity because *they are neutral and do not have an interest in the outcome*, but not the process to establish an appointing body; rather, the NZMC and FOMA would lead a process to choose the committee representatives. Counsel submitted:

> The role of the NZMC and FOMA would be to initiate, establish and oversee the process for the selection of Rangatiratanga Representatives, to ensure that the process is fair, equitable and inclusive of all Treaty Rights holders within the region. The main responsibilities associated with that role will be to initiate and then to oversee the process, and ensure that all relevant groups have the resources, time and space to participate. To ensure this, the NZMC and FOMA will receive, manage and account for all Crown funding for the self-determination processes, to ensure that it is disbursed in a way that will enable all relevant Treaty Rights holding Māori communities to participate.[105]

As a result, the NZMC's closing submissions went from opposing an exclusive role for PSGEs to opposing the leadership of the process by iwi and hapū, submitting: 'The Crown's singling out of iwi and hapū to lead the process to select Rangatiratanga Representatives is contrary to Te Tiriti principles of active protection of tino rangatiratanga, equity, and equality'.[106]

2.2.3.2 *The proposal of parties represented by Janet Mason*

For the claimants and interested parties represented by Janet Mason,[107] Ms Mason proposed an alternative to both the Crown and the NZMC proposal. Her clients suggested that:

- Pan-Māori national bodies, including the National Urban Māori Authority (NUMA), the NZMC, FOMA, the Māori Women's Welfare League, the ILG, and any others who wish to be involved, should form a National Facilitation Group.
- PSGEs, hapū, and urban Māori entities would lead the process at the regional level by forming an autonomous Regional Facilitation Group in each region.
- The regional group would design the process to select representatives for the regional planning committees (there would be no appointing body unless the regional group considered it appropriate). The national group would provide guidance and facilitation, and would oversee the selection process. Hapū would either participate directly or through their PSGEs, while 'Māori who live in the Region, but who do not whakapapa to that area' would be

104. Submission 3.3.80, p 14; submission 3.3.76, p 8
105. Submission 3.3.80, p 15
106. Ibid, p 3
107. Titewhai Harawira, John Tamihere, and Raymond Hall (Māori communities in Tamaki Makaurau); Jane Ruka (Grandmother Council of the Waitaha Nation); Michelle Marino, Errol Churton, and David James Churton (Ngāti Tama); Cletus Manu Paul (Ngāti Moewhare) and Rihari Dargaville (Tai Tokerau District Māori Council); and David Potter (Ngāti Rangitihi).

represented on the regional facilitation groups by Urban Māori Authorities (or some other urban entity).

- The regional group would also oversee and administer a regional register of entities in that region (the purpose of the register is not clear).[108]

Counsel for these parties submitted that it was not appropriate for the Crown to decide who should lead the process, and that it would be more consistent with the Randerson report for a group of national pan-Māori entities to design and facilitate the process. Also, leadership of the process in the regions ought to include not just iwi and hapū but also urban Māori to provide for the interests of the majority of Māori, who live outside their tribal regions, mostly in urban areas (issues in respect of urban Māori are addressed in section 2.3.5).[109]

2.2.3.3 *Our view*

Māori representation at the national level is expressed through a variety of pan-Māori and pan-tribal bodies. These include the NZMC, the Iwi Chairs Forum (with its various Iwi Leaders Groups), FOMA, the Māori Women's Welfare League, the National Urban Māori Authority, and others.[110] They each have their particular spheres of interest and activity, although there are overlaps. FOMA, for example, 'focuses its energies on Māori industry and Māori economic development'.[111] As we have seen throughout the National Freshwater and Geothermal Resources inquiry, Iwi Leaders Groups advocate for the interests of Māori in key policy areas, including resource management reform, and seek to work with Ministers and departments on policy development and reform. The NZMC has (among other things) the statutory responsibility of making representations to the Crown, and we have seen it carry out this function for the benefit of all Māori throughout the stages of this inquiry as well.

The question here is whether it is appropriate in terms of tikanga and the Treaty partnership for the Crown to impose a system through legislation in which the NZMC and FOMA and/or other national pan-Māori bodies would go into the regions and lead/facilitate the process to select representatives. In our view, it would not be appropriate unless they were invited to carry out that role by the hapū and iwi of the region. Under cross-examination by counsel for Ngāi Tahu, Sir Taihakurei Durie accepted this point:

> Q. [I]s it your evidence Sir, that the Māori Council should be involved even if the locals don't want them there?
>
> A. Well, there isn't that contest. Our function, what we are proposing to do here, is not to engage in these meetings ourselves but to be the facilitator to get – to ensure that all of these groups are engaged with.

108. Submission 3.3.84, pp 74–75
109. Ibid, pp 43–75
110. See Waitangi Tribunal, *Whaia Te Mana Motuhake*, pp 177–181
111. Ibid, p 178

Q. So, what would your response be if say some of the local marae at Murihiku said, 'well thanks very much Māori Council, we appreciate your interest, but we can row our own waka, and we don't want you involved. Thanks very much. Bye'.
A. That would be exactly correct. Our purpose is to respect the rights of the local people to make their own decisions.
Q. Right.
A. Our concern is just to see that all groups have that opportunity.[112]

We accept that the proposal to have national pan-Māori bodies lead the process came from a laudable desire to make sure that no one was left out, that all those with interests got to participate in making the decision. But it is not tika to impose those bodies as the leaders or facilitators without the agreement of the hapū and iwi in their regions. As we discuss further below (section 3.3.2), the Crown has proposed that it would fund facilitation at any stage of the process if requested by those involved. This could be the opportunity for the NZMC or another national body to facilitate if that were the wish of the groups involved.

Having discussed the Crown's proposal for who would lead the process, and the alternatives put forward by the claimants and interested parties, we turn to consider the Crown's proposal for the participation of those who hold rights and interests at place in the process to select an appointing body.

2.3 Groups with 'Rights and Interests at Place'

2.3.1 The proposal to prescribe who should participate in the process led by iwi authorities and groups that represent hapū

In a paper for discussion with the Te Tai Kaha technicians, MFE officials proposed the following issues for discussion:

> When creating new entities at the national and regional levels, how do we ensure we are not usurping the mana of iwi and hapū, and other rights and interests holders, at place?
>
> For Joint Committees, regarding the process to agree composition and identify appointing bodies:
>
> - If we prescribe an iwi and hapū-led process, what other mechanisms need to be in place to protect other rights and interests at place?
> - If we do not prescribe who leads this process, how do we ensure successful iwi/hapū/Māori participation without creating additional conflict or complexity?
> - How does expanding participation beyond iwi and hapū impact on the Crown's active protection obligations to uphold existing rights and interests?[113]

112. Transcript 4.1.6, p 33
113. 'Taking a System View of Partnership and Māori Participation: For Discussion with TTK Technicians', no date (doc H37(a)), p 297

These were crucial issues which Ministers have decided to resolve by two broad approaches:

- the iwi and hapū groups leading the process would have to engage with groups who had a right to participate in the discussion and decision, and to have that engagement recorded; and
- all existing Crown and local authority obligations in respect of particular Treaty settlements and other statutory arrangements would need to be translated into the new resource management system.

As a result of the consultation hui and written submissions process in November 2021–March 2022, and engagement with the ILG, the NZMC, FOMA, and others, it was clear to MFE that there were a 'diverse range of ways in which Māori choose to organise themselves in modern society', and a 'one-size fits all approach based on iwi and hapū will not reflect Māori rights and interests at place'.[114] The Ministerial Oversight Group decided in April 2022, therefore, that 'iwi authorities and groups representing hapū would be legally obliged to engage with their members and other Māori entities representing rights and interests "at-place" in the process of agreeing to a position on composition and appointing bodies'.[115] They would also need to keep a record of this engagement and make it publicly available.[116] Ministers also agreed that these requirements to 'engage with Māori groups that hold *relevant* interests at place (emphasis added)' and to 'keep a record of this engagement' would be specified in the legislation. The legislation would not be prescriptive about the form of engagement.[117]

Officials had debated what degree of prescription would be required in the legislation and whether it was appropriate to have any prescription at all in a self-determined process. Ultimately, MFE suggested that a 'low level of prescription enables iwi/hapū/Māori to exercise rangatiratanga as they determine their own processes for deciding appointing bodies'. They argued that there needed to be some considerations in the legislation that iwi authorities and groups that represent hapū would have to take into account while leading the process. The purpose of this prescription would be to ensure 'equal treatment' of Māori groups, and to promote an 'inclusive approach to decision-making that aims to represent the Māori groups that hold relevant interests at place in the region'.[118]

The first question to consider, therefore, is what was meant by 'rights and interests at place'? Officials explained that the term 'at place' would not appear in the legislation, but that it was used as shorthand for describing the Māori groups with 'rights and interests related to a particular area, water source, space and [natural] resource'.[119] MFE suggested that the kinds of groups with 'rights and interests at place' could include:

114. BRF-1692 RM Reform 189' (doc H37(a)), p 347
115. 'BRF-1562 RM Reform 192 – Delegated Decisions on Māori Appointment Process to Natural and Built Environments and Spatial Planning Committees', 19 July 2022 (doc H37(d)), p 5
116. Document H37, p 14
117. 'BRF-1562 RM Reform 192' (doc H37(d)), p 7
118. Ibid, pp 7–8, 18
119. 'MOG #17 Recommendations, Paper 2: Role of Māori in the System' (doc H37(a)), p 436

- whakapapa based groups (in addition to iwi and hapū) such as whānau, owners of Māori land and/or customary rights holders
- owners of Māori land
- holders of specific customary rights such as Customary Marine Title and Protected Customary Rights groups
- mātāwaka and Māori community groups (eg, urban Māori, the New Zealand MāoriCouncil)
- groups, and natural taonga with legal personality, who hold rights and interests deriving from the settlement of Treaty of Waitangi claims.[120]

Not all of these groups would hold relevant interests in all regions, and therefore the legislation would have to be non-prescriptive about *which* groups would need to participate, except where groups had rights under other legislation. That would include such groups as those with customary marine titles (under the Marine and Coastal Area (Takutai Moana) Act 2011) or Treaty settlement arrangements.[121]

We deal first with the proposed requirement to engage with groups who have various statutory arrangements, including Treaty settlements, noting that we return to the issue of those arrangements in section 2.4.1.

2.3.2 Customary marine title holders, protected customary rights groups, groups with particular rights arising from Treaty settlements

As noted, the Crown's proposal for who iwi and hapū have to engage with (and who have a right to participate in the decision) includes the following two categories of groups who hold relevant rights and interests 'at place':

- 'holders of specific customary rights such as Customary Marine Title and Protected Customary Rights groups'; and
- 'groups, and natural taonga with legal personality, who hold rights and interests deriving from the settlement of Treaty of Waitangi claims.'[122]

The groups who hold particular rights arising from Treaty settlements would in almost all cases be included among or represented by iwi authorities and groups representing hapū. How their particular statutory rights, enshrined in Treaty settlement legislation, would be reflected in the new system (including representation on regional committees) will be a matter for the Crown to resolve with PSGEs and give effect to in legislation (see section 2.4.1). The 'natural taonga with legal personality' have come about as a result of Treaty settlements and thus would be included in that process.

Similarly, the particular rights of holders of customary marine titles, for example, would need to be provided for in legislation. If they are to have any particular rights in terms of appointing regional committees, those would be statutory rights. Otherwise, such groups will be participating anyway as members of hapū or as whānau (they may sometimes *be* hapū or iwi).

120. 'BRF-1562 RM Reform 192' (doc H37(d)), p 7
121. Ibid, pp 7–8
122. Ibid, p 7

If the Crown is correct in its submission that the usual Māori processes for decision-making, such as calling a hui taumata, would be appropriate as per the tikanga of groups in a region, and that the iwi and hapū leading the process do not have to 'conduct an exhaustive determinative search for all interest holders', then we think that these two categories should be removed from the prescription for engagement.[123] We discuss the Crown's submission on this point further in the next section.

2.3.3 'Whakapapa-based groups such as whānau, owners of Māori land and/or customary rights holders'

2.3.3.1 *Evidence and submissions*

Kingi Smiler, citing a 2021 report prepared by Te Kai Kaha, stated that hapū were the primary right-holders in respect of natural resources, but that other related groups also had to be included:

> This report states that Māori rights and responsibilities exist in accordance with tikanga and state law. All relevant rights translate to the practice of whānaungatanga, mana, manaakitanga, kaitiakitanga, tapu/noa/utu and rangatiratanga. The starting point, and primary source of all Maori rights and responsibilities is within Te Ao including mana atua, mana tangata and mana whenua, and tikanga Māori as the framework of Māori law. The report concludes that in accordance with tikanga Māori and Te Tiriti o Waitangi the primary 'rights holders' in the natural resource space is primarily hapū, with ancillary or relational rights held by ahi kā/landowners/individuals, whānau and hapū collectives/confederations.[124]

The position for Māori landowners in this inquiry was put by three land-owning corporate entities: the Taheke 8C incorporation; the Tauhara North No 2 Trust; and the Tūaropaki Trust. The nub of the dispute between the Crown and these entities was the role that whānau who own Māori land and who are the kaitiaki of particular land blocks (and the resources associated with that land) should play in the process to select an appointing body. According to the trusts and Taheke 8C, Māori landowners should have a direct role in appointing the regional committee members,[125] although they expressed concern about what other avenues they might have under the new legislation to 'provide effective input in decision making processes that relate to their whenua and taonga'. Counsel for Tauhora North No 2 submitted that this 'lack of clarity is problematic and has unfortunately exacerbated and contributed to the fervour around Māori representation on Planning Committees'.[126]

Counsel for the Tūaropaki Trust submitted that it would be 'easy to become overwhelmed by the "busyness" of what the Crown says it is doing to increase

123. Submission 3.3.78, p 35
124. Document H17, p 4
125. Submission 3.3.83, p 3; submission 3.3.90, p 15; doc H2(a), pp 69–70
126. Submission 3.3.83, p 3

Māori participation in resource management through these reforms and its many assertions that the reforms will be transformative for Māori, including in terms of regional representation'. In the Trust's view, the proposed process for representation on regional planning committees

a. lack[s] certainty and definition;
b. limit[s] the (legitimate) role and voice of entities such as the Trust in the appointment of regional planning committees;
c. will almost certainly generate contests between groups in relation to representation rather than resolve them;
d. will create inefficiencies in appointing Māori representation to regional planning committees to the detriment of Māori; and
e. do[es] not put Te Tiriti and rangatiratanga at the centre (despite many stated commitments in documents to doing so).[127]

In closing submissions, counsel for the NZMC argued that iwi and hapū should not lead the process at all because that 'unjustifiably sets up a dominant/subordinate relationship between iwi/hapū and other place-based entities that hold Tiriti-grounded rights and interests, such as ahi kā/landowners and urban Māori communities'. According to claimant counsel, the role proposed for iwi authorities and groups that represent hapū would diminish 'the rangatiratanga and the mana of the subordinate rights-holders, contrary to Te Tiriti principles of equity, equality and active protection of tino rangatiratanga.'[128] Counsel for Tauhara North No 2 agreed that the Crown's proposal would relegate 'Māori groups-at-place such as the Trust' to a 'form of "second-class" representation that is limited to being consulted with', which would not align with the purpose of Māori representation.[129]

According to the evidence presented by these three geothermal landowner bodies, they are the 'mana whenua' and the kaitiaki of their lands and resources, and that – commercial imperatives notwithstanding – they manage their resources according to tikanga.[130] Dr James Ataria, for example, explained that the Tūaropaki Trust is an ahu whenua trust first established in 1952, through the amalgamation of the land of 297 individual owners. Those owners are members of the seven hapū of Mōkai marae, but not all members of the hapū are owners of the trust lands. Dr Ataria stated: 'We are kaitiaki of our lands and hold mana whenua of our lands. We operate and manage our resources as such, and upholding kaitiakitanga and our mana motuhake is at the heart of everything we do.'[131] Professor Jacinta Ruru, in commenting on the Crown's proposal, stated: 'Owners of Māori land are holding land that is recognised in law as taonga tuku iho. Māori land trusts and incorporations should be visible in this process.'[132]

127. Submission 3,3.90, p 7
128. Submission 3.3.80, p 6
129. Submission 3.3.83, p 3
130. Documents H2, H3, H15
131. Document H15, p 3
132. Document H20(a), p 2

Counsel for Taheke 8C submitted that the Crown's proposal does not 'actively protect the interests of Māori groups "at place"', and 'the Crown's Treaty relationship is not restricted to iwi and hapū.'[133] In February 2022, Taheke 8C provided feedback to MFE as part of the consultation round. Their position was that the relationship of all Māori – whānau, hapū, and iwi – with te taiao must be actively protected, and in regions where Māori retain a lot of land (such as the Bay of Plenty), the Crown must ensure that Māori landowners have 'a distinct and separate voice in RM planning processes commensurate with the significance they have as the mana whenua, ahi kā and kaitiaki of that land'. In respect of regional planning committees, Taheke 8C proposed that representation must include 'land holding entities' such as the incorporation, which have a mandate from the owners. Counsel also submitted that the land-holding entities (described as mana whenua groups) should have an equal number of seats on the regional planning committees as iwi and hapū, but only in regions with a significant proportion of Māori land. According to Taheke 8C, a hui of the land holding entities in a region could elect representatives, or there could be some more formal process using the mechanisms of Te Ture Whenua Māori Act.[134]

Counsel for Tauhara North No 2 submitted that national bodies like the NZMC and FOMA should have no role in any regional processes 'unless requested by mana whenua in particular regions'. Rather, the 'Māori place-based "mana whenua" groups (including iwi, hapū or whānau that exercise customary authority in an identified area)' should 'directly appoint representatives to the planning committees'. Counsel for Tauhara North No 2 suggested that involvement should thus be limited to those groups with customary authority in an area, excluding urban Māori and the NZMC.[135] In addition, counsel submitted that Crown acts and omissions have been responsible in part for the enormous loss of Māori land and for the processes that required Māori to 'piece their collectives back in various forms as best they could', generally using the 'limited Pākehā legal forms available to Māori'. The Crown should not, therefore, ignore trusts and incorporations and the like now that they exist and represent Māori landowners:

> The land tenure system that bundled up rights for landowners (that generally included possession, control, exclusion, enjoyment, and disposition) fundamentally changed the way that whānau, hapū and iwi could access and exercise authority and control over their territories.
>
> Today, Māori land trusts are one of the few Māori entities through which collective Māori ownership over whenua is recognised and expressed. These Trusts now form part of the permanent landscape of Māori collectives. Some of them, such as the Trust, see themselves as place-based rights holders exercising mana whenua, kaitiakitanga and ahi kā over their whenua on behalf of their beneficiaries all of whom have a direct whakapapa to the whenua. That is not to exclude hapū from having a layer

133. Submission 3.3.82, p 1
134. Andrew Irwin to MFE, email, [February 2022] (doc H2(a)), pp 69–70
135. Submission 3.3.83, p 3; transcript 4.1.6, pp 235–236

> of interest over that whenua. However, it would be unjust for the Crown to require Māori to adopt particular structures through which to reflect their relationship with their whenua and then ignore those collectives in relation to decisions that impact directly on that whenua. There are now layers of Māori voice that exist. Ahu whenua trusts are one of those layers.[136]

Counsel for Tauhara North No 2, however, also submitted that representation on the committees has only become so controversial because 'the broader input and voice that place-based rights and interest holders, such as the Trust, have into the planning framework is unclear'. 'If the Trust were confident', counsel submitted, 'that their voice had sufficient expression and weight in other parts of the planning framework, then they may not have participated in the inquiry.'[137]

This was an important point because the particular concerns of the land holding entities, especially around geothermal resources, could be managed without direct representation of every land trust and incorporation on regional planning committees. There is also the question of the many Māori landowners who do not have some form of management structure for their land, either a trust or incorporation.[138] Presumably they would be represented through their hapū and/or iwi.

Counsel for the ILG disagreed with the land holding entities, submitting that the 'appointment of Māori representatives to regional NBA committees should be the right of iwi and hapū at place, acting collectively and in accordance with tikanga'. The ILG's view, therefore, was that the NZMC and FOMA should have no role. Also, 'while Māori trusts and incorporations and possibly other Māori entities may have interests within a region that warrants the ability to participate and have input into planning processes relevant and relative to the nature and extent of those interests, that should not extend to the appointment of Māori members to regional NBA committees'.[139] Tina Porou, in her evidence for the ILG, suggested that the owners of Māori land had 'an absolute right to be involved in matters and advocate on issues that will impact their interests in that whenua'. Nonetheless, landowners did not have the same interest as iwi and hapū in all the matters affecting the broader takiwā. Ms Porou stated:

> As a personal example, as a beneficiary and Deputy Chair of the Lake Taupō Forest Trust, I am very confident that the Forest Trust will absolutely seek to protect its interests in the land it owns, but it would not seek to usurp the voice of our hapū. Rather, it respects and works closely with the hapū with mana whenua interests in the Trust's lands.[140]

136. Submission 3.3.83, p 9
137. Ibid, p 14
138. Fifty-eight per cent of Māori land parcels do not have a management structure: John Grant, 'Māori Participation in a Reformed Resource Management System', 25 May 2021 (doc H18(a)), p 674.
139. Submission 3.3.76, pp 8–9
140. Document H53, p 9

Riki James Ellison, in evidence for the ILG, also stated that iwi and hapū have rights and obligations in respect of their entire territory, and that the role of planning committees at the regional level made it 'more logical' that iwi and hapū would determine the committees' membership. Mr Ellison also noted that there are practical considerations which would make it difficult for iwi and hapū to carry out the responsibilities proposed by the Minister for the Environment:

> While he proposes iwi and hapū have a lead role, they are also given responsibility for engaging with a wide range of Maori stakeholders. This simply shifts responsibility for this logistically impossible task from local councils to iwi and hapū, with no benefit to anyone.[141]

Che Wilson suggested that iwi and hapū entities work hard at being accountable to their people, and that included land trusts and incorporations, but that the roles are distinct:

> In our rohe, in my experience as a Committee of Management member for Ātihau-Whanganui Incorporation, we expect our iwi to come to and work with us; and they do. However, we also acknowledge that our iwi represent all uri, including those who may no longer be landowners or shareholders, for whatever reason. The Atihau-Whanganui Incorporation is the largest ratepayer in the district, but we have no expectation that we be the Te Tiriti o Waitangi voice for our rohe. We are very clear that that is [the] role of iwi and hapū.[142]

Mr Wilson added that many individuals who are members of hapū and iwi are represented by them even though they 'whakapapa to particular land' but are 'excluded from land trusts and incorporations (by way of ownership interest or shareholding) because of historical circumstance and alienation'.[143]

There are, of course, significant regional variations, including the fact that there is very little Māori land remaining in some regions. In considering this issue, it is important to remember the scale of the task in terms of the relevant entities in some regions. The ILG did a series of three regional case studies in December 2021, which is instructive, although the studies appear to be based on Māori Land Court regions (which are larger than local government regions).

In the Tairawhiti region (as at December 2021), four iwi were identified as having formal iwi structures such as a trust or rūnanga, and one 'collective with interests at the border of the region'. There were three PSGEs and 1,404 formal management structures for land, including 1,035 ahu whenua trusts and 63 incorporations. At the hapū level, the modelling said that one of the four iwi had 50 hapū and 48

141. Document H52, pp 6–7
142. Document H49, p 4
143. Ibid, p 5

marae, one had nine hapū and 14 marae, one had five hapū and five marae, and the fourth had five hapū and three marae.[144]

The ILG case studies showed that there were 18 iwi with formal structures in the Aotea region, with 16 PSGEs and 1,271 formal management structures for Māori land, including 840 ahu whenua trusts and 23 incorporations. The Waiariki region (covering three regional councils) had about 28 iwi with formal structures, 11 PSGEs, and approximately 2,202 formal land management structures for Māori land.[145]

The Crown submitted that the question of who represents 'interests at place' should be determined regionally by Māori. The Crown has recognised that there are a range of interests, including 'whakapapa-based groups (in addition to iwi and hapū) such as whānau, owners of Māori land and/or customary rights holders', and that the Crown has 'various Tiriti relationships with them', but it 'does not consider all interests to be the same'. 'Nor', Crown counsel stated, 'does the Crown presume to define how the differing types of interests should come to arrangements among themselves'.[146] That point is crucial, as we discuss below.

2.3.3.2 *A remedy proposed by Taheke 8C*

Counsel for the ILG submitted:

> it was clear from the evidence and submissions of a number of claimants and interested parties that their concerns regarding the appointment process were driven by a lack of visibility and/or certainty regarding the other mechanisms through which Maori groups, entities and landowners other than iwi and hapū can participate in and have input into the development of regional natural and built environment plans in order to protect and advance their particular interests.[147]

The ILG argued that it was, therefore, 'reasonably open to the Tribunal to comment on the importance of the Crown ensuring, beyond and separate from any issue concerning the Māori appointments to regional planning committees', including (but not limited to) that there is 'express provision for the input of Māori groups, entities and landowners into the plan development process'.[148]

We agree that the concerns raised by counsel for Taheke 8C and for Tauhara North No 2 suggest that the focus of the priority inquiry on just one part of the system (albeit a key part) has led to concerns that representation on the regional committees will be the only avenue for any and all Māori groups, including land holding entities, to influence the content of the regional plans. This is not the case, according to the documentary evidence provided by the Crown, but we were

144. 'ILG Wānanga – Who Participates from Te Ao Māori in Regional and Local Level RM Functions', 16 December 2021 (doc H37(a)), pp 239–240
145. Ibid, pp 245–259
146. Submission 3.3.78, pp 35–36
147. Submission 3.3.93, p 13
148. Ibid, pp 13–14

unable to inquire into the full system due to the constraints of the priority inquiry. We do note the Crown's closing submission, which stated that there would be

> enhanced opportunities for direct participation locally, including through bespoke arrangements such as Mana Whakahono a Rohe with hapū enabled to initiate discussions as [well as] iwi authorities, Joint Management Agreements and Transfer of Powers (which will have their legislative barriers removed); iwi and hapū management plans which will have an enhanced weighting of 'particular regard to', and engagement agreements (which will enable agreements with the regional planning committees on how engagement will be undertaken on RSSs and NBA plans and funding for this engagement).[149]

There would also be 'new participation opportunities for Māori groups with relevant interests "at place"', and specific provisions to address problems in relation to Māori land.[150] We note further that there is a proposal for sub-committees as a way of enabling the regional committees to give effect to the principles of the Treaty (that is discussed further below).

Counsel for Taheke 8C's opening submissions proposed a remedy for the concerns of Māori land holding entities, based on the Crown's provision for whānau to apply for a customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011. In counsel's submission, the regional planning committees will have to 'recognise and provide for the potentially numerous planning documents prepared by specific groups in relation to specific areas of the coastal marine area', and those specific groups can include whānau.[151] The justification for this proposal was expanded upon in closing submissions. Under the 2011 Act, a whānau group could apply for customary marine title (section 9(1)). If successful, then 'one of the consequences of holding customary marine title is having the right to prepare a planning document' under section 85(1) ('planning document' is the term used in the RMA for iwi management plans). Then, under various subsections[152] of section 93:

> regional councils have a duty to initiate a process to determine whether to alter their relevant regional documents, if and to the extent that any alteration would achieve the purpose of the RMA, in order to 'recognise and provide for' the customary marine title area to which the [whānau] planning document relates. In making that determination, a regional council must consider the extent to which alterations must be made to 'recognise and provide for' the matters in a planning document that relate to the customary marine title area.

149. Submission 3.3.78, p 11
150. Ibid, pp 11–12
151. Submission 3.3.64(a), pp 6–7
152. Marine and Coastal Area (Takutai Moana) Act 2011, s 93(6)(a), (8)(a), (10), (11)

> Regional councils have limited discretion not to alter their relevant regional documents. The only grounds on which a regional council may decide not to alter their relevant regional documents are that the matters in the planning document:
> - are already provided for in a relevant regional document; or
> - would not achieve the purpose of the Resource Management Act 1991; or
> - would be more effectively and efficiently addressed in another way.[153]

Counsel for Taheke 8C's proposed remedy for land holding entities such as trusts and incorporations – to alleviate the need for *direct* representation on the regional planning committees – was for the new system to require the committees to 'recognise and provide for any planning documents prepared by the owners of specific Māori land only insofar as that document relates to the specific Māori land concerned'.[154] In counsel's submission, the new resource management system would be an important opportunity to offer whānau the same rights on dry land as they have in the coastal marine space; since they already have the right for one form of title, there would be no sound justification for denying them that right for another form of title. The Taheke 8C incorporation accepted that the proposal was not perfect and would need to be refined, noting that committees could have 'administrative difficulties' if presented with hundreds of whānau plans, although this risk could be minimised because the plans would be very specific to particular areas of land, and there could be an option of 'collectivising the views of Māori land owners' in fewer plans. Counsel for Taheke 8C also submitted that, since the Crown is committed to transitioning the takutai moana arrangements into the new resource management system, then there is a current opportunity to address the 'key concern' of Māori landowners about the planning decisions that will affect their ancestral land.[155]

Tina Porou's evidence was consistent with Taheke 8C's proposal, although she saw the role of Māori landowners as co-developing the plans with the secretariat. In her brief of evidence, Ms Porou stated:

> I believe this is a positive development in terms of being able to co-develop plans that enable Māori land development in accordance with tikanga. That will provide greater visibility to Māori landowners in the process who should have an appropriate role in plan development (rather than the Committee appointment process).[156]

At the hearing, Ms Porou added:

> We've also said that in the drafting of the plans we need to have a specific space and an expressed outcome for Māori landowners in the development of the plan. In my

153. Submission 3.3.82, p 18
154. Submission 3.3.64(a)), p 7
155. Submission 3.3.82, pp 19–20
156. Document H53, p 10

> view, with my Lake Taupō Forest Trust and all my other landowner hats, that is rightly where we sit.
>
> So, as an example, Lake Taupō Forest Trust has a taiao plan currently based on pest management, a Tāne Ora Plan. We have that for our 27,000 hectares that we manage. We want to ensure that the drafting of those plans gives effect as much as possible to the things that we want to see in terms of our landowners. But ultimately, our hapū and our iwi make the decision on the governance, that's where it rightly sits.[157]

Counsel for the Ngāpuhi claimants (owners of Lake Ōmapere) submitted that the Taheke 8C proposal is worth considering, but noted that successful candidates for customary marine title in the High Court have to show mandate, the process to prepare the plans would be expensive and time consuming, and 'the extent to which regard must be had to the document would require definition.'[158] On the mandate point, we observe that the Māori land holding entities have representatives already mandated through their constitutions.

The Crown did not respond to Taheke 8C's proposed remedy, stating in closing submissions that instructions had been 'unable to be confirmed within the timeframe for these submissions.'[159] That reflects the very tight timetable set as a result of the Crown's request for an early report, but we note that the proposal has been put to the Crown for consideration.

2.3.3.3 *Our view*

On the remedy proposed by the Taheke 8C Incorporation, we consider it is well worth serious consideration by the Crown, and further engagement with the Taheke 8C Incorporation and other Māori land holding entities on how such a proposal might work in practice. We in fact differ from counsel's interpretation of section 93(10) of the Marine and Coastal Area (Takutai Moana) Act, in terms of how much discretion there is for regional councils to decline to alter their plans in light of the customary marine title holder's planning document.[160] But the exact interpretation of that Act is not really the issue. Rather, the preparation of this kind of planning document is expensive, time consuming, and requires resource management specialist expertise, which makes it difficult for the average ahu whenua trust to develop, while (on the other hand) it could be difficult and burdensome for the regional planning committees to have to have regard to plans coming from every trust and incorporation as well as from iwi and hapū.

In our view, there could be an option in the new resource management system for the Māori land holding entities in a region to get together to prepare one joint

157. Transcript 4.1.6, pp 335–336
158. Submission 3.3.91, p 14
159. Submission 3.3.78, pp 51–52
160. Marine and Coastal Area (Takutai Moana) Act 2011, s 93(10)(a) (councils may consider that the matters covered in the customary marine title holder's plan are already covered in the coastal plan), s 93(10)(c) (the matters covered in the title holder's plan can be more readily achieved in another way), and s 93(10)(b) (the matters covered in the title holder's plan would not achieve the purpose of the RMA). Also, there is no right of appeal.

plan. Funding assistance from the Crown would be essential, and technical assistance from the secretariat may also be required. The regional planning committee could be required to have particular regard to the plan. This would enable the land holding entities to pool their resources, and to carry behind them the weight of numbers, and we consider it likely that some of the same or similar issues would arise for many of those entities and thus allow common approaches. Ideally, this would be done in conjunction with iwi and hapū plans to minimise the risk of conflicting proposals. Operating on a regional scale would also allow the Māori land holding entities more opportunity to cover the interests of Māori landowners who do not have a management structure under Te Ture Whenua Māori Act 1993. There would also be an obvious role for FOMA if the Māori land holding entities wished it – FOMA could assist in a number of ways, including by helping facilitate the preparation of the plan and with obtaining the necessary expertise for its development.

On the issue of the Crown's proposed process, the engagement/participation requirement discussed above would be an important safeguard to ensure the inclusivity of the process. All parties agreed that the process should be inclusive, although they differed as to who exactly should be included and in what capacity. There is no question, however, that hapū and iwi, who the Crown has proposed to facilitate the process, would have held hui throughout their rohe anyway to discuss the issue of an appointing body, whether there was a formal requirement for those with relevant interests 'at place' to participate or not. Tina Porou's evidence confirmed that point.[161] What is really crucial, therefore, in evaluating the Crown's proposal against the evidence and submissions about Māori landowners and others with rights and interests at place, is the question of how the decision is to be made. We turn to that question next.

2.3.3.4 *How the decision is made would be crucial to the effective participation of the groups who hold rights and interests 'at place'*

In essence, the Crown's proposal is that iwi authorities and groups that represent hapū would self-identify and would be asked by the Crown to lead or facilitate a process involving their memberships and any distinct holders of interests 'at place' to select an appointing body. The appointing body needs to have an 'enduring' role and be 'capable of developing and executing their own appointment and removal processes.'[162]

We heard evidence in this inquiry about whether this proposal is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), although mostly not with specific application of the Declaration to the facts of this case. Professor S James Anaya and Dr Claire Charters told us:

> The issue before the Waitangi Tribunal concerns the selection of Māori representatives and/or representative organisations on 'partnership bodies' at the regional level

161. Document H53, p 8; see also submission 3.3.81, p 4
162. Document H37, p 13

in the context of the Crown's resource management reforms. As we understand it, the NZMC is concerned that the Crown is assuming that it is entitled to determine the process for the selection of Māori representatives and/or representative organisations on 'partnership bodies' and which Māori representatives and/or representative bodies should have recognised roles on 'partnership bodies'.

As explained above, the Declaration, international human rights treaties and jurisprudence from UN specialist Indigenous mechanisms, such as the EMRIP [United Nations Expert Mechanism on the Rights of Indigenous Peoples] and the UN Special Rapporteur, establish that *Indigenous peoples have the exclusive authority to determine the structure and membership of their representative institutions in accordance with their distinct customs, traditions and practices, free from interference or influence from the State*.

Moreover, under the Declaration, other international human rights instruments and relevant jurisprudence, the *Indigenous peoples concerned have the exclusive authority, through their own decision-making processes, to freely determine which Indigenous representative institutions and representatives should participate and be included in consultative processes and which of these the State should engage with on partnership bodies concerning the management of their natural resources*.

Both of the above are grounded in Indigenous peoples' inherent right to self-determination. In our view, to ensure the right to self-determination can be realised, States are under a positive obligation to resource or fund Indigenous peoples and their representative institutions.

Examples internationally illustrate that Indigenous peoples often have multiple and overlapping representative institutions working with the State at any given time. The State should ensure that Indigenous peoples have sufficient time and space to effectively exercise their right to self-determination through these institutions. [Emphasis in original.][163]

Dr Max Harris, Professor Val Toki, Professor Jacinta Ruru, and Dr Robert Joseph gave evidence about the nature of self-determination:

> Collectively, [the] articles of the Declaration infer that in exercising the right of self-determination Māori have the right to belong to an Indigenous community or nation in accordance with their own traditions or customs, the right to determine their own identity and membership and the right to determine the structures and to select the composition of their group as long as this is in accordance with their tikanga. Subsequently, rather than a 'structure' such as a PSGE or similar, this supports the right of whānau or hapū to exercise their tino rangatiratanga in relation to matters relevant to their whanau or hapū.[164]

According to MFE, the principle of self-determination and the article 2 guarantee of rangatira would in fact be the basis for how Māori in a region organise to

163. Document H19, pp 23–24
164. Document H20, p 10

decide the appointing body. Also, giving effect to the principles of the Treaty is a core objective of the resource management reforms. Officials advised:

> The overall Treaty consistency of the system depends on the package of tools/mechanisms/provisions that provide for partnership with and participation by Māori in system oversight, national level policy development, plan governance, plan development, plan approval, consenting, compliance monitoring and enforcement and environmental monitoring and reporting. . . . The reform process must also balance the need to provide for local representation through democratic processes, and other considerations, against a greater, more direct role for iwi/hapū/Māori. It is important that, at the appropriate time (such as when detailed delegated decisions are being resolved), a further treaty assessment is carried out that considers the total proposed package for the NBA and SPA and the provision for Māori and treaty considerations within the package.[165]

In November 2021, the 'guiding principle of self-determination' for Māori participation in the new resource management system was put to the Ministerial Oversight Group, with the proposition that there be '[s]upport for an overall principle of self-determination; enabling tikanga processes to determine representation'. This was accompanied by the proposition that '[i]mplementation support is required for successful self-determination processes'.[166] These propositions were set as the 'direction of travel'.[167] In MFE's view, this 'guiding principle' was carried through to the proposal that iwi authorities and groups that represent hapū would self-identify and lead/facilitate the process, the prescription that those groups who have relevant interests 'at place' must participate (to ensure equity and equal treatment of Māori groups), and the proposal that all these groups together self-determine their own process to select an appointing body. In a recent paper (a revised copy was provided at the hearing), officials recommended that 'there is no prescription provided in legislation about how iwi authorities, groups that represent hapū or other Māori groups with relevant interests at place organise to make decisions on appointing bodies or who they choose to make this decision, beyond what was already decided at MOG #17'.[168] Those prescribed matters would be a requirement to take into account:

- existing arrangements between iwi/hapū/Māori groups and arrangements with local government
- providing for appropriate representation of Māori groups that hold relevant interests in the region

165. 'Paper 2: Role, Funding and Participation of Māori in the RM System', no date, annex A, p 25 (doc H37(a), p 534)
166. 'Agenda for MOG Māori interests subgroup on 24 November 2021' (doc H37(a)), p 157
167. 'BRF-1562 RM Reform 192' (doc H37(d)), p 4; doc H37, p 25
168. 'BRF-1562 RM Reform 192' (doc H37(d)), p 6

- ensuring they are satisfied that appointing bodies will be able to fulfil their ongoing roles and functions.[169]

MFE officials considered that a self-determined process to decide the appointing body, within the parameters set out above, was a process that would give effect to the Treaty guarantee of rangatiratanga. Provision would, however, be included for a circuit-breaker as an essential component (discussed below). Officials advised Ministers in late July 2022:

> The appointing body and circuit breaker processes' consistency with Te Tiriti will be influenced by who (which groups) participates in the respective processes, how the groups participate, that the processes are supported via implementation and the extent to which the steps in the processes and outcomes reached are endorsed by iwi/hapū/Māori involved in them. Consistency with Te Tiriti also requires that the Crown allows sufficient time for iwi/hapū/Māori to work through representation questions internally, only resorting to circuit breaker mechanisms as a last resort.
>
> In designing these proposals, a balance has been struck between providing for overall system efficiency and ensuring committees can be established while also upholding the rangatiratanga of iwi, hapū and Māori to determine their own representatives in accordance with their tikanga. This highlights the risk in this space that being overly prescriptive undermines rangatiratanga and does not allow for flexible arrangements, but not having enough prescription can result in inadequate Māori representation on NBA and SPA committees, or in a worst-case scenario, a length of time where there is no representation at all.
>
> To ensure that appointments to the Planning Committees are effective and that the Crown meets its Treaty obligations to enable meaningful participation of iwi/hapū/Māori in the system, the Crown must provide support to iwi/hapū/Māori that communicates their roles and responsibilities at different stages of the appointment process. This will be achieved through implementation support and guidance. Providing flexible support on request is one way the Crown can help Māori navigate these new roles and responsibilities without undermining the rangatiratanga of iwi, hapū and Māori.
>
> Sufficient and early funding for appointment processes is likely to contribute to effective decision-making and foster positive relationships between iwi/hapū/Māori groups. This has the potential to reduce the need for costly dispute resolution processes.[170]

In sum, the Crown's proposal at its most basic is that, if iwi and hapū lead or facilitate the process, and if they are required to engage with the relevant rights and interests on the ground (which we think they would have done anyway through hui), then the groups involved would reach a decision through their own processes and according to their tikanga, allowing for flexibility and variability

169. Ibid, pp 7–8
170. Ibid, p 16

within and across regions. Crown counsel noted concerns that Government funding 'must be at levels to enable the envisaged conversations among Māori to take place', and submitted that the Crown has already committed to this at a 'high level'. Implementation is yet to be worked through in detail.[171]

Crown counsel also submitted that the Tribunal (and parties) should not equate the leadership role of iwi authorities and groups that represent hapū with a 'determinative' one; rather, they are to initiate the process and 'lead discussions'. The 'discussions' are to be with Māori in the region, including those 'representing interests at place'. The process led by iwi and hapū would be 'conducted according to tikanga and self-determined processes (which will vary from region to region, may adapt to circumstances, and are not for the Crown to record or prescribe)'.[172] If, for example, the tikanga in a region is for the iwi and hapū to make the decision following the mandatory engagement process, then the system would be flexible enough for that to happen.[173]

Counsel for Tauhara North No 2, who suggested that the process should be carried out by iwi, hapū, and whānau with rights at place, accepted that adding whānau into the mix 'could significantly expand the number of those involved in the ultimate decision on representative appointment'. But counsel argued that customary processes could deal with this, and 'both the Crown and Māori need to have faith that Māori decision-making processes and tikanga work'.[174] Counsel added some pertinent points:

> It would likely be more workable (and less controversial) for those mana whenua groups who wish to engage in the appointment process to focus on the skills, background and experience of possible representatives than on creating an additional regional voice and layer of representation.
>
> Just because there are more *possible* voices that could be involved in decision-making does not mean all of those groups will choose to take up that opportunity. The suggested approach would however give those who wish to be engaged the opportunity to do so.
>
> The practical reality of Māori decision-making is that even with increased numbers of people involved – mana matters and not all voices or entities will carry equal weight. The mandate and mana of those engaged in the process will inevitably be significant.[175]

The Crown appeared to hold a similar view. Crown counsel disagreed with the proposition put forward by some parties that the iwi authorities and groups that represent hapū would have to 'conduct an exhaustive determinative search for all

171. Submission 3.3.78, p 33
172. Ibid, p 35
173. Ibid, p 36
174. Submission 3.3.83, pp 20–21
175. Ibid, p 20

interest holders'. Instead, the Crown submitted that there must be opportunities for those interest holders to participate. It could be by:

- calling a hui taumata;
- using existing 'annual fixtures in the region's cultural calendar' (such as AGMs or some other such widely-attended events); or
- calling for nominations followed by a hui (as was suggested at the hearing by counsel for Tauhara North No 2).[176]

In other words, the Crown's position was that the usual Māori processes can and should be used without constructing some elaborate edifice: 'The process is to be recorded but what that process is, is to be self-determined.'[177] Crown counsel also noted a comment by Che Wilson at the hearing about 'the mana of the kapu ti', submitting that there are 'processes within tikanga to manage the complexity and subtlety of these matters.'[178] Mr Wilson stated at the hearing:

> So, I share this today because there's so much concern. Kua kōtiti te ao. *The world has become unstable.* I also note that ego gets in the way and that I am fortunate that I have active working relationships with most of the parties because I respect the mana of kapu tī. It has great mana, and if we started having more cups of tea like I had with my cousin Tracey Houpapa [chair of FOMA] this morning at the airport where we discussed these issues, it might take us to a better place.
>
> So, as we go forward, I wear all of those different hats, and they are layers, as Tina [Porou] referred to, and you can either navigate them like you go down a river or you can crash into the first rock and say it's too hard. But we have to navigate them, that's just part of humanity.[179]

2.3.3.5 *Our view*

In our view, the Crown is likely correct in terms of intra-iwi processes, although there is always a risk of some groups being left out. That is why a record of the process and the option of early, independent facilitation in the event of disputes or disagreement would be so important. Officials suggested that the groups involved in the process to select an appointing body may also wish to establish an ongoing 'regional forum, which may provide a space for iwi authorities, groups that represent hapū and Māori groups that hold relevant interests at place to stay in touch with various decisions being made'.[180]

It may be more difficult, however, for inter-iwi positions to be reached, noting that there would be multiple iwi in most regions, and not enough seats on the committee for all of them. Composition is a complicating factor that we address later. MFE acknowledged that this was a risk of the process not working in 'regions

176. Submission 3.3.78, p 35
177. Ibid
178. Ibid
179. Transcript 4.1.6, p 363
180. 'BRF-1562 RM Reform 192' (doc H37(d)), p 18

with a number of iwi and hapū who do not whakapapa to each other and/or where there are existing conflicts pertaining to rights and interests.'[181]

In addition, the requirement that Treaty settlements and other statutory arrangements be taken into account during the process could make the task facing Māori in some regions significantly harder. We discuss that point in section 2.4.1, but here we note the suggestion from counsel for Tauhara North No 2 that there be secretariat support for the appointments process as an essential component to ensure its success. Counsel submitted that the Crown would 'need to provide funding for a regional secretariat to assist with administrative tasks such as calling hui, drafting public notices, assisting with venues and taking minutes.'[182]

Also, the Crown noted that there was a concern at the hearing that its proposed process could foster divisions between Māori.[183] On that head, the Crown suggested that early access to facilitation may play a key role. Ms Smith stated that the process of Māori deciding their appointing body could start before notification by the Local Government Commission to allow more time, and that facilitation would be available to assist the groups at any time.[184] Officials recommended to the Ministerial Oversight Group 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.[185]

This Crown-funded facilitation could be crucial to success, and we note that this role could potentially involve the NZMC, FOMA, or some other national Māori body if they were invited to facilitate by the groups involved, alongside a secretariat to manage the process in an administrative sense.

In addition, there would be funded dispute resolution processes available, including a circuit breaker, and those processes would assist conflicts and disagreements to be worked through and resolved. As noted, this would be particularly important for resolving differences at the inter-iwi level, although may equally be required for intra-iwi decision-making. This makes the dispute resolution proposals particularly important if the earlier, independent facilitation fails.

We turn next to consider the MFE and Te Arawhiti proposals for dispute resolution.

181. 'BRF-1562 RM Reform 192' (doc H37(d)), p 10
182. Submission 3.3.83, p 20
183. Submission 3.3.78, p 33
184. Document H37, p 19
185. 'BRF-1562 RM Reform 192' (doc H37(d)), p 8

2.3.4 The Crown's proposals for dispute resolution and a circuit breaker

2.3.4.1 *The Crown's options for dispute resolution*

As noted above, Crown counsel submitted that the role of the iwi authorities and groups that represent hapū would be to lead discussions and facilitate the process, not to have a 'determinative or dominant role'. Someone has to initiate the process, the Crown argued, and it is 'then to be conducted according to tikanga and self-determined processes'.[186] This position was confirmed by Ms Smith at the hearing, stating:

> the Crown has deliberately not wanted to prescribe what the decision making process is. I would just put the caveat in there that there is still the iwi authorities and the groups that represent hapū need to acknowledge that there is agreement from those groups who's been notified through that process when they're doing it.[187]

Officials advised Ministers in July 2022:

> The proposed test for whether a region has successfully agreed Māori appointing bodies is if – before the deadline – the regional council receives (and forwards to the Local Government Commission) the list of Māori appointing bodies that notes agreement by notified iwi authorities and groups that represent hapū that participated. Officials do 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.[188]

Iwi authorities and groups that represent hapū, therefore, have to *agree that a decision has been made* and that the regional council can be notified about the appointing bodies. The length of time available for that process to be completed would vary between regions and has not yet been decided by Ministers. Crown counsel explained:

> The time available for the Selection Process will be from notification by the LGC to the first statutory deadline. There is no fixed timeframe for this phase. It will be agreed by Ministers as part of implementation, and may vary between tranches. Given that the RMA will transition over eight to ten years, it may be that some regions' statutory deadlines are five or six years after enactment (although it is anticipated to be sooner).
>
> Three project [pilot] regions will be first off the block, with others to follow over time (and after having learnt the implementation lessons from the project regions).
>
> Groups can start their discussions (and request support and facilitation for them) prior to the statutory deadline being announced, and may thus have years to reach agreement through their own processes. If they wait until the statutory deadline is notified, the Selection Process has 10 months built in for the dispute resolution phase.

186. Submission 3.3.78, pp 26–27, 35
187. Transcript 4.1.6, p 473
188. 'BRF-1562 RM Reform 192' (doc H37(d)), p 7

> The committee must be confirmed at least two years prior to the date by which the first RSS [regional spatial strategy] must be notified to enable time for establishment, and a minimum of two years is provided for drafting strategies or plans prior to their notification.
>
> Should agreement not be reached by that time, the planning committee will begin operating without the involvement of any groups that have not confirmed their appointing bodies.[189]

That final point is particularly significant; if Māori were unable to agree on the appointing body within the statutory deadlines, or if they chose not to participate in the process, then the regional planning committees would begin work on the plans without any Māori seats at the table. Officials considered it a relatively small risk that non-participation by Māori would stop the formation of regional planning committees, but if 'key parties' chose not to participate or the dispute resolution failed in some way, then the joint committees would have to proceed 'without those seats being filled'.[190] The parties were particularly concerned about any possibility that the committees would be allowed to proceed without their Māori members, and suggested that the Crown must not allow that to occur.[191]

All of this makes the proposed dispute resolution process a critical factor in the selection of appointing bodies, especially for inter-iwi disputes. To make matters more difficult, however, iwi authorities and groups that represent hapū may be working through dispute resolution with councils about the number of Māori seats at the same time as working through dispute resolution among themselves about appointing bodies.[192]

The Crown has proposed that a dispute resolution phase would begin 10 months before the statutory deadline for the appointment of the regional planning committees. Seven months would be allowed for that phase, after which appointing bodies would have three months to consult and appoint the committee members. The seven months would be divided into:

- an optional four months for mediation or for some other process to resolve the dispute(s), and (if that failed);
- a three-month 'circuit breaker', which would involve an expert panel of some kind to determine the appointing body or bodies – seven months could be allowed for the circuit breaker if the groups involved did not accept the offer of mediation.[193]

Within those broad parameters, MFE and Te Arawhiti proposed different processes, one stated to be more in line with self-determination, the other stated to be more capable of delivering certainty, though there were basic similarities between both options.[194] Under the MFE option (see figure 2), the Crown would offer

189. Submission 3.3.78, pp 15–16
190. 'BRF-1562 RM Reform 192' (doc H37(d)), p 11
191. See, for example, submission 3.3.91, p 22
192. 'BRF-1562 RM Reform 192' (doc H37(d)), pp 20–21
193. Document H37(p)
194. 'BRF-1562 RM Reform 192' (doc H37(d)), pp 8–10, 20–24

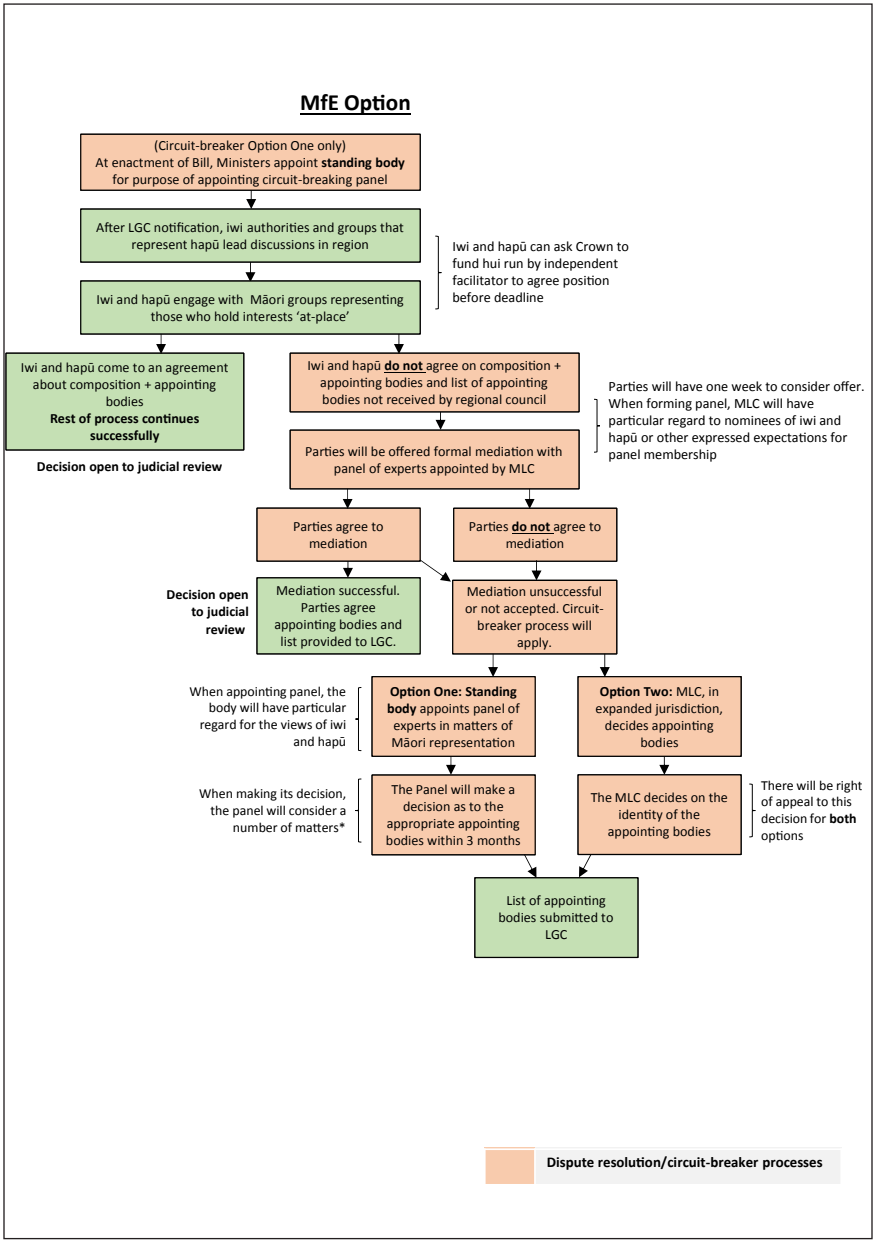


Figure 2: Disputes resolution and circuit breaker processes – Ministry for the Environment option, 1 August 2022 (doc H37(b), p 2)

mediation, with the mediators to be appointed by the Māori Land Court. When appointing the mediators, the court would be required to have 'particular regard to the nominees of iwi authorities and groups representing hapū in the region, or any other expressed expectations for panel membership' from those groups.[195] MFE hoped that agreement could be reached through mediation, because

> a key design principle is the need for committees to have strong mandates, supporting the efficiency of the system overall. In general, committee mandates will be weaker in situations where a circuit-breaking decision has been imposed by an external party. However, the need for committees with strong mandates must be balanced against the need to establish these committees as soon as possible to support implementation of the new system.[196]

If agreement could not be reached through a four-month mediation process, the 'circuit breaker' would be triggered to impose a decision on the groups in dispute.

MFE offered two options for the circuit breaker. The first option would involve a 'panel of experts in matters of Māori representation', which would make the final decision on who should be the appointing body. The Minister for the Environment and the Minister for Māori Crown Relations would appoint an expert body, which would in turn appoint a regional panel at the time the circuit breaker was triggered in a particular region. The reason for recommending the two-step process was that it made the Crown more removed from the process, rather than having the Ministers appoint a regional panel themselves. In appointing the regional panel, the national body would have 'particular regard' to the view of the Māori groups involved in the dispute. Although the words 'particular regard' were used in the recommendation, officials commented that, 'in line with the overall intent of preserving self-determination, *the emphasis will be on following the directives of iwi authorities and groups representing hapū on who should be appointed to the expert panel*' (emphasis added).[197]

When making its decision, the expert panel would consider:

- the matters which iwi authorities and groups representing hapū must have regard to when deciding on appointing bodies . . .
- relevant rights, interests of parties to the dispute
- the authorisation of the parties to speak and act on those interests
- the respective tikanga of parties to the dispute
- the records of engagement to date
- whether a decision on the composition arrangements have been reached and if not, how changes to that decision may affect the matters in dispute

195. Ibid, p 20
196. Ibid, p 8
197. Ibid, p 21

- the potential for reaching an interim decision on the matters in dispute
- any other relevant matter.[198]

There would be a right of appeal from the expert panel to the High Court:

> There will be a right of appeal on the merits of the panel decision to the High Court (but not beyond), within a month of a panel decision. Although an appeal would add time to the overall process, not having appeal rights makes it both more likely that any panel decision would be judicially reviewed and also more likely that the reviewing Court might grant an injunction to prevent a committee being formed pending the outcome of review. Additionally, an appeal on the merits is desirable given that the panel decision will affect substantive rights and interests.[199]

MFE's second option for a circuit breaker was to have the matter heard by the Māori Land Court if mediation failed to achieve agreement. This option was included because it was suggested by the Randerson report but MFE advised Ministers that reference to the court was not preferable to using the proposed panel of experts, which would be appointed with full input from the groups involved in the dispute. Officials were concerned that the court would be more expensive for the parties than the expert panel (although we do not see how it would be more expensive than an appeal to the High Court). Also, there were concerns about the court's workload, and that a court process would take longer and be more litigious than the proposed panel of experts.[200] Perhaps most importantly, officials advised Ministers that the ILG and TTK and others had expressed concern about using the court to determine who would appoint their representatives:

> Engagement on this policy revealed that not all iwi authorities and groups representing hapū are comfortable with giving authority over their decisions to the Māori Land Court. The policy has been revised in such a way to ensure their preferences on who will facilitate their mediation or issue circuit-breaker decisions are given priority (for option one with the ministerially-appointed body who appoints expert panels). This is intended as an articulation of the way any party representing the Crown in this capacity would need to give effect to Te Tiriti principles. For the second option (Māori Land Court decides) this concern of iwi and hapū would not be mitigated.[201]

The alternative option for dispute resolution and a circuit breaker was put forward by Te Arawhiti (see figure 3). Mediation would still be an option but, if the

198. 'BRF-1562 RM Reform 192' (doc H37(d)), p 22
199. Ibid, p 21
200. Ibid, pp 32–33; submission 3.3.78, p 32
201. 'BRF-1562 RM Reform 192' (doc H37(d)), pp 20–21; submission 3.3.78, p 32

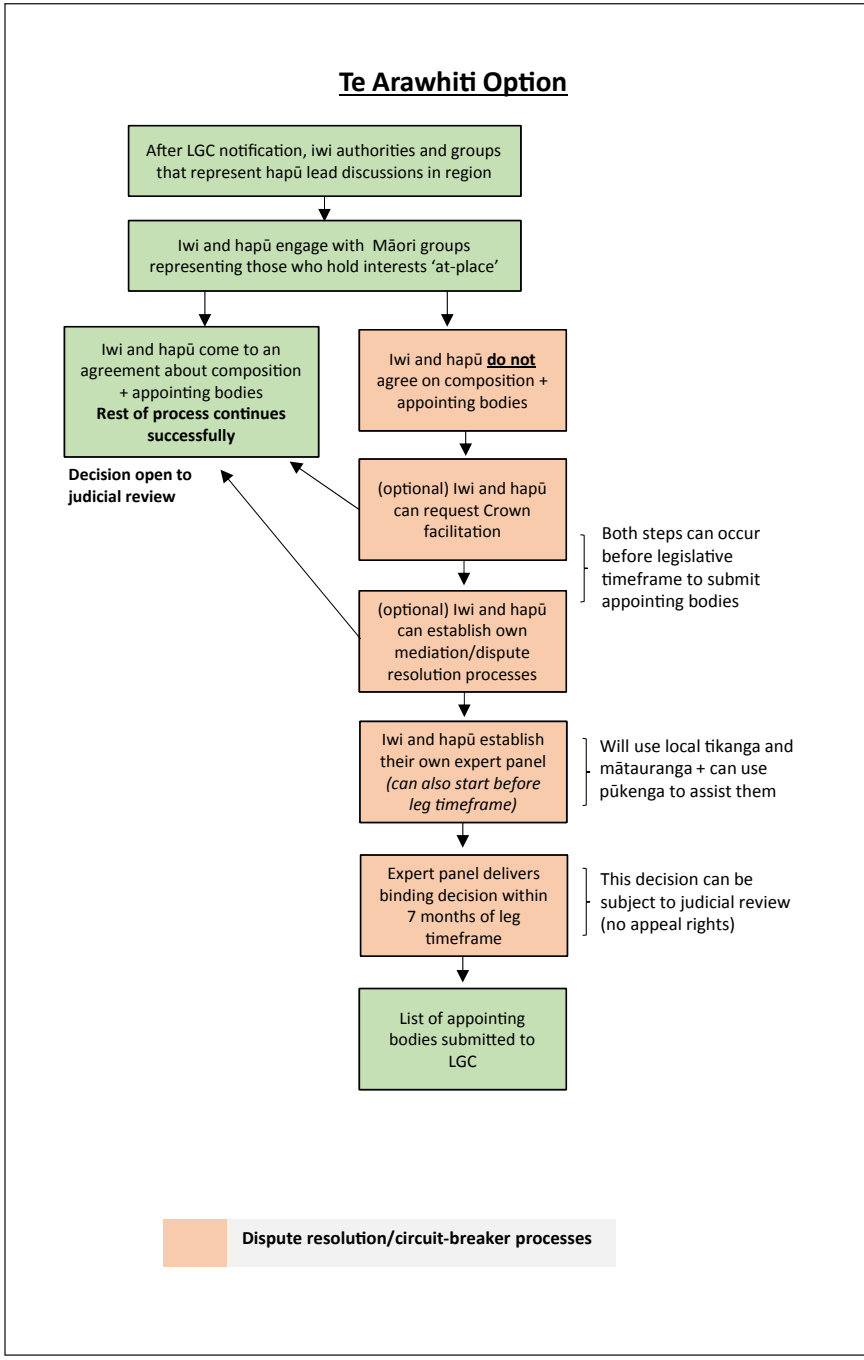


Figure 3: Disputes resolution and circuit breaker processes – Te Arawhiti option, 1 August 2022 (doc H37(b), p 2)

groups involved in the dispute did not want it, then they would appoint their own panel:

> 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 the initial deadline for identifying appointing bodies, similar to the MFE option, which recommends a four-month mediation process and a three-month expert panel decision-making process.[202]

This model of binding arbitration, involving experts appointed by the Māori groups themselves, was seen as a 'simpler "by Māori, for Māori" dispute resolution process'. Officials considered, however, that there was still merit in MFE's more prescriptive approach, which was 'managed by the Crown and its appointees, but designed to bring in the te ao Māori expertise needed to make an informed decision'.[203] Te Arawhiti considered that its option had fewer steps (and thus fewer opportunities for judicial review), and that the iwi authorities and groups representing hapū were more likely to feel that the decision had legitimacy. Also, it would make the dispute resolution process 'less prescriptive and involves a reduction in Crown control over a key element of the establishment of joint committees'.[204] There would not be a right of appeal because, according to officials, the decision would be a 'Māori-led one rather than a decision of the Crown, but the panel's decision could still be subject to judicial review'.[205] This was in contrast to the MFE model, with three decisions that could be judicially reviewed: the Minister's appointment of the central panel of experts; the central panel's appointment of the regional panel (albeit with input from the parties to the dispute); and the panel's decision, although the latter was subject to a right of appeal and therefore less likely to be subject to judicial review.[206]

2.3.4.2 *The parties' responses to the Crown's options*

The NZMC recommended that dispute resolution should involve facilitation of agreement by

> pūkenga (skilled, knowledgeable and learned persons in tikanga and te ao Māori), chosen by Treaty Rights holders within the region, or failing agreement by the Chief Judge of the Māori Land Court. The NZMC anticipates that – as Dr Robert Joseph explained in answer to Mr Crosby's questions – the pūkenga chosen would assist all

202. 'BRF-1562 RM Reform 192' (doc H37(d)), p 9
203. Ibid, pp 9–10
204. Ibid
205. Ibid, p 9
206. Ibid, p 10

relevant Treaty Rights holders within the region to make decisions on the selection of Rangatiratanga Representatives that are durable and sustainable.[207]

If a 'pūkenga-assisted process' failed to secure agreement, the circuit breaker would be the Māori Land Court. The court's role would be to investigate the process for its consistency with tikanga – the court would direct 'how the process should continue, or restart, in a tikanga-consistent manner'. The court would not decide the representatives.[208]

Counsel for the NZMC also objected to judicial review being included in the process, especially if the Māori groups *do* agree on a decision. Counsel submitted that judicial review is very expensive for all participants, the 'decision-maker and all affected parties must be named as respondents' so all must be involved, the court's decision will be based on process and likely result in an order that the challenged decision be reconsidered, and there is an automatic right of appeal (meaning that judicial review can take over two years).[209]

Janet Mason, as counsel for the Wai 2601 claimants and a number of interested parties, submitted that the MFE option for dispute resolution and circuit breaker was inappropriate because it involved the Crown appointing decision-makers, even at one remove. This risked political interference in the process, and was a breach of the Māori right to autonomy and to decide their own representatives.[210]

Counsel for Taheke 8C did not propose any particular model but was concerned that, according to the diagrams and information provided by the Crown,[211] only the notified iwi authorities and groups representing hapū would be able to participate in dispute resolution.[212] Crown counsel submitted that groups with rights and interests at place would also be able to participate in mediation, but that funding options have not yet been considered for that to occur.[213] If the Crown is correct, then the process diagrams would need to be updated again. Also, Kingi Smiler expressed concern in his evidence that funding is often directed at iwi, which impacts the ability of other Māori groups to participate, and that the Crown would need to ensure that 'other Māori communities and rights-holders (not just iwi and hapū representative organisations)' can 'build their capacity and capability to participate in the future system'.[214]

On dispute resolution in general, counsel for Taheke 8C submitted that mediation and the involvement of the Māori Land Court would be less expensive than judicial review, and less likely to damage relationships.[215]

Counsel for Ngāti Manu submitted:

207. Submission 3.3.80, p 17
208. Submission 3.3.80, pp 17–18
209. Ibid, p 11
210. Submission 3.3.84, pp 36–37
211. Document H37(b), p 2
212. Submission 3.3.82, p 11
213. Submission 3.3.78, p 36
214. Document H17(b), pp 2–3; see also doc H37(l), p 17
215. Submission 3.3.82, p 11

> The claimants support a dispute resolution process being only able to be triggered by mana whakahaere rights holders registered on the data base and that an independent process overseen by Pukenga and Pou Tikanga be the preferred starting point to assist the mana whakahaere rights holders within the region to make decisions on the selection of representatives that are durable and sustainable. In the absence of agreement then application can be made to the Chief Judge of the Māori Land Court to determine whether representatives have been appointed in accordance with tikanga, with no right of appeal. This pukenga-led dispute resolution process would in turn be subject to the supervisory oversight of the High Court, through judicial review proceedings but as noted in the NZMC submission all of these suggestions are prefaced on the basis for the need for significant changes to the present legal aid regimes to facilitate claims of this kind being made.[216]

Counsel for the Ngāpuhi claimants (owners of Lake Ōmapere) submitted that Māori groups involved should appoint the expert panel (not Ministers), fully funded mediation would be the preferred dispute resolution option, and there should be a right of appeal from the expert group but only on matters of law. Counsel also submitted that the proposed seven-month timeframe for dispute resolution was inadequate, and that no good reason had been provided for it. An option of judicial review would certainly take longer.[217] In addition, counsel for the Ngāpuhi claimants submitted that legal aid would not be available for judicial review, whether for those who take judicial review or those who are respondents.[218]

Counsel for the Tūaropaki Trust submitted that it was unclear whether any groups other than iwi and hapū could participate in dispute resolution. Counsel also submitted that judicial review would be an inappropriate component of the process (or anywhere else in the system for appointing representatives) because it would not consider the merits of the case, and the litigation would be Māori versus Māori, entrenching divisions and creating a risk that the Māori seats would remain vacant while the rest of the committee carried on without them.[219]

On the issue of judicial review, the Crown submitted that this form of review was not actually part of the circuit breaker but simply a requirement of the rule of law that 'judicial review will be available for any exercise of any statutory decision-making power'. It would, the Crown said, be 'a significant departure from legal and constitutional principle to proceed otherwise'. In terms of funding participation in judicial review, the Crown submitted that funding for this purpose would not be included in the legislation, but 'officials and Ministers have recognised more generally that Crown support for the self-determination processes [is] essential'.[220] On the issue of the dispute resolution options and circuit breakers proposed by MFE and Te Arawhiti, the Crown submitted that both options are still being considered.

216. Submission 3.3.92, p 25
217. Submission 3.3.91, pp 15–16
218. Ibid, pp 20–21
219. Submission 3.3.90, p 18
220. Submission 3.3.78, p 38

According to the Crown, the evidence at the hearing supported a 'tikanga-led process but there was limited clarity as to what form would be acceptable'. The Crown also submitted that there are multiple ways to resolve disputes, and to assess the Treaty compliance of each of those, but 'what must be assessed is the policy that is reasonably intended or decided upon'. The Crown welcomed Tribunal guidance on the options proposed, and submitted that any formal breach finding would not be appropriate because no Crown decisions had been made.[221]

2.3.4.3 *Our view*

We note before beginning our discussion that the presiding officer, Chief Judge Isaac, took no part in the deliberations for this section of the chapter.

In the Crown's proposed process, dispute resolution would be triggered 10 months out from the point at which a committee had to be established. Seven months would be allowed for dispute resolution and then three months for the appointing body to consult Māori in the region and appoint the representatives. On the basis that facilitation will have been available throughout the process, our view is that further facilitation after the 10-month deadline has been reached would not assist. We note, however, that there is a serious risk to the Crown's proposed process as it stands in that multiple dispute resolution processes may be occurring at the same time, involving the same parties having to engage in both intra-iwi and inter-iwi disputes, which would be burdensome, damaging to relationships, and put a great deal of pressure on the tight statutory timeframe (seven months).

As we see it, the primary form of dispute resolution should be mediation; by far the best outcome would be for the groups involved to reach agreement through mediation without resorting to a circuit breaker. The mediators would be independent. They should certainly include pūkenga but trained mediators would also be essential. Also, the iwi authorities and the groups representing hapū should nominate their preferred mediators (including back-ups if the chosen mediators are not available at the time of dispute) at the beginning of their leadership role as part of facilitating the process. That way, there would be no delays at the dispute resolution phase. The MFE option allows four months for mediation. That is a tight timeframe. If, however, there is a lack of agreement as to the mediators at the time of the dispute(s), our view is that the Māori Land Court should appoint mediators, taking into account the nominations of the parties involved in the dispute.

If mediation is not successful, then we do not consider a Crown-appointed panel of experts would be the appropriate way of breaking the impasse and making a decision. None of the claimants or interested parties who made submissions agreed with that part of the MFE proposal. Nor do we. Instead, the arbitration model proposed by Te Arawhiti would be the better circuit breaker (the process would need to be funded by the Crown). The groups involved would appoint the arbitrators, which would be more likely to get buy-in (if not full agreement) to the final decision.

221. Ibid, pp 31–33

Nonetheless, disputes could arise as to the qualifications or impartiality of an arbitrator. Problems could also occur in the process, such as parties not appointing an arbitrator within the time required, or the arbitrators failing to agree on the selection of an independent arbitrator. The Arbitration Act 1996 provides for the Minister of Justice to appoint a body to resolve such disputes or failures in process.[222] In order to remove any Crown involvement in this particular instance, we consider that the Māori Land Court should carry out that role.

On the issue of judicial review, we consider that there should be no option of judicial review at the point that Māori have made a decision on the appointing body, which was proposed in the Crown's process diagram.[223] We acknowledge the Crown's submission in respect of the rule of law, but surely if there is in fact disagreement (such that the decision might otherwise be sought to be judicially reviewed), then the dispute resolution process should be used. We consider this essential for an effective, timely process that causes the least possible damage to the whanaungatanga of the groups involved and enables the appointment of Māori committee members. We see the risk of the committees having to commence without Māori members as a very real one.

In respect of dispute resolution, we consider that mediation would be the first stage. If that is unsuccessful, in that there is still dissenting opinion at the end of the mediation, there would be the option to go to binding arbitration. In effect, if judicial review is available, then it *will* become the circuit breaker, and that outcome would not characterise a process that gives effect to rangatiratanga and Māori self-determination. In addition, we consider:

- The legal restrictions inherent in judicial review proceedings mean that usually, other than in rare cases, they are limited to a focus on procedural or jurisdictional errors rather than addressing the merits of the substantive issues.
- Judicial review proceedings are highly technical and complex, usually requiring counsel to be engaged, and in addition become costly and drawn-out.
- Expensive fees for filing, for setting down the proceedings for hearing, and daily hearing fees, impose heavy burdens on applicants.
- Judicial review proceedings also carry a serious risk of heavy costs orders being made against applicants if unsuccessful.
- Rights of appeal exist to the Court of Appeal and, with leave, to the Supreme Court, potentially adding many months or even years of further delay and a significant burden of extra expense, and also the risk of exposure to further award of costs against unsuccessful appellants.
- The review proceedings would not be against the Crown but would involve Māori parties pitted against each other, further exacerbating division.
- Any delay flowing from drawn out litigation over judicial review could mean that the committees begin their work (and continue it for some time) in the absence of Māori representation, which would be harmful to Māori and to

222. Arbitration Act 1996, s 6A, sch 1, cls 11–15
223. Document H37(b), p 2

the new system itself (which is predicated on full and meaningful Māori participation).

Thus, we consider judicial review inappropriate in this particular context.

Is judicial review, however, a legal and constitutional right of parties who are aggrieved at the exercise of a statutory power? We are aware that ouster clauses of varying kinds (and with varying exceptions) have been used in legislation, for example in the RMA where there is a right of appeal to the Environment Court.[224] In our view, it would be preferable that any dispute about the arbitration decision should be subject to a right of appeal on the merits to the Māori Appellate Court (with no further right of appeal from that court's decision). The Māori Appellate Court is a specialist court that would be faster and cheaper than judicial review or a right of appeal to the High Court. We consider that this form of appeal appropriately balances the need for procedural fairness against the risk of the committees starting without the Māori members. We also note that the court would not be appointing the Māori representatives, as has been argued by some counsel. Rather, the court would decide between the various proposed appointing bodies in the event that both mediation and arbitration had failed to obtain agreement. The appointing body (or bodies) would still need to carry out the three-month process of consultation and working with the people to select and appoint the Māori representatives to the regional planning committee.

In sum, our view is that a two-stage process of mediation followed by binding arbitration should be sufficient (where Māori choose the mediators and the arbitrators), and should enable processes that empower Māori to reach agreement or finality without a lengthy legal battle in the courts. If these processes do not succeed in resolving disputes, there should be a right of appeal on the merits to the Māori Appellate Court (with no further right of appeal). An ouster clause for judicial review would be beneficial in this particular context.

2.3.5 Non-kin-based communities – urban Māori (mātāwaka) as one of the 'relevant interests "at place"'

2.3.5.1 *Evidence and submissions*

As noted above, MFE stated that 'mātāwaka and Māori community groups (eg, urban Māori, the New Zealand Māori Council)', would be included in the 'Māori entities representing rights and interests "at-place"' that iwi authorities and groups representing hapū would be obliged to engage with or include in 'the process of agreeing to a position on composition and appointing bodies'.[225] In other words, they would have at least a participation role and, as also discussed above, the final decision would be made by a self-determined process led by iwi authorities and groups representing hapū according to the customary processes and tikanga of the Māori groups in the region. That is the essence of the Crown's proposal.

The term 'mātāwaka' was defined in the Local Government (Auckland Council) Act 2009 to mean 'Māori who live in Auckland and are not in a mana whenua

224. Resource Management Act 1991, s 296
225. 'BRF-1562 RM Reform 192' (doc H37(d)), p 5

group'. MFE used the term as it was used in the Randerson report to mean 'whānau, hapū and iwi Māori living in an area where they are not mana whenua.'[226] The only individuals or groups under this definition that we heard evidence from were urban Māori, so we simply use that term and confine our remarks in this priority report to mātāwaka who are urban Māori. In doing so, we acknowledge that there are also hapū and iwi who are 'urban Māori', and their position will also be discussed in this section.

On the issue of Māori associations and District Māori Councils whose members organise to participate in the Māori Community Development Act structure, they will have the opportunity to participate in the selection process. They would be able to do so as members of their associations or as members of their tribal communities as they chose. Rihari Dargaville, for example, is the chair of the Tai Tokerau District Māori Council. He is also a 'kaumātua and leader of various Ngāpuhi hapū' and has a seat on the Northland Regional Council Māori Advisory Board representing Te Rarawa.[227]

The role of urban Māori in the process to select appointing bodies was one of the more controversial issues in this priority inquiry.

MFE's position was shaped by the consultation round (November to March 2022) and subsequent, targeted engagement with Māori groups, although the Crown witnesses accepted under cross-examination that they had not engaged with urban Māori groups.[228] The feedback from Māori was described as including the following key points:

- the importance of self-identification for Māori in terms of participation at different levels of the system
- a greater role for hapū in the system – rather than just iwi authorities as is the approach for most of the RMA (which is consistent with the [Randerson] Panel's view)
- a range of Māori groups including urban Māori and Māori Land trusts/ahi kā should have a role (but different views on how their roles and influence should play out at different levels of the system)
- whakapapa relationship to Te Taiao is significant and confers distinct rights (although there are different views on the extent of the distinct rights and who have these).[229]

MFE's understanding was that, for rangatiratanga to be given effect to in the new resource management system, preference should be given to the 'exercise of rangatiratanga derived through *whakapapa relationships with te Taiao*' (emphasis added), which was seen as consistent with the roles of iwi and hapū in Mana

226. Ibid, note 4, p 5
227. Document H26, pp 1–2
228. Transcript 4.1.6, p 459
229. 'Paper 2: Role, Funding and Participation of Māori in the RM System', no date, annex A, p 24 (doc H37(a), p 533)

Whakahono a Rohe arrangements and other such mechanisms. 'The primacy given to whakapapa-based relationships', MFE advised Ministers, would be 'consistent with the current drafting of Te Oranga o te Taiao (TOOTT), included in the exposure draft of the NBA and is, in the opinion of officials, broadly consistent with tikanga as it relates to resource management'.[230] Upholding 'Te Oranga o te Taiao' was defined in the exposure draft as incorporating 'the health of the natural environment', the 'intrinsic relationship between iwi and hapū and te taiao', the 'interconnectedness of all parts of the natural environment'; and 'the essential relationship between the health of the natural environment and its capacity to sustain all life'.[231] Hence, the focus on whakapapa relationships with te Taiao in the proposed resource management system generally, and the proposed process to select an appointing body, although with a *participation* right for urban Māori and others (and a potential role in decision-making according to tikanga and the self-determined processes adopted in each region).

MFE conceded:

> There is less provision for the exercise of rangatiratanga and kaitiakitanga derived through more contemporary organisation of Māori communities/interests (eg, where Māori have organised in urban settings). This too is consistent with the current drafting of TOOTT [Te Oranga o te Taiao], and broadly consistent with the Crown's understanding of tikanga related to resource management. The proposals do however make provision for the exercise of such rights and interests through the positive obligations on iwi and hapū and decision-makers, and enable iwi and hapū to involve other Māori entities (such as urban Māori authorities) in certain processes.[232]

One such process would be the selection of appointing bodies.

MFE noted, in coming to this view, that urban Māori 'may continue to view their participation as inappropriately limited'.[233] That has certainly proved to be the case, based on the evidence and submissions in this inquiry.

John Tamihere gave evidence as an interested party. Mr Tamihere is the chief executive of the Whānau Ora Commissioning Agency and of Te Whānau o Waipareira Trust, and an executive member of the National Urban Māori Authority (NUMA). He is also a member of the Hoani Waititi Urban Marae. Mr Tamihere noted that RMA issues are crucial in respect of the problems facing urban Māori:

> Many of the issues that NUMA, the Waipareira Trust and WOCA deal with can be traced back to the decision-making of Councils under the Resource Management Act 1991 ('the RMA'). Our people are moved further and further out of the main centres into denser ghetto style housing because of Council decisions. Issues around the

230. Ibid, p 26 (p 535)
231. Exposure draft, cl 5(3) (doc H18(a)), pp 539–540
232. 'Paper 2: Role, Funding and Participation of Māori in the RM System', p 27 (doc H37(a), p 536)
233. Ibid, p 29 (p 538)

> spiralling costs of what should be basic human rights, like a right to housing, and a right to free clean and drinkable water, have hit our people the hardest. Food security and the right of urban Māori to have access to green spaces and community gardens are central to the wellbeing of our urban Māori.[234]

Statistician Len Cook commented that a number of processes, including Crown policies, have affected the connections of Māori to their iwi, hapū, and whānau.[235] Mr Tamihere pointed to 'urbanisation, pepper potting, assimilation, and integration'.[236] Although the census statistics about iwi affiliation are not reliable, they do suggest that a significant number of Māori may not know their iwi. Also, as at 2006, 80 percent of Māori were 'urban dwellers'.[237] Some whānau have lived in the cities for generations. For Auckland, mātāwaka make up about 84 percent of the Māori population. That would necessarily be a significant factor for any urban planning framework.[238]

Mr Tamihere suggested that the issue in respect of resource management is not really related to who people are when they are back in their rohe, but rather who they are *where they live*, and the crucial issues that face them there. Mr Tamihere stated: 'We have always accepted mana whenua and supported it. However, we all know that substantial numbers of Māori live outside their rohe. Who represents them? Or is it that they should not have a say?'[239] He added:

> I have chosen to be buried within the rohe of Ngāti Porou, and have therefore placed more energy in my Ngāti Porou tanga. I am the lead negotiator for Ngāti Porou ki Hauraki. My whole life, however, has been shaped by Hoani Waititi Marae and Te Whānau O Waipareira. Our Pepeha here in the West Auckland Region reflects the fact that the people of Hoani Waititi Marae are Waipareira tangata. We are in our fifth generation of kids that are being brought up with a connection to Te Whānau O Waipareira as their Iwi in the city, should they not be of mana whenua.[240]

Mr Tamihere also stated that Māori in the cities, who are the majority of Māori in New Zealand, have to 'look after ourselves, in our new and evolving landscape', which has 'shaped who we are and what we are'. It is not an either-or situation requiring a choice between the representatives of mana whenua marae and the representatives of 'Maatawaka Urban Māori Marae'. Rather, Mr Tamihere said, 'it must be "us-and us"'.[241] According to his evidence, the Māori members of regional planning committees should be selected directly:

234. Document H28(b), p 3
235. Document H4, p 5
236. Document H28(b), p 4
237. Document H4, pp 2–5
238. New Zealand Productivity Commission, *Better Urban Planning: Final Report* (Wellington: New Zealand Productivity Commission, 2017), pp 170–171
239. Document H28(b), p 4
240. Ibid, p 1
241. Ibid, p 6

> The residents of each District should hold hui to select their Committee representatives, as we are doing in Māori wards in the forthcoming local body election for first time in 182 years. Independent entities such as WOCA and NUMA could aid in the facilitation of these hui.[242]

Mr Tamihere's evidence was supported by Raymond Hall, the chair of the Te Whānau o Waipareira Trust. He stated that the Waipareira Trust supports 'our Tāmaki people through the issues that have arisen from the mass urbanisation of Māori throughout the 20th century, including from the loss of important whānau networks, and the consequent disconnection from community'.[243] His evidence was that the regional planning committees must include 'representatives of urban Māori entities' so that the problems encountered under the current RMA, such as 'extremely long wait times for the approval of social housing development projects', are not replicated under the new regime.[244]

Counsel for Mr Tamihere, Mr Hall, and Titewhai Harawira argued that urban Māori should be leading the process directly to appoint representatives to the regional planning committees alongside iwi and hapū. Counsel submitted:

> As the Tribunal was very clear to point out in the Waipareira Report, recognising non-tribal entities in an Article 2 context is not an undermining of the special status of Hapū and Iwi, nor their special relationship with the Crown under te Tiriti/the Treaty. Rather it is a recognition of the reality that Urban Māori entities are the best organisations to reach out to, and therefore represent, Urban Māori in a Tiriti/Treaty context. The Crown owes all Māori obligations under te Tiriti/the Treaty and its Principles. Urban Māori absolutely cannot be adequately represented in a Tiriti/Treaty context by IAS [iwi authorities], as suggested by the ILG in their Opening Submissions.[245]

Counsel also submitted that urban Māori have made 'significant shifts in having their Tiriti/Treaty rights recognised through organisations of their own choosing', as demonstrated in the fields of health, fisheries (under section 88(2) of the Māori Fisheries Act 2004), the revival of te reo (NUMA is a Reo Tukutuku organisation under the Te Ture o te Reo Māori Act 2016), and housing (through the Te Whare Oranga project).[246] Counsel stressed the recognition of urban Māori rights to fisheries as an article 2 taonga, submitting that 'Te Whānau o Waipareira and other entities representing Urban Māori should not be pigeon-holed into the social sector, or any other specific realm of influence'. Instead, the 'inclusion, or exclusion, of Urban Māori from decision-making processes affecting Māori should be assessed on the fact that Urban Māori have made a choice as to who will represent them',

242. Ibid, p 6
243. Document H29, p 1
244. Ibid, p 2
245. Submission 3.3.84, pp 51–52
246. Ibid, pp 55–60

and they have chosen to be represented through their urban marae, their urban Māori authorities, and NUMA.[247]

Counsel for these interested parties also emphasised the Tribunal's *Te Whanau o Waipareira Report*, arguing that the findings of that report should be applied more widely than the specific context of the inquiry (the provision of social services to Māori).[248] The Waipareira Tribunal found that urban Māori communities can exercise rangatiratanga in respect of their own affairs, and that the principle of partnership between Māori and the Crown therefore applies to them:

> Rangatiratanga, in this context, is that which is sourced to the reciprocal duties and responsibilities between leaders and their associated Maori community. It is a relationship fundamental to Maori culture and identity and describes a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support. A Maori community defines itself by a relationship of rangatiratanga between its leaders and members; rangatiratanga gives a group a distinctly Maori character; it offers members a group identity and rights. But it is attached to a Maori community and is not restricted to a tribe. The principle of rangatiratanga appears to be simply that Maori should control their own tikanga and taonga, including their social and political organisation, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes.
>
> That the Tribunal and the courts have viewed the principle of rangatiratanga as applying generally – that is, as a right of autonomy in a variety of situations neither restricted to tribes nor confined to the management of lands and fisheries – is evident in their conception of a partnership arising partly from the fact that the Maori rangatiratanga and the Crown's kawanatanga, or right of governance, are juxtaposed.[249]

A number of witnesses in this inquiry had a different view of the status and rights of urban Māori, although there was some acceptance of urban Māori authorities nonetheless.

Among the witnesses who live in urban centres but still connect back to their home rohe, we note the evidence of Tina Porou and Kereama Pene. Ms Porou gave evidence for the ILG at the priority hearing. She stated:

> And I just note the question that came up earlier about the urban space. So, in the regional areas, in the discussions we've had – I'll give you an example. I live in Porirua. I'm not from Porirua but I'm a good manuhiri *guest*. So, as a good manuhiri, I am not going to tell Ngāti Toa how to look after their whenua. I don't whakapapa to those awa, I don't whakapapa to that whenua. I whakapapa to my whenua in Ngāti Porou and Tūwharetoa and if I've got any views on the way in which those taonga are

247. Ibid, p 60
248. Ibid, pp 46–51
249. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), pp xxv–xxvi

managed, I will go home. It is inappropriate for urban Māori or taura here like myself to have those views. But, I will be represented as a general community member, just like everybody else in that system, so I am not left out.[250]

Kereama Pene, the chair of the Wellsford Māori Committee on the North Shore, gave evidence to the select committee which was provided to the Tribunal, stating: 'Our forebears lived together in marae papakainga. We are now pepper-potted in suburbs. We can participate in either the communities where we live or the marae communities we came from. Like many others I participate in both.'[251] Mr Pene participates where he lives through the NZMC structure at the Māori committee level.

Tribal leaders who participated in this priority inquiry were sympathetic and recognised urban Māori authorities as having an appropriate and necessary role, but they were concerned that that role not usurp their customary authority in respect of the environment and their taonga resources.

Ngarimu Alan Huiroa Blair, deputy chairperson of the Ngāti Whatua Ōrākei Trust (a PSGE), stated that 'it was inconceivable as a matter of tikanga that any entity other than those that have direct whakapapa, take, and are keepers of the mātauranga (knowledge) relevant to whenua, speak of and contribute to decisions that would directly affect our whenua and moana.'[252] Mr Blair said, however, that Ngāti Whatua acknowledged the importance of urban Māori authorities, including Te Whānau o Waipareira, so long as they operated for the benefit of their own community and within their own sphere:

> In our view, Te Whānau o Waipareira (*Waipareira*) is a reputable urban Māori authority in Tāmaki which does have a meaningful presence and impact for many urban Māori living in Tāmaki.
>
> We also supported Waipareira's Treaty claim in the 1990s to exercise rangatiratanga over their taonga, being their urban Māori community, under Article 2 of Te Tiriti. Waipareira therefore have a Te Tiriti-based relationship with the Crown in the social welfare of that particular community.
>
> We have also enjoyed a positive relationship with Te Marae o Hoani Waititi over five decades, built on mutual benefit, trust and respect for tikanga Māori. That marae of course has long served as a central hub for urban Māori in Tāmaki.
>
> Heoi anō, a Te Tiriti-based relationship and service to urban Māori in our rohe does not translate to involvement in matters of the whenua and moana of Tāmaki – that is a step too far. Matters of natural resource management, planning and allocation are within the exclusive domain of tangata whenua to lead.[253]

250. Transcript 4.1.6, pp 336–337. The word in italics is the interpreter speaking.
251. Document H9(a)), p 1
252. Document H46, p 4
253. Ibid, pp 5–6

Rikirangi Gage, chief executive of Te Rūnanga o Te Whānau (as stated above), noted the dislocation and disconnection that colonisation had brought about. Mr Gage's evidence acknowledged that

> the present way many can, and electively choose, to have their rights represented is through urban entities that serve them and for which they have established an affiliation. This is not the same as mana whenua, but it is a legitimate representative mana in its own right.
>
> I would not say in relation to mana whenua, environmental or territorial decisions, that those alternative urban affilations are able to trump hapū or iwi voice, but I also would not be arrogant enough to say they have no place. Where they legitimately represent the voice, rights, needs and aspirations of our mokopuna they possess a different type of agency, but one nonetheless determined by ourselves (albeit in response to colonial intrusion).[254]

Mr Gage concluded that 'Urban Māori, in 2022, occupy a unique place and merit distinct consideration in certain spheres, but that could never usurp and must not be inconsistent with the exercise of the rights, interests, responsibilities and authority of the iwi and hapū holding mana whenua'.[255]

Professor Rawiri Te Maire Tau, who is Upoko of the hapū Ngāi Tūāhuriri, told us that Ngāi Tahu has 'always exercised its tikanga to atawhai urban migrants by the provision of urban marae such as Rehua and Ngā Hau e Whā'. Tensions that arose between Ngāi Tahu and Ngā Hau e Whā in the 1980s were resolved by tikanga, and Ngāi Tahu have endorsed Norman Dewes as 'the rangatira of that marae and the role of Maata Waka within our takiwā'. Professor Tau explained that Ngāi Tūāhuriri hapū and 'Maata Waka have worked together for the well-being of our people' since the late 1990s, especially in 'Article 111 areas (education, health, justice and the general welfare of the people)'.[256] Professor Tau also provided an extract of an agreement between Ngāi Tūāhuriri and Te Rūnanga o Ngā Maata Waka, in which each recognised the appropriate spheres of the other:

> With reference to the Treaty of Waitangi, Ngāi Tūāhuriri holds exclusive authority and tino rangatiratanga in its takiwā, and all parties commit to the principle that Articles I and II are the sole domain of Ngāi Tūāhuriri.
>
> In matters regarding Article III of the Treaty of Waitangi, Ngāi Tūāhuriri commit to working with Te Rūnanga o Ngā Maata Waka exclusively within its takiwā as the pan-iwi organisation. That is, Ngāi Tūāhuriri will not privilege any other Māori group or iwi as an Article III partner in any activities within Christchurch.
>
> Likewise, Te Rūnanga o Ngā Maata Waka will prioritise its relationship with Ngāi Tūāhuriri as the principal relationship within Ngāi Tahu. Ngāi Tūāhuriri will support Te Rūnanga o Maata Waka on matters of health and well-being and will endeavour to

254. Document H51, pp 5–6
255. Ibid, p 9
256. Document H34(a), pp 6–7

ensure Te Rūnanga o Ngā Maata Waka functions with independent authority and not as a secondary partner to either Ngāi Tahu or the Crown.[257]

Professor Tau added:

> In the present day, Ngāi Tahu and all urban Māori leaders throughout the Ngāi Tahu Takiwā hold a joint understanding of the tikanga involved here. Mana and rangatiratanga to the land reside with Ngāi Tahu. As I have set out in my earlier statement of evidence, that has not hindered Ngāi Tahu and urban Māori authorities working together. In fact, our joint understanding has helped it.[258]

Norman Dewes, who is of Ngāti Kahungunu descent and has lived in Christchurch since the 1950s, is the chief executive of Te Rūnanga o Ngā Maata Waka. He is also the chair of Te Waipounamu District Māori Council. Mr Dewes did not comment specifically about the urban Māori situation (his evidence was focused on the NZMC), but he confirmed that Ngāi Tahu 'look after us manuhiri here', the manaakitanga is over and above.'[259]

As discussed above in section 3.2, Sir Taihakurei Durie also gave evidence in respect of urban Māori (among other Māori living outside their rohe). His view was that alternative forms of the Māori 'customary group ethic' have developed as a result of urbanisation, but noted that all marae, whether traditional or pan-Māori, can form a Māori committee within the Māori Community Development Act structure.[260]

At the hearing, Sir Taihakurei acknowledged the point about customary authority in respect of natural resources. He stated: 'I think all Māori would accept that the customary natural resources are associated with particular hapū and it's for them to look after those resources.'[261] According to Sir Taihakurei, the interests of urban Māori lie mostly within the 'built environment' part of the proposed Natural and Built Environments Act. He told us:

> But for the urban groups their interest is in the built environment and the like. They wanted to know what sort of things are being planned. What's in there in the special planning for example that makes sure that there's a provision for Māori communities. What provisions can be made for urban papakāinga? How can we get away from the old days when we had to be pepper potted back to a position where our people can start living together and developing their own communities? So, they have a very big interest in their place in the built environment. They also like all Māori have a cultural interest in saying that we should protect the environment, so they're not

257. Ibid, p 7
258. Ibid, p 8
259. Document H43, p 2
260. Document H7, pp 18–19
261. Transcript 4.1.6, p 51

external from that area. They have a cultural interest in saying like all Māori are able to say, 'we should be protecting the environment and the natural resources'.[262]

Sir Taihakurei's perspective on that point seems to be shared by Mr Tamihere. This was shown by cross-examination during the hearing:

> **Q.** Kia ora Mr Tamihere. Can I just explore some tikanga concepts with you. You talked about connectivity to whānau and hapū and iwi. What about connectivity to the taonga, to those that are going to be protected? Do you see that as an important principle when we're looking at Resource Management relationships?
> **A.** Are you talking about the people on the land or are you talking about the land?
> **Q.** I'm talking about resources, taonga, those things. I agree people are taonga, but I'm talking about those resources which really are the principal focus of a Resource Management regime.
> **A.** Large parts of Resource Management regime, that'll be the total purview of mana whenua.
> **Q.** And so – sorry.
> **A.** There will be times – hang on, I'll just finish my answer. There will be times where impacts on the building of our wānanga at Hoani Waititi Marae will be impacted because of the reserve classifications and a whole bunch of other things. To suggest that others are going to look after that well that's their view. We will front foot that if I was to give you an example.
> **Q.** So, you're talking about the urban environment of the main? I just want to clarify that you are seeking a particular relationship or a nexus to be recognised that tikanga?
> **A.** Well, it is already . . .[263]

Crown counsel submitted in closing that there were distinctions between 'kin-based relationships with te taiao' and 'non-kin based interests (which although also valuing te taiao, might be more appropriately focused on their specific communities of interest, or for urban Māori into built environment and urban planning matters (subject to their arrangements and respect for those with kin-based interests in those places)'.[264] This seems to us to be a fair summation, but the question is how these distinct interests are to be provided for in the system to appoint regional planning committees. The Crown's view was that the current proposal – iwi and hapū must engage with mātāwaka communities (as well as other interests 'at place') in the process to agree an appointing body – is sufficient to address the distinct interests. We are not so sure, as we explain next.

262. Ibid, p 51
263. Ibid, pp 186–187
264. Submission 3.3.78, p 36

2.3.5.2 *Our view*

It seems to be common ground between the parties that the natural resources that will be the subject of the new resource management system, especially those that are taonga, are the responsibility of the groups that exercise customary authority over those resources, and are kaitiaki of those resources. The interest of urban Māori communities, which can exercise rangatiratanga over their own affairs, is mostly restricted to the built environment that is home to those communities, and which is also the traditional rohe of the urban iwi and hapū, such as Ngāti Whatua at Tāmaki Makaurau. This appears to have been recognised in the arrangements for the Auckland Independent Māori Statutory Board, which was discussed at the hearing.[265] This board is appointed by a

> selection body, established for this purpose under the direction of the Minister of Māori Development and consisting of mana whenua representation, [which] must choose the nine members of the Board. The selection body simply chooses the seven mana whenua representatives (and may choose people on the selection body for the Board). The selection body chooses the mataawaka representatives from nominees received via a public notification process (Schedule 2 of the Local Government (Auckland Council) Act 2009).[266]

Two of the nine members of this board are 'mataawaka representatives', the other seven are 'mana whenua'. The board works to promote cultural, environmental, and social issues of significance to 'mana whenua groups and mataawaka of Tāmaki Makaurau', it ensures that the Auckland Council acts in accordance with the Treaty, and has two of its members sit on council committees that 'deal with the management and stewardship of natural and physical resources'.[267]

The Randerson report proposed that better enabling urban development within environmental limits would involve:

- spatial strategies to better manage land supply and infrastructure;
- specifying outcomes for the built environment that would enhance the quality of urban areas and ensure high quality, sustainable development;
- supply development capacity and simplify rules to make urban development easier and cheaper;
- make plan-making more able to respond to the dynamic nature of urban areas; and
- better allocate urban development capacity.[268]

These are issues of particular concern to Auckland Māori communities and to other urban Māori communities and, as such, we agree that representation is required in the crucial task of regional planning. We note that the Crown has not

265. Transcript 4.1.6, pp 189–190

266. Jacinta Ruru, Andrew Geddis, Mihiata Pirini, and Jacobi Kohu-Morris, 'Further Democratising Māori Decision-Making to Give Effect to Te Mana o te Wai' (doc H18(a)), p 748

267. Auckland Council, 'Independent Māori Statutory Board', https://aucklandcouncil.govt.nz

268. *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel* (doc H18(a)), p 28

yet decided what to do about unitary authorities such as Auckland, as far as we are aware, and it may be that the Independent Statutory Māori Board will in fact have a direct role on the regional planning committee. Officials advised Ministers:

> Unitary authorities provide a challenge to the joint committee model with only one council present to agree composition. To ensure that the geographic representation and local input provided for in multi-council regions is upheld in unitary authority areas, it is recommended that unitary authorities should not be prevented from having all councillors on the committee. This could result in a large committee in Auckland, with 21 members on Auckland Council (and the possibility of this increasing in the future), however we think the flexibility is appropriate to ensure adequate representation for a significant proportion of New Zealand's population.
>
> Officials propose to seek separate decisions on how unitary authorities are provided for under the legislation, in particular Auckland including the role of the Independent Māori Statutory Board in committee arrangements.[269]

While this may be the solution adopted for Auckland, no decisions have been made as far as we are aware.

As we see it, the problem is not that mātāwaka have been relegated to a participatory role in a process led by iwi and hapū (as claimed), but rather that they do not – as urban Māori communities which can exercise rangatiratanga over their own affairs – have an interest in the full range of matters to be considered in regional planning. In particular, while they share the concern of all Māori about the state of the environment, resource management issues in respect of the natural environment relate to the lands and resources over which customary Māori groups (particularly hapū) exercise rangatiratanga. Those who sit on the regional planning committees will have to be able to speak authoritatively and represent Māori on the full range of natural resources and environments, and not just on the urban planning issues that are of particular interest to urban Māori communities.

It appears to us that there is a solution for this situation in the MFE proposal to have topic-based sub-committees as one of the partnership mechanisms in the new system. Although the sub-committees were not mentioned in the brief of evidence of Janine Smith, they are covered in the documentation that Ms Smith and Ms Kohere provided in evidence to the Tribunal. Also, this suggestion relates to the proposition of 'a pool of additional representatives with specialities in resource-specific matters to be selected by various appointing bodies and subbed in and out by the principal representatives as necessary', which the presiding officer foreshadowed as an issue in the memorandum-directions granting the urgent hearing.[270]

MFE officials noted that the Ministerial Oversight Group in April 2022 (MOG #17) had been asked to agree to the proposition that

269. 'Paper 1: Regional Governance and Decision-Making for Plans in the Reformed Resource Management System', no date (doc H37(a)), p 468

270. Memorandum 2.6.83, p 7

> the SPA and NBA committees can, at their discretion, appoint sub-committees to assist the committees to develop plan content relating to inter-regional and sub-regional matters. That paper notes that sub-committees could also be established to provide for collaborative planning processes with Māori for specific plan or RSS content such as the inclusion of cultural landscapes or content on specific waterways. There is proposed to be no limitation on who the SPA and NBA committees can appoint to sub-committees.[271]

The sub-committee proposal was grounded on the proposition that 'control or partnership approaches balanced towards the kaitiaki, rather than [the] public interest, could still be provided for where appropriate (if SPA and NBA committees choose to accept the advice of iwi/hapū/Māori led sub-committees or advice provided directly by iwi/hapū/Māori groups)'. The sub-committees would thus be a partnership mechanism that enabled more Māori control over planning for a water resource, for example, or some other resource in which Māori have 'the priority interest'.[272] Officials stressed that the regional planning committee would still retain the final decisions over plan content, but that the sub-committees would provide scope for collaboration and for 'some plan content development to be led by iwi/hapū/Māori "at place"'.[273] Māori representatives would, of course, also be decision-makers on the regional committee, but the sub-committee proposal was considered an integral part of how the regional planning committees would give effect to the principles of the Treaty, specifically by enabling the committees to 'establish sub-committees for topics which could include cultural landscapes or content on specific waterways or other taonga'.[274]

While we do not consider that sub-committees are a mechanism for kaitiaki control of taonga resources, we do think that they could be a partnership mechanism (in conjunction with the other proposed mechanisms, including (but not limited to) engagement agreements, enhanced mana whakahono a rohe agreements, and iwi/hapū/Māori landowner management plans). Also, in our view, the sub-committee proposal for 'some plan content development to be led by iwi/hapū/Māori "at place"' could be a reasonable mechanism for resolving the issues discussed in this section. An urban Māori sub-committee, made up of mana whenua and mātāwaka representatives, could develop urban planning content for the regional plan. While some might object that urban mātāwaka communities should be represented directly on the regional planning committees, our view is that their specialist needs are better suited to sub-committee development. It may also be possible to substitute a representative (or add a representative) from that sub-committee onto the regional committee for the consideration of Māori interests in urban planning, especially during the preparation of the regional spatial

271. 'Paper 2: Role, Funding and Participation of Māori in the RM System', no date, annex C, p 68 (doc H37(a), p 550)
272. Ibid, annex A, p 32 (p 538)
273. Ibid, p 15 (doc H37(a), p 524)
274. 'Paper 1: Regional Governance and Decision-Making for Plans in the Reformed Resource Management System', no date (doc H37(a)), p 476

strategy, although the potential for substitutions or additions has not been considered by MFE officials in their advice to the Ministerial Oversight Group.

As noted, the proposal is that the regional planning committees would appoint the sub-committees, but we consider that there could be scope for an appointing body such as the selection body that appoints the members of the Independent Māori Statutory Board to appoint this particular sub-committee. It needs to have the confidence of urban Māori.

In sum, we agree with MFE advice to Ministers that sub-committees could be part of a package of proposals that enable regional planning committees to give effect to the principles of the Treaty (as would be required in the new system). The provision for sub-committees, and, in particular, for an urban Māori sub-committee and appointment process, would need to be included in the legislation.

We note that this is a suggestion on the basis of the evidence and submissions that we received, and it is not a formal finding or recommendation. We are also conscious that the parties have not had an opportunity to make a submission on the solution that we propose (an urban Māori sub-committee). It would therefore be important for the Crown to seek the views of urban Māori, both mātāwaka communities (perhaps through NUMA) and urban iwi and hapū. The select committee process may not be sufficient for that purpose.

2.3.6 Alternative models for rights and interests at place to be involved in the process to select an appointing body

2.3.6.1 *The catchment rights-holder model*

The process that the NZMC submitted it should lead (along with FOMA) was a process to identify every Treaty rights holder in a region and assist them to 'come together to formulate a plan (with agenda and protocols as appropriate), for deciding, within the particular region, the methods that should be followed for selecting the Rangatiratanga Representatives'. Counsel submitted that it would be 'feasible for all groups within a region to be engaged with, but a two-stage process may be necessary where the first stage determines just principles and process'.[275] Counsel for the NZMC also submitted that the Crown had failed to 'meaningfully progress work to identify what groups have what rights in water, waterways and water resources', in breach of the assurances the Crown gave to the Supreme Court in 2013, and therefore would be unable to assess whether iwi authorities and groups representing hapū had in fact engaged with all relevant Treaty rights holders at place. Instead, counsel submitted, the Crown would simply have to rely on iwi and hapū getting it right.[276]

Counsel for Ngāti Manu provided the fullest articulation of this catchment rights-holder model. Counsel asked the Tribunal to recommend that a process to sort out the rights in water resources take place urgently, and submitted that that process would result in an inclusive, rights-holder model for selecting representatives. In detail, counsel asked the Tribunal to recommend:

275. Submission 3.3.80, pp 14–15
276. Ibid, pp 8–9

- that a process to sort out rights holders in water, waterways and water sources must occur and with some immediacy;
- that the Crown commit to the process and be willing to engage with potential rights holders to find a solution to the rights and interests in water that the primary rights hold. This must be an inclusive regime and include whanau; hapū; landholding interests; marae and Māori with the mana to exercise power and authority with respect to those rights and interests and must not give a priority consideration to Treaty Settlements . . .[277]

Counsel submitted that, having carried out the process to identify rights in water resources, that 'any representation model at catchment level or at regional level' needed to ensure that the regional committee represented the 'tapestry of rights holders in the region who possess mana whakahaere (power and authority) at place over their taonga, their waters, waterways; water sources both hot and cold'. In order for the committee to do this, there needed to be an 'an inclusive model of representation' in which the Māori representatives on the committee were accountable to those rights holders and also to 'Māori generally, and to regions they are drawn from'.[278] This would be done by organising the self-registration of all rights holders in a region, after which a hui would be convened of all those registered to decide on an appointing body. The hui would be 'independently facilitated by Pukenga or Pou Tikanga'. If required, a tikanga Māori dispute resolution process would be 'prioritised'. The Crown would fund this process.[279]

The rest of the proposed model addressed the kind of representation necessary for the committees to do their jobs effectively. The representatives would need skills in resource management and tikanga Māori, they would need to understand that they represented the region and not any particular interest, and the committee as a whole needed to commit to a bicultural decision-making process. All these things would be necessary to have a system that promoted Te Mana o Te Wai and Te Oranga to Te Taiao.[280]

In addition, counsel for Ngāti Manu proposed that a 'representative oversight group comprising NZMC, FOMA and ILG be established for each region to maintain the integrity of the process in its design; implementation and recognition of these principles of representation'.[281]

Counsel submitted that this system, based on rights in water resources and inclusive of 'whanau; hapū; landholding interests; [and] marae', would be more 'inclusive of all "rights and interest" holders' than the Crown's proposed system. In addition, it would be more likely to achieve fairer outcomes and enable representatives to provide a voice for *all* 'rights and interest holders'. Counsel also submitted that it would need to be underpinned by 50:50 representation on the committees

277. Submission 3.3.92, p 7
278. Ibid
279. Ibid, pp 9–10
280. Ibid, pp 7–8
281. Ibid, p 8

and a bicultural decision-making framework for the committees. It would also be less litigious and ensure that Māori representatives had the free and informed consent of rights holders at place. This model, counsel submitted, would be Kaupapa Māori-designed, and would ensure representation of 'the tapestry of all rights and interest holders at the sub catchment, catchment, and regional level'.[282]

2.3.6.2 *Our view*

The Crown has said in closing submissions that it is not interested in completely different models at this late stage of legislative drafting, and would prefer to receive what it called constructive suggestions on how to improve its proposed model, which it has developed through consultation and engagement with Māori.[283]

We note that the Crown intends to introduce the NBA Bill in October 2022. As a result, there would be extremely little time for the type of rights-identification in water resources (both freshwater and geothermal resources) that counsel submitted should occur so as to ensure all rights holders would be identified for registration and participation in decision-making. It is possible that that work could be carried out by the Crown and Māori while the legislation is being enacted, although even that is a very tight timeframe for such an exercise.

The question for us is whether it is *necessary* for such an exercise to be done in order to appoint regional representatives to a committee. In our view, the model could work within its own terms without having to carry out the preliminary process. It could simply proceed as a process in which all those who consider they have relevant rights and interests are assisted to self-register by a project group, whether that be a national pan-Māori body or some other body. The result would be a flat structure to select an appointing body at a hui of all the rights holders in a region, although getting them all together and able to agree on an appointing body would be a significant challenge. As counsel for Ngāti Manu submitted, dispute resolution would be needed.

One key difference between the catchment rights holder model and the Crown's proposed process is that it would not be led by iwi and hapū. Indeed, iwi authorities would not be involved at all. This puts acceptance of the model by Māori at risk, especially because it is a regional model.

In our view, putting aside the position of iwi, this model of self-registration and hui could work to select an appointing body or representatives, although effective dispute resolution would be essential, and the scale of what is proposed in registering all rights holders and bringing them all together could pose some logistical challenges. There is no one Treaty-compliant model for selecting representatives, as the Crown has acknowledged; there are a number of ways it could be done, so long as self-identification and self-determination underpin the system. The particular model discussed in this section rests on the foundations of detailed

282. Ibid, pp 8–11
283. Submission 3.3.78, pp 4–5

research and analysis prepared for Te Kai Kaha as part of its engagement with the Crown over these issues.[284]

We consider that it would be too late, however, to try to introduce this model now, especially if the preliminary phase of identifying all rights holders is required – just designing and getting agreement to that process would take considerable time.

If Māori support this model, there could be opportunity for them to promote it at the three-year review of the appointments process proposed by Professor Ruru. The Crown is currently considering adding such a review (see section 2.5.1 below).[285]

Finally, we note this submission about jurisdiction from the ILG that the Tribunal should not

> make findings expressed in terms of 'right holders' when considering the interests of groups and entities other than iwi and hapū (noting that a number of statements were made in evidence and submissions about 'right holders' in the context of appointments to regional planning committees) in circumstances where the underlying issue of rights and interests in freshwater and natural resources in legal terms remains unresolved (subject to noting the findings made by the Tribunal in Stages 1 and 2 of the Wai 2358 Inquiry and in several other reports regarding the nature of the underlying customary rights and interests which rest, in terms of tikanga, with the collective descent-based groups of iwi and hapū).[286]

We note that we have not made any findings about 'rights holders' in commenting on the model proposed by counsel for Ngāti Manu.

2.3.6.3 *The ILG model: no need to prescribe engagement with rights and interests at place*

The Iwi Leaders Group submitted that there is no need to *prescribe* engagement with rights and interests at place in selecting an appointing model. Counsel for the ILG proposed that 'the appointment of Māori representatives to regional planning committees should be the right of iwi and hapū (which are whānau acting collectively in whakapapa-based kinship groups) at place, acting collectively and in accordance with tikanga.'[287] In that respect, the ILG compared the resource management reforms with the 'Three Waters' reforms, submitting as a matter of 'comparative context' that the latter just refers to iwi and hapū, and leaves it up to them to arrange their own process. By comparison, the ILG submitted, the Crown's process for appointing regional committees is 'over engineered'.[288]

284. See doc H17(a)
285. Submission 3.3.78, p 52
286. Submission 3.3.93, pp 10–11
287. Ibid, p 5
288. Ibid, p 15

Counsel also submitted that Māori trusts and incorporations, and 'possibly other Māori entities' may have 'interests within a region that warrants the ability to participate and have input into planning processes (albeit relevant and relative to the nature and extent of those interests)', that would not require them to have a 'direct role *in their capacity as trusts and incorporations* in the appointment of Māori members to regional planning committees' (emphasis in original).[289] Urban Māori groups who do not hold mana whenua should, the ILG submitted, be represented by their local councils on the committees.[290]

We have already commented on these issues above, especially our view that a self-determination process led by iwi and hapū would naturally result in hui to engage with iwi and hapū members on the matter; tikanga would require that to occur. We also commented that the engagement/participation requirement proposed by the Crown would be a safeguard to ensure the inclusivity of the process, as would the requirement that there be a record of the engagement. We have also commented on the role we think urban Māori mātāwaka entities should play (appointment to an urban Māori sub-committee that would also include urban iwi and hapū). We have commented, too, on the role we think regional Māori landowner plans could play.

2.4 Complicating Factors

2.4.1 Treaty settlements and other arrangements may displace the Crown's proposed process

2.4.1.1 *Evidence and submissions*

One of the crucial complicating factors in terms of the Crown's proposal is that it may be trumped or possibly displaced in some regions once the Crown has reached agreement on how to transition its Treaty settlement commitments, the takutai moana arrangements, and other arrangements such as joint management agreements into the new system. Ms Smith told us that one of the policy design questions for 'iwi, hapū and Māori participation in the new regional layer' included 'how to design the regional layer in a way that upholds Treaty settlement arrangements, while *not undermining other rights and interests in the region*' (emphasis added).[291] As part of this policy design, there will be a legislative requirement for iwi authorities and groups that represent hapū to take into account 'existing arrangements between iwi/hapū/Māori groups and arrangements with local government' when leading the process to select an appointing body.[292] Also, the Ministerial Oversight Group has decided that '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

289. Ibid, pp 4–5
290. Ibid, p 5
291. Document H37, p 26
292. 'BRF-1562 RM Reform 192' (doc H37(d)), pp 7–8

and identifying appointing bodies'.[293] As set out in section 3.3.1, these 'entities representing rights and interests "at-place"' would include:

- 'holders of specific customary rights such as Customary Marine Title and Protected Customary Rights groups'; and
- 'groups, and natural taonga with legal personality, who hold rights and interests deriving from the settlement of Treaty of Waitangi claims'.[294]

This was one (but only one) of the Crown's reasons for proposing that iwi authorities and groups representing hapū should lead the process, as they would include PSGEs and would be best placed to ensure that Treaty settlements, joint management agreements (usually created as a result of settlements), and other arrangements would be 'appropriately factored in during the early phases of discussions on composition and appointing bodies'.[295] Although we accept that the Crown's proposed process could engage all relevant interests and allow self-determined processes to reach agreement (as we stated in section 2.3.3.5), a requirement for these discussions to also come up with how to accommodate these bespoke arrangements might well put too much pressure on them for agreement to be reached.

The Crown has also proposed to make arrangements itself to provide for the transition of these various commitments into the new system in discussion with the PSGEs and other entities involved. The issue was explained in the papers for the April 2022 meeting of the Ministerial Advisory Group, at which Ministers were asked to note that:

> the Crown has committed to upholding Treaty settlements, Takutai Moana rights, rights under Ngā Rohe o Ngā Hapū o Ngāti Porou Act 2019 and other existing natural resource arrangements under the RMA, and that:
>
> - some existing arrangements through Treaty settlements or the RMA enable or provide for joint development between iwi/hapū, PSGEs and local authorities of aspects of regional and district planning documents, or decision-making on the same
> - future system will need to provide mechanisms to uphold the intent and integrity of those arrangements established via Treaty settlements and/or under the RMA (including co-governance, joint management, and arrangements for the development of regional planning documents)
> - decisions on composition arrangements in regions are also subject to ongoing discussions with affected parties in relation to upholding existing commitments and may require further policy decisions to provide for additional direct representation of those parties on SPA and/or NBA joint committees or sub-committees

293. Document H37, pp 12–13
294. 'BRF-1562 RM Reform 192' (doc H37(d)), p 7
295. 'Annex C: 'Roles for Māori at the Regional Governance Level' (doc H37(a)), p 546

- these matters will require further delegated decisions.[296]

Ms Smith confirmed in her evidence that the arrangements to transition Treaty settlements into the new resource management system could (and likely would) impact on the Crown's proposed process for appointments to regional planning committees:

> 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.
>
> 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. [Emphasis added.][297]

Ms Smith suggested that these 'issues and processes intersect, but do not overlap entirely, with the regional planning committee representation issue'.[298] It may be that that is the case in some regions, but in others the ability of PSGEs to make direct appointments to regional planning committees, and to have decision-making powers in respect of plans (or parts of plans), may trump or entirely displace the Crown's proposed process for appointing Māori representatives. The question of composition (that is, how many Māori seats there were on a committee) would be important here. One of the updated policy papers provided at the hearing suggested that the direct appointments may more usually be to sub-committees rather than to the regional committee (we discussed the sub-committees above).[299] It is problematic that there is no certain information for Māori (or for us) on how far Treaty settlements might affect appointments to the regional planning committees and in what regions.[300]

296. 'Minute: RM Reform Ministerial Oversight Group Meeting #17', 12 April 2022 (doc H37(a)), p 315
297. Document H37, p 9
298. Ibid
299. 'BRF-1716 RM Reforms 186 – Delegated Decisions on Regional Governance and Decision-Making Arrangements', 13 July 2022 (doc H37(c)), p [4]
300. Submission 3.3.79, p 3; submission 3.3.80, pp 5–6; submission 3.3.90, p 19; submission 3.3.80, pp 10–12

Te Rūnanga o Ngāi Tahu Act 1996 was raised at the hearing as an example of where existing arrangements could trump or displace the Crown's proposed process,[301] although counsel for Ngāi Tahu submitted that Te Rūnanga is in fact representative of hapū and makes significant efforts to 'engage with all its members, no matter where they reside'.[302] Professor Tau explained:

> The 1996 Act says Te Rūnanga o Ngāi Tahu was established for the benefit of, and as the representative of, Ngāi Tahu Whanui. The Act states that:
> - Te Rūnanga o Ngāi Tahu shall be recognised for all purposes as the representative of Ngāi Tahu Whanui;
> - Ngāi Tahu Whanui 'means the collective of the individuals who descend from the primary hapu of Waitaha, Ngati Mamoe, and Ngai Tahu, namely, Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Kai Te Ruahikihiki'; and
> - where any enactment requires consultation with any iwi or with any iwi authority, that consultation shall, with respect to matters affecting Ngāi Tahu Whanui, be held with Te Rūnanga o Ngāi Tahu.[303]

Counsel for Ngāi Tahu submitted:

> The difficulty with the Crown proposal, from the Ngāi Tahu perspective, is that it is ambiguous and does not expressly state it will comply with its Treaty obligations to Ngāi Tahu. Specifically, it makes no express reference to Te Rūnanga o Ngāi Tahu Act 1996 and the Ngāi Tahu Claims Settlement Act 1998.[304]

In answers to questions in writing, the Crown witnesses stated:

> In terms of the Ngāi Tahu takiwā, the Crown will consider Te Runanga o Ngāi Tahu Act 1996 and the Ngāi Tahu Claims Settlement Act 1998. The Crown will work directly with Ngāi Tahu to ensure their settlement is upheld and transitioned with integrity into the future system.[305]

Counsel for Ngāi Tahu submitted that, 'until the Crown's proposal *expressly* states it will be bound by this legislation, the view of Te Rūnanga o Ngāi Tahu is that it is not compliant with its Treaty and statutory obligations'.[306] Counsel also submitted:

> To comply with its Treaty obligations and settlement obligations to Ngāi Tahu, the Crown must go further and ensure that there will be specific provision in the legislation that Te Rūnanga o Ngāi Tahu, through engagement with Papatipu Rūnanga and

301. Document H34, pp 4–5
302. Submission 3.3.81, pp 9–10
303. Document H34, p 5
304. Submission 3.3.81, p 2
305. Document H37(l), p 12
306. Submission 3.3.81, p 4

Ngāi Tahu Whānui, is the appropriate and only entity to determine the appointing bodies for Māori representation within the Ngāi Tahu takiwā.[307]

It is not necessary for us to express an opinion on the legalities of how exactly the existing Ngāi Tahu arrangements could interact with the new resource management system; suffice to say that Ms Smith's evidence is that decision-making on plans and direct representation on regional planning committees will be required in some regions to give effect to existing settlements and other arrangements.

Nor is it possible for us to address the issue of representation vis-à-vis Ngāi Tahu that Ms Mason raised for the Grandmother Council of the Waitaha Nation. Ms Mason queried whether a Waitaha organisation could self-identify as a group representing hapū in the Crown's proposed process,[308] but that question cannot be answered because – as the Crown has also said – it is committed to discussing with PSGEs and others how their statutory arrangements will be given effect in the new system, and that process has been described as ongoing. There are no answers yet. The issue of distinct whakapapa and identity raised in the evidence of Anthony Olsen and responded to by Professor Tau is not one on which we can express an opinion in this priority inquiry.[309]

Counsel for the ILG gave a number of other examples where relevant existing arrangements will have to be provided for:

- the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (which includes substantive arrangements centred on Te Ture Whaimana, Waikato River Authority, an integrated river management plan, and compulsory joint management agreements with the five Waikato River Iwi which include substantive involvement in planning processes);
- the Taranaki Iwi Claims Settlement Act 2016 (which provides for Regional Council committee representation);
- the Hawke's Bay Regional Planning Committee Act 2015 (which arose out of arrangements negotiated in the context of the Ngāti Pāhauwera Setttlement);
- the Te Awa Tupua (Whanganui River Claims Settlemenmty Act 2017 (which recognises Te Awa Tupua and Tupua te Kawa, and establishes Te Kōpuka as a collaborative committee (and joint committee of council) that must, among other things, be the committee used by the Regional Council if it is to develop a policy statement or plan relating to freshwater management in the Whanganui River catchment through a collaborative process "under any legislation" and the development of Te Heke Ngahuru as a relevant planning document); and
- the Ngāti Rangi Claims Settlement Act 2019 (which includes the establishment of Ngā Wai Tōtā o Te Waiū as a joint committee of council and the development of Te Tāhoratanga as a relevant planning document).[310]

307. Ibid
308. Document H37(l), p 12; submission 3.3.88, pp 5–8
309. See doc H50, pp 2–4; transcript 4.1.6, pp 124–131, 263–265 270–271, 282–286
310. Submission 3.3.93, p 16

Crown counsel submitted that the 'parallel process to honour the Crown's Treaty settlements with Māori' is beyond the notified scope of the priority inquiry, and should not 'be taken into consideration or influence the Tribunal in its deliberations'.[311] Counsel for the ILG, on the other hand, submitted:

> Once the Crown has in fact been through that process and has upheld all of those Treaty settlements, the ILG considers that the vast majority of regions in this country will have a modified planning process to that presently proposed under the NBA, which will impact upon the role and responsibilities, and potentially composition, of regional planning committee, and the process for developing plans, in significant ways.
>
> To some degree then, the parties are making submissions, and the Tribunal is being asked to undertake an assessment, on generic regional planning committee arrangements that, in reality, may only be in operation in a few parts of the country (if any). It is noted that a specific question in writing was put by counsel to Crown witnesses on this point, enquiring as to how many regions included Treaty settlement arrangements that may affect such matters, but the Crown did not, or was not able to, respond with that detail.
>
> This is a significant failing on the Crown's part. The ILG considers that nature and effect of Treaty settlements should have been foundational to the creation of the new RM system and is fundamental to any discussions or decisions about regional planning arrangements including, but not limited to, Māori representation on regional planning committees. It beggars belief that the Crown can proffer what it says is a Treaty compliant mechanism in the absence of such analysis and understanding.[312]

In light of Janine Smith's evidence on this issue and the significant impact that the 'parallel processes' (to provide for existing arrangements and commitments in the new system) will have on the process for how Māori representatives will be appointed to regional planning committees, we disagree with the Crown's submission. In our view, this issue is clearly in scope, and we have considered it accordingly.

We suspect, however, that counsel for the ILG has overstated the matter when he submitted that the Crown's proposed appointments process 'may only be in operation in a few parts of the country (if any)'.[313] Due to the fact that the Crown's process to transition arrangements into the new system is still in progress, it is not possible to give any authoritative view on that matter. The NZMC and other parties expressed concern that the impact of Treaty settlements and other existing arrangements on the Crown's proposed appointments process would not be known until after the new system has been established.[314] Counsel for the NZMC

311. Submission 3.3.78(a), p 55
312. Submission 3.3.93, p 17
313. Ibid
314. Submission 3.3.79, p 3; submission 3.3.80, pp 5–6; submission 3.3.83, pp 10–12; submission 3.3.90, p 19

submitted that 'this unhelpful uncertainty can and should have been avoided by the Crown timely addressing those Treaty settlement issues – which should have been anticipated from the outset, and addressed by Te Tiriti partners in a timely way well before the eve of the introduction of transformative legislation such as the NBEA'.[315]

2.4.1.2 *Our view*

Ms Smith stated in her evidence that the issue of Māori representation on regional committees and the parallel process to transition Treaty settlements and other arrangements into the new system 'intersect, but do not overlap entirely'.[316] The level of intersection may be almost total, if counsel for the ILG is correct that the result will be the confinement of the Crown's proposed appointment process to only 'a few parts of the country'. The Crown's evidence is clear that the result will be direct appointments to the regional committees and decision-making on plans in at least some regions. This will trump or totally displace the Crown's proposed process in some regions. We agree with the claimants that this makes it difficult to assess the Crown's proposed process for selecting appointing bodies which in turn appoint the Māori representatives. The number of seats for Māori members will be a factor in assessing whether direct PSGE appointments (where that is necessary) will also allow appointments to be made through the Crown's proposed process. The role of sub-committees as additional partnership mechanisms would also come into play here.

We do not, however, offer any criticisms or opinions on the Crown's actual process to deal with PSGEs over how their RMA arrangements would work in the new system. The sequencing of these matters is not straightforward. It is difficult for the Crown and PSGEs to discuss how settlements and other arrangements could be reflected in the new system, for example, if the new system has not been designed. On the other hand, the impact that the settlements and other arrangements might make on the design could be significant. In sum, we are not sure that the Crown can put forward a sufficiently robust proposal for an appointments process without the detail of how Treaty settlements and other arrangements would alter it.

We agree with the Crown that the actual process by which the Crown is dealing with PSGEs over this matter is outside the ambit of this priority inquiry. While the process is out of scope, the sequencing is not.

2.4.2 Composition (the number of Māori seats)

There was agreement among the claimants and interested parties that composition of the committees was inextricably wound up with the appointments process and therefore in scope for the priority hearing, and that nothing less than a 50:50 partnership of Māori and other members (local authority and the Crown) could be acceptable in Treaty terms. For membership of the regional committees to deliver the Crown's intended reform outcomes, the claimants and interested parties

315. Submission 3,3,80, p 5
316. Document H37, p 9

argued that co-governance must be the fundamental basis of appointing the members.[317] Crown counsel, on the other hand, submitted that composition issues were outside the scope of the priority inquiry, and that issues of procedural fairness would prevent the Tribunal from addressing the evidence and submissions of those parties who have 'touched on' the issue. This was because:

- composition was not identified by the NZMC as an issue in its application for a priority hearing and it would be 'unusual for the Tribunal to grant a hearing broader than the issue put to it by the applicant';
- the policy process has a clear distinction between selection of members and composition of committees;
- the November 2021 consultation document announced that '50/50 governance' was not proposed for the committees, so there had been a clear opportunity for the NZMC or parties to raise that issue in sufficient time for it to be a subject of the hearing; and
- the composition of the committees affects more than just Māori, and would therefore require an opportunity for other parties representing broader interests to participate in the inquiry.[318]

Crown counsel accepted that 'composition can be seen as an aspect of representation', but the Crown considered composition was out of scope and thus did not 'cover composition in its evidence'. Procedural propriety would involve parties affected by the composition issue to 'have an opportunity to present evidence on that (it cannot be said that the Crown has had, and not chosen to utilise, that opportunity in the circumstances'.[319] Counsel also submitted: 'Should the Tribunal be minded to consider composition, or accord any weight to views presented to it on that matter, the Tribunal risks engaging in highly political issues without sufficient procedural fairness, nor evidential basis, to do so.'[320]

Counsel for the ILG submitted that, while the Tribunal should be cautious, it could not reasonably overlook matters of context presented in evidence before it:

> The Crown submits that the Priority hearing is concerned with the selection of Māori representatives on regional planning committees and that matters regarding the composition of those committees and matters beyond regional representation are beyond scope. The Crown notes issues of natural justice and the absence of an evidential basis for the Tribunal to properly consider wider matters.
>
> While acknowledging in broad terms the Crown's concern regarding matters of procedural and evidential propriety such that the Tribunal must be very cautious in the nature and extent of matters on which it makes direct findings in terms of Te Tiriti compliance, the ILG says that it goes too far to suggest that:

317. Submission 3.3.92, p 8; submission 3.3.80, pp 3–5; submission 3.3.80, pp 13–14; submission 3.3.84, p 32; submission 3.3.85, p 35; submission 3.3.93, pp 4, 39, 44; submission 3.3.86, p 4
318. Submission 3.3.78(a), pp 55–57
319. Ibid, p 57
320. Ibid, p 58

- broader matters cannot reasonably be taken into account by the Tribunal by way of context to the findings and recommendations that it does make (particularly on issues of process); or
- the adequacy or reasonableness of Crown's proposed process for the appointment of Māori representatives can be properly considered in the abstract without reference to the broader context of matters such as the overall composition of the regional planning committees and other mechanisms in the NBA which may enable the participation and input of Māori groups and entities other than iwi and hapū into the regional plan development process.[321]

We agree with the ILG that the 'the adequacy or reasonableness of [the] Crown's proposed process for the appointment of Māori representatives' cannot be considered 'in the abstract' without at least some reference to the composition issue, especially because it impinges so significantly on the proposed process to appoint Māori representatives (which is the focus of the inquiry).

We do have a great deal of Crown evidence on the composition issue, mostly presented in the documentation provided in the supporting papers of the Crown's witnesses.[322] The Crown also placed two versions of a process diagram on the record at the hearing (and three more after the hearing), which then became the focus for some evidence and cross-examination. All five diagrams included the process chart for both selection of Māori representatives and the decision-making for composition of the committees (notably, how the number of Māori seats is to be decided).[323] These process diagrams raised, among other things, the issue of the role of the Local Government Commission in having the final decision-making power on composition, which then became the subject of debate at the hearing.[324] The Crown witnesses also answered questions in writing about composition and the Local Government Commission's competence to decide issues in respect of Māori representation, and referred us to some of the relevant supporting documentary evidence.[325] Further, the Crown filed an updated policy document after the hearing entitled 'Paper 1A: Regional governance in the reformed management system – composition and decision-making of joint committees', to replace a document in the bundle of supporting documents.[326] There is, therefore, certainly more than sufficient evidence to address composition as a matter of context.

The issue of composition is important here because it is a factor that has the potential to complicate the proposed selection process, specifically in respect of the impact that composition (the number of Māori seats) may have on the process to select an appointing body and appoint Māori representatives to the committee.

321. Submission 3.3.93, pp 12–13
322. For officials' reasoning on why 50:50 composition should not be mandatory in the new system, see 'Paper 1: Regional Governance and Decision-Making for Plans in the Reformed Resource Management System', no date (doc H37(a)), pp 476–477.
323. Documents H37(b), (f), (m), (o), (p)
324. Transcript 4.1.6, pp 403–406
325. Document H37(l), pp 4–5, 18; doc H37(a), pp 544–545
326. Document H37(e)

In brief, the Crown's proposal is:

- there would not be a 50:50 co-governance requirement for committee composition;
- the minimum number of committee seats would be six, of which the minimum number of Māori seats would be two;
- the iwi authorities and groups representing hapū are supposed to engage with their members and those with rights and interests at place to *agree a position on composition* at the same time as agreeing on an appointing body;[327]
- the number of seats for the Māori and local authority representatives would be negotiated between the local authorities and the iwi authorities and groups representing hapū at the same time as the Māori bodies are leading the process to select an appointing body;
- the Local Government Commission would make the final composition decision in the event that the local authorities and Māori did not agree;
- the Crown's process diagrams suggest that agreement on both matters is to be reached about the same time, and that dispute resolution for the selection process would overlap with the Local Government Commission process to decide composition in the event of dispute and would take place in the knowledge of what had been proposed in respect of composition; and
- a 50:50 arrangement could be negotiated in some regions.

In addition, officials advised Ministers that,

> with the majority voting rule there is a risk that minority voices could be outvoted, and subject to composition arrangements this could have a greater impact on Māori members than local authorities. This is balanced by ensuring the focus is on committees coming to consensus decisions, supported by graduated dispute resolution steps.[328]

The key issue here is that composition would be relevant to the task of agreeing appointment bodies in a *process* sense. We note that there is unlikely to be enough Māori seats for every iwi (let alone every hapū) to be represented directly in at least some regions, and some iwi and hapū would be split between regions. This would inevitably make the process to select an appointing body more difficult. Officials noted this in advice to Ministers:

> 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. There will also be challenges, such as the number of seats allocated through composition discussions which will not always neatly fit with the number of Māori entities (including iwi and hapū

327. For this point, see 'Annex C: 'Roles for Māori at the Regional Governance Level' (doc H37(a)), pp 544–545.

328. 'Paper 1: Regional Governance and Decision-Making for Plans in the Reformed Resource Management System', no date (doc H37(a)), p 476

representative organisations) in the region. Furthermore, regional boundaries rarely match iwi and hapū rohe which adds further complexity to the way the new RM system will require Māori to work.[329]

Officials were in no doubt that the issue of composition would be a complicating factor. In the updated policy paper that the Crown provided during the hearing, officials discussed the MFE and Te Arawhiti options for dispute resolution (see section 3.3.3), identifying the risk that composition issues posed to both options:

> One risk that is shared across the two options is that *higher-order disputes around composition could make it impossible to reach an agreeable decision on the identities of some appointing bodies*. This risk is particularly relevant in regions with a number of iwi and hapū who do not whakapapa to each other and/or where there are existing conflicts pertaining to rights and interests, which could call into question the legitimacy of an expert panel's decision. [Emphasis added.][330]

MFE officials added that the new system could mitigate the risk that composition difficulties posed to the ability of Māori groups to agree on an appointing body through the use of criteria for composition:

> The main way the system attempts to address this risk is included in BRF-1716, where the matters that parties and region (and ultimately the LGC and High Court if involved in the final decision) must have regard to '*effectively representing regional, district, urban and rural and Māori interests*.' If this matter is factored into the composition of seats on a Planning Committee (alongside the general requirement for parties to give effect to te Tiriti principles), then it should be easier to come to decisions on appointing bodies, reducing the need for dispute resolution and circuit breakers. [Emphasis in original.][331]

Also, officials advised that the expert panel that would act as a circuit breaker and make a decision on the appointing body would have to consider composition (the number of seats available for Māori) and the effect of that on the dispute about the appointing body. Ministers were asked to agree that, when the expert body made its decision, it would be required to consider a number of matters, including 'whether a decision on the composition arrangements [had] been reached and, if not, how changes to that decision may affect the matters in dispute'.[332]

The cross-over that would inevitably occur between the appointments process and the composition process was also noted in one of the steps in the diagrams provided to the Tribunal. If the iwi authorities and groups representing hapū

329. 'Paper 2: Role, Funding and Participation of Māori in the RM System', no date, annex A, p 27 (doc H37(a), p 536)
330. 'BRF-1562 RM Reform 192' (doc H37(d)), p 10
331. Ibid
332. Ibid, p 22

did not reach an agreement with the local authorities on composition, the Local Government Commission would issue a draft decision within two months. The commission would then have five months to consult with the parties and issue a final decision. The expectation was that '[w]hile the LGC is working on the final determination, iwi and hapū can discuss preferred appointing bodies using [the] draft determination'.[333]

It is very clear, therefore, that MFE expected that there would be significant overlap between the two processes as they run simultaneously, and that composition issues would complicate the process to decide appointing bodies, and had the potential to prevent agreement on appointing bodies. On this issue, we consider that the composition process should be carried out first, or at least have reached the final decision point well before a decision on appointing bodies is required. This is essential to avoid the problem identified by MFE that disputes in the composition process could derail the selection of appointing bodies. This change in sequencing may also make it easier to reach agreement because all the groups involved would know at an early stage how many appointments (and appointing bodies) would be required. It would also allow time for the Māori groups involved to seek judicial review or exercise a right of appeal from the Local Government Commission's decision on composition (assuming there would be provision for this in the process).

On the broader composition issue, we appreciate that the regional planning committees have to be a reasonable and workable size to do their jobs effectively, and that this will mean that (as officials put it) the many [Māori groups] will have to be represented by the few. Nonetheless, a high-level commitment to 50:50 composition could take a lot of the heat out of the selection process (which is our focus here), as would the use of sub-committees as additional partnership mechanisms.

Counsel for the Tauhora North No 2 Trust pointed out that a 50:50 partnership in resource management is nothing new, noting the Waikato River Authority and the Hawkes Bay Regional Planning Committee as examples, and also the Crown's proposed 'regional representative groups for the new water services entities as part of the "Three Waters" reform'.[334] The new resource management system, counsel submitted, should not aspire to less than is already available in terms of partnership arrangements.

As our consideration of this issue is contextual only, we can take the matter of co-governance no further than that, and we will make no findings or recommendations about it in this report. We have already made findings and recommendations about the co-governance of freshwater taonga to the Crown in our stage 2 report.

We turn next to discuss some relevant issues that arose during the hearing.

333. Document H37(p)
334. Submission 3.3.83, pp 13–14

2.5 Issues that Arose during the Hearing

2.5.1 Should the Crown pause and consult further with Māori?

2.5.1.1 *Submissions*

Consultation and engagement issues were excluded from the inquiry as part of the application of the NZMC for a priority hearing. The NZMC argued that the proposed issue for inquiry did not concern the 'process the Crown has followed to develop its policy position, but what that position is and whether it is consistent with relevant principles of Te Tiriti'. Counsel further elaborated that the issues for priority hearing were 'questions of "substance", not "process"; questions that will not need to be determined by the Tribunal through a detailed narrative analysis'.[335] We have therefore not considered the issue of the Crown's consultation with Māori or its targeted engagement with the NZMC and others in coming to the positions that it has on the proposed process for selecting appointing bodies.

During the hearing, however, the claimants and some interested parties submitted that the Crown is now required to pause and consult further with Māori before final decisions are made on the matters at issue in this inquiry, and this was followed up in closing submissions.[336]

Counsel for Taheke 8C, for example, submitted:

> The circumstances here are:
> - Understandably, and for good reason, the Crown seeks, in the exercise of Kawanatanga, to repeal and reform the law relating to resource management.
> - One aspect of that reform provides Māori with representation on committees that will exercise important functions in the new regime.
> - How Māori are to be represented in this new regime fundamentally concerns tino rangatiratanga: the ability of Māori to determine for themselves how they would be represented.
> - That is the kind of issue where the Crown should not proceed without properly informed, broad-based support from Māori before introduction of legislation to Parliament.
> - Māori have not been generally informed of the Crown's proposals.
> - There is no Māori support for the Crown's proposals.
>
> For the Crown to proceed now without consultation with Māori on the detail of the proposals before introduction of the legislation would be in breach of the Treaty principle of partnership that requires the Crown and Māori to act towards one another with good faith, fairness, reasonableness and honour. Consultation through the Select Committee process removes any prospect that Māori may make claims to this Tribunal that the proposals are inconsistent with Te Tiriti/the Treaty.

Counsel for the ILG also submitted that the Tribunal should recommend that the Crown pause to enable further 'necessary analysis and discussion to occur

335. Memorandum 3.1.403, p 5
336. See, for example, submission 3.3.91, p 21

(and guide final policy development and decision'.[337] Counsel for the NZMC submitted that it was necessary for the Crown to consult further on the detail of the proposals (which has not been available before now), and that the select committee process would not be the appropriate mechanism because Māori have not previously had the opportunity to respond to a 'concrete' proposal from the Crown. Counsel submitted:

> in circumstances where . . . important details relating to the selection of Rangatiratanga Representatives are still to be settled, it is not consistent with Te Tiriti principles of active protection, consultation, informed decision-making and partnership, for the Select Committee process for the NBEA to provide the first and only real opportunity for Māori to scrutinise and respond to a concrete proposal. Māori are entitled to have meaningful time and space to review the Crown's detailed proposals, to discuss them locally, regionally and nationally, and to respond to them (including by identifying where they can be improved, to be more fit for purpose both practically and in terms of Te Tiriti principles). The Select Committee process is not sufficient for that, in the context of an issue of Te Tiriti partnership as significant as this.[338]

Because the Crown provided closing submissions first (inverting the usual order of submissions in order to meet the Crown's request for rapid reporting), the Crown did not have an opportunity to provide a specific response to these submissions. The Crown's position at hearing was that it had consulted broadly with Māori, followed by targeted engagement with the NZMC, the ILG, FOMA, and others to develop the detail of its proposals. The Crown filed Keita Kohere's brief of evidence, and supporting documents, to substantiate this position.[339] Further, the Crown's position was that it is about to introduce the NBA Bill in October 2022 and, having engaged with Māori throughout the process of developing its reforms, any further 'constructive suggestions as to how the Crown's proposal for the Selection Process could be improved would be welcomed (particularly from parties that have been substantially supported to conduct their own engagement processes (and engage expert technicians) and as encouraged by Panel Members)'.[340] As an example of a 'constructive suggestion', the Crown said that it would take account of Professor Ruru's evidence that a review clause should be added to the Bill.[341] Professor Ruru proposed:

> Review: considering the strict timeline the Government is working towards to introduce and enact this legislation, the Crown should be encouraged to build into the Bill a review process. The Crown should invest in a significant review of the process of selecting Māori representatives on NBA Joint Committees at perhaps three years after

337. Submission 3.3.93, p 60
338. Submission 3.3.80, p 13
339. Document H38
340. Submission 3.3.78, pp 4–5
341. Ibid, p 52

the enactment of the Bill. The review process should be Māori-led, leading to a Māori representative appointment process for the Joint Committees that is Māori-designed. The investment should be substantial to ensure this is done well.[342]

2.5.1.2 *Our view*

As noted, the issue of the Crown's consultation and the quality of its targeted engagement with Māori in the development of its proposals is not included in the priority inquiry. The question of whether the Crown should now pause and consult further on the process for appointing Māori representatives to the regional planning committees is within scope, because it developed from a wide sense of disagreement with the proposed process at the hearing.

Crown counsel acknowledged that 'opposition was strongly expressed by the wide range of participants in this inquiry', but rightly observed that the 'opposition was not united against the same issues'.[343] This will be apparent from the previous discussion in this chapter.

We find it difficult to consider that the entire resource management reform legislation, which the Crown has said is long overdue, should be paused while one particular piece – the appointment of Māori representatives to regional planning committees – is made the subject of further consultation. That does not appear reasonable to us. We note that the Crown is still willing to accept what it called constructive suggestions from all the parties in this inquiry (and presumably others), so we encourage the parties to take the Crown up on that offer in the intervening period before the introduction of the NBA Bill, and also to use the opportunity provided by the select committee process.

We also consider that a review clause of the kind suggested by Professor Ruru is essential, in light of the issues raised in this inquiry. We note, too, that the Crown will continue to work with PSGEs and other groups with RMA arrangements to ensure that they are reflected in the new resource management system, and that this work will likely carry on past the passage of the proposed legislation. Since, as discussed in section 2.4.1, the necessary provision for settlements and other arrangements will have a significant impact on the appointments process, amendments will be required to the legislation to provide for the necessary changes – possibly in an omnibus Bill, as was mooted recently by the Minister. What that means is that, in conjunction with the necessary review of the appointments process, there should be further opportunities for Māori to seek revisions to the appointments process to ensure that it works for them.

Having made these points, and in light of our Treaty findings below, we do not consider that the Crown should pause at this late stage and go back to full consultation with Māori about the details of the proposed appointments process.

In terms of whether the Crown is properly informed of its Treaty partner's views (a requirement of the partnership principle), a wide spectrum of views was expressed in the evidence and submissions in this inquiry. It does appear from the

342. Document H20(a), p 2
343. Submission 3.3.78, p 53

supporting documents attached to the evidence of Janine Smith and Keita Kohere that many of the views expressed during the inquiry have already been put to the Crown by the collectives the Crown has been engaging with: the ILG and Te Wai Māori Trust on the one hand, and Te Kai Kaha, comprising the NZMC, FOMA, and Kāhui Wai Māori, on the other.[344] The analysis necessary to determine whether that engagement met the test of co-design, which we recommended in our stage 2 report, is out of scope in this priority inquiry.

2.5.2 The secretariat is missing from the appointments process

2.5.2.1 *Evidence and submissions*

Each regional committee will be supported by a secretariat, which will do the detailed, expert work of preparing the draft regional plan and the regional spatial strategy. The committee would have the statutory power to appoint the director who would in turn have powers to contract and employ staff.[345]

The issue of whether the committee's secretariat should be included in the appointments process was an issue that arose during the hearing. The Crown did not object in closing submissions that the issue of appointments to the secretariat was out of scope.[346] In our view, there is no procedural reason why we could not consider the Crown's proposed appointments process in respect of whether it could be used to appoint members of the secretariat as well as committee members. The Crown's evidence did cover the secretariat, although it was not a focus for the Crown witnesses at the hearing, and those parties who wished to made submissions on the matter.

As noted, issues about the secretariat were covered in the documentation provided by the Crown in support of its two witnesses, although not much was said directly by Ms Smith about the secretariat in her brief of evidence. This may have been because, as Ms Smith noted, the detail of the 'supporting Māori role on the secretariat' was 'still currently being considered by Ministers'.[347] Ms Smith also stated that there would be 'roles for expert Māori practitioners', such as working as 'employees or contributors to NBA regional planning committee secretariats'.[348]

Tina Porou, who has 'over 20 years of experience in resource management matters', and has 'worked in environmental roles for several iwi organisations',[349] gave evidence about the crucial role of the secretariat.[350] Ms Porou told us:

> In terms of I guess the real business, where the real business happens is not in governance. What is provided to the governance in the planning committees around the plans is largely finished by the time it gets to that table. Our governors in the current

344. See doc H37(a). Members of Kāhui Wai Māori reformed as Ngā Kaiārahi o te Mana o te Wai Māori.
345. Document H37(l), p 1
346. Submissions 3.3.78, 3.3.78(a)
347. Document H37, p 20
348. Ibid, p 21
349. Document H53, p 2
350. Ibid, pp 9–10

RMA process in terms of plans really have received 15 full plans developed in whole by council planning teams and so you have very little influence on the contents of plans once it gets to those planning committee stages.

So, just want to emphasise that there's a lot of hullabaloo over these planning committees, but in practice as planners, those are largely procedural roles. Where the magic happens is in secretariats. So, as it's proposed, we think, in the current process, there will be independent secretariats housed under councils but directly responsible to the planning committees.

Now, we've been very clear that we need to see iwi technicians, hapū technicians, Māori technicians that are qualified to develop plans in those secretariats as a requirement of the secretariats' creation.[351]

In one of the papers for the Ministerial Oversight Group's April 2022 meeting, officials noted:

feedback from Māori groups has recognised the importance of the secretariat in enabling Māori planners and technicians to work alongside local authority planners in the development and drafting of RSS's and plans. Although costs of committee membership and roles and responsibilities in the secretariat will be fully funded by the committee, there are wider resourcing implications for Māori from these proposals . . .[352]

Officials, however, advised against there being any power for the Māori members of the committee or Māori entities to appoint secretariat staff, noting that this position disagreed with feedback from engagement with Māori. Their reasoning was that neither local authorities nor Māori entities should make appointments, thus preserving the independence of the secretariat although (again) Treaty settlement arrangements had the potential to trump this process:

The SPA and NBA secretariat would be responsible for RSS and NBA plan drafting and ensuring the joint committee has administrative support. In summary, the key proposals are that:

- the SPA and NBA committees will appoint a Secretariat director (statutory position)
- the director will consult with the SPA/NBA committee on a resourcing plan for the secretariat to consider the expertise and skills available across the groups represented on the SPA or NBA committee
- the director will employ/contract/second/coordinate secretariat staff (including secondments from Māori entities)
- there will be a duty for the director to ensure advice is informed by mātauranga Māori, te ao Māori, and Māori engagement expertise.

351. Transcript 4.1.6, p 335
352. 'Paper 1: Regional Governance and Decision-Making for Plans in the Reformed Resource Management System', no date (doc H37(a)), p 477

> The approach set out above does not provide specific direct appointments to the secretariat by Māori members on SPA/NBA committees or Māori appointing bodies, which is something that some Treaty partners indicated as their preference during our engagement with them. This preference for direct appointments is due to the significant role that the drafting processes play in the design and tone of the eventual plan or strategy.
>
> Options for direct appointments, for Māori and local authorities, have not been pursued as it would imply the secretariat was a separate legal entity with statutory appointment processes (which is not the intent). It is important that the director has clear responsibility for resourcing the secretariat, delivering the draft strategies and plans and can also exercise responsibilities as an employer. However, specific arrangements may need to be provided for as part of the secretariat resourcing or drafting processes where it is necessary to uphold a Treaty settlement in a region.
>
> The intention of the proposals agreed through Paper 1: Regional Governance is that there will be te ao Māori expertise on the secretariats through the combination of the provisions described . . . above.[353]

Counsel for the ILG submitted that there was 'no visibility of, and consequent uncertainty,' regarding a number of matters, including 'whether there will be any role for Māori in the appointment of the secretariats' or the independent hearing panels, where 'the critical technical work and input is required'.[354] Counsel for Tauhara North No 2 also raised concerns about the appointment of the secretariat, submitting:

> The Planning Committees will be supported by a secretariat. The Crown has indicated that there will be a duty for the secretariat director to ensure advice is informed by mātauranga Māori, te ao Māori, and Māori engagement expertise. No decisions have been made on how the Māori component of the secretariat will be appointed. There is no guarantee that Māori will have a role within the secretariat.[355]

In brief, these concerns arose from a view that the appointments to regional committees would not be sufficient on their own for a rangatiratanga role in governance and decision-making about regional plans; appointments to the secretariat would also be essential.

The latest Crown position on this was provided by the Crown witnesses in answers to questions in writing. Ms Smith and Ms Kohere stated that the director would be appointed by the committee, and would be responsible for ensuring that the advice provided to the committee included 'mātauranga Māori and te ao Māori perspectives'. In carrying out that function, the director would have to give effect to the principles of the Treaty of Waitangi (as per the Treaty clause). The secretariat staff would be contracted and employed by the director. The director

353. 'Annex C: 'Roles for Māori at the Regional Governance Level' (doc H37(a)), pp 548–549
354. Submission 3.3.93, p 57
355. Submission 3.3.83, pp 5–6

would also prepare a resourcing plan to ensure the secretariat had the necessary expertise and skills, and the committee would be consulted on the plan. Māori 'technicians and planners will work alongside council technicians and planners in the preparation of regional spatial strategies and NBA plans'. Further, the 'existing working-level arrangements between councils and Māori may continue in the new system'.[356]

2.5.2.2 *Our view*

The Randerson report argued that it was necessary to avoid 'politicised decision-making at the end' of the planning process, and that it was important for the regional committees to be autonomous so that 'politics are less likely to influence decisions, leading to greater acceptance of IHP [independent hearing panel] recommendations, making more of the plan operative sooner'.[357] We agree with that but we do not see any risk to the committee's independence if the Māori appointing body were to make appointments to both the committee and the secretariat. Instead, such appointments may enable more effective Māori participation in the new resource management system, which is one of the key goals of the reform. In addition, we agree with Tina Porou that there should be provision for the committee to appoint a 'a co-director Māori,'[358] to help ensure the effective delivery of the 'mātauranga Māori and te ao Māori perspectives' that the Crown has accepted is necessary.

2.5.3 Rights and interests in freshwater (and other natural) resources

The claimants and interested parties agreed in the priority hearing that the issue of rights and interests in freshwater resources has not been addressed by the Crown, and that this failure has made the resource management reform (including the issue of representation on regional committees) much harder to resolve.[359] The Crown submitted that the issue of 'geothermal and freshwater rights and allocations issues' is out of scope, and should not be 'taken into consideration or influence the Tribunal in its deliberations'.[360] Counsel for the Tūaropaki Trust, on the other hand, submitted:

> It is, the Trust says, a fallacy to say that the question of representation is somehow separate from the question of rights and interests. The two are intrinsically linked. To the extent the system empowers regional planning committees to make decisions around the use, allocation, and regulation of natural resources within a region, it assumes their entitlement to do so. Built into the system the Crown is proposing, therefore, is a default assumption that these are public resources that the government

356. Document H37(l), p 1
357. Resource Management Review Panel, *New Directions* (doc H18(a)), p 238
358. Document H53, pp 9–10
359. Submission 3.3.80, pp 8–9, 12–13; submission 3.3.93, pp 16, 40; submission 3.3.90, p 9
360. Submission 3.3.78(a), p 55

can regulate (through the committees it is establishing), including water and geothermal resources.[361]

We simply note the issue here, the concern raised by the claimants and interested parties, and that we have made findings and recommendations about rights and interests in freshwater resources at stages 1 and 2 of this inquiry. We have not yet heard the parties on geothermal resources.

2.6 Conclusions and Treaty Findings

In our stage 2 report, we have already set out the relevant Treaty principles. In this priority inquiry we rely on the principles of partnership, Māori autonomy and the article 2 guarantee of tino rangatiratanga, active protection, and equal treatment.

On the principle of partnership, the Tribunal stated in *Whaia Te Mana Motuhake*:

> At a fundamental level, the Treaty signifies a partnership between the Crown and the Māori people, and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other, and that in turn requires consultation. As is so often noted in this jurisdiction, it was a basic object of the Treaty that two peoples would live in one country and that their relationship should be founded on reasonableness, mutual cooperation, and trust. It is in the nature of the partnership forged by the Treaty that the Crown and Māori should seek arrangements which acknowledge the wider responsibility of the Crown while at the same time protecting Māori tino rangatiratanga.[362]

The principle of partnership applies in this inquiry to the process of developing the resource management reforms. The Treaty partnership must also be reflected in the new resource management system, including partnership mechanisms for the governance and control of natural resources that are taonga, not just in the specific area of joint management agreements or transfers of power but also in the governance and development of regional planning. The process of developing the reform required the Crown to make informed decisions on the matters affecting Māori interests and – in the context of this particular reform process – required collaboration between the Treaty partners, and possibly Māori consent to aspects of the reform. But the process by which the Crown arrived at its position in respect of its regional committee proposal was outside the scope of this inquiry.

The principle of Māori autonomy involves the article 2 guarantee of tino rangatiratanga. As we stated at stage 2, the principle of autonomy requires the Crown to actively protect tino rangatiratanga. We stated:

361. Submission 3.3.90, p 9
362. Waitangi Tribunal, *Whaia Te Mana Motuhake*, p 28

> 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'. 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'.[363]

The Crown is required to respect and protect the tino rangatiratanga of the Māori Treaty partner in the new resource management system. How that is to be done in terms of regional planning committees was the core subject of this priority inquiry. More specifically, the focus was on how Māori are to appoint their representatives to the committees, but it necessarily involved us looking at how Māori autonomy applies in the circumstance of regional planning for Māori landowners and for Māori communities that live outside their rohe and do not have a whakapapa relationship with the environment and its taonga where they live, more specifically urban mātāwaka communities. Those matters were in scope because they related to the fundamental question of how Māori representatives are to be appointed, and who should appoint them. As the Tribunal found in the Waipareira report, which has been discussed in section 2.3.5, Māori communities living outside their rohe have rangatiratanga over their own affairs, which is sourced to the 'reciprocal duties and responsibilities between leaders and their associated Maori community'. A mātāwaka community that exercises rangatiratanga over their own affairs should 'control their own tikanga and taonga, including their social and political organisation, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes'.[364]

The principle of active protection is also relevant in this priority inquiry. In the stage 2 report, we quoted the report of the Central North Island Tribunal, noting that this Treaty principle requires the 'active protection of lands, estates, and taonga, with duties analogous to fiduciary duties', and the 'active protection of rangatiratanga, including in environmental management'.[365] 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',

363. Waitangi Tribunal, *The Stage 2 Report*, p 17
364. Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp xxv–xxvi
365. Waitangi Tribunal, *The Stage 2 Report*, p 19; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1235

> 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.[366]

The principle of equal treatment was particularly important in this inquiry due to the number and range of groups whose interests the Crown needed to protect and provide for in the new resource management system. This principle requires the Crown to act fairly and impartially to all Māori groups. The Crown should not 'make arbitrary distinctions between groups so as to unjustly favour some ahead of others', and should instead 'treat like cases alike'.[367]

In the Crown's submission, the Treaty does not require perfection, and a number of different options could be Treaty compliant; what matters is that the option chosen is reasonable, practicable, and meets Treaty standards. The Crown's view in this inquiry is that the specific process that it has proposed to select Māori representatives for regional committees is Treaty compliant, although the Crown invited guidance on aspects of the process that had not yet been worked out in detail. The Crown summarised the reasons why its proposed process is Treaty compliant:

> Having the process led by iwi authorities and groups that represent hapū, in the sense that those groups initiate discussions, but prescribing that those groups must engage broadly with Māori within their region, is a workable compromise between the different values and interests engaged by this aspect of the reform. Limited process-oriented obligations promote accountability and provide guidance to iwi authorities and groups that represent hapū, yet do not undermine the ability of Māori to pursue their own processes for determining an appointing body in their own way. This gives effect to the central theme of the claimant and interested party evidence and submissions: that the process must be inclusive. Under the proposed system, land owners, kin-based groups, urban Māori and other significant rights and interests holders will be part of the discussions facilitated by iwi authorities and groups that represent hapū. How agreement is reached is a matter for those groups to determine according to their tikanga. But the Selection Process allows for all voices to be heard. There is no arbitrary line as to who may participate in relevant discussions.[368]

The claimants and interested parties, on the other hand, considered that the Crown's proposed process was not Treaty compliant, although they differed as to the reasons why it was not compliant. The NZMC argued that the process to select an appointing body should not be led by iwi and hapū but instead should be facilitated by national bodies (the NZMC and FOMA) who were impartial and would

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

367. Waitangi Tribunal, *The Stage 2 Report*, p 18; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 24–25

368. Submission 3.3.78, p 50

assist to identify all the relevant Treaty rights holders and call them together to make a decision. The ILG argued that the Crown's proposed process was over-engineered, and that iwi and hapū should be left to run their own processes without any prescription. In their view, Māori landowners and mātāwaka groups should not be involved in the process of appointing regional representatives.

Other interested parties had a variety of positions: that hapū alone should appoint the representatives; that Māori land holding entities should have a direct right of appointment; that there should be a flat structure in which all rights holders met at hui and make the decision; that urban Māori authorities should be involved in leading the process at the regional level and directly involved alongside the other groups in the selection process, and others. Most agreed that the Crown should have sorted out with PSGEs how Treaty settlements would be reflected in the new system at an early stage. All the claimants and interested parties agreed that representation on the regional committees should be on a co-governance 50:50 basis. They also agreed that the Crown should have sorted out their rights and interests in freshwater and other resources before embarking on this reform. To a large extent, these views (with the exception of that of the urban Māori authorities) appear to have been presented to the Crown during its targeted engagement with Māori groups.[369]

We agree with the Crown that there is more than one option for how Māori should choose their committee representatives. A number of options could be Treaty compliant.

We find that the Crown's proposal that iwi and hapū should lead and facilitate the process to decide an appointing body is Treaty compliant at a high level of principle, noting that all the detail had not been decided at the time of the hearing. In our view, it is appropriate for the Crown to invite iwi and hapū to lead a process; that is compliant with the Crown's partnership obligations and with the article 2 guarantee of tino rangatiranga.

We do not consider, however, that enough detail is available for us to make a finding on the Crown's proposal that iwi authorities and groups that represent hapū would self-register with the Local Government Commission. It may or may not be a workable and effective process in Treaty terms.

We find the Crown's proposal for a legislative requirement that iwi and hapū engage with their members and with relevant rights and interests holders, and keep a record of the engagement, is Treaty compliant at a high level of principle. Again, the detail is still being worked out. Although the ILG did not consider that it was necessary to prescribe this, our view is that a safeguard to ensure inclusiveness (and a record to establish that the process was inclusive) is consistent with the principle of equal treatment.

Some parties considered that a participatory right was insufficient and that they should lead the process or have a right of direct appointment. In our view, it is Treaty compliant for iwi and hapū to lead and facilitate the process, and for 'whakapapa-based groups such as whānau, owners of Māori land and/or

369. See doc H37(a)

customary rights holders' (to use the Crown's words) to be involved in the process and in the decision-making. Inclusiveness and self-determined processes for decision-making according to customary norms are essential.

In terms of selecting an appointing body, our view is that how the decision is made would be crucial to the effective participation of the groups who hold rights and interests 'at place'. The Crown's proposal is that the decision-making process would be self-determined, according to tikanga. The Crown also submitted that the engagement/participation requirement would not force iwi and hapū into an 'exhaustive determinative search for all interest holders'.[370] Rather, the mechanism could be a hui taumata or the existing 'annual fixtures in the region's cultural calendar' such as AGMs. A regional forum could be established (if groups wanted one). Crown counsel submitted that 'the process is to be recorded but what that process is, is to be self-determined'.[371]

At a high level of principle, we agree that for iwi and hapū to lead a self-determined process to decide an appointing body would be consistent with the principle of Māori autonomy and the article 2 guarantee of rangatiratanga.

We find that the Crown as a Treaty partner is required to protect and empower the exercise of tino rangatiratanga. This would entail the Crown providing secretariat/administrative support and funding to enable the proposed self-determined processes to occur and succeed. The Crown has committed to funding in principle but implementation decisions had not yet been made at the time of the hearing. The claimants and interested parties are understandably concerned that this (and other matters of detail) have not been worked out in a way that enables them to scrutinise and have confidence in what the Crown has proposed.

On the matter of *who* should participate in the decision, we do not think that the Crown's present list is entirely appropriate. For the reasons set out in section 2.3.2, we do not consider that there needs to be a specific requirement to engage with 'holders of specific customary rights such as Customary Marine Title and Protected Customary Rights groups' and 'groups, and natural taonga with legal personality, who hold rights and interests deriving from the settlement of Treaty of Waitangi claims'.

On the issue of urban Māori (mātāwaka) communities, our view is set out in section 2.3.5. We consider that their participation, in accordance with their Treaty right to exercise rangatiratanga over their own affairs, should enable them to appoint representatives to a sub-committee. Sub-committees are to be provided in the system as one of the partnership mechanisms. In our view, it is crucial that mātāwaka representatives have a decision-making role on a Māori urban planning sub-committee, so as to enable them to shape their own future as urban communities and provide for the needs of their people. Urban iwi and hapū would also need to be represented on that sub-committee. In our view, the sub-committee should be appointed directly, perhaps by a selection process as provided for the Independent Māori Statutory Board in Auckland. We believe that the

370. Submission 3.3.78. p 35
371. Ibid, p 35

sub-committee composition should be 50:50 as between mātāwaka representatives and iwi and hapū representatives, taking into account a number of factors, including that iwi and hapū would also be involved in selecting representatives for the regional committee. We also consider that there should be opportunity to sub a representative of the sub-committee on to the regional committee at appropriate times.

It might be objected that membership of a sub-committee is not sufficient to give expression to tino rangatiratanga, but our view is that the interest of mātāwaka who are urban Māori is focused on urban planning, and as such does not cover the full range of matters that representatives on the regional planning committees must address. Mātāwaka communities do not exercise tino rangatiratanga over natural resources. Given that we have made no finding of breach, this is a suggestion based on the evidence and our understanding of the Treaty principles, and not a formal recommendation.

In respect of Māori land holding entities, counsel for the Taheke 8C incorporation submitted that the 'core concern of Māori land owners in a proposal about how they might be represented in the process for determining Māori members of planning committees' could be met by according them the right to prepare planning documents that would have a 'determinative input into the relevant plan that relates to their land'.[372] In our view, the proposal of the Tahake 8C incorporation is one that the Crown should consider seriously and discuss further with the incorporation. We suggest that there should be provision in the new system for Māori land holding entities to join forces and prepare a regional planning document, with assistance and funding from the Crown and perhaps FOMA, to which the regional committee would be required to give particular regard.

On the issue of resolving disagreement or assisting in reaching agreement, we note that the presiding officer took no part in the deliberations about the dispute resolution and circuit breaker processes.

We agree with the Crown that Crown-funded facilitation should be available at any time in the process. The NZMC, FOMA, or some other Māori body could provide the facilitation if that was the wish of the groups involved. If there is no agreement by the statutory deadline for deciding an appointing body, our view is that mediation should be used for dispute resolution. The NZMC quoted a report in closing submissions that we consider apposite here.[373] In the *Te Arawa Settlement Processes Report*, the Tribunal stated:

> The promotion of hui or mediation and the time needed for consensus decision-making are all mechanisms that can be used to finally determine and put to bed issues of mandate. Such issues are usually easily solved by the iwi or hapu themselves, given

372. Submission 3.3.82, p 19
373. Submission 3.3.80, p 18

time and space. In accordance with tikanga, Maori accept such decisions, even though they may not like them.[374]

We suggest that the iwi and hapū leading and facilitating the process should agree on a pool of mediators at the beginning to save time when dispute resolution is required. For a circuit breaker, we suggest binding arbitration, with the groups involved each appointing an arbitrator. In respect of both mediation and arbitration, the Māori Land Court should resolve any disputes about appointees or failures in process. Also, for the reasons set out in section 2.3.4, we do not consider that judicial review would be an appropriate circuit breaker (which it would effectively become if it was available). We suggest an ouster clause for judicial review and a single right of appeal on the merits to the Māori Appellate Court if the arbitration decision is not accepted by a party or parties. In our view, this would be the appropriate specialist body to determine the dispute, and it would provide a faster, cheaper process than either judicial review or a right of appeal to the High Court. It is important to note that the court would not be appointing the Māori representatives but rather would resolve any remaining disputes about the appointing bodies. The Māori appointing bodies would make the appointments, following the consultation and other requirements for carrying out that responsibility.

We have also observed that two highly significant factors promise to complicate the appointments process to a large degree. First, the Crown is committed to reflecting Treaty settlements and other arrangements in the new system, but has not yet completed the process to do so. In terms of what is relevant here, the Crown has said that this process would include decision-making about plans and some direct appointments to the regional committees. We do not know how many regions would be affected, or to what extent, but the indications are that the impact would be significant. We are therefore unable to reach an overall view as to whether the Crown's proposed process is Treaty compliant, because the bespoke arrangements negotiated through settlements and other processes would potentially trump or even displace it in some regions. This has understandably led to a loss of confidence in the Crown's ability to deliver what is proposed, and most parties expressed misgivings about this situation.

The second factor is the overlap between the composition process and the appointments process; Crown evidence stated clearly that composition issues could make it impossible for agreement to be reached on appointing bodies. Also, all the claimants and interested parties agreed that the composition of the committees should be on a co-governance 50:50 basis. We observed that providing for a co-governance composition as the baseline could take a lot of the heat out of the appointments process. We are unable to comment further because composition issues were a contextual matter and not a focus of the priority inquiry, except to state our view that the process to decide composition must occur before the process to decide an appointing body for the reasons stated in section 2.4.2.

374. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p189

We also identified three issues that arose at hearing which required comment from us in the context of the Crown's proposed appointments process. First, the secretariat will play a crucial role in plan development, and our view is that there should be a co-director Māori, and that the appointing body should also appoint members of the secretariat. Secondly, the claimants and interested parties agreed that the Crown has failed to address rights and interests in freshwater (and other) resources. This has played a significant role in drawing Māori opposition to what the Crown is proposing. As noted above, we have made findings and recommendations about this issue in the stage 2 report. Thirdly, we addressed the issue of whether the Crown is now required to pause and consult further with Māori. For the reasons set out in section 2.5.1, we do not consider that this is required.

In addition, we note that counsel for Ngāti Manu proposed a flat structure in which all right holders are registered and attend hui to make the decision, similar to the proposal of the NZMC. Our view is that this could work if Māori wanted it, and this could be something explored further at a review of the appointments process. Professor Ruru suggested that a review clause would be essential for the new and untried appointments process, and we agree.

We have not found the Crown in breach of the Treaty, and so all our comments and suggestions do not have the status of formal recommendations. Nonetheless, given the Crown's statements that it is interested in guidance and constructive suggestions, and given the expenditure and efforts of all parties to participate and meet the very tight timeframes of this inquiry, the Crown should give serious consideration to this report. We have made comments throughout which should be taken into account, in addition to the conclusions and findings made in this section. The suggestions that we have made in this chapter are based on the evidence and submissions received from the parties and our understanding of the Treaty principles, and are made with the intention of assisting the Crown to avoid Treaty breach.

Finally, we appreciate that the Crown has embarked on a major reform of the resource management system, and has committed itself to giving effect to the principles of the Treaty in that system. The constraints of the priority inquiry did not enable us to consider the other parts of the proposed system except where relevant to the selection/appointments process. We reiterate that we have made findings and recommendations at stage 2 on co-governance and on Māori rights and interests in freshwater bodies.

The next stage of this inquiry will address Māori rights and interests in geothermal resources.

Dated at Wellington this 1st day of September 2022

Chief Judge Wilson Isaac, presiding officer

Dr Robyn Anderson, member

Ron Crosby, member

Dr Grant Phillipson, member

Professor Sir William Te Rangiua (Pou) Temara, member

THE SEAL OF THE WAITANGI TRIBUNAL

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APPENDIX I

RECORD OF HEARINGS

The Tribunal

The Tribunal comprised Chief Judge Wilson Isaac (presiding officer), Dr Robyn Anderson, Ron Crosby, Dr Grant Phillipson, and Professor Pou Temara. The priority hearing was held at the Waitangi Tribunal offices in Wellington on 1–3 August 2022. As the Covid-19 setting remained at orange at the time of the hearing, some counsel and witnesses appeared in person and others were heard remotely by audio-visual link (Zoom). Tribunal member Ron Crosby also attended by Zoom.

The Counsel

Counsel for the claimants were Matthew Smith, Donna Hall, and Rosie Grierson (for the New Zealand Māori Council, Wai 2358); Bryce Lyall (for the Ngāpuhi claim); and Janet Mason (for the Water and Geothermal Bodies (Tai Tokerau) claim, Wai 2601).

Counsel for the interested parties were Natalie Coates and Tyler Paki (for the Tauhara North No 2 Trust); Matanuku Mahuika and Tara Hauraki (for the Tūaropaki Trust); Justine Inns and Christopher Finlayson QC (for Te Rūnanga o Ngāi Tahu); Annette Sykes and Camille Houia (for Te Tai Tokerau Land claim, Wai 354); Andrew Irwin (for Tāheke 8C and Adjoining Blocks Incorporation, Wai 3055); Mark McGhie (for Matiu Haitana, his whānau, and Ngāti Ruakopiri, Wai 1072); Darrell Naden (for the Marine and Coastal Area (Takutai Moana) Act (Te Ao) claim, Wai 2604; Te Patutahi, Muhunga and Other Lands and Resources (Te Whanau-A-Kai) claim, Wai 892; Te Ngāti Pakahi (Aldridge) claim, Wai 2377; and Te Waimiha River Eel Fisheries (King Country) claim, Wai 762); Janet Mason (for the Te Waitaha (Te Korako and Harawira) claim, Wai 1940; Ngāti Rangitihi Inland and Coastal Land Blocks claim, Wai 996; and the Tāmaki Collective); and Jamie Ferguson (for the Freshwater Iwi Leaders Group and Whakakitenga o Waikato Incorporated).

Crown counsel were Mike Colson QC, Rachael Ennor, Jaimee Kirby-Brown, Trevor Moeke, and James Watson.

The Witnesses

Witnesses who gave evidence at the hearing for the claimants were Sir Taihakurei Durie, Dr Claire Charters, Professor James Anaya, Dr Leonard (Len) Warren Cook, Professor Jacinta Ruru, Dr Robert Joseph, Rebecca Elizabeth (Liz) Mellish, and Anthony Olsen (on behalf of the New Zealand Māori Council, Wai 2358); and Rihari Dargaville (for the Water and Geothermal Bodies (Tai Tokerau) claim, Wai 2601).

Witnesses who gave evidence at the hearing for the interested parties were Matiu Haitana (on behalf of himself, his whānau, and Ngāti Ruakopiri, Wai 1072); John Tamihere (on behalf of the Tāmaki Collective); Jane Mihingarangi Ruka (on behalf of the Te Waitaha

(Te Korako and Harawira) claim, Wai 1940); Kingi Smiler Houia (on behalf of the Te Tai Tokerau Land claim, Wai 354); Roger Tichborne (on behalf of the Marine and Coastal Area (Takutai Moana) Act (Te Ao) claim, Wai 2604); David Hawea (on behalf of Te Patutahi, Muhunga and Other Lands and Resources (Te Whanau-A-Kai) claim, Wai 892); Professor Rawiri Te Maire Tau and Lisa Tumahai (on behalf of Te Rūnanga o Ngāi Tahu); and Tina Porou and Che Wilson (on behalf of the Freshwater Iwi Leaders Group).

Witnesses who gave evidence at the hearing for the Crown were Janine Mary Smith and Keita Kohere.

APPENDIX II

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2 Tribunal Memoranda, Directions, and Decisions

2.6.81 Chief Judge Wilson Isaac, memorandum concerning request for prioritised hearing, 11 May 2022

2.6.83 Chief Judge Wilson Isaac, decision on applications for a priority hearing, 27 June 2022

2.6.84 Chief Judge Wilson Isaac, memorandum responding to priority hearing planning memoranda, 5 July 2022

2.6.87 Chief Judge Wilson Isaac, memorandum concerning various matters prior to hearing, 29 July 2022

2.6.88 Chief Judge Wilson Isaac, memorandum concerning timing of report, 3 August 2022

3 Submissions

3.2 Hearing stage

3.2.403 Matthew Smith, Donna Hall, and Rosie Grierson (New Zealand Māori Council), memorandum of counsel requesting a priority hearing as part of the stage three inquiry, 29 April 2022

3.2.404 Andrew Irwin (Wai 3055), memorandum of counsel for the Wai 3055 claimant, 11 May 2022

3.2.409 Janet Mason (Wai 2601), memorandum of counsel proposing urgent inquiry into the Natural and Built Environments Bill, 23 May 2022

3.2.469 Mike Colson, Rachael Ennor, and Jaimee Kirby-Brown (Crown), Memorandum for the Crown on timetabling issues, 3 August 2022

3.3 Opening and closing

3.3.64 Andrew Irwin (Wai 3055), opening submissions for the Proprietors of Taheke 8C and Adjoining Blocks Incorporation (Taheke 8C), 27 July 2022
(a) Amended synopsis of opening submissions for Taheke 8C, 1 August 2022

3.3.70 Darrell Naden, opening submissions for the interested parties, Evelyn Kereopa (Wai 762), David Hawea (Wai 892), Bryce Peda-Smith (Wai 2377), and Roger Tichborne (Wai 2604), 28 July 2022

3.3.74 Janet Mason (Wai 2601), opening submissions on behalf of Cletus Maanu Paul and Rihari Richard Takuira Dargaville, 28 July 2022
(a) NBE Committee Process: Draft Proposal, 2 August 2022

3.3.76 Jamie Ferguson, opening submissions for Freshwater Iwi Leaders Group, 28 July 2022

3.3.77 Mike Colson, Rachael Ennor and J Kirby-Brown (Crown), opening submissions, 29 July 2022

3.3.78 Mike Colson, Rachael Ennor, Liesle Theron, and James Watson (Crown), closing submissions, 9 August 2022
(a) Schedule 1: Crown submissions on scope, 9 August 2022

3.3.79 Mark McGhie (Wai 1072), closing submissions on behalf of Matiu Haitana, 10 August 2022

3.3.80 Matthew Smith and Rosie Grierson (New Zealand Māori Council), closing submissions, 10 August 2022

3.3.81 Christopher Finlayson and Justine Inns, closing submissions for Te Rūnanga o Ngāi Tahu, 10 August 2022

3.3.82 Andrew Irwin (Wai 3055), closing submissions for Taheke 8C, 10 August 2022

3.3.83 Natalie Coates and Tyler Paki, closing submissions on behalf of Tauhara North No 2 Trust, 11 August 2022

3.3.84 Janet Mason, closing submissions on behalf of Titewhai Harawiria, John Tamihere, and Raymond Hall (on behalf of Māori communities in Tamaki Makaurau), 11 August 2022

3.3.85 Janet Mason (Wai 2601), closing submissions on behalf of Cletus Maanu Paul and Rahari Richard Takuira Dargaville, 11 August 2022

3.3.86 Janet Mason (Wai 996), closing submissions on behalf of David Potter and the late Andre Patterson, and Cletus Maanu Paul, 11 August 2022

3.3.87 Janet Mason (Wai 337), closing submissions on behalf of Michelle Marino, Errol Churton, and David James Churton, 11 August 2022

3.3.88 Janet Mason (Wai 1940), closing submissions on behalf of Jane Mihingarangi Ruka Te Korako, 11 August 2022

3.3.89 Darrell Naden, closing submissions for the interested parties, Evelyn Kereopa (Wai 762), David Hawea (Wai 892), Bryce Peda-Smith (Wai 2377), and Roger Tichborne (Wai 2604), 11 August 2022

3.3.90 Matanuku Mahuika and Tara Hauraki, closing submissions on behalf of Tūaropaki Trust, 11 August 2022

3.3.91 Bryce Lyall, closing submissions for the Ngāpuhi claimants, 11 August 2022

3.3.92 Annette Skyes and Camille Houia (Wai 354), closing submissions on behalf of Arapeta Hamilton, 11 August 2022
(a) Bundle of authorities in support of Annette Skyes and Camille Houia closing submissions, 11 August 2022

4 Transcripts and Translations

4.1.6 Transcript of the Wai 2358 Freshwater and Geothermal Resources Inquiry Priority Hearing, 1–3 August 2022, Waitangi Tribunal Office, Wellington

SELECT RECORD OF DOCUMENTS

e Series

e13 Hon Sir Taihākurei Durie, Dr Robert Joseph, Dr Andrew Erueti, and Dr Valmaine Toki, 'Ngā Wai o te Māori – Ngā Tikanga me Ngā Ture Roia: The waters of the Māori: Māori Law and State Law' (a paper prepared for the New Zealand Māori Council), 23 January 2017

h Series

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h3 Wikitoria Hepi-Te Huia, brief of evidence, 8 July 2022

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h6 Kelly Dobbs, brief of evidence, 8 July 2022
(b) Oral submission of Kelly Dobbs to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

h7 Sir Taihākurei Durie, brief of evidence, 15 July 2022
(a) Evidence of Hon Sir Taihākurei Durie in reply to written evidence of Rawiri Te Maire Tau, 26 July 2022

h8 George Ngātai, brief of evidence, 8 July 2022
(a) Oral submission of George Ngāti to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

H9 Kereama Pene, brief of evidence, 8 July 2022
(b) Oral submission of Kereama Pene to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft

H10 Dr Sharon Gemmell, brief of evidence, 8 July 2022
(a) Written submission of Dr Sharon Gemmell to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

H11 Thompson Hokianga, brief of evidence, 8 July 2022
(a) Oral submission of Thompson Hokianga to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

H12 Wanda Brljevich, brief of evidence, 8 July 2022
(a) Oral submission of Wanda Brljevich to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

H13 Warahi Paki, brief of evidence, 8 July 2022
(a) Oral submission of Warahi Paki to the Environment Select Committee on the Natural and Built Environments Bill Exposure Draft, 8 July 2022

H14 Wiremu Robert Abraham, brief of evidence, 8 July 2022
(a) Oral submission of Wiremu Robert Abraham to the Environment Select Committee on the Natural and Built Environments Bill exposure draft, 8 July 2022

H15 Dr James Meville Ataria, brief of evidence, 8 July 2022

H17 Kingi Winiata Smiler (Wai 354), affidavit, 11 July 2022
(a) Supporting documents

H18 Peter Fraser and Takuta Ferris, brief of evidence, 8 July 2022
(a) Supporting documents, 11 July 2022

H19 Professor S James Anaya and Dr Claire Winifield Ngamihi Charters, brief of evidence, 8 July 2022

H20 Dr Max Harris, Professor Valmaine Toki, Professor Jacinta Ruru, and Dr Robert Joseph, brief of evidence, 29 July 2022
(a) Answer of Professor Jacinta Ruru to question in writing from Dr Grant Phillipson, 5 August 2022

H24 Michelle Marino (Wai 377), brief of evidence, 11 July 2022

H26 Rihari Richard Takuira Dargaville (Wai 2601), brief of evidence, 11 July 2022

H28 John Henry Tamihere, brief of evidence, 11 July 2022
(b) Amended brief of evidence of John Henry Tamihere, 2 August 2022

H29 Raymond Phillip Hall, brief of evidence, 11 July 2022

H30 Roger Tichborne, brief of evidence, 11 July 2022

H33 Te Uranga Aroha Evelyn Kereopa (Wai 762), brief of evidence, 11 July 2022

H34 Rawiri Te Maire Tau, brief of evidence, 12 July 2022
(a) Rawiri Te Maire Tau, brief of evidence in reply, 27 July 2022

H35 Traci Houpapa MNZM JP and Rebecca Elizabeth Mellish MNZM, brief of evidence, 29 July 2022

H37 Janine Mary Smith, brief of evidence, 21 July 2022
(a) Supporting documents, 21 July 2022
(b) Appointments process diagrams, 1 August 2022
(c) BRF-1716 RM Reform 186 – Delegated decisions on regional governance and decision-making arrangements, 2 August 2022
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(e) Paper 1A: Regional governance in the reformed resource management system – composition and decision-making of joint committees, 3 August 2022
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(m) Updated appointments processes diagram, 8 August 2022
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H38 Keita Sarah Kohere, brief of evidence, 21 July 2022

H39 Cross-examination bundle for Crown witnesses Keita Kohere and Janine Mary Smith, 25 July 2022

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H46 Te Rakitaunuku Nukutauraro Tau, brief of evidence in reply, 27 July 2022

H47 Pahia Turia, brief of evidence in reply, 26 July 2022

H49 Che Philip Wilson, brief of evidence in reply, 26 July 2022

H50 Anthony Olsen, brief of evidence in reply, 26 July 2022

H51 Te Kou Rikirangi Gage, brief of evidence in reply, 27 July 2022

H52 Riki James Ellison, brief of evidence in reply, 27 July 2022

H53 Tina Tangi Whaiora Porou, brief of evidence in reply, 27 July 2022

H54 Selwyn Tanetoa Parata, brief of evidence in reply, 8 August 2022