

Freshwater decision-making and Māori rights and interests – a stocktake of where we have been and where we might be going

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Purpose

What this paper is

1. On 3 July 2018, Cabinet issued a minute outlining a new approach to the Crown/Māori relationship for freshwater (ENV-18-MIN-0032). It summarized Māori aspirations with respect to freshwater as:¹
 - Improving water quality and the health of ecosystems and waterways;
 - Governance / management / decision-making: Māori want to be involved in freshwater decision-making, and have the capacity, capability and resources to do so effectively;
 - Recognition: ensuring there is formal recognition of iwi/hapū relationships with particular freshwater bodies²; and
 - Economic development: Māori want to be able to access and use water resources (i.e. water takes and discharge rights) in order to realise and express their economic and development interests (although this remains within the context of a holistic view of Te Mana o te Wai).³
2. This paper concerns the second aspiration. It provides a stocktake of the current freshwater governance system, including existing mechanisms designed to strengthen Māori involvement in freshwater decision-making. It also summarises what various parties have been said about improving Māori involvement in freshwater decision-making (including the Crown), and identifies future work programmes that might achieve these improvements (in particular the comprehensive review of the resource management system).

What this paper is not

3. This paper does not contain any advice or recommendations on how to improve Māori involvement in freshwater decision-making. It is a stocktake only, and is intended as a foundation for future work.
4. Nor is this paper a comprehensive response to the recommendations of the Resource Management Review Panel, or to the Waitangi Tribunal's report on stage two of the Freshwater and Geothermal Resources inquiry (Wai 2358 stage two). However, this paper may inform comprehensive responses to both of these kaupapa.

¹ This summary was based on feedback and reporting from more than 100 hui on freshwater run by the Iwi Leaders Group (ILG) across New Zealand throughout 2014-15. These four points closely mirror the joint work programme agreed by the Crown and the ILG in March 2015.

² The Cabinet paper attached to the minute mentioned that many hui also raised concerns over the uncertainty of supply of potable water on all marae and in papakāinga

³ The Cabinet paper attached to the minute noted that protecting customary activities (e.g. food gathering, access to wāhi tapu, and spiritual practices) was a foundation for all four of these points.

5. This paper is primarily concerned with the way that decisions are made about freshwater in New Zealand. It does not deal substantially with decision-making concerning other aspects of the resource management system (such as land), although it implicitly acknowledges that it may be difficult to disentangle questions of water and land governance.

Structure of this paper

6. This paper is comprised of several parts, which can be divided into two broad themes – *where we have been* and *where we might be going*. To reduce the size of the body text, much of the detail is contained in Appendices.
7. *Where we have been* summarises the ‘state of play’ with regards to freshwater decision-making, and how we have gotten here. It outlines:
 - Why decision-making is a central component of addressing rights and interests
 - How freshwater is currently governed
 - The existing mechanisms for involving Māori in freshwater decision-making.
8. *Where we might be going* identifies what future reforms could involve. This includes:
 - What the Waitangi Tribunal has said a Treaty-compliant freshwater system looks like
 - What the Crown’s current position is on freshwater decision-making and rights and interests, including soon to be enacted and potential future reform programmes
 - What various Māori and non-Māori organisations have said about addressing Māori rights and interests in freshwater decision-making
9. I acknowledge the work of our former colleague Dan Shenton, who prepared a paper in March 2019 on the Kāhui Wai Māori’s (KWM) proposed workstream on a ‘Tino Rangatiranga / Kāwanatanga freshwater management system’.⁴ While this paper is pitched at a higher level than Dan’s was, much of his work has been gratefully incorporated.

Definitions

10. ‘Freshwater decision-making’ is used throughout this document as shorthand to describe a variety of ways in which Māori are, and can be, involved in decision-making, ranging from consultation to full empowerment. Te Arawhiti’s spectrum of engagement methods provides a useful framework for categorizing these methods (see table 1 below). While this spectrum was designed to guide Crown-Māori engagement in the development of new

⁴ <https://tepuna.mfe.govt.nz/otcs/cs.dll/Overview/11265083>

policy, it is equally applicable to the ways which engagement can occur within the existing system.

Inform	The Crown will keep Māori informed about what is happening. Māori will be provided with balanced and objective information to assist them to understand the problem, alternatives, opportunities and/or solutions.
Consult	The Crown will seek Māori feedback on drafts and proposals. The Crown will ultimately decide. The Crown will keep Māori informed, listen and acknowledge concerns and aspirations, and provide feedback on how their input influenced the decision.
Collaborate	The Crown and Māori will work together to determine the issues/problems and develop solutions together that are reflected in proposals. The Crown will involve Māori in the decision-making process but the Crown will ultimately decide.
Partner / co-design	The Crown and Māori will partner to determine the issue/problem, to design the process and develop solutions. The Crown and Māori will make joint decisions.
Empower	Māori will decide. The Crown will implement the decision made by Māori.

Table 1: Te Arawhiti's spectrum of engagement methods⁵

11. In recent years, certain types of Māori involvement in freshwater decision-making are often described as co-governance, co-management and (less frequently) co-planning. While often used interchangeably, these terms are distinct. They describe involvement at different levels and in different aspects of decision-making. Crucially, they also describe the extent of decision-making powers involved.
12. There is no single, authoritative definition of these terms. The definitions used by the Office of the Auditor-General in a 2016 paper on co-governance principles are often referred to in the literature. This defines co-governance as '[a]rrangements in which ultimate decision-making authority resides with a collaborative body exercising devolved power – where power and responsibility are shared between government and local stakeholders', and co-management as '[t]he collaborative process of decision-making and problem solving within the administration of conservation policy.'⁶ Several reports written by Manaaki Whenua use the following definitions⁷:
 - **Co-governance:** A formal agreement to share decision-making. In terms of iwi/hapū and the Crown this should be based on the Treaty

⁵ Te Arawhiti, *Guidelines for engagement with Māori*, October 2018, p 6

⁶ Office of the Auditor-General, 'Principles for effectively co-governing natural resources', February 2016, p. 8. Drawn from G. Dodson, 'Co-Governance and Local Empowerment? Conservation Partnership Frameworks and Marine Protection at Mimiwhangata, New Zealand' in *Society & Natural Resources: An International Journal* 7:25 (2014).

⁷ Robb M., Harmsworth G., Awatere S., *Māori values and perspectives to inform collaborative processes and planning for freshwater management*. Landcare Research, 2015.

of Waitangi. Through principles and collaborative guidelines, the Treaty provides the basis for meaningful ongoing relationships.

- *Co-planning*: Planning together under co-governance agreements. A shared process where iwi/hapū/tangata whenua interests and values, and the use and understanding of mātauranga Māori are incorporated into local or regional planning, including the development of policies, goals and objectives in council, regional and district plans, and/or urban design.
 - *Co-management*: Actions and responsibilities implemented jointly by the parties. Deciding how a desired goal, objective or outcome is best achieved (e.g. catchment, wetland, and farm plans, consents, riparian planting, river clean-ups, restoration, etc.). Iwi/hapū groups work together with partner agencies.
13. While these definitions provide a useful starting point, they do not fully capture the different functions and characteristics of co-governance and co-management. Indeed, co-planning is itself a function that can be performed at either a co-governance or co-management level (more typically the latter).
14. Furthermore, the boundaries between these terms are not always clear cut. Rachael Harris has suggested that they are part of ‘a spectrum of power sharing arrangements in resource management’ rather than distinct categories.⁸ Donna Llewellyn argues that they both involve ‘collaborative processes and opportunity with an entity and its membership working towards a collective goal of sustainable management and enhancement of the environment’, and that the distinctions are ‘semantics best left to academics’.⁹ Llewellyn suggests that focusing on *characteristics* is more important:

Co-governance	High level governance; strategic directions; defining values; setting common aspirations, vision, objectives, action priorities and planning to achieve those; development of a public statutory document which interfaces with localised regulatory and planning frameworks; influencing decision-making (including funding, use and allocation of the natural resource, and the means to achieve the mutual co-governance goals)
Co-management	Medium to lower level governance; operational decision-making; directing or conducting physical day-to-day management; natural resource may be publicly or privately owned; the entity may have a contract for service delivery; management and planning more localised and informal.

Table 2: Characteristics of co-governance and co-management¹⁰

⁸ Rachael Harris, ‘The changing face of co-governance in New Zealand: How are Ngāi Tahu and Ngāi Tūhoe promoting the interests of their people through power-sharing arrangements in resource management?’ (MA: University of Canterbury, 2015), p 36

⁹ Donna Llewellyn, ‘He aha ngā mea nui o te ao nei? Ngā awa, ngā roto me te kotahitanga’, *Lawtalk* 926 (March 2019), p 89

¹⁰ *Ibid.*

15. For the purposes of this paper, it suffices to say that co-governance and co-management lie on a spectrum of engagement, and that the terms are not always mutually exclusive. Many arrangements between Māori and local authorities include aspects of co-governance and co-management.
16. Finally, aspects of freshwater decision-making occur at a national, regional, and local level. A non-exhaustive definition of the functions performed at each of these three levels is set out below.

National decision-making	Developing and implementing national legislation, regulation and direction; administering sources of funding; and undertaking system oversight
Regional decision-making	Developing and implementing regional policy statements and plans; administering sources of funding; administering resource consent applications (including conducting hearings); and undertaking compliance monitoring and enforcement (CME) of resource management issues in the region.
Local decision-making	Developing visions and strategies for specific freshwater taonga (such as catchments, rivers and lakes); administering resource consents relating to those taonga (including consent hearings); developing, implementing and monitoring freshwater values; and administering sources of funding.

Table 3: Levels of decision-making

Part One: Where we have been?

Why is decision-making central to Māori rights and interests in freshwater?

17. In Te Ao Māori, Māori have an inherited obligation to govern freshwater in a manner that protects and preserves it for future generations. This obligation goes beyond simply being 'consulted on': it obliges Māori to speak for their freshwater taonga, and to be partners in how they are governed.
18. This inherited obligation is expressed through concepts such as whakapapa, whanaungatanga, mauri, tapu, mana, kaitiakitanga, tikanga, rāhui, manaakitanga, taonga, rangatiratanga, and mana whakahaere. **Appendix 1** contains a more in-depth analysis of these concepts, and how they give rise to an inherited obligation to govern.
19. Prior to 1840, Māori held sole authority and control over the use of, and access to, New Zealand's freshwater. Te Tiriti o Waitangi guaranteed Māori their tino rangatiratanga (the unqualified exercise of their chieftainship) over their lands, villages, and all their taonga.¹¹ The Waitangi Tribunal found that this 'confirmed, guaranteed and protected' Māori authority and control over their freshwater taonga, save to the extent that there was an expectation that the waters would be shared with incoming settlers.¹²

How is freshwater currently governed in New Zealand?

20. The current freshwater system can be broadly understood as an ongoing relationship between central and local government.
21. This relationship is expressed across three axes: vertical, horizontal, and operational. **Appendix 2** contains more information on the different components of these axes.

Vertical axis – a hierarchy of legislation, regulation, and planning

22. The overarching governance structure is hierarchical, with key pieces of legislation such as the Resource Management Act 1991 (RMA) and the Local Government Act 2002 (LGA) at the top.
23. Central government may also issue national regulations providing more specific direction on how local authorities are expected to carry out their statutory responsibilities for managing natural resources. These include National Policy Statements, National Environmental Standards, and Section 360 Regulations.

¹¹ Sir Hugh Kawharu's English translation of the te reo Māori version of the Treaty of Waitangi. In Michael Belgrave et al., *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed. (Oxford University Press, 1989).

¹² *The stage one report on the National Freshwater and Geothermal Resources claim* (Legislation Direct, 2014), p 81

24. For freshwater, the current regulations (as at the time of writing) are the *National Policy Statement for Freshwater Management (2020) (NPSFM)*, the *National Environmental Standard for Freshwater, Section 360 regulations* relating to stock exclusion, and the *National Environmental Standard for Sources of Human Drinking Water (2007)*. Work is underway as part of the Three Waters Review to introduce new national environmental standards for drinking water and wastewater.
25. Regional councils must uphold the above in Regional Policy Statements and Regional Plans, the latter of which then set the conditions that resource consent applications must meet in order to be granted.
26. There are also a number of 'touch-points' where central government may intervene in local matters, such as Water Conservation Orders and Matters of National Significance.

Horizontal axis – functions split between different agencies

27. The freshwater governance system is complicated by the fact that aspects of the freshwater system are managed either wholly or partially by different legislation and/or agencies, including the purpose and framework for local government, fisheries, and compliance monitoring and auditing. Ownership of water and river and lake beds is managed through a mixture of statute and common law presumptions.

Operational axis – governance versus management

28. Decision-making occurs at multiple levels within the freshwater governance system. Some decisions reside with Cabinet Ministers or elected local government councilors, while others reside with Chief Executives, managers, and other officials. These operational levels are reflected in the differences between co-governance, co-planning, and co-management, as defined by Robb et al. (see definitions section above). Involving Māori in decision-making at each of these levels requires different mechanisms and approaches.
29. One of the differentiating factors between operational levels is whether Māori have the power to make final decisions, or whether there is a final decision-making body that sits above them. For example, a local authority may have an agreement that allows Māori to contribute to drafting a regional or district policy statement or plan, while final decisions on the plan rest with elected regional councilors. In this case, the drafting process could represent a partnership at the management level (i.e. between Māori and officials), but a collaboration at the governance level (in the absence of Māori wards or constituencies).

The effect on Māori

30. The division across these three axes can make it difficult for Māori to exercise their tino rangatiratanga at all stages and levels of freshwater decision-

making. While there are mechanisms for Māori to participate at various points (discussed below), these can seem like ‘clip-ons’ or ‘plug-ins’ rather than a genuine Treaty partnership. This likely contributes to the perception that the freshwater governance system does not reflect the holistic view of the environment in Te Ao Māori.

What mechanisms currently exist to involve Māori in freshwater decision-making?

31. There are currently various mechanisms available for Māori to participate in freshwater decision-making. The scope of these mechanisms ranges from consultation (seeking feedback from Māori) to empowerment (granting Māori decision-making powers). Likewise, the level of difficulty in enacting these mechanisms, and the extent to which they have been used in practice, varies greatly.
32. Some of these are common mechanisms available in the RMA, the LGA and the Local Electoral Act 2001 (LEA). Separate mechanisms exist for involving Māori in customary fisheries management under the Fisheries Act 1996 and associated regulations for customary and amateur fishing. Others have been introduced through Treaty settlement legislation, or are voluntary measures entered into by local authorities and hapū/iwi.
33. For simplicity’s sake, the following stocktake of existing mechanisms does not include those for ‘informing’ Māori, on the basis that they do not provide any appreciable level of involvement in the freshwater governance system.

Current legislative mechanisms

34. The RMA and LGA include some general provisions regarding Māori values and decision-making. Part 2 of the RMA requires those exercising functions under the act to:
 - Recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga (section 6);
 - Have particular regard to kaitiakitanga (section 7); and
 - Take into account the principles of the Treaty of Waitangi (section 8).
35. The LGA requires local authorities to provide opportunities for Māori to contribute to local government decision-making processes. It also requires them to consider ways in which it may foster the development of Māori capacity to contribute to decision-making processes, and to discuss these in its long-term and annual plans.¹³
36. The RMA, LGA, LEA and the Fisheries Act 1996 (and associated regulations) also contain a number of specific mechanisms designed to involve Māori in

¹³ LGA Part 6 Section 81, Schedule 10 Part 1 (8), Schedule 10 Part 3 (35)

freshwater decision-making. These are described in more detail in **Appendix 3**. Some key mechanisms include:

- *Consult*: National policy statements and environmental standards, regional and district policy statements / plans, resource consent applications
 - *Collaborate*: Collaborative planning process, joint committees, Māori hearing commissioners, temporary closures of fishing areas or restrictions on fishing methods
 - *Partner*: Mana Whakahono ā rohe, joint management agreements, Māori constituencies and wards, taiāpure, mātaimai
 - *Empower*: Transfer of powers.
37. As a general rule, the mechanisms at the lower end of the engagement spectrum (consult / collaborate) are used far more often than those at the higher end (partner / empower). Furthermore, the mechanisms in the 'collaborate' and 'partner' category are more often pursued through Treaty settlement negotiations (in particular joint committees and joint management agreements) or custom legislation (in particular Māori constituencies and wards).
38. To date, only one regional council has agreed to transfer powers to Māori.¹⁴
39. The NPSFM provides local authorities with specific direction on how the provisions in the RMA should be applied in respect of freshwater. It requires regional councils to 'give effect to' Te Mana o te Wai and actively involve tangata whenua in freshwater management and decision-making, including the value-setting process (such as through a compulsory mahinga kai value). It also requires them to report on how they are investigating the potential use of joint management agreements and transfers of power under the RMA.

Treaty settlement mechanisms

40. Over the last two decades, Treaty settlement negotiations have resulted in a significant number of bespoke mechanisms to recognize Māori relationships with their freshwater taonga and involve Māori in decision-making for those taonga. These mechanisms have significantly changed the face of the freshwater governance system in New Zealand. Some mechanisms, such as granting legal personhood to a natural resource, have attracted international interest for their innovation and novelty.
41. Treaty settlements employ a wide range of mechanisms, depending on the type of environmental taonga, the aspirations of the settling group, and the nature of any community relationship with / use of the taonga. A summary of some of the more common mechanisms are set out in **Appendix 4**.

¹⁴ The Waikato Regional Council recently agreed to transfer the monitoring of summer bathing beaches, regional rivers, rainfall and groundwater quality within the Lake Taupō catchment to the Tūwharetoa Māori Trust Board.

42. Some of the themes that emerge from the range of settlements and mechanisms used to-date are:
- *The degree of involvement in freshwater decision-making varies considerably.* Some mechanisms involve Māori in the co-governance or co-management of particular freshwater taonga, while others (such as statutory acknowledgements) merely ensure that the settling group is consulted on consent applications and other RMA functions that concern their taonga. A variety of mechanisms fall between the two (such as advisory groups, appointments to council committees, and joint committees).
 - *Mechanisms can sit 'inside' or 'outside' the existing freshwater governance system.* Some mechanisms, such as joint committees and joint management agreements, make use of existing provisions within the RMA and the LGA. Others, including bespoke co-governance bodies and legal frameworks (such as legal personhood), sit 'outside' the system and 'plug-in' in a variety of ways (such as the high legal weighting given to the visions, strategies and values identified by these bodies or frameworks).
 - *Multiple mechanisms are required to build an ongoing and durable Treaty relationship.* No single mechanism is likely to meet the Crown's Treaty obligations or the aspirations of the settling group. Settlements therefore include a mixture of mechanisms, ranging from decision-making roles, statutory acknowledgements, relationship agreements, early engagement commitments, and resourcing.
 - *Treaty settlements are being used to achieve what existing mechanisms sometimes fail to do.* Treaty settlements are being used to establish co-governance and co-management arrangements due to the barriers to achieving these through existing mechanisms in the RMA. In recent years, Treaty settlements have begun to include agreements to collaboratively develop customary fishing regulations for the same reason (i.e. Waikato River iwi, Whanganui River iwi).

Voluntary agreements / statutory mechanisms entered into outside of Treaty settlements

43. Māori and local authorities have entered into a variety of relationship agreements, memoranda of understanding, and advisory boards outside of any Treaty settlement or legislative provision to better involve Māori in freshwater decision-making. These are too numerous to be discussed here, but are summarized in the Crown's closing submissions to the Waitangi Tribunal in stage two of the Freshwater and Geothermal Resources inquiry

(Wai 2358 stage two).¹⁵ Some of these are also discussed in a 2017 report by Local Government New Zealand (LGNZ).¹⁶

44. In rare instances, custom legislation outside of Treaty settlements has been used to improve Māori involvement in freshwater decision-making. The Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001 establish three Māori constituencies on the regional council. The Local Government (Auckland Law Reform) Bill 2009 established an Independent Māori Statutory Board to monitor the performance of the new Auckland unitary authority under Te Tiriti and to assist with the development of planning documents.

¹⁵ [Wai 2358, #3.3.46\(a\)](#)

¹⁶ LGNZ, *Council-Māori Participation Arrangements: Information for councils and Māori when considering their arrangements to engage and work with each other*, June 2017 – see chapters 3 and 4.

Part Two: Where we might be going

What has the Waitangi Tribunal said about the role of Māori decision-making in a Treaty-compliant freshwater governance system?

Wai 262

45. In its report on the inquiry into indigenous flora and fauna (the Wai 262 report), the Tribunal found that a Treaty-compliant environmental management regime is one that is capable of delivering a sliding scale of Māori decision-making in respect of their environmental taonga:¹⁷
- *Control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority
 - *Partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard
 - *Effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.
46. The Tribunal recommended that this be achieved in a number of ways, including amendments to the RMA to strengthen the weight of iwi management plans and remove barriers to joint management agreements and transfers of power, stronger national direction, and resourcing Māori participation (see **Appendix 5** for more information).

Wai 2358

47. The Tribunal built upon its recommendations in the Wai 262 inquiry in the Wai 2358 stage two report.
48. At a national level, the Tribunal recommended that there should be an independent national body established on a co-governance basis with Māori, with its scope and functions to be negotiated and decided by the Treaty partners. At a minimum, the Tribunal recommended that its role should be to ensure that Treaty principles and Māori values, rights and interests are fully incorporated in freshwater policy and management.
49. If a co-governance body is not established, the Tribunal suggested that future freshwater policy should be co-designed with an existing national Māori body or bodies, such as the Iwi Leaders Group (ILG), the New Zealand Māori Council (NZMC), and KWM.¹⁸

¹⁷ Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wellington: Legislation Direct, 2011), Volume 1, pp 285-286

¹⁸ Waitangi Tribunal, *Stage two report on the national freshwater and geothermal resources claims* (Wellington, Legislation Direct, 2020), pp 558-559

50. The Tribunal made a number of recommendations concerning freshwater decision-making at a regional and local level, which are set out in detail in **Appendix 5**. Some of its key recommendations were:
- Including Te Mana o te Wai in section 6 of the RMA as a matter of national importance that must be recognised and provided for by decision makers
 - Revising section 8 of the RMA to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the RMA
 - Removing the statutory and practical barriers to the use of joint management agreements and transfers of power in the RMA.

What is the Crown's position on Māori involvement in freshwater decision-making?

The Crown acknowledges that Māori have rights and interests in freshwater, including a role in decision-making

51. The Crown has acknowledged that Māori have rights and interests in freshwater, and that this includes a role in decision-making. This acknowledgement has been made through a number of fora (including Ministerial commitments, public discussion documents, and evidence and submissions before the Waitangi Tribunal). The clearest acknowledgement was made by the then Deputy Prime Minister Bill English before the Supreme Court in November 2012 in the context of the Mixed Ownership Model litigation:

The recognition of rights and interests in freshwater and geothermal resources must, by definition, involve mechanisms that relate to the ongoing use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use.¹⁹

52. Many national Māori groups have used this acknowledgement as a 'yardstick' to measure whether or not the Crown is upholding its commitment to address Māori rights and interests in freshwater.

The Crown must uphold the principles of Te Tiriti

53. The Crown recognizes that it must uphold the principles of Te Tiriti. However, its obligations under these principles are not absolute and unqualified. Case law has identified three broad Treaty principles that the Crown must uphold:
- *Partnership*: Both the Crown and Māori have a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

¹⁹ Affidavit of Simon William English in opposition to application for judicial review, 7 November 2012 (filed in *Pouakani Claims Trust v Attorney-General*, CIV-2012-485-2185), paras 28, 29, 38.

- *Active protection*: The Crown has a positive duty to protect Māori property interests and taonga.
 - *Redress*: Past wrongs give rise to a right to redress.
54. In order to act consistently with these principles, the Crown must undertake early due diligence to properly understand the nature of the right or interest claimed or established, to weigh that material with any wider or competing rights or interests, and to make informed decisions that are reasonable in the prevailing circumstances.

The Crown has responsibilities to a wide variety of stakeholders

55. Māori are Treaty partners to whom the Crown holds certain duties and obligations above and beyond other New Zealanders. They are not simply one stakeholder among many.
56. However, the Crown must also consider the interests of a variety of stakeholders in the way that freshwater is governed in New Zealand. These include environmental, conservationist, community, recreational, and economic interests. It must also operate within a legal framework that is centred on the protection of private property rights.
57. Since the advent of the RMA, the Crown has also maintained that decisions affecting local communities should be devolved as much as possible to those local communities, including Māori, as this is where the critical knowledge of local circumstances is held. This is primarily a legacy of the economic and political decentralization of the 1980s, although there is a broader tradition of local government decision-making in New Zealand.

Some progress has been made in improving Māori involvement in freshwater decision-making

58. Between 2014 and 2017, the Crown worked with the ILG to develop and implement several policies to improve Māori involvement in freshwater decision-making. This included the addition of Te Mana o te Wai and Part D to the NPSFM, and amending the RMA to include Mana Whakahono ā Rohe.
59. The Tribunal congratulated the Crown on its innovative process of co-designing freshwater policy proposals with a national Māori body during this period. However, it found that the outcomes of this co-design process were disappointing, due primarily to the Crown reserving the final power of decision-making. It criticised the Crown for dismissing most of the proposals that were developed through this co-design process, including removing barriers preventing the use of joint management agreements and transfers of power, strengthening Part D of the NPSFM, and adequately resourcing Māori to participate at all levels of freshwater management.²⁰

²⁰ Waitangi Tribunal, *Stage two report on the national freshwater and geothermal resources claims* (Wellington, Legislation Direct, 2020), pp 532-544

The Crown is open to a water commission

60. The Crown's position in Wai 2358 on a national water commission was that it is open to exploring all options to better provide for a Māori-Crown partnership.²¹ However, it noted that there are multiple matters that need to be considered before fundamentally changing the freshwater governance system, in particular:

- The connections between water and land issues, and the potential effects of separating out one from the other
- Ensuring that decision-making occurs at a local level, and is sufficiently informed by local knowledge.

Future reforms may improve Māori involvement in decision-making

61. The proposed new Water Services Regulator Bill will require Taumata Arowai – the new water services regulator – to give effect to Te Mana o te Wai. The Taumata Arowai board must also have members who have knowledge and experience of, and capability in, the Treaty of Waitangi and its principles, perspectives of Māori and tikanga Māori. It would also establish a Māori Advisory Group to advise on Māori interests and knowledge (which the board must have regard to), as well as several operating principles regarding building credibility and integrity and partnering and engaging early with Māori.²²

What did the Resource Management Review Panel say about Māori involvement in freshwater decision-making?

62. Cabinet has committed to a comprehensive review of the resource management system, focusing primarily on the RMA and its connections with other relevant legislation (such as the LGA).
63. An independent Resource Management Review Panel (RMRP) issued a report in July 2020 recommending that the RMA be replaced by a new Natural and Built Environments Act and a Strategic Planning Act. Their recommendations concern the entire resource management system, not just freshwater.
64. The RMRP made a number of recommendations concerning Te Tiriti and Te Ao Māori, many of which align with the Waitangi Tribunal's recommendations in the Wai 262 and Wai 2358 reports (see **Appendix 7**). These include strengthening the wording regarding the principles of Te Tiriti, removing the barriers to using the transfer of power provisions and joint management agreements, and resourcing Māori to participate in freshwater management processes.

²¹ Wai 2358, #3.4.20

²² See the draft Taumata Arowai Bill:

<http://www.legislation.govt.nz/bill/government/2019/0202/latest/whole.html#LMS294345>

65. In addition, the RMRP recommended measures to improve system oversight, monitoring and auditing at a central level, with additional functions divided between the Ministry for the Environment and the Parliamentary Commissioner for the Environment. However, they also recommend that local authorities should retain primary responsibility for data gathering and system monitoring at the local level. They also recommend the establishment of new regional hubs to undertake compliance, monitoring and enforcement at a local level (see **Appendix 9**)
66. Post-release of the RMRP report, Cabinet has agreed to ‘a broad, open process of public consultation, and that it will ‘look for appropriate opportunities to collaboratively refine and co-design policy options with Māori’.²³ This will not occur until after the election, and will depend on the priorities of the incoming Government.

What have Māori and non-Māori organisations said about involving Māori in freshwater decision-making?

67. **Appendix 6** provides a summary of what various national-level Māori organisations have said about involving Māori in freshwater decision-making at a national, regional and local level. It also outlines what various hapū, iwi and other Māori organisations have said through the summaries of submissions on the *Action for Healthy Waterways* discussion document and the Resource Management Review Panel’s *Issues and Options* paper.
68. A number of non-Māori organisations have commented on the concept of a national commission of some kind. These are also summarized in Appendix 6.

At a regional and local level

69. The organisations do not generally differentiate between regional and local level processes. All agreed, however, that freshwater co-governance is the minimum standard required by Te Tiriti, and that this should involve a 50/50 arrangement.
70. They differed slightly in their views on how to achieve this. Most favoured removing barriers preventing the use of existing mechanisms, such as joint management agreements and transfers of power, while some favoured introducing new mechanisms (such as regional catchment boards). Others suggested the need to strengthen the wording in section 8 of the RMA from ‘take into account’ to ‘give effect to’ the principles of the Treaty.
71. The need to resource Māori to participate in freshwater decision-making processes was a common theme.

²³ CAB-19-MIN-0585.01, paras 9-10

At a national level

72. Almost all of the organisations support the establishment of some form of independent national water (or water and land) body or commission. The recommended functions for such a body varied broadly between the different organisations; however, some of the commonly suggested functions were:
- Providing oversight of agencies performing functions under the Resource Management Act (RMA), and monitoring system performance and progress in general
 - Presenting a national voice in regional resource management processes, such as reviewing draft or notified plans, participating in hearing proceedings for notified plans, and ‘calling in’ local matters that are of national significance
 - Developing national directions and other central regulations, or being consulted on their development
 - Providing guidance and support to agencies within the environmental system on planning, science, mātauranga, and Tiriti matters
 - Developing and/or managing a new water allocation regime that upholds Māori proprietary rights in freshwater.
73. A Water Commission is not universally supported within Māoridom. Both the Iwi Leaders Group (ILG) and Ngāi Tahu argue that the Crown should be dealing with the relevant iwi authorities in each catchment to manage and regulate water rather than establishing a national body. Ngāi Tahu believe a Water Commission is inconsistent with their tribal rangatiratanga, and would not be able to resolve specific catchment-level issues such as over-allocation, degraded water quality and hydro-generation.²⁴

²⁴ Te Rūnanga o Ngāi Tahu submission on the Action for Healthy Waterways discussion document, 7 November 2019, para 4.16; ILG closing submissions in stage two of the Waitangi Tribunal’s National Freshwater and Geothermal Resources inquiry, Wai 2358, #3.3.41, para 53

Part Three: Appendices

Appendix 1: Māori obligations to wai – a brief summary²⁵

The whakapapa of wai

74. Whakapapa is the web of kinship that binds all things. It is the foundation of mātauranga Māori, or the Māori way of knowing and understanding the world. Whakapapa enables Māori to position themselves in an extended genealogy that encompasses all things in the terrestrial and spiritual worlds. This web of kinship is described as whanaungatanga, and it is a defining principle in Te Ao Māori.
75. Whakapapa connects all things across time. It emerges from creation, when Te Ao Mārama (the world of light) emerged from Te Kore (the void, the realm of possibilities) and Te Pō (the darkness).²⁶ It incorporates Ranginui and Papatūānuku, and the children huddled between them in their tight embrace. When Tāne Mahuta forcibly separated his parents to bring light into the world, he and his siblings became free to preside over different aspects of the environment. Tāne Mahuta is also widely credited for having shaped the first woman from the soil of Papatūānuku, Hineahuone, and making her his wife. All of humanity descends from this coupling.
76. Fresh water is part of this whakapapa. It is the connective tissue between Ranginui and Papatūānuku, an expression of their grief at having been forever parted. Ranginui's tears fall from the sky in the form of rain, creating the many states of liquid water from the mountains to the sea, including rivers and lakes. Papatūānuku's sighs of longing rise from her breast to the heavens in the form of mist, creating an endless cycle of renewal.
77. Whakapapa connects Māori with all aspects of this web of kinship, including water. As a result, many hapū, whānau and iwi describe their rivers as tūpuna, or ancestors. As the whakataukī of the Whanganui River people goes, 'ko au te awa, ko te awa ko au (I am the river and the river is me)'.

The obligations of whakapapa

78. All living things within the web of whakapapa are infused with mauri, an energy or force from the spiritual realm that energises all things in the living world. Mauri, in turn, enables mana to flow into the world.
79. Mana, which can loosely be translated as status, authority, power, influence and prestige, comes in many forms. It is inherited through whakapapa from the Ātua, but it is also strengthened or weakened by the integrity of one's actions. Traditionally, the ability to exercise mana over land and natural

²⁵ This section outlines my understanding as a Pākehā New Zealander / tangata Tiriti. It cannot substitute for the diverse traditions of hapū and iwi across NZ, or the scholarly work of Māori academics like Māori Marsden, Charles Royal, and Hirini Mead, which I highly recommend reading.

²⁶ There are multiple stages in this process, and the sequences vary between some iwi/hapū.

resources was established by whakapapa, and reinforced through conquest, occupation and use. Ahi ka, or the continued fires of occupation, are an expression of mana whenua.

80. Water bodies, as tūpuna, possess their own mana. This is embodied in concepts such as 'Te Mana o te Awa' (used in the Waikato River Settlement) and 'Te Mana o te Wai' (used in the National Policy Statement for Freshwater Management).
81. Tapu is a concomitant of mana. It is a set of restrictions, disciplines and commitments that must take place if mana is to be expressed in physical form, such as in a person or object.
82. The exercise of mana is qualified by the responsibilities associated with kaitiakitanga. Kaitiakitanga is an expression of whanaungatanga, or the kinship ties between Māori and the environment. It requires those who exercise mana over natural resources to do so in a way that protects and preserves them for current and future use. Mana and kaitiakitanga go together as right and responsibility.

Māori authority over freshwater prior to 1840

83. Prior to 1840, Māori held sole authority and control over the use of, and access to, New Zealand's freshwater. Rivers, lakes and other water bodies, including their banks, beds, fisheries and flora and fauna, were part of the rohe over which different tribal groups held mana whenua. They were taonga, prized for their ability to provide for spiritual and physical nourishment.
84. The kinship ties of whakapapa often resulted in a complex network of overlapping use and access rights to rivers, lakes, and other water bodies. This network determined which water bodies each hapū, whanau and iwi could or could not access, at what times, and for what purposes (including drinking, washing, ceremonial uses, fishing, and navigation).
85. Mana and kaitiakitanga were (and continue to be) expressed through the use of customary laws and practices, or tikanga. Chief among these were rāhui, or ritual prohibitions on the use of a particular resource. Rāhui may be imposed to conserve a scarce or diminishing resource, or because an area enters a state of tapu (due, for example, to a death in the area).

The guarantees of Te Tiriti

86. The Māori version of the Treaty guaranteed Māori their tino rangatiratanga (or the unqualified exercise of their chieftainship) over their lands, villages, and all their taonga.²⁷ The English version guaranteed Māori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, until such time as the individually or collectively

²⁷ Sir Hugh Kawharu's English translation of the te reo Māori version of the Treaty of Waitangi. In Michael Belgrave et al., *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed. (Oxford University Press, 1989).

agreed to part with them. According to the Waitangi Tribunal, the Treaty ‘confirmed, guaranteed and protected’ Māori authority and control over their water bodies, save to the extent that there was an expectation that the waters would be shared with incoming settlers.²⁸

87. In practice, Māori customary authority and control over water bodies remained the status quo for some time after 1840, particularly in areas where the Crown’s presence was limited or non-existent. For example, missionaries, explorers and travelers had to secure approval from rangatira to navigate and use the rivers they traversed on their journeys. Some rangatira even charged tolls for river passage. One Wesleyan missionary station in Mōkau observed in 1846 that local Māori ‘never dream ... they would lose their chieftainship in the river.’²⁹
88. There are countless examples of Māori exercising (or attempting to exercise) authority over their freshwater taonga in the nineteenth and twentieth centuries. In 1862, when the Governor proposed to put an iron steamer on the Waikato River, the editor of the Kingitanga newspaper wrote that “‘E hara a Waikato awa i a te kuini, erangi no nga Maori anake”. (The Waikato River does not belong to the Queen of England, it belongs only to Maori).’ In 1876, Te Keepa Rangihwinui cautioned the Whanganui Harbour and River Conservation Board against altering the traditional flow of the Whanganui River:

My ancestors downwards, have been in the habit of frequenting these waters of the ancient Pa of Putiki wharanui. The right passage for the waters of the Wanganui to take is that through Te Patapu, which is now being closed by the European. If you persist in closing up the passage naturally sought after by the contending waters of the Wanganui, the money of the Government spent thereon will float to the sea and be lost sight of. In the ancient days, before the memory of living man, this was the course taken by the Wanganui. Therefore, I advise you, let the waters seek their ancient outlet by the direct channel of my ancestor, Rere o Maki, to nature’s outlet.³⁰

89. In the twentieth century, Māori waged several legal battles in the Māori Land Court and the superior courts to secure title to the beds of several lakes and rivers. In the 1929 decision regarding Lake Ōmāpere – the only case in New Zealand to-date where Māori were expressly awarded title both to the lake bed and the water contained in the lake – the Judge commented upon the holistic way that Māori viewed their freshwater taonga:

The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of

²⁸ *The stage one report on the National Freshwater and Geothermal Resources claim* (Legislation Direct, 2014), p 81

²⁹ Matthew Cunningham, *The environmental management of the Mōkau River mouth* (Wai 898, #A149), 2014, p 13

³⁰ Waitangi Tribunal, *The Whanganui River report* (Wellington: GP Publications, 1999), p 180.

his own lakes. A lake is land covered with water, and it is part of the surface of the country in which it is situated, and . . . it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a stream

...

To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.³¹

90. Māori authority and control over freshwater is sometimes described as mana whakahaere. The preamble to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 describes mana whakahaere as 'the authority that Waikato-Tainui and other River tribes have established in respect of the Waikato River over many generations, to exercise control, access to and management of the Waikato River and its resources in accordance with tikanga (values, ethics and norms of conduct).'

³¹ Bay of Islands Native Land Court minute book 11, 1 August 1929, p 7

Appendix 2: The current freshwater governance system

A potted history of freshwater governance in New Zealand

91. The history of freshwater governance in New Zealand can be broadly summed up as the steady expansion of Crown intervention via statute law, and the subsequent overruling of certain common law rights. This expansion usually occurred for one of three reasons:

- To support particular uses of freshwater (such as gold mining, wastewater discharge and farming);
- To explicitly vest certain common law rights in the Crown (especially where there was doubt that the Crown possessed such rights); or
- To respond to pressing crises (such as flooding, pollution, and overallocation / overuse).

92. Following the signing of Te Tiriti, the Crown generally assumed that the common law, which emphasized individual property rights, had superseded Māori authority over freshwater. Then, as now, the common law treated the beds of water bodies (such as rivers and lakes) separately from the water contained in those bodies:

- Rights to the beds of water bodies are conveyed through the common law presumption of *ad medium filum aquae*, which assumes that riparian landowners hold rights over the beds of lakes and rivers to the middle of the water body³², except where legislation overrides these rights.³³
- The water itself is treated under common law as a common property resource that cannot be owned by anyone (a presumption known as *publici juris*).³⁴ This presumption has not been tested in a New Zealand court setting, and there is precedent for Māori being granted ownership of water.³⁵

³² However, the 2014 Supreme Court ruled in *Paki v Attorney-General (No 2)* that *ad medium filum aquae* only applies when it is consistent with Māori custom. In addition, many Māori groups successfully rebutted the *ad medium filum aquae* presumption as it relates to lake beds during the twentieth century, with the result that the beds of many lakes are now owned by Māori. The common law is therefore less clear regarding lake bed ownership.

³³ Such as (1) the Coal Mines Amendment Act 1903, which vests the bed of navigable non-tidal rivers in the Crown, (2) the Marine and Coastal Area Act, which clarifies that the beds of rivers that are part of the coastal marine area are owned by no-one, and (3) certain Treaty settlement legislation, such as Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, that includes provisions vesting riverbed ownership in specific organisations.

³⁴ Except where water has been ‘appropriated’ (i.e. taken into possession, such as in a pipe, tank or cistern)

³⁵ The trust order setting aside Lake Ōmāpere as a Māori reservation vests both the lake bed ‘and the waters thereon’ in the Lake trustees. See *The stage one report on the National Freshwater and Geothermal Resources claim* (Legislation Direct, 2014), pp 39-42. Crown legal advice in the 1960s also suggested that, in the case of Lake Waikaremoana, Māori ownership of the lake bed could imply that the lake water was

- While no one can own the water, owners of riparian land (land adjoining a water body) accrue certain rights to use the water as it passes by their land. These rights have largely been extinguished through subsequent statute (see below).

93. In the nineteenth century, the Crown's statutory approach to freshwater was localised and piecemeal. Starting from 1842³⁶, legislation was passed to give local authorities (such as provincial councils, town districts, county and borough councils) the power to divert or dam rivers, extract water for supply, build sewers and discharge wastewater to rivers. This period also saw the first water rights issued to support the gold mining industry in Central Otago. Legislation was also passed to manage timber floating, and the damage this often caused to structures on river beds (including eel weirs).

94. In the late nineteenth century, legislation was passed that allowed local ratepayers to petition the Government to establish river and drainage boards in their districts. River boards were responsible for carrying out flood control and other works, and drainage boards were empowered to drain wetlands or divert waterways to create arable farmland. The latter had a particularly drastic effect on Māori through the loss of wetland fisheries.

95. In the early twentieth century the Crown passed two statutes that overrode aspects of the common law relating to freshwater. The first, the Water Power Act 1903, vested in the Crown the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power. This was later repealed after it was made redundant by the passage of the Water and Soil Conservation Act 1967 (see below). The second, the Coal Mines Amendment Act 1903, explicitly vested the beds of all navigable rivers in the Crown:

Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

96. This act overrode the common law presumption of *ad medium filum aquae* as it pertained to navigable rivers (although the definition of 'navigable' has been the subject of dispute in subsequent case law).³⁷

97. In 1953, the Crown also vested in itself the sole right to tap and use geothermal energy through the Geothermal Energy Act.

also owned by Māori while it remained in the lake. See David Alexander, 'Lake Waikaremoana: a case study of its waters' (Wai 2358, #D29, pp 28-30).

³⁶ With the passage of the Municipal Corporations Ordinance of 1842

³⁷ However, as noted above, the Supreme Court suggested in *Paki v Attorney-General (No 2)* that this may not have been sufficiently explicit to extinguish aboriginal title to navigable river beds. If it did, however, the possibility remains open for future litigation that it was a confiscatory measure for which the Crown owes compensation to Māori.

98. From the middle of the twentieth century the Crown began to enact legislation that considered entire rivers and catchments more holistically. The Soil Conservation and Rivers Control Act 1941 enabled the establishment of catchment boards to combat soil erosion and undertake flood protection works. The Water Pollution Act 1953 established a Pollution Advisory Council to carry out investigations and surveys on water pollution and compile model by-laws for local government. Its powers were increased in 1963 to allow it to actively monitor and control water pollution through discharge permits and a series of water classifications.
99. The Water and Soil Conservation Act 1967 brought together a number of freshwater-related functions for the first time. It also expressly vested the following rights in the Crown (which were later preserved in RMA):
- Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water is hereby vested in the Crown subject to the provisions of this Act:
- Provided that nothing in this section shall restrict the right to take, divert or use sea water:
- Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has responsibility and for or in connection with firefighting purposes.
100. This allowed the Crown to delegate to new Regional Water Boards the right to issue water rights to dam, divert, use, or discharge to waters. It overrode many of the common law rights formerly held by riparian landowners, although the Waitangi Tribunal has noted that this was unlikely to have been clear and plain enough to extinguish aboriginal title.
101. The Resource Management Act 1991 (RMA) brought together a number of resource management and environmental protection functions which were previously administered under some 70 different acts. The duties and functions of Regional Water Boards were absorbed into the new regional councils that had been established in 1989.

A hierarchy of legislation, regulation and planning documents

102. The RMA sets out requirements that local government needs to meet, processes they need to follow and issues they need to consider when making decisions about the use of natural resources.
103. Central government is empowered under the RMA to issue regulations providing more specific direction on how local authorities are expected to carry out their statutory responsibilities for managing natural resources. For freshwater, the current regulations are the *National Policy Statement for Freshwater Management (2020) (NPSFM)*, the *National Environmental Standard for Freshwater, Section 360 regulations* relating to stock exclusion, and the *National Environmental Standard for Sources of Human Drinking Water (2007)*.

104. The NPSFM requires regional councils to identify what is valued about a certain water body, in discussions with their communities (including tangata whenua). Values identified must then inform the setting of freshwater objectives and limits in regional plans. The NPSFM provides local authorities with specific direction on how the provisions in the RMA should be applied in respect of freshwater. It requires regional councils to 'give effect to' Te Mana o te Wai and actively involve tangata whenua in freshwater management and decision-making, including the value-setting process (such as through a compulsory mahinga kai value). It also requires them to report on how they are investigating the potential use of joint management agreements and transfers of power under the RMA.
105. Work is underway as part of the Three Waters Review to introduce new national environmental standards for drinking water and wastewater.
106. Regional councils are required to prepare *Regional Policy Statements* and *Regional Plans* describing the resource management issues in the region and outlining how the management of natural resources will be implemented. These documents must uphold councils' statutory obligations under the RMA and 'give effect to' all central government regulations.
107. Regional councils are also required under the LGA to prepare *Annual Plans* setting out the council's current activities, budget, and rates schedule, and *Long Term Plans* to outline how the council intends to meet the objectives and outcomes set in Regional Plans over a ten-year period.
108. Regional councils often prepare non-statutory plans to meet specific local requirements, such as catchment plans and flood management plans.
109. Territorial authorities are responsible for preparing *District Plans* setting out rules that govern land-based activities in their area.
110. Regional councils and territorial authorities process individual *resource consent applications*, which are subject to the provisions of the RMA, national regulations, and regional and district plans. These plans classify activities into three categories: permitted; controlled, discretionary or non-complying; and prohibited. Under the first category, no resource consent application is required, while under the second category, resource consent is required. Prohibited activities cannot be undertaken.

Touch-points where central government may intervene in local matters

111. *Water Conservation Orders*, which pre-date the RMA, allow any person to submit an application to 'recognise and sustain' waterways of outstanding amenity or intrinsic values. The Minister then decides whether or not to appoint a special tribunal (in consultation with the Minister of Māori Development and the Minister of Conservation) to consider the application.
112. *Matters of National Significance*. Under part 6AA of the RMA, the Minister for the Environment has the authority to refer a proposal of national significance directly to the Environment Court or a board of inquiry. This can include

resource consent applications, applications for changes to or cancellation of resource consent conditions, local authority plan changes or variations, requests for plan changes, requests for the preparation of regional plans, and notices of requirement.

Other aspects of the freshwater governance system

113. The purpose and framework for local government authorities, including principles and requirements for engaging with Māori, are contained in the LGA. Provisions for establishing Māori constituencies and wards are contained in the LEA.
114. The *Ministry for Primary Industries* (MPI) is responsible for administering all freshwater fisheries (excluding sports fish and whitebait) under the Fisheries Act 1996 and associated regulations for customary and amateur fishing.
115. The *Department of Conservation* (DOC) is responsible under section 6A of the RMA for preserving all freshwater fisheries and for protecting indigenous freshwater fish, and protection of the recreational freshwater fishery. As part of this, it is tasked with managing whitebait fishing under the Whitebait Fishing Regulations 1994. DOC also manages a significant amount of riparian land held in the conservation estate.
116. The *Environmental Protection Authority* (EPA) is responsible for managing proposed matters of national significance.
117. The *Office of the Auditor-General* (OAG) and the *Parliamentary Commissioner for the Environment* (PCE) assess and audit the performance of public entities, including their environmental performance, under the Public Audit Act 2001 and the Environment Act 1986 respectively (although MfE and Te Puni Kōkiri also have an auditing function).
118. *Crown Research Institutes*, such as Manaaki Whenua and the National Institute of Water and Atmospheric Research (NIWA), produce research on freshwater issues, land use, and other environmental impacts, and help to maintain national monitoring databases such as the National River Water Quality Network and Land Air Water Aotearoa.

Appendix 3: Current legislative mechanisms for Māori to participate in freshwater decision-making

General legislative requirements

The RMA

119. The RMA introduced aspects of tikanga Māori into statute law for the first time. It requires those exercising functions under the act to:
- Recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga (section 6);
 - Have particular regard to kaitiakitanga (section 7); and
 - Take into account the principles of the Treaty of Waitangi (section 8).
120. While these provisions do not in themselves relate to involving Māori in freshwater decision-making, they set legal requirements that those exercising functions under the RMA must meet. The wording in each of these provisions has different legal weighting. In general terms, ‘recognise and provide for’ imposes the strongest level of obligation of the three sections, while ‘take into account’ is the weakest.
121. The principles of the Treaty are largely defined by case law. The duties on the Crown include:
- To act in good faith, reasonably and honourably towards its Treaty partners; and
 - To undertake early due diligence to inform itself about Māori property interests and taonga, and actively protect those interests.
122. The Waitangi Tribunal is empowered with the exclusive authority to determine the meaning and effect of the Treaty as embodied in the Māori and English texts, and to make recommendations on claims relating to the practical application of the principles of the Treaty.³⁸ The Tribunal’s definition of the principles of the Treaty are typically much broader than those described in case law. However, its recommendations are not binding on the Crown, with the exception of certain forms of Treaty breach remedies.
123. There is some debate over whether the requirement to ‘take into account’ the principles of the Treaty is sufficient enough to impart the Crown’s Treaty obligations to local authorities when exercising functions under the RMA. The Waitangi Tribunal recommended that section 8 be amended to state that ‘the duties imposed on the Crown in terms of the principles of the Treaty of

³⁸ Treaty of Waitangi Act (1975, No. 114), preamble and section 5(2)

Waitangi are imposed on all those persons exercising powers and functions under the Act'.³⁹

The LGA

124. The LGA requires local authorities to provide opportunities for Māori to contribute to local government decision-making processes. It also requires them to consider ways in which it may foster the development of Māori capacity to contribute to decision-making processes, and to specify these in its long-term plan.⁴⁰ Annual reports must comment on the activities that the local authority has undertaken in the year to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority.⁴¹

Fisheries legislation and regulations

125. Under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Crown must provide for Māori non-commercial, traditional and customary fishing rights and interests and must also provide for Māori participation in management and conservation of New Zealand's fisheries. The Fisheries Act 1996 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998 introduced several other customary fishing management tools: taiāpure-local fisheries, temporary closures/method restrictions, tangata kaitiaki, and mātaihai.

126. These tools are designed to give effect to the obligations stated in Section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to 'develop policies to help recognize use and management practices of Māori in the exercise of non-commercial fishing rights'.⁴²

Specific mechanisms in the current legislative framework

127. The current mechanisms in the RMA, the LGA, the LEA and the Fisheries Act 1996 and associated regulations are set out in the Table 5 below, and assessed against Te Arawhiti's guidelines for engagement. This table does not include voluntary measures or mechanisms introduced through Treaty settlement legislation, which are discussed elsewhere in this paper.

³⁹ Waitangi Tribunal, *Stage two report on the national freshwater and geothermal resources claims* (Wellington, Legislation Direct, 2020), p 559

⁴⁰ LGA Part 6 Section 81, Schedule 10 Part 1 (8)

⁴¹ LGA Schedule 10 Part 3 (35)

⁴² Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, (1992 No. 121), Section 10

Table 5: Current mechanisms for engaging with Māori regarding freshwater in the RMA, LGA, LEA, and the Fisheries Act

Engagement method	Kaupapa	Legislation	Description	Comments / examples
Consult	National policy statements and environmental standards	RMA Section 46A(4)	<p>When proposing to issue a national direction, the Minister for the Environment must:</p> <ul style="list-style-type: none"> • Give notice to iwi authorities of the proposal and why it is consistent with the purpose of the RMA • Give iwi authorities adequate time and opportunity to make a submission <p>Those tasked with reviewing submissions (whether a Board of Inquiry, officials, or other process) must produce a report and recommendations for the Minister for the Environment on these submissions and the subject matter of the national direction.</p>	
Consult	Regional and district policy statements / plans	RMA Schedule 1 Part 1(3)(1) and (3B)	<p>During the preparation of a proposed policy statement or plan, local authorities must consult the tangata whenua of the area who may be so affected through iwi authorities. Local authorities will be treated as having consulted with iwi authorities if it:</p> <ul style="list-style-type: none"> • considers ways in which it may foster the development of their capacity to respond to an invitation to consult • establishes and maintains processes to provide opportunities for those iwi authorities to consult it • consults with those iwi authorities • enables those iwi authorities to identify resource management issues of concern to them • indicates how those issues have been or are to be addressed. 	
		RMA Schedule 1 Part 1 (4A)	Prior to notifying a proposed policy statement or plan, local authorities must provide a copy of the draft to iwi authorities, ensure they have adequate time and opportunity to consider	

Engagement method	Kaupapa	Legislation	Description	Comments / examples
			and provide advice on it, and have particular regard to any advice provided.	
		RMA Section 32(4A)	Local authorities must produce an evaluation report summarizing all advice provided by iwi authorities, and the response to the advice (including any provisions intended to give effect to that advice)	
Consult	Regional policy statements / plans	RMA Section 61(2A)(a), 66(2A)(a)	Regional councils must take into account any relevant planning document recognized by an iwi authority when preparing or changing a regional policy statement or plan	Iwi management plans are the main form of 'relevant planning document' replied upon.
Consult	District plans	RMA Section 74(2A)	Territorial authorities must take into account any relevant planning document recognized by an iwi authority when preparing or changing a district plan, to the extent that its content has a bearing on the resource management issues of the district.	Iwi management plans also help local authorities work out which hapū/iwi to notify about resource consent applications (see below)
Consult	Resource consent applications	RMA Schedule 4 Clause 6(1)(f)	While applicants for resource consent are not required to consult any person (including Māori) ⁴³ , they must provide an assessment of environmental effects, which should identify the persons affected by the activity, any consultation undertaken, and any response to the views of any person consulted.	Māori participation in the freshwater management process occurs primarily during the resource consent stage. Some local authorities have agreements in place with Māori to inform them of all resource consent applications, including non-notified applications. The volume of resource consent applications to respond to can present significant capacity and capability issues for hapū/iwi.
		RMA Section 96	Māori may make submissions on resource consent applications that are publicly notified. If it is limited notified, Māori identified as affected persons may make submissions.	
		RMA Sections 108 and 127-133A	Conditions imposed by the consenting authority on the resource consent may require ongoing engagement with Māori.	

⁴³ RMA Section 36A

Engagement method	Kaupapa	Legislation	Description	Comments / examples
Consult	General decision-making by local authorities	LGA Part 6 Section 82(2)(c)	A local authority must ensure that it has in place processes for consulting with Māori in relation to any decision or other matter must be undertaken.	
Consult	Water conservation orders	RMA Part 9	<p>Any person may, upon payment of any prescribed fee, apply to the Minister for the making of a water conservation order in respect of any water body.</p> <p>The criteria for applications include providing for:</p> <ul style="list-style-type: none"> • Recreational, historical, spiritual, or cultural purposes • The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori. <p>The Minister for the Environment must decide either to reject the application or appoint a special tribunal to hear it. Before appointing a special tribunal, he/she must, where appropriate, consult with the Minister for Māori Development and the Minister of Conservation regarding the membership of the tribunal.</p> <p>The special tribunal must ensure that notice of the application is served on the relevant iwi authorities. However, any person may make submissions to the tribunal.</p> <p>The special tribunal must send its final report to relevant iwi authorities.</p>	
Collaborate	Collaborative planning process	RMA Schedule 1 Part 4(40)(1)(a)	A local authority may appoint a collaborative group to assist it to prepare or change a proposed policy statement or plan. If it does so, iwi authorities must appoint at least one member to represent the views of tangata whenua on the group.	Legislation only requires one iwi-appointed member on the collaborative group and the review panel.

Engagement method	Kaupapa	Legislation	Description	Comments / examples
		RMA Schedule 1 Part 4(46)	A local authority must work with the group to prepare the proposed policy statement or plan or change in a way that gives effect to the group’s consensus position.	Final decision-making power remains with the local authority, although it must provide justification if its decision does not reflect the collaborative group’s consensus view ⁴⁴ or the review panel’s recommendations.
		RMA Schedule 1 Part 4(51)	A local authority must prepare a report on the submissions received on the proposed policy statement or plan or change. It must provide invite comments on this report from the collaborative group and to tangata whenua of the relevant area through iwi authorities.	
		RMA Schedule 1 Part 4(65)(5)(b)	A local authority must appoint a review panel to hear submissions on the proposed policy statement or plan or change. The panel must include at least one member who: <ul style="list-style-type: none"> • Is appointed after consultation with tangata whenua through the relevant iwi authorities • Has an understanding of tikanga Māori and the perspective of tangata whenua. 	
Collaborate	Appointing Māori representatives on council committees / sub-committees	LGA Schedule 7 Part 1 (31)	A local authority may appoint Māori representatives to a committee or sub-committee.	Many councils have standing committees with Māori representation. Māori members can be full members with voting rights, or be observers, who generally have the right to speak but not vote. Depending on the composition of the committee, this provides a voice for Māori in decision-making, although the effect of

⁴⁴ The local authority can only disagree with the collaborative group’s consensus view in a proposal policy statement or plan or change if the consensus position would not comply with other provisions of the RMA.

Engagement method	Kaupapa	Legislation	Description	Comments / examples
				that can be diluted in larger committees. Local authorities retain control over the appointment of Māori representatives.
Collaborate	Joint committees	LGA Schedule 7 Part 1 (30-30A)	A local authority may appoint a joint committee as a subordinate decision-making structure.	Local authorities control the creation, membership, and disestablishment of joint committees. They also set directions on the committee's affairs. Joint committees are more often set up through Treaty settlement legislation (i.e. the Te Maru o Kaituna River Authority). The Rotorua Te Arawa Lakes Strategy Group began as a joint committee under the LGA before being made permanent under the Te Arawa Lakes Settlement Act 2006.
Collaborate	Māori hearing commissioners	RMA Section 34(a)	A local authority may appoint a hearing commissioner and delegate any functions, powers, or duties under the RMA to them except the power to approve a proposed policy statement or plan. If the local authority is considering appointing one or more hearing commissioners, it must: <ul style="list-style-type: none"> Consult tangata whenua through relevant iwi authorities on whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū 	Many commissioners who want to preside over a hearing cannot do so because of the perceived conflict of interest in making decisions that impact their respective iwi or hapū traditional rohe. Because of this, appointed commissioners often come from outside the area.

Engagement method	Kaupapa	Legislation	Description	Comments / examples
			<ul style="list-style-type: none"> If the local authority considers it appropriate, appoint at least one commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū, in consultation with relevant iwi authorities 	
Collaborate	Temporary closures of fishing areas or restrictions on fishing methods	Fisheries Act Section 186A-B	<p>The Minister for Primary Industries may temporarily close any area of New Zealand fisheries waters, or temporarily restrict or prohibit the use of any fishing method in any area of New Zealand fisheries waters.</p> <p>In the North Island, the Minister:</p> <ul style="list-style-type: none"> May only do this if they are satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing right. Must be satisfied that the fishing method is having an adverse effect on the use and management practices of tangata whenua in the exercise of non-commercial fishing rights Must provide for the input and participation in the decision-making process of tangata whenua with a non-commercial interest in the species or the effects of fishing in the area concerned, having particular regard to kaitiakitanga. <p>In the South Island, the Minister:</p> <ul style="list-style-type: none"> May only do this if it is likely to assist in recognising and making provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights. Must provide for the participation in the decision-making process of tangata whenua with a non-commercial interest in the stock or the effects of fishing in the area concerned, having regard to kaitiakitanga. 	The Crown retains final decision-making power.

Engagement method	Kaupapa	Legislation	Description	Comments / examples
Partner	Mana Whakahono ā rohe	RMA Section 58L – 58U	When initiated by iwi authorities, local authorities must enter into an agreement to work with the iwi authority to discuss, agree and record how they will work together under the RMA. This can include how tangata whenua will be involved in decision-making processes.	<p>Local authorities must enter into them when initiated by iwi authorities.</p> <p>Iwi authorities must rely on their own resourcing and capability. They do not require (but can be negotiated) participation in decision-making processes. Can only be initiated by iwi authorities.</p> <p>Two have been initiated, within the Bay of Plenty region. Iwi of the Taranaki region are in preliminary discussions with the Taranaki Regional Council about the initiation of a regional Mana Whakahono ā rohe arrangement</p>
Partner	Joint management agreements	RMA Sections 36B-36E	<p>A local authority may enter into a joint management agreement (JMA) with an iwi authority or a group that represents hapū, provided that the local authority is satisfied that it:</p> <ul style="list-style-type: none"> • Represents the relevant community of interest • Has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority • That the JMA is an efficient method of performing or exercising the function, power, or duty <p>Any party to the JMA may terminate the agreement by giving 20 days' notice.</p>	<p>Can provide genuine joint decision-making over an aspect of the natural environment (such as a river or lake).</p> <p>Only local authorities can initiate JMAs, and they are not compelled to enter into them. The threshold for entering into a JMA is high – as a result, they are mostly progressed through Treaty settlement legislation. However, some have been negotiated outside Treaty settlements:</p>

Engagement method	Kaupapa	Legislation	Description	Comments / examples
				<ul style="list-style-type: none"> • The JMA between Taupō District Council and Ngāti Tūwharetoa (2009) provides for councillors and accredited iwi appointees to make joint decisions on resource consents and private plan changes where they apply to Māori multiple owned freehold land. • The JMA between Gisborne District Council and Te Runanganui o Ngāti Porou (2015) provides for joint decision-making on notified resource consent applications, plan changes and private plan changes within the Waiapu catchment.
Partner	Māori constituencies and wards	LEA Part 1A Section 19Z-19ZH	<p>A local authority may resolve to divide their district or region into one or more Māori wards (for district) or constituencies (for regions). If this happens, a poll on the issue must be held if five percent of the electors of the city, district or region request it.</p> <p>Alternatively, a council may decide to hold a poll on whether or not there should be Māori wards or constituencies.</p> <p>A poll on whether there should be Māori wards or constituencies must be held if requested by a petition signed by five percent of the electors of the city, district or region.</p> <p>The result of these polls are binding on the council for at least two elections.</p>	<p>Māori wards and constituencies are rare, except where they are enabled through separate statutes (such as the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001).</p> <p>In part, this is because of the polling requirements associated with establishing Māori wards and constituencies, which are not required for other types of wards and constituencies.</p>

Engagement method	Kaupapa	Legislation	Description	Comments / examples
Partner	Taiāpure	Fisheries Act 1996 Part 9	<p>Taiāpure may be established over areas of estuarine or coastal waters that are of significance to Māori as a source of food or for spiritual or cultural reasons.</p> <p>Taiāpure are managed by a management committee comprising members that are representative of the local Māori community.</p> <p>Management committees oversee both commercial and non-commercial fishing within the taiāpure and advise the Minister for Primary Industries on regulations to manage fisheries within the taiāpure.</p>	While these mechanisms devolve certain powers to Māori, others are recommendatory only (for example, bylaws). In the case of these bylaws, the engagement method is closer to collaboration than it is to partnership, as the Crown retains final decision-making power.
Partner	Tangata kaitiaki / tiaki	Fisheries (Kaimoana Customary Fishing) Regulations 1998	<p>Māori may nominate tangata kaitiaki / tiaki to act as guardians of their rohe moana. These nominees are appointed by the Minister for Primary industries.</p> <p>Tangata kaitiaki / tiaki are responsible for authorising all taking of fisheries for customary food gathering within their rohe (not just hui and tangi).</p> <p>Tangata kaitiaki / tiaki can also provide input into management or sustainability measures, and can nominate honorary fisheries officers to the chief executive of the Ministry for Primary Industries.</p> <p>In addition, tangata kaitiaki / tiaki can prepare iwi planning documents for their rohe moana which must be taken into account by the Minister for Primary Industries when preparing fisheries regulations under Section 10(b) of the Treaty of Waitangi Fisheries Claims Settlement Act 1992.</p>	
Partner	Mātaitai reserve	Fisheries (Kaimoana Customary Fishing)	<p>Tangata whenua or the tangata kaitiaki / tiaki of a rohe moana may apply for a particular area within their rohe moana to be set aside as a mātaitai reserve.</p> <p>No commercial fishing may take place within a mātaitai reserve.</p>	

Engagement method	Kaupapa	Legislation	Description	Comments / examples
		Regulations 1998	The tangata kaitiaki / tiaki of a mātaihai reserve may recommend bylaws that restrict or ban the taking of fisheries resources from all or part of that reserve for non-commercial purposes.	
Empower	Taking of fish for hui or tangi	Fisheries (Amateur Fishing) Regulations 2013 Sections 50-51	Māori have the authority to manage the taking of fish, aquatic life or seaweed for hui or tangi. Written approval for these activities must be obtained from authorized representatives of marae committees, Māori committees, rūnanga or Māori trust boards that represent the tangata whenua of the area.	These mechanisms offer a very limited form of empowerment – it only includes the ability to issue certain types of customary fishing licenses. They do not include the ability to make or recommend bylaws, for example.
Empower	Taking of fish for other traditional non-commercial fishing uses	Fisheries (Amateur Fishing) Regulations 2013 Section 52	The Chief Executive of the Minister for Primary Industries may delegate the authority to take fish, aquatic life or seaweed for other 'traditional non-commercial fishing' uses to marae committees, Māori Committees, or 'any kaitiaki of the tangata whenua'.	These mechanisms are expected to become defunct as more tangata kaitiaki/tiaki, taiāpure and mātaihai are established (see measures above).
Empower	Transfer of powers	RMA Section 33	A local authority may transfer any one or more of its functions, powers, or duties under the RMA to an iwi authority, provided that: <ul style="list-style-type: none"> • It has used the special consultative procedure set out in section 83 of the LGA; and • It serves notice on the Minister for the Environment • Both authorities agree that the transfer is desirable on all of the following grounds: <ul style="list-style-type: none"> ○ the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty: ○ efficiency: ○ technical or special capability or expertise. 	Can only be initiated by a local authority. The local authority retains the right to change or revoke the transfer at any time by notice to the transferee. The threshold for transferring power is very high.

Appendix 4: Common forms of cultural redress in Treaty settlement negotiations⁴⁵

Type	Description
Legal framework	This is where new legal frameworks are recognised by the Crown (for example, Te Awa Tupua, Te Waiū-o-te-Ika, Te Ture Whaimana o te Awa o Waikato)
Ture, Kawa, Tikanga, Toka	Particular recognition made by the Crown of Ture, kawa, tikanga or Toka that the Crown commits to recognising through policy and legislation, including stating in reports for functions across multiple pieces of legislation how it has done so.
Relationship Redress (Ministers)	Accords, Portfolio Agreements and Relationship Instruments with Ministers, or Legal Frameworks with responsibilities that include Ministers. Many of these form part of wider whole of Crown Accord.
Relationship Redress (officials)	Relationship Agreements and Deed settlement commitments with responsibilities for Secretary for the Environment and/or Ministry for the Environment
Revesting	All settlements include a revesting of lands back as fee simple, fee simple with other conditions (to be administered as reserves, or Māori reservation). In some cases these are revested in the settling group, in others they are revested in the ecosystem itself through an entity with legal personality.
Statement	Statements made by the Crown within Deeds of Settlement and/or Legislation acknowledging the special association between the settling group and an environmental resource, such as a river or an indigenous species.
Customary activities protection	Protected customary rights can be granted for a customary activity like collecting hāngi stones or launching waka within the area of interest. A protected customary right lets the applicant group carry out the protected activity without needing a resource consent.
Customary fishing regulations	The ability to work collaboratively with MPI to develop regulations managing customary food gathering.
Statutory body	A body established or recognised in legislation to provide for specific functions (i.e. Waikato River Authority, Rangitaiki River Forum)
Permanent joint committee	A Joint committee established under clause 30(1)(b) of Schedule 7 of the LGA (i.e. Rotorua Lakes Strategy Group, Te Maru o Kaituna River Authority)
Appointments to council committee or guardian groups	Legislation provides appointments to existing council committees and guardian groups (i.e. the Iwi of Taranaki to appoint 3 members to each of Taranaki Regional Council planning and regulatory committees, Ngai Tahu to make appointments to appointment to several statutory boards).
Documents with legal weighting	Strategies, plans or management documents that have legal weight for local or national decision makers.
Joint management agreements	Jointly perform the functions held by a local authority in relation to a natural or physical resource in all or part of the region/district

⁴⁵ This information is summarised from a table of settlements maintained by MfE: <https://tepuna.mfe.govt.nz/otcs/cs.dll/Overview/13002335>

Type	Description
Advisory group	A group established under legislation that performs advisory functions only
Statutory acknowledgement	Acknowledging a hapū, iwi or collective's particular cultural, spiritual, historical, and traditional association with specified areas.
Hearing Commissioners	Right to maintain registers of approved commissioners for resource consent functions or proposals of national significance, and taking nominations for appointments of hearing commissioners
Water conservation orders	Roles and recognition in respect of water consent applications, such as providing advice or appointing Tribunal members.

Appendix 5: The recommendations of the Waitangi Tribunal in Wai 262 and Wai 2358 concerning freshwater decision-making

Wai 262 ⁴⁶	Amend the RMA to strengthen the weight given to iwi management plans, which should identify iwi resource management priorities and opportunities for delegation of control to kaitiaki or establishment of partnership
	Amend the RMA to remove unnecessary barriers to the use of joint management agreements and transfers of power, and requiring regional councils to regularly review and report upon their activities in respect of these provisions
	Require MfE to explore options for delegating authority to heritage protection authorities, and to report annually to Parliament on this
	Require MfE to commit to building Māori capacity to participate in RMA processes and in the management of taonga
	Require MfE to develop national policy statements on Māori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership, and influence on environmental decision-making
Wai 2358 ⁴⁷	Establish a national co-governance body with 50/50 Crown-Māori representation, to ensure that Treaty principles and Māori values, rights and interests are fully incorporated in freshwater policy and management. OR Continue to co-design freshwater policy options with a national Māori body or bodies, and that this be made a regular feature of Government where Māori interests are concerned.
	Amend section 6 of the RMA to include Te Mana o te Wai as a matter of national importance that must be recognised and provided for by RMA decision makers.
	Amend section 8 of the RMA to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the RMA
	Statutory and practical barriers to the use of the RMA provisions concerning joint management agreements and transfers of power be removed.
	Co-governance and co-management of freshwater bodies be made a compulsory matter that must be discussed and agreed as part of Mana whakahoko a rōhe agreements.
	Give greater legal weight to iwi management plans in respect of water bodies where co-governance has not been arranged.
	Amend Objective D1 of the NPSFM to state that iwi and hapū must be directly involved in decision-making, that Māori values/rights/interests must be recognised and provided for, and that councils must actively seek

⁴⁶ Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wellington, Legislation Direct, 2011), Volume 1, pp 285-286. These recommendations concern environmental taonga more broadly, not just freshwater

⁴⁷ Waitangi Tribunal, *Stage two report on the national freshwater and geothermal resources claims* (Wellington, Legislation Direct, 2020), pp 559-561. The Tribunal also made several recommendations concerning freshwater allocation, which are not included here.

	opportunities to enter into joint management agreements and transfers of power
	Revise and add to the policies in Part D to give effect to the changes to Objective D1
	Offer co-governance/co-management agreements for freshwater bodies in all future Treaty settlements, unless sole iwi governance is more appropriate
	Assess whether a separate Water Act is necessary, either with a national co-governance body or in co-design with key national Māori organisations.
	Take urgent action to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes.
	Monitor the Treaty performance of local authorities
	Require regional councils to submit regular reports on their activities in respect of joint management agreements and transfers of power to either the Parliamentary Commissioner for the Environment or the national co-governance body

Appendix 6: Summary of the positions of various Māori and non-Māori organisations on ways to improve Māori involvement in freshwater decision-making

At a regional and local level

Organisation	Position
NZMC ⁴⁸	<p>The NZMC recommended the establishment of a national water commission and regional catchment boards to govern freshwater, both of which would be appointed by the Crown and Māori on a 50/50 basis. The functions of the regional catchment boards would include:</p> <ul style="list-style-type: none"> • Entering into joint management agreements with iwi and hapū • Carrying out water management and consenting at the regional level
ILG ⁴⁹	<p>The ILG believe that the Crown should be dealing with the relevant iwi authorities in each catchment to manage and regulate water. They argue that co-management should be the benchmark, and that hapū and iwi should be adequately resourced to use the tools developed to promote Māori involvement (such as Mana Whakahono ā Rohe).</p> <p>The ILG advocate using the Ngā Matāpono ki te Wai framework to guide freshwater reform, as it 'reflects and affirms the multi-faceted nature of the rights and interests of iwi and hapū in relation to freshwater.'</p>
KWM ⁵⁰	<p>KWM recommend reforming the RMA to:</p> <ul style="list-style-type: none"> • Revise section 8 to give effect to the principles of Te Tiriti o Waitangi • Reform sections 5, 6, 7 and 8 to better reflect te ao Māori, including Māori law, Māori rights and interests, Māori decision-making and to recognise Te Mana o te Taiao. • Confer resource management decision-making directly on iwi and hapū via 50/50 involvement in decision-making in resource consents and plan-making hearings • Amend the existing statutory governance mechanisms for transfer of powers, joint management and iwi participation (in the case of mana whakahono ā-rohe) to make them compulsory • Introduce a dispute resolution mechanism that, as a circuit breaker, uses the Māori Land Court's section 30 Te Ture Whenua Māori Act 1993 jurisdiction to advise on or determine representation of Māori groups where matters of representation have stalled. <p>They also endorsed some of the RMRP's proposals on its 'issues and options' paper as minimum requirements to ensure that the RMA is Treaty compliant:</p> <ul style="list-style-type: none"> • Give greater status to Iwi Management Plans in Part 5 of the RMA • Ensure the principles of Te Tiriti are upheld by authorities to whom resource management functions are delegated • Provide funding mechanisms to support Māori participation.

⁴⁸ Wai 2358, #3.3.33, #3.3.52

⁴⁹ Wai 2358, #3.3.41

⁵⁰ KWM submission to the Resource Management Review Panel, 18 March 2020

Organisation	Position
Submissions on the AfHW package ⁵¹	<ul style="list-style-type: none"> • Council and iwi partners need to work together, to express views in freshwater management. • Establish co-governance between Crown and Māori for freshwater management going forward. Regulations are essential to strengthen the Māori voice at all stages in water management system design and processes. • Government and regional councils must co-design these processes with tangata whenua. • Providing for 50:50 representation by Māori commissioners would help improve Māori representation in decision-making and give effect to Te Tiriti o Waitangi (Treaty of Waitangi). • Co-governance is implied by Te Tiriti o Waitangi (Treaty of Waitangi) principles. This level of governance is required at a minimum, given Crown Māori rights and interest obligations in water.
Submissions on the RMRP 'issues and options' paper ⁵²	<p>The majority of submitters supported changes to section 8 to improve the reference to te Tiriti/the Treaty</p> <ul style="list-style-type: none"> • The most popular suggestion was to change “take into account” to “give effect to” the Treaty in section 8 • Another popular suggestion was to put it into section 5 and allow principles to cascade into 6 and 7 • There was no clear consensus on whether to reference Tiriti or Treaty, though when mentioned it was usually to emphasise the Māori language version of the Treaty. • A few submitters preferred reference to the articles rather than the principles • Those who did not support change usually thought the existing wording worked well, or didn't think enhanced wording would change implementation. <p>Suggestions to address Māori interests and engagement in the RMA included :</p> <ul style="list-style-type: none"> • The most popular option with everyone was providing a funding mechanism to support Māori participation • Options popular with Māori included: <ul style="list-style-type: none"> ○ Removing barriers to participation, either through existing provisions (s33, 36B, Mana Whakahono a Rohe etc) or new provisions. ○ Increasing the status of Iwi/hapū management plans and funding their development ○ Spatial planning with iwi participation • Improving the definition of iwi authority and hapū was popular with local government and business/industry interests, though iwi/hapū were concerned that an inappropriate definition would exclude Māori groups who had legitimate rights and interests. • Other topics mentioned by submitters included Māori heritage, cultural landscapes mātauranga Māori, the relationship to Treaty settlements, and constitutional change.

⁵¹ Ministry for the Environment, *Action for healthy waterways: Summary of submissions on national direction for our essential freshwater* (Wellington: Ministry for the Environment, 2020), p 178

⁵² <https://tepuma.mfe.govt.nz/otcs/cs.dll/Overview/13364156>

At a national level

Organisation	Position
NZMC ⁵³	<p>The NZMC believe that management of freshwater be removed from the Resource Management Act (RMA) and included in an independent Water Act.</p> <p>The Water Act would be Treaty compliant and guided by the principles of tikanga and mātauranga Māori. Its primary purpose would be to safeguard the mauri of water bodies, followed by the provision of drinking water, and then commercial uses of water.</p> <p>The NZMC recommended the establishment of a national water commission and regional catchment boards to govern freshwater, both of which would be appointed by the Crown and Māori on a 50/50 basis. The functions of the national water commission would include:</p> <ul style="list-style-type: none"> • Administering a register of iwi and hapū rights in respect of particular water bodies • Establishing an allocation framework, including limits to ensure sustainable flows and ecosystem health • Establishing charges for commercial uses and the discharge of pollutants and waste water • Allocating funding for Māori economic development, the clean-up of degraded water bodies, and compensation for proprietary interests (where hapū cannot be allocated an appropriate amount of water) • Establishing a framework for freshwater management and give direction to regional catchment boards • Monitoring, reviewing, and occasionally overriding regional catchment boards
ILG ⁵⁴	<p>The ILG do not support a national water commission. They argue that the Crown should be dealing with the relevant iwi authorities in each catchment to manage and regulate water.</p> <p>The ILG also believe that national water policy should continue to be co-developed by the Crown and ILG, in consultation with Māori more broadly.</p>
KWM ⁵⁵	<p>KWM recommend that a new independent national Te Mana o te Wai Commission be established. Its functions would include:</p> <ul style="list-style-type: none"> • Setting national direction that promotes Te Mana o te Wai • Calling-in applications at the local catchment level where appropriate • Auditing water-related local government and catchment level processes and decisions • Bringing, and participating in, proceedings relating to local government and catchment level processes and decisions. <p>KWM also recommend that further consideration be given to establishing a standalone Water Act.</p> <p>KWM also endorsed some of the RMRP's proposals in its 'issues and options' paper as minimum requirements to ensure that the RMA is Treaty compliant:</p> <ul style="list-style-type: none"> • Establish a National Māori Advisory Board on Planning and the Treaty

⁵³ Wai 2358, #3.3.33, #3.3.52

⁵⁴ Wai 2358, #3.3.41

⁵⁵ Kāhui Wai Māori, *Te Mana o te Wai: The Health of our Wai, the Health of our Nation* (September 2019), p 9

Organisation	Position
	<ul style="list-style-type: none"> • Strengthen independent oversight and review (through an independent Te Mana o te Wai Commission) • Require a mandatory national policy statement on Te Tiriti o Waitangi <p>KWM, the FLG and RSWS agreed that the national and regional freshwater management system should be subject to performance monitoring by an independent entity comprised of 50/50 Crown/iwi membership.⁵⁶</p>
Land and Water Forum (LAWF) ⁵⁷	<p>LAWF first recommended that the Crown establish 'National Land and Water Commission' in co-governance with Māori in 2010. LAWF repeated this recommendation in its final report, and suggested that a Land and Water Commission:</p> <ul style="list-style-type: none"> • Oversee and monitor the roll-out of a national freshwater management implementation strategy, including setting national priorities for actions, activities or priority catchments, and addressing urban and rural water management • Undertake for the Minister a review of council identification and management of at-risk catchments • Oversee and provide technical assistance in the development of good management practice (GMP) (national standards and standardised risk assessment frameworks), technical and process support for GMP farm and catchment plan development and auditing, including personnel, minimum qualifications, and templates. • Oversee the monitoring of the effectiveness and development of updated practices • Provide advice on science and knowledge, data, monitoring and modelling requirements to sector groups, central government, regional councils and science providers. • Ensure a national view is represented at hearings on regional plans and water management frameworks, including in respect of nitrogen allocation • Provide technical support and resources, including training and best practice plan provisions and implementation tools to councils • Review all regional plans, provide recommendations and make submissions when necessary to improve consistency of regional responses to the National Policy Statement for freshwater Management (NPS-FM) • Develop the aspects of the regime for managing nitrogen discharges • Provide a key interface between central government, with land users, sector groups, NGOs, science providers and regional councils.
FLG ⁵⁸	<p>The FLG recommended that a freshwater commission be established as a new central government agency to drive implementation and accountability. Until such a commission is established, the FLG recommended that the Minister for the Environment and MfE play a stronger role in compelling change at a regional level. The FLG envisioned that a water commission would perform the following functions:</p> <ul style="list-style-type: none"> • Provide stewardship of the overall freshwater management system, including relevant national direction instruments

⁵⁶ Joint KWM / FLG / RSWS letter to Ministers Parker and O'Connor, 6 March 2020

⁵⁷ Land and Water Forum advice on improving water quality: preventing degradation and addressing sediment and nitrogen, May 2018

⁵⁸ Freshwater Leaders Group, *Report of the Freshwater Leaders Group to the Minister for the Environment* (July 2019), pp 22-23

Organisation	Position
	<ul style="list-style-type: none"> • Maintain and report on outcomes and indicators • Evaluate and report to the Minister for the Environment on the performance of regional councils in undertaking their roles. • Identify and take action to respond to any capacity and capability gaps within the system. • Be responsible for developing and maintaining any relevant national standards to be used in Land Environment Plans. • Be responsible for the plans and investment for key decision support and measurement tools (such as OVERSEER). • Develop and maintain freshwater-related competency requirements for farm advisers. • Provide advice and assistance to regional councils during the planning process, and as they implement the new plans after 2025. • Take compliance action where appropriate (while regional councils retain responsibility for the majority of compliance activity). • Advise on and potentially fund research needs across the freshwater system. • Coordinate and deliver promotional and information services. • Coordinate central government financial assistance and facilitation. • Work with regional councils, sectors and communities on coordinating national initiatives (for example, standard elements of models, learning from experiences in other catchments).
Environmental Defence Society (EDS) ⁵⁹	<p>The EDS support the recommendations of the KWM and FLG to establish an independent freshwater commission. They see the role of such a commission as being heavily implementation-focused. Its primary function would be ‘assisting regional councils to implement the reforms by providing scientific advice, support funding, plan-making advice and (where required) direct Ministerial interventions.’ They suggest a commission could also be empowered to prepare and notify plans where regional councils struggle to do so.</p> <p>The EDS have separately recommended the creation of an independent Futures Commission with a future-focused mandate and roles under various pieces of legislation, including the RMA. While it would originally focus on filling ‘gaps’ in the system, such as developing a national environmental plan. However, its role would gradually expand so that it is integrated into the system’s legal processes rather than just fulfilling an investigative or advisory function. Other commissions (such as the Climate Change Commission and a potential Freshwater Commission) would eventually be incorporated underneath the ‘umbrella’ of the Futures Commission.</p> <p>The EDS envisioned that the Futures Commission might be accompanied by a separate Tikanga Commission, or by dedicated tikanga commissioners within the Futures Commission.⁶⁰</p>
Submissions on the AfHW package ⁶¹	Submissions supported the Waitangi Tribunal recommendation of a National Co-governance body, with suggestions of other functions the body could be responsible for. These included:

⁵⁹ EDS submissions on the *Action for healthy waterways discussion document* (October 2019), paras 3.24-3.25

⁶⁰ EDS, *Reform of the Resource Management System: a pathway to reform: working paper 2 – a model for the future* (Auckland: Environmental Defence Society Incorporated, 2019), pp 73-75.

⁶¹ Ministry for the Environment, *Action for healthy waterways: Summary of submissions on national direction for our essential freshwater* (Wellington: Ministry for the Environment, 2020), p 181

Organisation	Position
	<ul style="list-style-type: none"> • Investigating other possible mechanisms for proprietary redress, including royalties • Developing a new water allocation regime, in partnership with Māori which enables the development of Māori land • Overseeing and holding councils to account, ensuring they are meeting and delivering on their responsibilities <p>Submitters saw this body as essential to improve the degradation of waterways. To be Te Tiriti o Waitangi (Treaty of Waitangi) compliant it would have to adequately represent Māori interests in freshwater and be co-designed with Māori.</p>
Submissions on the RMRP's 'issues and options' paper ⁶²	Auditing of councils on their performance against the Treaty was somewhat popular with iwi. Some of them thought a national Māori body could do it

⁶² <https://tepuna.mfe.govt.nz/otcs/cs.dll/Overview/13364156>

Appendix 7: Summary of the Resource Management Review Panel's recommendations concerning Te Tiriti / Te Ao Māori

Chapter 3 Te Tiriti me te ao Māori

Key recommendations - Te Tiriti o Waitangi me te ao Māori

- 1 The concept of 'Te Mana o te Taiao', should be introduced into the purpose of the Natural and Built Environments Act to recognise our shared environmental ethic.
- 2 Specific outcomes should be provided for 'Tikanga Māori', including for the relationships of mana whenua with cultural landscapes.
- 3 The current Treaty clause should be changed so that decision-makers under the Act are required to 'give effect to' the principles of Te Tiriti o Waitangi.
- 4 A national policy statement should be required on how the principles of Te Tiriti will be given effect through functions and powers exercised under the Act.
- 5 A more effective strategic role for Māori in the system should be provided for, including representation of mana whenua on regional spatial planning and joint planning committees.
- 6 A National Māori Advisory Board should be established to monitor the performance of central and local government in giving effect to Te Tiriti and other functions identified in the report.
- 7 The current Mana Whakahono ā Rohe provisions should be enhanced to provide for an integrated partnership process between mana whenua and local government to address resource management issues.
- 8 The current legislative barriers to using the transfer of power provisions and joint management agreements should be removed and there should be a positive obligation on local authorities to investigate opportunities for their use.
- 9 The current definitions of the terms 'iwi authority' and 'tangata whenua' should be replaced with a new definition for 'mana whenua'.
- 10 Provision should be made for payment of reasonable costs where Māori are undertaking resource management duties and functions in the public interest.
- 11 The funding and support options recommended in this chapter should be implemented.

Appendix 8: Shortcomings with the existing resource management system identified by the Resource Management Review Panel

Lack of clear protection mechanism	For most of its life the RMA has not been clear about how to achieve its purpose of sustainable management, making it hard to protect the environment and address cumulative effects
Lack of benefits of urban development	Because it doesn't recognize the wider environmental benefits of quality urban development, the RMA hinders development of sorely needed housing and infrastructure.
Effects more important than outcomes	The RMA focuses on passively managing effects of activities, rather than directing progress toward achieving its purpose.
Status-quo bias	The RMA favours existing uses and consents, even when they are no longer sustainable or aligned with strategic goals.
Lack of integration	The RMA no longer goes far enough to integrate decision-making that affects the environment, with particular gaps apparent between the RMA, LGA, and LTMA.
Complexity, uncertainty, and costs	The RMA has grown increasingly complex alongside requirements under other legislation, and considerable variation exists between consenting authorities.
Lack of national direction	There is a basic lack of strategic direction to guide interpretation of the RMA and resolving tensions within its purpose and principles.
Poor operation for Māori	Though it was once a great step forward for Māori involvement, the RMA has not lived up to its promise under te Tiriti. Good provisions for joint management and shared authority go unused and Local Governments struggle to include Māori in decision-making.
Weak Compliance, Monitoring, Enforcement, and	A large number of small local government agencies struggle to monitor activities for compliance with the rules in their plans. Penalties are too low and too many offenders profit from breaking rules. Cost recovery is an issue.
Capacity & capability	Lack of funding and capability affects several actors in the system and creates delay, uncertainty and additional costs.
Weak oversight and system stewardship	There is not enough objective research and monitoring done to understand whether key parts of the system are effective and prompt evidence-based improvements as needed.

Appendix 9: Summary of the Resource Management Review Panel's recommendations concerning system oversight and compliance, monitoring and enforcement

Chapter 12 System oversight

Key recommendations - National environmental monitoring system	
1	The Ministry for the Environment should establish in consultation with other agencies a comprehensive, nationally coordinated environmental monitoring system with the following features: <ul style="list-style-type: none"> (i) it should incorporate and build on the current National Monitoring System, with improvements to be more systematic about the data it collects and to make it easier for councils to use (ii) it should be supported with sufficient resourcing to improve the capacity and capability of central and local government, including science and data capability.
2	The Minister for the Environment should provide national direction on how the system should be implemented, including national direction developed with Māori on how to incorporate Māori perspectives and mātauranga Māori into the system.
3	The Ministry for the Environment should be responsible for implementing the system and monitoring performance of the system at a national level.
4	Local authorities should continue to have primary responsibility for the collection of data and the monitoring of system performance at local government level.
5	Combined plans should provide for monitoring and reporting.
Key recommendations - Environmental reporting	
6	The Ministry for the Environment and the Government Statistician should continue to be responsible for regular reporting to the Minister for the Environment on environmental outcomes at a national level.
7	There should be clear links between the Natural and Built Environments Act and Environmental Reporting Act.
8	Local authorities should be required to report regularly to the Ministry for the Environment on the state of the environment in their regions and districts.
9	Reports on the state of the environment should be made publicly available.

Key recommendations - Oversight of system performance	
10	The Ministry for the Environment should have primary responsibility for oversight of the effectiveness of the resource management system, including the effectiveness of the Natural and Built Environments Act and national direction made under it.
11	The combined planning joint committees should have oversight of the performance and effectiveness of combined plans.
Key recommendations - Auditing of system performance and responding to evidence of poor outcomes	
12	The Parliamentary Commissioner for the Environment's role should be expanded to include a more formalised and independent auditing and oversight role of the performance and effectiveness of the resource management system and on the state of the environment.
13	The Parliamentary Commissioner for the Environment should be required to provide regular reports to Parliament on the performance and effectiveness of the resource management system and on the state of the environment.
14	These reports should be made publicly available and the Minister for the Environment should be required to identify steps to be taken to respond to issues identified.
15	Local authorities should also be required to state how they will respond to issues identified that relate to their regions and districts.

Chapter 13 Compliance, monitoring and enforcement

Key recommendations - Compliance, monitoring and enforcement	
1	System links should be established between compliance monitoring, state of the environment monitoring and monitoring progress towards outcomes.
2	New regional hubs should be established to undertake resource management compliance, monitoring and enforcement options.
3	The offence and penalties regime should be strengthened, including by: <ul style="list-style-type: none"> (i) increasing the maximum financial penalties (ii) deterring offending by extending the circumstances in which commercial gain may be taken into account in sentencing (iii) adjusting the maximum imprisonment term so most prosecutions may be heard as judge-alone trials (iv) prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act

Key recommendations - Compliance, monitoring and enforcement	
	<ul style="list-style-type: none"> (v) enabling creative sentencing options (vi) developing new Solicitor-General prosecution guidelines for environmental cases.
4	<p>A number of new compliance, monitoring and enforcement measures should be introduced and existing measures improved, including by</p> <ul style="list-style-type: none"> (i) enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring (ii) amending the power to require disclosure of information about those carrying out the allegedly contravening activity (iii) creating a new offence for contravention of a condition of consent (iv) enabling abatement notices for the contravention of a consent notice, or any covenant imposed by condition of consent (v) establishing a new power to allow a regulator to apply for a consent revocation order in response to serious or repeated non-compliance (vi) providing for enforcement of undertakings.