



To: Sam Buckle, Janine Smith  
From: Matthew Cunningham  
CC: Melanie Mark-Shadbolt, Hayden Johnston, Keita Kohere, Kylie Brown, Simon King, Lesley Baddon, Clare Maihi, Lucy Bolton, Regan Brash  
Date: 25 January 2022  
Appendices: Appendix A: Additional information on the nature and extent of Māori rights and interests  
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## **RE: Proposed next steps for Māori rights and interests in freshwater**

### **Purpose**

1. This memo:
  - a. Outlines the aspects of Māori freshwater rights and interests (FR&I) policy that can still be progressed through the resource management (RM) reforms without specific decisions by Cabinet or a commitment to a FR&I work programme; and
  - b. Seeks your approval to develop policy options to address these aspects of FR&I.

### **Alignment with Cabinet's RM reform objectives**

2. The proposals and recommendations in this memo align primarily with Cabinet's third agreed objective for the RM reforms (give proper recognition to the principles of Te Tiriti of Waitangi and provide greater recognition of te ao Māori including mātauranga Māori).

### **Executive summary**

3. In October 2021, Cabinet did not agree to pursue options at this stage for freshwater allocation reform and FR&I. This included access and use rights as well as governance and management arrangements. Nevertheless, the ongoing RM reforms overlap considerably with FR&I, particularly with respect to environmental limit-setting, governance, Māori participation and resource allocation.
4. The RM reforms will continue regardless of Cabinet's position on FR&I. It is likely that aspects of the reforms will preclude options to address FR&I, while others may contribute to addressing aspects of FR&I.



5. Minister Parker and Associate Minister Allen agreed with the Freshwater Iwi Leaders Group (ILG) to establish an approach to working on FR&I via an accord and a work programme, but over a longer time than the RM Reform. It is unclear when the details of this approach will be agreed and shared with us.
6. We need to develop a shared understanding within the Ministry of how to approach FR&I within the context of the RM reforms. Such an understanding would not be intended to comprehensively address FR&I, which we do not have a mandate to do. Rather, it would simply provide a baseline that:
  - a. Progresses those aspects of FR&I that can be progressed through the RM reforms; and
  - b. Preserves the Crown's ability to address other aspects of FR&I at a later date.
7. This baseline would not pre-empt an agreed approach with the ILG or Te Tai Kaha (TTK). It would simply ensure that we address those aspects of FR&I that remain within scope of the RM reforms. If a more comprehensive FR&I work programme eventuates before the RM reforms are finalised, it could build on this baseline.
8. The approach in this memo has not been discussed with ILG or TTK.
9. I recommend that aspects of FR&I be incorporated into three key policy avenues within the RM reforms, via MOG and delegated decision briefings that are already planned:
  - a. Developing the freshwater content of the National Policy Framework (NPF) by transitioning the policy intent of existing freshwater instruments;
  - b. Strengthening the role of Māori in freshwater governance and decision-making at a local level (through mechanisms such as JMAs, transfers of power and Treaty partnership entities); and
  - c. Enable equitable access to freshwater resources for Māori (via the resource allocation framework).
10. I also recommend that policy options be developed (as part of the resource allocation framework) that will preserve the Crown's ability to address FR&I more comprehensively at a later date.
11. This policy work would be led by the Māori freshwater rights and interests team, who would work with other teams to incorporate material into relevant MOG and delegated decision briefings: This would require reprioritisation away from other work currently being performed by the team.
12. An alternative approach would be to wait until Cabinet agrees to a comprehensive FR&I mandate before developing a full package of FR&I proposals. The drawback of this approach is that it fails to take advantage of the opportunity presented by those aspects of the RM reforms that overlap with FR&I, and which could preclude options if they are not parsed through a FR&I lens.
13. Key RM reform decisions will be made in the next three months – at MOG #16 (on resource allocation) and MOG #17 (on Māori participation). Timely agreement on an



approach to FR&I is necessary if the proposals outlined in this paper are to be progressed within these timeframes.

- 14. This memo does not propose an approach to Māori rights and interests in other natural resources (R&I). It may be that the approach I propose for FR&I is equally applicable to R&I more broadly. However, as our knowledge base on R&I more broadly is less developed than it is for FR&I, I cannot say this with confidence. Further analysis and targeted engagement with ILG / TTK may be needed to determine the best approach. Appropriate resourcing would be needed for this.
- 15. If you support the approach outlined in this memo, I recommend that you discuss it with the cross-agency DCEs group. Please let me know if you would like me to draft a paper for you to take to this group. If so, I would like to seek feedback on a draft of the paper from Te Arawhiti, Te Puni Kōkiri and Treasury before it goes to the group.
- 16. I also recommend that you test our understanding of what remains in scope with respect to FR&I with Minister Parker and Associate Minister Allan. I defer to your judgement on the appropriate channels and sequencing of these discussions.

## Recommendations

17. I recommend that you:

**Agree** to us developing policy options for aspects of FR&I that can be progressed through the RM reforms without a mandate; those being:

- Developing the freshwater content of the NPF;
- Strengthening the role of Māori in freshwater governance and decision-making at a local level;
- Enabling equitable access to freshwater resources for Māori; and
- Preserving the Crown's ability to address other aspects of FR&I at a later date.

Yes / No

**Agree** that any FR&I policy options that are developed be included in MOG and delegated decision briefings that have already been planned rather than separate briefings (except where necessary to meet the MOG #15 agreement to delegate R&I decisions):

Yes / No

**Agree** to discuss this proposed approach with the cross-agency DCEs group.

Yes / No



**Agree** to test our understanding of what aspects of FR&I remain within the scope of the RM reforms with Minister Parker and Associate Minister Allan.

Yes / No

**Note** that this proposal will require rapid additional policy work and engagement with ILG and TTK. Resource reprioritisation will be needed.

**Note** that the Māori freshwater rights and interests team will continue to review RM papers as they are drafted for any FR&I implications.



## Supporting information

### Context

#### *Māori have rights and interests in natural resources*

18. The Waitangi Tribunal has consistently found that the Treaty of Waitangi guaranteed Māori an interest greater than the general public in natural and other resources (see Appendix A). As such, Māori interests have been a key consideration in the allocation and governance of a number of natural resources since the late 1980s, including commercial fisheries, aquaculture and the foreshore and seabed.

#### *The Crown has acknowledged that Māori have rights and interests in freshwater, but has struggled to comprehensively address them*

19. The Crown has acknowledged that Māori have rights and interests in freshwater for many years. It has provided several undertakings to address these rights and interests, but it has struggled to do so comprehensively (although some progress has been made in respect of Māori concepts and measures of water quality and through Treaty settlements). The Waitangi Tribunal has found that Māori had rights and interests in their water bodies at 1840 for which the closest English equivalent in 1840 was ownership rights.
20. Both the Crown and Māori have put considerable work into exploring the nature and extent of FR&I. Our understanding of R&I in other natural resources governed by the Resource Management Act (RMA), such as air discharges, river and coastal marine area materials (such as gravel and sand) and the development capacity of land, is less developed.

#### *Māori rights and interests in freshwater and other natural resources overlap with the RM reforms*

21. From a policy perspective, FR&I are typically grouped under four broad 'pou':
  - a. *Water quality* (mechanisms to improve water quality and the health of ecosystems and give effect to Māori freshwater values)
  - b. *Recognition* (recognise Māori relationships with particular water bodies)
  - c. *Governance / management / decision-making* (enhance Māori participation at all levels of freshwater decision-making)
  - d. *Economic development* (develop mechanisms to enable Māori to access and use freshwater in order to realise and express their economic and development interests).
22. These FR&I pou overlap considerably with the RM reforms, particularly environmental limit-setting, governance, Māori participation and resource allocation.
23. R&I more broadly are also likely to overlap with some or all of the same aspects of the reforms, given that the Natural and Built Environments Act (NBA) will govern all natural resources that are not covered by separate legislation.



***The extent to which we can develop options to address Māori rights and interests in freshwater and other natural resources is currently unclear***

24. Despite the overlaps between the RM reforms, FR&I (and R&I more broadly), our mandate to develop options to address FR&I is unclear. Cabinet and Ministers have made several decisions and commitments that have a bearing on FR&I and R&I, but they are unclear and somewhat contradictory. These are set out in full in Appendix C, but the key points are:
- a. Cabinet agreed to proceed with RM reform using the Randerson report as a template, which proposed a stronger strategic role for Māori in the system and a new resource allocation framework;
  - b. Cabinet did not agree to pursue options at this stage for freshwater allocation reform and FR&I, including access and use rights as well as freshwater governance and management arrangements;
  - c. Cabinet's agreed framing of FR&I includes a commitment to work with Māori and regional government on the fair allocation of freshwater for underdeveloped land on a catchment-by-catchment basis;
  - d. Ministers have committed that the RM reforms will not preclude any options to address FR&I;
  - e. MOG has agreed to ensure equitable access to resources for Māori; and
  - f. MOG has delegated decisions relating to R&I jointly to Minister Parker and Associate Minister Allan in consultation with other relevant Ministers.
25. The RM reforms will continue regardless of Cabinet's position on FR&I and R&I. It is likely that aspects of the reforms will impact on, and preclude, options to address FR&I. Conversely, it is also possible that aspects of the RM reforms could contribute to addressing aspects of FR&I. The same applies to R&I more broadly, although our understanding of the nature and extent of R&I in other natural resources is less developed as freshwater.
26. We need to develop a shared understanding within the Ministry of how to approach FR&I within the context of the RM reforms. Such an understanding would not be intended to comprehensively address FR&I, which we do not have a mandate to do. Rather, it would simply provide a baseline that:
- a. Progresses those aspects of FR&I that can be progressed through the RM reforms; and
  - b. Preserves the Crown's ability to address other aspects of FR&I at a later date.
27. These two areas are discussed in turn below.



## Discussion

### Assumptions

28. The advice in this section is based on the following four assumptions:

- a. *Options to address aspects of FR&I must be grounded in the Randerson panel's recommendations, Cabinet's agreed objectives for the RM reforms, and MOG decisions to-date.* Cabinet's mandate in this area is clear – it intends to repeal and replace the RMA in this term using the Randerson report as a template. This provides the space to address aspects of FR&I where they overlap with the broad pillars of the RM reforms, particularly with respect to environmental limit-setting, governance, Māori participation and resource allocation.
- b. *Enabling equitable access to freshwater and other resources for Māori is within the scope of the RM reforms.* The Randerson panel's proposed resource allocation framework, combined with the MOG's decision on equitable access to resources for Māori and Cabinet's 2018 commitment regarding underdeveloped Māori land, provide a basis to develop proposals to enable equitable freshwater access and use rights for Māori. These are distinct from, and should not be confused with, rights to a share of freshwater based on whakapapa.
- c. *Options to address aspects of FR&I should not pre-empt the possibility of a more detailed work programme.* Minister Parker and Associate Minister Allan have agreed to work with the ILG to develop an accord and a work programme to address FR&I over the next 2-3 years. We understand that TTK will be providing advice to Ministers on their FR&I priorities as well. The advice in this section is not intended to pre-empt the outcome of these discussions – it merely provides a baseline for what we still have a mandate to do within the context of the RM reforms. If a more detailed FR&I work programme or mandate emerges from these discussions, we will need to pivot accordingly.
- d. *Engagement with Māori on policy proposals will be integrated with the broader RM engagement programme.* As this paper proposes that aspects of FR&I be progressed through the RM reforms, it seems logical and efficient that engagement with Māori on any policy proposals occur as part of the broader engagement (ie. the weekly meetings with ILG / TTK, engagement with Post-Settlement Governance Entities, wider engagement with iwi / hapū / Māori).

29. Appendix D assesses the more commonly suggested options to address FR&I against these assumptions. The key points from this analysis are outlined below.

### **What aspects of FR&I can we progress through the RM reforms without a FR&I Cabinet mandate?**

30. There are three key policy avenues that could help address aspects of FR&I through the RM reforms:

- a. *Developing the freshwater content of the National Policy Framework (NPF).* Working with Māori to transition the policy intent of existing freshwater



national directions to the NPF, and assessing whether they are sufficient to address the water quality pou of FR&I, will likely be key considerations (noting there may be limited scope to amend existing national directions in the first-generation NPF).

- b. *Strengthening the role of Māori in freshwater governance and decision-making at a local level.* In addition to strengthening the strategic role of Māori via regional joint committees, the MOG has agreed to a number of proposals that could strengthen the role of Māori in freshwater governance and decision-making at a local (i.e. sub-regional) level. Chief among these are:
  - i. Treaty partnership entities, if they are pursued further (which could provide a stronger decision-making role in Freshwater Management Unit and catchment-level plan content, including allocation decisions);
  - ii. Removing the barriers to Joint Management Agreements (JMAs) and transfers of power and integrating them with an enhanced Mana Whakahono ā Rohe process (which could provide an integrated avenue for decision-making powers in other aspects of freshwater management); and
  - iii. A balanced relationship weighting for Iwi Management Plans (IMPs). Stronger legal weighting for freshwater IMPs (or content of IMPs relating to freshwater) could be explored, although this would require revisiting (or at least nuancing) the MOG #6 decision that IMPs be 'taken into account'.<sup>1</sup> Links to Te Mana o te Wai statements (which can take the form of IMPs) may need to be considered.
- c. *Enabling equitable access to freshwater resources for Māori.* Options to enable equitable access and use of freshwater resources for Māori could be explored as part of the development of a resource allocation framework. We expect this would relate to Article 3 FR&I (such as the development of underdeveloped Māori land) rather than a perpetual and inalienable share of the resource based on whakapapa (more commonly associated with Article 2, and similar to agreements reached with respect to other resources).

31. Transition and implementation requirements will need to be considered early to identify key dependencies, overlaps and opportunities. This includes the work already underway to support the implementation of the Essential Freshwater package.

### ***How can the Crown's ability to address other aspects of FR&I be preserved?***

32. Freshwater access and use rights based on whakapapa (such as a share of the resource and any royalties generated by its use) are the key aspect of FR&I that cannot be

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<sup>1</sup> MOG #11/12 also agreed that appropriate weighting and consideration should be given to Māori technical inputs (including IMPs). The team working on the NBA plan functions and mechanisms paper also suggested at one point that IMPs be given a 'balanced relationship weighting'.



progressed without a Cabinet mandate. This is inextricably linked to reform of the freshwater allocation system more broadly.

33. There are several options that could assist the Crown to address these rights at a later date. These include shorter consent durations for freshwater takes and discharges, stronger Ministerial intervention powers (such as targeted moratoria on consents and the ability to formalise expectations when directing plan changes), and strengthening the ability of decision-makers to review and amend consents (such as when scarcity thresholds are met). These should be explored as part of the RM reforms. They are also likely to be relevant to enabling equitable access.
34. Similar preservation mechanisms may need to be considered if the resource allocation framework enables decision-makers to introduce charges for resource use. This could include setting aside a portion of the funds for later 'settlement'.

### *How should we approach R&I more broadly?*

35. Our understanding of R&I in other natural resources that will be governed by the NBA is limited. While the options outlined above for freshwater might be equally applicable to other resources, we cannot say this for certain. Further analysis and targeted engagement with ILG / TTK may be needed to determine the best approach. This could include a targeted review of the relevant literature (in particular Waitangi Tribunal reports) to build our knowledge base. Appropriate resourcing would be needed for this.
36. We are currently also considering the approach to geothermal resources, and are preparing advice for relevant directors. Next steps may include a stocktake of what we currently know about geothermal resources (not limited to R&I), assessing how the current resource management system is working, how decisions already taken in RM reforms affect geothermal resources, and considering options for improvement in the new RM system (including how the overall objectives and decisions made to-date interact with geothermal resources).

### **Risks and mitigations**

37. The approach outlined in this paper:
  - a. Will not comprehensively address FR&I. It is essentially a holding pattern – making progress where we can while ensuring the future RM framework preserves the Crown's ability to address the more elusive aspects of FR&I later.
  - b. Does not include options that are outside the scope of the RM reforms, such as a Water Act, a Water Commission, or titling of river and lake beds.
38. As such, there is the ever-present risk that Māori may turn to the courts to define their FR&I (as some groups have already done), or to challenge aspects of the RM reforms. The legal team are better positioned to advise on this risk.
39. Not having the mandate for a more comprehensive work programme to address FR&I also poses a relationship risk with our Treaty partners, particularly given the strong message from Māori in submissions on the NBA exposure draft that FR&I needed to



be addressed as part of the RM reforms. The approach outlined in this paper may be seen as insufficient, and could impact negatively on our ongoing engagement with the ILG / TTK, Post-Settlement Governance Entities (PSGEs), and Māori more broadly.

40. Progressing with some aspects of FR&I prior to a comprehensive Cabinet mandate risks a fragmented, non-holistic approach to addressing FR&I. An alternative approach would involve waiting until Cabinet agrees to a FR&I mandate before developing a comprehensive package of FR&I proposals (a 'comprehensive approach'). The drawback of this approach is that it fails to take advantage of the opportunity presented by those aspects of the RM reforms that overlap with FR&I, and which could preclude options if they are not parsed through a FR&I lens. Either approach will likely require amendments to the NBA (and possibly the SPA); however, the comprehensive approach would require more substantive amendments rather than targeted ones.
41. As the policy development phase of the RM reforms nears its conclusion, more concrete decisions will need to be made on various matters. This increases the probability of FR&I options being precluded. We will continue to review draft papers as they are developed to avoid this, and we are streamlining our processes to ensure there is greater opportunity for early engagement with authors.

## Approach

42. If you agree with the recommendations set out in this memo, the Māori freshwater rights and interests team will work with the leads on relevant MOG and delegated decisions papers to address and preserve the relevant aspects of FR&I rather than preparing separate advice. This would involve working with the authors from early in the process and drafting components of advice where required

## Next steps

43. If you support the approach outlined in this memo, I recommend that you discuss it with the cross-agency DCEs group. Please let me know if you would like me to draft a paper for you to take to this group. If so, I would like to seek feedback on a draft of the paper from Te Arawhiti, Te Puni Kōkiri and Treasury before it goes to the group.
44. I also recommend that you test our understanding of what remains in scope with respect to FR&I with Minister Parker and Associate Minister Allan. I defer to your judgement on the appropriate channels and sequencing of these discussions.



## Appendix A: Additional information on the nature and extent of Māori rights and interests

### The Treaty guaranteed Māori rights and interests in natural resources

1. Māori interests have been a key consideration in the allocation of a number of natural resources since the late 1980s, including commercial fisheries, aquaculture and the foreshore and seabed.<sup>2</sup> These often followed Waitangi Tribunal inquiries into the nature and extent of the Māori interest in a particular resource. Addressing Māori interests in each resource has posed its own unique challenges, including the nature of the resource, the extent of existing and overlapping use rights and determining how best to administer and distribute assets to Māori. Financial compensation and a share of the resource (typically 20%) are common forms of 'settlement'.
2. The Tribunal has consistently found that the Treaty of Waitangi guaranteed Māori an interest greater than the general public in natural and other resources. This is summarised in the Tribunal's report on the allocation of radio frequencies, which highlighted the relevance of the Treaty in both the governance and the use of natural resources:

As we see it, the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of this resource. Māori interests in natural resources are protected by the distinctive element of tino rangatiratanga. The Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of tino rangatiratanga. This means that consultation between partners is vital to the Treaty itself and to its spirit.

There is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.<sup>3</sup>

### The Crown has recognised that Māori have rights and interests in freshwater

3. The Crown has acknowledged that Māori have rights and interests in freshwater since the first serious attempt to introduce national freshwater regulations through the Sustainable Water Programme of Action in 2003-2004. This was most clearly set out in the then Prime Minister Bill English's evidence to the High Court in 2012 in the context of the Mixed Ownership Model litigation:

The Crown acknowledges that Māori have rights and interests in water and geothermal resources ...

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<sup>2</sup> And other resource allocations too, such as the disposal of broadcasting assets and the auction of spectrum rights.

<sup>3</sup> *Report of the Waitangi Tribunal on claims concerning the allocation of radio frequencies* (Wellington: GP Publications, 1990), p. 42.



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 ...

At the outset of discussions between Ministers and the Iwi Leaders Group, it was agreed that there would be no disposition or creation of property rights or interests in water without prior engagement ... with iwi.<sup>4</sup>

4. From a policy perspective, FR&I are typically grouped under four broad 'pou':
  - a. *Water quality* (mechanisms to improve water quality and the health of ecosystems and give effect to Māori freshwater values)
  - b. *Recognition* (recognise Māori relationships with particular water bodies)
  - c. *Governance / management / decision-making* (enhance Māori participation at all levels of freshwater decision-making)
  - d. *Economic development* (develop mechanisms to enable Māori to access and use freshwater in order to realise and express their economic and development interests).
5. These four pou were distilled from a series of over 20 regional hui held by the Iwi Advisors Group in 2014, along with a series of case studies commissioned by MfE, to assemble a comprehensive picture of what Māori rights and interests in freshwater entailed. They subsequently formed the basis of a joint work programme agreed to by the Crown and the ILG in 2015 (CAB Min (15) 26/10, para 6), and were reiterated by Cabinet in July 2018 (ENV-18-MIN-0032 refers).
6. The exact framing of these pou reflect certain political realities. They had to fit within the context of the National government's bottom lines at the time, so residual proprietary rights were not included. 'Customary uses' was also originally a separate pou but was subsequently woven into the other four pou. 'Economic development' also presumes that Māori aspirations with respect to freshwater access and use are solely financial, which might not always be the case. Access to potable water for marae and papakainga is another commonly raised aspect of FR&I.

## **Comprehensively addressing Māori freshwater rights and interests has proved difficult**

7. Addressing FR&I has proven to be one of the most intractable political issues of this century. Successive governments have struggled particularly to make any progress in addressing access and use rights (which is tied to the broader question of freshwater allocation reform). They have also struggled to meaningfully recognise Māori in freshwater governance and decision-making outside of Treaty settlements.

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<sup>4</sup> 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. While the original affidavit used the phrase 'engagement and agreement', the Crown clarified in a follow-up affidavit that the word 'agreement' was included in error.



8. Nevertheless, some progress has been made in addressing aspects of FR&I over the last ten years:
  - a. The National Policy Statement for Freshwater (NPSFM), including Te Mana o te Wai, mahinga kai and the requirement to 'actively involve' tangata whenua in freshwater management and decision-making.
  - b. The introduction of Mana Whakahono ā Rohe to the RMA in 2017.
  - c. Treaty settlements relating to specific freshwater bodies.

## **The Waitangi Tribunal has made detailed recommendations on addressing Māori freshwater rights and interests**

9. In stage one of the Wai 2358 inquiry, the Waitangi Tribunal found that Māori had rights and interests in their water bodies at 1840 'for which the closest English equivalent in 1840 was ownership rights'. The Treaty 'confirmed, guaranteed and protected' these rights and interests save to the extent that there was an expectation that the waters would be shared with the incoming settlers. In practice this meant recognising that:
  - a. The Crown was required to govern in the best interests of the nation and the environment (albeit within the context of a Treaty partnership);
  - b. Tauīwi had a right to access water resources; and
  - c. Māori now had the option of 'walking in two worlds' courtesy of the rights of British citizenship.<sup>5</sup>
10. In stage two of the Wai 2358 inquiry, the Tribunal provided detailed recommendations on how to address FR&I. On access and use rights, it recommended:
  - d. The Crown should arrange for an allocation of water on a percentage basis to iwi and hapū, according to a regional, catchment-based scheme. All allocations to iwi and hapū should be perpetually renewable and inalienable other than by lease or some other form of temporary transfer.
  - e. The Crown should arrange for an allocation of water for the development of Māori land (including land returned in Treaty settlements), where this is sustainable.
  - f. Other possible mechanisms for 'proprietary redress', including royalties, should be investigated (as there was insufficient evidence for the Tribunal to make a recommendation to the Crown).
11. On governance, the Tribunal recommended:
  - g. A national co-governance body should be established with 50/50 Crown–Māori representation, to ensure that Treaty principles and Māori values,

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<sup>5</sup> *The stage one report on the National Freshwater and Geothermal Resources claim* (Legislation Direct, 2014), pp. 77–79, 81.



rights, and interests are fully incorporated in freshwater policy and management.

- h. A number of amendments to the existing mechanisms for co-governance and co-management which were considered would enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies (with co-governance being the minimum standard).



## Appendix B: The Crown's July 2018 reframing of Māori freshwater rights and interests

14. agreed (consistent with the decision in paragraph 11 above) to reframe the Crown position by adopting the following parameters:

14.1 the Crown and Māori have a key shared interest in improving the quality of New Zealand's freshwater, including the ecosystem health of our waterways;

14.2 the Crown and Māori have a shared interest in ensuring sustainable, efficient, and equitable access to and management of freshwater resources;

14.3 no one owns freshwater – it belongs to everyone, and we all have a guardianship role to look after it;

14.4 the Crown acknowledges that Māori have rights and interests in freshwater, including accessing freshwater resources to achieve their fair development aspirations for under-developed land;

14.5 the Crown acknowledges that existing users also have interests that must be considered;

14.6 the Crown will work with Māori and regional government to consider how, on a catchment by catchment basis, freshwater resources can be accessed fairly so as to achieve the development of under-developed land, based on the following principles:

14.6.1 the need to gather key catchment-level information on Māori land development opportunities and the current situation in those catchments in terms of water quality, water takes and existing capital investments;

14.6.2 any change to existing allocation method is achieved in a way and at a pace that takes into account the interests of existing users and the public interest in the optimal use of the resource; and

14.6.3 the need to ensure that solutions for water meet sustainable limits for swimmability, ecological health and human health, being the values captured by 'Te Mana o Te Wai'.



## Appendix C: Decisions and commitments made by Cabinet / Ministers relating to Māori rights and interests in freshwater and other natural resources

Decision / commitment	Relation to FR&I and R&I
Cabinet reframing of FR&I	<p>Cabinet agreed to reframe the Crown’s position on freshwater on 3 July 2018 (ENV-18-MIN-0032) and upheld this framing as a starting point for conversations with Māori on 9 December 2020 (CBC-20-MIN-0119). Key aspects of this reframing were:</p> <ul style="list-style-type: none"> <li>• No one owns freshwater – it belongs to everyone, and we all have a guardianship role to look after it</li> <li>• The Crown acknowledges that Māori have rights and interests in freshwater, including accessing freshwater resources to achieve their fair development aspirations for under-developed land</li> <li>• The Crown will work with Māori and regional government to consider how, on a catchment-by-catchment basis, freshwater resources can be accessed fairly so as to achieve the development of under-developed land.</li> </ul>
Cabinet decision to proceed with RM reform	<p>Cabinet agreed on 14 December 2020 to proceed with RM reform in the basis of the Randerson panel’s recommendations, while noting that further work and refinement was needed in some areas (CAB-20-MIN-0522 para 7). This included:</p> <ul style="list-style-type: none"> <li>• Giving effect to the principles of the Treaty</li> <li>• Establishing a stronger strategic role for Māori in the system</li> <li>• Creating a new resource allocation framework based on the principles of sustainability, equity and efficiency.</li> </ul> <p>FR&amp;I were specifically excluded from the Randerson panel’s purview.</p>
Government and Ministers’ commitment not to preclude options to address FR&I	<p>The accompanying paper to the NBA exposure draft states that the draft ‘does not preclude any options for addressing freshwater rights and interests and their consideration as part of the ongoing discussions with iwi, hapū, and Māori’. Ministers Parker and Allan have also reassured Te Tai Kaha that the broader resource management reforms ‘[are] not intended to preclude any options that might be agreed as part of the freshwater rights and interests work programme’ (21-M-00718).</p>
MOG decisions relating to Māori access to resources	<p>MOG #2 agreed that one of the outcomes of Cabinet’s objective to ‘give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori’ is that equitable access to resources for Māori is ensured.</p>



Decision / commitment	Relation to FR&I and R&I
	MOG #6 agreed that the Treaty clause for the NBA exposure draft should be to 'give effect to the principles of Te Tiriti plus ... allocation principles (subject to outcomes of the work programme on Māori rights and interests in freshwater)'.
Cabinet consideration of options for progressing freshwater allocation and FR&I	On 19 October 2021 Cabinet considered a paper on options for progressing with freshwater allocation reform and Māori freshwater rights and interests (CPC-21-MIN-0022). <sup>6</sup> The scope of the Cabinet paper included 'equitable allocation / access for iwi, hapū and Māori' and 'Treaty-based governance and management'. Cabinet did not agree to pursue options at that stage.
Ministers' agreement to a FR&I work programme with ILG	On 19 November 2021 Minister Parker and Associate Minister Allan agreed to work with ILG to develop an accord and a work programme to address FR&I over the next 2-3 years.
MOG decision to delegate R&I decisions	MOG #15 agreed to delegate decisions relating to R&I jointly to the Minister for the Environment and Associate Minister for the Environment (Hon Kiritapu Allan), in consultation with other relevant Ministers through the Māori interests sub-group.

<sup>6</sup> The Cabinet minute 'invited the Minister for the Environment to consult with the Labour Māori caucus on the matter and give further consideration to proposals'. Our understanding is based on discussions with Ministers.

## Appendix D: Assessment of commonly suggested options to address FR&I against the scope of Cabinet’s mandate

The commonly suggested options listed below are drawn from a more comprehensive assessment of the overlaps between FR&I and the RM reforms.<sup>7</sup> The four assumptions noted above are:

1. Options to address aspects of FR&I must be grounded in the Randerson panel’s recommendations, *Cabinet’s agreed objectives for the RM reforms*, and MOG decisions to-date.
2. Enabling equitable access to freshwater and other resources for Māori is within the scope of the RM reforms.
3. Options to address aspects of FR&I should not pre-empt the possibility of a more detailed work programme.
4. Engagement with Māori on policy proposals will be integrated with the broader RM engagement programme.

Pou	Option	Assessment
Overarching	Consider creating a separate piece of legislation for water (a ‘Water Act’)	Not within scope.
Water quality	Use Māori concepts to frame national freshwater regulations and freshwater management more generally (most commonly Te Mana o te Wai or Ki Uta Ki Tai)	Within scope of the NPF.
	Strengthen Māori values / measures of freshwater health or make them mandatory (commonly suggested values / measures include mahinga kai, Te Mana o te Wai, and values identified locally through Treaty settlements and iwi management plans)	Cabinet has agreed to combine the current functions and powers of existing national directions into the NPF. This includes the NPSFM 2020, which appears to have largely addressed the options most commonly suggested to address the water quality pou of FR&I.

<sup>7</sup> Available in Sharepoint



Pou	Option	Assessment
	Make national freshwater regulations stricter and more comprehensive (such as by expanding the NOF to cover more contaminants, introducing more stringent bottom lines, providing for cultural / ecological flows, protecting wetlands / native fish species / fish passage, introducing stock exclusion regulations)	There may be limited scope to go beyond existing national directions in the first-generation NPF, and any amendments could impact on councils' ability to notify freshwater plans by the end of 2024 in any case.
	Strengthen obligations on local authorities (particularly regional councils) to identify and engage with tangata whenua about water quality in their freshwater taonga	Work is already underway to design a process for developing the first-generation NPF, including a bespoke process for engaging with Māori (as the national entity will not be established in time).
	Provide stronger guidance and implementation support	<p>Within scope – largely covered by implementation support for the Essential Freshwater regulations.</p> <p>Aligning the implementation of the NPSFM 2020 with the RM reforms will be an important part of transition and implementation.</p>
Recognition	Provide reliable water supply / water storage for marae and papakāinga	Not within scope – possibly being explored as part of the Three Waters reforms and the Provincial Growth Fund (but would need to check).
	Provide for water takes for customary practices, and/or funding for restoration of mahinga kai sites and dried-up puna	Not within scope.
	Recognise relationships through forms of title (such as the vesting of river or lake beds, water columns, or water	Not within scope.



Pou	Option	Assessment
	bodies themselves in Māori groups, or creating a new form of title and vesting it in Māori groups)	
	Provide for pou to be nominated by Māori and the Crown to speak for water bodies	Partially within scope – existing mechanisms such as JMAs could potentially be used to create governance structures like this.
Governance management decision-making / /	Establish a Water Commission or national freshwater co-governance body	Not within scope.
	Require local authorities to ‘give effect to’ the Treaty and/or its principles, or otherwise strengthen the existing Treaty clause to ensure that the Crown’s Treaty responsibilities are upheld by local authorities	Within scope – is one of Cabinet’s five agreed objectives for the RM reforms, and will be a clause within the NBA (and possibly the SPA).
	50/50 Crown/Māori partnership at all levels of the freshwater management system	Only within scope to the extent that 50/50 partnership is provided for through environmental management institutions more broadly (see discussion of JMAs / transfers of power / Treaty partnership entities below).
	Remove the barriers to JMAs / transfers of power and make them mandatory in some circumstances	<p>Within scope – removing the barriers has already been agreed to by the MOG, and exploring degrees of compulsion could be part of the process of developing / refining further recommendations for MOG #17.</p> <p>The NPSFM already requires regional councils to work with tangata whenua to investigate the use of these mechanisms with respect to freshwater management, and to record and publish any decisions made in</p>



Pou	Option	Assessment
		respect of these investigations (including decisions not to use these mechanisms).
	Enable co-governance / co-management in all catchments, covering functions such as plan-making, consenting, environmental monitoring / reporting, and Compliance Monitoring and Enforcement (CME)	Within scope. In addition to JMAs and transfers of power (discussed above), co-governance in plan-making could be explored through the process of developing / refining further advice on Treaty partnership entities for MOG #17.
	Strengthen the legal weighting of IMPs	Within scope.  MOG have currently agreed to a 'take into account' weighting for IMPs, and further advice being developed on NBA plan functions and mechanisms recommends a 'balanced relationship weighting'.
	Ensure Māori are adequately resourced to perform freshwater management functions	Within scope – further advice on funding for Māori will be provided to MOG #17.
	Provide stronger guidance and implementation support	Within scope – transition and implementation + work being done by freshwater implementation on mana whakahaere.
Economic development	Provide both a whakapapa-based share of the resource (which should be perpetual, inalienable and not tied to land) and separate measures for Māori landowners.	Largely out of scope, with the exception of exploring measures to ensure equitable access for Māori.
	Other mechanisms to address FR&I should be explored where this is required (such as royalties or compensation)	Not within scope.



Pou	Option	Assessment
	Replace grandparenting, the presumption of renewal and first-in-first-served with a new freshwater allocation system (models proposed are usually market- or administrative merit-based).	Within scope – the resource allocation team are considering an enabling framework that allows decision-makers to adopt alternative allocation models.
	Introduce mechanisms to ‘claw-back’ overallocated catchments and/or protect the ability to address FR&I (such as a moratorium on new and renewed consents, ‘tagging’ consents for renewal at a later date, pooling consents at the end of their term for reallocation, and shaving a percentage off the top of existing consents)	<p>Within scope – strengthening the ability of decision-makers to review and amend consents, and stronger Ministerial intervention powers, are being considered as part of the RM reforms.</p> <p>Ministers have also agreed not to preclude options to address FR&amp;I – these sorts of mechanisms could assist in upholding that commitment.</p>
	Introduce charges or royalties on commercial use	Partially within scope – introducing an enabling framework that allows for charges on resource use is being explored by the resource allocation team, but providing a share of the royalties to Māori appears to be out of scope.
	Include a FR&I preservation clause in the NBA	Within scope. Ministers have also agreed not to preclude options to address FR&I – these sorts of mechanisms could assist in upholding that commitment.