

Māori rights and interests in freshwater governance and decision-making – a whole-of-MfE picture

Purpose

1. This paper attempts to provide a high-level picture of Māori rights and interests in freshwater governance and decision-making, and how these are being progressed within the Ministry for the Environment's (MfE's) freshwater allocation and resource management work programmes. Specifically, it:
 - a. Highlights why freshwater governance and decision-making is a crucial component of addressing rights and interests, from both a Crown and Māori perspective
 - b. Outlines some examples of what a Treaty-based governance and management framework for freshwater (as sought by Te Tai Kaha) might look like
 - c. Outlines the key components of the resource management reforms that relate to this kaupapa (including the overarching framework, spatial and regional planning, and system oversight)
 - d. Discusses some possible freshwater-specific governance requirements that are not currently part of the resource management reforms (allocation governance and a water commission).
2. Other aspects of the Government's reform programme not being led by MfE, such as Three Waters and the removal of legislative barriers to introducing Māori wards and constituencies, provide additional mechanisms through which Māori rights and interests in freshwater governance and decision-making will be progressed. While they are not discussed in this paper, they form an important part of the overall picture nonetheless.

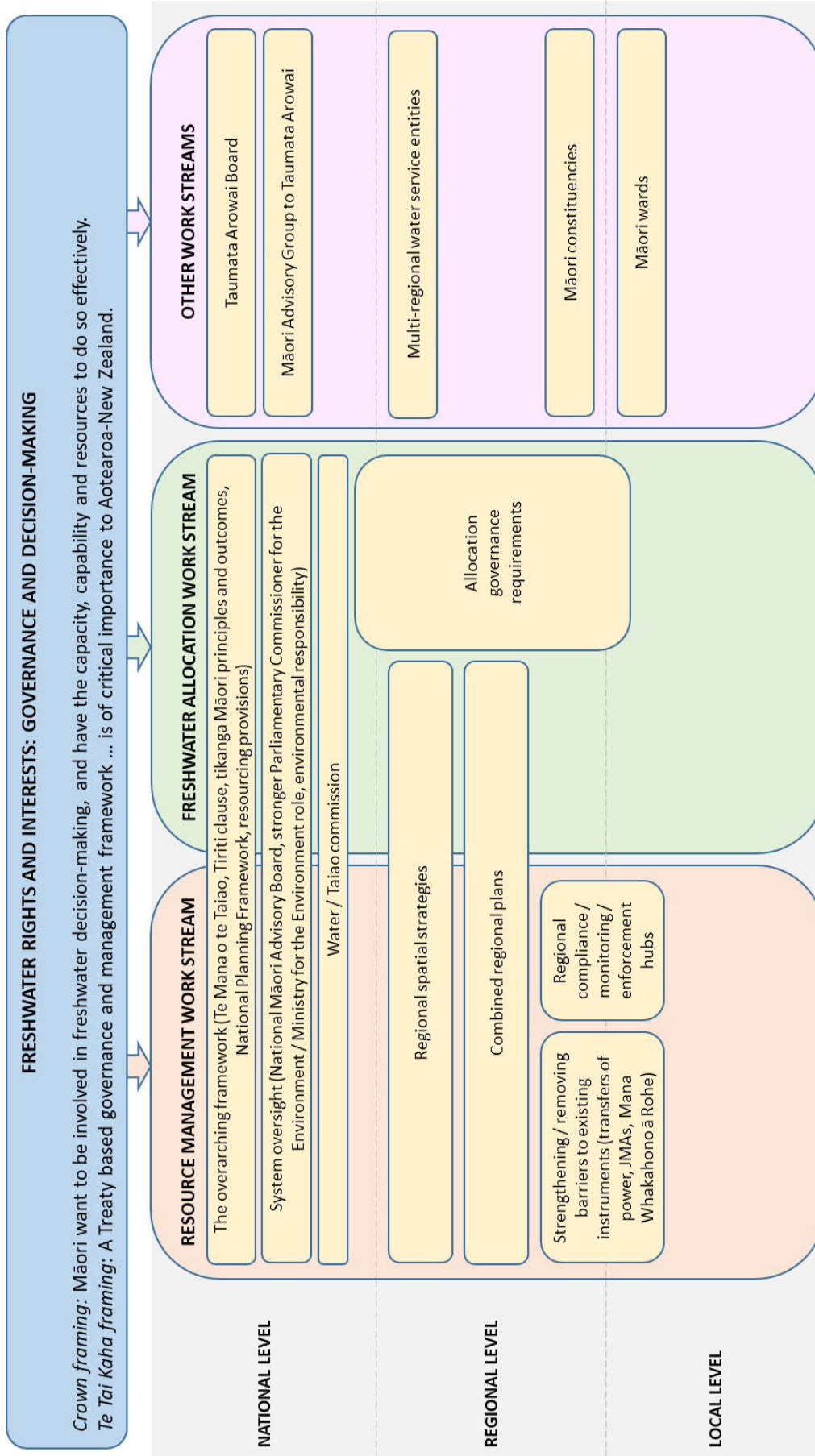
Positioning

3. 'Governance and decision-making' is one of four pou frequently identified when describing rights and interests in freshwater. Most recently, on 3 July 2018, Cabinet summarised these four pou as follows:
 - a. Improving water quality and the health of ecosystems and waterways
 - b. **Governance / management / decision-making: Māori want to be involved in freshwater decision-making, and have the capacity, capability and resources to do so effectively**
 - c. Recognition: ensuring there is formal recognition of iwi/hapū relationships with particular freshwater bodies
 - d. 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).¹

¹ ENV-18-MIN-0032 refers. These four pou mirror the joint work programme agreed by the Crown and the Freshwater Iwi Leaders' Group (ILG) in 2015. The exact framing of these pou was something of a negotiation between the ILG and the Crown (for example, they don't include proprietary rights, and matters like customary use and water supply for marae/papakāinga were absorbed under the four pou).

Highlights

4. Rights and interests in freshwater governance and decision-making are complex and multi-layered. They exist at a national, regional and local spatial level, and across both governance and management. They are closely intertwined with governance and decision-making for other aspects of the environment, both from a holistic, Te Ao Māori perspective, and from a pragmatic perspective (as water quality and quantity is interlinked with what occurs in other environmental domains). They are central to the development of new resource management and freshwater allocation systems, and any transitional arrangements required in the interim.
5. As an example, the governance and decision-making aspirations for any given iwi could involve some or all of the following:
 - a. Co-governance and co-management of significant rivers within their rohe over which they hold mana whenua
 - b. Working with local authorities and other hapū and iwi within their region to develop and implement regional planning instruments
 - c. Introducing Māori wards and / or constituencies, nominating and supporting candidates, and holding them accountable to mana whenua
 - d. Participating in the provision of three waters services within their region
 - e. Working with central government to develop freshwater legislation and regulations that are appropriate for the awa in their rohe or region
 - f. Working with central and / or local government to develop and implement freshwater allocation options for the awa in their rohe or region
 - g. Carrying out freshwater monitoring in accordance with the values and measures appropriate to their mātauranga
 - h. Contributing to oversight of freshwater instruments, agencies and consent holders.
6. Given this complex skein of potential roles and responsibilities, there is no single proposal that can address all of them. This includes the often-raised concept of a water commission. Instead, rights and interests in freshwater governance and decision-making must be progressed through multiple avenues.
7. Overall, the resource management reforms provide the best vehicle to progress rights and interests in freshwater governance and decision-making. The recommendations of the Resource Management Review Panel (the Panel) concerning Te Tiriti me Te Ao Māori have the potential to provide for much greater Māori recognition and participation in all aspects of environmental governance and decision-making, including freshwater. The Panel's recommendations were informed by, and align strongly with, the Waitangi Tribunal's recommendations in the Wai 262 and Wai 2358 inquiries. They also reflect many of the points raised in recent years by the national Māori organisations that form part of Te Tai Kaha, as well as Māori more broadly.
8. There are two interrelated aspects of governance and decision-making which are specific to freshwater, and which were not part of the Panel's recommendations. The first is the concept of a water commission, which we have some concerns about but which we are open to discussing. The second is the governance of a future freshwater allocation system, which is sometimes mentioned as one of the potential functions of a water commission. Both of these are discussed below.
9. The following diagram outlines the various proposals currently being considered which relate to Māori rights and interests in freshwater governance and decision-making. Each of these proposals is discussed later in this paper, with the exception of those not being led by MfE which fall under 'other work streams'.



Why is governance and decision-making a crucial component of addressing rights and interests?

The Crown's view

10. The Crown has recognised for many years that addressing Māori rights and interests in freshwater must include enhancing the role of Māori in governance and decision-making. This acknowledgement has been made through several 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.²

11. 'Governance / management / decision-making' was one of four priority workstreams agreed to by the Crown and the Freshwater Iwi Leaders Group (ILG) in 2015.³ The objectives agreed by Cabinet at the time were to:

- a. Enhance iwi/hapū participation at all levels of freshwater decision-making
- b. Build capacity and capability amongst iwi/hapū and councils, including resourcing.

12. The key outcome of this workstream was the inclusion of Mana Whakahono ā Rohe in the Resource Management Amendment Act 2017.

13. The Crown has previously expressed a willingness to explore all options to better provide for a Māori-Crown partnership, including a water commission.⁴ However, it noted that there are multiple matters that need to be considered before fundamentally changing the freshwater governance system, in particular:

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

14. However, the Crown has also stressed that its kāwanatanga duties require it to consider the interests of all New Zealanders in the way that freshwater is governed. It must also operate within a legal framework that is fundamentally centred on the protection of private property rights, which is a colonial import to New Zealand.

15. Since the advent of the Resource Management Act (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 longer tradition of local government decision-making in New Zealand extending back to the provincial governments of the nineteenth century.

² 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.

³ Cab Min (15) 26/10, paras 6-7.

⁴ Wai 2358, #3.4.20

The Māori view

16. To understand why Māori have rights and interests in freshwater governance and decision-making, one must turn to whakapapa. In doing so, it must be stressed that there is no single whakapapa, but many – it is contested. Nevertheless, some common themes emerge.
17. Whakapapa is much more than genealogy. It is a web of kinship that binds all things. It enables Māori to position themselves in an extended genealogy that encompasses all things in the terrestrial and spiritual worlds. It is the basis of mātauranga Māori, or the Māori way of knowing and understanding the world structured through whakapapa relationships.
18. Whakapapa connects all things across time. It incorporates Ranginui and Papatūānuku, and the children huddled between them in their tight embrace at the beginning of the world. 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. Through descent from Tāne Mahuta and his coupling with Hineahuone, Māori have a familial link with the environment.⁵ Environmental taonga are thus tupuna, or ancestors, who can be traced through whakapapa.
19. Because of this familial relationship, the health and wellness of the environment impacts upon the health and wellness of the people. This whakapapa relationship, and the intertwined nature of human and environmental health and wellbeing, are summed up in the whakataukī of Whanganui River iwi: 'ko au te awa, ko te awa ko au (I am the river and the river is me)'.
20. Whakapapa is one of the sources of mana, through which comes rangatiratanga (the authority to make decisions) and kaitiakitanga (the obligation to preserve environmental taonga for current and future use). Rangatiratanga and kaitiakitanga are 'intimately linked' – they go together as right and responsibility.⁶
21. Prior to 1840, Māori held sole authority and control over the use of, and access to, New Zealand's freshwater taonga. Rivers, lakes and other water bodies, including their banks, beds, fisheries and flora and fauna, were part of the rohe over which different hapū and iwi held mana whenua. Whakapapa determined which water bodies one could or could not access, at what times, and for what purposes (including drinking, washing, ceremonial uses, fishing, and navigation).⁷ Customary conservation practices such as rāhui were used to conserve scarce or diminishing resources.
22. The Māori version of Te Tiriti guaranteed Māori their tino rangatiratanga (or the unqualified exercise of their chieftainship) over their lands, villages, and all their taonga.⁸ 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.⁹ The protection of taonga also

⁵ It's worth noting that hapū and iwi hold different versions of the whakapapa mapping the connections from Te Kore to the Ātua down to tangata whenua – there is no one, single agreed whakapapa.

⁶ Reverend Maori Marsden, 'Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Maori' (Wellington: Ministry for the Environment, 1992), p. 20.

⁷ Ibid.

⁸ 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).

⁹ *The stage one report on the National Freshwater and Geothermal Resources claim* (Legislation Direct, 2014), p. 81. 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.

extended to mātauranga Māori, which is a living and evolving body of knowledge built on lived experiences with the environment.¹⁰

23. The rights and obligations bestowed by whakapapa form the foundation upon which Māori have consistently sought greater involvement in freshwater governance and decision-making. Importantly, they seek recognition of something that already exists and which was protected under Te Tiriti, rather than the creation of new rights. Te Tai Kaha summarised this expectation as ‘a Treaty based governance and management framework’.¹¹

What might ‘a Treaty-based governance and management framework’ look like?

24. There is no single, authoritative source for what a Treaty-based governance and management framework for freshwater might look like. However, some direction is provided by constitutional scholars and the Waitangi Tribunal:
- a. The authors of the *Matike Mai* report utilised three overlapping ‘spheres of influence’ as their governing metaphor – a ‘rangatiratanga sphere’ where Māori make decisions for Māori, a ‘kāwanatanga sphere’ where the Crown makes decisions for its people, and a ‘relational sphere’ where the two will act in partnership.¹²
 - b. In *Ko Aotearoa Tēnei*, the Waitangi 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:
 - i. *Control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority
 - ii. *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
 - iii. *Effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.¹³
 - c. In the stage two report for the National Freshwater and Geothermal Resources inquiry, the Tribunal found that the Treaty standard for freshwater management is co-governance.¹⁴ A summary of the Tribunal’s specific recommendations concerning freshwater governance and decision-making are set out in **Appendix 1**.
25. Existing co-governance arrangements, such as Te Awa Tupua and the Waikato River, provide examples of how a freshwater Treaty partnership can work on the ground. Te Kōpuka nā Te Awa Tupua, which is tasked with developing a strategy for the river, includes representatives from river hapū / iwi and other communities with interests in the river.

¹⁰ The additional oral guarantee offered by William Hobson at Waitangi on 6 February 1840 (sometimes referred to as ‘Article 4’) may also have some bearing on mātauranga Māori. According to written accounts, Hobson agreed to protect the several Christian faiths of England and Rome, along with Māori customs or ritenga.

¹¹ Letter from the Māori Collective to the Prime Minister, 19 November 2020, p. 1.

¹² Rawiri Manley, ‘He pukenga korero: an analysis of the effectiveness of current co-governance / co-management regimes’ (Wellington: Ministry for the Environment, 2021), p. 7.

¹³ Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wellington: Legislation Direct, 2011), Volume 1, pp 285-286

¹⁴ Waitangi Tribunal, *Stage two report on the national freshwater and geothermal resources claims* (Wellington, Legislation Direct, 2020), p 526. Our summary of the report was set out in #2019-B-05950.

26. The five organisations comprising Te Tai Kaha have previously expressed views on how to enhance Māori involvement in freshwater governance and decision-making. These are summarised in **Appendix 2**. While these should not be taken as representing the proposals that Te Tai Kaha will collectively develop, they provide an indication of what each group may bring to the discussion.
27. One key area where Te Tai Kaha members disagree is whether a central water body or 'water commission' is required, and what its functions might be. This is discussed further below. The Federation of Māori Authorities (FOMA) also stress the importance of involving Māori landowners in local decision-making alongside hapū and iwi.

Overlaps between freshwater rights and interests and the resource management reforms

28. Freshwater governance and decision-making is closely intertwined with governance and decision-making for the environment as a whole. The agents and agencies that hold the statutory authority to make environmental decisions are not unique to water, and most of the instruments through which decision-making occurs are likewise common across all environmental domains (such as policy statements, plans, and resource consents). Given these overlaps, the Government's commitment to repealing the RMA and replacing it with a suite of new environmental legislation provides a crucial opportunity to address Māori rights and interests in freshwater governance and decision-making.¹⁵
29. There are several components of the resource management reforms which have the potential to significantly progress Māori rights and interests in freshwater governance and decision-making. These span the gamut of the resource management process from policy development to implementation and monitoring.
30. Involving Māori in designing these components will be essential. We note Cabinet's commitment to work with Te Tai Kaha in developing many of these proposals. It will also be important to work with hapū and iwi across the motu, both to uphold the Crown's Treaty obligations (including its Treaty settlement commitments) and to learn from the mātauranga held in each rohe.

The overarching framework

31. There are several components of the proposed purpose and supporting provisions for a new Natural and Built Environments Act (NBA) which are informed by Te Ao Māori and Te Tiriti. Together, these components form a korowai (cloak) that clothe the broader set of proposed reforms. Not only does this korowai provide a pattern for each of the reforms sitting under it to follow, but each of those reforms should (if designed correctly) form a muka (thread) that is woven into the korowai.
32. Viewed from the perspective of governance and decision-making, the key components of this korowai are the proposals regarding Te Mana o te Taiao and the Tiriti clause. Te Mana o te Taiao was inspired by the incorporation of Te Mana o te Wai into successive freshwater regulations, which encapsulates the rights and responsibilities inherited through whakapapa. We are endeavouring to co-develop the definition of this concept with Te Tai Kaha and mātauranga Māori experts. The Tiriti clause recommended by the Panel was to 'give effect to' the principles of Te Tiriti o Waitangi. This proposal, along with how best to implement the elements needed to give effect to the Tiriti clause, are also matters that we will endeavour to design with Te Tai Kaha.
33. Other key proposals in the overarching framework include:

¹⁵ CAB-20-MIN-0522.

- a. Including specific tikanga Māori outcomes that will require decision-makers to restore and protect ancestral relationships, wāhi tapu and other taonga; and recognise protected customary rights
 - b. Including specific Māori implementation principles that will require decision-makers to provides for kaitiakitanga, mātauranga and tikanga Māori, and promote mechanisms for iwi, hapū and whānau participation.
 - c. Creating a National Planning Framework that sets environmental limits across all natural environment domains.
 - d. Providing for Māori to be resourced for resource management duties and functions undertaken in the public interest (such as mana whenua representatives on committees for all types of planning).
34. Many of these components are currently being actively discussed with Te Tai Kaha and the Ministerial Oversight Group (MOG).¹⁶
35. Some of these components have a governance aspect. The National Planning Framework, for example, will need to be developed under a partnership approach if it is to uphold the standard of a Treaty-based governance framework. What this partnership approach looks like will be something we need to discuss with Te Tai Kaha. However, it will need to account for the Crown's obligations to national Māori organisations and hapū and iwi, as well as its specific Treaty settlement commitments to certain iwi with respect to policy development and relationship redress.

Spatial planning

36. The Panel's proposal to require all regions in Aotearoa to have a long-term (at least 30 year) spatial strategy is a significant opportunity to contribute to strategic decision-making in the resource management system. The proposed Strategic Planning Act (SPA) provides an opportunity to protect Māori interests and support Māori aspirations through Treaty-based partnerships in strategic planning. Sufficient funding and support would be required to enable Māori to participate effectively in strategic planning processes.
37. There is currently no consistent formal framework for strategic planning in Aotearoa. The Panel recommended Aotearoa adopt strategic spatial planning more formally and enact a SPA for that purpose. It envisaged that the SPA would promote the social, economic, environmental and cultural wellbeing of present and future generations through the long-term strategic integration of functions under several statutory frameworks. Regional spatial strategies would be developed jointly by central and local government and mana whenua, with significant stakeholder and public involvement.
38. Regional spatial strategies may provide an opportunity for Māori and local communities to express their aspirations for their catchments in the future, which could influence allocation decisions under the NBA. We will continue to explore this and any other links between spatial planning and allocation.

Regional planning

39. The Panel's proposal to replace all local plans and policy statements with combined regional plans is a significant opportunity to recognise tino rangatiratanga at a local level. Indeed, of all the Panel's proposals, this is likely to have the most immediate, visible and powerful effect in addressing rights and interests in freshwater governance and decision-making.

¹⁶ #2021-B-07599. See also our previous advice in the talking points for your meeting with Te Tai Kaha on 9 February 2021 (#2021-B-07574).

40. The Panel envisioned that the new combined regional plans would be produced by regional committees consisting of representatives from local authorities and mana whenua acting in partnership. Crucially, the Panel recommended that the new regional committees have final decision-making power over the content of those plans. This is a major step-change from the current system, where elected councillors have sole authority to make the final decision over plan content. It has the potential to involve Māori as partners at the highest level of environmental planning and decision-making within their rohe. This would provide a key mechanism to uphold the Tiriti clause in the NBA framework by helping to ensure that the Crown's Treaty obligations to Māori are preserved in the legislative framework for local government decision-making.
41. There are several complex questions underpinning the Panel's proposal that we hope to work through with Te Tai Kaha before it is brought before the MOG on 22 March 2021. These include mana whenua representation, dispute resolution, and the preservation of existing co-governance arrangements under a new planning system.

Removing barriers to existing instruments

42. Removing legislative and other barriers to the use of existing provisions such as transfers of power and joint management agreements will also progress rights and interests in freshwater governance and decision-making. It is also proposed to include positive obligations to encourage their use. The Tribunal has long recognised the potential for these mechanisms to empower Māori to exercise tino rangatiratanga over specific environmental taonga.
43. More thought needs to be given to how these mechanisms will work in relation to the new regional planning proposals discussed above and how to best ensure that they are supported to be given effect to through the proposed integrated partnerships process.

System oversight

44. We are exploring several options for improving oversight of the environmental management system. This includes the Panel's proposals to establish a National Māori Advisory Board and strengthen the oversight functions performed by the Ministry for the Environment and the Parliamentary Commissioner for the Environment.
45. We are also exploring whether broader ideas of environmental responsibility could be reflected in system oversight arrangements, which we have previously briefed you on.¹⁷
46. The panel's proposed National Māori Advisory Board would:
- a. Monitor and audit the performance of central and local government in giving effect to Te Tiriti
 - b. Participate in developing a national policy statement on Te Tiriti, if one is developed
 - c. Advise central government on policies, regulations, processes and methods that will best give effect to the principles of Te Tiriti
 - d. Consider ways to address resource management Tiriti issues of national importance and/or issues that are common to multiple regions
 - e. Maintain a register of mana whenua groups and assisting local authorities and mana whenua on engagement.
47. While we will continue to explore these functions and the agencies best suited to perform them, we note that, in accordance with the Article Two guarantee of 'te tino rangatiratanga ... o ngā taonga katoa', Māori may have interests in all system oversight functions, not just

¹⁷ #2020-B-07344.

compliance with Te Tiriti. We will therefore consider additional options that would promote Māori involvement across all system oversight functions.

48. Greater system oversight is commonly listed as a function for a potential water commission. This is discussed further below.

Compliance monitoring and enforcement

49. The Panel recommended that regional hubs should be established to undertake resource management compliance, monitoring and enforcement (CME) options. This could provide an opportunity to involve Māori in CME, and to recognise the CME work that local kaitiaki already perform but which is not recognised or remunerated as part of the current resource management system.

Possible freshwater-specific governance requirements

Water commission

50. The idea of an independent commission to provide oversight of aspects of the freshwater management system, and to provide direction and advice to agencies within the system, has a long pedigree. It was first raised by the Land and Water Forum (LAWF) in 2010, which recommended that the Crown establish a 'National Land and Water Commission' in co-governance with Māori. Since then, an independent water commission has been recommended by several Māori and non-Māori organisations.
51. The functions suggested for a water commission have varied greatly. The most commonly suggested functions are:
- a. Providing oversight of agencies performing freshwater functions under the RMA, and monitoring system performance and progress in general
 - b. Presenting a national voice in regional freshwater 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
 - c. Developing national freshwater directions and other central regulations, or being consulted on their development
 - d. Providing guidance and support to agencies within the freshwater system on planning, science, mātauranga, and Tiriti matters
 - e. Developing and/or managing a new water allocation regime that upholds Māori rights and interests in freshwater.
52. All major organisations that have recommended a water commission agree that it should reflect a Treaty partnership approach.
53. Within Māoridom, the New Zealand Māori Council (NZMC) and Te Kāhui Wai Māori (KWM) are the key national-level Māori organisations that have recommended a water commission. The NZMC proposal is arguably the most transformational, as it envisages removing responsibility for water from the RMA and vesting it in a new Water Act, a national commission, and regional catchment boards.
54. A water commission is not universally supported within Māoridom. The ILG and Te Rūnanga o Ngāi Tahu have argued 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.
55. We have some concerns about whether a water commission is best suited to perform many of the proposed functions listed above. These include:

- a. Many of these functions apply to other aspects of the environment, including those that are currently being underperformed or not performed at all. As solutions to these problems may be applicable across the whole environmental management system, care must be given to creating a separate commission for water or any other environmental domain.
 - b. Water is inextricably tied to the rest of the environment (especially land use). Arguably one of the key strengths of the RMA was that it brought together a significant number of previously disparate environmental statutes to provide a single process by which one could seek consent to undertake an activity that may affect the environment.¹⁸ Splitting certain water functions off could result in a less holistic, more siloed approach, resulting in poorer environmental outcomes.
 - c. Poor or under-performance is not itself a justification for shifting functions to a new agency. The reasons for poor or under-performance need to be better understood first before assessing whether a new agency is best placed to overcome them.
 - d. Centralising too much authority in a single body may override decisions made through local elected bodies, and impinge upon the obligations of hapū and iwi to exercise tino rangatiratanga at place.
56. We are open to discussing a water commission (or a broader taiao commission) further with Te Tai Kaha, and hapū and iwi more broadly. Through these discussions, we hope to get a clearer picture of which aspects of freshwater management (including rights and interests) are best suited to a separate body such as a commission, and which are better served by remaining integrated within existing institutions alongside other aspects of environmental management.

Governance of a future freshwater allocation system

57. As we have noted before, the freshwater allocation and resource management reforms are interlinked. Governance is one of the key areas of overlap.
58. As freshwater allocation reform is still in its early stages, it is difficult to anticipate what governance functions will need to be performed in a future allocation system. It will depend to large extent on the allocation options that are employed (such as auctioning, points-based allocation, or cap and trade). The options used may also vary between catchments, depending on local circumstances.
59. At the very least, a future allocation system will likely involve administrative, data, oversight, and compliance monitoring and enforcement functions. The agencies best suited to perform these functions will vary depending on which allocation options are employed. It may be that most of these functions can be performed by existing agencies, and are compatible with the new legislative and governance machinery proposed by the RM Review Panel.
60. A water commission, or some other central body, could perform some of the functions that may be required for specific allocation options. A points-based allocation system, for example, would require a body (or bodies) to develop national and / or regional criteria, and to assess consent applications against those criteria. A commission could also play a role in implementing a reset or initial reallocation, although the concern we outline above about not overriding local decision-making or tino rangatiratanga at place is a relevant consideration here.
61. Key components of the resource management reforms, such as the overarching framework and spatial and regional planning, will undoubtedly overlap with allocation.

¹⁸ David Young, *Values as Law: The History and Efficacy of the Resource Management Act* (Wellington: Institute of Policy Studies, 2001), p. 1.

62. We intend to discuss freshwater allocation governance with Te Tai Kaha, and with hapū and iwi more broadly, in the coming months.

Appendix 1 – the recommendations of the Waitangi Tribunal in Wai 262 and Wai 2358 concerning freshwater governance and decision-making

Wai 262 ¹⁹	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 ²⁰	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 rohe 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 National Policy Statement for Freshwater Management (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 opportunities to enter into joint management agreements and transfers of power

¹⁹ Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wellington, Legislation Direct, 2011), Volume 1, pp 285-286. These recommendations concern environmental taonga more broadly, not just freshwater

²⁰ 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.

	Revise and add to the policies in Part D of the NPSFM 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 2 – summary of the positions of Te Tai Kaha members on ways to enhance Māori involvement in freshwater decision-making

Organisation	Position
NZMC ²¹	<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 <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 ²²	<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. 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 Mātāpono 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>
Te Wai Māori (TWM) ²³	<p>TWM noted that a number of existing mechanisms under the RMA, such as transfers of power and joint management agreements, are underused due to chronic under-resourcing for Māori, lack of willingness on the part of local authorities, and the absence of robust monitoring and auditing by central government.</p> <p>TWM also stressed that any use of Māori concepts in a legislative context must be clearly defined and led by tangata whenua through a Te Tiriti based process.</p>

²¹ Wai 2358, #3.3.33, #3.3.52

²² Wai 2358, #3.3.41

²³ Te Wai Māori, 'Further Feedback on the Resource Management Review Panel's Issues and Options Paper', March 2020, paras 15-17, 21.

Organisation	Position
FOMA ²⁴	FOMA stress the importance of improving the involvement of Māori landowners in local-level decision-making as well as hapū and iwi.
KWM ²⁵	<p>KWM recommended 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 recommended that further consideration be given to establishing a standalone Water Act.</p> <p>KWM recommended 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"> • Establish a National Māori Advisory Board on Planning and the Treaty • 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 • 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.

²⁴ FOMA Submission on Clean Water Consultation 2017.

²⁵ KWM submission to the Resource Management Review Panel, 18 March 2020; Kāhui Wai Māori, *Te Mana o te Wai: The Health of our Wai, the Health of our Nation* (September 2019), p 9