



# Cabinet Environment, Energy and Climate Committee

## Minute of Decision

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### A New Approach to the Crown/Māori Relationship for Freshwater

Portfolio Crown/Māori Relations / Environment

On 3 July 2018, the Cabinet Environment, Energy and Climate Committee:

- 1 **noted** there are significant ongoing expectations on the Crown to engage meaningfully with Māori as to the recognition of Māori rights and interests in freshwater;
- 2 **noted** that the aspirations of Māori with respect to freshwater can be broadly summarised as:
  - 2.1 improving water quality and the health of ecosystems and waterways;
  - 2.2 governance/ management/ decision-making: Māori want to be involved in freshwater decision-making, and have the capacity and capability to do so effectively;
  - 2.3 recognition: ensuring there is formal recognition of iwi/hapū relationships with particular freshwater bodies;
  - 2.4 economic development: Māori want to be able to access and use freshwater resources (i.e. water takes and discharge rights) in order to realise and express their economic and development interests (within the context of a holistic view of Te Mana o te Wai);
- 3 **noted** that, while considerable progress has been made in respect of paragraphs 2.2 and 2.3 above, considerably more progress is needed to improve water quality and ecosystem health (paragraph 2.1 above) and provide for fair access to freshwater resources to allow for the development of under-developed land (paragraph 2.4 above);
- 4 **noted** that there is a building sense among Māori that there is no clear 'path ahead' for the Crown's engagement with Māori and addressing Māori rights and interests in freshwater;
- 5 **noted** that feedback from public engagement on the Crown/Māori Relations portfolio suggests that the Crown has not been talking to a broad enough cross section of Māori society on freshwater issues;
- 6 **noted** s9(2)(h) [REDACTED] and that the Crown remains in an active Waitangi Tribunal Inquiry as to its freshwater reform programme:

- 7 **noted** that there are significant information gaps in our understanding of catchment issues including water-based Māori land development opportunities, the current situation in those catchments in respect of freshwater resource availability and use, and the opportunities to:
- 7.1 appropriately increase access to water resources, through such measures as environmentally responsible water storage, managed aquifer recharge or water use efficiency;
  - 7.2 employ policy instruments and initiatives to reduce nutrient loads on waterways, and thus help create headroom so that new entrants can develop under-developed land;

### A phased approach

- 8 **agreed** that the Crown will take a phased approach to its engagement with Māori across all freshwater issues, starting with a focus on water quality issues rather than water allocation and addressing the key information gaps discussed in paragraph 7;
- 9 **agreed** that following this initial phase, the government will then engage on our broad policy parameters regarding Māori desires for access to freshwater resources to allow development of under-developed land;

### Options for addressing Māori desires for access and use of freshwater resources

- 10 **noted** that the Minister for Crown/Māori Relations and the Minister for the Environment have considered the following three options for addressing Māori desires for access to and use of freshwater resources:
- 10.1 Option A: impose a royalty/charge on the use of freshwater (payable to the Crown), and distribute under-used water permits (or discharge capacity) that could be relinquished, and the revenue from the charge;
  - 10.2 Option B: find a mechanism to more equitably share the resources over time through a 'regulatory' route: in scarce catchments this proposal could require the generation of 'headroom' between the total allocated quantum of 'use rights' and the sustainable limit in order to give Māori (and other new users) the opportunity to obtain a share of those use rights;
  - 10.1 Option C: allow matters to unfold through the courts and Waitangi Tribunal;
- 11 **agreed** that the government signals its preference is Option B because it:
- 11.1 focuses the debate on regulatory solutions that meet Māori concerns, rather than a contest about 'ownership';
  - 11.2 allows for meaningful development of Māori land; and
  - 11.3 is significantly more constructive and likely to provide more certainty than an exploration of rights in the Courts;
- 12 **noted** that, although a charging mechanism (Option A) may eventually be useful to drive efficient use of freshwater resources, Ministers have not considered it further because of the coalition agreement; and that Option C may still be where the parties end up if the Crown and Māori have exhausted all good faith endeavours and options to resolve the issues;

## Reframing the Crown's position

- 13 **noted** that it is appropriate to update the 'five bottom lines' for freshwater agreed by the previous government in 2015 to constructively approach the conversation with Māori or the general public about freshwater [CAB Min (15)1/9];
- 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'.
- 15 **noted** that the Green Party has expressed a reservation about paragraph 14.3 above. The Party's position is that Māori have rangatiratanga rights and customary rights in freshwater, and the nature of these rights may extend to proprietary interests in some circumstances. However, the Green Party otherwise supports the need to make progress in this area and, in particular, are committed to raising the quality of New Zealand's freshwater and waterways;
- 16 **agreed** that the Crown position described in paragraph 14 above, be communicated publicly;

## Broadening the conversation with Māori and establishing Kahui Wai-Māori – the Māori Freshwater Forum

- 17 **agreed** to establish Kahui Wai-Māori – the Māori Freshwater Forum (KWM) to enable collaborative development and analysis of freshwater policy options for issues of particular relevance to Māori;

18 **noted** that:

- 18.1 the KWM will not be the only way in which the Crown engages with Māori about freshwater, that it would not hold a mandate to 'sign off' on final options for reflecting Māori rights and interests in freshwater policy and regulation;
- 18.2 the Crown will still meet with the Iwi Leaders Group and other key Māori and non-Māori organisations prior to significant decision points and wider public consultation;

19 **authorised** the Minister for Crown/Māori Relations, the Minister for the Environment, and the Minister for Māori Development, in consultation with other relevant Ministers, to develop and finalise a Terms of Reference for KWM that provide for:

19.1 Purpose & Functions: the key functions of KWM should be to:

- 19.1.1 facilitate engagement between the Crown and Māori on freshwater reform;
- 19.1.2 collaboratively develop and analyse policy options on issues of particular importance to Māori across the freshwater reform programme;
- 19.1.3 provide advice directly to Ministers where it wishes to;
- 19.1.4 undertake any other advisory/research function agreed between the Crown and the KWM; and
- 19.1.5 undertake or facilitate engagement with the wider Māori community on key issues if necessary;

19.2 Scope: the scope of the KWM be limited to issues being discussed in the Freshwater reform programme, and specifically exclude historical Treaty settlement issues or local issues such as those related to a particular water body or region, except to the extent these examples are used as case studies;

19.3 Principles of engagement: setting out some key principles to ensure good faith and timely engagement and transparency between the parties. The Crown's engagement would be based on the parameters described at paragraph 14 above;

19.4 Information sharing: setting clear parameters for the sharing of information. In particular, including an undertaking to discuss the substance of Cabinet papers with the KWM before they are considered by Cabinet, and giving the forum an explicit mechanism to include their views in Cabinet papers if the KWM considers this necessary. Sharing of draft papers themselves would be considered by Ministers on a case by case basis;

19.5 Confidentiality: conversations to be conducted under a condition of confidentiality and an expectation of prior consent before information is shared beyond the immediate membership of the KWM;

19.6 Publicity: KWM members would be expected to seek prior consent of the Crown and other KWM members before making any public statements related to the substance of KWM issues;

20 **agreed** that KWM membership should be based on perspectives, insights and skills from a wide range of Māori society;

- 21 **agreed** that KWM should have a flat structure, including both rangatira and people with a Māori perspective on more technical issues, and be supported by a secretariat based in the Ministry for the Environment;
- 22 **agreed** to establish KWM with a hybrid structure in which the Crown requests nominations from a small number of Māori organisations and then contracts additional members at key engagement points who it thinks would bring particularly relevant perspectives or capabilities to specific issues;
- 23 **authorised** the Minister for Crown/Māori Relations, the Minister for the Environment, and Minister for Māori Development, in consultation with other relevant Ministers, to approach nominating agencies and potential members and finalise the membership of KWM through the Cabinet Appointments and Honours Committee;
- 24 **invited** the Minister for Crown/Māori Relations, the Minister for the Environment, and Minister for Māori Development to report back to the Cabinet Crown/Māori Relations Committee to inform them of the final membership of KWM;

### A guide for engagement with Māori

- 25 **noted** the draft guide for engagement with Māori on freshwater issues attached as Appendix Two of this paper under ENV-18-SUB-0032;
- 26 **authorised** the Minister for Crown/Māori Relations and the Minister for the Environment to discuss the draft guide with the Iwi Leaders Group and with the KWM, and make minor changes;

### Financial implications

- 27 **noted** that the establishment of the KWM has estimated financial implications of up to \$0.89 million;
- 28 **approved** the following changes to appropriations to give effect to the policy decision in paragraph 14 above, with a corresponding impact on the operating balance:

Vote Environment Minister for the Environment	\$m – increase/(decrease)				
	2017/18	2018/19	2019/20	2020/21	2021/22 & Outyears
Multi-Category Expenses and Capital Expenditure: Improving Environmental Management MCA Departmental Output Expense: Water Management Policy Advice (funded by revenue Crown)	0.000	0.890	0.000	0.000	0.000

- 29 **agreed** that the proposed change to appropriations for 2018/19 above be included in the 2018/19 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

- 30 **agreed** that the expenses incurred in paragraph 28 above be a charge against the between-Budget operating contingency, established as part of Budget 2018.

Vivien Meek  
Committee Secretary

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**Present:**

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Grant Robertson  
Hon Dr Megan Woods (part item)  
Hon David Parker (Chair)  
Hon Peeni Henare  
Hon Meka Whaitiri (part item)  
Hon James Shaw  
Hon Eugenie Sage

**Officials present from:**

Office of the Prime Minister  
Officials Committee for ENV

**Hard-copy distribution:**

Minister for Crown/Māori Relations  
Minister for the Environment



**Office of the Minister for Crown/Māori Relations  
Office of the Minister for the Environment**

Chair  
Cabinet Environment, Energy and Climate Committee

**A new approach to the Crown/Māori Relationship for Freshwater**

**Proposal**

- 1 This paper proposes a new approach to the Crown/Māori relationship for freshwater, including:
  - 1.1 a phased engagement with Māori, focussing initially on water quality rather than water allocation; and gathering key, catchment-level, information;
  - 1.2 signalling a preferred option for addressing Māori desires for access to and use of a fair portion of freshwater resources;
  - 1.3 re-framing of the previous Government's five 'bottom lines' for the development of freshwater policy, as agreed by Cabinet in 2015 [CAB Min (15)1/9 refers]; and
  - 1.4 a broader approach to engaging with Māori, including the establishment of a new forum – a Māori Freshwater Forum called 'Kahui Wai-Māori' (KWM) – to collaboratively develop and analyse policy options on issues that have a particular impact on Māori.
- 2 On 25 June 2018 Cabinet considered a related paper covering the wider freshwater reforms (including a proposed work programme) [CAB-18-MIN-0296 refers]. As a key component of the wider freshwater work programme, we seek agreement to a new approach to engaging with Māori on freshwater, and the parameters of that engagement.

**Executive Summary**

- 3 Freshwater is a precious and limited resource and a taonga of huge significance. The state of our water bodies is far from what New Zealanders want. Māori have consistently identified improving water quality, including the health of freshwater ecosystems, as a key priority. In addition, the current way water resources are allocated risks locking in under-developed land into current uses, lost economic opportunities, inefficiencies and the exclusion of some landowners, in particular Māori, from accessing the resource. Allocation issues relate to both quantity (in terms of rights to take water) and quality (in terms of the rights to discharge to water). Resolving either is not straightforward.
- 4 There is a significant opportunity to achieve better environmental, cultural, economic, and social outcomes through freshwater reform. However, many of these issues cannot be progressed without a concurrent and substantive discussion with Māori.
- 5 To date, the Crown has engaged primarily with the Freshwater Iwi Leaders Group (ILG) on these issues, and much progress has been made on providing for Māori

input to decision-making in relation to the governance and management of freshwater. However, a great deal still needs to be done to address water quality. In addition, given the difficulty and lack of progress on allocation issues, no substantive policy decisions have been made that address Māori interests in economic development through access to, and use of, freshwater resources. As such, Māori remain disproportionately represented in a group of landowners that have not been able to access freshwater resources (and therefore develop land) in scarce catchments under 'first come first served' allocation models.

6 In 2015, the previous Government agreed five 'bottom lines' for the development of freshwater policy [CAB Min (15)1/9 refers]:

- 6.1 no-one owns freshwater, including the Crown;
- 6.2 there will be no generic share of freshwater resources provided for iwi;
- 6.3 there will be no national settlement of iwi/hapū claims to freshwater resources;
- 6.4 freshwater resources need to be managed locally on a catchment-by-catchment basis within the national freshwater management framework; and
- 6.5 the next stage of freshwater reform will include national-level tools to provide for iwi/hapū rights and interests.

7 There is a building sense among Māori that there is no clear 'path ahead' for the Crown's engagement with Māori and addressing Māori rights and interests in freshwater. In addition, initial feedback from public engagement on the Crown/Māori Relations portfolio suggests that the Crown has not been talking to a broad enough cross section of Māori society, and that there would be much to learn from a dialogue with Māori Incorporations and business leaders, Māori interest groups, and representatives of hapū/whānau with a significant interest in freshwater.

8 s9(2)(h)

9 Further, there are significant information gaps in our understanding of catchment issues, including water-related Māori land development opportunities, and the current situation in those catchments in terms of water quality, water takes and existing capital investments that are dependent on access to water resources. Nor do we have sufficient information on the opportunities to, for example:

- 9.1 appropriately increase access to water resources, through such measures as environmentally responsible water storage, managed aquifer recharge or water use efficiency
- 9.2 employ policy instruments and initiatives to reduce nutrient loads on waterways, and thus help create headroom so that new entrants can develop under-developed land.

#### *A phased approach*

10 We propose the Crown take a phased approach to its engagement with Māori across all freshwater issues. This would initially start with a focus on water quality issues



rather than water allocation, including such matters as a revised NPS-FM; greater use of farm environment plans; options to reduce sedimentation; sector/community-led initiatives; and other practical measures to halt the decline and start to improve our waterways.

- 11 We also propose that we gather the information and undertake the analysis needed to address key information gaps discussed in paragraph 9 above (noting that this would build off existing information sources, case studies and analysis).
- 12 While the initial focus will be on water quality and building the information base to support our engagement with Māori, we will then need to engage on our broad policy parameters regarding Māori desires for access to freshwater resources to allow development of under-developed land. Three broad options for such engagement are discussed in paragraph 14 below.
- 13 We propose the Government provides an indication of its preferred approach in respect of those options, since this will help us to lay out a clear description of how the Government intends to approach these issues over time. However, as noted above, there are too many information gaps to initiate discussions on allocative matters immediately.

#### *Options for addressing Māori desires for access and use of freshwater resources*

- 14 We have considered three broad options for addressing Māori desires for access to and use of a fair portion of freshwater resources:
  - A. *impose a royalty on the use of freshwater (payable to the Crown), and distribute under-used water permits (or discharge capacity) that could be relinquished, and the revenue from the charge;*
  - B. *find a mechanism to more equitably share the resources over time through a 'regulatory' route: in scarce catchments, this could require the generation of 'headroom' between the total allocated quantum of 'use rights'<sup>1</sup> and the sustainable limit in order to give Māori (and other new users) the opportunity to obtain a share of those use rights;*
  - C. *allow matters to unfold through the courts and Waitangi Tribunal.*
- 15 These options are discussed in more detail in the body of this paper.
- 16 Our preference is Option B. Although a charging mechanism (Option A) may eventually be useful to drive efficient use of freshwater resources, we do not consider it further because of the coalition agreement. Similarly, although Option C may still be where the parties end up if the Crown and Māori have exhausted all good-faith endeavours and options to resolve the issues, we consider it much more constructive to first explore regulatory solutions for ensuring that Māori (and other owners of under-developed land) can access freshwater resources under the Resource Management Act 1991 (RMA). Option C also risks:
  - long delays in reaching conclusions on water allocation;

<sup>1</sup> That is, the right to access and use (or discharge to) water under the Resource Management Act, either via a specific resource consent or a 'permission' under an RMA plan.

- continuation of economic inefficiencies and current unfairness to owners of under-developed land (particularly Māori);
  - high legal costs for landowners, Māori, councils and the Crown; and
  - an inconsistent patchwork of approaches and rules throughout the country based on various council and court decisions.
- 17 The primary advantage of Option B is that it focuses the debate on regulatory solutions that meet Māori concerns, rather than a contest about 'ownership'. It is also the option most likely to provide for the meaningful development of under-developed Māori land (and other land) to the benefit of landowners, communities and regions.
- 18 We therefore recommend that the Government signal a preference to pursue Option B; a regulatory route. This leaves open the ability of Māori to exercise their right to seek resolution through the courts, and also the Crown to revert to that route if necessary.
- 19 Option B would not, however, be straightforward. There is historic capital investment in land based on existing water usage. The Government would need to ensure that any re-allocation occurs in a way and at a rate that balances the need to provide for new users with the interests of those existing users and the interest of the general public in the efficient use of freshwater resources. Many catchments are over-allocated. There are also strong interests amongst existing users in maintaining the status quo, which favours the roll-over of existing permits. To create headroom, more small-scale water storage and a range of other measures may be needed. National direction under the RMA (and possibly some changes to the RMA) may also be needed.
- 20 In those catchments where freshwater resources are not scarce, there will be a weaker argument for change.
- 21 There are different views within Māoridom as to who should obtain use rights (i.e. iwi/hapu or Māori landowners).
- 22 Over time, all of these issues would need to be worked through with the proposed KWM and Māori stakeholders.

#### *Reframing the Crown position*

- 23 We also need to decide whether the Government will engage with Māori based on the previous five 'bottom lines' described in paragraph 6, or whether we wish to update them. We want to emphasise that the Government is more interested in exploring what is possible than focusing on what is not. We therefore recommend that the Crown position be reframed as follows:
- 23.1 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;
  - 23.2 The Crown and Māori have a shared interest in ensuring sustainable, efficient, and equitable access to and management of freshwater resources;
  - 23.3 No one owns freshwater – it belongs to everyone, and we all have a guardianship role to look after it;

- 23.4 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;
- 23.5 The Crown acknowledges that existing users also have interests that must be considered;
- 23.6 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:
- 23.6.1 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;
  - 23.6.2 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
  - 23.6.3 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'.

*Broadening the conversation with Māori - a Kahui Wai-Māori (Māori Freshwater Forum)*

- 24 We propose to establish the Kahui Wai-Māori (KWM) – a Māori Freshwater Forum – to collaboratively develop and analyse policy options on issues that have a particular impact on Māori. The KWM would represent perspectives, insights and skills from a wider range of Māori society.
- 25 It is important to note that the KWM would not be the only way in which the Crown engages Māori on freshwater, nor would they hold a mandate to 'sign off' on final options for reflecting Māori rights and interests in freshwater policy and regulation. We would still engage with the ILG, and undertake substantive consultation with important Māori organisations prior to key decision points. At the most significant decision points, iwi and hapū would have the ability to contribute views as part of full public consultation.
- 26 We seek authorisation for relevant Ministers to approach potential members and finalise the Terms of Reference for this group.

*A guide for engagement with Māori*

- 27 Attached at **appendix two** is a draft guide for engagement with Māori on freshwater issues. It lays out work areas and a timeline and/or conditions for when we expect issues to be addressed. We intend to discuss this as part of our initial engagement with the ILG (discussed below). Discussion with KWM, once it is formed, will also be necessary before it is finalised. We recommend that Cabinet authorises the Minister for Crown/Māori Relations and the Minister for the Environment to make minor changes and approve a final engagement plan.

## *Next steps*

- 28 Should Cabinet agree with the proposals in this paper, we will develop a communication plan to support this approach.
- 29 An initial step will be to engage with the ILG to outline the Government's proposed approach and the reasons for it. We seek authorisation to do this.
- 30 We will also need to establish the KWM, which could take two to three months.

## **Background**

- 31 Freshwater is a precious and limited resource and a taonga of huge significance. Water is at the heart of what it is to be a New Zealander. The life-supporting capacity of water is critical for human health and the habitat of freshwater species. Water underpins our agriculture and electricity sectors and is crucial for tourism.
- 32 New Zealanders rightly consider they have a birth-right to swim safely in our rivers and lakes and at our beaches. Waterways should also be fishable and safe for food gathering. Māori want to restore the mauri (life force) to waterways subjected to pollution and practices that have compromised their traditional relationship with these taonga.
- 33 The state of our water bodies is far from what New Zealanders want. Māori have consistently identified improving water quality and ecosystem health as a key priority. In addition, the current way water resources are allocated in scarce catchments (both water takes and rights to discharge to water) has led to limited economic opportunities, inefficiencies and the exclusion of some groups, in particular Māori, from accessing the resource to develop under-developed land.
- 34 There is a significant opportunity to achieve better economic, environmental, cultural, and social outcomes by:
  - 34.1 **Stopping further degradation and loss** – taking a series of actions now to stop the state of our freshwater resources getting worse, i.e. to stop adding to their degradation and loss, and to start making immediate improvements;
  - 34.2 **Reversing past damage** – promoting restoration activity to bring our freshwater ecosystems and waterways to a healthy state; and
  - 34.3 **Addressing water allocation issues** – achieving efficient and fair allocation of freshwater and nutrient discharges, having regard to all interests including Māori, and existing and potential new users.
- 35 Many of these issues cannot be progressed without a concurrent and substantive discussion with Māori about their rights and interests in freshwater under the Treaty of Waitangi.

## *The broad nature of Māori aspirations*

- 36 The aspirations of Māori with respect to freshwater can be broadly summarised as<sup>2</sup>:

<sup>2</sup> This summary is based on feedback and reporting from more than 100 hui on freshwater run by the ILG across New Zealand throughout 2014-15.

- 36.1 **Improving water quality and the health of ecosystems and waterways:** this was consistently identified as the most important and pressing issue;
- 36.2 **Governance/ Management/ Decision-making:** Māori want to be involved in freshwater decision-making, and have the capacity, capability and resources to do so effectively;
- 36.3 **Recognition:** ensuring there is formal recognition of iwi/hapū relationships with particular freshwater bodies<sup>3</sup>; and
- 36.4 **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).
- 37 A foundation to all these aspirations is the need to ensure protection of customary activities (e.g. food gathering, access to waahi tapu, and use of water for spiritual practices), and recognising and protecting the mauri of the water bodies.
- 38 However, it is important to note that there is a wide range of views within Māoridom about how to address freshwater issues, including significant differences of opinion as to the level of Māori society at which any rights to use and discharge to water should be held.

#### Recent progress and litigation

- 39 Since 2009, the Crown has engaged primarily with the Freshwater Iwi Leaders Group (ILG) on these issues. Much progress has been made in relation to points 36.2 and 36.3 above, with a set of Māori objectives incorporated in the National Policy Statement for Freshwater Management (NPS-FM), and the inclusion of 'Mana Whakahono ā Rohe': Iwi Participation Arrangements as a new tool designed to assist tangata whenua and local authorities discuss, agree and record how they will work together under the RMA. This includes agreeing how tangata whenua will be involved in decision making processes and a number of co-management models already put in place via historical Treaty settlements.
- 40 Some limited progress has also been made on initial steps for improving water quality (36.1 above), though considerably more effort is needed. For example, ecosystem health and reducing sedimentation are not adequately addressed in the national direction framework under the RMA. Fencing regulations were not progressed by the previous government, and there are still too many high-risk land management practices being used. Intensification of agriculture may be insufficiently controlled in some areas, and estuaries continue to decline and wetlands continue to be lost.
- 41 The Crown has made no substantive policy decisions on addressing Māori interests in access to and use of freshwater for economic development purposes (36.4 above). There are still considerable information gaps in our understanding of catchment issues, including water-related Māori land development opportunities, and the current situation in those catchments in terms of water quality, water takes and existing capital investments that are dependent on access to water resources.

<sup>3</sup> Many hui also raised concerns over the uncertainty of supply of potable water on all marae and in papakāinga.



- 42 Since 2012 the Waitangi Tribunal has been inquiring into claims led by the New Zealand Māori Council and 10 co-claimants (individuals representing various iwi/hapū / Māori interests in specific water bodies or systems) about Māori rights and interests in freshwater and geothermal resources (Wai 2358).
- 43 The first stage of the resulting inquiry, the National Freshwater and Geothermal Resources Inquiry (Wai 2358) concluded that in 1840 Māori had rights and interests in specific water bodies. It considered the closest English law equivalent for those rights and interests in 1840 was 'ownership'. The Tribunal considered that such rights were confirmed and protected by the Treaty. However, the Tribunal concluded that those rights were modified by the Treaty, to the extent that the Treaty provided for the sharing of the water resource with all New Zealanders. It considered there may be residual rights still in place but did not engage in detailed identification of such rights or their content.
- 44 In 2013 the Supreme Court dismissed an appeal from the New Zealand Māori Council and others about the proposed sale of shares in state-owned enterprises that use freshwater. During this process the Crown told the Court it was open to discussing (among other things) the possibility of Māori proprietary rights in water, short of full ownership, as a means of better recognising Māori rights and interests in freshwater.
- 45 In 2015, the previous Government agreed five key 'bottom lines' in relation to the development of freshwater policy [CAB Min (15)1/9 refers]:
- 45.1 no-one owns freshwater, including the Crown;
  - 45.2 there will be no generic share of freshwater resources provided for iwi;
  - 45.3 there will be no national settlement of iwi/hapū claims to freshwater resources;
  - 45.4 freshwater resources need to be managed locally on a catchment-by-catchment basis within the national freshwater management framework; and
  - 45.5 the next stage of freshwater reform will include national-level tools to provide for iwi/hapū rights and interests.
- 46 The second stage of the Wai 2358 inquiry is still in progress. It is concerned with the law relating to freshwater management under the Resource Management Act generally. s9(2)(h)  
[REDACTED] Hearings began in November 2016. The final week of hearings is scheduled for August 2018. Closing submissions have not been scheduled. s9(2)(h)  
[REDACTED] The claimants allege that the Crown has failed to appropriately recognise their ownership rights in freshwater, and that the Resource Management Act 1991 fails to give appropriate recognition to rangatiratanga and kaitiakitanga.
- 47 As part of the inquiry, the Crown has again acknowledged that iwi/hapū have rights and interests in freshwater and has committed to considering how to better recognise these rights and interests in a contemporary system for freshwater management. The Tribunal has directed the Crown to provide regular updates on the Crown's policy process.

- 48 **Appendix three** provides officials' analysis of the principles of the Treaty of Waitangi and the Crown's previous approaches to Māori rights and interests in natural resources.

*Council progress in giving effect to the NPS/freshwater reforms to date*

- 49 All regional councils have made some progress in implementing the NPS-FM, though this is highly variable across New Zealand. In some areas, such as Canterbury and the Waikato, considerable progress has been made with new plans and rules now being operative that are already affecting Māori landowners' access to water resources. In the case of Canterbury, for example, this has generally been collaborative and with the support of Ngāi Tahu.
- 50 In other areas, such as in the key catchment around the Rotorua lakes, decisions are being made by councils that some Māori do not consider adequately recognise their rights and interests. For example, in the case of Rotorua lakes, the Bay of Plenty Regional Council is seeking to improve water quality and, as part of a package of measures, has decided on a variant of 'grandparenting'<sup>4</sup> nutrient discharge rights to existing farm operations. This means some Māori owned land now faces restrictions on development (the proposed plan change is being appealed by the Māori Trustee and Central North Island Iwi Land Management Limited – which manages the land transferred under the Central North Island Treaty Settlement - amongst others).
- 51 Many other councils are yet to address these issues. However, as more effort is made to improve water quality, decisions on how to allocate limited discharge rights will become unavoidable across much of New Zealand.

**What risks does this history create?**

- 52 Although progress has been made, this background has created a sense among Māori that there is no clear 'path ahead' for the Crown's engagement with Māori and addressing Māori rights and interests in freshwater. In addition, initial feedback from public engagement on the Crown/Māori Relations portfolio suggests that the Crown has not been talking to a broad enough cross section of Māori society, and that there would be much to learn from a dialogue with Māori Incorporations and business leaders, Māori interest groups, and representatives of hapū/whānau with a significant interest in freshwater.
- 53 At the same time, Councils are looking to central government (as the Treaty partner and the lead on national policy formulation) to provide clear guidance on how Māori rights and interests should be addressed at a local and regional level.

54 s9(2)(h)

**So where to from here?**

- 55 Taking all of the above into account, we consider it is time for us to take measured but positive steps towards resolving the significant issues remaining for freshwater.
- 56 We propose the Crown take a phased approach to its engagement with Māori across all freshwater issues. This would initially start with a focus on water quality issues,

<sup>4</sup> This term refers to allocating use rights in a way that is directly related (in whole or in proportion to) existing rights.

which Māori have identified as a key priority, rather than water allocation; and gathering the information needed to support our engagement with Māori across other freshwater policy issues. We will then need to engage on our broad policy parameters regarding Māori desires for access to freshwater resources to allow development of under-developed land.

57 The subsequent sections of this paper discuss:

- 57.1 a proposal for broadening our engagement with Māori, including establishing the KWM - a Māori Freshwater Forum - to enable broad but practical engagement and collaborative development and analysis of policy options;
- 57.2 an outline of a phased engagement with the KWM and other groups;
- 57.3 a preferred option for addressing Māori desires for access to and use of a fair portion of freshwater resources; and
- 57.4 a re-framing of the previous Government's five 'bottom lines' for the development of freshwater policy, as agreed by Cabinet in 2015 [CAB Min (15)1/9 refers].

#### **How we can broaden the conversation with Māori: Kahui Wai-Māori – a 'Māori Freshwater Forum'**

- 58 We would like to engage with a forum that represents perspectives, insights and skills from a wide range of Māori society, and be flexible enough to provide useful input to the full range of relevant issues in the freshwater work programme.
- 59 As such, we propose the establishment of the KWM, a new 'Māori Freshwater Forum', as a body to collaboratively develop and analyse policy options with the Crown on those issues that have a particular impact on Māori. The Crown would retain final decision-making rights on policy options on behalf of all New Zealanders.
- 60 We propose a flat structure, where rangatira and other representatives with a Māori perspective on technical issues freely exchange views in developing and analysing policy options with the Crown. The group would be supported by a secretariat based in the Ministry for the Environment. It would also have the ability to provide advice directly to Ministers when it wishes to do so.
- 61 The KWM would not be the only way in which the Crown engages Māori on freshwater. Nor would it hold a mandate to 'sign off' on final options for reflecting Māori rights and interests in freshwater policy and regulation. We would still engage with the ILG, and undertake substantive consultation with important Māori organisations prior to key decision points. For the most significant decisions, we will also be undertaking full public consultation.
- 62 We anticipate the KWM including people who are also members or advisers of the ILG or the wider Iwi Chairs Forum (ICF). They would be members of the KWM on the basis that they represent a particular perspective or skill-set that is useful to co-designing policy options for freshwater as opposed to representing the interest of a particular group or the ICF. And as usual, they would not speak on behalf of other specific iwi. It is possible that, once there is a degree of consensus with the KWM about particular policy options, we could explore how these might work in particular local contexts by engaging with specific iwi and local authorities.



- 63 As such, we seek agreement on the following key aspects of the KWM so we can proceed with its establishment and appointment of members.

*Terms of Reference: Purpose, Functions, Scope, and Information*

- 64 We seek approval to develop a Terms of Reference for the KWM, along with the Minister for Māori Development, that is focused on the following key features:

64.1 Purpose & Functions: we propose the key functions of KWM should be to:

- 64.1.1 facilitate engagement between the Crown and Māori on freshwater reform;
- 64.1.2 collaboratively develop and analyse policy options on issues of particular importance to Māori across the freshwater reform programme, consistent with the draft guide for engagement with Māori on freshwater issues (see **appendix two**);
- 64.1.3 provide advice directly to Ministers where they wish to;
- 64.1.4 undertake any other advisory/research function agreed between the Crown and the KWM; and
- 64.1.5 undertake or facilitate engagement with the wider Māori community on key issues if necessary.

64.2 Scope: we propose the scope of the KWM be limited to issues being discussed in the freshwater reform programme, and specifically exclude historical Treaty settlement issues or local issues such as those related to a particular water body or region, except to the extent these examples are used as case studies;

64.3 Principles of engagement: we propose that the Terms set out some key principles to ensure good faith and timely engagement and transparency between the parties. The Crown's engagement would be based on the principles described at paragraph 23 above;

64.4 Information sharing: the Terms of Reference will need to set clear parameters for the sharing of information. In particular, we propose including an undertaking to discuss the substance of Cabinet papers with the KWM before they are considered by Cabinet, and give the forum an explicit mechanism to include their views in Cabinet papers if necessary. Sharing of draft papers themselves would be considered by Ministers on a case by case basis;

64.5 Confidentiality: conversations would need to be conducted under a condition of confidentiality and an expectation of prior consent before information is shared beyond the immediate membership of the KWM;

64.6 Publicity: KWM members would be expected to seek prior consent of the Crown and other KWM members before making any public statements related to the substance of KWM issues.

*Membership and structure of the KWM*

- 65 We would like to ensure that the following perspectives are represented:

- 65.1 Iwi and hapū;
- 65.2 Pan Māori organisations (e.g. the New Zealand Māori Council, the Federation of Māori Authorities);
- 65.3 Māori Incorporations (e.g. Atihau Incorporation, Wakatu Incorporation);
- 65.4 Other Māori Industry: 'land-based', tourism, and energy generation perspectives;
- 65.5 Māori interest groups and academics (e.g. the Wai Māori Trust, the Māori Women's Welfare League, the Māori legal society); and
- 65.6 Māori rangatahi (youth).
- 66 At the same time, we would also like to ensure we have the following capabilities represented:
- 66.1 Natural resource systems and planning;
- 66.2 Mātauranga Māori;
- 66.3 Commercial/business;
- 66.4 Economics, legal, and policy; and
- 66.5 Science: freshwater scientists, human health expertise.
- 67 We would like these perspectives and capabilities to inform each other within a single-tier structure to ensure the KWM provides highly practical advice. Having considered a number of options for the structure and membership of the KWM we propose adopting a hybrid model of some fixed and some fluid membership.
- 68 Under this hybrid approach, we would appoint nominees from a range of organisations, but then contract additional members in at key engagement points who would bring particularly relevant perspectives or capabilities to specific issues. We propose that the Minister for Crown/Māori Relations, the Minister for the Environment and Minister for Māori Development, in consultation with other relevant Ministers, would approach nominating agencies and potential members and would finalise the membership of the KWM through the Cabinet Appointments and Honours Committee.
- 69 One potential risk of this model is that it may create a sense of hierarchy between appointed and contracted members. However, we consider this risk can be mitigated by appointing a skilled and respected forum chair and by discussing potential skill-based members with other members in advance.

#### *Secretariat support and budget*

- 70 To be effective, the KWM would require a funded secretariat to support the group, members' fees, and travel and accommodation costs. We discuss these costs in the financial implications section below.



## *Duration and review*

- 71 In order to provide a measure of certainty and commitment, but preserve the ability to change these arrangements if they do not work, we propose commissioning the KWM for 12 months. Before the end of the first 12 months, the efficiency and effectiveness of KWM will be reviewed, and decisions made on whether it should be continued, reconfigured or discontinued. The review should be timed so that any funding implications can be considered as part of Budget 2019.

## **A phased approach to our engagement with Māori**

- 72 As noted above, we propose the Crown take a phased approach to its engagement with Māori, starting with a focus on water quality issues. This would include such matters as a revised NPS-FM; better recognition of ecological values in the national direction framework; greater use of farm environment plans; options to reduce sedimentation; any relevant recommendations arising from the tax working group in respect of improving environmental outcomes; sector/community-led initiatives; and other practical measures to halt the decline and start to improve our waterways.
- 73 Simultaneously, we would seek to address the gaps in our understanding of catchment issues, including water-related Māori land development opportunities, and the current situation in those catchments in terms of water quality, water takes and existing capital investments that are dependent on access to water resources. This would build off existing information sources, case studies and analysis.
- 74 We would also undertake analysis on the opportunities to increase access to water resources and reduce pressure on catchments, by, for example:
- 74.1 appropriately increasing access to water resources, through such measures as environmentally responsible water storage, managed aquifer recharge or water use efficiency
  - 74.2 employing policy instruments and initiatives to reduce nutrient loads on waterways, and thus help create headroom so that new entrants can develop under-developed land.
- 75 We do not consider the Crown will be in a position to adequately engage Māori on their economic development aspirations until we have more information and analysis as described above.
- 76 While initially we propose focussing on water quality and gathering key information, we will then need to engage on our broad policy parameters regarding Māori desires for access to freshwater resources to allow development of under-developed land. Three broad options for such engagement are discussed in the following section (paragraphs 79 to 95).
- 77 We propose the Government signals its preferred approach in respect of those options, since this will help us to lay out a clear description of how the Government intends to approach these issues over time. However, as noted above, there are too many information gaps to take final decisions on the Government's position, or to initiate discussions on allocative matters immediately.

- 78 Attached at **appendix two** is a draft guide for engagement with Māori on freshwater rights and interests. It lays out work areas and a timeline and/or conditions for when we expect issues to be addressed. We intend to discuss this as part of our initial engagement with the ILG (discussed below). It will also need to be discussed with KWM before it is finalised. We recommend that Cabinet authorises the Minister for Crown/Māori Relations and the Minister for the Environment to make minor changes and approve a final engagement plan.

### **Options for addressing Māori desires for access and use of freshwater resources**

- 79 Māori are disproportionately represented amongst landowners who have not been able to develop their land in scarce water catchments. This does not mean that criticisms of the application of the current 'first come first served' allocation model are valid. While water resources were not scarce, regulators had little choice but to allocate water permits or discharge rights to those who sought them. Renewal of those permits or rights made sense when water was abundant or water quality had not reached environmental limits.
- 80 The economics of land use and irrigation has changed, often rapidly, in recent decades, as evidenced by the percentage increase in the area of irrigated land and the expansion of dairying. For complex reasons, Māori often lacked the capital and ownership structures to participate in that transition. Now that irrigation water has become scarce and/or environmental limits for nutrients have been reached, Māori are left in the position that, in many catchments, there are little or no water resources available to use in developing their under-developed land. Our challenge therefore is to find a solution that is fair to Māori and existing users.
- 81 We have considered three broad options for addressing Māori desires for access to and use of a fairer portion of freshwater resources:

*Option A: impose a royalty/charge on the use of freshwater (payable to the Crown), and distribute under-used water permits (or discharge capacity) that could be relinquished, and the revenue from the charge;*

*Option B: find a mechanism to more equitably share the resources over time through a 'regulatory' route: in scarce catchments, this proposal could require the generation of 'headroom' between the total allocated quantum of 'use rights'<sup>5</sup> and the sustainable limit in order to give Māori (and other new users) the opportunity to obtain a share of those use rights;*

*Option C: allow matters to unfold through the courts and Waitangi Tribunal.*

#### ***Option A – impose a charge to encourage and fund the transfer of use rights to Māori***

- 82 Whilst this option has some merit as a policy instrument to encourage efficiency and cause the reallocation of under-utilised water permits, there is no guarantee it would achieve an equitable re-allocation of the resource for those who are currently not able to access and use freshwater (including Māori). It depends on the Crown being able

<sup>5</sup> That is, the right to access and use (or discharge to) water under the RMA, either via a specific resource consent or a 'permission' under an RMA plan.

to create conditions for transferability of use rights and assumes the Crown can accurately 'price' the charge.

- 83 In addition, where a charge like this is used as an allocative mechanism, Māori are likely to assert that the Crown was assuming an 'ownership' type interest in freshwater. The Crown imposes royalties on gravel takes and excise duties on alcohol and tobacco without asserting ownership, and we do not accept that a royalty imposed on water assumes or implies Crown ownership. However, we do agree that this option could disrupt a genuine conversation about the provision of access and use for Māori. In any event, imposing a royalty now would also be inconsistent with the coalition agreement.

#### *Option B – a 'regulatory' route*

- 84 Under this option the Government would seek to resolve allocation issues more fairly, efficiently and consistently by providing more specific direction to local authorities, particularly in catchments where water resources are scarce or at their limits. A key objective would be to more fairly recognise the interests of all potential parties to access resources, rather than the near automatic renewal of existing time-limited privileges. Given Māori have a disproportionate amount of under-developed land, this option is likely to directly address Māori economic development aspirations.
- 85 In scarce catchments, this proposal could require the generation of 'headroom' between the total allocated quantum of 'use rights'<sup>6</sup> and the sustainable limit in order to give Māori (and other new users) the opportunity to obtain a share of those use rights. The Crown could choose to assist the generation of headroom in some catchments via targeted initiatives such as environmentally responsible water storage, managed aquifer recharge, requiring best practice farm management or tree planting. The Crown could also adopt other measures where there are particular impediments to development of Māori land.
- 86 This approach would not create a property right at law, and it would not generate a 'transferable' interest in the same way as fishing quota. Māori associations with specific water bodies could still be a factor in determining where and how to make access to resources available, and would still be a significant factor in how the Crown provides for Māori input to the management of water.
- 87 The primary advantage of this option is that it focuses the debate on regulatory solutions that meet Māori concerns, rather than focusing on 'ownership'. It also maintains the opportunity for the Government to introduce charging or trading mechanisms in future, which may be more acceptable to Māori if the Crown has first addressed equity issues around access and use of freshwater resources via an initial re-allocation.
- 88 As with other options, this option is not straightforward. There is substantial historic capital investment in land and improvements based on existing water usage. The Government would need to ensure that any re-allocation occurs in a way and at a rate that fairly takes into account the interests of those existing users, and the interest of the general public in the efficient use of water. Many catchments are over-allocated and there are strong interests in maintaining the status quo.

<sup>6</sup> ie, the right to access and use (or discharge to) water under the RMA, either via a specific resource consent or a 'permission' under an RMA plan.

- 89 In those catchments where water is not yet scarce, there will be less of a contest for resources and less impediment to land development. In addition, regulatory use rights to water resources have different commercial values in different catchments. There are different views within Māoridom as to who should obtain and hold use rights (i.e. iwi/hapū or Māori landowners). All of these issues would need to be worked through in conjunction with the proposed KWM and Māori stakeholders.

*Option C – allow matters to unfold in the Courts and Waitangi Tribunal*

- 90 Under this option the Government would allow matters to unfold over time through the courts and the Waitangi Tribunal. The Waitangi Tribunal has been asked to consider contemporary breaches by the Crown of its Treaty obligations, describe the nature of and make recommendations about Māori interests in freshwater, and will likely recommend its preferred allocative and management regime.
- 91 The courts would likely be asked to determine whether individual iwi, hapū, or whānau hold customary property rights in freshwater and/or rule on legality and procedure of the water allocation proposals in council plans on a case by case basis.
- 92 The key advantage of this option is that it uses existing legal mechanisms and remedies to resolve issues on a case by case basis over time. The Government would engage with these legal processes as necessary.
- 93 However, legal proceedings would be unpredictable, and are likely to lead to:
- long delays in reaching conclusions on water allocation;
  - continuation of economic inefficiencies and current unfairness to owners of under-developed land (particularly Māori);
  - high legal costs for landowners, Māori, councils and the Crown; and
  - an inconsistent patchwork of approaches and rules throughout the country based on various council and court decisions.
- 94 In addition, there is no certainty that litigation of common law rights would meaningfully or equitably address Māori desires to access and use the resource. The approach is also likely to be seen as inconsistent with statements made by the Crown under previous Governments committing to address iwi/hapū rights and interests.

s9(2)(h)

*Preferred option*

- 95 Our preference is Option B. Although a charging mechanism (Option A) may eventually be useful to drive efficient use of freshwater resources, we do not consider it further because of the coalition agreement. Similarly, although Option C may still be where the parties end up if the Crown and Māori have exhausted all good-faith endeavours and options to resolve the issues, we consider it much more constructive to first explore regulatory solutions for ensuring Māori (and other owners of under-developed land) can access freshwater resources under the Resource Management Act 1991 (RMA).

## Reframing the Crown's position

- 96 We also need to consider whether we rescind, suspend, or update the five bottom lines agreed by the previous Government. Although these parameters reflect some significant policy considerations, it is not helpful or constructive to start our conversation with Māori by unilaterally stating what the Crown may not be willing to consider. Rather, we think we need to refocus the Crown position on what we are prepared to explore. Any new parameters also need to retain 'space' for a genuine, good faith discussion with Māori about specific options.
- 97 As such, we propose reframing the Crown position by adopting the following parameters:
- 97.1 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;
  - 97.2 The Crown and Māori have a shared interest in ensuring sustainable, efficient, and equitable access to and management of freshwater resources;
  - 97.3 No one owns freshwater – it belongs to everyone and we all have a guardianship role to look after it;
  - 97.4 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;
  - 97.5 The Crown acknowledges that existing users also have interests that must be considered;
  - 97.6 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:
    - 97.6.1 the need to gather key catchment-level information on water-related Māori land development opportunities and the current situation in those catchments in terms of water quality, water takes and existing capital investments;
    - 97.6.2 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
    - 97.6.3 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'.
- 98 The position stated in paragraph 97.3 – no one owns freshwater – is based on a well-established common law principle that there is no property in flowing water. The Government considers this is reflected in New Zealand's statutory regime. In *New Zealand Maori Council v Attorney-General* [2013] 3 NZLR 31, the Crown acknowledged to the Supreme Court that Māori have rights and interests in water, and was "open to discussing the possibility of Maori proprietary rights in water, short



of full ownership.” The Court did not determine the nature and extent of those rights and interests, and acknowledged that how they are recognised was a matter for ongoing consideration.

- 99 Given this background, and uncertainty as to how the Courts might interpret customary rights to freshwater, we consider the ‘no one owns freshwater’ parameter continues to be appropriate. In combination with the other parameters, it provides a sound platform for Crown/Māori engagement on the nature and extent of Māori rights and interests in freshwater.
- 100 Having been consulted on this paper, the Green Party has expressed a reservation about paragraph 97.3. The Party’s position is that Māori have rangatiratanga rights and customary rights in freshwater, and the nature of these rights may extend to proprietary interests in some circumstances. However, the Green Party otherwise supports the need to make progress in this area and, in particular, are committed to raising the quality of New Zealand’s freshwater and waterways. The Green Party supports the direction outlined in the paper and, specifically, the approach taken in this paper to engaging with Māori, improving water quality, and facilitating the development of under-developed Māori land.

#### Next steps

- 101 Should Cabinet agree with the proposals in this paper, we propose that we develop a communication plan to support this approach.
- 102 An initial step will be to engage the ILG to outline the Government’s proposed approach and the reasons for it. We seek authorisation for the Minister of Crown/Māori Relations and the Minister for the Environment to do this, including engaging on the proposed engagement plan as noted in paragraph 78 above.
- 103 We will also need to establish the KWM, which could take two to three months. Discussion on the engagement plan with the KWM will also be necessary before it is finalised.
- 104 We note that there are many stakeholders with an interest in freshwater policy. It is not possible for the Crown to engage with Māori in isolation from these other interests. Rather, engagement with Māori and other stakeholders will need to be simultaneous and iterative. In this respect, the input of ideas from the Land and Water Forum (LAWF) is useful. Whether consensus can be found amongst all the interests is unclear.
- 105 Assuming that consensus cannot be reached, it is likely that wide engagement with Māori and other stakeholders, especially the primary sectors, will be needed. Ideally any preferred options would be developed jointly with the KWM and Māori stakeholders more broadly, and be consistent with the input from the LAWF (where relevant) and the Primary Sector Council, recently established by the Minister of Agriculture. At this stage it is impossible to predict if this will prove possible.

#### Ongoing disclosure process with the Waitangi Tribunal

- 106 The Tribunal has directed the Crown to provide quarterly updates on freshwater policy development. It has also directed the Crown to advise it if significant policy decisions are made in the time between quarterly updates. s9(2)(h)

107 s9(2)(h)

### Consultation

- 108 This paper was prepared jointly by the Crown/Māori Relations Roopū in the Ministry of Justice and the Ministry for the Environment. The Ministry for Primary Industries, the Treasury, Te Puni Kōkiri, and the Department of Prime Minister and Cabinet were engaged during its development. The Crown Law Office was informed. The New Zealand First Party and the Green Party have been consulted during the development of the paper.

### Financial Implications

- 109 The only financial implications arising as a result of this paper relate to the fees, travel, and accommodation, secretariat and analytical support costs for the KWM. As above, we propose to establish KWM initially for a 12-month period, and then review its efficiency and effectiveness.
- 110 It was not possible to seek funding for this entity during the 2018 Budget process because decisions had not been made. Nevertheless, we need to make immediate progress towards the establishment of an entity that can support our broader approach to engaging with Māori on freshwater, and the Crown cannot in good faith expect the KWM members to contribute their expertise without remuneration. At the same time, the existing funding for engagement with the ILG has expired and the Ministry for the Environment is unable to reprioritise funding to meet these costs.
- 111 As such, we seek new money for the KWM out of the Between Budget Contingency for 2018/19. Officials had already proposed a budget of \$1.2 million to support the KWM. However, we asked officials to review this proposal in the interest of a more nimble forum and fiscal prudence. Our revised total cost estimate is shown in the table below, and is based on:
- 111.1 a maximum of 15 members;
  - 111.2 an average member rate for the core members of \$500/day (consistent with the range for a Group 4, Level 1 Advisory Body under the Cabinet Fees Framework);
  - 111.3 10 'monthly' meetings and approximately 27 non-contact working days;
  - 111.4 average travel and accommodation costs of \$500 per person per meeting;

111.5 work day overheads covered by the Ministry for the Environment or individual members; and

111.6 secretariat support based on KWM being able to access two independent analytical or technical experts or contracted equivalents, plus one full time equivalent administrative support person.

<b>Costs</b>	<b>\$(million)</b>
Member fees	\$0.28m
Travel & accommodation	\$0.08m
Secretariat support (analytical capacity and administration)	\$0.48m
External hui facilitation	\$0.05m
<b>TOTAL (2018/19)</b>	<b>\$0.89m</b>

112 Should the KWM prove to be successful, it is likely that we would seek further funding in subsequent years.

#### *Treasury comment*

113 The Treasury supports this initiative and agrees that it needs to be adequately resourced in order to be successful. However, the Treasury only supports new funding of \$500,000 to cover the external costs of the KWM, plus appropriate administrative support. The remaining \$390,000 sought should be met through reprioritisation. It is a general expectation that new initiatives considered outside of the Budget process will be funded through internal reprioritisation. In this case, the relevant fiscal year has not yet begun, so the Ministry has flexibility to reprioritise its planned spending to ensure it can meet emerging Government priorities.

#### *Ministry for the Environment Comment*

114 The Ministry for the Environment is under considerable baseline pressure, and is already undertaking a departmental wide review of priorities and activity for 2018-19 and beyond. The Ministry has very little capacity to re-prioritise further, and consequently if the additional funding is not appropriated the KWM is unlikely to have access to independent expertise to support it.

115 Given the breadth and importance of the issues the KWM will be dealing with, the Ministry for the Environment considers that the proposed level of independent expertise available to the KWM is a bare minimum. The Ministry also considers that the ability of the KWM to get independent analysis done will be vital to transparency and both sides having trust in the analysis. If the KWM has no capacity for independent analysis this risks undermining the process.

#### **Human Rights**

116 This paper presents no inconsistencies with the Bill of Rights Act 1990 or the Human Rights Act 1993.

#### **Legislative Implications**

117 There are no legislative implications arising from this paper.

## Regulatory Impact Analysis

118 There are no regulatory impacts arising from this paper.

## Gender Implications

119 There are no gender implications arising from this paper.

## Disability Perspective

120 There are no disability implications arising from this paper

## Publicity

121 We recommend developing a communications plan specifically on the matters discussed in this paper. This would include communicating the Crown's position described in paragraph 97. We also recommend the proactive release of this paper, with the necessary redactions. Communicating these matters would need to be coordinated with and linked to the wider communication of the Government's freshwater work programme.

## Recommendations

122 The Minister for Crown/Māori Relations and the Minister for the Environment recommend that the Cabinet Environment, Energy and Climate Committee:

1. **note** there are significant ongoing expectations on the Crown to engage meaningfully with Māori as to the recognition of Māori rights and interests in freshwater;
2. **note** that the aspirations of Māori with respect to freshwater can be broadly summarised as:
  - 2.1 Improving water quality and the health of ecosystems and waterways;
  - 2.2 Governance/ Management/ Decision-making: Māori want to be involved in freshwater decision-making, and have the capacity and capability to do so effectively;
  - 2.3 Recognition: ensuring there is formal recognition of iwi/hapū relationships with particular freshwater bodies; and
  - 2.4 Economic development: Māori want to be able to access and use freshwater resources (i.e. water takes and discharge rights) in order to realise and express their economic and development interests (within the context of a holistic view of Te Mana o te Wai).
3. **note** that while considerable progress has been made in respect of 2.2 and 2.3 above, considerably more progress is needed to improve water quality and ecosystem health (2.1 above) and provide for fair access to freshwater resources to allow for the development of under-developed land (2.4 above);
4. **note** that there is a building sense among Māori that there is no clear 'path ahead' for the Crown's engagement with Māori and addressing Māori rights and interests in freshwater;

5. **note** that feedback from public engagement on the Crown/Māori Relations portfolio suggests that the Crown has not been talking to a broad enough cross section of Māori society on freshwater issues;
6. **note** s9(2)(h) [REDACTED] and that the Crown remains in an active Waitang Tribunal Inquiry as to its freshwater reform programme;
7. **note** that there are significant information gaps in our understanding of catchment issues, including water-related Māori land development opportunities, the current situation in those catchments in terms of water quality, water takes and existing capital investments, and the opportunities to:
  - 7.1 appropriately increase access to water resources, through such measures as environmentally responsible water storage, managed aquifer recharge or water use efficiency;
  - 7.2 employ policy instruments and initiatives to reduce nutrient loads on waterways, and thus help create headroom so that new entrants can develop under-developed land;

#### *A phased approach*

8. **agree** that the Crown will take a phased approach to its engagement with Māori across all freshwater issues, starting with a focus on water quality issues rather than water allocation; and addressing the key information gaps discussed in recommendation 7;
9. **agree** that following this initial phase, the Government will then engage on our broad policy parameters regarding Māori desires for access to freshwater resources to allow development of under-developed land;

#### *Options for addressing Māori desires for access and use of freshwater resources*

10. **note** we have considered the following three options for addressing Māori desires for access to and use of freshwater resources:
  - 10.1 Option A: impose a royalty/charge on the use of freshwater (payable to the Crown), and distribute under-used water permits (or discharge capacity) that could be relinquished, and the revenue from the charge;
  - 10.2 Option B: find a mechanism to more equitably share the resources over time through a 'regulatory' route: in scarce catchments this proposal could require the generation of 'headroom' between the total allocated quantum of 'use rights' and the sustainable limit in order to give Māori (and other new users) the opportunity to obtain a share of those use rights;\_
  - 10.3 Option C: allow matters to unfold through the courts and Waitangi Tribunal.
11. **agree** that the Government signals its preference is Option B because it: focuses the debate on regulatory solutions that meet Māori concerns, rather than a contest about 'ownership'; allows for meaningful development of Māori land; and is



significantly more constructive and likely to provide more certainty than an exploration of rights in the Courts;

12. **note** that, although a charging mechanism (Option A) may eventually be useful to drive efficient use of freshwater resources, we have not considered it further because of the coalition agreement; and that Option C may still be where the parties end up if the Crown and Māori have exhausted all good faith endeavours and options to resolve the issues;

#### *Reframing the Crown's position*

13. **note** that it is appropriate to update the 'five bottom lines' for freshwater agreed by the previous Government in 2015 [CAB Min (15)1/9 refers] to constructively approach the conversation with Māori or the general public about freshwater;
14. **agree** (consistent with the decision in recommendation 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 water-related 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'.

- 15. note** that the Green Party has expressed a reservation about paragraph 97.3. The Party's position is that Māori have rangatiratanga rights and customary rights in freshwater, and the nature of these rights may extend to proprietary interests in some circumstances. However, the Green Party otherwise supports the need to make progress in this area and, in particular, are committed to raising the quality of New Zealand's freshwater and waterways;
- 16. agree** that the Crown position described in recommendation 14 above, be communicated publicly;

*Broadening the conversation with Māori and establishing Kahui Wai-Māori – the Māori Freshwater Forum*

- 17. agree** to establish Kahui Wai-Māori – the Māori Freshwater Forum (KWM) to enable collaborative development and analysis of freshwater policy options for issues of particular relevance to Māori;
- 18. note** that the KWM will not be the only way in which the Crown engages with Māori about freshwater, that it would not hold a mandate to 'sign off' on final options for reflecting Māori rights and interests in freshwater policy and regulation, and that the Crown will still meet with the Iwi Leaders Group and other key Māori and non-Māori organisations prior to significant decision points and wider public consultation;
- 19. authorise** the Minister for Crown/Māori Relations, the Minister for the Environment, and the Minister for Māori Development, in consultation with other relevant Ministers, to develop and finalise a Terms of Reference for KWM that provide for:

**19.1 Purpose & Functions:** the key functions of KWM should be to:

**19.1.1 facilitate engagement between the Crown and Māori on freshwater reform;**

**19.1.2 collaboratively develop and analyse policy options on issues of particular importance to Māori across the freshwater reform programme;**

**19.1.3 provide advice directly to Ministers where it wishes to;**

**19.1.4 undertake any other advisory/research function agreed between the Crown and the KWM; and**

**19.1.5 undertake or facilitate engagement with the wider Māori community on key issues if necessary.**

**19.2 Scope:** the scope of the KWM be limited to issues being discussed in the Freshwater reform programme, and specifically exclude historical Treaty settlement issues or local issues such as those related to a particular water body or region, except to the extent these examples are used as case studies;

**19.3 Principles of engagement:** setting out some key principles to ensure good faith and timely engagement and transparency between the parties. The

Crown's engagement would be based on the parameters described at recommendation 14;

- 19.4 Information sharing: setting clear parameters for the sharing of information. In particular, including an undertaking to discuss the substance of Cabinet papers with the KWM before they are considered by Cabinet, and giving the forum an explicit mechanism to include their views in Cabinet papers if the KWM considers this necessary. Sharing of draft papers themselves would be considered by Ministers on a case by case basis;
- 19.5 Confidentiality: conversations to be conducted under a condition of confidentiality and an expectation of prior consent before information is shared beyond the immediate membership of the KWM;\_
- 19.6 Publicity: KWM members would be expected to seek prior consent of the Crown and other KWM members before making any public statements related to the substance of KWM issues;
20. **agree** that KWM membership should be based on perspectives, insights and skills from a wide range of Māori society;
21. **agree** that KWM should have a flat structure, including both rangatira and people with a Māori perspective on more technical issues, and be supported by a secretariat based in the Ministry for the Environment;
22. **agree** to establish KWM with a hybrid structure in which the Crown requests nominations from a small number of Māori organisations and then contracts additional members at key engagement points who it thinks would bring particularly relevant perspectives or capabilities to specific issues;
23. **authorise** the Minister for Crown/Māori Relations, the Minister for the Environment, and Minister for Māori Development, in consultation with other relevant Ministers, to approach nominating agencies and potential members and finalise the membership of KWM through the Cabinet Appointments and Honours Committee;
24. **invite** the Minister for Crown/Māori Relations, the Minister for the Environment, and Minister for Māori Development to report back to the Cabinet Crown/Māori Relations Committee to inform them of the final membership of KWM;

*A guide for engagement with Māori*

25. **note** the draft guide for engagement with Māori on freshwater issues attached as appendix two of this paper;
26. **authorise** the Minister for Crown/Māori Relations and the Minister for the Environment to discuss the draft guide with the Iwi Leaders Group and with the KWM, and make minor changes to it;

*Financial implications*

27. **note** that the establishment of the KWM has estimated financial implications of up to \$0.89 million;

EITHER (Ministry for the Environment's preferred option)

28. **approve** the following changes to appropriations to give effect to the policy decision in recommendation 16 above, with a corresponding impact on the operating balance:

	\$m – increase/(decrease)				
<b>Vote Environment</b>	<b>2017/18</b>	<b>2018/19</b>	<b>2019/20</b>	<b>2020/21</b>	<b>2021/22 &amp; Outyears</b>
<b>Minister for the Environment</b>					
Multi-Category Expenses and Capital Expenditure: Improving Environmental Management MCA					
Departmental Output Expense:					
Water Management Policy Advice (funded by revenue Crown)	0.000	0.890	0.000	0.000	0.000

OR (Treasury preferred option)

29. **approve** the following changes to appropriations to give effect to the policy decision in recommendation 16 above, with a corresponding impact on the operating balance:

	\$m – increase/(decrease)				
<b>Vote Environment</b>	<b>2017/18</b>	<b>2018/19</b>	<b>2019/20</b>	<b>2020/21</b>	<b>2021/22 &amp; Outyears</b>
<b>Minister for the Environment</b>					
Multi-Category Expenses and Capital Expenditure: Improving Environmental Management MCA					
Departmental Output Expense:					
Water Management Policy Advice (funded by revenue Crown)	0.000	0.500	0.000	0.000	0.000

30. **agree** that the proposed change to appropriations for 2018/19 above be included in the 2018/19 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
31. **agree** that the expenses incurred under EITHER recommendation 27 OR recommendation 28, as the case may be, be a charge against the between-Budget operating contingency, established as part of Budget 2018.

Authorised for lodgement

Hon Kelvin Davis  
Minister for Crown/Māori Relations

Hon David Parker  
Minister for the Environment



Appendix one: s9(2)(h) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## Appendix two: Draft guide for engagement with Māori on freshwater issues

Work area	Description	Timeframes
<b>Phase one</b>		
Completing the package of national direction on water quality under the RMA	<p>This is a large and complex work area, vital to improving the quality of our water and ecosystems. Existing national direction on freshwater quality under the RMA is incomplete. This work area would provide further national direction (i.e. via a new National Policy Statement, National environmental standards, or regulations) on water quality issues not yet adequately addressed. such as:</p> <ul style="list-style-type: none"> <li>• ecosystem health;</li> <li>• sedimentation reduction;</li> <li>• fencing regulations</li> <li>• high-risk land management practices</li> <li>• controls on agriculture intensification</li> <li>• allocation methodology for nutrient discharges.</li> </ul>	<ul style="list-style-type: none"> <li>• KWM September 2018 (first meeting) – brief KWM on scope and work to date</li> <li>• KWM October 2018 - discuss areas likely to be advanced</li> <li>• KWM December 2018 – agree advice to Ministers on matters to be addressed in new national direction.</li> <li>• Q1 2019 public consultation on detailed proposals.</li> </ul> <p>There may be matters that cannot be progressed without further research. Work on these matters will be on-going.</p>
Key information and analysis to support engagement	<p>There are significant information gaps in our understanding of catchment issues, including water-related Māori land development opportunities, the current situation in those catchments in terms of water quality, water takes and existing capital investments. This work area would address these key information gaps. It would build off existing information sources, case studies and analysis.</p>	<ul style="list-style-type: none"> <li>• KWM September 2018 (first meeting) <ul style="list-style-type: none"> <li>• agree scope and process</li> <li>• identify information sources</li> </ul> </li> <li>• KWM October 2018 – agree ToRs and commission work</li> </ul>
Enhancing availability of water	<p>Targeted at catchments in which water regularly becomes scarce and where economic development is being limited by this scarcity - this work area would consider measures that could support economic growth, land development, and community and environmental resilience, including:</p> <ul style="list-style-type: none"> <li>• environmentally responsible water storage and distribution</li> <li>• other options to increase the availability of water, such as managed aquifer recharge,</li> </ul>	<ul style="list-style-type: none"> <li>• KWM September 2018 (first meeting) - Brief KWM and initiate work (e.g. establishing criteria). Discuss scope of work and process/deliverables.</li> </ul>

	<p>and greater use of water use efficiency technologies</p> <p>Measures may include initiatives supported under the Provincial Growth Fund.</p>	<ul style="list-style-type: none"> <li>• KWM October 2018 – <ul style="list-style-type: none"> <li>• agree ToRs, scope and deliverables</li> <li>• identify whether there are suitable projects that could be advanced in the near-term.</li> </ul> </li> </ul> <p>Identifying practical measures/initiatives would benefit from catchment-level information and analysis described above.</p>
Enhancing the use of farm environmental plans, good management practice and extension support	<p>This work area would look at the role of farm-level environmental planning, including possible greater use of mandated planning, and:</p> <ul style="list-style-type: none"> <li>• how this could fit with existing farm planning initiatives and council requirements</li> <li>• how to support wide adoption of good management practice</li> <li>• what improvement in water quality might be achieved</li> <li>• how this might reduce compliance costs for farmers, and</li> <li>• what support and human capability and competency would need to be developed.</li> </ul>	<ul style="list-style-type: none"> <li>• KWM September 2018 (first meeting) - Brief KWM on work to date and existing planning environment. Discuss scope of work.</li> <li>• KWM October 2018 – agree work plan and deliverables.</li> </ul>
Central and local government support	<p>Central and local government have a range of support mechanisms and funding available or under development that can be applied to improve water quality (and wider environmental and commercial outcomes). This work area would look across these to assess whether they: are appropriately aligned with key priorities; coordinated across government and with private sector-led support; and are adequately responding to the needs of Māori. Central government support includes:</p> <ul style="list-style-type: none"> <li>• Provincial growth fund</li> <li>• 1 billion trees programme</li> <li>• Sustainable Farming Fund</li> <li>• Primary Growth Partnership (PGP)</li> <li>• Afforestation grants, the Erosion Control Funding Programme, and the Hill Country Erosion Programme</li> <li>• Freshwater Improvement Fund; and</li> <li>• Climate change and water-related research funds, including those targeted at reducing</li> </ul>	<ul style="list-style-type: none"> <li>• KWM September 2018 (first meeting) - Brief KWM on scope and purpose of Government support. Discuss scope of work.</li> <li>• KWM October 2018 – agree work plan, roles and deliverables.</li> <li>• KWN December 2018 – initial advice for Ministers on changes to current support mechanisms and identified gaps.</li> </ul>

	<p>agricultural emissions, adaptation and new water management technologies</p> <p>The work area would also identify any key gaps in government support and make prioritisation recommendations accordingly.</p>	
Sector and community partnerships	<p>Māori may wish to explore practical community/iwi/hapū or landowner-led initiatives to improve water quality, and what role local or central government may have in supporting or facilitating such initiatives. There are also a number of sector-led and community-led initiatives, strategies and action plans under development targeting water quality, wider environmental performance and market development. Māori may wish to explore whether they see a specific role for them in these initiatives.</p>	<ul style="list-style-type: none"> <li>• KWM October 2018 – discuss possible scope of work and deliverables.</li> </ul>
Drinking water for rural communities	<p>Māori identified access to safe drinking water in rural communities (especially for marae and in papakāinga) as an important issue. This work area would identify options and make recommendation to achieve safe drinking water in rural communities.</p>	<ul style="list-style-type: none"> <li>• KWM October 2018 – brief KWM on issues and discuss scope of work and deliverables.</li> <li>• KWM November &amp; December 2018 – discuss advice to Ministers on options to ensure drinking water quality in marae and in papakāinga.</li> </ul>
<b>Phase two</b>		
The planning and consenting environment	<p>Specific mechanisms have been established to provide for Māori input into decision-making. However, feedback from Māori, stakeholders and councils is that current processes are causing frustration.</p> <p>Consenting arrangements also strongly favour rollover of existing uses. It is also difficult to review consents in line with changing information or new national direction.</p> <p>This work area will look at these issues and make recommendations accordingly. In doing so it will be cognisant of other key areas of work, such as the Urban Growth Agenda, that are inquiring into the New Zealand's planning arrangements.</p>	<ul style="list-style-type: none"> <li>• KWM October 2018 – brief KWM on issues and feedback from councils/stakeholders.</li> <li>• KWM November &amp; December 2018 – discuss initial advice to Ministers</li> <li>• KWM February 2019 – agree initial advice on possible changes to planning and consenting arrangements.</li> </ul> <p>A detailed work programme could be developed thereafter, depending on future Government decisions.</p>
Pricing and user	<p>The Tax Working Group will be reporting in February 2019 on whether the tax system can be</p>	<ul style="list-style-type: none"> <li>• KWM March 2019 – initiate work</li> </ul>

charges	<p>used to enhance environmental outcomes. Its work may cover possible resource rentals to recognise the externalities caused by pollution (e.g. N discharges) and charges on the use of resources. It may also consider how to apply any revenue that could be gathered.</p> <p>This work area will consider the recommendations of the TWG and develop advice accordingly.</p>	<p>following the TWG report. Agree scope of work, roles and deliverables.</p>
Allocation of water takes	<p>In this work area 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:</p> <ul style="list-style-type: none"> <li>• the need to gather key catchment-level information on water-related Māori land development opportunities and the current situation in those catchments in terms of water quality, water takes and existing capital investments;</li> <li>• 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</li> <li>• 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'.</li> </ul> <p>Building on all of the work above – advice on opportunities to create 'headroom' in over-allocated catchments will also be part of this work area.</p> <p>The role of market-based mechanisms/trading to allow some re-allocation of discharge rights may also be explored as part of this work area.</p>	<p>Commence once the necessary information and analysis is available.</p>



## Appendix three: A policy analysis of Māori rights and interests in freshwater in relation to the Treaty of Waitangi

This analysis was prepared by the Ministry of Justice, Crown/Māori Relations Unit, May 2018

### What are the broad Treaty obligations relevant to freshwater?

The Crown understands the Treaty as giving rise to the following contemporary rights and obligations that are particularly relevant to freshwater issues:

- the right to exercise kawanatanga (government) in a manner consistent with the principle of partnership;
- the duty to protect rangatiratanga in relation to 'taonga katoa';<sup>7</sup> and
- the duty to redress past breaches of the Treaty.<sup>8</sup>

Treaty principles speak to the relationship between the Crown and Māori. They do not dictate specific outcomes. They encourage flexibility and openness. Treaty-consistent outcomes vary in substance, nature and form depending on the context.

Hence, what these broad obligations mean in practice – and what steps may be needed to comply with them in a given situation – will depend on the particular circumstances. The overall criterion is reasonableness and good faith between the Treaty partners. This is the standard consistently applied by the courts since the 1980s.

Ultimately, these are matters for the Crown and for Māori to determine. In considering any decision, the Crown must also take into account a number of considerations including the interests of the public as a whole. Where Māori are unsatisfied, they may litigate. Where that occurs, the Courts may have a role in determining the nature of rights and interests that may be recognised.

It is also important to note that these obligations overlap both conceptually and in their contribution to outcomes. In the case of freshwater, substantial progress has already been made in providing for Māori input in decision making processes under the Resource Management Act 1991.

The Crown has previously submitted to the Waitangi Tribunal (as part of the Tribunal's inquiry into freshwater and geothermal resources) that the existing regulatory framework is Treaty-consistent, while noting there is scope for further improvement. Although effective participatory models are not yet established in all places, this can be achieved within existing legislative and policy settings, as well as through future Treaty settlements of historical claims (settlements may provide rights or authority in relation to specific waterways). It may take time for local

7 This is the phrase used in Article Two of the Treaty to expand upon the resources specifically listed in that Article, although it needs to be appreciated that the Māori conception of taonga is wider than common law conceptions of property, and may encompass many things that the Crown might otherwise regard as socio-cultural, such as Te Reo Māori and mātauranga Māori.

8 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (*Mighty River Power*). In this case the Supreme Court considered a legal challenge to the Crown's decision to partly privatise a hydro-electricity generator. The Court found that the Crown had not breached statutory references to the Treaty in implementing its policy because the challenged decisions did not "materially impair" the Crown's ability to address Māori claims relating to freshwater in the future.

communities to develop relationships and strategies in ways that suit their particular circumstances and needs, but the statutory framework and Treaty settlement process provide effective tools to facilitate that process.

Nevertheless, as the Crown explores further changes to how freshwater is allocated (in terms of both the right to take water and the right to discharge to water), there is a question as to whether the Crown needs to provide Māori with a greater measure of authority or autonomy over freshwater. In other words, the question becomes: *what more may be required (in practice) to meet the obligation to provide for rangatiratanga in relation to freshwater?*

### **What do the findings of the Tribunal suggest about this question?**

In general, the Waitangi Tribunal has recognised that comparing “rangatiratanga over taonga” to “ownership of property” at common law is not straightforward. The Tribunal has acknowledged that rangatiratanga may be expressed in a variety of ways, and that some aspects of rangatiratanga may resemble some elements of ownership, including aspects of autonomy and control.

This is not the same as recommending “full ownership” or property rights at law, but the Tribunal does contemplate providing rights that are similar to rights forming part of ownership at common law. Such rights may be provided within a regulatory framework (for example, by ensuring Māori have the ability to use and derive economic benefit from a natural resource within the regulatory framework for the management of that resource).

Whether and how this might occur needs to be informed by carefully weighing the expressions of rangatiratanga Māori seek in respect of the taonga against the public interest and the interests of existing rights holders, while also having regard to the nature of the taonga and (where relevant) how it is regulated.

### **What does this mean for natural resources in terms of contemporary Treaty policy?**

What this tends to mean in a natural resource context is that, so long as resources are abundant and no one party's enjoyment has a practical impact on another, there may be no need to provide rights to Māori or non-Māori that are akin to ‘property’. In this context, providing for Māori input to decision making over resources is likely to be sufficient recognition of the rangatiratanga relationship with a natural resource.

However, the situation may be quite different when:

- a resource becomes scarce;
- the Crown has derived and seeks to allocate rights to access, use and derive economic benefit from a resource via a legal framework (such as the Resource Management Act); and
- a combination of economic disparity and allocative methods (like first come, first served) have effectively prevented Māori from obtaining a fair proportion of those use rights.

In such cases, officials consider there is a strong argument that a contemporary Treaty policy response should ensure Māori can access and use a fair portion of the resource, particularly at points where those rights are re-allocated.

However, this argument is not necessarily determinative in all cases. There may be instances where the geophysical features of a natural resource, the way in which people can access or benefit from a resource, and the way in which the resource is best regulated mean that guaranteed access is not required. Hence, in the case of petroleum resources (discussed below), the complicated and costly nature of extracting the resource, the fact that the Crown already controls access and that all New Zealanders can still benefit economically from that control and allocation meant that specific access and use rights for Māori was not required.

It may also be the case that the public interest in the optimal use of a resource or the interests of existing rights holders has a significant impact on the way in which the Crown ensures access and use for Māori, or how quickly it can achieve this.

In addition, where the Government of the day seeks to recognise and better provide for the social cost of resource use by imposing a charge or establishing other mechanisms for creating efficient use, it will not necessarily be unreasonable for the Crown to expect Māori to participate in those mechanisms (providing that equitable outcomes have already been addressed by re-allocation or other policy steps). In other words, responding to Government initiatives that seek to manage the scarcity and social cost of resource use is likely to be the responsibility of all users, Māori and non-Māori.

### **What has the Crown previously provided for when considering this question in relation to natural resources and why does that matter?**

The Crown has approached this issue on a case by case basis, sometimes (but sometimes not) ensuring access and use of a portion of a resource for Māori in order to fully meet the obligation to provide for rangatiratanga (in conjunction with existing input to decision-making). The major examples are summarised in the table below.

In a number of cases, the Crown's response has been prompted or triggered by a reference to Māori interests in legislation [such as for section 88(2) of the Fisheries Act 1986 in relation to fisheries and section 9 of the State Owned Enterprises Act 1986 in relation to forestry].

Resource	Approach
Commercial fisheries (1992)	Following retention of section 88(2) in the Fisheries Act 1986 that protected Māori interests in fisheries, a mix of cash, shareholdings in fishing companies, and commercial fishing quota was transferred to Māori under the Treaty of Waitangi Fishing Claims Settlement Act.
Aquaculture 2005	20% of coastal space for aquaculture
Petroleum 2003	No specific allocative share of extraction, use rights or economic benefits for Māori
Radio Spectrum (1990 – 2009)	25% of 3G spectrum set aside for Māori content providers, and cash payments made for Māori digital technology development at 3G and 4G stages
Forests	Māori interests in Forestry were dealt with through the historical Treaty settlement process by the Crown making Crown Forest Licensed Land available as redress for historical grievances.

These solutions, like all Treaty settlements, were political compacts reflecting the particular nature of the resource, the way in which it was regulated, and good faith discussion between the Crown and Māori in the context of the Treaty principles.

Nevertheless, these decisions were not accompanied by clear, public statements as to the rationale for these arrangements. As such, they have not led to a strong public understanding or consensus about the nature of the Crown's contemporary Treaty obligations, and when the Crown should (or should not) ensure access and use for Māori as part of meeting its obligation to provide for the rangatiratanga relationship with that resource.

This is significant because freshwater is unlikely to be the last instance where the Crown needs to make decisions about the allocation (or re-allocation) of rights derived from a scarce natural resource.

More generally, as populations grow and resources become scarce, or as technology allows access to resources that were not previously considered viable, the Crown may increasingly find itself having to allocate (or re-allocate) use rights in a way that balances economic efficiency with wider environmental, social, or cultural outcomes<sup>9</sup>.

Providing a clear rationale for your decision on freshwater could help to:

- build the public's understanding of and support for the Government's decision; and
- manage the precedent effect of that decision in relation to future 'Treaty issues' involving natural resources.

<sup>9</sup> For example, it is easy to imagine the occupation of some environmental 'spaces' for recreational or commercial purposes becoming highly contested in future.

Conversely, making a decision about freshwater without a clear and specific rationale risks widening the gap between Māori expectations and the expectations of the general public on these issues, threatening the Crown-Māori relationship.

### **How the Government could proceed with freshwater**

It remains an option for the Crown to address its contemporary Treaty obligations in relation to freshwater through Māori input to decision-making (under the Resource Management Act).

However, officials do not consider this will be sufficient to reach agreement with Māori.

Although it is not possible to provide detailed options until more is known about the Government's generic policy with respect to allocation, we consider there is value in exploring how the Crown can ensure access to and use of the resource for Māori, particularly in scarce catchments. We consider this approach broadly justified by a combination of:

- a) the Crown's contemporary Treaty obligation to provide for tino rangatiratanga in relation to taonga;
- b) the nature of freshwater as a highly accessible resource and one integral to daily life (and associated wellbeing);
- c) the extent to which Māori have effectively been locked out of accessing freshwater use rights as a result of existing economic disparity and current allocation methods;
- d) the significant contribution that doing so would make to the economic, social, and cultural wellbeing of Māori and all New Zealanders; and
- e) the fact that the Resource Management Act and national policy tools allow scope to balance any guaranteed access for Māori with the public interest in freshwater and the interests of existing rights holders.

### *Couching this decision within a wider framework or set of considerations*

Further to the above analysis about the precedent this decision could set for future Treaty issues that relate to natural resources, you could also consider adopting a more generic set of considerations that would govern the Crown's approach to whether and how it responds to the question of Māori rights and interests in natural resources.

We would need to undertake further analysis of such considerations and engage with Māori in their development.