Ministry for the Environment
Manatu Mo Te Taiao

Extracts from Waitangi Tribunal commentary, findings and recommendations on the Resource Management Act 1991

New Zealand Government

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About this document

This document collates together commentary, findings and recommendations from Te Rōpū Whakamana i te Tiriti o Waitangi (the Waitangi Tribunal) from 1993 until 2020 that specifically reference the Resource Management Act 1991 (RMA). It does not include references from Waitangi Tribunal reports released prior to the RMA that, alongside cases brought before the courts, also shaped the provisions that were included in the RMA. [1] Only extracts found in the analysis, findings and recommendations of the Waitangi Tribunal's reports on the RMA have been included in this document. Text is not included when describing the provisions in the RMA, just the findings and recommendations *about* them. Where there are multiple stages of a Waitangi Tribunal claim with separate reports or interim reports published, only the latter stage or final reports are included.

This document does not include the latest Crown position on the Tribunal findings. It provides a collation of the Tribunal's commentary, findings and recommendations.

Under the Environment Act 1986, Manatū Mō te Taiao / the Ministry for the Environment is to ensure full and balanced account is to be taken of the principles of the Treaty of Waitangi in the management of natural resources. The Ministry's functions under section 31(c)(i) include providing the Government, its agencies and other public authorities advice on the application, operation and effectiveness of a list of 37 Acts with this and other objectives. [2] This document supports this function for the RMA, within the Ministry and Crown's broader responsibilities that flow from Te Tiriti o Waitangi.

[1] These Waitangi Tribunal reports prior to 1991 include Wai 4 on the Kaituna River, Wai 6 – the Motunui-Waitara Claim, and Wai 8 The Manukau Claim. Cases brought before the courts included the Huakina Trust v Waikato Valley Authority and Bowater decision of 1987 that shaped section 6e in the RMA.

[2] The statutory purpose and functions of Manatū Mō te Taiao / Ministry for the Environment is in Appendix 1

About Te Rōpū Whakamana i te Tiriti o Waitangi – the Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi (the Waitangi Tribunal) is a permanent commission of inquiry set up by the Treaty of Waitangi Act 1975. It inquires into and can make recommendations on claims brought by Māori relating to Crown actions or omissions which are found to breach the promises made in the Treaty of Waitangi.

Timeline

2040 Te Tiriti o Waitangi bicentenary

2021 Today

1991 – 2020: See extracts from Waitangi Tribunal reports

Shorter extracts by report in Table 1 on pages 7-13

Longer extracts by report on pages 14-88

Longer extracts categorised by issue on pages 89-174

1991 Resource Management Act 1991 enacted

1985 Treaty of Waitangi Amendment Act 1985 – Waitangi Tribunal's jurisdiction extended to cover Crown acts and omissions since the signing of the treaty in 1840

1975 Treaty of Waitangi Act 1975 – Waitangi Tribunal established

1940 Te Tiriti o Waitangi centenary

1840 Te Tiriti o Waitangi signed

Why was a systemic review of Waitangi Tribunal findings conducted?

Since 1991, there have been a significant number of claims and reports by the Waitangi Tribunal on the Treaty compliance of the RMA. Ensuring that this body of work is both incorporated into policy development and is accessible for those involved in the current resource management system and its replacement is important to ensure consistency with the Treaty.

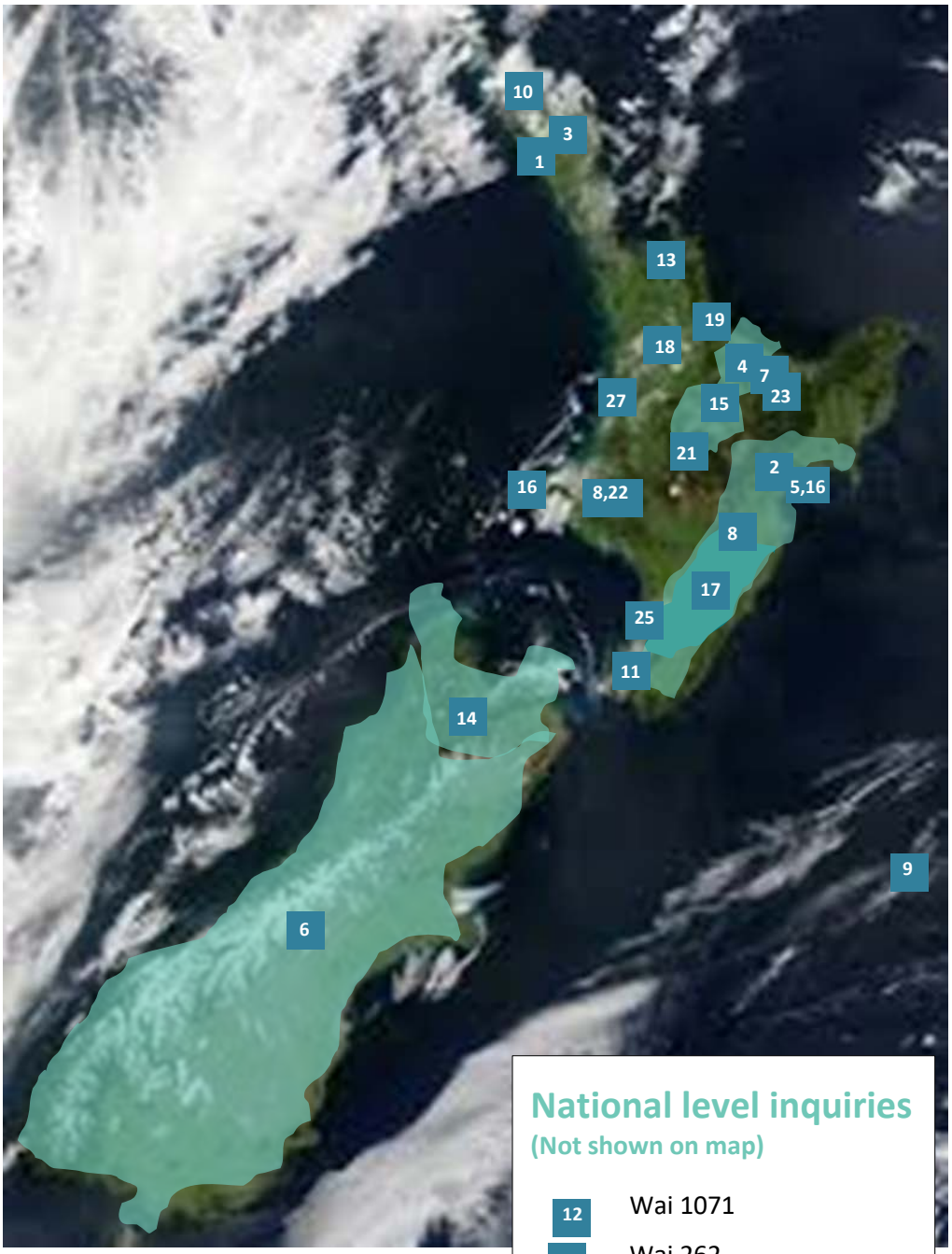
The terms of reference for the Resource Management Review Panel chaired by retired Court of Appeal Judge Hon Tony Randerson, QC listed fourteen existing reviews of the resource management system that were relevant. This 'review' is an updated and republished version of a document provided to the Resource Management Review Panel.

Review of Waitangi Tribunal reports

All Waitangi Tribunal reports were reviewed for references to ‘resource management’ or ‘RMA’ using thematic analysis software. Appendix 2 identifies the number of references to ‘resource management’ or ‘RMA’ by report and which reports have been included in this collation of extracts. Surrounding paragraphs were reviewed with a focus on commentary, findings and recommendations about the RMA.

Map of areas associated with each report

The map below identifies the rohe of claimants where the Waitangi Tribunal has made commentary, findings and recommendations within its reports relating to the Resource Management Act 1991 (RMA). It is intended to help readers understand the locations related to claimants and Tribunal findings.



National level inquiries
(Not shown on map)

12	Wai 1071
20	Wai 262
24	Wai 2478
26	Wai 2358

Extracts by Waitangi Tribunal report

Shorter extracts on the RMA

Table 1 provides shorter extracts from the fuller extracts outlined later in the report.

Table 1: Shorter extracts with map location references and years

	Wai number	Extracts
2019	**Wai 898 – Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV** 27	"At the very least, to compensate for the prejudice that has been suffered from the Crown's environmental management regime, we stated that any settlement legislation negotiated by the parties should explicitly recognise the rights of Te Rohe Pōtae Māori te tino rangatiratanga and mana whakahaere. In no other field of endeavour is this more needed than in the area of environmental management." "Ultimately, Te Rohe Pōtae Māori lack power under the RMA system – more than consultation alone is needed for the Crown to meet its Treaty of Waitangi obligations. Iwi should be full participants as self-governing entities working in partnership with local and regional councils both in terms of planning and resource consents, including the appointment of hearing committees." "The Crown has an obligation to make sure this is happening in all areas of land use decision making and heritage protection included under the RMA and this must be done by legislative amendment and the allocation of resources for iwi and hapū." "While the addition of Māori issues under Part 2 of the Resource Management Act has improved the situation for Māori communities, the 1991 Act does not accord an appropriate priority to Māori concerns. Obviously, there is improved recognition of Te Rohe Pōtae Māori relationships with water and waterways, their values and tikanga, but unfortunately as is evidenced by the Piopio case study, the application of section 5 of the Act does not necessarily result in an outcome that is consistent with Māori tikanga, values, and expectations for their taonga." "The Crown has acted in a manner inconsistent with the principle of good government for its continued failure to adhere to previous Waitangi Tribunal reports requiring that section 8 of the RMA 1991 be amended."
2019	**Wai 2358 – National Freshwater and Geothermal Inquiry Stage 2 Report** 26	"We recommend two specific amendments to part 2 of the RMA: • The amendment of section 6 to include Te Mana o te Wai as a matter of national importance that must be recognised and provided for by RMA decision makers." • The amendment of section 8 to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the Act." "We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies…" [seven recommendations follow] "We recommend that the Crown continue its approach of co-design of policy options with a national Māori body or bodies and that this should be made a regular feature of government where Māori interests are concerned." "We recommend that the Crown urgently take such action or actions as are necessary to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes, including freshwater management and freshwater decision-making"

	Wai number	Extracts
		"We reiterate the recommendations of previous Tribunals that the Crown should monitor the Treaty performance of local authorities. For freshwater matters, this should be carried out by the co-governance body." "We also reiterate the recommendation of the Wai 262 Tribunal, that councils make regular reports on their activities in respect of section 33 and 36B to the Parliamentary Commissioner for the Environment or – in the case of freshwater bodies – to the co-governance body if it is established."
2017	**Wai 2200 – Horowhenua – The Muaūpoko Priority Report** 25	"We also reject the Crown's approach regarding its responsibility for the day-to-day affairs of local authorities on the same basis that it was rejected in Ko Aotearoa Tēnei (the Wai 262 report) That report found that the environmental management regime on its own without reform was not sufficient in Treaty terms. The Wai 262 Tribunal stated that the Crown has an obligation to protect the kaitiaki relationship of Māori with their environment and that it cannot absolve itself of this obligation by statutory devolution of its environmental management powers and functions to local government. Thus the Crown's Treaty duties remain and must be fulfilled and it must make statutory delegates accountable for fulfilling them too The same duty to guarantee rangatiratanga, and to respect the other principles of the Treaty thus remains as an obligation on the Crown and it is not enough for the Crown to wash its hands of the matter and say that the day-to-day decision-making process is in the hands of local authorities" We note further the Waitangi Tribunal has previously held in various reports that the RMA 1991 is not fully compliant with Treaty principles*. In the Wai262 report, the Tribunal stated: > the RMA has not delivered appropriate levels of control, partnership, and influence for kaitiaki in relation to taonga in the environment. Indeed, the only mechanisms through which control and partnership appear to have been achieved are historical Treaty and customary rights settlements" "In context of the claims before us, we consider another important issue raised by the RMA 1991 is that it is not remedial in its purpose or effect as outlined in section 5. That provision merely provides that the purpose of the legislation is to 'promote the sustainable management of natural and physical resources."
2016	**Wai 2478 – He Kura Whenua ka Rokohanga- Report on Claims about the Reform of Te Ture Whenua Maori Act 1993** 24	"We recommend that the Crown reviews the Resource Management Act and other planning legislation, policy, and practice, to ensure that Whanganui Māori are not unduly prevented from building houses on, or developing, their own land. It should work with local authorities to ensure that they have proper regard to the importance of Māori being able to maintain their papakāinga. It should also engage with iwi Māori on the kaupapa of regional development, with a view to creating opportunities for people to participate in economic ventures that make it viable for them to occupy their ancestral kāinga."
2015	**Wai 894: Te Urewera Report Volume VII** 23	"There seems to have been some improvement in recent decades, but at the time of our hearings the Crown was still not giving effect to its Treaty obligations. In particular, it did not appear that enough was being done to restore fisheries, and Resource Management Act powers to delegate or share power with iwi were not being used. As the Wai 262 tribunal found, the Resource Management Act 'has delivered Māori scarcely a shadow of its original promise'."

	Wai number	Extracts
2015	**Wai 903 – He Whiritaunoka – The Whanganui Land Report Volume 3** 22	"The Crown cannot avoid its Treaty obligations by delegating powers, but is bound to preserve and pass on those obligations to its delegates."
2013	**Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report** 21	"Ko Aotearoa Tēnei [found] that the Act has not fulfilled its promise with respect to Māori: there have, in particular, been very few transfers of powers to iwi authorities…' 'As a consequence, the claimants have been, and are likely to continue to be, prejudiced by such a breach." "The Ngāwha and CNI Tribunals recommended that the RMA be amended so that Crown delegates are required to 'act in a manner that is consistent with the principles of the Treaty of Waitangi.' In the National Park inquiry context, we make three recommendations…"
2011	**Wai 262: Ko Aotearoa Tēnei** 20	"It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed" "We have found that a Treaty-compliant environmental management regime is one that is capable of delivering the following outcomes, by means of a process that balances the kaitiaki interest alongside other legitimate interests."
2010	**Wai 215: Tauranga Moana 1886-2006 – Report on the Post-Raupatu Claims Volume 2** 19	"In the Ngawha Geothermal Resource Report, the Tribunal examined in some detail the implications for the Crown of its duty of active protection of Māori resource-use. It identified several important elements of the duty, including : • that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences; • that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms; • that the degree of protection to be given to Māori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great physical and spiritual importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances), for so long as Māori wish it to be protected ; and • that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled. • "We agree with these views about the nature and extent of the Crown's duty of active protection over Māori possession of their lands, waters, and other taonga." "In 1992 the Te Roroa Tribunal provided a sustained analysis of the proper role of tangata whenua and the Crown in the management of Māori cultural heritage…." "That Tribunal further proposed that the Crown : re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wahi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment…" "We endorse these findings of the Te Roroa Tribunal."

	Wai number	Extracts
2010	Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 18	"The Resource Management Act 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for River use. The Act did not, however, provide for protection of te mana o te Awa and te mana whakahaere of Waikato-Tainui." "From the 1860s to the present, Waikato-Tainui have continually sought justice for their Raupatu claim and protection for the River. The principles of te mana o te awa and mana whakahaere have long sustained the Waikato River claim together with the principles described in the Kiingitanga Accord, and those principles underlie the new regime to be implemented by this settlement..." (This extract is from legislation but has been included as it was highlighted in a Waitangi Tribunal report. The Waikato Raupatu Claim was dealt with by direct negotiation, not through the Waitangi Tribunal.)
2010	**Wai 863: Wairarapa ki Tararua Report** 17	"We find that while the local Government Act 2002 exposes iwi to the policies and actions of local government, it does not hold councils to account if they fail to provide opportunities for Māori to participate in decision making or do not actively protect environmental taonga. [T]he Crown has delegated responsibility to local councils, but has not delegated an equivalent level of accountability." "[W]e have seen in all spheres of local government activity, that the Treaty provisions and the relevant legislation are not sufficiently prescriptive to oblige local bodies to conduct themselves in a manner that is consistently Treaty compliant. In this the Crown fails in its duty of active protection. Thus, we consider that both the Local Government Act, and the Resource Management Act, require more compelling Treaty provisions. Also needed are regular audits and sanctions for non-compliance."
2010	**Wai 796: The Report on the Management of the Petroleum Resource** 16	"The Crown has failed to monitor the performance of its delegated Treaty responsibilities by local authorities. Although councils are trying, their efforts have been piecemeal and have not met with particular success. The Crown has failed to monitor this situation or assist with constructive solutions." "We consider that there are fundamental flaws in the operation of the current regime… which arise from the combined effect of the following features: the limited capacity of 'iwi authorities' to undertake the role envisaged for them in the regime; the Crown's failure, despite its Treaty responsibility to protect Māori interests, to provide local authorities with clear policy guidance and to require them to adopt processes that ensure appropriate Māori involvement in key decisions; and the low level of engagement with te ao Māori and Māori perspectives exhibited by central and local government decision-makers."
2008	**Wai 1200: He Maunga Rongo: Report on CNI** 15	"On the basis of our discussions in this chapter (and the other chapters of part V), we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi.' 'It fails in the following important respects…'"
2008	**Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims** 14	"[The Crown] has failed to ensure that the Resource Management Act 1991 is implemented in accordance with its stated intention to protect Maori interests and to provide for their values, customary law, and authority in resource management decisions. It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. The Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it."

	Wai number	Extracts
2006	**The Hauraki Report Volume 3** 13	"We suggest that, for the Resource Management Act to be a more consistently effective tool for Maori (which the Crown has conceded is not always the case), the Government, local authorities, and Maori should work together to ensure an understanding of the processes on offer, as well as a consistent approach to their application. We acknowledge that the Resource Management Act already makes provision for these parties to work together, and we encourage the use of these available provisions for protection of wahi tapu to the fullest extent possible. Use of the existing provisions under the Resource Management Act should be carefully monitored, so that the Crown can put in place effective mechanisms should the existing provisions be less than fully adequate."
2004	**Wai 1071: Report on the Crowns Foreshore and Seabed Policy** 12	"There are extensive provisions in that Act for recognition of the Maori interest in the management of the environment, including the devolution to them of decision-making powers. It is certainly the case that the Treaty aspirations of that legislation have never come to fruition. The complaints of Maori about the regime have come before us, and have been reported upon to the Government." "In our view, the Crown had an obligation to take measures to ensure that the intentions of that Act were realised long ago. To agree to do it now as partial recompense for the removal of legal rights does not seem to us to be a very good deal for Maori."
2003	**Wai 145 : Te Whanganui a Tara me ona Takiwa-Report on the Wellington District** 11	"Under the Resource Management Act 1991, Maori values and the principles of the Treaty of Waitangi must now be taken into account when making decisions about resource management and there is greater provision for Maori to have input into resource management issues concerning the harbour. We consider, however, that the Act does not go far enough, in that it merely requires decision-makers to take into account the principles of the Treaty and does not ensure that persons exercising powers under the Act do so in a way that gives effect to and is consistent with the Treaty."
2002	**Wai 45 : The Muriwhenua Land Claims Post 1865 (2002)** 10	"Not only is the definition of kaitiakitanga in the Resource Management Act 1991 inadequate, but in s.7 it is listed as only one of seven other matters that 'persons exercising functions and powers' under the Act 'shall have particular regard to'."
2001	**Wai 64: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands** 9	"We find that we must part company with the understanding of 'tangata whenua' and 'mana whenua' as used in the Reserves Act 1977, the Conservation Act 1987, and the Resource Management Act 1991." "[W]e cannot support the approach adopted in the Resource Management Act 1991, which defines tangata whenua by asking who has the customary authority in a place. If that question can be answered at all, the answer will surely exclude many who are properly tangata whenua as well. If it is the intention of the Act that some special consideration should be given to Maori who have ancestral associations with particular areas of land, then we think that it would be best if that were said. It might then be found that more than one group has an interest. If in any particular case it is intended that particular Maori communities should be heard, then it would be best to describe the type of community, be it traditional or modern.

	Wai number	Extracts
1999	**Wai 167: The Whanganui River Report** 8	"To the extent that the Resource Management Act 1991 vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles." 'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away.'
1998	**Wai 212: Te Ika Whenua Rivers Report (1999)** 7	"While there are now provisions under the Resource Management Act 1991 for consultation with tangata whenua, these could be likened to recognition of tangata whenua as a party with a special interest, not one with authority and control commensurate with tino rangatiratanga over taonga or property." "In the Ngawha Geothermal Resource Report 1993, the Tribunal found that…" "In the Te Whanganui-a-Orotu Report 1995, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga…." "We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues."
1995	**Wai 27: The Ngai Tahu Ancillary Claims Report** 6	"The Tribunal in its Ngawha Geothermal Resource Report (Wai 304) has recently expressed strong reservations about the effect of the words 'take into account' in section 8 of the Resource Management Act." "We must now await and see how the Government responds to the Tribunal's recommendations." "We caution, however, that in devolving power to local authorities the Crown's responsibility to uphold the principles of the Treaty is in no way lessened."
1995	**Wai 55: Te Whanganui-a-Orotu report** 5	"We endorse the findings in the Ngawha Geothermal Resource Report 1993. As in the Ngawha claim, we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish." "In the present climate, we think that the resource management and conservation management structures are themselves impediments to Treaty principles and utmost good faith."
1993	**Wai 153: Te Arawa Geothermal Resources** 4	"We repeat here our finding in chapter 8 of the Ngawha Geothermal Resource Report, that the Resource Management Act 1991 is inconsistent with the principles of the Treaty." "We reiterate our recommendation in chapter 8 of the [Ngawha Report]"

	Wai number	Extracts
1993	**Wai 304: Ngawha Geothermal Resources** 3	"It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed." "The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it… shall act in a manner that is consistent with the principles of the Treaty of Waitangi." "The Crown obligation … "cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled."
1992	**Wai 119: The Mohaka River Report** 2	"The Crown is entitled to devolve its duties under the Treaty, through carefully worded legislation, to another authority. Nonetheless, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga. The question of whether the Act is consistent with the principles of the Treaty was not argued in detail before us. We therefore express no opinion on that question."
1992	**Wai 38: Te Roroa Report** 1	"That the Crown take urgent action to amend the procedural provisions of the Resource Management Act 1991 to ensure that all Maori with interests in multiply-owned Maori land have the right to be informed on all matters affecting their land." "That the Crown resource an advocacy service to represent all Maori with interests in multiply-owned Maori land and provide advice to Maori in relation to resource management and conservation issues." "The Crown has identified a problem with multiply-owned Maori land in relation to resource management matters and has provided a solution, the "iwi authority", which is assumed to be a traditional concept. To provide what is thought to be a "Maori" solution suggests an assumption that it is a Maori problem. It is not. It is a Crown problem…" "In our view there is an urgent need for amendment to the Resource Management Act 1991 in order to overcome problems such as those in relation to s353 "iwi authorities" and the time limits throughout the Act." "To fulfil its obligations under the Treaty, we do not consider that the procedure under the Resource Management Act for the creation of heritage protection authorities is an option to be adopted by the Department of Conservation. We accept the claimants' submission that it would be a violation of their rangatiratanga."
1991	**Resource Management Act enacted**	

Fuller extracts on the RMA

The below are fuller extracts that have been identified as referring directly to the Resource Management Act 1991. Providing these **should not be** interpreted as the only commentary by the Tribunal on these matters.

Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019)

Read the Part IV report on the Waitangi Tribunal website

Chapter 19 : He Kaunihera he Rēti, he Whenua ka Riro : Local Government and Rating in Te Rohe Pōtae

19.12 Treaty Analysis and Findings

"But all the different arrangements and opportunities are ad-hoc and the various legislation that provide for these opportunities lack coherence. In some cases, such as section 33 of the Resource Management Act, while offering Māori the means to exercise their authority to manage natural resources, local authorities have discretion whether to agree or not ; they are not obliged to transfer any power to iwi."

"We recognise that some local authorities in the district have taken steps to improve Māori representation and participation in local government decisions, but these are largely dependent on the 'good-will' of the local authority and local community. In our view, having to rely on the discretion of the local authority and good-will of the community is another breach of the principle of partnership. We find, in particular, that sections 19ZA to 19ZG of the Local Electoral Act 2001, which allows for polls of electors to decide on whether Māori wards or Māori constituencies can be established, are inconsistent with the principles of the Treaty and breach Te Rohe Pōtae Māori tino rangatiratanga."

"The Crown is obliged to ensure that local authorities reflect Treaty principles. In failing to do so, the Crown is acting inconsistently with the principles of the Treaty of Waitangi, namely the principles of partnership, rangatiratanga, and equity and has breached its duty of active protection of Te Rohe Pōtae tino rangatiratanga."

"The lack of coherence indicates that specific legislation is needed to fully recognise Te Rohe Pōtae Māori tino rangatiratanga. The Crown should negotiate with Te Rohe Pōtae Māori, or their mandated representatives, to put in place legislation that recognises and gives effect to their tino rangatiratanga in local government." p 139

Chapter 21 : Te Taiao – Ko te Whenua te Toto o te Tangata : Environment and Heritage in Te Rohe Pōtae

"The Tribunal, through several inquiries, has also examined the Crown's recognition of Māori interests in environmental management in the late twentieth century in legislation relating to resource management, the conservation estate, local government, and heritage protection. The Te Tau Ihu Tribunal, for example, noted that a stated intention of the Resource Management Act 1991 ('the RMA') was to partially incorporate Māori customary law into resource management decision-making. The Tribunal identified a grave responsibility on the

part of the Crown to ensure that Māori customary law is preserved and strengthened as a result."

"In addition to references to Treaty principles and terms such as kaitiakitanga and wāhi tapu, the RMA provides specific mechanisms for iwi and hapū influence, and in some cases partnership or delegated control. However, although many iwi management plans have been developed, in the flora and fauna inquiry the Tribunal identified serious concerns within Māoridom about the effectiveness of these plans in practice. Moreover, while partnership over the control of taonga is provided for in theory, in practice it has only been attempted in the form of highly specialised Treaty settlements, as with the Waikato River settlement accord, and the Te Arawa (Rotorua) and Taupō lakes agreements."

"The flora and fauna Tribunal identified a spectrum of Māori involvement in environmental decision-making, from autonomy and control at one end, partnership and co-management in the middle, and mere influence at the other end. Without specifying which approach would be suitable in each circumstance, the Tribunal found that both the RMA and the Conservation Act 1987 fall short in providing tangata whenua the appropriate level of rangatiratanga over their taonga. Similar findings have been made in relation to the protection in cultural heritage legislation of wāhi tapu, urupā, and other significant Māori sites." p 322

"In the Ngai Tahu (1991) and Te Whanganui a Tara (2003) reports, the Tribunal considered the question of whether direct correlations could be established between Crown actions or inactions and a particular environmental modification. Both concluded that, although the loss of mahinga kai and other taonga due to the effects of European settlement was seriously detrimental to the claimants, it could not be solely attributed to the Crown, given the multi-causal nature of environmental change."

"On the other hand, the Mohaka ki Ahuriri (2004), Hauraki (2006), Te Tau Ihu (2008), and Tauranga Moana (2010) reports considered a different and broader question : whether the Crown had recognised and acted on evidence of the need for environmental controls with sufficient priority. Reports for these inquiries agreed that the Crown cannot be held solely responsible for the broad sweep of environmental change, they also found that from the early twentieth century the Crown was aware of many of the negative cumulative impacts of settlement on the environment. In Tauranga Moana, for example, the Tribunal identified :

- widespread public and official concerns about the possible effects of deforestation on timber supplies, climate, and soil erosion ;"
- "links between forest clearance and swamp drainage and a decline in fish populations, including advice in the 1930s that īnanga spawning grounds should be fenced off ; and"
- "problems with the pollution of Tauranga Harbour and other waterways, especially the effects of sewage disposal, prompting consistent protest by Tauranga Māori from 1928 onwards."

"Ultimately all four of the latter Tribunals were able to make findings of Treaty breach, concluding, in the words of the Mohaka ki Ahuriri Tribunal, that 'the Crown was simply late in adopting appropriate controls, rather than totally neglectful of its Treaty responsibility', at least in that district. The Tauranga Tribunal expressed its findings for its district as follows :

> *the Crown did not place proper priority on the interests of its Treaty partner. The Crown breached the Treaty principle of reciprocity and its duty of active protection by failing to*

safeguard the legitimate Treaty interests of Tauranga Māori. Crown control over natural resources, and the destruction of forests and fisheries permitted by the Crown, left Tauranga Māori unable to sustain their traditional way of life, and unable to utilise natural resources as a base for economic development." p 322-323

Environmental Management – Treaty analysis and findings p391-395

"One of the main issues, as previous Tribunals have found, lies in the RMA as far as Treaty principles are concerned. Section 8 needs to be amended to reflect wording more akin to that in section 9 of the State-Owned Enterprises Act 1986. Alternatively, it should be integrated into section 5 of the RMA. Left as it is the RMA is incapable of ensuring that the Crown's Treaty guarantees to Māori are honoured. Furthermore, the Crown's heritage system while improved to that which existed before the Historic Places Act 1993, continues the ad hoc approach to the protection of all sites important to the claimants. The problem is that registration under the Historic Places 1993 and its link to the RMA, recognises only a small proportion of their sites and their experience has been that protection for those sites registered is not guaranteed." p 394

…

"For all the above reasons, including for failing to provide in any significant way for Māori participation in environmental management in Te Rohe Pōtae from 1880 to 1977 (but not with respect to the introduction of exotic terrestrial flora and fauna), we find that the Crown acted in a manner contrary to the principles of the Treaty of Waitangi and Te Ōhākī Tapu and associated agreements. It used its authority to regulate land and natural resource management and use contrary to the principle of partnership, the principle of reciprocity and mutual benefit, the principles of equity and development in article 3 and the Crown's duty of active protection of rangatiratanga over taonga (which also denotes kaitiakitanga). In doing so the Crown has failed to actively protect the rangatiratanga and kaitiakitanga of Te Rohe Pōtae Māori over their forests, lands, waterways, and other environmental taonga. While the Town and Country Planning Act 1977 (section 3(1)(g)), the reforms heralded by the Environment Act 1986, the Conservation Act 1987 and the RMA 1991 had led to improvement, the experience of Ngāti Maniapoto indicates that further reforms are needed. This is consistent with findings made in previous Tribunal reports. Current environmental statutes and policies do not adequately meet appropriate Treaty standards and must be amended and the continued failure by the Crown to address these matters is a breach of the principle of good government. Ultimately, the Crown is responsible for the policy and legislation that was not put in place in partnership with Te Rohe Pōtae Māori, nor in adequate consultation with them." p 396

"Improvements to land use planning under RMA due to part 2 requirements and the enactment of the New Zealand Historic Places Trust Act 1993 also came a little too late for other taonga sites of significance such as Maniapoto's Cave. While the legislation led to greater participation from affected Māori post 1991, in practice that participation has been reduced to consultation and information sharing. In Te Rohe Pōtae, this practice is evident in the case studies reviewed after the year 2000. Where consultation and participation has occurred in relation to planning and consents, Te Rohe Pōtae Māori consent was given with qualifications that they wanted respected. However, sites were and are still being disturbed, damaged or destroyed."

“Importantly, consultation for the completion of a resource consent application is not mandatory either by an applicant or local authority. This provision in the RMA was enacted as late as 2005. Thus any consultation is usually only undertaken to advance a local or regional authority planning process or an applicant’s resource consent proposal, where they need to provide a cultural assessment of the sites or waterways subject to the application. Iwi rightly ask : What is the benefit to them of such a system, given the evidence is that decision makers rarely gave full consideration to Treaty of Waitangi principles, other than superficial tick box exercises around stating that they have complied with part 2 or section 8 of the RMA?”

“In addition, as with the land use studies above, the RMA cannot be used to require historical rectification of environmental effects. Therefore, the historical destruction of wāhi tapu, archaeological sites, the desecration of Maniapoto’s Cave and the historical effects of mining operations on the lakes at Tahāroa, are not matters that new consents can address. All that can be done is to make sure new resource consents (and associated conditions) are adhered to. Whether or not enforcement is undertaken depends on the views of the regional or local authority concerned or Heritage New Zealand, rather than Ngāti Te Wehi, Ngāti Maniapoto, Ngāti Mahuta or any other group affected.”

“The final issue, and the continuing one, is that ultimately Māori lack power under the RMA system. Māori cannot have veto over environmental decision making as that would be inconsistent with the principle of partnership. However, more than consultation under the RMA is needed to discharge the Crown’s Treaty of Waitangi obligations. Iwi should be full participants as self-governing entities working in partnership with local and regional councils both in terms of planning and resource consents, including the appointment of hearing committees. The Crown has an obligation to make sure this is happening in all areas of land use decision making and heritage protection included under the RMA, and this must be done by legislative amendment and the allocation of resources for iwi and hapū. Numerous panels of the Waitangi Tribunal have recommended that the Crown must start with an amendment to section 8 of the RMA. The flora and fauna Tribunal focused upon what was needed in terms of planning as well.”

“For all these reasons, we find :

- That the Crown has acted in a manner inconsistent with Te Ōhākī Tapu and the principles of the Treaty of Waitangi. We find that this is the case with respect to its historic actions in Te Rohe Pōtae in the case studies identified above, as well as regarding its environmental land use policy and legislation 1900–91. This includes the manner in which effects on lakes, waterways and drainage are notified under a regime that does not have, even as a starting point, the need to consult, let alone provide for decision making authority in partnership arrangements that enhance environmental management.”

- “That, while the RMA and the New Zealand Historic Places Trust Act 1993 have improved the situation, the statutes have not provided sufficient protection for important taonga sites and are in their present format therefore inconsistent with the principles of the Treaty with respect to the Crown’s duty to actively protect taonga.”

- “That the Crown has acted inconsistently with the principles of partnership, reciprocity and mutual benefit derived from article 2, by breaching the principles of equality and the principle of redress for failure to properly compensate for Te Rohe Pōtae loss of mahinga kai, both principles being derived from article 3.”

- "That the Crown has acted in a manner inconsistent with the principle of good government for its continued failure to adhere to previous Waitangi Tribunal reports requiring that section 8 of the RMA 1991 be amended." p 497-499

21.6 Prejudice

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from:

…

- "A failure to require decision makers take into account and provide for the rangatiratanga, kaitiakitanga, tikanga and mātauranga Māori of Te Rohe Pōtae Māori associated with forests, land, wetlands and taonga sites until the 1980s. Rangatiratanga, kaitiakitanga and tikanga (such as rāhui) are sourced from mātauranga Māori and its definitions of the values attributed to each. Values such as whanaungatanga, manaakitanga, utu, and tapu cumulatively define appropriate behaviour, and the consequences for not complying with the norms associated with this system of law in the environmental space include a loss of mana and ultimately well-being."

- "A failure to require consultation with Te Rohe Pōtae Māori (other than as affected landowners and in some cases not even then) over developments that would affect their waterways and other taonga even under the RMA."

- "A failure to provide for Te Rohe Pōtae iwi mana whakahaere and full participation as partners in environmental decision-making and taonga site protection under the Environment Act 1986, the Conservation Act 1987, the RMA and the Historic Places Trust Act 1993 other than for the Waipā River and through other treaty settlement arrangements."

…

- "A general failure to assist Māori owners and the Lakes Trust monitor the operations of New Zealand Steel Mining Limited, including with respect to damage to Lake Tahāroa, the Wainui Stream, and associated taonga fisheries."

- "A failure to partner with Te Rohe Pōtae Māori to protect important taonga sites under the Historic Places Trust Act 1993 and material culture under the Protected Objects Act 1975."

- "A failure to address the loss of mahinga kai (particularly wetlands) and a failure to require full compensation for the loss of such places."

- "The loss of relationships with the metaphysical aspects of the environment including Patupaiarehe, taniwha and kaitiaki through denial of access."

- "The continued subjection of the claimants to the decision making of regional and local authorities who are not required by legislation to give effect to the principles of the Treaty of Waitangi in the administration of their powers and functions under the legislation and in planning and consenting procedures."

"As a result, there has been massive environmental change in the district without Te Rohe Pōtae Māori having any meaningful control and authority over developments that have fundamentally changed the nature of their relationship with their environment. They have suffered financial loss and customary resource loss. They are no longer able to express their rangatiratanga, kaitiakitanga, their tikanga, and mātauranga Māori over sites and wetlands that they no longer own or where these have been destroyed. Even where they own them, such as the lakes (and fisheries) at Tahāroa or Maniapoto's cave they have not been able to protect them from desecration or collapse."

"In the summary of parts 1 and 2 of this report, the Tribunal acknowledged that the circumstances of the district have changed significantly since the 1880s. Te Rohe Pōtae Māori are no longer the owners of all the land in the district. They now hold a small proportion of that land, and a sizeable number of people now call the region home, as well as a range of local councils and Crown agencies that exercise specific functions in the district." p 499-500

"At the very least, to compensate for the prejudice that has been suffered from the Crown's environmental management regime, we stated that any settlement legislation negotiated by the parties should explicitly recognise the rights of Te Rohe Pōtae Māori te tino rangatiratanga and mana whakahaere. In no other field of endeavour is this more needed than in the area of environmental management."

"We also encourage the parties that in providing for the practical exercise of the tino rangatiratanga of Te Rohe Pōtae Māori communities, the negotiations between the parties and any settlement legislation should address how their right of mana whakahaere should be institutionalised. We return to the main recommendation we made with respect to this below." p 500 - 501

21.7 Recommendations

"The Tribunal recommends :

- "That the Crown acts, in conjunction with Te Rohe Pōtae Māori or the mandated settling group or groups in question, to put in place means to give effect to their rangatiratanga in environmental management. For Ngāti Maniapoto or their mandated representatives, this will require the Crown to take into account and give practical effect to Te Ōhākī Tapu. How this might be achieved will be for the parties to decide in negotiations ; however, the Tribunal considers that for the Crown to relieve the prejudice suffered by Te Rohe Pōtae Māori, the following minimum conditions must be met."

- "First, that the rangatiratanga of Te Rohe Pōtae Māori (or the settling group or groups in question) be enacted in legislation in a manner which recognises and affirms their rights of autonomy and self-determination within their rohe, and imposes a positive obligation on the Crown and all agencies acting under Crown statutory authority to give effect to those rights. For Ngāti Maniapoto or their mandated representatives, this will require legislation that recognises and affirms Te Ōhākī Tapu, and imposes an obligation on the Crown and its agencies and regional and local authorities to give effect to the right to mana whakahaere. The brief of evidence of Steven Wilson (Manahautū Whanake Taiao – Group Manager Environment for the Maniapoto Trust Board) dated 28 April 2014 could provide a sound basis for negotiations on this issue."

- "Secondly, subject to negotiations between the parties, that the legislation makes appropriate provision for the practical exercise of rangatiratanga by Te Rohe Pōtae

Māori (or the settling group or groups in question) in environmental management. For Ngāti Maniapoto or their mandated representatives, this will require legislation that gives practical effect to Te Ōhākī Tapu, and provides for the practical exercise of mana whakahaere."

- "Thirdly, and for other iwi in the district, co-management regimes could be chosen from the existing suite of options under the RMA or through the enactment of legislation for a different form of co-management."

- "The iwi concerned should have a real mandate to represent hapū, and whānau. They should also reflect this through constituting representative structures that elevate the voices of hapū and whānau in the decision-making process. These co-management bodies, and the relationship they reflect, should be established on the basis that the environment is a taonga of Te Rohe Pōtae Māori. The Crown, as part of this recognition and the development of these co-management regimes, should proactively look to restore taonga sites where practicable. These sites should be identified in conjunction with Te Rohe Pōtae Māori and may include wetlands, forests, wāhi tapu, or any other sites of environmental or heritage value."

…

- "The Crown, as part of this recognition and the development of these co-management regimes, should proactively look to restore taonga sites where practicable. These sites should be identified in conjunction with Te Rohe Pōtae Māori and may include wetlands, forests, wāhi tapu, or any other sites of environmental or heritage value." p 501

"Regarding our findings on waterways and water bodies, we recommend :

- "The Ngā Wai o Maniapoto (Waipā River) Act 2012 be amended to cover all the waterways and river mouths and habours of Ngāti Maniapoto. This legislation is to include co-management with the Department of Conservation of customary freshwater fisheries species, particularly eels and marine species found in river mouths and harbours."

- "That in relation to other Iwi of the district, that the Crown consider special legislation to address their Treaty claims with respect to waterways, river mouths, and harbours."

- "That a mataitai be constituted with respect to Whāingaroa Harbour."

"We reserve the right to make further findings and recommendations with respect to these chapters at the conclusion of our report. We also reserve the right to refuse any applications to exercise our resumptive powers based upon this pre-publication report until the final part of our report is released."

21.8 Summary of Findings

"Our key findings in this chapter have been :

- Rather than acknowledge Māori tino rangatiratanga and mana whakahaere, as promised in the Treaty and negotiated as part of Te Ōhākī Tapu and associated agreements, the Crown introduced discriminatory legislation to manage the

environment, which allowed it to, amongst other things, take administrative control of the region."

- "Te Rohe Pōtae Māori were subject to the authority of central, local and regional authorities who did not have to consider Treaty principles, provide for Māori co-management, engage and consult Māori, enable their participation in management or have regard to their customary values outside of possible granting of authorisations or permits for gathering, taking or catching species or for the protection of their archaeological sites. As a result, they were further separated from many of their important taonga sites and species and there was a corresponding loss of mātauranga Māori."

- "The Town and Country Planning Act 1977 was the first statute to recognise that Māori continued to have a relationship with certain areas even where they no longer owned land. It would not be until the introduction of the Conservation Act 1987 and the Resource Management Act 1991 that the principles of the Treaty were considered to be relevant to environmental management, though these Acts still fail to fully address Te Rohe Pōtae Māori environmental concerns. The RMA, in particular, needs to be amended to ensure that the Crown's Treaty obligations are met."

- "Heritage protection legislation has been unable to prevent destruction or modification of many sites of importance to Te Rohe Pōtae Māori. The new Heritage New Zealand Pouhere Taonga Act 2014 may improve the position, but its impact was not known at the time of hearing."

- "The legislation and policy operation of the Ministry for the Environment and Department of Conservation do not adequately meet appropriate Treaty standards. Both ministries need to prioritise adequate consultation regarding, and participation in, environmental management, with a focus on ultimately working in partnership with Māori. The first step is to amend section 4 and 6 of the Conservation Act 1987 and update DOC's Conservation General Policy 2005."

…

- "Initiatives that the Crown has taken over time to protect indigenous forests (on a national scale) are too small and have come too late to be of any real significance to Te Rohe Pōtae Māori."

…

- "The Crown has by omission, in legislation, and by its actions, failed to act in a manner consistent with the principles of the Treaty of Waitangi with respect to the traditional forests and lands of those iwi and hapū who have not achieved settlement of the Treaty claims in Te Rohe Pōtae, namely under article 2 – the principle of partnership, the principle of reciprocity underpinned by the exchange of kāwanatanga for the guarantee of rangatiratanga, the principle of mutual benefit, and the duty of active protection of their rangatiratanga and of their taonga. In part, this is a problem with the legislation and the fact that it provides no guidance to DOC, other than section 4, on how it must administer and interpret the legislation consistently with Treaty principles. What is needed is an amendment to section 6 as we have noted above."

- "Where Māori continued to own land, their ability to protect taonga sites and other material taonga, waterways, and fisheries, was continually threatened by the Crown's land use and planning policies and legislation."

- "The Crown similarly prioritised the mining industry over the needs of Te Rohe Pōtae Māori. The enactment of various legislations has authorised a range of people to assert control over their taonga sites, material culture, and waterways without adequate corresponding consultation with tangata whenua."

- "Some newer legislations, such as the Heritage New Zealand Pouhere Taonga Act 2014, have the potential to address environmental issues in the district, particularly regarding consultation, but they still do not go far enough. Under the RMA, for example, consultation for the completion of a resource consent application is not mandatory either by an applicant or local authority and this provision was enacted as late as 2005."

- "Ultimately, Te Rohe Pōtae Māori lack power under the RMA system – more than consultation alone is needed for the Crown to meet its Treaty of Waitangi obligations. Iwi should be full participants as self-governing entities working in partnership with local and regional councils both in terms of planning and resource consents, including the appointment of hearing committees."

- "The Crown has an obligation to make sure this is happening in all areas of land use decision making and heritage protection included under the RMA and this must be done by legislative amendment and the allocation of resources for iwi and hapū."

- "The Crown has acted in manner inconsistent with Te Ōhākī Tapu and the principles of the Treaty of Waitangi with respect to its historic actions in Te Rohe Pōtae with respect to its environmental land use policy and legislation 1900–91."

- "While the RMA and the New Zealand Historic Places Trust Act 1993 have improved the situation, the statutes have not provided sufficient protection for important taonga sites and are therefore inconsistent with the principles of the Treaty with respect to the Crown's duty to actively protect taonga."

- "The Crown has acted inconsistently with the principles of partnership, reciprocity, and mutual benefit derived from article 2, by breaching the principles of equality and redress by failing to properly compensate for Te Rohe Pōtae loss of mahinga kai."

- "The Crown has acted in a manner inconsistent with the principle of good government for its continued failure to adhere to previous Waitangi Tribunal reports requiring that section 8 of the RMA 1991 be amended." p 669-671

Chapter 22 : Ngā Wai Manawa Whenua: Waterways and Water Bodies in Te Rohe Pōtae

"Therefore, no tangible result from these provisions of the Resource Management Act (as then in force) had been achieved in terms of water under the Act until 2012, and we note that the statutory power to determine such matters still resides with Environment Waikato. The departure from this pattern was the enactment of the Ngā Wai o Maniapoto (Waipā River) Act 2012. This was watershed legislation for Te Rohe Pōtae Māori that clearly gives effect to the principles of partnership, reciprocity, and mutual benefit and provides a blueprint for the

management of water and waterways/bodies in the district. However, the vexed issue of possession and ownership remains."

"Since 2014, and the close of hearings, the Resource Management Act has been amended to include the possibility of Rohe Mana Whakahono agreements. The purpose of such agreements as set out in section 58M are to provide a 'mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes' under the Act. The other purpose is to 'assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.' The use of these provisions will also benefit other iwi beside Te Rohe Pōtae Māori."

"The Crown's position adopted in closing submissions for this inquiry (that it must treat Māori equitably with non-Māori in the application of its policies and practices in respect of waterways and take a balanced approach) was a position not apparent in any legislation until 1991. It did not treat Māori equitably with non-Māori because it did not recognise and provide for their rights and interests, and nor did it require those matters be balanced against other interests. The only exception being the Mōkau River Trust Act 1903, which did not remain on the statute books for long. The RMA has improved the situation, but it has its limitations."

"Therefore, we find that the Crown has acted in a manner contrary to the principles of the Treaty of Waitangi. It has used its authority to regulate water and waterways/bodies contrary to the principle of partnership, the principle of reciprocity underpinned by the essential exchange of kāwanatanga for rangatiratanga and the principle of mutual benefit. It has done so by failing until 2012 to provide for Māori mana whakahaere and possession with respect to their water taonga. In doing so it has failed to actively protect the rangatiratanga of Te Rohe Pōtae Māori over the water and waterways/bodies that they consider taonga. A treaty consistent approach would have been to develop the detail of how the mana whakahaere of Te Rohe Pōtae Māori could be recognised and provided for. An extension of the Ngā Wai o Maniapoto (Waipā River) Act 2012 to include all taonga waters, waterways/bodies of Ngāti Maniapoto is the obvious solution to the issue. Similar legislation will be needed for other iwi of Te Rohe Pōtae or Rohe Mana Whakahono agreements will need to be negotiated." p 557

"Fourthly, regional authorities and consent holders who were responsible for historical environmental effects that continue to plague the water and waterways/bodies considered taonga by Te Rohe Pōtae Māori are not required to address these matters under the Resource Management Act. We acknowledge that many of the problems associated with pollution are historical. That is exactly the issue with the Resource Management Act. It is not retrospective. Therefore, neither the Crown, nor any regional authorities in existence post 1991 or long-term consent holders, can be made accountable under the 1991 legislation for the mismanagement of water and waterways/bodies pre-1991, or before the issue of current consents." p 588-589

"While the addition of Māori issues under Part 2 of the Resource Management Act has improved the situation for Māori communities, the 1991 Act does not accord an appropriate priority to Māori concerns. Obviously, there is improved recognition of Te Rohe Pōtae Māori relationships with water and waterways, their values and tikanga, but unfortunately as is evidenced by the Piopio case study, the application of section 5 of the Act does not necessarily result in an outcome that is consistent with Māori tikanga, values, and expectations for their taonga."

“The lack of priority accorded to the relationship between Māori groups and various waterways/bodies of water is because the Act also requires a number of other values to be recognised and provided for, taken into account or considered. Therefore, while there is space for Māori voices to be heard, this is limited by the other matters that can be given equal or greater weight. Furthermore, treaty rights and interests, and indeed all other matters listed in Part 2 of the Act, are trumped by section 5, which describes the purpose of the Resource Management Act as to ‘promote the sustainable management of natural and physical resources.’ As noted in chapter 21 on the Environment, all those exercising duties and powers under the Act, including the Environment Court, are required to give effect to this primary purpose. The Act then lists a hierarchy of matters decision makers must consider. Section 6 sets out what they must recognise and provide for and this includes the relationship of Māori with their ancestral lands and waters. Section 7 merely requires that the matters listed including kaitiakitanga be taken into account. Section 8 only requires that the court have regard to the principles of the Treaty of Waitangi.”

“Te Rohe Pōtae Māori cannot expect veto authority over the allocation, use, and management of water, waterways/bodies as that would be contrary to the principles of the Treaty of Waitangi. However, they can expect that their Treaty rights are appropriately integrated into decision making and planning under the Resource Management Act. If the hierarchy in part 2 of the Act were reversed or if the purpose of the legislation under section 5 was extended to require all those exercising duties and functions under the Act to act in a manner consistent with the principles of the Treaty of Waitangi, a different balancing exercise would be required. It would be one that was clearly focused on partnership, mutual benefit, and reciprocity, alongside sustainable management.”

“It would also require providing for the rangatiratanga or mana whakahaere of Te Rohe Pōtae Māori in local government, in planning, and in consent processes including enforcement. Engagement on issues such as sewage disposal would be premised upon a recognition that their culture, tikanga, and values have as much to offer as regional and local body politicians representing the views of the rest of the community. This different framework for management is more likely to meet the section 5 purpose of the legislation, as noted by the Environment Court in the Mōkau ki Runga decision discussed previously. As it stands, the status quo is resulting in the health of the districts waterways/bodies continuing to decline.”

“Thus, for all waters and waterways/bodies (with the exception of the Waipā River) there is a disconnect between the legislative framework for the management of environmental effects as regard water and waterways/bodies and the way that Te Rohe Pōtae Māori want their rangatiratanga and kaitiaki responsibilities exercised.”

“Therefore, we find that the Crown acted in a manner contrary to the principles of the Treaty of Waitangi from 1840 to 1991, namely the principles of good governance in article 1 and rangatiratanga in article 2. It did so because it did not legislate to recognise and provide for the mana whakahaere, values, and tikanga of Te Rohe Pōtae Māori associated with taonga water and waterways/bodies so they could be integrated into its legislative management regime. Since 1991, the Resource Management Act has improved the situation but has its limitations as described in this section and this issue needs to be addressed. The solution would be to amend the Ngā Wai o Maniapoto (Waipā River) Act 2012 to include all taonga waters, and waterways/bodies of Ngāti Maniapoto. Similar legislation will be needed for other iwi of Te Rohe Pōtae or Rohe Mana Whakahono agreements will need to be negotiated. At the least, section 8 of the Resource Management Act should be amended to state that nothing in the Act should be done in a manner inconsistent with the principles of the Treaty of Waitangi or a new reference with the wording stipulated previously should be added to section 5.” p 589-591

"Since 1991, the RMA has improved the situation as far as managing environmental effects on the harbours but has its limitations as described in section 22.4 and this issue needs to be addressed. To address that issue, section 8 of the Resource Management Act should be amended to state that nothing in the 1991 legislation should be done in a manner inconsistent with the principles of the Treaty of Waitangi or a new reference should be added to section 5." p 625

22.7 Prejudice

"It is clear from the evidence examined in this chapter that water and water bodies are of immense cultural, spiritual, and practical importance to Te Rohe Pōtae Māori. Prior to the arrival of Pākehā, Te Rohe Pōtae Māori developed numerous principles and protocols, based on tikanga, to carefully manage and protect these water bodies, which in turn provided nourishment for whānau, hapū, and iwi throughout the district."

"In the decades following the Crown's arrival to the district and the formalisation of a series of legislative and statutory regimes in which it progressively assumed greater control of water and water bodies, Te Rohe Pōtae Māori were stripped of the rangatiratanga that they had exercised for centuries, as well as the mana whakahaere they were entitled to."

"The Crown's assumption of the management of water bodies went hand in hand with their subsequent widespread degradation. As Pākehā settlement increased in the district, so too did water pollution from sedimentation due to land clearance work, pastoral production, mining, industry and human waste from settlements and towns. Despite the efforts of many Te Rohe Pōtae Māori to address this continued grievance, such as by imposing stricter controls on local and regional authorities, there has been little success."

"Perhaps most distressing to Te Rohe Pōtae Māori today is the loss of their food basket, their 'source of spiritual and physical sustenance'. The Crown's assumption of authority over fisheries, combined with the marked decline of taonga species (particularly tuna) as a result of commercial fishing and habitat destruction, has led to the severe detriment of Te Rohe Pōtae Māori, who can no longer gather kaimoana as they had for generations before."

"The cumulative prejudice of these factors, the diminishing of Te Rohe Pōtae Māori tino rangatiratanga and mana whakahaere, the destruction and degradation of their traditional water bodies, and the significant decline of taonga species have caused serious and long-lasting prejudice to Te Rohe Pōtae Māori, the legacies of which continue to this day."

"We therefore recommend:

- That the Ngā Wai o Maniapoto (Waipā River) Act 2012 be amended to cover all the waterways and river mouths and harbours of Ngāti Maniapoto. This legislation to include co-management with DOC of customary freshwater fisheries species, particularly eels and marine species found in river mouths and harbours."

- "That, in relation to other iwi of the district, the Crown consider special legislation to address their Treaty claims with respect to waterways, river mouths, and harbours."

- "That a mataitai be constituted with respect to Whāingaroa Harbour." p 668-669

22.8 Summary of Findings

"Our key findings in this chapter have been :

- Where water formed a part of a waterway or water-body Te Rohe Pōtae Māori considered a taonga and where possession could be established on the evidence as at 1840, Māori had the full rights of possession and management or mana whakahaere over that water and waterway according to their own tikanga or customary law and in accordance with their own cultural preferences. That pattern was set in the 19th century legislation and it continued into the 20th century until 1991. The Mōkau River Trust Act 1904 stands out as a rare exception to the Crown's pattern of management."

- "The Crown's early legislation, contrary to Māori approaches to managing water, focused upon the rights of landowners, public navigation, introduced exotic fish species, recreation and regulating development."

- "The Crown generally instituted its system of water management without regard to the Treaty of Waitangi or its principles, Māori tikanga or values."

- "The Crown vested in itself the sole right to use water for the purposes of hydro-electric generation. In doing so it assumed the right to control access and to charge for the use of water."

- "Even where it was made aware of potential impacts on rights and interests in land, it pursued its own course and either it kept excess Māori land taken under the Public Works Act as for the Wairere dam or it failed to take into account potential impacts on Māori land as with Aorangi B blocks and the Mōkauiti dam."

- "Having taken possession of or authority over water and waterways/bodies, the Crown also delegated management responsibility to regional and local authorities without including or making provision for Te Rohe Pōtae Māori tino rangatiratanga or mana whakahaere. This is contrary to the principles of the Treaty, namely the principles of good governance in article 1 and rangatiratanga in article 2, and we find that the Crown's actions and omissions from 1840 to the passing of the RMA 1991 are inconsistent with their Treaty obligations."

- "The Crown's local government restructuring commencing in the 1980s and the passing of the RMA 1991 has provided some opportunity for improved recognition of Te Rohe Pōtae Māori tino rangatiratanga or mana whakahaere, though this recognition remains extremely limited and has not been well implemented by the Crown or those bodies with delegated Crown authority."

- "The historical management of waterways/bodies has been tantamount to treating them as sewers or drains into which pollutants such as sewage could be discharged. This has led to the significant decline in water quality in many waterways/bodies in the district and has significantly impacted on Māori spiritual and customary values and use. Because the RMA 1991 is not retrospective, the Crown, its agents, and long-term consent holders cannot be held accountable for the historical management of water pre-1991."

- "Although the Crown has worked to address the pollution of rivers and streams in Te Rohe Pōtae, there was no evidence that this had been successful in any significant

way, and some evidence indicating that the Waikato Regional Council's water management regulations were insufficient and in need of review."

- "For all waters and waterways/bodies (with the exception of the Waipā River) there is a disconnect between the legislative framework for the management of environmental effects as regard water and waterways/bodies and the way that Te Rohe Pōtae Māori want their tino rangatiratanga and kaitiaki responsibilities exercised."

- "Despite provision in the Fisheries Act 1908 that nothing in the legislation should affect Māori fishing rights, the Crown did not willingly enable or provide for those rights in statute. Māori concerns about the decline of their fisheries due to habitat loss, commercial exploitation and over-fishing were thereafter marginalised in the Crown's management regime until the 1980s."

- "The Crown's fishery management regime does not adequately provide for mana whakahaere for the claimants over tuna, which is a taonga of Te Rohe Pōtae Māori. Furthermore, the Crown has prioritised the commercial exploitation of tuna at the expense of Te Rohe Pōtae Māori concerns for the health of the species and their ability to harvest sufficient tuna for customary purposes. This is the case for other species, such as whitebait, as well."

- "The appointment of tangata kaitiaki/tiaki and the management of customary fishing reserves and rohe moana areas under the Fisheries (Kaimoana Customary) Fishing Regulations is a vast improvement for the expression of Te Rohe Pōtae Māori tino rangatiratanga. At the local level this certainly provides the opportunity for practical mana whakahaere. We remain concerned that no progress in this respect has been made with respect to Whāingaroa at the end of our hearings."

- "Overall, there has been a general decline in fish stocks in Te Rohe Pōtae. Some of this decline can be attributed to commercial fishing, over-exploitation and environmental effects on habitat. This amounts to a Crown failure to abide by its duty to actively protect taonga species and mahinga kai important to Te Rohe Pōtae Māori."

- "Māori never willingly relinquished their possession and authority over fisheries, rather it was progressively wrested from them."

- "The Crown failed to legislate provisions recognising or providing for Te Rohe Pōtae Māori's tino rangatiratanga, relationship, values and tikanga related to taonga fisheries and mahinga kai until the enactment of the Māori Fisheries Act 1989. This failure is contrary to the Treaty principles of good governance, rangatiratanga, partnership, reciprocity, and mutual benefit."

Wai 2358: The Stage 2 Report on the National Fresh Water and Geothermal Claims (2019)

Read the full report on the Waitangi Tribunal website

SUMMARY OF FINDINGS AND RECOMMENDATIONS [pages 523–564]

7.1 Introduction

"In this chapter, we provide a summary of the findings that we have made in chapters 2–6, before proceeding to make our recommendations to the Crown."

"Having assessed all the evidence and submissions in our inquiry, it appears to us that there were some broad points of agreement between all the parties:

- they agreed that Māori rights and interests in freshwater bodies needed to be addressed ;
- they agreed that Māori values were not being reflected in freshwater decision-making, and that the decision-making framework needed to change to better reflect those values ;
- they broadly agreed that the role of Māori in freshwater management and decision-making needed to be enhanced, although they did not agree on how far it should be enhanced or in what ways ;
- they agreed that under-resourcing was preventing Māori from participating effectively (or at all) in many RMA processes ;
- they agreed that national direction to councils was required, and that more water quality reforms were still needed (as at 2017) ; and
- they agreed that Māori interests in water entailed economic benefits, but they did not agree in what form or to what extent, including on whether the Crown should recognise Māori proprietary rights, or provide an allocation of water to iwi and hapū, or provide an allocation for Māori land development, or carry out some other reform, such as royalties."

"Given these broad points of agreement, it is clear why the Crown and the ILG could collaborate on freshwater reforms, and also why they could not reach agreement on many points."

"We begin by congratulating the Crown on its commitment to address Māori rights and interests in a Treaty-compliant manner, and its successful introduction of such reforms as Te Mana o te Wai in the NPS-FM 2014 as amended in 2017."

"As we explained in chapters 3–6, there have been some positive results from the Crown–ILG co-design of reforms in 2015–17."

"Ultimately, however, we found that the RMA had significant flaws in Treaty terms at the time the reform programme began, and that the reforms the Crown has completed are not sufficient to make the RMA and the freshwater management regime Treaty compliant. We also found that the NPS-FM is not yet Treaty compliant, for the reasons summarised in the following sections. We found that Māori have been prejudiced by these breaches, including the failure to set adequate controls and standards for the active protection of their freshwater taonga."

"In the manner and to the extent that we have found breaches and prejudice, the Wai 2358 and Wai 2601 claims are well founded. The breaches and prejudice in respect of the RMA and the Crown's freshwater reforms have also affected those iwi and hapū who were interested parties, and who gave evidence and made submissions in our inquiry."

"Having found that the claims are well founded, for the reasons summarised in sections 7.2–7.5 below, we make our recommendations to the Crown in section 7.7. Before making our recommendations, we set out the parties' positions on the proposal for a national co-governance body (the national water commission), and for a separate Water Act, in section 7.6."

7.2 The law in respect of fresh water

7.2.1 Introduction

"In chapter 2, we assessed the law in respect of fresh water in light of the principles of the Treaty of Waitangi. We began with a brief introduction to the pre-1991 legislation, followed by a fuller analysis of the RMA in respect of its application to freshwater resources. Our analysis was focused mostly on the period between 1991 and 2009, so that matters could be assessed as at the beginning of the Crown's Fresh Start for Fresh Water reform programme in 2009–10. We were primarily concerned with how the Act provided for (or failed to provide for) Māori rights and interests in their freshwater taonga, and whether the RMA regime was compliant with the principles of the Treaty. We made findings on the following issues:

- whether the purpose and principles in part 2 of the RMA provided sufficient recognition of, and protection of, Māori rights, interests, and values ;
- whether the RMA provided for Māori participation in freshwater management and decision-making in a manner consistent with the partnership principle and the Treaty's guarantee of tino rangatiratanga ;
- why the RMA did not recognise any Māori proprietary rights or provide Māori with any economic benefit from the allocation and commercial use of their freshwater taonga ; and
- the extent to which the Crown and/or the RMA regime were responsible for the increasingly degraded state of many of those taonga."

"Our findings on those issues are summarised in this section."

7.2.2 The purpose and principles of the RMA

"We discussed part 2 of the RMA in section 2.4 of chapter 2. We agreed with the Crown that sections 6–8 of the RMA introduced tikanga requirements into the statute law for freshwater management for the first time. The legislation prior to that was mono-cultural and did not recognise Māori values or interests. After 1991, RMA decision makers were required to recognise and provide for the relationship of Māori with their ancestral waters, to have particular regard to kaitiakitanga, and to take account of the principles of the Treaty. This was a significant improvement on the previous situation. But we also agreed with the claimants that there were key weaknesses in the operation of part 2 of the Act. These included the relative weakness of the Treaty clause (section 8), and the potential for Māori interests to be 'balanced out' in the hierarchy of matters to be considered by decision makers under sections 6–8."

"Previous Tribunal reports have found that a balancing exercise was widely applied under the RMA, which allowed Māori interests to be balanced out altogether in many RMA decisions. Māori have been significantly prejudiced as a result. Professor Jacinta Ruru, David Alexander,

and other claimant witnesses confirmed that Māori interests have also been balanced away in freshwater management decisions during the period under review in chapter 2. We noted that this situation may improve to some extent, depending on the application of the Supreme Court's King Salmon decision. We also noted the Crown's view that there was an 'increasing sophistication' in the Environment Court's treatment of Māori interests. But litigation remained a costly exercise, time and expertise-intensive, which was beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori. In our view, statutory amendments are required to ensure that RMA decision-making on freshwater matters is Treaty compliant."

"First, we agreed with many Tribunal reports that section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty. The Petroleum Management Tribunal found that the Crown's delegation of Treaty responsibilities in resource management must be done in a manner that ensures Treaty compliance. Our view is that section 8 should be amended to state that the duties imposed on the Crown in terms of Treaty principles are imposed on all those persons exercising powers and functions under the Act. Such an amendment would ensure that Māori interests are protected (not balanced out), that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that part 2 of the RMA is Treaty compliant. We make a recommendation to that effect later in this chapter."

"Secondly, we agreed with the Petroleum Management Tribunal that amending section 8 will not, on its own, ensure that RMA decision-making is carried out consistently with the principles of the Treaty. Māori must themselves be RMA decision makers for their freshwater taonga, and their role in this respect needs to be enhanced to meet the Treaty guarantee of tino rangatiratanga. We turn to that matter next."

7.2.3 Freshwater management and decision-making

"We considered the RMA's provisions for freshwater management and decision-making in section 2.5 of chapter 2."

7.2.3.1 The Treaty standard for freshwater management and decision-making

"In its 2011 report, the Wai 262 Tribunal found that RMA decision-making for natural resources should be made on a sliding scale, depending on the strength of the kaitiaki interest in the particular resource, the nature and extent of other interests in the resource, and the interests of the resource itself. We agreed with this finding in our stage 1 report, as follows:

The Tribunal found that kaitiaki rights exist on a sliding scale. At one end of the scale, full kaitiaki control of the taonga will be appropriate. In the middle of the scale, a partnership arrangement for joint control with the Crown or another entity will be the correct expression of the degree and nature of Māori interest in the taonga (as balanced against other interests). At the other end of the scale, kaitiaki should have influence in decision-making but not be either the sole decision-makers or joint decision-makers, reflecting a lower level of Māori interest in the taonga when balanced against the interests of the environment, the health of the taonga, and the weight of competing interests."

"This scheme is not incompatible with Māori having residual proprietary interests in – or, indeed, full ownership of – water bodies that are taonga. Rather, that would be a factor to be considered in terms of the weight accorded the kaitiaki interest vis-à-vis other interests in the resource."

"Having heard the evidence of the claimants and interested parties in both stage 1 and stage 2 of this inquiry, our view is that the Māori Treaty right in the management of most freshwater taonga is at the co-governance / co-management part of the scale. Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga."

"The exception to co-governance and co-management is that, in some cases, the strength of the Māori interest in a particular freshwater taonga may be such that it requires Māori governance of that taonga. Our view was that the presence of other interests in New Zealand's water bodies will more often require a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga; that is the Treaty standard for freshwater management."

"In making this finding in chapter 2, we were not departing from the Wai 262 findings but rather specifying the Treaty standard for one particular resource out of the many that come under the RMA."

7.2.3.2 The RMA's participation mechanisms

"Having set the Treaty standard for freshwater management and decision-making, we assessed the RMA mechanisms against that standard. We also examined the Crown's argument that statutory arrangements and Treaty settlements have created a 'tapestry of co-governance and co-management arrangements for waterways across New Zealand' since 2011. We accepted that the RMA has a number of participation mechanisms for Māori, including section 33 (which enables the transfer of functions and powers to iwi authorities), section 36B (which enables Joint Management Agreements between councils and iwi or hapū), the provision for iwi management plans, and the schedule 1 consultation requirements for regional plan making. The provision for Heritage Protection Authorities, however, does not apply to water and therefore does not provide a mechanism for Māori to participate in freshwater management."

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows:

- Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used. That is, there are high barriers within section 36B itself to its use by councils and iwi or hapū (as the Crown has acknowledged), and the Crown has not provided incentives for its use or any compulsion to actively consider its use.

- Iwi management plans have not been accorded their due weight in RMA planning. The Crown has turned down repeated calls for the enhancement of their legal weight.
- The consultation requirements of the RMA have been confined to the plan-making phase of freshwater decision-making (consultation is not required for the consenting phase). The consultation requirements have also suffered from under-resourcing and the lack of a clear path for consultation to take place in a meaningful and effective way. Crown counsel argued that the new Mana Whakahono a Rohe mechanism will provide just such a path (our findings on that new mechanism are summarised below)."

"Alongside these flaws in the RMA mechanisms themselves, we found that under resourcing has contributed to a lack of capacity and capability for many Māori entities in freshwater management. This has crippled their ability to participate effectively in RMA processes. Examples included the ability to meet the 'efficiency' requirements of sections 33 and 36B, to prepare effective iwi management plans, and to participate effectively (or at all) in consultation and RMA hearing processes."

"The Local Government Act 2002's requirement that councils must 'consider ways to foster the capacity of tāngata whenua' has not sufficiently addressed this crucial problem. The Crown has recognised the existence and importance of this problem in multiple policy and consultation documents since 2004, as we set out in chapters 2-4."

"For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making."

"We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011."

"We accepted, however, that Treaty settlements have delivered co-governance and co-management authority for a limited selection of freshwater taonga."

"Council practice and iwi-council relationships have also improved in some areas– mostly but not entirely due to Treaty settlements. Some councils have provided limited funding. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making. Our conclusion was that Treaty settlements have provided for the exercise of tino rangatiratanga over selected waterways, such as the Waikato and Whanganui Rivers. But not all iwi who have settled with the Crown obtained those kinds of arrangements, nor will they necessarily be available for groups which are yet to settle. In those cases, Māori participation in freshwater management remains limited in nature. The Crown could not reasonably rely on the Treaty settlement process, therefore, to avoid reforming the participatory arrangements in the RMA."

7.2.4 Proprietary rights, economic benefits, and the RMA allocation regime

"During the Resource Management Law Reform (RMLR) project in 1988–90, Māori leaders sought to make the new legislation consistent with the Treaty. In particular, tribal leaders, the NZMC, the Taitokerau District Māori Council, and others wanted the Māori ownership of natural resources (including water) to be recognised and protected in the new Act. The Crown refused to do this on the basis that there would be a separate process to negotiate ownership

issues. As far as we were aware, there had been no such process for water, and we noted that Treaty settlement policy excluded ownership of water bodies as an option (with rare exceptions as to the beds of certain waterways). Officials at the time of the RMLR argued that the law reform should focus not on Māori ownership but on Māori 'participation, control and authority in resource management decision-making'."

"The Crown's position 20 years later echoed this thinking, except that the Crown acknowledged in our inquiry that there is also an 'economic benefit aspect of Māori rights and interests' in fresh water, and that its reforms must deliver economic benefits to iwi and hapū from their freshwater resources. We agreed with the Crown that Māori are entitled to an economic benefit from their interests in fresh water and, in our view, that right was inextricably linked to rights of property in their freshwater taonga."

"An associated issue was the RMA regime for allocating water takes, which has allocated rights to take and use water for commercial purposes on the basis of a first-in, first-served system of applications. The claimants argued that this system had excluded Māori, had resulted in many catchments being over-allocated, and had caused environmental damage – points that have all been conceded in many of the documents placed before us by the Crown."

"Our findings on these issues were:

- the RMA made a proviso for the prior rights of farmers (preserving the effects of section 21 of the Water and Soil Conservation Act 1967), but did not do the same for the prior rights of Māori in section 354 or anywhere else in the Act, and did not otherwise recognise or provide for their rights of a proprietary nature ;
- even if the prior rights of Māori had been provided for in the RMA, the first-in first-served system of allocation did not allow applications for water permits to be compared or prioritised (so that Māori rights could be taken into account) ;
- the first-in, first-served system was also unfair to Māori, especially in catchments that had become fully or over-allocated, because of statutory and other barriers that had prevented Māori landowners from participating in it in the past ;
- RMA mechanisms allowed Māori little or no say in the decisions about allocation and use ;
- councils very rarely provided an allocation to Māori in the absence of strong national direction; and
- the first-in first-served system had resulted in over-allocation and environmental problems, and needed urgent reform."

"For all those reasons, we found that the RMA and its allocation regime are not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by:

- the ongoing omission to recognise their proprietary rights ;
- barriers that have prevented their participation in the first-in, first-served allocation system in the past ; and
- the lack of partnership in allocation decision-making."

"Economic opportunities have been foreclosed by these barriers to their access to water."

"We also noted that Māori had continued to pursue their water claims in the Waitangi Tribunal during the 1990s and 2000s, and had also begun to seek new mechanisms for the recognition of their proprietary rights. In the period from 2003 to 2009, they began to call for an allocation of water to iwi and hapū and/or for the development of Māori land. Councils appeared to be

unwilling or unable to make such allocations under the law as it exists at present, pointing to four small exceptions in the practice of regional councils. At the same time, we noted that Māori have not ceased to raise the question of ownership, and it seemed to us that that they will never do so unless some form of recognition is provided."

7.2.5 Environmental outcomes and the need for reform: why has the RMA failed to deliver sustainable management of freshwater resources?

"We discussed environmental outcomes and early Crown reforms in sections 2.7 and 2.8 of chapter 2. We set out the concerns of claimants and interested parties in respect of degraded freshwater taonga, including Lake Ōmāpere, the Taumārere River, the Ōroua River, the Manawatū River, Lake Horowhenua, the Rangitīkei River, the Tukituki River, the Waipaoa River, and the Tarawera River."

"It was clear to the Crown by 2003–04 at the latest that the RMA was failing to deliver the sustainable management of many water bodies, mainly those in urban and pastoral catchments. Sediment and diffuse discharges were prominent causes of a decline in water quality. The RMA's failure was due to a number of causes, including the inability of councils to manage diffuse discharges without Crown intervention, and the exclusion of Māori from freshwater decision-making. In 2004, a Crown consultation document identified the following issues:

- the Crown had not provided national direction to councils ;
- the Crown had not provided sufficient support to councils ;
- nationally important values had not been identified or prioritised, which could require changes to water conservation orders to protect nationally important water bodies or a new schedule for the RMA ;
- water had become over-allocated, and there was a lack of RMA tools to enable councils to deal effectively with over-allocation and with declines in water quality;
- diffuse discharges had not been managed effectively, partly because of a lack of RMA tools to do so ;
- there was a need to set environmental bottom lines and allocation limits but there was also a lack of either strategic planning or good scientific information to support this ;
- the definitions for water permits needed to be changed to enable more flexibility in how they were managed ; and
- there had been a failure to engage with Māori in freshwater decision-making because of a lack of resources or any clear process through which to do so. In particular, Māori interests and values needed to be incorporated into regional planning, a need that had been identified in a review of the RMA in 2004."

"The Crown argued in our inquiry that the problem was not with the RMA but with its implementation by councils (which are not 'the Crown'). It also argued that it had acknowledged that there is a problem and has attempted to fix it, but that this acknowledgement of a problem with the regime was not an acknowledgement that the regime and its statute were inconsistent with the Treaty.11 The claimants and interested parties, on the other hand, argued that the Crown had failed to provide a regime that actively protected their taonga, and that this was a breach of Treaty principles."

"We agreed with the claimants that systemic problems with the RMA regime had allowed the situation to develop and worsen, with apparent disregard for the fundamental purpose of the

RMA. Councils could not manage the effects of land use on water, or the clash of commercial and environmental imperatives, without a better management framework and strong national direction from the Crown."

"The Crown has attempted to rectify those problems, however, so our view was that any Treaty findings should await consideration of the Crown's reforms, and the question of how rapidly and effectively the Crown addressed the acknowledged problems."

"We also noted the link between this issue and the earlier breaches found in respect of the RMA. We had already found that section 8 of the RMA was too weak to protect Māori interests, and that the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches."

"The Crown instituted the Sustainable Water Programme of Action in 2003–04 but, as explained in chapter 3, the first national direction to councils on these matters did not come until 2011. We turn next to summarise our findings on the Crown's freshwater reform programme."

7.3 Reforms to address Māori rights and interests

7.3.1 Introduction

"From 2009 to 2017, the National-led Government carried out its 'Fresh Start for Fresh Water' and 'Next Steps for Fresh Water' programme of reforms. That programme is assessed in chapters 3–5 of our report. In terms of addressing Māori rights and interests, the reform programme had three major achievements:

- the inclusion of section D in the NPS-FM 2011 ;
- the introduction of Te Mana o te Wai to the NPS-FM in 2014, followed by its significant strengthening in 2017 (with associated amendments to the NPS-FM 2014) ; and
- the insertion of Mana Whakahono a Rohe (iwi participation) arrangements in the RMA in 2017."

"We have discussed these and other reform proposals in chapters 3–4. Our full conclusions and findings are located in sections 3.8 ; 4.4.4 ; 4.5.6 ; 4.6.7 ; and 4.7.3."

"We summarise those findings in this section of our chapter."

7.3.2 The Crown's commitment to address Māori rights and issues

"Importantly, the Crown has repeatedly stated its intention to address Māori rights and interests in fresh water since 2009. This undertaking was stated in Cabinet papers, policy documents, consultation documents, and the Deputy Prime Minister's evidence to the Supreme Court in Mighty River Power in 2012. In our view, the Treaty principles required the Crown to act on its knowledge that Māori rights and interests were not adequately provided for, and urgent action was required to address that matter in partnership with Māori."

"During the course of developing its reforms, the Crown developed a number of 'bottom lines' as to what it was prepared to accept in addressing Māori rights and interests, including the position that 'no one owns water'. Crown counsel argued in our hearings that the Crown's reforms could nonetheless deliver 'use and control' to Māori through enhanced decision-making roles and economic benefits, which could be provided through Treaty settlements and

regulatory reform. The Crown relied on a statement in the Supreme Court's Mighty River Power decision to that effect."

7.3.3 Collaboration: 2009–14

"During the development and embedding of its reforms, the Crown collaborated with the Freshwater ILG on a number of reform options. It also put its reform proposals out for wider consultation with Māori and the general public. In addition, the ILG had influence as one of the 'stakeholders' in the Land and Water Forum, where IAG members were part of the 'Small Group', and that influence is clear in some of the forum's recommendations across its four main reports. The Crown did not, however, accept all the LAWF's thinking and recommendations, nor did it reach fully agreed positions with the ILG. Nonetheless, our view was that the joint work of officials and the IAG, the work of the IAG with other stakeholders in the LAWF, and the high-level meetings between Ministers and the ILG, all contributed to a degree of Crown–Māori cooperation in the development of freshwater reforms. We hesitated to characterise this as a partnership model in the period up to 2014, because there was no co-design of the version of the NPS-FM that was issued in 2011, and only limited co-design of the 2014 version. The real co-design phase came later in 2015–17."

"The result of the collaboration was a quite limited treatment of Māori rights and interests in the first six years of the Crown's freshwater reform programme."

7.3.4 Section D of the NPS-FM 2011

"In respect of its commitment to address Māori rights and interests, the reforms which the Crown completed in 2011 and 2014 were focused on a single matter: an attempt to ensure that Māori values were better reflected in freshwater management, especially in regional policy statements and plans. The mechanism for this was the NPS-FM. In part, this focus arose from earlier decisions by the Labour-led Government, which had drafted the first version of the NPS-FM in 2008."

"The first major reform was the national direction given to councils by section D of the NPS-FM. In 2011, the Crown made some crucial decisions about the content and extent of section D which have not been altered since. Section D remained untouched in the amendments of 2014 and 2017."

"The board of inquiry's consultation revealed that the Māori provisions of the proposed NPS-FM fell well short of what Māori saw as their Treaty rights in freshwater management. Both the IAG and the Māori submitters had called for a governance and decision-making role for Māori. The final text of Objective D1, however, only directed councils to provide for Māori 'involvement', and to ensure that their 'values and interests' were 'identified and reflected' in, freshwater management and decision-making in freshwater planning. Policy D1 required councils to 'take reasonable steps' to 'involve iwi and hapū' in freshwater management, work with them to identify their values and interests, and reflect those values and interests in freshwater management and decision-making."

"We noted two major points about the Crown's decisions on section D. First, the Crown did not accept the board's recommendation that councils would have to 'recognise and provide for' Māori values and interests in freshwater management and in decisions about plans. The use of the words 'identify and reflect' gave a comparatively lesser degree of protection for Māori interests. Secondly, the Crown inserted a requirement to 'involve' Māori, and deliberately omitted to specify a particular form or level of involvement. At the time, the Minister noted that '[r]eference to involving tāngata whenua in freshwater "decision-making" generally has

been removed' from the board's version. The Minister also noted that councils would 'retain the ability to use existing tools under the RMA, such as joint management agreements, as they wish', and argued that requiring that Māori have a decision-making role would 'impact on the resources of both regions and iwi/hapū'. Councils had hitherto failed to use the provision for Joint Management Agreements in the RMA (with two exceptions), and the Wai 262 Tribunal recommended that the Crown direct councils to actively promote and use section 33 and section 36B by including policies to do so in their plans. The Crown chose not to do this in promulgating and amending the NPS-FM."

"The effect of the Crown's decisions about section D was summarised as follows by the relevant Cabinet paper in 2011:

> The NPS makes it clear that involvement of iwi and hapū is important in plan making.
>
> The related policies do no more or less than what is already provided for in the RMA. Councils will retain the ability to utilise existing tools under the RMA, such as joint management agreements, as they wish. The real benefit is clarifying that tāngata whenua values and interests should be identified by, or with, iwi and hapū and not just by councils themselves. [emphasis added]"
>
> "Section D's requirement that councils work with iwi and hapū to identify their values was an important one. But we found that, overall, this was a very disappointing outcome in terms of the Crown's stated intention to address Māori rights and interests in fresh water, especially since the section D requirements have not changed in any of the subsequent reforms."

"We found that section D is an inadequate mechanism for ensuring the Māori 'involvement' in freshwater decision-making required by the Treaty principle of partnership. We found that it is not Treaty compliant, and that Māori have been prejudiced in their exercise of tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga as a result."

"We also found that the NPS-FM will not be Treaty compliant until section D is reformed in such a way that it provides more effectively for the tino rangatiratanga of iwi and hapū. Our view was that this required a co-governance level of 'involvement' in decision-making, and national direction for councils to use partnership mechanisms in plan-making and in freshwater management more generally."

7.3.5 Te Mana o te Wai in the NPS-FM 2014

"Carrying on the theme of providing better for Māori values in freshwater management, the Crown's significant reform in 2014 was the introduction of Te Mana o te Wai into the NPS-FM. The ILG sought to integrate Te Mana o te Wai in all parts of the national policy statement by inserting an overarching purpose statement, a new objective A1(c) in section A (the 'Water Quality' section), and links to the national values of the NOF in appendix 1."

"The Crown, however, was only prepared to agree to a very disjointed and watered-down version of Te Mana o te Wai in the NPS-FM 2014. There was no definition of Te Mana o te Wai or any explanation of it or how councils might provide for it. The overarching purpose statement was not part of the main body of the NPS-FM (and did not explain Te Mana o te Wai). The Crown rejected the ILG's proposed Objective A1(c). The many submissions from Māori during the consultation process, seeking to strengthen and integrate the Te Mana o te Wai requirements in the NPS-FM, were also rejected. Appendix 1 did use the titles 'Te Hauora o te Wai', 'Te Hauora o te Tāngata', and 'Te Hauora o te Taiao' for three of the national values.

But the text of those values did not necessarily identify Māori values or correspond to the titles, nor was there any explanation that these titles were connected to Te Mana o te Wai."

"We concluded that the Crown's inclusion of Te Mana o te Wai in the NPS-FM was weak and ineffective. It did not enhance the Crown's objective that Māori values would be better reflected in freshwater management and plan-making. We made no Treaty finding, however, because the 2014 version of the NPS-FM did not represent the Crown's final decision on this issue."

7.3.6 RMA reforms: the Crown's decisions on enhancing participation prior to Next Steps

"Our findings on RMA reforms were in two parts. In chapter 3, we considered the Crown's decision in 2013 to exclude certain matters from its RMA reforms, a decision that was partly revisited in the Next Steps co-design phase in 2015–16 (but with similar outcomes)."

"The Crown conducted a major consultation initiative on freshwater reforms in 2013 – the first since 2005. The Crown's reform proposals were released in two inter-related documents: a consultation document entitled Improving our resource management system; and a white paper entitled Freshwater reform 2013 and beyond. In these papers, the Crown renewed its commitment to address Māori rights and interests, and acknowledged that there was a problem with 'effective and meaningful iwi/Māori participation' in freshwater management (and resource management more generally). In Freshwater reform 2013 and beyond, the Crown stated:

> Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners."

"As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes."

"The Crown proposed to amend the RMA to, among other things:

- create a new mechanism for iwi input at the plan-making stage, called Iwi Participation Arrangements, which would have an advisory and recommendatory role ;
- to remove the statutory barriers for the under-used sections 33 and 36B to 'facilitate greater uptake of these under-used tools' ;
- to make iwi management plans more effective ; and to introduce a new stakeholder-led planning process."

"The Crown's decisions on these matters were initial decisions in the sense that an RMA Bill still needed to be drafted and passed through Parliament, but some of the Crown's decisions to omit certain matters proved to be long-lasting and we made findings about those decisions in chapter 3."

"We noted that the 'iwi/Māori participation' issue in these documents was still focused mainly on the more effective reflection of Māori values in RMA plan-making, even if some of the language used in the consultation documents had been broader in scope. The Crown decided in 2013 that it would go ahead with establishing Iwi Participation Arrangements. Our findings on this proposal are summarised below, after it was transformed into the broader Mana Whakahono a Rohe mechanism in 2017."

"Importantly, in 2013 the Crown decided not to make any reforms in respect of section 33 transfers, Joint Management Agreements, and iwi management plans."

"Urgent reforms were needed on these parts of the RMA to remove statutory barriers to their adoption, and to make them more genuinely available to iwi and councils."

"The Wai 262 Tribunal had recommended significant reforms in its 2011 report."

"The Crown decided in 2013, however, to limit its enhanced 'iwi/Māori participation' in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious."

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles."

"As summarised earlier (section 7.2.3), the Treaty requires co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership and the Treaty guarantee of tino rangatiratanga. We agreed with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring/ enforcing water quality requirements, and thereby protecting the mauri of water bodies'."

7.3.7 The 'Next Steps' co-design process

"From 2014 to 2017, the Crown and ILG entered into two phases of 'co-design' of reform options: the first was the 'Next Steps' phase (summarised here) ; and the second was the work of the officials and the IAG on a revised version of the NPS-FM in 2017 (summarised in section 7.3.10)."

"In Treaty terms, co-design was probably the most important process innovation of the Crown's freshwater reform programme. Our view was that the process of co-design with a national Māori body, followed by wider consultation with Māori and the public, was compliant with the principles of the Treaty. The Crown is to be congratulated on this innovation, which we thought should become a standard part of government policy-making."

"We also found that the Crown did not breach the principle of equal treatment in its choice of the Iwi Chairs Forum (and its appointed iwi leaders group) as the national Māori body with which to work. Having said that, we thought that the need for other perspectives in the co-design process became clearer as time went on. When the NZMC filed its claim in 2012, it presented itself as a national Māori body with a particular and contrasting view to that of the ILG – a view that was also widely supported by a number of interested Māori parties. We think it was evident to the Crown that it ought to have broadened its co-design programme to include the NZMC, and this was a missed opportunity to have included the view that the Māori council represented."

7.3.8 The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests

"Although the co-design concept was promising in Treaty terms, we found that its outcomes in 2016 were disappointing. This was primarily because the Crown reserved the final power of decision-making to itself alone, and its decisions were not – for the most part – Treaty compliant."

"The Crown and the ILG worked together to design reform options across four workstreams, with agreed objectives:

- Enable formal recognition of iwi/hapū relationships with particular waterbodies
- Enhance iwi/hapū participation at all levels of freshwater decision-making
- Build capacity and capability amongst iwi/hapū and councils, including resourcing
- Develop a range of mechanisms to give effect to iwi/hapū values in order to maintain and improve freshwater quality
- Develop a range of mechanisms to enable iwi/hapū to access freshwater resources in order to realise and express their economic interests
- Address uncertainty of supply of potable water on marae and in papakāinga."

"There was certainly potential for significant reforms to meet these objectives."

"In section 4.3.6, we described the detail of how officials and the IAG worked on 62 possible reform options. Potential reform options included amending sections 33 and 36B of the RMA, enhancing the status of iwi management plans, providing an allocation of water and discharge rights, compulsory Joint Management Agreements in all catchments, and many others. Ultimately, the options were significantly reduced first by officials (sometimes in agreement with the IAG), and again when Cabinet selected a small number of proposals for public consultation in the Next Steps consultation document. We noted that amendments to section 36B made it into the December 2015 Cabinet paper but did not make the final cut in 2016. There was no agreement at all in the 'economic development' workstream, and no reform proposals were selected for that workstream. The Crown's bottom line that there would be no generic share of freshwater resources for iwi made reaching agreement impossible. Overall, the ILG did not agree to the issuing of Next Steps as a joint consultation document because its reform proposals did not go far enough for the iwi leaders."

"The consultation document, Next steps for fresh water, was issued in February 2016. Its proposals to address 'iwi rights and interests in fresh water' were:

- strengthening Te Mana o te Wai in the NPS-FM ;
- requiring councils to engage with iwi and hapū to identify all their relationships with water bodies in regional plans, and then to engage with those iwi and hapū when identifying values and objectives for the particular waterways (the recognition workstream) ;
- inserting Mana Whakahono a Rohe arrangements in the RMA (the Crown having accepted the ILG's alternative model to its earlier Iwi Participation Arrangements) ;
- giving Māori a greater role in the process for deciding water conservation orders (which was not supported by the ILG as a measure to address rights and interests) ;
- the Ministry facilitating and resourcing programmes to support councils and 'iwi/hapū' to engage effectively in freshwater management and decision-making; and

- the Government considering if additional funding was required for marae and papakāinga water infrastructure."

"The 40 iwi and other Māori groups who made submissions on Next Steps were all in support of these proposals to address Māori rights and interests, although many argued that the proposals should go further. After the consultation, however, the Crown narrowed the reform options instead. As a result, despite all the work and option-development in the 'co-design' phase, there were really only three outcomes : the insertion of Mana Whakahono a Rohe arrangements in the RMA ; amending the NPS-FM to strengthen Te Mana o te Wai ; and an agreement that MFE would provide a guidance programme on Mana Whakahono a Rohe (capacity and capability building)."

"We agreed that two of these three outcomes had the potential to make a significant difference for Māori in the exercise of authority and kaitiakitanga over their freshwater bodies. Te Mana o te Wai in the NPS-FM had the potential to alter the manner of achieving the purpose of the RMA in a way that better protected Māori interests. The Mana Whakahono a Rohe arrangements had the potential to improve iwi–council relationships and the way they work together, especially by providing a mechanism for the schedule 1 consultation process to occur. But many options that were omitted in 2016 were so crucial that, in our view, the Crown squandered a real opportunity to make the RMA and its freshwater management regime Treaty-compliant."

"We found that Māori have been prejudiced by the following omissions from the Crown's decisions on Next Steps reform options:

- no amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism ;
- no amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism ;
- no alternative co-governance or co-management mechanisms inserted in the RMA (to make these kinds of mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi) ;
- no amendments to enhance the legal weight of iwi management plans ;
- no mechanisms for formal recognition of iwi and hapū relationships with– and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream ;
- no strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori as freshwater decision makers ;
- no recognition of proprietary rights (ruled out by the Crown's bottom line that 'no one owns water') ;
- no commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle in the Next Steps process ; and
- no funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation."

"Also, no funding actually materialised as a result of the proposal about water infrastructure on marae and papakāinga."

"We concluded that 'co-design' of reforms by the Crown and iwi leaders did not fulfil its potential. The Crown's omission of so many important options to address Māori rights and interests seriously limited the value of its freshwater reforms in Treaty terms. In particular, the Crown's Next Steps reforms did not meet their stated objective of enhancing Māori participation in freshwater management and decision-making, other than providing a new mechanism to improve relationships and schedule 1 consultation. We summarise our view on the Mana Whakahono a Rohe mechanism further when we assess the Crown's RMA reforms in the next section."

7.3.9 RMA reforms: Mana Whakahono a Rohe arrangements

"The Mana Whakahono a Rohe mechanism was one of the major achievements of the freshwater reform programme. As summarised above, the impetus for enhancing Māori participation began with a dual approach in Improving Our Resource Management System in 2013: new Iwi Participation Arrangements paired with statutory reforms to section 33, section 36B, and the provisions for iwi management plans. The period of Crown–ILG co-design in 2015 resulted in a renewed effort towards Iwi Participation Arrangements – in the form of the ILG's broader Mana Whakahono a Rohe – and reform of section 36B Joint Management Agreements."

"But the necessary link between these two things was severed in 2013 and again in 2016, with the result that the Crown pinned everything on the new participation arrangements alone."

"The claimants argued that the Mana Whakahono a Rohe arrangements are to be 'applauded' as an improvement, but 'they are too little, too late, and do not go anywhere far enough'. In particular, the claimants noted that these new arrangements have not removed the statutory barriers to section 33 transfers or JMAs, and that Māori utilisation of these arrangements is 'constrained by the same resourcing problems that inhibit effective Māori participation in RMA processes more generally'.[22] Crown counsel stressed that Mana Whakahono a Rohe offered the possibility of 'formal and permanent relationships' between councils and iwi, a possibility that had not been present before in the RMA. According to the Crown, they represent a significant step forward in the 'RMA's ability to give effect to the Māori role as kaitiaki'.[23] In terms of the particulars, the Crown relied mainly on the voluntary aspects of the Mana Whakahono a Rohe, and only one of the compulsory requirements (a role in monitoring):

> "During these discussions, Māori may demand more meaningful involvement in resource management processes, either through agreements to transfer local authority powers to an iwi authority, or in other forms, such as the co-management of resources. The agreements may include involvement in decision-making through the appointment of iwi commissioners on hearing panels, establishing joint management agreements or other mechanisms, and environmental monitoring. They can also be used to develop monitoring methodologies so that mātauranga Māori and Māori measurements can be consistently used in regional council processes."

"We noted that key points sought by the ILG to be matters for compulsory negotiation and agreement were relocated to the voluntary parts of the Mana Whakahono a Rohe in the Resource Legislation Amendment Act 2017."

"Our view was that this mechanism in its final form (in the 2017 Act) was important but limited. It was important because, in negotiating agreement on the compulsory parts of the Mana Whakahono a Rohe, there is an opportunity for iwi or hapū to seek co-management agreements, joint planning committees, or some other mechanism not provided for in the Mana Whakahono a Rohe itself. Also, a relationship/participation agreement was a vital step

towards councils and iwi or hapū working together in freshwater management. Without the establishment of some kind of improved and enduring relationship, it is difficult to imagine a council agreeing to a Joint Management Agreement, for example, without the intervention of the Crown (as has occurred in some Treaty settlements). Further, iwi can initiate a Mana Whakahono a Rohe, councils are compelled to negotiate and reach agreement if iwi initiate one, and councils cannot end the agreement unilaterally ; these are all improvements over other RMA participation mechanisms. But the key problem with the Mana Whakahono a Rohe arrangements is that the compulsory matters to be agreed are very limited. Apart from an increased role in monitoring, which does now have to be agreed upon, the mandatory parts of the agreement relate to the consultation required by the Act (which is limited to policy statements and plans) and the participation of iwi in plan preparation or changes. In reality, what this does is provide a mechanism for councils and iwi to do the things that schedule 1 of the Act already required them to do. Anything extra comes under the parts that the parties may discuss and agree but there is no requirement for them to do so."

"The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown."

"Further, even if relationships are improved and discussions are held through a Mana Whakahono a Rohe, statutory barriers still inhibit section 33 transfers and Joint Management Agreements. The evidence of the Crown was clear on that point. In all these circumstances, it is at best unlikely that Mana Whakahono a Rohe will result in a greater decision-making role for Māori in freshwater management, such as co-governance and co-management, without further statutory amendment."

"The issue of resourcing is also crucial. The ILG's view was that 'both local authorities and iwi must be resourced to ensure that the establishment and implementation of Mana Whakahono a Rohe agreements is as successful as possible'."

"We agreed. The evidence in our inquiry was that the lack of resources has prevented effective Māori participation in RMA processes. Mana Whakahono a Rohe arrangements will be no different in that respect unless resources are provided."

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty."

"We were not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found. The Mana Whakahono a Rohe

agreements have the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans."

"They will likely result in an enhanced role for Māori in decision-making at the front-end, planning stage of the RMA. But the range of matters iwi and councils are compelled to negotiate and agree on is very limited. Our finding was that the Mana Whakahono a Rohe provisions have not made the RMA Treaty-compliant."

7.3.10 Te Mana o te Wai in the NPS-FM 2014 as amended in 2017

"Alongside Mana Whakahono a Rohe, the strengthening of Te Mana o te Wai was the second major achievement of the Next Steps reform process."

"In 2017, the new 'National significance' statement and section AA of the NPS-FM provided a much-needed explanation of Te Mana o te Wai, and of the requirements that councils must meet in order to 'consider and recognise' it in their policy statements and plans. The inclusion of mātauranga Māori in the monitoring requirements was also a major improvement, and one which Māori had sought in their submissions on the 2014 version of the NPS-FM."

"Our view was that all of this has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (objective D1), then Te Mana o te Wai is a platform for achieving this (through the 'National significance' statement and objective AA1), and mātauranga Māori must now be used to measure its success (policy CB1). It is also a platform for the whole community's values because it is water-centric."

"As the Crown and the ILG had intended, Te Mana o te Wai was framed so as to put the health of freshwater bodies first in the discussions necessary to set objectives and limits under the NPS-FM. The potential for Te Mana o te Wai to have a significant impact is likely reflected in the submissions of those who tried in 2017 to disconnect it from the national values in appendix 1. We found, however, that there are some weaknesses in the tools for giving effect to Te Mana o te Wai."

"First, as already found in chapter 3, section D of the NPS-FM is relatively weak. It does not provide a co-governance approach to identifying Māori values and setting freshwater objectives. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. Secondly, the relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. Our view was that this is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management. Thirdly, the severing of Te Mana o te Wai from the NOF values in appendix 1 reduces its utility as an over-arching principle in freshwater plan making. Fourthly, the failure to include tools for cultural monitoring (policy CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and freshwater management more generally."

"Further, and outside of the NPS-FM itself, the ongoing problems with resourcing and effective participation mean that some Māori groups will be unable to take proper advantage of this new mechanism in the NPS-FM – as the Ministry's 2017 review of the NPS-FM has acknowledged."

"On balance, we found that the 2017 amendments have improved the NPS-FM in Treaty terms, but the amendments have some significant weaknesses. We found that the NPS-FM is still not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management."

7.3.11 Resourcing for capacity and capability

"The third Next Steps reform arose from the Crown's decision on the issue of resourcing for capacity and capability. The Crown and the ILG had agreed to 'consider ways to build iwi and hapū capability and resourcing to enable effective participation in freshwater decision-making'. The result was an objective to '[b]uild capacity and capability amongst iwi/hapū and councils, including resourcing' (emphasis added). The Crown dropped the phrase 'including resourcing' from its reform proposal on this matter, and the proposal in Next Steps was for the Crown to 'build capacity and capability by providing training and guidance'."

"In response, the strongest theme in the consultation submissions was the need for additional resourcing to support Māori and councils to carry out the additional requirements on top of the already resource-intensive RMA processes. The Crown did not change its mind, and so the ultimate outcome in this case was a guidance manual and training on Mana Whakahono a Rohe."

"We found that the Māori Treaty partner has made repeated appeals to the Crown over many years to assist with funding and resourcing, and these appeals have not been adequately met. The Crown's stated objective to enhance Māori participation in freshwater management and decision-making will not be achieved unless an answer is found to the problem of under-resourcing. Many Crown documents have admitted that Māori participation in RMA processes is variable and sometimes non-existent. The Crown–ILG objective to '[b]uild capacity amongst iwi/hapū and councils, including resourcing' has not been fulfilled, and it needs to be if the Crown's reforms are to be Treaty compliant."

"We accepted that the Crown's reform programme is not finished, and that there is still opportunity to address this long-standing problem more effectively. We reiterated its crucial importance and the need for it to be addressed if the Crown's reforms are to be Treaty compliant. In the meantime, Māori continue to suffer long-term prejudice."

7.4 Water Quality Reforms

7.4.1 Introduction

"The need for reforms to improve freshwater management and outcomes was clear to all parties. In chapter 2, we described the degraded state of many of the claimants' and interested parties' freshwater taonga, and the increasing decline in water quality as a result of diffuse discharges and sediment in particular. The Crown's water quality reforms were mainly focused on its RMA role of giving national direction to councils, and on the development of other tools such as farm management best practice and stock exclusion regulations. The primary tool was the NPS-FM, which councils were required to implement in their regional policy statements and regional plans. We considered five versions in chapter 5: the Labour-led Government's draft in 2008, the board of inquiry's recommendations in 2010, the first formal NPS-FM that was issued in 2011, a second version that was issued in 2014, and the (currently) final NPS-FM in 2017. We also considered the Crown's attempt to develop stock exclusion regulations, which Cabinet decided not to promulgate in 2017."

"In brief, the NPS-FM 2011 required councils to set quality and quantity limits, so that water quality was maintained or improved overall in a region. In 2014, more specific water quality standards were added in the form of the NOF, which included two compulsory values with national bottom lines. Further important amendments were made in 2017, in particular the strengthening of Te Mana o te Wai as an overarching purpose in the discussions for setting objectives and limits."

"The Crown's view in our inquiry was that the NPS-FM was developed carefully on the advice of scientists and with stakeholder buy-in, and that it met the standard of active protection of freshwater taonga. The claimants and interested parties, on the other hand, were highly critical of the NPS-FM. They considered that the Crown's reforms had been too slow and piecemeal, and that the quality standards in the NPS-FM were inadequate."

"For the technical aspects of the reforms, we relied in particular on points of agreement between the scientists on both sides and the Crown's officials. The lack of crucial water quality attributes in the NOF, such as sediment, was one such point of agreement."

"In addition to freshwater management reforms, we assessed the Crown's funding initiatives for restoring degraded water bodies."

"Our findings on water quality reforms are located in section 5.8 of chapter 5, and our findings on restoration funding are in section 5.9.3."

7.4.2 Active protection of freshwater taonga

"The Crown submitted that 'the role of central government is to provide pollution controls and standards', and that the Crown's reforms had 'developed and improved tools for the active protection of taonga waters'. The claimants and interested parties agreed that the Crown owes a Treaty duty of active protection of their taonga waters, but denied that the Crown's reforms have met this Treaty standard. They argued that the Crown's freshwater reforms have created weak, inadequate standards and controls that are insufficient for the active protection of their freshwater taonga. In assessing the Crown's water quality reforms, we examined whether the reforms, and in particular the controls and standards introduced in the NPS-FM, did meet the Crown's duty of active protection."

7.4.3 Collaboration in developing the reforms

"The Crown's water quality reforms were developed in collaboration with the ILG and IAG, the stakeholders in the Land and Water Forum, and sector interests (through targeted engagement on particular reforms, such as the stock exclusion regulations). The ILG's role was less prominent in this part of the reform programme, although it did play a co-design role in the development of Te Mana o te Wai for the NPS-FM in 2015–17. Otherwise, the Crown's primary collaboration was with the forum. Alongside the work of the forum, and partly crossing over with it, was the work of the science panels and the NOF reference group, which advised the Ministry on the science of NOF attributes and numerical attribute states. The iwi science panel played a role but its main contribution, a Te Mana o te Wai attribute table for the NOF, came too late for inclusion in 2017, and appears to have been rejected in any case (the Crown did not intend to have a Te Mana o te Wai attribute in the NOF)."

"Apart from the intensive and contested work of developing technical reforms, the greatest difficulty appears to have been balancing the interests of the environment with the interests of the economy (especially of primary industries). This balancing of interests in the political sphere partly accounts for why the Crown's reforms have taken such a lengthy, cautious approach. It is also partly why the Crown brought Māori (via the ILG) and stakeholders

(via the forum) in with it to collaborate, create solutions, and develop buy-in and consent step by step."

7.4.4 The NPS-FM 2011

"Labour's 2008 version of the NPS-FM proposed a zero-tolerance policy towards further contamination of fresh water. The board of inquiry not only agreed with that but took it further. The standard it proposed was that outstanding water must be protected, the quality of all fresh water contaminated by human activity must be enhanced, and the quality of all other fresh water must be maintained."

"The Crown made its decisions on the board's recommendations in 2011, with input from the forum and ILG but no wider consultation. The Crown considered that the board's version of the NPS-FM was out of balance with section 5 of the RMA. The board's view was that fresh water was in such a state that environmental protection had to take priority over economic considerations, at least for a generation or so. The Crown's view in 2011, on the other hand, was that freshwater quality standards must not be too costly or controversial for councils and the primary sector to accept. Nor should such quality standards be allowed to constrain economic growth (or should do so as little as possible). The Crown had a major business growth agenda to deliver."

"In its 2011 decisions, the Crown altered the transitional provisions (so that they no longer applied to permitted activities), and allowed only a test of overall quality across a region, a move that went against the advice of the Department of Conservation. In doing so, the Crown reduced the requirement that councils control the adverse effects of farming intensification that was recognised at the time as the leading source of nitrate contamination, the very measure which was causing the greatest water quality concern. The fundamental principle of the NPS-FM 2011 – that water quality be maintained or improved overall across a region (unless it exceeded limits) – would also potentially lock in any additional degradation that occurred by the time councils actually set limits. Under the timeframe set by the NPS-FM, they had until 2030 to do so (or even later, depending on appeals to regional plan changes)."

"Our finding was that the NPS-FM 2011 did not provide adequate controls and standards for the active protection of freshwater taonga, and it was not consistent with the principles of the Treaty of Waitangi. On the other hand, we accepted that the Crown had finally provided some belated direction to regional councils."

"Ministers and officials were aware at the time that further reforms would be required (including improvements to the NPS-FM), but we noted that significant parts of that foundational document remain in force today."

7.4.5 The NPS-FM 2014 and the National Objectives Framework (NOF)

"In terms of water quality standards, the key reform came in 2014 with the establishment of the National Objectives Framework (NOF). As well as providing guidance on how to set objectives and limits, the NOF set national water quality standards. Water bodies would have to be improved if they fell below the national bottom lines of Ecosystem Health and Human Health, as set in attribute tables. At the time, the Crown acknowledged that it was essential to set standards in the NOF to ensure national consistency, avoid duplication of effort in the regions, and assist councils (many of which were finding the scientific work for limit-setting to be a very costly and difficult exercise). Where attributes were missing from the NOF, however, the Crown directed that the regions must fill the gaps."

"The scientific evidence agreed that crucial attributes such as sediment were omitted from the NOF in 2014. This significantly weakened the value of the standards set by the NOF, including the national bottom lines. Also, there were no compulsory Māori values, with attributes and national bottom lines attached to them."

"Te Mana o te Wai was not made a compulsory value, and the Crown decided not to retain Te Mana o te Wai as an overall title for the two compulsory values in the NOF. Indeed, there were no cultural attributes at all in the 2014 version of the NOF."

"Further, attributes and bottom lines had only been developed for rivers and lakes; there were none for aquifers, wetlands, and estuaries. This further weakened the effectiveness of the NOF and the NPS-FM."

"Where there were bottom lines, Māori and many others criticised them as too low. The setting of a bottom line for nitrate toxicity (instead of nitrogen as a nutrient) and a bottom line of secondary contact (instead of full immersion) were the most controversial. It was understood at the time that 20 per cent of freshwater species, including kōura, would be affected by nitrate at the relatively high concentration set for the nitrate toxicity bottom line. Also, the 'unders and overs' approach to managing water quality was left unchanged, which weakened the water quality standards in the NOF further."

"We accepted that a huge and collaborative effort had gone into the NOF, and that its addition to the NPS-FM 2014 was a necessary improvement on the 2011 version."

"But our finding was that the standards set by the NOF in 2014 were not consistent with the Treaty principle of active protection."

7.4.6 Stock exclusion and amendments to the NPS-FM in 2017

"Some significant improvements were made to the NPS-FM in 2017, which resulted in stronger water quality standards:

- Te Mana o te Wai was significantly strengthened, which would increase the weighting given to the health of water bodies in freshwater plan-making ;
- intermittently closing and opening lakes and lagoons were added to the NPS-FM, applying the existing attributes for lakes to them ;
- the 'unders and overs approach' was restricted to the level of the freshwater management unit instead of across a whole region ;
- specific direction on nutrients was added to the NOF, including requiring councils to set 'exceedance criteria' for nitrogen and phosphorus, if councils set an objective relating to periphyton ;
- monitoring would now require the use of both mātauranga Māori and the Macroinvertebrate Community Index ; and
- swimmability (on a frequency basis) was introduced as a new Human Health requirement for large rivers and lakes, and also for any other sites identified by councils as primary contact sites, which was a highly significant policy change for the Crown."

"Although these were significant amendments, we also found that some defects had either not been rectified or had been introduced with the new amendments:

- No more attributes were added to the NOF in 2017, even though the Crown had been working on several since 2014. This meant that the NOF still lacked some of the most

essential water quality standards, including bottom lines for attributes such as sediment. No Māori compulsory values or cultural indicators were added, and Te Mana o te Wai was severed from the NOF. Attributes remained confined to lakes and rivers; no attributes for wetlands or aquifers were added.

- The nitrate toxicity bottom line would still allow impacts on 20 per cent of aquatic species, and the direction that had been added on nutrient enrichment was acknowledged as incomplete (with further work planned).
- The 'maintain or improve' requirement would still allow water quality to degrade until limits were set (by 2030 at the latest but with opportunity for appeals), although that would no longer be so much of an issue for attributes with a compulsory national bottom line. Also, water quality could potentially still degrade from the top to the bottom of wide bands and yet be 'maintained', although it could not be allowed to go down a band.
- In replacing the previous E coli attribute table, the Crown removed any bottom line for Human Health in water bodies that were not fourth order rivers, large lakes, or identified as sites for swimming. Also, the targets for swimmability would take a long time to reach (until 2040 to reach 90 per cent) and did not apply to smaller rivers and lakes unless identified by councils as swimming sites."

"Although there are defects in the NPS-FM, we acknowledged that the Crown has made a significant effort to address the pressures on fresh water and provide national water quality standards for regional councils to implement. The Crown has worked collaboratively and has attempted to gain widespread buy-in for its reforms, which will likely assist their success in the long run. Nonetheless, we found that the freshwater quality standards set in the NPS-FM 2014, as amended in 2017, are not yet adequate to provide for the Crown's Treaty duty of active protection of freshwater taonga. In chapter 2, we described the prejudice experienced by iwi and hapū whose spiritual and cultural relationships with their freshwater taonga have been profoundly harmed by degraded water quality."

"The failure to provide for stock exclusion compounds the breach, because it further weakened the scope and effectiveness of the freshwater quality reforms."

"The swimmability targets, for example, depend on the exclusion of farm animals to reduce *E coli* levels. Also, diffuse discharges remain a fundamental problem, and we are not convinced that the reforms have yet developed a sufficient response to either quality or quantity over-allocation."

"We noted further that three-quarters of native fish species are now threatened with or at risk of extinction, compared to only one-fifth in 1991 when the RMA was passed. The fishing rights guaranteed in the Treaty have been infringed by this loss of fisheries, and Māori have been prejudiced thereby."

"More reforms were under consideration even as the NPS-FM was issued in 2017."

"The present Government has also planned to undertake significant freshwater management reforms, but those were at an early stage when our hearings ended."

"The freshwater quality standards and controls in the NPS-FM 2014 (as amended in 2017) are still currently in force."

7.4.7 Funding of restoration for degraded freshwater bodies

"During the period of the Crown's freshwater reforms, it has established funding initiatives to address both water infrastructure and the clean-up of degraded water bodies. These included:

- the Irrigation Acceleration Fund in 2011 (voted $60 million over 10 years)
- the Fresh Start for Fresh Water Clean-up Fund in 2011 ($14.7 million on seven projects) ;
- the Te Mana o te Wai Fund in 2014 ($5 million on iwi-led projects and an additional $1 million in 2017) ; and
- the Freshwater Improvement Fund in 2016 (voted $100 million over 10 years)."

"Other Government initiatives have also made contributions, such as the Community Environment Fund in 2014 and the Contaminated Sites Remediation Fund."

"We noted the Crown's commitment to funding clean-up of degraded water bodies, and that the initiatives discussed in chapter 5 were an important first step."

"We also noted that the funding had assisted kaitiaki in projects to begin restoring water quality in some freshwater taonga, and had led to some capacity building and partnerships in the various projects. But our finding was that the Crown's funding efforts were not yet sufficient to deal with the sheer scale of the damage done prior to the first NPS-FM in 2011. Nor were those funds sufficient to counterbalance the nutrients and contaminants still being released into soils, wetlands, streams, rivers, and lakes. We also found that, although some iwi and hapū had applied for, received, and matched funds, many more do not have the funding to carry out the clean-up of degraded freshwater taonga. We agreed with the claimants that there remains a need for committed, long-term funding to address water quality issues on a local and national scale, and that the Treaty standard of active protection will not be met until such larger-scale, longer-term funding has been dedicated to restoration of these highly vulnerable taonga."

7.5 Allocation reform options

7.5.1 Introduction

"The RMA's allocation regime was urgently in need of reform in the early 2000s. The first-in, first-served approach had resulted in the full or over-allocation of many catchments. During the co-design of the Next Steps reform proposals, the Crown and the ILG agreed that providing an economic benefit from water was essential to addressing Māori rights and interests in fresh water. But they could not agree on what form this should take: the ILG wanted an allocation to iwi and hapū; whereas the Crown wanted an allocation for the development of Māori land."

"The Crown had imposed bottom lines on the co-design of reform options, including that no one owns water and that there would be no generic share of water for iwi. Discussions in the 'economic development' workstream reached an impasse, so no reforms from that workstream were proposed in Next Steps. More work was needed to design a whole new allocation system in any case, but, as noted above, the Crown could have decided in principle that there should be an allocation for iwi and hapū."

"Following the Next Steps consultation, the Crown established a new allocation work programme in 2016, which developed reform options but did not reach the point of decisions prior to the change of government in 2017. We assessed the programme and its options in chapter 6 of our report."

7.5.2 Collaboration

"Broadly speaking, the ILG had a minimal role in the allocation work programme. It provided a member of the Technical Advisory Group and nominated two qualified people for the work programme team. There was also a Joint Advisory Group but its role and impact were not clear to us on the evidence we received. The Crown decided there would be no co-design of these reforms, and the ILG considered that its level of engagement with the allocation programme was inadequate. There were some discussions with the IAG as the programme developed."

7.5.3 Equity

"Cabinet acknowledged in 2016 that Māori landowners faced statutory and other historical barriers to their ability to access water for economic development. Māori have been particularly disadvantaged by the first-in first served system, including iwi who have recently received land as redress in Treaty settlements."

"We considered this to be an important acknowledgement, and noted earlier Tribunal inquiries that found many of those historical barriers had been of the Crown's making. Māori have been denied a level playing field in the New Zealand economy. The NZMC, the ILG, and the Crown seemed to find common ground in the view that the current allocation system is unfair to Māori, and that there should be an allocation of water and discharge rights to Māori. We agreed that the allocation system is inequitable for Māori. The Treaty principle of equity requires the Crown to act fairly as between Māori and non-Māori. At present, the RMA's allocation regime is in breach of Treaty principles (see chapter 2 findings as summarised above)."

7.5.4 The work programme's allocation reform options

"Acknowledging that the present allocation system is unfair to Māori, officials developed three significant reform options (all of which they considered were necessary):

- access to water and discharge rights for the owners of Māori land as a matter of equity and to assist regional development ;
- an allocation for iwi and hapū (but not on the basis of a national percentage) ; and
- an in-stream allocation for cultural and economic purposes."

"Cabinet made no decisions on these options in December 2016, although it expressed a preference for an allocation to Māori land development on the grounds of equity. A similar preference has been expressed recently by the new Government."

"In 2017, officials proceeded to develop system models to incorporate the various options that had been developed in 2016, but this work was not completed, and no decisions were ever made on how the allocation system should be reformed."

7.5.5 Addressing Māori rights and interests

"Over and above the issue of fairness, the Crown was committed to providing for 'use' of freshwater resources in addition to 'control', in recognition of Māori rights (as noted above). A commitment to this effect was made in the Supreme Court in 2012, where the Crown's position was that any recognition of Māori rights and interests 'must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use".'"

"As we found at stage 1, Māori rights in their freshwater taonga included proprietary rights in indivisible water resources, of which the water was an integral component. What was necessary, we said, was an exercise in rights recognition and rights reconciliation. The claimants' position in stage 2 of our inquiry was that a number of mechanisms could now provide 'proprietary redress': a percentage allocation through any of a number of models, such as the aquaculture settlement or a quota management system; royalties; or even compensation if necessary."

"The option that officials have proposed in recognition of Māori rights, whether defined as proprietary (by the NZMC) or economic (by the ILG), is an allocation of water and discharge rights to iwi and hapū as well as a separate allocation for land development. Officials certainly thought that this could be done, in conjunction with an in-stream allocation for customary purposes, although the Crown to date has made no decisions. The allocation work programme did not really consider other options to address Māori rights, such as the payment of a levy or a royalty on commercial uses."

7.5.6 Our view of a Treaty-compliant allocation regime

"We made no findings on the allocation reforms because the Crown did not make any decisions, and the new Government is in the course of deciding its freshwater reforms. We did, however, provide our view of what was necessary to make the allocation regime Treaty compliant (having found that it was not in chapter 2)."

"Our view was that an allocation of water and discharge rights for Māori land development would not satisfy the rights and interests of Māori as guaranteed by the Treaty of Waitangi. If regulatory reforms are to deliver something approximating the Treaty guarantees in today's circumstances, then an allocation for the exclusive use of iwi and hapū is also required. That allocation should be inalienable other than by lease, and it should be perpetually renewable (as all consents are in theory, provided there is still allocable water available). We did not see any insuperable obstacle to this, given the arrangements for Māori that the Crown has agreed to in the past concerning commercial aquaculture and fisheries. We agreed with the Crown that the circumstances of catchments must be taken into account when the details are decided, especially where catchments are over-allocated. But RMA reform can provide a solution without the need for a national percentage, which was one of the former Government's bottom lines. The details of such a reform could be worked out by a national water commission if one is established."

"The evidence suggested that some Māori groups will not consider that their proprietary rights are fully satisfied by an allocation of water and/or discharge rights, if allocation reforms of that type do in fact eventuate. If the Crown is only prepared to consider regulatory reform, the other mechanism which the RMA can offer is a charge or royalty."

"We also considered that, if it is necessary to go outside the RMA for solutions, the Crown's previous bottom lines (2015–17) were not likely to permit a Treaty compliant outcome. We did not consider the new Government's bottom lines (described as 'parameters') because we lacked the necessary evidence. We noted, however, that, if the Crown's decision is still to confine allocation to Māori land development, then that will not produce a result that makes the RMA and its allocation regime compliant with Treaty principles. Too many Māori have lost too much land throughout the country as a result of Treaty breaches for that approach to have any prospect of being compliant with Treaty principles."

"We make our recommendations on allocation below."

"We turn next to a consideration of the NZMC's proposal for a national water commission, after which we make our recommendations to the Crown."

7.6 Proposals for a Water Commission

7.6.1 Introduction

"In the course of our inquiry, there have been a number of proposals for Māori to have an institutional role in water policy at the national level. There seems to be broad agreement among the claimants and many interested parties that such a role should take the form of a Crown–Māori partnership, although the scope and nature of the partnership differed in the various proposals. We need to explain and assess these proposals before making our recommendations."

7.6.2 The Land and Water Forum's proposal

"We have already described the iwi membership of the Land and Water Forum in previous chapters, as well as the role of IAG members on the forum's 'Small Group'. The various stakeholders in the Land and Water Forum included environmental groups, primary industries, and hydro power companies. It is significant, therefore, that the first proposal for a national co-governance body in the form of a commission came from them in 2010. The forum recommended that a non-statutory 'National Land and Water Commission' be established on a 'cogovernance basis with iwi'. The commission would be serviced by the Ministry for the Environment, and its functions would be as follows:

> The Commission would act as a coordinating, leadership and collaborative body, helping ensure consistency and action. Its mission would be to advise Ministers on the management of water resources, and land resources which impact on water, with a view to sustaining the life-supporting capacity of water and its ability to meet the needs of future generations, whilst enabling people and communities to achieve their economic, social, cultural and environmental well-being."

"It would:

- recognise the iwi Treaty relationship with the Crown, including providing an avenue for iwi to express their Treaty partner aspirations
- continue to foster collaborative relationships between the various sectors and interests concerned with water
- advise on ways to improve the efficiency and effectiveness of the national water management system
- develop and oversee the implementation of a National Land and Water Strategy
- promote best use and practice in water management
- identify degraded waters for priority restoration
- identify opportunities and constraints to water storage and reticulation
- liaise with regional councils about the need for and potential role of restoration funding in each region, including priorities for that funding
- advise the Ministry for the Environment (which would administer a Water Restoration Fund) on priorities for spending from that fund
- facilitate, promote the development of, and monitor non-statutory regional water strategies and plans

- work with the Ministry for the Environment, the Environmental Protection Authority and regional councils to ensure that financial and technical skills could be made available to under-resourced regions
- liaise with the Ministry for the Environment, the Environmental Protection Authority and other relevant government agencies over water management and receive regular reports from the Chief Executives' Forum."

"The Commission would stand outside the formal Resource Management Act regime although it would provide advisory input on relevant RMA matters."

"The commission's Land and Water Strategy would provide a 'national oversight and integrating function' for non-statutory tools and methods, such as the development of water infrastructure. One of its roles would be 'recognising the relationship between iwi and the Crown, and iwi expectations for water management', on which the commission would advise the Crown."

"In a review of its recommendations in 2016, the forum noted that the Crown had decided not to implement its recommendation for a commission. Cabinet had 'agreed that further work was needed on which functions LAWF have proposed for the Commission should be implemented as well as the desirability or otherwise for any of them being performed by an autonomous body or bodies'. The forum commented that it was 'unclear whether that further work has occurred or what the outcome was'. Martin Workman, the head of the Water Directorate in the Ministry for the Environment, told us in 2018 that the Crown had seen a need to investigate 'the rationale for introducing another body into the wider public sector', and to clarify its 'proposed responsibilities'. The forum's recommendation seems to have gone no further by the end of our hearings in 2018."

7.6.3 The claimants' proposals

7.6.3.1 The New Zealand Māori Council's proposal

"The NZMC's proposal for a national water commission has changed and developed since it was first made in 2014. The original proposal was for an independent commission to manage water allocation by setting prices for commercial users, allocating water takes (through a subsidiary mechanism), and using the funds generated by commercial users for monitoring, research, restoration projects, and payments to Māori in recognition of their proprietary interests. The funds for Māori would be used to secure water supplies for marae and papakāinga, restore waterways, and develop commercial water operations."

"In closing submissions for the Wai 2358 claimants, counsel proposed that redress in respect of proprietary rights should be provided through a mechanism such as an allocation of water, royalties, or some other instrument. The claimants also proposed that one item of redress would be an independent national water commission to be established on a partnership basis, with half its membership chosen by Māori and half by the Crown. The commission could work in conjunction with the RMA or a Water Act, but its roles would be to:

- manage and regulate water ;
- stop further degradation and reverse past damage ;
- establish water quality bottom lines that would protect the mauri of water bodies ;
- determine a fair allocation of water to Māori for customary and economic purposes ;
- enforce council–Māori co-management agreements ; and

- determine compensation (where an allocation to Māori was not possible)."

"These activities would be funded by charges on the commercial use of water. The claimants argued that the commission's composition, powers, and functions would give effect to the Treaty principles of partnership and active protection."

"This submission was supported by a number of interested parties, although they may have had different views as to matters of detail."

"In February 2019, the Wai 2358 claimants provided their submissions in reply to the Crown's closing submission. The NZMC took that opportunity to provide an updated and expanded submission on a separate Water Act and national commission."

"In their view, fresh water must be taken out from under the RMA because there is an 'unresolved binary between economic interests and environmental values in terms of the management of the freshwater resource in New Zealand which has not been solved by the RMA'. We found evidence of such a 'binary' in our analysis of water quality reforms in chapter 5, including the Crown's decisions on the board of inquiry's report in 2011 and the failure to issue stock exclusion regulations in 2017."

"In any case, the claimants argued that the Water Act should be guided by the principles of tikanga and should recognise the rights and responsibilities of Māori (tino rangatiratanga and kaitiakitanga). The primary purpose of the Act would be to safeguard the mauri of water bodies, followed by the provision of drinking water, and then commercial uses of water. It would be carried out by a national water commission and regional catchment boards. The commission would be appointed by the Crown and Māori on a 50/50 basis, and would be independent of the Government (and the political pressures which the claimants argued had produced such minimally effective reforms). The commission would administer a register of iwi and hapū rights in respect of particular water bodies (there would be a dispute resolution function for contested rights). It would establish charges for commercial uses and the discharge of pollutants and waste water. Those funds would be used by the commission for Māori economic development, the clean-up of degraded water bodies, and compensation (where hapū could not be allocated an appropriate amount of water). The commission would also establish a framework for freshwater management and give direction to regional catchment boards."

"The Act would specify that the framework must be Treaty compliant."

"The claimants proposed that the commission should also establish an allocation framework, which would include limits set by the commission to ensure sustainable flows and ecosystem health. The first priority would be protecting the mauri, the second would be drinking water, the third would be a percentage allocation to Māori for cultural and economic purposes on a quota management basis, and the fourth would be allocation to commercial users. The commission would also monitor, review, and occasionally override regional catchment boards. The new catchment boards would be co-governance bodies with a 50/50 composition. They would enter into Joint Management Agreements with iwi and hapū, and carry out water management and consenting at the regional level. The Māori members of both the national commission and the boards would be appointed by 'major entities within Māoridom, such as the NZMC and the Iwi Leaders Group'."

7.6.3.2 The Wai 2601 claimants' proposal

"The Wai 2601 claimants (Maanu Paul and Charles White on behalf of Ngāti Moe, and the Taitokerau District Māori Council) also proposed a national water commission. They were supported by four other District Māori Councils which were interested parties in our inquiry. The claimants suggested the establishment of a Wai Māori Commission/Te Ohu Wai Māori, which would be funded by the Crown and would consist of 15 members appointed by national Māori bodies."

"This commission would 'co-devise' a new water regulatory regime with an equal number of Crown representatives. That task would include devising regimes and institutions for water management and allocation. The commission on its own, however, would devise the tikanga for the new regime, determine 'which Iwi and Hapū own which Water bodies', and work with them and with water users to set prices for the commercial use of water."

"Under the new regulatory regime, the Crown would need to recognise Māori proprietary rights, and all commercial users would pay a levy that would go to the Māori owners. Local authorities which managed water supplies would have to pay a levy as well, to be used for restoring degraded water bodies. Discharge rights would also involve the payment of fees to be used for clean-up funds."

7.6.4 The response of the Crown and the Freshwater ILG

7.6.4.1 The Freshwater ILG's view

"Counsel for the ILG submitted that the national model for making water policy should continue to be a partnership engagement between the Crown and iwi leaders, with consultation more widely with Māori. The ILG opposed both the Crown's new consultative body (Te Kahui Wai Māori) and the idea of a national water commission. In respect of the commission, the ILG's view was that 'the relevant iwi authorities in the respective catchments would be the appropriate bodies, alongside the Crown (whether that ultimately be through local authorities or not) to manage and regulate water'. The ILG did, however, agree with the NZMC that remedies should include:

- some form of allocation, royalty, or compensation ;
- co-management as the benchmark for freshwater management (including at the national as well as regional levels) ; and
- that the problem of chronic under-resourcing must be addressed."

"Apart from the issue of a national water commission, these other matters have been addressed in earlier chapters (and summarised above)."

7.6.4.2 The Crown's position

"The Crown's closing submissions stated in a footnote that it had no official position on the claimants' proposal for a national water commission. Crown counsel also confirmed that when the forum proposed a commission, the Crown's view was that 'further work was required to consider exactly what such a commission would do, and whether it would be consistent with the government's goals of "efficient, stream lined and well organised" government administration'."

"In response to the claimants' reply submissions, the Crown filed a further memorandum in April 2019. Counsel stated that the Crown 'remains committed to continuing discussions on how to better provide for a Māori–Crown partnership that recognises the tino rangatiratanga

guaranteed to Māori under te Tiriti and gives effect to Treaty principles including kawanatanga'. The Crown's view was that the NZMC's revised proposal had some 'underlying objectives' that it would like to explore further, such as a register of Māori rights and interests in water and funding for Māori capacity to engage in 'decision-making processes'."

"But whether a national commission was the correct structure to provide for those kinds of objectives was a 'difficult question'. The Crown suggested that a fundamental change to freshwater governance would require careful examination of multiple issues, such as how the effects of land-use on water would be included."

"If water were to be separated out and governed under a commission, there would need to be some integration with land management authorities. Also, the Crown considered that management decisions are best made with local knowledge at the catchment level."

"Nonetheless, Crown counsel stated that the Crown is 'open to exploring all of these issues with Māori' but is already working on fundamental water reforms in its 'Essential Freshwater' programme. It was therefore premature for the Crown to consider particular governance structures at present. Further, Crown counsel submitted that the Tribunal should 'avoid definitively endorsing one governance structure above others' in light of the difficult issues raised by the Crown and its ongoing engagement with Māori (through Te Kahui Wai Māori) on freshwater reforms. The Crown also intends to discuss policy options with the ILG and NZMC, primary industry, and others before wider consultation."

7.6.5 Our view of the water commission proposals

"It seems to us that there are some commonalities in the various approaches that have been put forward so far. The stakeholders of the Land and Water Forum clearly saw that a national commission is necessary, and that it must be established on a co-governance basis (points held in common with the NZMC and the Wai 2601 claimants). The claimants and interested parties also agreed that there needs to be a role for the exercise of tino rangatiratanga at the national level, in partnership with the Crown, although they had differences on what kind of institutional arrangement would best reflect that partnership function. The Crown has said that it is open to exploring such matters but has not endorsed an institutional role for Māori at the national level. In practice, we note that it has developed most of its reforms in collaboration with the appointed representatives of a national Māori body (the ILG and IAG) and more recently with Te Kahui Wai Māori."

"In our view, another point of agreement between the forum and the claimants is that there is a significant gap in the freshwater policy and management structure (following the dissolution of the National Water and Soil Conservation Authority) ; there is no independent national body to oversee the system, monitor performance, develop policy, and conduct research on a national scale. We agree that this is a significant gap. For example, the need to conduct research and to develop and populate the NOF underlines the need for this gap to be filled."

"We agree with the forum and the claimants that there should be an independent national body established on a co-governance basis with Māori. At a minimum, its role should be to act in partnership to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management."

"We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with those issues. Either model could work so long as it is institutionalised, but the value of the co-

governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori. In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary."

7.7 Recommendations

7.7.1 Introduction

"In this section of our chapter, we make our recommendations for the remedy of the breaches and prejudice summarised above, and to prevent similar prejudice from occurring in the future."

"We note that because significant reforms have already been completed or commenced by the Crown, we are in a position to make detailed recommendations on some matters. We do not make any recommendations about specific water bodies, as our focus in stage 2 is on the Crown's freshwater management regime and its reforms to that regime, and some water bodies have been the subject of detailed inquiry in the Tribunal's district inquiries."

7.7.2 Purpose and principles of the RMA

"We recommend two specific amendments to part 2 of the RMA:

- The amendment of section 6 to include Te Mana o te Wai as a matter of national importance that must be recognised and provided for by RMA decision makers.
- The amendment of section 8 to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the Act."

7.7.3 Co-governance and co-management

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies:

- A national co-governance body should be established with 50/50 Crown–Māori representation, to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management. The details should be arranged between the Treaty partners.
- Sections 33 and 36B of the RMA should be amended to remove statutory and practical barriers to their use, to provide incentives for their use, and to compel councils to actively seek opportunities for their use. Sections 33 and 36B should also be amended so that transfers of power and Joint Management Agreements cannot be revised or cancelled without the agreement of both parties. Section 33 should be amended so that transfers of power in respect of a water body or water bodies may be made to hapū. Joint Management Agreements for water bodies should apply to the whole catchment of a water body, and should include (among other things) 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.

- Sections 33 and 36B should also be amended to include a process for iwi authorities to apply to councils for transfers and Joint Management Agreements. A mandatory process of engagement would follow any application, with mediation and the assistance of the Crown (or the co-governance body for freshwater applications) to be available as required.
- The Mana Whakahono a Rohe provisions of the RMA should be amended to make the co-governance and co-management of freshwater bodies a compulsory matter that must be discussed and agreed by the parties. Other matters could also be made compulsory (as discussed in chapter 4), and the Crown should discuss and agree to any such further proposed amendments with the ILG, which designed the original Mana Whakahono a Rohe proposal.
- Objective D1 of the NPS-FM should be amended to specify that iwi and hapū must be directly involved in freshwater decision-making, that Māori values, rights, and interests must be recognised and provided for in freshwater decision-making, and that councils must actively seek opportunities to enter into section 33 transfers and section 36B Joint Management Agreements for freshwater bodies (where Treaty settlements have not already established co-governance agreements for freshwater bodies). Consequential amendments should be made in policy D1, and further policies could be inserted as required. These amendments should specify 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- The RMA provisions for iwi management plans should be amended to provide that, in the case of water bodies where co-governance and co-management has not been arranged, the iwi and hapū management plans filed by kaitiaki will have greater legal weight in the process of developing or amending regional plans and in consenting processes.
- The Crown should offer co-governance / co-management agreements for freshwater bodies in all future Treaty settlements, unless sole iwi governance of a freshwater taonga is more appropriate in the circumstances."

"We also recommend that the national co-governance body should assess whether a separate Water Act is necessary. Whether such an Act is required or not, we do not recommend the duplication of authorities at the regional level. Land, water, and other natural resources should be managed in an integrated manner by regional councils on a co-governance/co-management basis with iwi and hapū."

7.7.4 Co-design

"We recommend that the Crown continue its approach of co-design of policy options with a national Māori body or bodies and that this should be made a regular feature of government where Māori interests are concerned."

7.7.5 Resourcing

"We recommend that the Crown urgently take such action or actions as are necessary to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes, including freshwater management and freshwater decision-making. We also recommend that, in respect of fresh water, the resourcing measures be developed, and their effectiveness monitored, by the national co-governance body. If the national co-governance body has not been established, that role should be performed by the Crown in partnership with the Iwi Chairs Forum and NZMC. Because this issue of resources is not confined to RMA processes relating to fresh water, we have not specified the ILG and Te Kahui Wai Māori here.

Necessarily, this recommendation includes the building of capacity and capability for iwi and hapū to enter into co-governance and co-management arrangements and Mana Whakahono a Rohe arrangements, and support for both councils and Māori to establish those arrangements."

7.7.6 Water quality

"We recommend that water policy (including water quality standards and national bottom lines) be decided by or in conjunction with the national co-governance body, with the details to be arranged between the Treaty partners. We expect that the Crown and Māori representatives would consult with their respective constituencies in carrying out that work, and that the national body would hold an inquiry and receive submissions in the manner of a board of inquiry.

We acknowledge that the national water body may come to alternative views on amendments to the NPS-FM, but if such a body is not established, or agreement cannot be reached between the Crown and Māori representatives, we recommend the following amendments to the NPS-FM:

- The overall aim of the NPS-FM should be the improvement of water quality in freshwater bodies that have been degraded by human contaminants, so as to restore or protect the mauri and health of those water bodies, while maintaining or improving the quality of all other water bodies. The board of inquiry's objectives E1 and E2, from the board's report in 2010, should be inserted in the NPS-FM and consequential changes made.
- The NOF should be fully populated as soon as practicable, including the development and insertion of the attributes that have been omitted (the details are in chapter 5), so that national water quality standards are comprehensive and effective. This should include attributes and bottom lines for wetlands, aquifers, and estuaries, and more effective controls for nutrients.
- More stringent national bottom lines should be set so as to recognise and provide for Māori values (including Te Mana o te Wai – the health of the water body must come first) and the revised overall aim of the NPS-FM.
- Te Mana o te Wai, and such other Māori values as the national co-governance body decides or recommends, should be made compulsory national values in the NOF, with national bottom lines. Cultural indicators should also be added to the NOF.
- Objective AA1 and policy AA1 should be amended to state that Te Mana o te Wai must be recognised and provided for, in conjunction with the amendments to objective D1 as recommended above (a direct involvement of Māori in freshwater decision-making).
- Timeframes for implementation should be reassessed, and interim measures be arranged (perhaps through National Environmental Standards) to ensure that water bodies are not further degraded in the meantime."

"We also recommend that:

- National stock exclusion regulations should be promulgated urgently.
- The Crown and the national co-governance body should consider the promulgation of National Environmental Standards, including a standard for ecological and cultural flows (which has been on hold for some years).
- The Crown and the national co-governance body should devise measures and standards urgently for the absolute protection of wetlands. This may require statutory amendment, regulations, or some other tools, or a combination of all of these.

- The Crown and the national co-governance body should also take urgent action to develop measures for habitat protection and habitat restoration, and any other measures necessary to save three-quarters of freshwater native fish species from the threat of extinction. The development of attributes and bottom lines for the Mahinga Kai value in the NOF would be one of the necessary actions.
- The Crown and the national co-governance body should develop measures to encourage and assist councils to dispose of sewage effluent to land wherever feasible."

"If the national co-governance body has not been established, these recommendations should be carried out by the Crown in partnership, and on a co-design basis, with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori."

"In terms of funding for restoration, we recommend that the Crown provide funding and that, where possible, levies on commercial users also be applied for the restoration of water bodies. The co-governance body should design and oversee a programme for restoration of freshwater bodies, which could involve it in considering and deciding applications and monitoring projects. This body should also identify priorities for the restoration of freshwater taonga. While that programme is being developed, we recommend that the Crown continue to fund projects for freshwater quality improvement. We also recommend that the Crown and the co-governance body should consider retaining the Te Mana o te Wai Fund as a long-term fund for the restoration of degraded freshwater taonga."

7.7.7 Māori proprietary rights and economic interests vis-à-vis the allocation regime

"We recommend that the Crown recognise Māori proprietary rights and economic interests through the provision of what the NZMC has called 'proprietary redress'."

"In conjunction with this, we make the following recommendations concerning the RMA's allocation regime:

- The allocation regime should be reformed so as to recognise and provide for Te Mana o te Wai, and this should be done urgently.
- The first-in, first-served system of allocation should be replaced, and over allocation phased out.
- The Crown should devise a new allocation regime in partnership with Māori, including through the national co-governance body.
- The Crown should arrange for an allocation of water on a percentage basis to iwi and hapū, according to a regional, catchment-based scheme to be devised by the national co-governance body in consultation with iwi and hapū. If any iwi, hapū, or local authority reports that catchment circumstances do not allow the allocation to be made, the national co-management body should hold an inquiry on that matter, and investigate possibilities for the creation of head room, as well as any alternatives to the allocation (including the possibility of compensation). All allocations to iwi and hapū should be perpetually renewable and inalienable other than by lease or some other form of temporary transfer.
- The Crown should also arrange for an allocation of water for the development of Māori land (including land returned in Treaty settlements), where such allocation is sustainable, according to a scheme to be devised by the national co-governance body.
- The national co-governance body should investigate other possible mechanisms for 'proprietary redress', including royalties, as there is insufficient evidence for the Tribunal to make a recommendation to the Crown. We think this should include leading a wider conversation within Māoridom on proprietary rights and how these might be recognised."

"We make no recommendations as to an allocation of discharge rights because it is not yet clear whether such rights will be made transferable or, indeed, will become a general feature of the freshwater management regime. The co-governance body should consider this matter and develop an approach for allocations to iwi and hapū and for the development of Māori land if discharge rights (including transferable discharge rights) become a general feature of freshwater management."

"If the co-governance body is not established, then the Crown should carry out these recommendations in partnership (and on a co-design basis) with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori."

"Finally, we note that it may now be necessary for a test case to be brought before the courts on whether native title in fresh water (as a component of an indivisible freshwater taonga) exists as a matter of New Zealand common law and has not been extinguished. We have given our view but our jurisdiction is recommendatory only, and the question has not been decided definitively by the courts."

7.7.8 Monitoring and enforcement

"We reiterate the recommendations of previous Tribunals that the Crown should monitor the Treaty performance of local authorities. For freshwater matters, this should be carried out by the co-governance body."

"We also reiterate the recommendation of the Wai 262 Tribunal, that councils make regular reports on their activities in respect of section 33 and 36B to the Parliamentary Commissioner for the Environment or – in the case of freshwater bodies – to the co-governance body if it is established."

"We are aware that monitoring and enforcement of consent conditions is also a significant issue in the freshwater management regime, but we did not receive sufficient evidence to make a recommendation (other than the recommendation made above in respect of Joint Management Agreements)."

7.7.9 Clean, safe drinking water for marae and papakāinga

"Finally, we make a recommendation that arises from one of the unfulfilled reform options in the Next Steps co-design process. We recommend that the Crown provide urgent assistance, including funding and expertise, for water infrastructure and the provision of clean, safe drinking water to marae and papakāinga."

"This will likely need to include a subsidy scheme to resume the important but incomplete work of the previous National Drinking Water Assistance Subsidy Scheme (2005–15)."

"We recommend that the national co-governance body should devise an appropriate water supply and infrastructure scheme for marae and papakāinga, which may need to be developed and implemented with or alongside a scheme for safe, clean rural water supplies. If the national co-governance body is not established, the Crown should develop and implement a scheme in partnership with Māori on a co-design basis and with co-governance of the scheme."

Wai 2200: Horowhenua – The Muaūpoko Priority Report (2017)

Read the full report on the Waitangi Tribunal website

"We also reject the Crown's approach regarding its responsibility for the day-to-day affairs of local authorities on the same basis that it was rejected in Ko Aotearoa Tēnei (the Wai 262 report). That report found that the environmental management regime on its own without reform was not sufficient in Treaty terms. The Wai 262 Tribunal stated that the Crown has an obligation to protect the kaitiaki relationship of Māori with their environment and that it cannot absolve itself of this obligation by statutory devolution of its environmental management powers and functions to local government. Thus the Crown's Treaty duties remain and must be fulfilled and it must make statutory delegates accountable for fulfilling them too. The same duty to guarantee rangatiratanga, and to respect the other principles of the Treaty thus remains as an obligation on the Crown and it is not enough for the Crown to wash its hands of the matter and say that the day-to-day decision-making process is in the hands of local authorities."

"We note further the Waitangi Tribunal has previously held in various reports that the RMA 1991 is not fully compliant with Treaty principles. In the Wai262 report, the Tribunal stated

> the RMA has not delivered appropriate levels of control, partnership, and influence for kaitiaki in relation to taonga in the environment. Indeed, the only mechanisms through which control and partnership appear to have been achieved are historical Treaty and customary rights settlements."

"In context of the claims before us, we consider another important issue raised by the RMA 1991 is that it is not remedial in its purpose or effect as outlined in section 5. That provision merely provides that the purpose of the legislation is to 'promote the sustainable management of natural and physical resources."

"While the 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord' (2013) has created opportunities to work in partnership with local bodies, and that is to be applauded, under the RMA 1991 and the local government legislation Muaūpoko have no lawful rights to control or to enforce the commitments made in that accord In other words, Muaūpoko mana whakahaere (control and management) over their taonga is not fully provided for under the current legislative regime Such a situation can be compared to the rights that the Waikato-Tainui river tribes have in terms of the Waikato River under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. The 2010 legislation states that the 'RMA 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for river use'. It is further recorded that the RMA does not provide for the protection of the mana of the river or the mana whakahaere (ability to exercise control, access to, and management of the river) of Waikato. It notes the number of resource consent proceedings that the tribe had been involved in, and then the Crown acknowledges, among other things, that it 'failed to respect, provide for, and protect the special relationship of Waikato-Tainui' with the river." p 648-650

11.7 Conclusion

"We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002

and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does not ensure that Muaūpoko rangatiratanga and kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for." p651–652

Wai 2478: He Kura Whenua ka Rokohanga – Report on Claims about the Reform of Te Ture Whenua Maori Act 1993 (2016)

Read the full report on the Waitangi Tribunal website

"As in 2013 (and in the research and reviews leading up to it), many people raised the issue of barriers to development that had not been addressed by the Crown and that were not the subject of the proposed reforms:

> There is a clear view among hui participants that the success of any reforms does not rest on legislation alone but also needs to be backed with access to resources such as fresh water and financial support. At almost every hui we heard significant concerns about landlocked Māori land and the impact of other legislation, particularly the Resource Management Act 1991, the Local Government (Rating) Act 2002, and the Public Works Act 1981." p 122

Wai 903: He Whiritaunoka – The Whanganui Land Report Volume 3 (2015)

Read the full Volume 3 report on the Waitangi Tribunal website

"We recommend that the Crown reviews the Resource Management Act and other planning legislation, policy, and practice, to ensure that Whanganui Māori are not unduly prevented from building houses on, or developing, their own land. It should work with local authorities to ensure that they have proper regard to the importance of Māori being able to maintain their papakāinga. It should also engage with iwi Māori on the kaupapa of regional development, with a view to creating opportunities for people to participate in economic ventures that make it viable for them to occupy their ancestral kāinga". p 1176

Wai 894: Te Urewera Report Volume VI (2015)

Read volume VI on the Waitangi Tribunal website

"Whatever the current position of legal ownership, the beds of rivers are de facto in the control of central and local government. Te Urewera rivers are a good example of this. The Resource Management Act 1991 is a significant improvement on the previous regime for management of rivers. It makes provision for powers exercised by local authorities to be transferred to iwi authorities. But no management powers in respect of any rivers in Te Urewera had been transferred to iwi at the time of our hearings." [Letter of Transmittal, page xix]

“At the heart of the waterways and customary fisheries claims before the Tribunal was the disquiet of the claimants that they should have been dispossessed of their rivers by a principle of English common law (the ad medium filum presumption) of which they were not aware. They did not knowingly or willingly alienate their rivers to the Crown when their land, or undivided interests in their land, was purchased. New Zealand legislation had also expropriated their ownership and management rights in their rivers. The Coal-mines Act Amendment Act 1903 had confiscated their navigable rivers, the claimants say, yet they are still not sure which rivers or stretches of rivers the Crown believes it took under the legislation. And by later legislation the Crown has assumed exclusive control over rivers, disregarding their tino rangatiratanga, and then has managed them badly. Their indigenous fisheries, including tuna, were sacrificed to introduced trout, and to hydroelectric development. The Resource Management regime introduced in 1991, according to the claimants, has yet to deliver effective recognition of hapu and iwi as owners and kaitiaki of their rivers.” p 190

“The Crown’s failure to properly acknowledge Maori ownership of their awa, is matched by its failure to give effect to the Treaty in its management of the rivers and river fisheries. While some acknowledgement was occasionally given to Maori rights to their fisheries, precedence was given to power generation, demand for gravel, and sport fishing. Until about the 1990s, hapu and iwi were rarely even consulted over the management of rivers and river resources, even when their interests were seriously affected. The most obvious example of this was the construction of hydro works. These had hugely detrimental effects on tuna (eels) and other river life, but the affected communities were given no say or compensation.” p 358–359

“There seems to have been some improvement in recent decades, but at the time of our hearings the Crown was still not giving effect to its Treaty obligations. In particular, it did not appear that enough was being done to restore fisheries, and Resource Management Act powers to delegate or share power with iwi were not being used. As the Wai 262 Tribunal found, the Resource Management Act ‘has delivered Maori scarcely a shadow of its original promise’. In our inquiry, claimants said that they were not even properly consulted over environmental matters. Management of the Ohinemataroa River, in particular the selling of gravel, was cited as one instance in which the rights and interests of tangata whenua were virtually ignored. Overall, we did not receive enough evidence to make findings on the operation of the Resource Management Act in Te Urewera, except to say that it appears that the Wai 262 Tribunal’s findings apply to our inquiry district.” p 359

Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report Volume 3 (2013)

Read the full Volume 3 on the Waitangi Tribunal website

“Ngā iwi o te kāhui maunga have largely been excluded from the management of their water resources. Under the RMA, this task has been delegated to the Manawatu–Wanganui and Waikato Regional Councils. Ko Aotearoa Tēnei, in an examination of the RMA, has asked if the current RMA system provides for kaitiakitanga control, partnership, and influence on environmental management. It finds that the Act has not fulfilled its promise with respect to Māori: there have, in particular, been very few transfers of powers to iwi authorities.”

"Ko Aotearoa Tēnei encourages greater use and recognition of iwi management plans, and points towards partnership arrangements as an appropriate way to involve iwi in decision-making without excluding local government or wider communities of interest. The report also recommends greater use of national policy statements to enhance 'kaitiaki control, partnership, and influence on environmental decision-making'."

"Our recommendations recognise the very particular character of our inquiry district, the importance of the waters for the nga iwi o te kāhui maunga, the impacts of the TPD on these waters, and the opportunities and limitations of the RMA."

"In the National Park inquiry context, we make three recommendations which, taken together, will increase opportunity for ngā iwi o te kāhui maunga to exercise their kaitiakitanga over their waters. They include local action and national action and sit within the present resource management framework. Those recommendations are that:

- The Crown provides funding for the preparation of an iwi management plan for the waters of te kāhui maunga (section 61(2A)(a) of the RMA). This funding should be ongoing and take into account capacity building and monitoring needs.
- That ngā iwi o te kāhui maunga and the regional councils for Manawatu–Wanganui and Waikato enter into a partnership arrangement for the management of the waters of te kāhui maunga (sections 36B, 36C, and 36D of the RMA provide a framework for this ; section 36E, which allows for termination at 20 days' notice, is not applicable). One of the tasks of this partnership would be the preparation of a water 14.14.4 The Tongariro Power Development Scheme management plan. As a further aspect of the partnership, when applications for water-related consents are considered, the hearing committee should be appointed jointly by iwi and regional councils.
- That the Crown prepare a national policy statement for Māori participation in resource management (section 45(1) of the RMA). Such a policy statement should be consistent with the recommendations of Ko Aotearoa Tēnei and identify mechanisms for the exercise of kaitiakitanga, for partnerships between iwi and regional councils, and for the involvement of iwi in decision-making with respect to te ao tūroa, the sustainable management of resources." p 1166-1167

"The Ngāwha Tribunal, said counsel, found that in enacting this legislation the Crown failed to include

> adequate provisions to ensure that the Treaty rights of the claimants ... are fully protected. As a consequence, the claimants have been, and are likely to continue to be, prejudiced by such a breach."

"Counsel asked that the National Park Tribunal note the Ngāwha Tribunal's findings in relation to this legislation."

"With regard to the Tokaanu field, Ngāti Tūwharetoa submitted that Crown regulation has 'failed to protect the geothermal resource', in that the Crown has allowed 'unchecked development' to occur in the vicinity of the field, resulting in 'significant and unnecessary degradation of the resource'. In respect of the regulatory framework imposed by the Crown, the claimants further submitted that their 'right of rangatiratanga amounts to the right of Māori to be decision-makers with respect to the use of the resource'. However, they said, this has not been recognised by the Crown." p 1192–1193

(4) Crown delegation to local authorities

"The implication of the Treaty of Waitangi Act 1975 is that the Crown is expected to act consistently with the principles of the Treaty, in that, where any Act, proposed legislation, regulation, Order in Council, policy, or practice is inconsistent with the principles of the Treaty, Māori may bring a claim about the matter to the Tribunal."

"The Crown has delegated most of its authority to carry out the duties of the RMA to local authorities. Along with that delegation is the requirement for the local authority to 'take into account the principles of the Treaty of Waitangi' when making decisions. However, as the Ngāwha Tribunal noted:

> Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources."

"In short, whereas the Crown itself is required to act consistently with the principles of the Treaty, that responsibility was significantly watered down under the Crown's delegation of authority to regional councils. Essentially, local authorities were not obliged to be Treaty-compliant in their decisions. The Ngāwha Tribunal found that this aspect of the legislation was 'fatally flawed'."

"The Ngāwha and CNI Tribunals recommended that the RMA be amended so that Crown delegates are required to 'act in a manner that is consistent with the principles of the Treaty of Waitangi'." p 1242

Wai 262: Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (2011)

Read the full Taumata Tuatahi report on the Waitangi Tribunal website

Claimants were from the following iwi: Te Rarawa, Ngāti Wai, Ngāti Porou, Ngāti Koata, Ngāti Kurī, Ngāti Kahungunu, Tūhoe

"The RMA in the reform process that led to it was a beacon of hope for Māori. For the first time, it seemed that they might be able to take more positive and proactive roles in environmental decision-30 making than those they had become accustomed to under earlier legislation."

"It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway."

"The relationships between kaitiaki and the natural environment – entwined as they are with the fundamental concept of whanaungatanga – are crucial to Māori culture and identity. Under the Treaty, the Crown must actively protect the continuing obligations of kaitiaki towards the environment."

"Kaitiakitanga is extensively acknowledged in the Resource Management Act 1991. The Act purports to 'recognise and provide for' Māori relationships with their ancestral lands, waters, sites, wāhi tapu and other taonga as 'matters of national interest'. It also specifically requires those who exercise powers under the Act to 'have particular regard to' kaitiakitanga and to 'take into account' the principles of the Treaty. We have found that a Treaty-compliant environmental management regime is one that is capable of delivering the following outcomes, by means of a process that balances the kaitiaki interest alongside other legitimate interests:

- control by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- partnership models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and
- effective influence and appropriate priority to the kaitiaki interests in all areas of environmental management when the decisions are made by others."

"The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case."

"Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified, specifically:

- **Enhanced iwi management plans:** We recommend that the RMA be amended to provide for the development of enhanced iwi resource management plans; that these plans be developed by iwi in consultation with local authorities; that these plans identify iwi resource management priorities and opportunities for delegation of control to kaitiaki or establishment of partnerships; and that these plans be confirmed during a joint statutory negotiation process between iwi and local authority representatives, during which there may be compromise. We recommend that, once adopted, these plans have the same status under the RMA as any district or regional plan or policy statement as the case may be.
- **Improved mechanisms for delivering control:** We recommend that the RMA's existing mechanisms for delegation, transfer of powers, and joint management be amended to remove unnecessary barriers to their use. We recommend that local authorities be required to regularly review their activities to see if they are making appropriate use of sections 33 and 36B, and be required to report annually to the Parliamentary Commissioner for the environment explaining why they made delegations or established partnerships in some circumstances and not in others. We also recommend that the Ministry for the environment be required to proactively explore options for delegations under section 188, and to report annually to Parliament on this.
- **A commitment to capacity-building:** We recommend that the Ministry for the environment commit to building Māori capacity to participate in RMA processes and in the management of taonga, and that this commitment should include providing resources to assist kaitiaki with the development of iwi resource management plans, and assisting kaitiaki to develop the resources or technical skills needed to exercise their kaitiaki roles.

- **Greater use of national policy statements:** We recommend that the Ministry for the environment develop national policy statements on Māori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership and influence on environmental decision-making."

Wai 863: Wairarapa ki Tararua Report Volume 3 (2010)

Read the full Volume 3 report on the Waitangi Tribunal website

"We find that while the local Government Act 2002 exposes iwi to the policies and actions of local government, it does not hold councils to account if they fail to provide opportunities for Māori to participate in decision making or do not actively protect environmental taonga. In other words, the Crown has delegated responsibility to local councils, but has not delegated an equivalent level of accountability."

"Delegation of Crown functions is of course in accordance with the Treaty if the Crown's Treaty obligations go with the delegation. However, we have seen in all spheres of local government activity, that the Treaty provisions and the relevant legislation are not sufficient prescriptive to oblige local bodies to conduct themselves in a manner that is consistently Treaty compliant. In this the Crown fails in its duty of active protection."

"Thus, we consider that both the Local Government Act, and the Resource Management Act, require more compelling Treaty provisions. Also needed are regular audits and sanctions for non-compliance." p 1062

"The Local Government Act 2002, Resource Management Act 1991, Historic Places Act 1993 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and other relevant legislation be amended to provide Māori the level of input that recognises their status as a Treaty partner."

"The current public works regime be changed to give effect to the Treaty of Waitangi, through amending the Public Works Act 1981 and amendments to Section 134 of Te Ture Whenua Māori Act 1993 and Section 342 and Schedule 10 of the Local Government Act 1974." p 1060

Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010)

Read the full Volume 2 report on the Waitangi Tribunal website

7.6.4 Conclusions

"Even though the Resource Management Act is universally acknowledged as a significant improvement on previous laws, the claimants' evidence point to several areas of ongoing concern. For several reasons, the Act's provisions that enable Māori to exercise rangatiratanga and act as kaitiaki in environmental management have not yet been properly realised in practice. Councils have been slow to come to terms with the Act's requirements to engage with Māori in their planning processes. At present, the most potentially potent provisions in the Act for the exercise of Māori rangatiratanga are those relating to the transfer, delegation,

or sharing of powers; however, councils in the region have made only very small and tentative steps towards sharing powers. Iwi management plans can also now be a powerful tool, but neither central nor local government has properly resourced such plans, and (at least initially), they had very little statutory weight."

"Instead of being involved in decision making and engaging in the preparation of plans, Tauranga Māori have expended considerable effort on fighting resource consents. This is a costly and ineffective way to try and shape planning processes, and as a result many Tauranga Māori have become extremely frustrated. The capacity of Tauranga Māori to participate in environmental management as kaitiaki is badly compromised by a lack of resources. Further, their largely unsuccessful battles show that the values of Tauranga Māori, particularly those of a spiritual nature, are not well understood by the general public or local authorities, and are often given little weight in their planning processes."

"There is tremendous and largely untapped potential for Tauranga Māori to play a much greater role as kaitiaki over the environments of Tauranga Moana, and to help restore their ancestral landscapes and the taonga of their waterways. Realising their desire to be kaitiaki will require much more constructive working relationships to be forged between tangata whenua, councils, and the wider community. There is considerable scope for such relationships under current legislation; what is required is a greater willingness to realise the enormous potential benefits from Māori involvement." p 587–588

"In the Ngawha Geothermal Resource Report, the Tribunal examined in some detail the implications for the Crown of its duty of active protection of Māori resource-use. It identified several important elements of the duty, including:

- that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences ;
- that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms;
- that the degree of protection to be given to Māori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great physical and spiritual importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances), for so long as Māori wish it to be protected; and
- that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled."

"We agree with these views about the nature and extent of the Crown's duty of active protection over Māori possession of their lands, waters, and other taonga."

"We have stressed that the Crown has always acknowledged that it has been bound to uphold the property rights of Tauranga Māori over their lands, waters, and taonga, as determined by their own customs. Any abrogation of this standard by the Crown constitutes a breach of the Treaty."

“However, a further issue then arises – one which is critical in the context of these claims. This is the question of whether, if Tauranga Māori have lost legal rights over their taonga by means that are inconsistent with Treaty principles, they may not now retain any Treaty interests in their taonga. This is a very significant issue for the hapū of Tauranga Moana, since so much of their property has been alienated. They have thereby lost the ability to control or care for their taonga, including wāhi tapu (as discussed in chapter 8), and waterways.”

“The Tribunal’s Petroleum Report and He Maunga Rongo have each found that Māori retain ‘a Treaty interest’ whenever legal rights are lost by means that are inconsistent with Treaty principles. Further, when a Treaty interest arises:

> "there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy.” p 602–603

“(b) Treaty analysis and findings :

“The Crown’s efforts to secure title to navigable rivers through the Coal-Mines Amendment Act 1903 represent a very serious breach of Treaty principles. Instead of providing active protection, the Crown unilaterally removed Māori property rights. It did so without consultation – indeed, by an obscure and virtually undebated clause of a seemingly unrelated Act. This was a breach of the principles that the Crown should seek to engage with Māori in a spirit of partnership, and act in good faith.”

“Incorporation of this provision in subsequent legislation, most recently as section 354(1) of the Resource Management Act 1991, has allowed the breach to continue.” p 610–611

“Several previous Tribunals have found that the Resource Management Act as it then was did not provide for rangatiratanga. The Ngawha Geothermal Resource Report concluded in 1993 that the Act was ‘fatally flawed’ because it does not require decision-makers to act in conformity with, and apply, Treaty principles. It stressed that the language used by the Act’s provisions meant that the Crown’s Treaty obligations could not be given proper priority.”

“Though the Crown has since amended the Act, those amendments still do not address the principal concerns outlined in the Ngawha Report.”

“As stressed in the Ngawha Report, the key provisions of part 2 of the Resource Management Act use comparatively weak language. In particular, section 8 (by which persons exercising powers and functions under the Act must only ‘take into account’ the principles of the Treaty) is a weak provision. It is weaker than the language used in sections 6 and 7, where decision-makers are to respectively ‘recognise and provide for’ and ‘have particular regard to’ various matters, some of which are relevant to Māori. It is also weaker than the language used in other Acts that make reference to the Treaty, such as the Conservation Act, which requires decision-makers to ‘give effect’ to the principles of the Treaty.”

“This weakness is reflected in case law, which suggests that though decision-makers must be able to show that they have found a balance between section 8 and other matters being considered, section 8 itself may often not impose any further obligations on decision-makers other than those listed in sections 6(e) and 7(a) of the Act. As He Maunga Rongo found, the partnership principle, which rests on the accommodation between kawanatanga and rangatiratanga, therefore cannot be weighed in the balance.710 That report also noted that kaitiakitanga ‘can exist only where there is rangatiratanga, because they are inextricably linked’.” p 620–621

"In short, the provisions of the Resource Management Act do not guarantee that those exercising powers under the Act do so in a manner consistent with the Treaty, and in practice Māori have been generally unable to become one of the bodies that exercise those powers. In allowing this to occur the Crown is in breach of the principle of partnership, and of its duty of active protection of Māori rangatiratanga."

"Previous Tribunals have found that the Act ought to be amended to address these shortcomings. This is certainly one way in which the Crown could better ensure its delegates comply with its Treaty obligations. But it is not, we believe, the only way. In our view, the real issue with the Act, as it stands, is that the existing legislative provisions for Māori to exercise rangatiratanga and act as kaitiaki are not being properly implemented. In particular, after almost 20 years there has still not been a single instance of a transfer of powers to iwi. Nor, in Tauranga, has there been an explicit instance of joint management under section 36. There have been very tentative movements towards allowing Māori to participate in management functions and powers, but these fall far short of Māori aspirations, and do not reflect a true partnership. Clearly, given such a history, the provisions relating to Māori management or joint management or resources cannot be left solely at the discretion of local authorities. We find that much more active Crown oversight is required if such transfers or sharing or powers are to occur. We find that they must occur, if the Crown is to avoid further breaches of the principle of partnership and its duty of active protection. As demonstrated by the history of customary fisheries, the Crown has a legacy of passing legislative provisions that would enable a measure of Māori rangatiratanga over their property and taonga, only to then leave the provisions unsupported and unpromoted so that they are never utilised. In such cases, as found by the Manukau Report, '[t]hose words mean nothing'."

"The principle of partnership and the duty of active protection oblige the Crown to ensure that under its legislation Māori can – and do – exercise rangatiratanga over their taonga. The Crown must actively work with tangata whenua and local authorities to identify which natural resources and environments in Tauranga Moana will most help to restore tribal rangatiratanga over their taonga, and are suitable for a shift in the management regime." p 623–624

"In summary, the Historic Places Act now contains a strong injunction that the principles of the Treaty must be given effect to (albeit with a qualifying clause of unspecified scope), while a number of provisions for the statutory protection of heritage have been added to the Resource Management Act, in particular, and its existing provisions for Māori participation have been strengthened."

"However, a number of the key recommendations of the reviews that we have summarised have not been implemented. In particular, despite the unanimity of the reviews on these key points, there is still no standalone Māori heritage agency, and there is still no national policy statement for heritage management. Other areas where significant issues remain almost entirely unaddressed include: the continuing ambiguity about the role of, and funding for, the trust's register; the lack of incentive funding at the local authority level; and the lack of funding to assist iwi and hapū to create heritage databases." p 642

"In 1992 the Te Roroa Tribunal provided a sustained analysis of the proper role of tangata whenua and the Crown in the management of Māori cultural heritage. That Tribunal found that Māori participation in what others decide to do with their taonga is not the proper partnership envisaged by the Treaty:

> Wahi tapu are taonga of Maori, acknowledged as such in article 2 of the Treaty. The role of the department and Historic Places Trust in the 'partnership' is not a decision making role or being 'included' in what is not theirs. Rather, it is to assist Te Roroa by the

> provision of services and advice when they are sought, to enable them to protect and care for the wahi tapu."

"That Tribunal further proposed that the Crown:

> re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wahi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment." p 292

"We endorse these findings of the Te Roroa Tribunal. The issue is whether Crown legislation and policy has since evolved to enable Tauranga Māori to exercise rangatiratanga (authority and control), and act as kaitiaki (protect and care for) over their cultural heritage."

"Before we address this issue however, we need to make clear that the capacity of the Crown to enable Māori to exercise rangatiratanga and to act as kaitiaki will differ depending on the specific category of land at issue, for example, Crown land, public land owned by local authorities, and private land. The latter categories present particularly complex problems of how to best reconcile public rights of access and enjoyment, or the legitimate property rights of private landowners, with the equally legitimate right of tangata whenua to retain links to their significant sites within their ancestral landscape. These issues are further complicated in situations where Māori have lost their ancestral lands in ways inconsistent with the principles of the Treaty. We acknowledge the complexity of the issues involved but consider that the Crown and Māori must not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of kaitiakitanga."

"To this day neither the Historic Places Act nor the Resource Management Act provide Tauranga Māori with any straightforward mechanisms to exercise rangatiratanga and act as kaitiaki over their ancestral places on any of these categories of land. One mechanism which might come closest is the possibility, under both the Historic Places Act and Resource Management Act, that Māori groups might become heritage protection authorities, able to issue heritage protection orders. Under the Resource Management Act, an iwi authority, Māori trust, or incorporation, can in theory become heritage authorities if constituted as a body corporate, and if the Minister for Culture and Heritage accepts their application."

"The Te Roroa Tribunal commented that there may be several issues for Māori in considering undertaking this process. First, that Tribunal felt that the requirement to be a body corporate was inappropriate, since the trustees who administer marae, the cultural foci of Māori communities, do not constitute a body corporate. We note, however, that trusts and incorporations established under Te Ture Whenua Māori Act 1993, and Māori trust boards, are body corporates. Secondly, disclosing the location of wāhi tapu and scrutiny at public hearings could pose threats to their security. Thirdly, and most significantly, substantial costs are involved in making a heritage order, including one-off costs for applying (and a high likelihood of appeal) and ongoing costs in processing resource consent applications. In particular, landowners can apply for compulsory purchase and compensation by the heritage authority if they cannot sell or use their land in a reasonable manner.294 Making a heritage order therefore inevitably involves significant delays, financial costs, and considerable risks ; as the Parliamentary Commissioner for the Environment noted in 1996, it is a last resort option for protection." p 678–679

Wai 796: The Report on the Management of the Petroleum Resource (2010)

Read the full report on the Waitangi Tribunal website

[There is an extensive section in the Tribunal Analysis and Findings section 8.2 p 147–188. See the full report for this]

"In terms of the RMA, we recommend, as the Tribunal has done many times before us, that it be amended to require decision-makers to act consistently with the Treaty. We also recommend that a commissioner be established, perhaps with the title of Treaty of Waitangi commissioner, to monitor local authorities' performance in respect of Treaty obligations delegated to them by the Crown. In order to ensure the fullest possible protection of Māori interests, legal aid for appeals to the Environment Court (the final resort for objectors) should be more readily available to hapū and tribal authorities."

"If these recommendations are implemented, we believe that the petroleum management regime can be made Treaty-consistent and that the high level of protection that legislators intended to give Māori interests when originally passing these Acts can be given better effect. We will all benefit from a truly fair balancing of interests and the protection of cultural and environmental heritage for future generations." [Letter of Transmittal p xvii)

"In this chapter, we provide our analysis of the claims and our findings on whether the petroleum management regime is consistent with Treaty principles. In essence, our view is that the regime falls short of this standard by a considerable margin, because of three key systemic flaws that affect its operations and results. First, Māori lack capacity in terms of infrastructure and resources to engage effectively with Crown Minerals Act and Resource Management Act processes. Secondly, the Crown has failed to monitor the performance of its delegated Treaty responsibilities by local authorities. Although councils are trying, their efforts have been piecemeal and have not met with particular success. The Crown has failed to monitor this situation or assist with constructive solutions. Thirdly, partly as a result of the first two problems, Māori perspectives are not being adequately considered or protected in decision-making on petroleum matters. Also, the regime has specific flaws in Treaty terms: it fails to provide sufficient protection for the small surviving Māori land base or for Māori interests (including environmental interests) in the management of petroleum in the exclusive economic zone (the EEZ)."

"We finish by outlining the prejudice suffered by claimants as a result of the regime's Treaty failings and we discuss various remedies that might help both to make the management of petroleum Treaty compliant and to remove the prejudice currently being suffered by the claimants." p 147

"The Crown's failure to respond to the Tribunal's repeated recommendation to cure the RMA of its 'fatal flaw' is a continuing source of grievance for many claimants. Our inquiry has been closely focused on just one corner of the resource management system, and as a result we have been able to make specific recommendations to the Crown about how to make that corner Treaty compliant. While there are some differences between the petroleum 'corner' and the rest of the regime, we are confident that our recommendations for the reform of the petroleum corner will, if adopted, have beneficial flow-on effects right through the resource management system. In other words, we believe that, if the Crown 'gets it right' for Māori in

the management of the petroleum resource, it will also get it right – or, at least, see how to get it right – for Māori throughout the entire resource management system. That is because our recommendations for reform have a very large procedural focus. And that is because, in an area of law as complex as resource management – where numerous interests are involved and very few fixed answers can be given in advance to any problems that may arise – we consider that the best way of ensuring Treaty-compliant outcomes is to ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made."

"In our view, while the Local Government Act 2002 encourages such processes, it has proven inadequate to ensure that local authorities discharge the Crown's Treaty obligations. And, while central government entities are more familiar with the Crown's obligations, they too can lack the capacity and the will to incorporate Māori knowledge and values systematically in their decision-making processes. Māori are the clear losers from this state of affairs, in a subject area of vital importance to their culture."

"But in fact all New Zealanders lose out, for Māori interests often coincide with other environmental interests, and the preservation of Māori culture is truly a matter of national importance."

"In sum, then, we believe that this inquiry provides a snapshot of one part of a large and complex system, from which a manageable plan for reform can be developed that will apply with beneficial effects throughout the system." p 186

8.2.4 Systemic problems in the current regime

We consider that there are fundamental flaws in the operation of the current regime for managing the petroleum resource which arise from the combined effect of the following features:

- the limited capacity of 'iwi authorities' to undertake the role envisaged for them in the regime ;
- the Crown's failure, despite its Treaty responsibility to protect Māori interests, to provide local authorities with clear policy guidance and to require them to adopt processes that ensure appropriate Māori involvement in key decisions; and
- the low level of engagement with te ao Māori and Māori perspectives exhibited by central and local government decision-makers. p154

Recommendations:

- The Resource Management Act 1991 be amended to require decision makers to act consistently with the Treaty principles.
- The Crown produce National Policy Statements and National Environmental Standards to provide guidance to territorial authorities on enhancing and protecting taonga and wāhi tapu.
- Joint consent hearings by local authorities be put to greater use.

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

Read the full legislation on the Parliamentary website

Note: This extract is from the settlement legislation sections 14 to 16 in the Preamble. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 was by direct Negotiation, not with proceedings through the Waitangi Tribunal. It has been included as it was referenced in another Tribunal report and was also agreed by Crown and Waikato-Tainui for inclusion in the legislation.

"The Resource Management Act 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for River use. The Act did not, however, provide for protection of te mana o te Awa and te mana whakahaere of Waikato-Tainui. Since the Act came into effect, Waikato-Tainui have been involved as respondents in many consent hearings, seeking conditions which would protect the River."

"Negotiations with the Crown were commenced by Robert Te Kotahi Mahuta on behalf of Waikato-Tainui in 1999. Following his death, they recommenced in 2005, leading to the deed of settlement and the Kiingitanga Accord between the Crown and Waikato-Tainui dated 22 August 2008."

"From the 1860s to the present, Waikato-Tainui have continually sought justice for their Raupatu claim and protection for the River. The principles of te mana o te awa and mana whakahaere have long sustained the Waikato River claim together with the principles described in the Kiingitanga Accord, and those principles underlie the new regime to be implemented by this settlement."

Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims Volume III (2008)

Read the full volume III report on the Waitangi Tribunal website

"We find the Crown in breach of the Treaty principles of partnership and active protection. It has failed to ensure that the Resource Management Act 1991 is implemented in accordance with its stated intention to protect Maori interests and to provide for their values, custom law, and authority in resource management decisions. It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. As a result, iwi are faced with insufficient regard to, or even understanding of, their values and interests, and an inability to participate on a level playing field with consent applicants and authorities. Although the Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it. Clearly, the claimants have been prejudiced by these breaches of Treaty principle." p 1223

"The Tribunal also highlighted problems with resource and fishery management regimes and recommended changes and improvements to ensure that these regimes were more consistent with the Treaty. The Crown admitted that the Resource Management Act 1991 was not being implemented in a manner that provided fairly for Māori interests."

The Tribunal's report highlighted a number of shortcomings with respect to the current 'offer-back' regime under the Public Works Act 1981. It recommended amendments to Te Ture Whenua Māori Act 1993 and the Public Works Act to address these issues."

Wai 1200: He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008)

Read the Volume 4 (Part V) on the Waitangi Tribunal website

> 'It is now settled law that those exercising powers under the RMA are not required to act in a manner consistent with the principles of the Treaty of Waitangi. Rather, they must engage in balancing each of these factors. Thus, all matters listed in sections 6 to 8 are evaluated one against the other. In chapter 17, we considered whether such an approach to Treaty rights is consistent with Treaty principles and concluded, as the Whanganui River Tribunal did, that it is not.'
>
> "Furthermore – and again as Ms Chen points out – there is case law that suggests that section 8 does not give rise to any obligation on a decision maker under the RMA to consider additional obligations, beyond those listed in sections 6(e) and 7(a) of the Act. Thus, principles such as the partnership principle – with its accommodation between kawanatanga and rangatiratanga, its mutual benefit, and its reciprocity – cannot be weighed in the balance. Only those matters listed in sections 6 to 8 can. We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can exist only where there is rangatiratanga, because they are inextricably linked.'p 1408

The Tribunal's findings

"On the basis of our discussions in this chapter (and the other chapters of part V), we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi. In doing so, we accept the submissions made by Mr Bennion that, while the Act is an advance on previous legislation, it still fails to accord with Treaty principles. It fails in the following important respects:

- During the reforms of the 1980s, the Crown indicated that ownership issues were not to be dealt with by the RMA. But the Crown then preserved its rights to control access to natural water, which it promptly delegated to regional or district councils. It also preserved its rights conferred by the Coal-mines Act Amendment Act 1903. Thus, while the section of the Coal-mines legislation vesting ownership in the Crown of all beds of navigable rivers was repealed, as was section 21 of the Water and Soil Conservation Act 1967, section 354(1) of the RMA provides that the Crown's rights conferred by these statutes continue. So the Crown's position has never been diminished by the RMA. Conversely, the Maori position has been diminished. Their rights and interests have not progressed much further than where they were pre-1991. We take this view because section 6 simply indicates that the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga is a matter of national importance. Other than broadening the category of taonga that may be considered, this provision takes Maori little further than the Town and County Act 1977. Furthermore, taking into account kaitiakitanga, as listed in section 7, does not recognise that, in order to exercise kaitiakitanga, there had to be rangatiratanga. If that may not be taken into account when considering the meaning of kaitiakitanga and its relevance to the 'matter of national importance', then what is left? The answer has to be Maori cultural and spiritual

values. This again takes Maori no further than was recognised in the Huakina Development Trust (1987) High Court decision. Finally, in terms of section 8 of the Act, all that can be considered may be restricted to those matters listed in part II. Therefore, we ask, what has been gained? The only answer must be perhaps a greater right to be consulted. Although not as sophisticated, that was already a feature of the pre-1991 regime."

- "The Crown's justification for these lack of gains for Maori is that there are a multitude of groups with interests in many of these resources, and only the Crown or its delegates may fairly and independently determine rights of allocation and use. Furthermore, only it or its delegates should be responsible for their management. The arguments are absolutist in the sense that they rely totally on article 1 of the Treaty of Waitangi and the right to govern. We reject such a contention on the basis that the Treaty right to govern in article 1 was also subject to the guarantee in article 2 of protection for what Maori possessed and the exercise of rangatiratanga over those possessions. We discussed the full extent of the Treaty guarantees in chapter 17."
- "Therefore, the Crown's position has never been diminished by the RMA. Conversely, the Maori position has been diminished. Their rights and interests have not progressed much further than where they were pre-1991. We take this view because section 6 simply indicates that the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga is a matter of national importance. Other than broadening the category of taonga that may be considered, this provision takes Maori little further than the Town and County Act 1977. Furthermore, taking into account kaitiakitanga, as listed in section 7, does not recognise that, in order to exercise kaitiakitanga, there had to be rangatiratanga. If that may not be taken into account when considering the meaning of kaitiakitanga and its relevance to the 'matter of national importance', then what is left? The answer has to be Maori cultural and spiritual values. This again takes Maori no further than was recognised in the Huakina Development Trust (1987) High Court decision. Finally, in terms of section 8 of the Act, all that can be considered may be restricted to those matters listed in part II. Therefore, we ask, what has been gained? The only answer must be perhaps a greater right to be consulted. Although not as sophisticated, that was already a feature of the pre-1991 regime."
- "There is no requirement on regional or district councils, when making decisions under the RMA, to give effect to Maori concerns because they are Treaty rights-holders. Contrast that with the requirement to give full expression to the purpose of the Act as set out in section 5. An example of the approach they must take comes from the decision in Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti District Council, where the majority of the Environment Court found that:

  > We cannot see any way in which the principles of the Treaty of Waitangi, the principles of s 7, or the principles of s 6 can be applied in a manner which would cause us to set to one side the all embracing community thrust of s 5, aimed as it is in the present case, at a living community suffering extraordinary difficulties and grief as a result of substandard arterials."
- "While we recognise, in certain circumstances, the need to provide for all communities, an approach that can set aside Maori concerns in the manner described above is not acceptable. In our view, alternative options would need to be explored first before a proposal got to the point where it became a contest between competing interests."

- "The RMA fails to deal with the key issue of contested ownership of resources. As Mr Bennion pointed out, the Act itself does not recognise or allow those exercising powers under it to recognise situations where ownership of resources is contested by Maori."
- "A consent authority, for example, cannot use this information to refuse an application for a resource consent. Rather, all a consent authority needs to assess is whether such access is consistent with the sustainable management of the resource and the other requirements of the Act. In other words, the consent authorities may not act in a manner consistent with the principles of the Treaty of Waitangi, because they must act in accordance with the Act's statutory regime. In this respect, we point to the evidence concerning geothermal resources which we discuss in detail in chapter 20."
- "As we discuss below and in chapter 20, the RMA fails to deal with historical issues. It does not look backwards in any substantial way. As a result, the historic degradation, damage, or pollution of a taonga cannot be raised as more than background during resource consent processes under the Act. Nor can a consent authority consider the historical issues concerning how an iwi or hapu has lost their ownership of a resource or taonga. There is no requirement for consent authorities to consider how Maori have been placed historically in terms of these resources. While they may do so, they are not required to do so by the RMA."
- "We note the option for transfer of power under section 33 of the Act. But it has never been used in the Central North Island. We also note that while a local authority may agree to enter into a joint-management agreement under the Resource Management Act Amendment Act 2005 (section 4 and section 36B of the RMA), it is not required to do so. Herein lies the problem for Maori: decisions to enter joint-management arrangements are at the discretion of a local or regional authority. This subordinates iwi or hapū rangatiratanga because they cannot expect that such decisions will be made or reviewed in accordance with Treaty principles. Such agreements could only ever operate in a manner consistent with the RMA, which, as we have explained, is deficient in Treaty terms."
- "As we note in detail in chapter 20, consultation with Maori in the resource consent process is not a statutory requirement under the Act unless they are recognised landowners who may be affected by the grant of a consent. (See section 36A of the Act.) Rather, consultation is a matter left to the discretion of the staff of the consent authority or the applicant for the consent. While we note the decisions of the Environment Court and the High Court suggesting that it would be good practice to engage in such consultation, it is unlikely that the failure to consult (given the new section 36A of the Act), could now be used as the basis for rejecting a resource consent application." p 1410–1411

Wai 686: The Hauraki Report Volume 3 (2006)

Read the full Volume 3 report on the Waitangi Tribunal website

"We acknowledge the role of the Resource Management Act in the protection of wahi tapu and taonga, and appreciate that this Act is an attempt by Government to provide a holistic approach to the management of resources and taonga. But we also consider that it should be noted that the legislation is complex, and specialist legal advice is currently required for access to the full range of legislative protections on offer. The various protective options provided by the Act are not used consistently by territorial authorities nationwide."

"We suggest that, for the Resource Management Act to be a more consistently effective tool for Maori (which the Crown has conceded is not always the case), the Government, local authorities, and Maori should work together to ensure an understanding of the processes on offer, as well as a consistent approach to their application. We acknowledge that the Resource Management Act already makes provision for these parties to work together, and we encourage the use of these available provisions for protection of wahi tapu to the fullest extent possible. Use of the existing provisions under the Resource Management Act should be carefully monitored, so that the Crown can put in place effective mechanisms should the existing provisions be less than fully adequate. In the Report on the Manukau Claim of almost 20 years ago, the Tribunal observed, and we agree, that wahi tapu protection procedures must be publicised. We note that such a step appropriately involves the full participation of both Crown and Maori as Treaty partners." p965

Wai 1071: Report on the Crowns Foreshore and Seabed Policy (2004)

Read the full report on the Waitangi Tribunal website

"But it should not be forgotten that Maori were intended to be active participants in, for example, the resource management regime, from the outset – in the case of the Resource Management Act, since 1991. There are extensive provisions in that Act for recognition of the Maori interest in the management of the environment, including the devolution to them of decision-making powers. It is certainly the case that the Treaty aspirations of that legislation have never come to fruition. The complaints of Maori about the regime have come before us, and have been reported upon to the Government."

"In our view, the Crown had an obligation to take measures to ensure that the intentions of that Act were realised long ago. To agree to do it now as partial recompense for the removal of legal rights does not seem to us to be a very good deal for Maori." p 104–105

Wai 145: Te Whanganui a Tara me ona Takiwa – Report on the Wellington District (2003)

Read the full report on the Waitangi Tribunal website

"[W]e have found that the Crown failed to make legislative provision for the involvement of Maori in the managing of the harbour and its resources until very recently, and we deplore this lack of provision during the period in which the harbour became seriously polluted. Under the Resource Management Act 1991, Maori values and the principles of the Treaty of Waitangi must now be taken into account when making decisions about resource management and there is greater provision for Maori to have input into resource management issues concerning the harbour. We consider, however, that the Act does not go far enough, in that it merely requires decision-makers to take into account the principles of the Treaty and does not ensure that persons exercising powers under the Act do so in a way that gives effect to and is consistent with the Treaty." p XXV

18.6.8 The Resource Management Act 1991

"While helpful, the Tribunal believes that the provisions of the Resource Management Act 1991 and associated policy statements are inadequate. The Tribunal's Ngawha Geothermal Resource Report 1993 was critical of the Resource Management Act on the ground that it does not require persons exercising functions under the statute to act in conformity with Treaty principles but merely provides that Treaty principles must be taken into account. This criticism was endorsed by the Tribunal in its 1993 Preliminary Report on the Te Arawa Representative Geothermal Resource Claims and its Te Whanganui-a-Orotu Report 1995. In its 1999 Whanganui River Report, the Tribunal found the Resource Management Act to be 'inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi'. This finding is equally relevant to Wellington Harbour." p 478

Wai 45: The Muriwhenua Land Claims Post 1865 (2002)

Read the full report on the Waitangi Tribunal website

"Not only is the definition of kaitiakitanga in the Resource Management Act 1991 inadequate, but in s.7 it is listed as only one of seven other matters that 'persons exercising functions and powers' under the Act 'shall have particular regard to'. In s.6 a number of 'Matters of national importance' are listed, including 'preservation of the natural character of the coastal environment' in s.6(a), and 'maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers' in s.6(d). Among all these is s.6(e): 'The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'."

"While the Act provides for consultation with iwi by local and regional authorities, Muriwhenua people feel that in the past this has either not occurred, or has been inadequate." p 343

Wai 64: Rekohu- A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands (2001)

Read the full report on the Waitangi Tribunal website

"We find that we must part company with the understanding of 'tangata whenua' and 'mana whenua' as used in the Reserves Act 1977, the Conservation Act 1987, and the Resource Management Act 1991. In section 2 of the latter, 'mana whenua' means 'customary authority exercised by an iwi or hapu in an identified area'. 'Tangata whenua', in relation to a particular area, is defined as meaning 'the iwi or hapu that holds mana whenua over that area'. We think that this confuses several things, not least by its association of 'tangata whenua' with power. We have thought it best to leave aside the legal definitions and to look at the matter solely in customary terms."

"As we see it, the core meaning of 'tangata whenua' relates to an association with the land akin to the umbilical connection between an unborn child and its mother. It comes from creation beliefs holding that Maori were born of Papatuanuku (Mother Earth) and is used to describe the first people of a place, as though they were born out of the land. However, it is also used to describe those who have become one with the land through occupation over generations. It is relevant to ask whether the newcomers placed the placenta of the new born on the land, whether their ancestors have been regularly buried in particular sacred sites, and whether regular respect for those ancestors and sites is still maintained."

"These and similar questions define the degree of permanence or transience in cultural terms."

"Accordingly, it is possible that some people can be more 'tangata whenua' than others, so that the term 'tangata whenua tuturu ake' or 'the true tangata whenua' might be used to distinguish, for example, Moriori, from Ngati Mutunga of Rekohu. Moriori described the latter as 'tangata whenua iho' meaning 'afterwards'."

"But 'tangata whenua' is not customarily used to describe political power. Instead, it would be appropriate for Maori speakers to talk of conquerors on the one hand and the true owners of the soil, the tangata whenua, on the other." p 25–26

"[W]e cannot support the approach adopted in the Resource Management Act 1991, which defines tangata whenua by asking who has the customary authority in a place. If that question can be answered at all, the answer will surely exclude many who are properly tangata whenua as well. If it is the intention of the Act that some special consideration should be given to Maori who have ancestral associations with particular areas of land, then we think that it would be best if that were said. It might then be found that more than one group has an interest. If in any particular case it is intended that particular Maori communities should be heard, then it would be best to describe the type of community, be it traditional or modern." p 26

Wai 167: The Whanganui River Report (1999)

Read the full report on the Waitangi Tribunal website

"The several respects in which the Treaty has been breached have been set out at various parts of this report. Broadly, however, the finding of the Tribunal is that the acts of the Crown in removing from Atihaunui the possession and control of the Whanganui River and its tributaries, and its omission to protect the Atihaunui rangatiratanga in and over the river, were and are contrary to the principles of the Treaty of Waitangi, and Atihaunui have been and continue to be prejudiced as a result."

"Acts contrary to the principles of the Treaty of Waitangi include the Coal-mines Act Amendment Act 1903 in expropriating the riverbed. To the extent that the Resource Management Act 1991 vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles. The Act in fact vests control of rivers in regional authorities, with certain rights of hearing and appeal being given to the public, including Atihaunui."

"'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more

akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away. Moreover, the Act perpetuates the vesting of the Whanganui riverbed in the Crown."

"As we have said, Atihaunui possessed and controlled the river. We have also found that possession and control was not taken from them in any way that was consistent with the Treaty of Waitangi. It follows that such use rights as are consistent with the Treaty are only those that Atihaunui have freely and willingly allowed." p 339

Wai 212: Te Ika Whenua Rivers Report (1998)

Read the full report on the Waitangi Tribunal website

5.3.5 Power to grant water rights retained in Resource Management Act 1991

"Section 21 of the Water and Soil Conservation Act 1967 (rights in respect of natural water) was retained in section 354(1) (b) of the Resource Management Act 1991. The power to grant rights for the use of natural water, however, was to be exercised by regional water boards instead of by ministerial discretion."

"Under the Resource Management Act, specific provision is made for the protection of Maori values and interests. All persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are required to recognise and provide for various matters of national importance, including the 'relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (s 6(e)). They are also required to have particular regard to kaitiakitanga (s 7(a)), interpreted as 'the exercise of guardianship', including 'the ethic of stewardship' (s 2). Furthermore, all persons exercising functions and powers under the Act are required to 'take into account the principles of the Treaty of Waitangi' (s 8)."

"When preparing or changing a regional policy statement, a regional council is required under section 61(2)(a)(ii) and (iii) of the Act to have regard to any regional planning document recognised by an iwi authority affected by the policy statement and to regulations relating to the conservation or management of fisheries, including taiapure, mahinga mataitai, and non-commercial Maori customary fishing. Similar provisions are imposed under section 66(2)(c)(ii) and (iii) in the case of preparation or change of a regional plan. A regional policy statement is to state matters of resource management significance to iwi authorities (s62(1)(b)). A regional council is required to consider the desirability of preparing additional regional plans whenever any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources are likely to arise (s 65(3)(e))."

"The Act, Ms Ertel submitted, was deficient because it failed to make any positive provision for the recognition and exercise of Maori ownership and tino rangatiratanga over a river and, particularly, of or over the water." p 47

"While there are now provisions under the Resource Management Act 1991 for consultation with tangata whenua, these could be likened to recognition of tangata whenua as a party with a special interest, not one with authority and control commensurate with tino rangatiratanga over taonga or property. It is not surprising that the claimants allege that consultation was

inadequate over the Kioreweku proposal (see sec 6.4) and the eel replenishment scheme (see secs 6.5-6.8), for while some individuals were consulted, there was no attempt made to identify and consult with hapu interests. Although the Act makes specific provision for the protection of Maori values and interests (see sec 5.3.5) – in contrast to the Water and Soil Conservation Act 1967 (sec 5.3.4) – it does not accord to tangata whenua the authority or control over taonga or property guaranteed to them under article 2 of the Treaty." p90

"While the Resource Management Act requires those administering it or in management to take into account the principles of the Treaty and Maori views and values, it does not confer tino rangatiratanga on tangata whenua or recognise any such status. It simply gives Maori the opportunity to be heard by the controlling body on matters of concern to them; albeit without any funding or assistance by way of proper legal and technical advice - a situation that seems to us to be far removed from the guarantee given under article 2 of the Treaty." p141

"In the Ngawha Geothermal Resource Report 1993, the Tribunal found that:

> the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi." p 141

"In the Te Whanganui-a-Orotu Report 1995, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga."

"We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues." P142

Wai 55: Te Whanganui-a-Orotu report (1995)

Read the full report on the Waitangi Tribunal website

"We endorse the findings in the Ngawha Geothermal Resource Report 1993 that (para 8.4.6):

> 'The Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed.'"

"Paragraph 8.4.7:

> 'We repeat here our finding that the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.'"

"As in the Ngawha claim, we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish."

"In the present climate, we think that the resource management and conservation management structures are themselves impediments to Treaty principles and utmost good faith. The way in which they operate in the claim area reflects what Sir Kenneth Keith, president of the New Zealand Law Commission, described to the New Zealand Institute of Advanced Legal Studies Conference in February 1995 as 'a top down view of law and administration', rather than 'a bottom up view'."

"He went on to suggest that:

> 'We should draw on the extensive experience of individuals, families, tribes, and many of other groups organising themselves within a State or indeed across several States.'

"The Tribunal commends this suggestion to the local authorities and the Department of Conservation, which are managing the resources of Te Whanganui-a-Orotu and conserving the Ahuriri Estuary essentially from 'a top down view'. They should seek to act as a catalyst for 'a bottom up view'." p 158–159

Wai 27: The Ngai Tahu Ancillary Claims Report (1995)

Read the full report on the Waitangi Tribunal

"The Tribunal in its Ngawha Geothermal Resource Report (Wai 304) has recently expressed strong reservations about the effect of the words 'take into account' in section 8 of the Resource Management Act:

> 'It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so.'

"As a result of its inquiry into the Ngawha geothermal claim, the Tribunal has recommended that an appropriate amendment be made to the Resource Management Act 1991 to require that all persons exercising functions under the Act shall act in a manner consistent with the principles of the Treaty of Waitangi. We must now await and see how the Government responds to the Tribunal's recommendations." p 342

"We caution, however, that in devolving power to local authorities the Crown's responsibility to uphold the principles of the Treaty is in no way lessened." p 369

Wai 153: Te Arawa Geothermal Resources (1993)

Read full report on the Waitangi Tribunal website

"The Crown cannot avoid its Treaty duty of active protection of the claimants' taonga by delegation to local or regional authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of geothermal resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled."

"We repeat here our finding in chapter 8 of the Ngawha Geothermal Resource Report that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi. The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the omission and in particular, by the absence of any provision in the Act ensuring priority is given to the protection of their taonga and confirming their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control them as they wish." p 34

"The Crown, through the medium of the Resource Management Act, has delegated to regional councils the power to make regional plans without the full interest of the claimants in the geothermal resource, and the extent of the Crown's Treaty obligations to protect such interests, being first ascertained. As a consequence, it is virtually certain that a regional geothermal plan, such as that proposed to be publicly notified on or about 1 July 1993 by the Bay of Plenty regional council in respect of the Rotorua geothermal field, will fail adequately to protect Maori Treaty rights in their geothermal taonga. Such failure on the part of the Crown is inconsistent with its Treaty duty to protect the claimants' interest in their taonga. As a consequence, claimants are likely to be prejudicially affected by such breach of duty."

"We reiterate our recommendation in chapter 8 of the Ngawha Geothermal Resource Report 1993, that an appropriate amendment be made to the Resource Management Act 1991 providing that, in achieving the purpose of the Act. All persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi." p 35

Wai 304: Ngawha Geothermal Resources (1993)

Read the full report on the Waitangi Tribunal website

"It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed." p 145

Tribunal findings

"At the time of the signing of the Treaty in 1840 Maori were almost totally dependent for their sustenance and livelihood on the natural resources of Aotearoa. Maori nurtured and protected those resources. Kaitiakitanga was an essential element of rangatiratanga. It is inconceivable that Maori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return they exchanged the power of governance. The Ngawha springs are of immense value not only to the claimant hapu of Ngawha but to all of Ngapuhi. The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership which the Treaty embodies and represents requires no less."

"The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi."

"The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision, a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha." p 146

Recommendations

"The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi." p 147

"We turn next to the question of whether, as the claimants maintain, the Resource Management Act and in particular the management regime established by the Act ensures that the claimants' Treaty rights in respect of their geothermal resource are fully protected."

"We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled."

"Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed."

"We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi."

"The tribunal has further found that the claimants have been or are likely to be prejudicially affected by the foregoing omission and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision a development such as that proposed by the joint venture to exploit the underlying

Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha." P153-154

Wai 119: The Mohaka River Report (1992)

Read the full report on the Waitangi Tribunal website

"Under the Resource Management Act, local authorities are responsible for the management of river and associated resources and for approving consents for uses in these areas. As noted above, these authorities are required to take into account the Treaty when exercising any functions or powers under the Act. We think that this is appropriate. The Crown is entitled to devolve its duties under the Treaty, through carefully worded legislation, to another authority. Nonetheless, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga."

"The question of whether the Act is consistent with the principles of the Treaty was not argued in detail before us. We therefore express no opinion on that question." p 68–69

Wai 38: Te Roroa Report (1992)

Read the full report on the Waitangi Tribunal website

[There is an extensive passage about impacts on multiple land ownership, wāhi tapu, and the definition of iwi authorities. See the full report for this.]

"No evidence has been presented as to the consequences of multiple ownership, and accordingly we have not considered these in the report. We have, however, considered it appropriate to provide some discussion, especially its resource management implications, which is in appendix 5"

"The Crown has identified a problem with multiply-owned Maori land in relation to resource management matters and has provided a solution, the "iwi authority", which is assumed to be a traditional concept. To provide what is thought to be a "Maori" solution suggests an assumption that it is a Maori problem. It is not. It is a Crown problem…" "In our view there is an urgent need for amendment to the Resource Management Act 1991 in order to overcome problems such as those in relation to s353 "iwi authorities" and the time limits throughout the Act." p 356

"To fulfil its obligations under the Treaty, we do not consider that the procedure under the Resource Management Act for the creation of heritage protection authorities is an option to be adopted by the Department of Conservation. We accept the claimants' submission that it would be a violation of their rangatiratanga." p 257

"That the Crown take urgent action to amend the procedural provisions of the Resource Management Act 1991 to ensure that all Maori with interests in multiply-owned Maori land have the right to be informed on all matters affecting their land"

"That the Crown resource an advocacy service to represent all Maori with interests in multiply-owned Maori land and provide advice to Maori in relation to resource management and conservation issues" p 294

Extracts of issues regarding the RMA identified across all Waitangi Tribunal reports

Table 2 identifies issues and recommendations across all the Waitangi Tribunal reports. Using the same extracts from the 'Fuller extracts' section, this section organises these by each category and issue identified.

Disclaimer:

The issues identified have been derived from extracts within proximity to the words 'resource management' and 'RMA' within the Waitangi Tribunal reports. These are not exhaustive and may not be the only locations where these have been provided by the Tribunal. However, they do provide references for issues where the Tribunal has included findings or recommendations related to the RMA.

Table 2: Categorisation of issues regarding the RMA across Waitangi Tribunal reports 1992-2019

Categories	Issues (or Recommendations) identified in report	Wai 898 2019	Wai 2358 2019	Wai 2200 2017	Wai 2478 2016	Wai 894 2015	Wai 903 2015	Wai 1130 2013	Wai 262 2011	Wai 215 2010	Wai 863 2010	Waikato River* 2010	Wai 796 2010	Wai 1200 2008	Wai 785 2008	Wai 686 2006	Wai 1071 2004	Wai 145 2003	Wai 45 2002	Wai 64 2001	Wai 167 1999	Wai 212 1998	Wai 27 1995	Wai 55 1995	Wai 153 1993	Wai 304 1993	Wai 119 1992	Wai 38 1992
Overarching themes	Protection and recognition of Rangatiratanga and Kaitiakitanga	x	x	x		x			x	x				x	x						x	x		x	x	x	x	
	Does not deliver control, partnership, mana whakahaere	x	X	x		x			x	x		x			x							x				x		
	Not protecting Māori interests and to provide for values, customs and authority		X							x		x			x									x	x	x	x	x
	Delegating powers without sufficient Treaty responsibilities	x	X					x		x	x												x		x	x	x	
	Not protecting Taonga, or Mana or river	x	X			x				x			x	x								x				x		
	No compensation for loss of mahinga kai	x																										
	Need for bottom up view, rather than just top down	x																						x				
	Not being implemented in manner that provided for fairly for Māori interests/failed to ensure it is implemented in accordance with stated intention														x													
	All New Zealanders miss out by system not being Treaty-compliant												x															
Ownership	Ownership and vesting of lands, river beds and management more akin to ownership		X			x				x				x							x	x						
	'First-in first-served' allocation basis		X																									
	Māori proprietary rights and economic interests		x																									
	Public Works Act including offer back, Te Ture Whenua Māori Act 1993 and s342 of Schedule 10 of LGA 1974										x				x													
Cross-legislation	All spheres of activity, treaty provisions in LGA, RMA, Historic Places Act are not sufficient to oblige LG to act consistently with the Treaty	x		x							x																	
	Local Government not required to be Treaty compliant under LGA	x									x																	
Co-governance/co-management and co-design	Māori Treaty right in freshwater taonga is co-governance / co-management		x																									
	Co-design as the Treaty standard where Māori interests are concerned		x																									
Past RM review processes	Past RM Review processes have not been treaty-compliant		X																									
	Co-design process Treaty compliant but outcomes disappointing primarily because of Crown-reserved final decision-making		X																									

Categories	Issues (or Recommendations) identified in report	Wai 898 2019	Wai 2358 2019	Wai 2200 2017	Wai 2478 2016	Wai 894 2015	Wai 903 2015	Wai 1130 2013	Wai 262 2011	Wai 215 2010	Wai 863 2010	Waikato River* 2010	Wai 796 2010	Wai 1200 2008	Wai 785 2008	Wai 686 2006	Wai 1071 2004	Wai 145 2003	Wai 45 2002	Wai 64 2001	Wai 167 1999	Wai 212 1998	Wai 27 1995	Wai 55 1995	Wai 153 1993	Wai 304 1993	Wai 119 1992	Wai 38 1992
RMA ambition/delivery – general	Aspirations of RMA have not come to fruition		X					x	x								x											
	RMA provisions did not go much further than pre-RMA													x														
	Obligations to ensure aspirations were to be fulfilled a long time ago/continuing source of grievance not responding to address recommendations		X													x	x											
	Use of settlements to provide what should have been addressed as part of the RMA	x	X						x																			
	Ongoing prejudice		x																					x		x		
RMA Part II	Section 8 weight given to Treaty relationship	x	x	x				x		x	x		x	x				x				x	x	x	x	x		
	RMA is not remedial	x	x	x		x						x		x														
	Impact of Part 2: Balanced judgement	x	x											x														
	Kaitiakitanga section 7 inadequate, Kaitiakitanga is not separate from Rangatiratanga		x																x									
	Section 6 – Te Mana o te Wai as matter of national importance		x																									
Direction/accountability	Absence/gaps in national direction		x					x	x	x			x													x		
	Monitoring/accountability of councils		X						x	x	x		x	x		x										x		
Sharing and transfer of powers	Lack of use of transfer of powers functions, and/or provisions are inadequate		X					x	x	x	x			x														
	Mana Whakahono provisions inadequate - need enhancement		x																									
	Crown to offer co-governance, co-management through all settlements		x																									
	Time focussed on fighting consents, rather than being involved in decision-making									x																		
Plan-making	Plan development is not cognisant of Treaty relationship and interests in taonga		X						x	x															x			
	Iwi Management Plans (IMPs) have little weight, or are not resourced	x	x					x	x	x																		
Crown definition of partner	Impact of iwi authority definition																											x
	Tangata Whenua, Mana Whenua definitions																				x							
Wāhi tapu and heritage protection	Wāhi tapu protection – incl Crown-Māori working together to work this through	x								x			x			x												x
	Funding and support for heritage protection including Historic Places Trust									x																		

Categories	Issues (or Recommendations) identified in report	Wai 898 2019	Wai 2358 2019	Wai 2200 2017	Wai 2478 2016	Wai 894 2015	Wai 903 2015	Wai 1130 2013	Wai 262 2011	Wai 215 2010	Wai 863 2010	Waikato River* 2010	Wai 796 2010	Wai 1200 2008	Wai 785 2008	Wai 686 2006	Wai 1071 2004	Wai 145 2003	Wai 45 2002	Wai 64 2001	Wai 167 1999	Wai 212 1998	Wai 27 1995	Wai 55 1995	Wai 153 1993	Wai 304 1993	Wai 119 1992	Wai 38 1992
Relationship with different categories of land	Clarification of no loss of treaty interest if land has been alienated									x			x															
	Crown and Māori to not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of Kaitiakitanga (pertaining to different categories of lands)									x																		
Māori-owned land	Interface with Te Ture Whenua Māori Act 1993						x				x			x														
	Issues impeding multiply-owned Māori lands						x																					x
	Remove impediments to Papakāinga across planning legislation including RMA				x		x																					
Hapū/iwi capacity and resourcing	Capacity and resourcing to participate fairly		x						x	x	x		x		x													
Government and council capability	Low level engagement with Te Ao Māori and Māori perspectives exhibited by central and local government decision-makers		x							x			x															
	Greater willingness needed									x																		
Engagement/consultation	Timing of consultation																											x
	Not proper engagement undertaken on specific issues		x																x			x						
	Not consulted on gravel extraction					x																						
Consenting	Resource consenting processes fails to respect, provide for and protect the special relationship of [tribe] with the [river]			x																								
	Joint consent committees put to greater use							x																				
	Enforcement	x																										
Other	Extent of availability of legal aid		x										x															

Overarching themes

Protection and recognition of Rangatiratanga and Kaitiakitanga

“At the very least, to compensate for the prejudice that has been suffered from the Crown’s environmental management regime, we stated that any settlement legislation negotiated by the parties should explicitly recognise the rights of Te Rohe Pōtae Māori te tino rangatiratanga and mana whakahaere. In no other field of endeavour is this more needed than in the area of environmental management.”

“We also encourage the parties that in providing for the practical exercise of the tino rangatiratanga of Te Rohe Pōtae Māori communities, the negotiations between the parties and any settlement legislation should address how their right of mana whakahaere should be institutionalised. We return to the main recommendation we made with respect to this below.” (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 501)

“The Tribunal recommends :

- “That the Crown acts, in conjunction with Te Rohe Pōtae Māori or the mandated settling group or groups in question, to put in place means to give effect to their rangatiratanga in environmental management. For Ngāti Maniapoto or their mandated representatives, this will require the Crown to take into account and give practical effect to Te Ōhākī Tapu. How this might be achieved will be for the parties to decide in negotiations ; however, the Tribunal considers that for the Crown to relieve the prejudice suffered by Te Rohe Pōtae Māori, the following minimum conditions must be met.”

- “First, that the rangatiratanga of Te Rohe Pōtae Māori (or the settling group or groups in question) be enacted in legislation in a manner which recognises and affirms their rights of autonomy and self-determination within their rohe, and imposes a positive obligation on the Crown and all agencies acting under Crown statutory authority to give effect to those rights. For Ngāti Maniapoto or their mandated representatives, this will require legislation that recognises and affirms Te Ōhākī Tapu, and imposes an obligation on the Crown and its agencies and regional and local authorities to give effect to the right to mana whakahaere. The brief of evidence of Steven Wilson (Manahautū Whanake Taiao – Group Manager Environment for the Maniapoto Trust Board) dated 28 April 2014 could provide a sound basis for negotiations on this issue.”

- “Secondly, subject to negotiations between the parties, that the legislation makes appropriate provision for the practical exercise of rangatiratanga by Te Rohe Pōtae Māori (or the settling group or groups in question) in environmental management. For Ngāti Maniapoto or their mandated representatives, this will require legislation that gives practical effect to Te Ōhākī Tapu, and provides for the practical exercise of mana whakahaere.” (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 501)

“As a result, there has been massive environmental change in the district without Te Rohe Pōtae Māori having any meaningful control and authority over developments that have fundamentally changed the nature of their relationship with their environment. They have suffered financial loss and customary resource loss. They are no longer able to express their rangatiratanga, kaitiakitanga, their tikanga, and mātauranga Māori over sites and wetlands

that they no longer own or where these have been destroyed. Even where they own them, such as the lakes (and fisheries) at Tahāroa or Maniapoto's cave they have not been able to protect them from desecration or collapse." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…"

- "A failure to require decision makers take into account and provide for the rangatiratanga, kaitiakitanga, tikanga and mātauranga Māori of Te Rohe Pōtae Māori associated with forests, land, wetlands and taonga sites until the 1980s. Rangatiratanga, kaitiakitanga and tikanga (such as rāhui) are sourced from mātauranga Māori and its definitions of the values attributed to each. Values such as whanaungatanga, manaakitanga, utu, and tapu cumulatively define appropriate behaviour, and the consequences for not complying with the norms associated with this system of law in the environmental space include a loss of mana and ultimately well-being." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"The flora and fauna Tribunal identified a spectrum of Māori involvement in environmental decision-making, from autonomy and control at one end, partnership and co-management in the middle, and mere influence at the other end. Without specifying which approach would be suitable in each circumstance, the Tribunal found that both the RMA and the Conservation Act 1987 fall short in providing tangata whenua the appropriate level of rangatiratanga over their taonga. Similar findings have been made in relation to the protection in cultural heritage legislation of wāhi tapu, urupā, and other significant Māori sites." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 322)

"Our key findings in this chapter have been…" "Rather than acknowledge Māori tino rangatiratanga and mana whakahaere, as promised in the Treaty and negotiated as part of Te Ōhākī Tapu and associated agreements, the Crown introduced discriminatory legislation to manage the environment, which allowed it to, amongst other things, take administrative control of the region." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 669)

"It would also require providing for the rangatiratanga or mana whakahaere of Te Rohe Pōtae Māori in local government, in planning, and in consent processes including enforcement. Engagement on issues such as sewage disposal would be premised upon a recognition that their culture, tikanga, and values have as much to offer as regional and local body politicians representing the views of the rest of the community. This different framework for management is more likely to meet the section 5 purpose of the legislation, as noted by the Environment Court in the Mōkau ki Runga decision discussed previously. As it stands, the status quo is resulting in the health of the districts waterways/bodies continuing to decline."

"Thus, for all waters and waterways/bodies (with the exception of the Waipā River) there is a disconnect between the legislative framework for the management of environmental effects as regard water and waterways/bodies and the way that Te Rohe Pōtae Māori want their rangatiratanga and kaitiaki responsibilities exercised." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 590)

"It is clear from the evidence examined in this chapter that water and water bodies are of immense cultural, spiritual, and practical importance to Te Rohe Pōtae Māori. Prior to the arrival of Pākehā, Te Rohe Pōtae Māori developed numerous principles and protocols, based on tikanga, to carefully manage and protect these water bodies, which in turn provided nourishment for whānau, hapū, and iwi throughout the district."

"In the decades following the Crown's arrival to the district and the formalisation of a series of legislative and statutory regimes in which it progressively assumed greater control of water and water bodies, Te Rohe Pōtae Māori were stripped of the rangatiratanga that they had exercised for centuries, as well as the mana whakahaere they were entitled to."

"The Crown's assumption of the management of water bodies went hand in hand with their subsequent widespread degradation. As Pākehā settlement increased in the district, so too did water pollution from sedimentation due to land clearance work, pastoral production, mining, industry and human waste from settlements and towns. Despite the efforts of many Te Rohe Pōtae Māori to address this continued grievance, such as by imposing stricter controls on local and regional authorities, there has been little success."

"Perhaps most distressing to Te Rohe Pōtae Māori today is the loss of their food basket, their 'source of spiritual and physical sustenance'. The Crown's assumption of authority over fisheries, combined with the marked decline of taonga species (particularly tuna) as a result of commercial fishing and habitat destruction, has led to the severe detriment of Te Rohe Pōtae Māori, who can no longer gather kaimoana as they had for generations before."

"The cumulative prejudice of these factors, the diminishing of Te Rohe Pōtae Māori tino rangatiratanga and mana whakahaere, the destruction and degradation of their traditional water bodies, and the significant decline of taonga species have caused serious and long-lasting prejudice to Te Rohe Pōtae Māori, the legacies of which continue to this day."

"We therefore recommend:

- That the Ngā Wai o Maniapoto (Waipā River) Act 2012 be amended to cover all the waterways and river mouths and harbours of Ngāti Maniapoto. This legislation to include co-management with DOC of customary freshwater fisheries species, particularly eels and marine species found in river mouths and harbours."

- "That, in relation to other iwi of the district, the Crown consider special legislation to address their Treaty claims with respect to waterways, river mouths, and harbours."

- "That a mataitai be constituted with respect to Whāingaroa Harbour." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 668-669)

"Māori must themselves be RMA decision makers for their freshwater taonga, and their role in this respect needs to be enhanced to meet the Treaty guarantee of tino rangatiratanga." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"Having heard the evidence of the claimants and interested parties in both stage 1 and stage 2 of this inquiry, our view is that the Māori Treaty right in the management of most freshwater taonga is at the co-governance / co-management part of the scale. Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require

the use of partnership mechanisms for the joint governance and management of freshwater taonga." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making."

"We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"We found that section D [of the NPS-FM 2011] is an inadequate mechanism for ensuring the Māori 'involvement' in freshwater decision-making required by the Treaty principle of partnership. We found that it is not Treaty compliant, and that Māori have been prejudiced in their exercise of tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga as a result."

"We also found that the NPS-FM will not be Treaty compliant until section D is reformed in such a way that it provides more effectively for the tino rangatiratanga of iwi and hapū. Our view was that this required a co-governance level of 'involvement' in decision-making, and national direction for councils to use partnership mechanisms in plan-making and in freshwater management more generally." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"The Crown decided in 2013, however, to limit its enhanced 'iwi/Māori participation' in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious."

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles."

"As summarised earlier (section 7.2.3), the Treaty requires co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership and the Treaty guarantee of tino rangatiratanga. We agreed with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring / enforcing water quality requirements, and thereby protecting the mauri of water bodies'."20 (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"First, as already found in chapter 3, section D of the NPS-FM is relatively weak. It does not provide a co-governance approach to identifying Māori values and setting freshwater objectives. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. Secondly, the relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. Our view was that this is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.10 Te Mana o te Wai in the NPS-FM 2014 as amended in 2017)

"It seems to us that there are some commonalities in the various approaches that have been put forward so far. The stakeholders of the Land and Water Forum clearly saw that a national commission is necessary, and that it must be established on a co-governance basis (points held in common with the NZMC and the Wai 2601 claimants). The claimants and interested parties also agreed that there needs to be a role for the exercise of tino rangatiratanga at the national level, in partnership with the Crown, although they had differences on what kind of institutional arrangement would best reflect that partnership function. The Crown has said that it is open to exploring such matters but has not endorsed an institutional role for Māori at the national level. In practice, we note that it has developed most of its reforms in collaboration with the appointed representatives of a national Māori body (the ILG and IAG) and more recently with Te Kahui Wai Māori." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.6.5 Our view of the water commission proposals)

"We agreed that two of these three outcomes had the potential to make a significant difference for Māori in the exercise of authority and kaitiakitanga over their freshwater bodies. Te Mana o te Wai in the NPS-FM had the potential to alter the manner of achieving the purpose of the RMA in a way that better protected Māori interests. The Mana Whakahono a Rohe arrangements had the potential to improve iwi–council relationships and the way they work together, especially by providing a mechanism for the schedule 1 consultation process to occur. But many options that were omitted in 2016 were so crucial that, in our view, the Crown squandered a real opportunity to make the RMA and its freshwater management regime Treaty-compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.8 The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests)

"Our view was that all of this [NPS 2017 amendments) has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (objective D1), then Te Mana o te Wai is a platform for achieving this (through the 'National significance' statement and objective AA1), and mātauranga Māori must now be used to measure its success (policy CB1). It is also a platform for the whole community's values because it is water-centric." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.10 Te Mana o te Wai in the NPS-FM 2014 as amended in 2017)

"We also reject the Crown's approach regarding its responsibility for the day-to-day affairs of local authorities on the same basis that it was rejected in Ko Aotearoa Tēnei (the Wai 262 report). That report found that the environmental management regime on its own without reform was not sufficient in Treaty terms. The Wai 262 Tribunal stated that the Crown has an obligation to protect the kaitiaki relationship of Māori with their environment and that it cannot absolve itself of this obligation by statutory devolution of its environmental management powers and functions to local government. Thus the Crown's Treaty duties remain and must be fulfilled and it must make statutory delegates accountable for fulfilling them too The same duty to guarantee rangatiratanga, and to respect the other principles of the Treaty thus remains as an obligation on the Crown and it is not enough for the Crown to wash its hands of the matter and say that the day-to-day decision-making process is in the hands of local authorities "

"We note further the Waitangi Tribunal has previously held in various reports that the RMA 1991 is not fully compliant with Treaty principles. In the Wai262 report, the Tribunal stated the RMA has not delivered appropriate levels of control, partnership, and influence for kaitiaki in relation to taonga in the environment. Indeed, the only mechanisms through which control and partnership appear to have been achieved are historical Treaty and customary rights settlements." (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

"And by later legislation the Crown has assumed exclusive control over rivers, disregarding their tino rangatiratanga, and then has managed them badly. Their indigenous fisheries, including tuna, were sacrificed to introduced trout, and to hydroelectric development. The Resource Management regime introduced in 1991, according to the claimants, has yet to deliver effective recognition of hapu and iwi as owners and kaitiaki of their rivers."(Wai 894: Te Urewera Report Volume VII (2015))

"The Crown's efforts to secure title to navigable rivers through the Coal-Mines Amendment Act 1903 represent a very serious breach of Treaty principles. Instead of providing active protection, the Crown unilaterally removed Māori property rights. It did so without consultation – indeed, by an obscure and virtually undebated clause of a seemingly unrelated Act. This was a breach of the principles that the Crown should seek to engage with Māori in a spirit of partnership, and act in good faith." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"Several previous Tribunals have found that the Resource Management Act as it then was did not provide for rangatiratanga. The Ngawha Geothermal Resource Report concluded in 1993 that the Act was 'fatally flawed' because it does not require decision-makers to act in conformity with, and apply, Treaty principles. It stressed that the language used by the Act's provisions meant that the Crown's Treaty obligations could not be given proper priority."

"Though the Crown has since amended the Act, those amendments still do not address the principal concerns outlined in the Ngawha Report." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"As stressed in the Ngawha Report, the key provisions of part 2 of the Resource Management Act use comparatively weak language. In particular, section 8 (by which persons exercising powers and functions under the Act must only 'take into account' the principles of the Treaty) is a weak provision. It is weaker than the language used in sections 6 and 7, where decision-makers are to respectively 'recognise and provide for' and 'have particular regard to' various matters, some of which are relevant to Māori. It is also weaker than powers. In allowing this to occur the Crown is in breach of the principle of partnership, and of its duty of active protection

of Māori rangatiratanga. Previous Tribunals have found that the Act ought to be amended to address these shortcomings. (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"The principle of partnership and the duty of active protection oblige the Crown to ensure that under its legislation Māori can – and do – exercise rangatiratanga over their taonga." (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

"In 1992 the Te Roroa Tribunal provided a sustained analysis of the proper role of tangata whenua and the Crown in the management of Māori cultural heritage. That Tribunal found that Māori participation in what others decide to do with their taonga is not the proper partnership envisaged by the Treaty:

> Wahi tapu are taonga of Maori, acknowledged as such in article 2 of the Treaty. The role of the department and Historic Places Trust in the 'partnership' is not a decision making role or being 'included' in what is not theirs. Rather, it is to assist Te Roroa by the provision of services and advice when they are sought, to enable them to protect and care for the wahi tapu." p291

"That Tribunal further proposed that the Crown:

> re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wahi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment." p 292

"We endorse these findings of the Te Roroa Tribunal. The issue is whether Crown legislation and policy has since evolved to enable Tauranga Māori to exercise rangatiratanga (authority and control), and act as kaitiaki (protect and care for) over their cultural heritage."

"Before we address this issue however, we need to make clear that the capacity of the Crown to enable Māori to exercise rangatiratanga and to act as kaitiaki will differ depending on the specific category of land at issue, for example, Crown land, public land owned by local authorities, and private land. The latter categories present particularly complex problems of how to best reconcile public rights of access and enjoyment, or the legitimate property rights of private landowners, with the equally legitimate right of tangata whenua to retain links to their significant sites within their ancestral landscape. These issues are further complicated in situations where Māori have lost their ancestral lands in ways inconsistent with the principles of the Treaty. We acknowledge the complexity of the issues involved but consider that the Crown and Māori must not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of kaitiakitanga".

"To this day neither the Historic Places Act nor the Resource Management Act provide Tauranga Māori with any straightforward mechanisms to exercise rangatiratanga and act as kaitiaki over their ancestral places on any of these categories of land. One mechanism which might come closest is the possibility, under both the Historic Places Act and Resource Management Act, that Māori groups might become heritage protection authorities, able to issue heritage protection orders. Under the Resource Management Act, an iwi authority, Māori trust, or incorporation, can in theory become heritage authorities if constituted as a body corporate, and if the Minister for Culture and Heritage accepts their application."

"The Te Roroa Tribunal commented that there may be several issues for Māori in considering undertaking this process. First, that Tribunal felt that the requirement to be a body corporate

was inappropriate, since the trustees who administer marae, the cultural foci of Māori communities, do not constitute a body corporate. We note, however, that trusts and incorporations established under Te Ture Whenua Māori Act 1993, and Māori trust boards, are body corporates. Secondly, disclosing the location of wāhi tapu and scrutiny at public hearings could pose threats to their security. Thirdly, and most significantly, substantial costs are involved in making a heritage order, including one-off costs for applying (and a high likelihood of appeal) and ongoing costs in processing resource consent applications. In particular, landowners can apply for compulsory purchase and compensation by the heritage authority if they cannot sell or use their land in a reasonable manner.[294] Making a heritage order therefore inevitably involves significant delays, financial costs, and considerable risks ; as the Parliamentary Commissioner for the Environment noted in 1996, it is a last resort option for protection." p 295 (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"Furthermore – and again as Ms Chen points out – there is case law that suggests that section 8 does not give rise to any obligation on a decision maker under the RMA to consider additional obligations, beyond those listed in sections 6(e) and 7(a) of the Act. Thus, principles such as the partnership principle – with its accommodation between kawanatanga and rangatiratanga, its mutual benefit, and its reciprocity – cannot be weighed in the balance. Only those matters listed in sections 6 to 8 can. We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can exist only where there is rangatiratanga, because they are inextricably linked.' (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"On the basis of our discussions in this chapter (and the other chapters of part V), we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi. In doing so, we accept the submissions made by Mr Bennion that, while the Act is an advance on previous legislation, it still fails to accord with Treaty principles. It fails in the following important respects…"

- "During the reforms of the 1980s, the Crown indicated that ownership issues were not to be dealt with by the RMA. But the Crown then preserved its rights to control access to natural water, which it promptly delegated to regional or district councils. It also preserved its rights conferred by the Coal-mines Act Amendment Act 1903. Thus, while the section of the Coal-mines legislation vesting ownership in the Crown of all beds of navigable rivers was repealed, as was section 21 of the Water and Soil Conservation Act 1967, section 354(1) of the RMA provides that the Crown's rights conferred by these statutes continue. So the Crown's position has never been diminished by the RMA."

  (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"Not only is the definition of kaitiakitanga in the Resource Management Act 1991 inadequate, but in s.7 it is listed as only one of seven other matters that 'persons exercising functions and powers' under the Act 'shall have particular regard to'. In s.6 a number of 'Matters of national importance' are listed, including 'preservation of the natural character of the coastal environment' in s.6(a), and 'maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers' in s.6(d). Among all these is s.6(e): 'The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'." (Wai 45: The Muriwhenua Land Claims Post 1865 (2002))

"The following acts by or on behalf of the Crown are in breach of the Treaty:

> 6) the statutes regulating control of the River, particularly the Resource Management Act and its precursors which fail to give effect to Whanganui rangatiratanga and delegate authority to the Regional Council and District Council on a basis which does not require them to act in conformity with the Crown's obligations under the Treaty"

"Acts contrary to the principles of the Treaty of Waitangi include the Coal-mines Act Amendment Act 1903 in expropriating the riverbed. To the extent that the Resource Management Act 1991 vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles. The Act in fact vests control of rivers in regional authorities, with certain rights of hearing and appeal being given to the public, including Atihaunui.

'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away. Moreover, the Act perpetuates the vesting of the Whanganui riverbed in the Crown. (Wai 167: The Whanganui River Report (1999))

"While there are now provisions under the Resource Management Act 1991 for consultation with tangata whenua, these could be likened to recognition of tangata whenua as a party with a special interest, not one with authority and control commensurate with tino rangatiratanga over taonga or property." (Wai 212: Te Ika Whenua Rivers Report (1998))

"While the Resource Management Act requires those administering it or in management to take into account the principles of the Treaty and Maori views and values, it does not confer tino rangatiratanga on tangata whenua or recognise any such status. It simply gives Maori the opportunity to be heard by the controlling body on matters of concern to them; albeit without any funding or assistance by way of proper legal and technical advice - a situation that seems to us to be far removed from the guarantee given under article 2 of the Treaty." p 141 (Wai 212: Te Ika Whenua Rivers Report (1998))

"In the Te Whanganui-a-Orotu Report 1995, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga."

"We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues." (Wai 212: Te Ika Whenua Rivers Report (1998))

"As in the Ngawha claim, we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish." (Wai 55: Te Whanganui-a-Orotu report (1995)

"We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or

regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled." (Wai 304: Ngawha Geothermal Resources (1993))

"At the time of the signing of the Treaty in 1840 Maori were almost totally dependent for their sustenance and livelihood on the natural resources of Aotearoa. Maori nurtured and protected those resources. Kaitiakitanga was an essential element of rangatiratanga. It is inconceivable that Maori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return they exchanged the power of governance. The Ngawha springs are of immense value not only to the claimant hapu of Ngawha but to all of Ngapuhi. The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership which the Treaty embodies and represents requires no less." (Wai 304: Ngawha Geothermal Resources (1993))

"To fulfil its obligations under the Treaty, we do not consider that the procedure under the Resource Management Act for the creation of heritage protection authorities is an option to be adopted by the Department of Conservation. We accept the claimants' submission that it would be a violation of their rangatiratanga." (Wai 38: Te Roroa Report (1992)

Does not deliver control, partnership, mana whakahaere

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…"

- "A failure to provide for Te Rohe Pōtae iwi mana whakahaere and full participation as partners in environmental decision-making and taonga site protection under the Environment Act 1986, the Conservation Act 1987, the RMA and the Historic Places Trust Act 1993 other than for the Waipā River and through other treaty settlement arrangements." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"The final issue, and the continuing one, is that ultimately Māori lack power under the RMA system. Māori cannot have veto over environmental decision making as that would be inconsistent with the principle of partnership. However, more than consultation under the RMA is needed to discharge the Crown's Treaty of Waitangi obligations. Iwi should be full participants as self-governing entities working in partnership with local and regional councils both in terms of planning and resource consents, including the appointment of hearing committees. The Crown has an obligation to make sure this is happening in all areas of land use decision making and heritage protection included under the RMA, and this must be done by legislative amendment and the allocation of resources for iwi and hapū. Numerous panels of the Waitangi Tribunal have recommended that the Crown must start with an amendment to section 8 of the RMA. The flora and fauna Tribunal focused upon what was needed in terms of planning as well." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 497)

While the Town and Country Planning Act 1977 (section 3(1)(g)), the reforms heralded by the Environment Act 1986, the Conservation Act 1987 and the RMA 1991 had led to improvement, the experience of Ngāti Maniapoto indicates that further reforms are needed. This is consistent with findings made in previous Tribunal reports. Current environmental statutes and policies do not adequately meet appropriate Treaty standards and must be amended and

the continued failure by the Crown to address these matters is a breach of the principle of good government. Ultimately, the Crown is responsible for the policy and legislation that was not put in place in partnership with Te Rohe Pōtae Māori, nor in adequate consultation with them." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 396)

"Our key findings in this chapter have been…" "Rather than acknowledge Māori tino rangatiratanga and mana whakahaere, as promised in the Treaty and negotiated as part of Te Ōhākī Tapu and associated agreements, the Crown introduced discriminatory legislation to manage the environment, which allowed it to, amongst other things, take administrative control of the region." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 503)

"Our key findings in this chapter have been…" "The Crown has by omission, in legislation, and by its actions, failed to act in a manner consistent with the principles of the Treaty of Waitangi with respect to the traditional forests and lands of those iwi and hapū who have not achieved settlement of the Treaty claims in Te Rohe Pōtae, namely under article 2 – the principle of partnership, the principle of reciprocity underpinned by the exchange of kāwanatanga for the guarantee of rangatiratanga, the principle of mutual benefit, and the duty of active protection of their rangatiratanga and of their taonga. In part, this is a problem with the legislation and the fact that it provides no guidance to DOC, other than section 4, on how it must administer and interpret the legislation consistently with Treaty principles. What is needed is an amendment to section 6 as we have noted above." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 503)

"Therefore, we find that the Crown has acted in a manner contrary to the principles of the Treaty of Waitangi. It has used its authority to regulate water and waterways/bodies contrary to the principle of partnership, the principle of reciprocity underpinned by the essential exchange of kāwanatanga for rangatiratanga and the principle of mutual benefit. It has done so by failing until 2012 to provide for Māori mana whakahaere and possession with respect to their water taonga. In doing so it has failed to actively protect the rangatiratanga of Te Rohe Pōtae Māori over the water and waterways/bodies that they consider taonga. A treaty consistent approach would have been to develop the detail of how the mana whakahaere of Te Rohe Pōtae Māori could be recognised and provided for. An extension of the Ngā Wai o Maniapoto (Waipā River) Act 2012 to include all taonga waters, waterways/bodies of Ngāti Maniapoto is the obvious solution to the issue. Similar legislation will be needed for other iwi of Te Rohe Pōtae or Rohe Mana Whakahono agreements will need to be negotiated." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 557)

"The exception to co-governance and co-management is that, in some cases, the strength of the Māori interest in a particular freshwater taonga may be such that it requires Māori governance of that taonga. Our view was that the presence of other interests in New Zealand's water bodies will more often require a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga; that is the Treaty standard for freshwater management." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making." (Wai 2358:

Go to

The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.2.3.2 The RMA's participation mechanisms)

"For all those reasons, we found that the RMA and its allocation regime are not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by:

- the ongoing omission to recognise their proprietary rights ;
- barriers that have prevented their participation in the first-in, first-served allocation system in the past ; and
- the lack of partnership in allocation decision-making." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.2.4 Proprietary rights, economic benefits, and the RMA allocation regime)

"Nonetheless, our view was that the joint work of officials and the IAG, the work of the IAG with other stakeholders in the LAWF, and the high-level meetings between Ministers and the ILG, all contributed to a degree of Crown–Māori cooperation in the development of freshwater reforms. We hesitated to characterise this as a partnership model in the period up to 2014, because there was no co-design of the version of the NPS-FM that was issued in 2011, and only limited co-design of the 2014 version. The real co-design phase came later in 2015–17." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.3 Collaboration: 2009–14)

"We found that section D [of the NPS-FM] is an inadequate mechanism for ensuring the Māori 'involvement' in freshwater decision-making required by the Treaty principle of partnership." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.4 Section D of the NPS-FM 2011)

"The Crown decided in 2013, however, to limit its enhanced 'iwi/Māori participation' in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious."

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles."

"As summarised earlier (section 7.2.3), the Treaty requires co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership and the Treaty guarantee of tino rangatiratanga. We agreed with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring / enforcing water quality requirements, and thereby protecting the mauri of water bodies'."[20] (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.6 RMA reforms: the Crown's decisions on enhancing participation prior to Next Steps)

“First, as already found in chapter 3, section D of the NPS-FM is relatively weak. It does not provide a co-governance approach to identifying Māori values and setting freshwater objectives. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership.” (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.10 Te Mana o te Wai in the NPS-FM 2014 as amended in 2017).

“We also noted that the funding had assisted kaitiaki in projects to begin restoring water quality in some freshwater taonga, and had led to some capacity building and partnerships in the various projects. But our finding was that the Crown’s funding efforts were not yet sufficient to deal with the sheer scale of the damage done prior to the first NPS-FM in 2011. Nor were those funds sufficient to counterbalance the nutrients and contaminants still being released into soils, wetlands, streams, rivers, and lakes. We also found that, although some iwi and hapū had applied for, received, and matched funds, many more do not have the funding to carry out the clean-up of degraded freshwater taonga. We agreed with the claimants that there remains a need for committed, long-term funding to address water quality issues on a local and national scale, and that the Treaty standard of active protection will not be met until such larger-scale, longer-term funding has been dedicated to restoration of these highly vulnerable taonga.” (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.4.7 Funding of restoration for degraded freshwater bodies)

“In the course of our inquiry, there have been a number of proposals for Māori to have an institutional role in water policy at the national level. There seems to be broad agreement among the claimants and many interested parties that such a role should take the form of a Crown–Māori partnership, although the scope and nature of the partnership differed in the various proposals.” (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.6 Proposals for a Water Commission, 7.6.1 Introduction)

“It seems to us that there are some commonalities in the various approaches that have been put forward so far. The stakeholders of the Land and Water Forum clearly saw that a national commission is necessary, and that it must be established on a co-governance basis (points held in common with the NZMC and the Wai 2601 claimants). The claimants and interested parties also agreed that there needs to be a role for the exercise of tino rangatiratanga at the national level, in partnership with the Crown, although they had differences on what kind of institutional arrangement would best reflect that partnership function. The Crown has said that it is open to exploring such matters but has not endorsed an institutional role for Māori at the national level. In practice, we note that it has developed most of its reforms in collaboration with the appointed representatives of a national Māori body (the ILG and IAG) and more recently with Te Kahui Wai Māori.”

“In our view, another point of agreement between the forum and the claimants is that there is a significant gap in the freshwater policy and management structure (following the dissolution of the National Water and Soil Conservation Authority); there is no independent national body to oversee the system, monitor performance, develop policy, and conduct research on a national scale. We agree that this is a significant gap. For example, the need to conduct research and to develop and populate the NOF underlines the need for this gap to be filled.”

“We agree with the forum and the claimants that there should be an independent national body established on a co-governance basis with Māori. At a minimum, its role should be to act in partnership to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management.”

"We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with those issues. Either model could work so long as it is institutionalised, but the value of the co-governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori. In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.6.5 Our view of the water commission proposals)

"We recommend that the Crown recognise Māori proprietary rights and economic interests through the provision of what the NZMC has called 'proprietary redress'."

"In conjunction with this, we make the following recommendations concerning the RMA's allocation regime: [including]

- The Crown should devise a new allocation regime in partnership with Māori, including through the national co-governance body.

"If the co-governance body is not established, then the Crown should carry out these recommendations in partnership (and on a co-design basis) with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7.7 Māori proprietary rights and economic interests vis-à-vis the allocation regime)

"We recommend that the national co-governance body should devise an appropriate water supply and infrastructure scheme for marae and papakāinga, which may need to be developed and implemented with or alongside a scheme for safe, clean rural water supplies. If the national co-governance body is not established, the Crown should develop and implement a scheme in partnership with Māori on a co-design basis and with co-governance of the scheme." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7.9 Clean, safe drinking water for marae and papakāinga

"While the 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord' (2013) has created opportunities to work in partnership with local bodies, and that is to be applauded, under the RMA 1991 and the local government legislation Muaūpoko have no lawful rights to control or to enforce the commitments made in that accord In other words, Muaūpoko mana whakahaere (control and management) over their taonga is not fully provided for under the current legislative regime Such a situation can be compared to the rights that the Waikato-Tainui river tribes have in terms of the Waikato River under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. The 2010 legislation states that the 'RMA 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for river use'. It is further recorded that the RMA does not provide for the protection of the mana of the river or the mana whakahaere (ability to exercise control, access to, and management of the river) of Waikato. It notes the number of resource consent proceedings that the tribe had been involved in, and then the Crown acknowledges, among other things, that it 'failed to respect, provide for, and protect

the special relationship of Waikato-Tainui' with the river." (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

"The Resource Management Act 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for River use. The Act did not, however, provide for protection of te mana o te Awa and te mana whakahaere of Waikato-Tainui. Since the Act came into effect, Waikato-Tainui have been involved as respondents in many consent hearings, seeking conditions which would protect the River"

"From the 1860s to the present, Waikato-Tainui have continually sought justice for their Raupatu claim and protection for the River. The principles of te mana o te awa and mana whakahaere have long sustained the Waikato River claim together with the principles described in the Kiingitanga Accord, and those principles underlie the new regime to be implemented by this settlement." (Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010)

Not protecting Māori interests and to provide for values, customs and authority

[Under ' Systemic problems in the current regime'] We consider that there are fundamental flaws in the operation of the current regime for managing the petroleum resource which arise from the combined effect of the following features…" "the Crown's failure, despite its Treaty responsibility to protect Māori interests, to provide local authorities with clear policy guidance and to require them to adopt processes that ensure appropriate Māori involvement in key decisions; (Wai 796: The Report on the Management of the Petroleum Resource (2010)))

"In the Ngawha Geothermal Resource Report, the Tribunal examined in some detail the implications for the Crown of its duty of active protection of Māori resource-use. It identified several important elements of the duty, including:

- that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences ;
- that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms ;
- that the degree of protection to be given to Māori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great physical and spiritual importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances), for so long as Māori wish it to be protected; and
- that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled."

"We agree with these views about the nature and extent of the Crown's duty of active protection over Māori possession of their lands, waters, and other taonga." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

Delegating powers without sufficient Treaty responsibilities

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…"

- "The continued subjection of the claimants to the decision making of regional and local authorities who are not required by legislation to give effect to the principles of the Treaty of Waitangi in the administration of their powers and functions under the legislation and in planning and consenting procedures." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"Our key findings in this chapter have been :

- Te Rohe Pōtae Māori were subject to the authority of central, local and regional authorities who did not have to consider Treaty principles, provide for Māori co-management, engage and consult Māori, enable their participation in management or have regard to their customary values outside of possible granting of authorisations or permits for gathering, taking or catching species or for the protection of their archaeological sites. As a result, they were further separated from many of their important taonga sites and species and there was a corresponding loss of mātauranga Māori."

- "The Town and Country Planning Act 1977 was the first statute to recognise that Māori continued to have a relationship with certain areas even where they no longer owned land. It would not be until the introduction of the Conservation Act 1987 and the Resource Management Act 1991 that the principles of the Treaty were considered to be relevant to environmental management, though these Acts still fail to fully address Te Rohe Pōtae Māori environmental concerns. The RMA, in particular, needs to be amended to ensure that the Crown's Treaty obligations are met." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 669)

"Having taken possession of or authority over water and waterways/bodies, the Crown also delegated management responsibility to regional and local authorities without including or making provision for Te Rohe Pōtae Māori tino rangatiratanga or mana whakahaere. This is contrary to the principles of the Treaty, namely the principles of good governance in article 1 and rangatiratanga in article 2, and we find that the Crown's actions and omissions from 1840 to the passing of the RMA 1991 are inconsistent with their Treaty obligations." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 670)

"We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002 and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does not ensure that Muaūpoko rangatiratanga and

kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for." (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

"The implication of the Treaty of Waitangi Act 1975 is that the Crown is expected to act consistently with the principles of the Treaty, in that, where any Act, proposed legislation, regulation, Order in Council, policy, or practice is inconsistent with the principles of the Treaty, Māori may bring a claim about the matter to the Tribunal."

"The Crown has delegated most of its authority to carry out the duties of the RMA to local authorities. Along with that delegation is the requirement for the local authority to 'take into account the principles of the Treaty of Waitangi' when making decisions. However, as the Ngāwha Tribunal noted: Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources. In short, whereas the Crown itself is required to act consistently with the principles of the Treaty, that responsibility was significantly watered down under the Crown's delegation of authority to regional councils. Essentially, local authorities were not obliged to be Treaty-compliant in their decisions. The Ngāwha Tribunal found that this aspect of the legislation was 'fatally flawed'. The Ngāwha and CNI Tribunals recommended that the RMA be amended so that Crown delegates are required to 'act in a manner that is consistent with the principles of the Treaty of Waitangi'. (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"As a result of its inquiry into the Ngawha geothermal claim, the Tribunal has recommended that an appropriate amendment be made to the Resource Management Act 1991 to require that all persons exercising functions under the Act shall act in a manner consistent with the principles of the Treaty of Waitangi. We must now await and see how the Government responds to the Tribunal's recommendations.

'We caution, however, that in devolving power to local authorities the Crown's responsibility to uphold the principles of the Treaty is in no way lessened.' (Wai 27: The Ngai Tahu Ancillary Claims Report (1995))

"The omission of any such statutory provision [giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish] is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision, a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha." (Wai 304: Ngawha Geothermal Resources (1993))

"We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled." (Wai 304: Ngawha Geothermal Resources (1993))

"Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under

the Act, ensured that its Treaty duty of protection of Maori interests will be implemented." (Wai 304: Ngawha Geothermal Resources (1993))

"The Crown, through the medium of the Resource Management Act, has delegated to regional councils the power to make regional plans without the full interest of the claimants in the geothermal resource, and the extent of the Crown's Treaty obligations to protect such interests, being first ascertained." (Wai 153: Te Arawa Geothermal Resources (1993))

"Under the Resource Management Act, local authorities are responsible for the management of river and associated resources and for approving consents for uses in these areas. As noted above, these authorities are required to take into account the Treaty when exercising any functions or powers under the Act. We think that this is appropriate. The Crown is entitled to devolve its duties under the Treaty, through carefully worded legislation, to another authority. Nonetheless, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga." (Wai 119: The Mohaka River Report (1992))

Not protecting Taonga, or Mana or river

"In the Ngai Tahu (1991) and Te Whanganui a Tara (2003) reports, the Tribunal considered the question of whether direct correlations could be established between Crown actions or inactions and a particular environmental modification. Both concluded that, although the loss of mahinga kai and other taonga due to the effects of European settlement was seriously detrimental to the claimants, it could not be solely attributed to the Crown, given the multi-causal nature of environmental change."

"On the other hand, the Mohaka ki Ahuriri (2004), Hauraki (2006), Te Tau Ihu (2008), and Tauranga Moana (2010) reports considered a different and broader question : whether the Crown had recognised and acted on evidence of the need for environmental controls with sufficient priority. Reports for these inquiries agreed that the Crown cannot be held solely responsible for the broad sweep of environmental change, they also found that from the early twentieth century the Crown was aware of many of the negative cumulative impacts of settlement on the environment. In Tauranga Moana, for example, the Tribunal identified :

- widespread public and official concerns about the possible effects of deforestation on timber supplies, climate, and soil erosion ;"
- "links between forest clearance and swamp drainage and a decline in fish populations, including advice in the 1930s that īnanga spawning grounds should be fenced off ; and"
- "problems with the pollution of Tauranga Harbour and other waterways, especially the effects of sewage disposal, prompting consistent protest by Tauranga Māori from 1928 onwards."

"Ultimately all four of the latter Tribunals were able to make findings of Treaty breach, concluding, in the words of the Mohaka ki Ahuriri Tribunal, that 'the Crown was simply late in adopting appropriate controls, rather than totally neglectful of its Treaty responsibility', at least in that district. The Tauranga Tribunal expressed its findings for its district as follows :

> *the Crown did not place proper priority on the interests of its Treaty partner. The Crown breached the Treaty principle of reciprocity and its duty of active protection by failing to safeguard the legitimate Treaty interests of Tauranga Māori. Crown control over natural*

> *resources, and the destruction of forests and fisheries permitted by the Crown, left Tauranga Māori unable to sustain their traditional way of life, and unable to utilise natural resources as a base for economic development."* (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 322-323)

"These co-management bodies, and the relationship they reflect, should be established on the basis that the environment is a taonga of Te Rohe Pōtae Māori. The Crown, as part of this recognition and the development of these co-management regimes, should proactively look to restore taonga sites where practicable. These sites should be identified in conjunction with Te Rohe Pōtae Māori and may include wetlands, forests, wāhi tapu, or any other sites of environmental or heritage value." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 501)

"Ultimately, however, we found that the RMA had significant flaws in Treaty terms at the time the reform programme began, and that the reforms the Crown has completed are not sufficient to make the RMA and the freshwater management regime Treaty compliant. We also found that the NPS-FM is not yet Treaty compliant, for the reasons summarised in the following sections. We found that Māori have been prejudiced by these breaches, including the failure to set adequate controls and standards for the active protection of their freshwater taonga." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): Summary of Findings and Recommendations, 7.1 Introduction)

"The claimants and interested parties, on the other hand, argued that the Crown had failed to provide a regime that actively protected their taonga, and that this was a breach of Treaty principles."

"We agreed with the claimants that systemic problems with the RMA regime had allowed the situation to develop and worsen, with apparent disregard for the fundamental purpose of the RMA. Councils could not manage the effects of land use on water, or the clash of commercial and environmental imperatives, without a better management framework and strong national direction from the Crown."

"The Crown has attempted to rectify those problems, however, so our view was that any Treaty findings should await consideration of the Crown's reforms, and the question of how rapidly and effectively the Crown addressed the acknowledged problems."

"We also noted the link between this issue and the earlier breaches found in respect of the RMA. We had already found that section 8 of the RMA was too weak to protect Māori interests, and that the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.2.5 Environmental outcomes and the need for reform: why has the RMA failed to deliver sustainable management of freshwater resources?)

"Recommendation: The Crown produce National Policy Statements and National Environmental Standards to provide guidance to territorial authorities on enhancing and protecting taonga and wāhi tapu." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"So the Crown's position has never been diminished by the RMA. Conversely, the Maori position has been diminished. Their rights and interests have not progressed much further than where they were pre-1991. We take this view because section 6 simply indicates that the

relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga is a matter of national importance." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"In the Te Whanganui-a-Orotu Report 1995, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga."

"We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues." (Wai 212: Te Ika Whenua Rivers Report (1998))

No compensation for loss of mahinga kai

"For these reasons, we find…" "That the Crown has acted inconsistently with the principles of partnership, reciprocity and mutual benefit derived from article 2, by breaching the principles of equality and the principle of redress for failure to properly compensate for Te Rohe Pōtae loss of mahinga kai, both principles being derived from article 3."(Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 479)

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…" "A failure to address the loss of mahinga kai (particularly wetlands) and a failure to require full compensation for the loss of such places." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

Need for bottom up view, rather than just top down

"In the present climate, we think that the resource management and conservation management structures are themselves impediments to Treaty principles and utmost good faith. The way in which they operate in the claim area reflects what Sir Kenneth Keith, president of the New Zealand Law Commission, described to the New Zealand Institute of Advanced Legal Studies Conference in February 1995 as 'a top down view of law and administration', rather than 'a bottom up view'.

He went on to suggest that:

> 'We should draw on the extensive experience of individuals, families, tribes, and many of other groups organising themselves within a State or indeed across several States.'

The Tribunal commends this suggestion to the local authorities and the Department of Conservation, which are managing the resources of Te Whanganui-a-Orotu and conserving the Ahuriri Estuary essentially from 'a top down view'. They should seek to act as a catalyst for 'a bottom up view'." (Wai 55: Te Whanganui-a-Orotu report (1995))

"The iwi concerned should have a real mandate to represent hapū, and whānau. They should also reflect this through constituting representative structures that elevate the voices of hapū

and whānau in the decision-making process. (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 501)

Not being implemented in manner that provided for fairly for Māori interests / Failed to ensure it is implemented in accordance with stated intention

"We find the Crown in breach of the Treaty principles of partnership and active protection. It has failed to ensure that the Resource Management Act 1991 is implemented in accordance with its stated intention to protect Maori interests and to provide for their values, custom law, and authority in resource management decisions. It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. As a result, iwi are faced with insufficient regard to, or even understanding of, their values and interests, and an inability to participate on a level playing field with consent applicants and authorities. Although the Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it. Clearly, the claimants have been prejudiced by these breaches of Treaty principle." (Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims (2008))

All New Zealanders miss out by system not being Treaty-compliant

"Our view was that all of this has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (objective D1), then Te Mana o te Wai is a platform for achieving this (through the 'National significance' statement and objective AA1), and mātauranga Māori must now be used to measure its success (policy CB1). It is also a platform for the whole community's values because it is water-centric." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We also noted the link between this issue and the earlier breaches found in respect of the RMA. We had already found that section 8 of the RMA was too weak to protect Māori interests, and that the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"But in fact all New Zealanders lose out, for Māori interests often coincide with other environmental interests, and the preservation of Māori culture is truly a matter of national importance." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

Go to

Ownership

Ownership and vesting of lands, river beds and management more akin to ownership

“During the Resource Management Law Reform (RMLR) project in 1988–90, Māori leaders sought to make the new legislation consistent with the Treaty. In particular, tribal leaders, the NZMC, the Taitokerau District Māori Council, and others wanted the Māori ownership of natural resources (including water) to be recognised and protected in the new Act. The Crown refused to do this on the basis that there would be a separate process to negotiate ownership issues. As far as we were aware, there had been no such process for water, and we noted that Treaty settlement policy excluded ownership of water bodies as an option (with rare exceptions as to the beds of certain waterways). Officials at the time of the RMLR argued that the law reform should focus not on Māori ownership but on Māori ‘participation, control and authority in resource management decision-making’.”

“The Crown’s position 20 years later echoed this thinking, except that the Crown acknowledged in our inquiry that there is also an ‘economic benefit aspect of Māori rights and interests’ in fresh water, and that its reforms must deliver economic benefits to iwi and hapū from their freshwater resources. We agreed with the Crown that Māori are entitled to an economic benefit from their interests in fresh water and, in our view, that right was inextricably linked to rights of property in their freshwater taonga.” (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

“Whatever the current position of legal ownership, the beds of rivers are de facto in the control of central and local government. Te Urewera rivers are a good example of this. The Resource Management Act 1991 is a significant improvement on the previous regime for management of rivers. It makes provision for powers exercised by local authorities to be transferred to iwi authorities. But no management powers in respect of any rivers in Te Urewera had been transferred to iwi at the time of our hearings.”

“At the heart of the waterways and customary fisheries claims before the Tribunal was the disquiet of the claimants that they should have been dispossessed of their rivers by a principle of English common law (the ad medium filum presumption) of which they were not aware. They did not knowingly or willingly alienate their rivers to the Crown when their land, or undivided interests in their land, was purchased. New Zealand legislation had also expropriated their ownership and management rights in their rivers. The Coal-mines Act Amendment Act 1903 had confiscated their navigable rivers, the claimants say, yet they are still not sure which rivers or stretches of rivers the Crown believes it took under the legislation. And by later legislation the Crown has assumed exclusive control over rivers, disregarding their tino rangatiratanga, and then has managed them badly. Their indigenous fisheries, including tuna, were sacrificed to introduced trout, and to hydroelectric development. The Resource Management regime introduced in 1991, according to the claimants, has yet to deliver effective recognition of hapu and iwi as owners and kaitiaki of their rivers.”

The Crown’s failure to properly acknowledge Maori ownership of their awa, is matched by its failure to give effect to the Treaty in its management of the rivers and river fisheries” (Wai 894: Te Urewera Report Volume VII (2015)

“The Crown’s efforts to secure title to navigable rivers through the Coal-Mines Amendment Act 1903 represent a very serious breach of Treaty principles. Instead of providing active

protection, the Crown unilaterally removed Māori property rights. It did so without consultation – indeed, by an obscure and virtually undebated clause of a seemingly unrelated Act. This was a breach of the principles that the Crown should seek to engage with Māori in a spirit of partnership, and act in good faith." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"On the basis of our discussions in this chapter (and the other chapters of part V), we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi. In doing so, we accept the submissions made by Mr Bennion that, while the Act is an advance on previous legislation, it still fails to accord with Treaty principles. It fails in the following important respects:

- During the reforms of the 1980s, the Crown indicated that ownership issues were not to be dealt with by the RMA. But the Crown then preserved its rights to control access to natural water, which it promptly delegated to regional or district councils. It also preserved its rights conferred by the Coal-mines Act Amendment Act 1903. Thus, while the section of the Coal-mines legislation vesting ownership in the Crown of all beds of navigable rivers was repealed, as was section 21 of the Water and Soil Conservation Act 1967, section 354(1) of the RMA provides that the Crown's rights conferred by these statutes continue."
- "The Crown's justification for these lack of gains for Maori is that there are a multitude of groups with interests in many of these resources, and only the Crown or its delegates may fairly and independently determine rights of allocation and use. Furthermore, only it or its delegates should be responsible for their management. The arguments are absolutist in the sense that they rely totally on article 1 of the Treaty of Waitangi and the right to govern. We reject such a contention on the basis that the Treaty right to govern in article 1 was also subject to the guarantee in article 2 of protection for what Maori possessed and the exercise of rangatiratanga over those possessions. We discussed the full extent of the Treaty guarantees in chapter 17. (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))
- "The RMA fails to deal with the key issue of contested ownership of resources. As Mr Bennion pointed out, the Act itself does not recognise or allow those exercising powers under it to recognise situations where ownership of resources is contested by Maori."

"A consent authority, for example, cannot use this information to refuse an application for a resource consent. Rather, all a consent authority needs to assess is whether such access is consistent with the sustainable management of the resource and the other requirements of the Act. In other words, the consent authorities may not act in a manner consistent with the principles of the Treaty of Waitangi, because they must act in accordance with the Act's statutory regime. In this respect, we point to the evidence concerning geothermal resources which we discuss in detail in chapter 20."

"As we discuss below and in chapter 20, the RMA fails to deal with historical issues. It does not look backwards in any substantial way. As a result, the historic degradation, damage, or pollution of a taonga cannot be raised as more than background during resource consent processes under the Act. Nor can a consent authority consider the historical issues concerning how an iwi or hapu has lost their ownership of a resource or taonga. There is no requirement for consent authorities to consider how Maori have been placed historically in terms of these resources. While they may do so, they are not required to do so by the RMA." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"The Crown, through the medium of the Resource Management Act, has delegated to regional councils the power to make regional plans without the full interest of the claimants in the geothermal resource, and the extent of the Crown's Treaty obligations to protect such interests, being first ascertained." (Wai 153: Te Arawa Geothermal Resources (1993))

'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away. Moreover, the Act perpetuates the vesting of the Whanganui riverbed in the Crown. (Wai 167: The Whanganui River Report (1999))

'First-in first-served' allocation basis

"An associated issue was the RMA regime for allocating water takes, which has allocated rights to take and use water for commercial purposes on the basis of a first-in, first-served system of applications. The claimants argued that this system had excluded Māori, had resulted in many catchments being over-allocated, and had caused environmental damage – points that have all been conceded in many of the documents placed before us by the Crown."

"Our findings on these issues were:

- the RMA made a proviso for the prior rights of farmers (preserving the effects of section 21 of the Water and Soil Conservation Act 1967), but did not do the same for the prior rights of Māori in section 354 or anywhere else in the Act, and did not otherwise recognise or provide for their rights of a proprietary nature;
- even if the prior rights of Māori had been provided for in the RMA, the first-in first-served system of allocation did not allow applications for water permits to be compared or prioritised (so that Māori rights could be taken into account);
- the first-in, first-served system was also unfair to Māori, especially in catchments that had become fully or over-allocated, because of statutory and other barriers that had prevented Māori landowners from participating in it in the past;
- RMA mechanisms allowed Māori little or no say in the decisions about allocation and use;
- councils very rarely provided an allocation to Māori in the absence of strong national direction; and
- the first-in first-served system had resulted in over-allocation and environmental problems, and needed urgent reform."

"For all those reasons, we found that the RMA and its allocation regime are not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by:

- the ongoing omission to recognise their proprietary rights;
- barriers that have prevented their participation in the first-in, first-served allocation system in the past ; and
- the lack of partnership in allocation decision-making."

"Economic opportunities have been foreclosed by these barriers to their access to water."

"We also noted that Māori had continued to pursue their water claims in the Waitangi Tribunal during the 1990s and 2000s, and had also begun to seek new mechanisms for the recognition

of their proprietary rights. In the period from 2003 to 2009, they began to call for an allocation of water to iwi and hapū and/or for the development of Māori land. Councils appeared to be unwilling or unable to make such allocations under the law as it exists at present, pointing to four small exceptions in the practice of regional councils. At the same time, we noted that Māori have not ceased to raise the question of ownership, and it seemed to us that that they will never do so unless some form of recognition is provided." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.2.4 Proprietary rights, economic benefits, and the RMA allocation regime)

"The RMA's allocation regime was urgently in need of reform in the early 2000s. The first-in, first-served approach had resulted in the full or over-allocation of many catchments. During the co-design of the Next Steps reform proposals, the Crown and the ILG agreed that providing an economic benefit from water was essential to addressing Māori rights and interests in fresh water. But they could not agree on what form this should take: the ILG wanted an allocation to iwi and hapū; whereas the Crown wanted an allocation for the development of Māori land."

"The Crown had imposed bottom lines on the co-design of reform options, including that no one owns water and that there would be no generic share of water for iwi. Discussions in the 'economic development' workstream reached an impasse, so no reforms from that workstream were proposed in Next Steps. More work was needed to design a whole new allocation system in any case, but, as noted above, the Crown could have decided in principle that there should be an allocation for iwi and hapū."

"Following the Next Steps consultation, the Crown established a new allocation work programme in 2016, which developed reform options but did not reach the point of decisions prior to the change of government in 2017. We assessed the programme and its options in chapter 6 of our report." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5 Allocation Reform Options, 7.5.1 Introduction)

"Cabinet acknowledged in 2016 that Māori landowners faced statutory and other historical barriers to their ability to access water for economic development. Māori have been particularly disadvantaged by the first-in first served system, including iwi who have recently received land as redress in Treaty settlements."

"We considered this to be an important acknowledgement, and noted earlier Tribunal inquiries that found many of those historical barriers had been of the Crown's making. Māori have been denied a level playing field in the New Zealand economy. The NZMC, the ILG, and the Crown seemed to find common ground in the view that the current allocation system is unfair to Māori, and that there should be an allocation of water and discharge rights to Māori. We agreed that the allocation system is inequitable for Māori. The Treaty principle of equity requires the Crown to act fairly as between Māori and non-Māori. At present, the RMA's allocation regime is in breach of Treaty principles (see chapter 2 findings as summarised above)." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"Acknowledging that the present allocation system is unfair to Māori, officials developed three significant reform options (all of which they considered were necessary):

- access to water and discharge rights for the owners of Māori land as a matter of equity and to assist regional development ;
- an allocation for iwi and hapū (but not on the basis of a national percentage) ; and
- an in-stream allocation for cultural and economic purposes."

"Cabinet made no decisions on these options in December 2016, although it expressed a preference for an allocation to Māori land development on the grounds of equity. A similar preference has been expressed recently by the new Government."

"In 2017, officials proceeded to develop system models to incorporate the various options that had been developed in 2016, but this work was not completed, and no decisions were ever made on how the allocation system should be reformed." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5.3 Equity)

Māori proprietary rights and economic interests

"During the Resource Management Law Reform (RMLR) project in 1988–90, Māori leaders sought to make the new legislation consistent with the Treaty. In particular, tribal leaders, the NZMC, the Taitokerau District Māori Council, and others wanted the Māori ownership of natural resources (including water) to be recognised and protected in the new Act. The Crown refused to do this on the basis that there would be a separate process to negotiate ownership issues. As far as we were aware, there had been no such process for water, and we noted that Treaty settlement policy excluded ownership of water bodies as an option (with rare exceptions as to the beds of certain waterways). Officials at the time of the RMLR argued that the law reform should focus not on Māori ownership but on Māori 'participation, control and authority in resource management decision-making'."

"The Crown's position 20 years later echoed this thinking, except that the Crown acknowledged in our inquiry that there is also an 'economic benefit aspect of Māori rights and interests' in fresh water, and that its reforms must deliver economic benefits to iwi and hapū from their freshwater resources.8 We agreed with the Crown that Māori are entitled to an economic benefit from their interests in fresh water and, in our view, that right was inextricably linked to rights of property in their freshwater taonga."

"An associated issue was the RMA regime for allocating water takes, which has allocated rights to take and use water for commercial purposes on the basis of a first-in, first-served system of applications. The claimants argued that this system had excluded Māori, had resulted in many catchments being over-allocated, and had caused environmental damage – points that have all been conceded in many of the documents placed before us by the Crown."

"Our findings on these issues were:

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- even if the prior rights of Māori had been provided for in the RMA, the first-in first-served system of allocation did not allow applications for water permits to be compared or prioritised (so that Māori rights could be taken into account) ;
- the first-in, first-served system was also unfair to Māori, especially in catchments that had become fully or over-allocated, because of statutory and other barriers that had prevented Māori landowners from participating in it in the past ;
- RMA mechanisms allowed Māori little or no say in the decisions about allocation and use ;
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- the first-in first-served system had resulted in over-allocation and environmental problems, and needed urgent reform."

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- the ongoing omission to recognise their proprietary rights;
- barriers that have prevented their participation in the first-in, first-served allocation system in the past; and
- the lack of partnership in allocation decision-making."

"Economic opportunities have been foreclosed by these barriers to their access to water."

"We also noted that Māori had continued to pursue their water claims in the Waitangi Tribunal during the 1990s and 2000s, and had also begun to seek new mechanisms for the recognition of their proprietary rights. In the period from 2003 to 2009, they began to call for an allocation of water to iwi and hapū and/or for the development of Māori land. Councils appeared to be unwilling or unable to make such allocations under the law as it exists at present, pointing to four small exceptions in the practice of regional councils. At the same time, we noted that Māori have not ceased to raise the question of ownership, and it seemed to us that that they will never do so unless some form of recognition is provided." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): Summary of Findings and recommendations, 7.2.4 Proprietary rights, economic benefits, and the RMA allocation regime)

"Over and above the issue of fairness, the Crown was committed to providing for 'use' of freshwater resources in addition to 'control', in recognition of Māori rights (as noted above). A commitment to this effect was made in the Supreme Court in 2012, where the Crown's position was that any recognition of Māori rights and interests 'must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use".'"

"As we found at stage 1, Māori rights in their freshwater taonga included proprietary rights in indivisible water resources, of which the water was an integral component. What was necessary, we said, was an exercise in rights recognition and rights reconciliation. The claimants' position in stage 2 of our inquiry was that a number of mechanisms could now provide 'proprietary redress': a percentage allocation through any of a number of models, such as the aquaculture settlement or a quota management system; royalties; or even compensation if necessary."

"The option that officials have proposed in recognition of Māori rights, whether defined as proprietary (by the NZMC) or economic (by the ILG), is an allocation of water and discharge rights to iwi and hapū as well as a separate allocation for land development. Officials certainly thought that this could be done, in conjunction with an in-stream allocation for customary purposes, although the Crown to date has made no decisions. The allocation work programme did not really consider other options to address Māori rights, such as the payment of a levy or a royalty on commercial uses." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5 Allocation Reform Options, 7.5.5 Addressing Māori rights and interests)

Go to

Public Works Act including offer back, Te Ture Whenua Māori Act 1993 and s342 of Schedule 10 of LGA 1974

"The Tribunal also highlighted problems with resource and fishery management regimes and recommended changes and improvements to ensure that these regimes were more consistent with the Treaty. The Crown admitted that the Resource Management Act 1991 was not being implemented in a manner that provided fairly for Māori interests. The Tribunal's report highlighted a number of shortcomings with respect to the current 'offer-back' regime under the Public Works Act 1981. It recommended amendments to Te Ture Whenua Māori Act 1993 and the Public Works Act to address these issues." (Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims (2008))

Cross-legislation

All spheres of activity, treaty provisions in LGA, RMA, Historic Places Act are not sufficient to oblige LG to act consistently with the Treaty

"But all the different arrangements and opportunities are ad-hoc and the various legislation that provide for these opportunities lack coherence. In some cases, such as section 33 of the Resource Management Act, while offering Māori the means to exercise their authority to manage natural resources, local authorities have discretion whether to agree or not ; they are not obliged to transfer any power to iwi."

"We recognise that some local authorities in the district have taken steps to improve Māori representation and participation in local government decisions, but these are largely dependent on the 'good-will' of the local authority and local community. In our view, having to rely on the discretion of the local authority and good-will of the community is another breach of the principle of partnership. We find, in particular, that sections 19ZA to 19ZG of the Local Electoral Act 2001, which allows for polls of electors to decide on whether Māori wards or Māori constituencies can be established, are inconsistent with the principles of the Treaty and breach Te Rohe Pōtae Māori tino rangatiratanga."

"The Crown is obliged to ensure that local authorities reflect Treaty principles. In failing to do so, the Crown is acting inconsistently with the principles of the Treaty of Waitangi, namely the principles of partnership, rangatiratanga, and equity and has breached its duty of active protection of Te Rohe Pōtae tino rangatiratanga."

"The lack of coherence indicates that specific legislation is needed to fully recognise Te Rohe Pōtae Māori tino rangatiratanga. The Crown should negotiate with Te Rohe Pōtae Māori, or their mandated representatives, to put in place legislation that recognises and gives effect to their tino rangatiratanga in local government." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 139)

"We find that, while the Local Government Act 2002 exposes iwi to the policies and actions of local government, it does not hold councils to account if they fail to provide opportunities for Māori to participate in decision-making or do not actively protect environmental taonga (treasured property). In other words, the Crown has delegated responsibility to local councils but has not delegated an equivalent level of accountability."

"In the public works chapter (ch 8), we have already discussed the Crown's delegation of powers to local authorities. There we found that that the Crown may not avoid its Treaty obligations by unilaterally deciding that Crown functions will be carried out by others."

"Delegation of Crown functions is of course in accordance with the Treaty if the Crown's Treaty obligations go with the delegation. However, we have seen in all spheres of local government activity that the Treaty provisions in the relevant legislation are not sufficiently prescriptive to oblige local bodies to conduct themselves in a manner that is consistently Treaty-compliant. In this, the Crown fails in its duty of active protection."

"Thus we consider that both the Local Government Act and the Resource Management Act require more compelling Treaty provisions. Also needed are regular audits, and sanctions for non-compliance." (Wai 863: Wairarapa ki Tararua Report (2010))

"We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002 and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does not ensure that Muaūpoko rangatiratanga and kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for." (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

Local Government not required to be Treaty compliant under LGA

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…" "The continued subjection of the claimants to the decision making of regional and local authorities who are not required by legislation to give effect to the principles of the Treaty of Waitangi in the administration of their powers and functions under the legislation and in planning and consenting procedures." Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"But all the different arrangements and opportunities are ad-hoc and the various legislation that provide for these opportunities lack coherence. In some cases, such as section 33 of the Resource Management Act, while offering Māori the means to exercise their authority to manage natural resources, local authorities have discretion whether to agree or not ; they are not obliged to transfer any power to iwi."

"We recognise that some local authorities in the district have taken steps to improve Māori representation and participation in local government decisions, but these are largely dependent on the 'good-will' of the local authority and local community. In our view, having to rely on the discretion of the local authority and good-will of the community is another breach of the principle of partnership. We find, in particular, that sections 19ZA to 19ZG of the Local Electoral Act 2001, which allows for polls of electors to decide on whether Māori wards or Māori constituencies can be established, are inconsistent with the principles of the Treaty and breach Te Rohe Pōtae Māori tino rangatiratanga."

"The Crown is obliged to ensure that local authorities reflect Treaty principles. In failing to do so, the Crown is acting inconsistently with the principles of the Treaty of Waitangi, namely the

principles of partnership, rangatiratanga, and equity and has breached its duty of active protection of Te Rohe Pōtae tino rangatiratanga."

"The lack of coherence indicates that specific legislation is needed to fully recognise Te Rohe Pōtae Māori tino rangatiratanga. The Crown should negotiate with Te Rohe Pōtae Māori, or their mandated representatives, to put in place legislation that recognises and gives effect to their tino rangatiratanga in local government." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 139)

"In our view, while the Local Government Act 2002 encourages such processes, it has proven inadequate to ensure that local authorities discharge the Crown's Treaty obligations. And, while central government entities are more familiar with the Crown's obligations, they too can lack the capacity and the will to incorporate Māori knowledge and values systematically in their decision-making processes. Māori are the clear losers from this state of affairs, in a subject area of vital importance to their culture." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"While we recognise that steps have been taken by some local authorities in some places to improve Māori representation and participation in local government decisions, we emphasise that this is not required in the legislation – and nor are there sanctions for poor practice. To ensure that good working relationships happen all the time, rather than arbitrarily or opportunistically, we call for clear lines of accountability that are supported by legislation that enables, promotes, and (at least for key decisions) requires full involvement of tangata whenua."

"Recommendations:

> The Local Government Act 2002, Resource Management Act 1991, Historic Places Act 1993 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and other relevant legislation be amended to provide Māori the level of input that recognises their status as a Treaty partner."(Wai 863: Wairarapa ki Tararua Report (2010))

Co-governance/co-management and co-design

Māori Treaty right in freshwater taonga is co-governance/co-management

"Having heard the evidence of the claimants and interested parties in both stage 1 and stage 2 of this inquiry, our view is that the Māori Treaty right in the management of most freshwater taonga is at the co-governance / co-management part of the scale. Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga."

"The exception to co-governance and co-management is that, in some cases, the strength of the Māori interest in a particular freshwater taonga may be such that it requires Māori governance of that taonga. Our view was that the presence of other interests in New Zealand's water bodies will more often require a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga; that is the Treaty standard for freshwater management."

"In making this finding in chapter 2, we were not departing from the Wai 262 findings but rather specifying the Treaty standard for one particular resource out of the many that come under the RMA."

"Having set the Treaty standard for freshwater management and decision-making, we assessed the RMA mechanisms against that standard. We also examined the Crown's argument that statutory arrangements and Treaty settlements have created a 'tapestry of co-governance and co-management arrangements for waterways across New Zealand' since 2011.5 We accepted that the RMA has a number of participation mechanisms for Māori, including section 33 (which enables the transfer of functions and powers to iwi authorities), section 36B (which enables Joint Management Agreements between councils and iwi or hapū), the provision for iwi management plans, and the schedule 1 consultation requirements for regional plan making. The provision for Heritage Protection Authorities, however, does not apply to water and therefore does not provide a mechanism for Māori to participate in freshwater management."

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows:

- Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used. That is, there are high barriers within section 36B itself to its use by councils and iwi or hapū (as the Crown has acknowledged),6 and the Crown has not provided incentives for its use or any compulsion to actively consider its use.
- Iwi management plans have not been accorded their due weight in RMA planning. The Crown has turned down repeated calls for the enhancement of their legal weight.
- The consultation requirements of the RMA have been confined to the plan-making phase of freshwater decision-making (consultation is not required for the consenting phase). The consultation requirements have also suffered from under-resourcing and the lack of a clear path for consultation to take place in a meaningful and effective way. Crown counsel argued that the new Mana Whakahono a Rohe mechanism will provide just such a path (our findings on that new mechanism are summarised below)."

"Alongside these flaws in the RMA mechanisms themselves, we found that under resourcing has contributed to a lack of capacity and capability for many Māori entities in freshwater management. This has crippled their ability to participate effectively in RMA processes. Examples included the ability to meet the 'efficiency' requirements of sections 33 and 36B, to prepare effective iwi management plans, and to participate effectively (or at all) in consultation and RMA hearing processes."

"The Local Government Act 2002's requirement that councils must 'consider ways to foster the capacity of tāngata whenua' has not sufficiently addressed this crucial problem. The Crown has

recognised the existence and importance of this problem in multiple policy and consultation documents since 2004, as we set out in chapters 2-4."

"For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making."

"We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011."

"We accepted, however, that Treaty settlements have delivered co-governance and co-management authority for a limited selection of freshwater taonga."

"Council practice and iwi-council relationships have also improved in some areas– mostly but not entirely due to Treaty settlements. Some councils have provided limited funding. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making. Our conclusion was that Treaty settlements have provided for the exercise of tino rangatiratanga over selected waterways, such as the Waikato and Whanganui Rivers. But not all iwi who have settled with the Crown obtained those kinds of arrangements, nor will they necessarily be available for groups which are yet to settle. In those cases, Māori participation in freshwater management remains limited in nature. The Crown could not reasonably rely on the Treaty settlement process, therefore, to avoid reforming the participatory arrangements in the RMA."

"We also found that the NPS-FM will not be Treaty compliant until section D is reformed in such a way that it provides more effectively for the tino rangatiratanga of iwi and hapū. Our view was that this required a co-governance level of 'involvement' in decision-making, and national direction for councils to use partnership mechanisms in plan-making and in freshwater management more generally." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"As summarised earlier (section 7.2.3), the Treaty requires co-governance and co-management in plan-making, as it does in other parts of the decision-making relating to freshwater taonga, for the RMA regime to be compliant with the principle of partnership and the Treaty guarantee of tino rangatiratanga. We agreed with the claimants that co-management must be 'fixed at an irreducible involvement', including 'a leading role in developing, applying and monitoring / enforcing water quality requirements, and thereby protecting the mauri of water bodies'." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We found that Māori have been prejudiced by the following omissions from the Crown's decisions on Next Steps reform options:

- no amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism ;
- no amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism ;

- no alternative co-governance or co-management mechanisms inserted in the RMA (to make these kinds of mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi) ;
- no amendments to enhance the legal weight of iwi management plans ;
- no mechanisms for formal recognition of iwi and hapū relationships with– and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream;
- no strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori as freshwater decision makers ;
- no recognition of proprietary rights (ruled out by the Crown's bottom line that 'no one owns water') ;
- no commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle in the Next Steps process ; and
- no funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation."

"The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown."

"Further, even if relationships are improved and discussions are held through a Mana Whakahono a Rohe, statutory barriers still inhibit section 33 transfers and Joint Management Agreements. The evidence of the Crown was clear on that point. In all these circumstances, it is at best unlikely that Mana Whakahono a Rohe will result in a greater decision-making role for Māori in freshwater management, such as co-governance and co-management, without further statutory amendment."

"The issue of resourcing is also crucial. The ILG's view was that 'both local authorities and iwi must be resourced to ensure that the establishment and implementation of Mana Whakahono a Rohe agreements is as successful as possible'."

"We agreed. The evidence in our inquiry was that the lack of resources has prevented effective Māori participation in RMA processes. Mana Whakahono a Rohe arrangements will be no different in that respect unless resources are provided."

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and

kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We agree with the forum and the claimants that there should be an independent national body established on a co-governance basis with Māori. At a minimum, its role should be to act in partnership to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management."

"We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with those issues. Either model could work so long as it is institutionalised, but the value of the co-governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori. In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies:

- A national co-governance body should be established with 50/50 Crown–Māori representation, to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management. The details should be arranged between the Treaty partners.
- Sections 33 and 36B of the RMA should be amended to remove statutory and practical barriers to their use, to provide incentives for their use, and to compel councils to actively seek opportunities for their use. Sections 33 and 36B should also be amended so that transfers of power and Joint Management Agreements cannot be revised or cancelled without the agreement of both parties. Section 33 should be amended so that transfers of power in respect of a water body or water bodies may be made to hapū. Joint Management Agreements for water bodies should apply to the whole catchment of a water body, and should include (among other things) 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- Sections 33 and 36B should also be amended to include a process for iwi authorities to apply to councils for transfers and Joint Management Agreements. A mandatory process of engagement would follow any application, with mediation and the assistance of the Crown (or the co-governance body for freshwater applications) to be available as required.
- The Mana Whakahono a Rohe provisions of the RMA should be amended to make the co-governance and co-management of freshwater bodies a compulsory matter that must be discussed and agreed by the parties. Other matters could also be made compulsory (as discussed in chapter 4), and the Crown should discuss and agree to any such further

proposed amendments with the ILG, which designed the original Mana Whakahono a Rohe proposal.

- Objective D1 of the NPS-FM should be amended to specify that iwi and hapū must be directly involved in freshwater decision-making, that Māori values, rights, and interests must be recognised and provided for in freshwater decision-making, and that councils must actively seek opportunities to enter into section 33 transfers and section 36B Joint Management Agreements for freshwater bodies (where Treaty settlements have not already established co-governance agreements for freshwater bodies). Consequential amendments should be made in policy D1, and further policies could be inserted as required. These amendments should specify 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- The RMA provisions for iwi management plans should be amended to provide that, in the case of water bodies where co-governance and co-management has not been arranged, the iwi and hapū management plans filed by kaitiaki will have greater legal weight in the process of developing or amending regional plans and in consenting processes.
- The Crown should offer co-governance / co-management agreements for freshwater bodies in all future Treaty settlements, unless sole iwi governance of a freshwater taonga is more appropriate in the circumstances."

"We also recommend that the national co-governance body should assess whether a separate Water Act is necessary. Whether such an Act is required or not, we do not recommend the duplication of authorities at the regional level. Land, water, and other natural resources should be managed in an integrated manner by regional councils on a co-governance/co-management basis with iwi and hapū." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7.3 Co-governance and co-management)

Co-design as the Treaty standard where Māori interests are concerned

"We hesitated to characterise this as a partnership model in the period up to 2014, because there was no co-design of the version of the NPS-FM that was issued in 2011, and only limited co-design of the 2014 version. The real co-design phase came later in 2015–17…" "The result of the collaboration was a quite limited treatment of Māori rights and interests in the first six years of the Crown's freshwater reform programme." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"From 2014 to 2017, the Crown and ILG entered into two phases of 'co-design' of reform options: the first was the 'Next Steps' phase (summarised here); and the second was the work of the officials and the IAG on a revised version of the NPS-FM in 2017 (summarised in section 7.3.10)."

"In Treaty terms, co-design was probably the most important process innovation of the Crown's freshwater reform programme. Our view was that the process of co-design with a national Māori body, followed by wider consultation with Māori and the public, was compliant with the principles of the Treaty. The Crown is to be congratulated on this innovation, which we thought should become a standard part of government policy-making."

"We also found that the Crown did not breach the principle of equal treatment in its choice of the Iwi Chairs Forum (and its appointed iwi leaders group) as the national Māori body with which to work. Having said that, we thought that the need for other perspectives in the

co-design process became clearer as time went on. When the NZMC filed its claim in 2012, it presented itself as a national Māori body with a particular and contrasting view to that of the ILG – a view that was also widely supported by a number of interested Māori parties. We think it was evident to the Crown that it ought to have broadened its co-design programme to include the NZMC, and this was a missed opportunity to have included the view that the Māori council represented." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"Although the co-design concept was promising in Treaty terms, we found that its outcomes in 2016 were disappointing. This was primarily because the Crown reserved the final power of decision-making to itself alone, and its decisions were not – for the most part – Treaty compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"We concluded that 'co-design' of reforms by the Crown and iwi leaders did not fulfil its potential. The Crown's omission of so many important options to address Māori rights and interests seriously limited the value of its freshwater reforms in Treaty terms. In particular, the Crown's Next Steps reforms did not meet their stated objective of enhancing Māori participation in freshwater management and decision-making, other than providing a new mechanism to improve relationships and schedule 1 consultation. We summarise our view on the Mana Whakahono a Rohe mechanism further when we assess the Crown's RMA reforms in the next section." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"The RMA's allocation regime was urgently in need of reform in the early 2000s. The first-in, first-served approach had resulted in the full or over-allocation of many catchments. During the co-design of the Next Steps reform proposals, the Crown and the ILG agreed that providing an economic benefit from water was essential to addressing Māori rights and interests in fresh water. But they could not agree on what form this should take: the ILG wanted an allocation to iwi and hapū; whereas the Crown wanted an allocation for the development of Māori land."

"The Crown had imposed bottom lines on the co-design of reform options, including that no one owns water and that there would be no generic share of water for iwi. Discussions in the 'economic development' workstream reached an impasse, so no reforms from that workstream were proposed in Next Steps. More work was needed to design a whole new allocation system in any case, but, as noted above, the Crown could have decided in principle that there should be an allocation for iwi and hapū." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5 Allocation Reform Options, 7.5.1 Introduction)

"Broadly speaking, the ILG had a minimal role in the allocation work programme. It provided a member of the Technical Advisory Group and nominated two qualified people for the work programme team. There was also a Joint Advisory Group but its role and impact were not clear to us on the evidence we received. The Crown decided there would be no co-design of these reforms, and the ILG considered that its level of engagement with the allocation programme was inadequate. There were some discussions with the IAG as the programme developed." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5.2 Collaboration)

"We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with

those issues. Either model could work so long as it is institutionalised, but the value of the co-governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori. In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.6.5 Our view of the water commission proposals)

"We recommend that the Crown continue its approach of co-design of policy options with a national Māori body or bodies and that this should be made a regular feature of government where Māori interests are concerned." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7 Recommendations)

"We acknowledge that the national water body may come to alternative views on amendments to the NPS-FM, but if such a body is not established, or agreement cannot be reached between the Crown and Māori representatives, we recommend the following amendments to the NPS-FM:" [recommendations followed]

"If the national co-governance body has not been established, these recommendations should be carried out by the Crown in partnership, and on a co-design basis, with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7 Recommendations, 7.7.6 Water quality)

"We recommend that the Crown recognise Māori proprietary rights and economic interests through the provision of what the NZMC has called 'proprietary redress'."

"In conjunction with this, we make the following recommendations concerning the RMA's allocation regime:" [recommendations followed]

"If the co-governance body is not established, then the Crown should carry out these recommendations in partnership (and on a co-design basis) with the Freshwater ILG, the NZMC, and Te Kahui Wai Māori." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7 Recommendations, 7.7.7 Māori proprietary rights and economic interests vis-à-vis the allocation regime)

"Finally, we make a recommendation that arises from one of the unfulfilled reform options in the Next Steps co-design process. We recommend that the Crown provide urgent assistance, including funding and expertise, for water infrastructure and the provision of clean, safe drinking water to marae and papakāinga."

"This will likely need to include a subsidy scheme to resume the important but incomplete work of the previous National Drinking Water Assistance Subsidy Scheme (2005–15)."

"We recommend that the national co-governance body should devise an appropriate water supply and infrastructure scheme for marae and papakāinga, which may need to be developed and implemented with or alongside a scheme for safe, clean rural water supplies. If the national co-governance body is not established, the Crown should develop and implement a scheme in partnership with Māori on a co-design basis and with co-governance of the

scheme." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.7 Recommendations, 7.7.9 Clean, safe drinking water for marae and papakāinga)

Past RM review processes

Past RM review processes have not been treaty-compliant

"Importantly, in 2013 the Crown decided not to make any reforms in respect of section 33 transfers, Joint Management Agreements, and iwi management plans."

"Urgent reforms were needed on these parts of the RMA to remove statutory barriers to their adoption, and to make them more genuinely available to iwi and councils."

"The Wai 262 Tribunal had recommended significant reforms in its 2011 report."

"The Crown decided in 2013, however, to limit its enhanced 'iwi/Māori participation' in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious."

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.6 RMA reforms: the Crown's decisions on enhancing participation prior to Next Steps)

Co-design process Treaty compliant but outcomes disappointing primarily because of Crown-reserved final decision-making

"From 2014 to 2017, the Crown and ILG entered into two phases of 'co-design' of reform options: the first was the 'Next Steps' phase (summarised here); and the second was the work of the officials and the IAG on a revised version of the NPS-FM in 2017 (summarised in section 7.3.10)."

"In Treaty terms, co-design was probably the most important process innovation of the Crown's freshwater reform programme. Our view was that the process of co-design with a national Māori body, followed by wider consultation with Māori and the public, was compliant with the principles of the Treaty. The Crown is to be congratulated on this innovation, which we thought should become a standard part of government policy-making."

"We also found that the Crown did not breach the principle of equal treatment in its choice of the Iwi Chairs Forum (and its appointed iwi leaders group) as the national Māori body

with which to work. Having said that, we thought that the need for other perspectives in the co-design process became clearer as time went on. When the NZMC filed its claim in 2012, it presented itself as a national Māori body with a particular and contrasting view to that of the ILG – a view that was also widely supported by a number of interested Māori parties. We think it was evident to the Crown that it ought to have broadened its co-design programme to include the NZMC, and this was a missed opportunity to have included the view that the Māori council represented." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.7 The 'Next Steps' co-design process)

"Although the co-design concept was promising in Treaty terms, we found that its outcomes in 2016 were disappointing. This was primarily because the Crown reserved the final power of decision-making to itself alone, and its decisions were not – for the most part – Treaty compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.8 The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests)

"We found that Māori have been prejudiced by the following omissions from the Crown's decisions on Next Steps reform options:

- no amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism
- no amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism ;
- no alternative co-governance or co-management mechanisms inserted in the RMA (to make these kinds of mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi) ;
- no amendments to enhance the legal weight of iwi management plans ;
- no mechanisms for formal recognition of iwi and hapū relationships with– and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream ;
- no strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori as freshwater decision makers ;
- no recognition of proprietary rights (ruled out by the Crown's bottom line that 'no one owns water') ;
- no commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle in the Next Steps process ; and
- no funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation."

"Also, no funding actually materialised as a result of the proposal about water infrastructure on marae and papakāinga."

"We concluded that 'co-design' of reforms by the Crown and iwi leaders did not fulfil its potential. The Crown's omission of so many important options to address Māori rights and interests seriously limited the value of its freshwater reforms in Treaty terms. In particular, the Crown's Next Steps reforms did not meet their stated objective of enhancing Māori participation in freshwater management and decision-making, other than providing a new

mechanism to improve relationships and schedule 1 consultation. We summarise our view on the Mana Whakahono a Rohe mechanism further when we assess the Crown's RMA reforms in the next section." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.8 The effectiveness of the 'Next Steps' process in developing and progressing reforms to address Māori rights and interests)

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty."

"We were not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found. The Mana Whakahono a Rohe agreements have the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans."

"They will likely result in an enhanced role for Māori in decision-making at the front-end, planning stage of the RMA. But the range of matters iwi and councils are compelled to negotiate and agree on is very limited. Our finding was that the Mana Whakahono a Rohe provisions have not made the RMA Treaty-compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.9 RMA reforms: Mana Whakahono a Rohe arrangements)

"The third Next Steps reform arose from the Crown's decision on the issue of resourcing for capacity and capability. The Crown and the ILG had agreed to 'consider ways to build iwi and hapū capability and resourcing to enable effective participation in freshwater decision-making'.26 The result was an objective to '[b]uild capacity and capability amongst iwi/hapū and councils, including resourcing' (emphasis added). The Crown dropped the phrase 'including resourcing' from its reform proposal on this matter, and the proposal in Next Steps was for the Crown to 'build capacity and capability by providing training and guidance'."

"In response, the strongest theme in the consultation submissions was the need for additional resourcing to support Māori and councils to carry out the additional requirements on top of the already resource-intensive RMA processes. The Crown did not change its mind, and so the ultimate outcome in this case was a guidance manual and training on Mana Whakahono a Rohe."

"We found that the Māori Treaty partner has made repeated appeals to the Crown over many years to assist with funding and resourcing, and these appeals have not been adequately met. The Crown's stated objective to enhance Māori participation in freshwater management and decision-making will not be achieved unless an answer is found to the problem of under-resourcing. Many Crown documents have admitted that Māori participation in RMA processes is variable and sometimes non-existent. The Crown–ILG objective to '[b]uild capacity amongst

iwi/hapū and councils, including resourcing' has not been fulfilled, and it needs to be if the Crown's reforms are to be Treaty compliant."

"We accepted that the Crown's reform programme is not finished, and that there is still opportunity to address this long-standing problem more effectively. We reiterated its crucial importance and the need for it to be addressed if the Crown's reforms are to be Treaty compliant. In the meantime, Māori continue to suffer long-term prejudice." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.3.11 Resourcing for capacity and capability)

"We made no findings on the allocation reforms because the Crown did not make any decisions, and the new Government is in the course of deciding its freshwater reforms. We did, however, provide our view of what was necessary to make the allocation regime Treaty compliant (having found that it was not in chapter 2)."

"Our view was that an allocation of water and discharge rights for Māori land development would not satisfy the rights and interests of Māori as guaranteed by the Treaty of Waitangi. If regulatory reforms are to deliver something approximating the Treaty guarantees in today's circumstances, then an allocation for the exclusive use of iwi and hapū is also required. That allocation should be inalienable other than by lease, and it should be perpetually renewable (as all consents are in theory, provided there is still allocable water available). We did not see any insuperable obstacle to this, given the arrangements for Māori that the Crown has agreed to in the past concerning commercial aquaculture and fisheries. We agreed with the Crown that the circumstances of catchments must be taken into account when the details are decided, especially where catchments are over-allocated. But RMA reform can provide a solution without the need for a national percentage, which was one of the former Government's bottom lines. The details of such a reform could be worked out by a national water commission if one is established."

"The evidence suggested that some Māori groups will not consider that their proprietary rights are fully satisfied by an allocation of water and/or discharge rights, if allocation reforms of that type do in fact eventuate. If the Crown is only prepared to consider regulatory reform, the other mechanism which the RMA can offer is a charge or royalty."

"We also considered that, if it is necessary to go outside the RMA for solutions, the Crown's previous bottom lines (2015–17) were not likely to permit a Treaty compliant outcome. We did not consider the new Government's bottom lines (described as 'parameters') because we lacked the necessary evidence. We noted, however, that, if the Crown's decision is still to confine allocation to Māori land development, then that will not produce a result that makes the RMA and its allocation regime compliant with Treaty principles. Too many Māori have lost too much land throughout the country as a result of Treaty breaches for that approach to have any prospect of being compliant with Treaty principles." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.5.6 Our view of a Treaty-compliant allocation regime)

"It seems to us that there are some commonalities in the various approaches that have been put forward so far. The stakeholders of the Land and Water Forum clearly saw that a national commission is necessary, and that it must be established on a co-governance basis (points held in common with the NZMC and the Wai 2601 claimants). The claimants and interested parties also agreed that there needs to be a role for the exercise of tino rangatiratanga at the national level, in partnership with the Crown, although they had differences on what kind of institutional arrangement would best reflect that partnership function. The Crown has said

that it is open to exploring such matters but has not endorsed an institutional role for Māori at the national level. In practice, we note that it has developed most of its reforms in collaboration with the appointed representatives of a national Māori body (the ILG and IAG) and more recently with Te Kahui Wai Māori."

"In our view, another point of agreement between the forum and the claimants is that there is a significant gap in the freshwater policy and management structure (following the dissolution of the National Water and Soil Conservation Authority); there is no independent national body to oversee the system, monitor performance, develop policy, and conduct research on a national scale. We agree that this is a significant gap. For example, the need to conduct research and to develop and populate the NOF underlines the need for this gap to be filled."

"We agree with the forum and the claimants that there should be an independent national body established on a co-governance basis with Māori. At a minimum, its role should be to act in partnership to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management."

"We also agree with the ILG that the Crown could, and in some cases should, develop policy on a co-design basis with an existing national Māori body or bodies, with the choice to be made according to the nature of the issues and the Māori constituency most involved with those issues. Either model could work so long as it is institutionalised, but the value of the co-governance model proposed by the NZMC is that it is a decision-making body. One of the flaws in the co-design process carried out for freshwater reforms in 2015–16 was that the decisions were not made in partnership but by the Crown alone. The results were disappointing given the options supposedly on the table, the sustained effort put in on both sides, and the actual outcomes for Māori. In terms of the scope and possible functions of a co-governance partnership body, our view is that that is a matter to be negotiated and decided by the Treaty partners, but we have recommended that the Crown include some particular functions where that seemed necessary." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019): 7.6.5 Our view of the water commission proposals)

RMA ambition/delivery – general

Aspirations of RMA have not come to fruition

"There seems to have been some improvement in recent decades, but at the time of our hearings the Crown was still not giving effect to its Treaty obligations. In particular, it did not appear that enough was being done to restore fisheries, and Resource Management Act powers to delegate or share power with iwi were not being used. As the Wai 262 Tribunal found, the Resource Management Act 'has delivered Maori scarcely a shadow of its original promise'" (Wai 894: Te Urewera Report Volume VII (2015))

"Ngā iwi o te kāhui maunga have largely been excluded from the management of their water resources. Under the RMA, this task has been delegated to the Manawatu– Wanganui and Waikato Regional Councils. Ko Aotearoa Tēnei, in an examination of the RMA, has asked if the current RMA system provides for kaitiakitanga control, partnership, and influence on environmental management. It finds that the Act has not fulfilled its promise with respect to Māori: there have, in particular, been very few transfers of powers to iwi authorities" (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"The RMA in the reform process that led to it was a beacon of hope for Māori. For the first time, it seemed that they might be able to take more positive and proactive roles in environmental decision-30 making than those they had become accustomed to under earlier legislation."

"It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway." " (Wai 262: Ko Aotearoa Tēnei: (2011))

"If these recommendations are implemented, we believe that the petroleum management regime can be made Treaty-consistent and that the high level of protection that legislators intended to give Māori interests when originally passing these Acts can be given better effect. We will all benefit from a truly fair balancing of interests and the protection of cultural and environmental heritage for future generations." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"But it should not be forgotten that Maori were intended to be active participants in, for example, the resource management regime, from the outset – in the case of the Resource Management Act, since 1991. There are extensive provisions in that Act for recognition of the Maori interest in the management of the environment, including the devolution to them of decision-making powers. It is certainly the case that the Treaty aspirations of that legislation have never come to fruition. The complaints of Maori about the regime have come before us, and have been reported upon to the Government." (Wai 1071: Report on the Crowns Foreshore and Seabed Policy (2004))

RMA provisions did not go much further than pre-RMA

"On the basis of our discussions in this chapter (and the other chapters of part V), we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi. In doing so, we accept the submissions made by Mr Bennion that, while the Act is an advance on previous legislation, it still fails to accord with Treaty principles. It fails in the following important respects:

- "During the reforms of the 1980s, the Crown indicated that ownership issues were not to be dealt with by the RMA. But the Crown then preserved its rights to control access to natural water, which it promptly delegated to regional or district councils. It also preserved its rights conferred by the Coal-mines Act Amendment Act 1903. Thus, while the section of the Coal-mines legislation vesting ownership in the Crown of all beds of navigable rivers was repealed, as was section 21 of the Water and Soil Conservation Act 1967, section 354(1) of the RMA provides that the Crown's rights conferred by these statutes continue. So the Crown's position has never been diminished by the RMA. Conversely, the Maori position has been diminished. Their rights and interests have not progressed much further than where they were pre-1991. We take this view because section 6 simply indicates that the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga is a matter of national importance. Other than broadening the category of taonga that may be considered, this provision takes Maori little further than the Town and County Act 1977. Furthermore, taking into account kaitiakitanga, as listed in section 7, does not recognise

that, in order to exercise kaitiakitanga, there had to be rangatiratanga. If that may not be taken into account when considering the meaning of kaitiakitanga and its relevance to the 'matter of national importance', then what is left? The answer has to be Maori cultural and spiritual values. This again takes Maori no further than was recognised in the Huakina Development Trust (1987) High Court decision. Finally, in terms of section 8 of the Act, all that can be considered may be restricted to those matters listed in part II. Therefore, we ask, what has been gained? The only answer must be perhaps a greater right to be consulted. Although not as sophisticated, that was already a feature of the pre-1991 regime."

(Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

Obligations to ensure aspirations were to be fulfilled a long time ago / continuing source of grievance not responding to address recommendation

"The Crown's failure to respond to the Tribunal's repeated recommendation to cure the RMA of its 'fatal flaw' is a continuing source of grievance for many claimants. (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"In our view, the Crown had an obligation to take measures to ensure that the intentions of that Act were realised long ago. To agree to do it now as partial recompense for the removal of legal rights does not seem to us to be a very good deal for Maori." p104 (Wai 1071: Report on the Crowns Foreshore and Seabed Policy (2004))

Use of settlements to provide what should have been addressed as part of the RMA

"Therefore, no tangible result from these provisions of the Resource Management Act (as then in force) had been achieved in terms of water under the Act until 2012, and we note that the statutory power to determine such matters still resides with Environment Waikato. The departure from this pattern was the enactment of the Ngā Wai o Maniapoto (Waipā River) Act 2012. This was watershed legislation for Te Rohe Pōtae Māori that clearly gives effect to the principles of partnership, reciprocity, and mutual benefit and provides a blueprint for the management of water and waterways/bodies in the district. However, the vexed issue of possession and ownership remains." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 557)

"Council practice and iwi-council relationships have also improved in some areas– mostly but not entirely due to Treaty settlements. Some councils have provided limited funding. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making. Our conclusion was that Treaty settlements have provided for the exercise of tino rangatiratanga over selected waterways, such as the Waikato and Whanganui Rivers. But not all iwi who have settled with the Crown obtained those kinds of arrangements, nor will they necessarily be available for groups which are yet to settle. In those cases, Māori participation in freshwater management remains limited in nature. The Crown could not reasonably rely on the Treaty settlement process,

therefore, to avoid reforming the participatory arrangements in the RMA." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Iwi/Māori rights and interests are sometimes not addressed and provided for, or not in a consistent way. Current arrangements do not always reflect their role and status as Treaty partners…" "As a result, some iwi/Māori concerns which could be addressed through a better freshwater management system are dealt with through Treaty settlements, while other iwi continue to feel excluded from management processes."18 (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway." " (Wai 262: Ko Aotearoa Tēnei: (2011))

Ongoing prejudice

"Ultimately, however, we found that the RMA had significant flaws in Treaty terms at the time the reform programme began, and that the reforms the Crown has completed are not sufficient to make the RMA and the freshwater management regime Treaty compliant. We also found that the NPS-FM is not yet Treaty compliant, for the reasons summarised in the following sections. We found that Māori have been prejudiced by these breaches, including the failure to set adequate controls and standards for the active protection of their freshwater taonga."

"In the manner and to the extent that we have found breaches and prejudice, the Wai 2358 and Wai 2601 claims are well founded. The breaches and prejudice in respect of the RMA and the Crown's freshwater reforms have also affected those iwi and hapū who were interested parties, and who gave evidence and made submissions in our inquiry." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Previous Tribunal reports have found that a balancing exercise was widely applied under the RMA, which allowed Māori interests to be balanced out altogether in many RMA decisions. Māori have been significantly prejudiced as a result. Professor Jacinta Ruru, David Alexander,

and other claimant witnesses confirmed that Māori interests have also been balanced away in freshwater management decisions during the period under review in chapter 2. We noted that this situation may improve to some extent, depending on the application of the Supreme Court's King Salmon decision.1 We also noted the Crown's view that there was an 'increasing sophistication' in the Environment Court's treatment of Māori interests. But litigation remained a costly exercise, time and expertise-intensive, which was beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori. In our view, statutory amendments are required to ensure that RMA decision-making on freshwater matters is Treaty compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"[W]e found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"[W]e found that the RMA and its allocation regime are not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by:

- the ongoing omission to recognise their proprietary rights ;
- barriers that have prevented their participation in the first-in, first-served allocation system in the past ; and
- the lack of partnership in allocation decision-making."

(Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We found that section D is an inadequate mechanism for ensuring the Māori 'involvement' in freshwater decision-making required by the Treaty principle of partnership. We found that it is not Treaty compliant, and that Māori have been prejudiced in their exercise of tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga as a result." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Importantly, in 2013 the Crown decided not to make any reforms in respect of section 33 transfers, Joint Management Agreements, and iwi management plans."

"Urgent reforms were needed on these parts of the RMA to remove statutory barriers to their adoption, and to make them more genuinely available to iwi and councils."

"The Wai 262 Tribunal had recommended significant reforms in its 2011 report."

"The Crown decided in 2013, however, to limit its enhanced 'iwi/Māori participation' in freshwater management to a mechanism for giving advice to councils on RMA plans. We found that the Crown's omission to adopt and pursue reforms that would improve the governance and co-management tools in the RMA, and enable them to be actually used, was a breach of the Treaty principles of partnership and Māori autonomy. Māori were prejudiced in their ability to exercise tino rangatiratanga in freshwater management and in RMA processes more generally, and – as the evidence throughout this inquiry has shown – this prejudice was serious."

"It was particularly concerning to the Tribunal that the RMA already had these tools to provide for the Treaty partnership in freshwater management but that the Crown had put those tools beyond the reach of tribal groups unless they could secure co-management arrangements in their Treaty settlements. Some have done so but many have not, yet the RMA theoretically made co-management available to all iwi. We found that the Crown's omission to reform the RMA and make these RMA mechanisms genuinely effective was a breach of Treaty principles." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We found that Māori have been prejudiced by the following omissions from the Crown's decisions on Next Steps reform options:

- no amendments of section 33 to make transfers of authority more accessible to iwi, or to compel councils to explore the use of this mechanism ;
- no amendments of section 36B to make JMAs more accessible to hapū and iwi, or to compel councils to explore the use of this mechanism ;
- no alternative co-governance or co-management mechanisms inserted in the RMA (to make these kinds of mechanisms available to more than a few settled iwi if JMAs continued to remain outside the reach of most hapū and iwi) ;
- no amendments to enhance the legal weight of iwi management plans ;
- no mechanisms for formal recognition of iwi and hapū relationships with– and rights in respect of – freshwater bodies, as had been proposed in the recognition workstream;
- no strengthening of the weak requirements in section D of the NPS-FM to provide a role for Māori as freshwater decision makers ;
- no recognition of proprietary rights (ruled out by the Crown's bottom line that 'no one owns water') ;
- no commitment as yet to allocate water or discharge rights to Māori (either to iwi and hapū or to the owners of Māori land), which could have been made in principle in the Next Steps process ; and
- no funding or resourcing for Māori participation in freshwater decision-making, RMA processes, or the building of capacity and capability (other than through a training programme on Mana Whakahono a Rohe), thus failing to address a critical practical barrier to Māori participation."

"Also, no funding actually materialised as a result of the proposal about water infrastructure on marae and papakāinga." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"[W]e found that the freshwater quality standards set in the NPS-FM 2014, as amended in 2017, are not yet adequate to provide for the Crown's Treaty duty of active protection of freshwater taonga. In chapter 2, we described the prejudice experienced by iwi and hapū whose spiritual and cultural relationships with their freshwater taonga have been profoundly harmed by degraded water quality." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"On balance, we found that the 2017 amendments have improved the NPS-FM in Treaty terms, but the amendments have some significant weaknesses. We found that the NPS-FM is still not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We found that the Māori Treaty partner has made repeated appeals to the Crown over many years to assist with funding and resourcing, and these appeals have not been adequately met. The Crown's stated objective to enhance Māori participation in freshwater management and decision-making will not be achieved unless an answer is found to the problem of under-resourcing. Many Crown documents have admitted that Māori participation in RMA processes is variable and sometimes non-existent. The Crown–ILG objective to '[b]uild capacity amongst iwi/hapū and councils, including resourcing' has not been fulfilled, and it needs to be if the Crown's reforms are to be Treaty compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We accepted that the Crown's reform programme is not finished, and that there is still opportunity to address this long-standing problem more effectively. We reiterated its crucial importance and the need for it to be addressed if the Crown's reforms are to be Treaty compliant. In the meantime, Māori continue to suffer long-term prejudice." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We noted further that three-quarters of native fish species are now threatened with or at risk of extinction, compared to only one-fifth in 1991 when the RMA was passed. The fishing rights guaranteed in the Treaty have been infringed by this loss of fisheries, and Māori have been prejudiced thereby." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"In this section of our chapter [Recommendations], we make our recommendations for the remedy of the breaches and prejudice summarised above, and to prevent similar prejudice from occurring in the future." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"The Ngāwha Tribunal, said counsel, found that in enacting this legislation the Crown failed to include adequate provisions to ensure that the Treaty rights of the claimants ... are fully protected. As a consequence, the claimants have been, and are likely to continue to be, prejudiced by such a breach. (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"As in the Ngawha claim, we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their

rangatiratanga and kaitiakitanga to manage and control it as they wish." (Wai 55: Te Whanganui-a-Orotu report (1995)

"The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty." (Wai 304: Ngawha Geothermal Resources (1993))

RMA Part II

Section 8: weight given to treaty relationship

"In this chapter we have demonstrated how the Crown in actively pursuing its policy priorities with respect to the environment in conjunction with local or regional authorities, acted in a manner inconsistent with the principles of the Treaty of Waitangi. The actions, policies and legislation it was and is responsible for causing prejudice to the claimants have stemmed from…"

- "The continued subjection of the claimants to the decision making of regional and local authorities who are not required by legislation to give effect to the principles of the Treaty of Waitangi in the administration of their powers and functions under the legislation and in planning and consenting procedures." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 500)

"For these reasons, we find…" "That the Crown has acted in a manner inconsistent with the principle of good government for its continued failure to adhere to previous Waitangi Tribunal reports requiring that section 8 of the RMA 1991 be amended." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 499

"One of the main issues, as previous Tribunals have found, lies in the RMA as far as Treaty principles are concerned. Section 8 needs to be amended to reflect wording more akin to that in section 9 of the State-Owned Enterprises Act 1986. Alternatively, it should be integrated into section 5 of the RMA. Left as it is the RMA is incapable of ensuring that the Crown's Treaty guarantees to Māori are honoured." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 394)

"Te Rohe Pōtae Māori cannot expect veto authority over the allocation, use, and management of water, waterways/bodies as that would be contrary to the principles of the Treaty of Waitangi. However, they can expect that their Treaty rights are appropriately integrated into decision making and planning under the Resource Management Act. If the hierarchy in part 2 of the Act were reversed or if the purpose of the legislation under section 5 was extended to require all those exercising duties and functions under the Act to act in a manner consistent with the principles of the Treaty of Waitangi, a different balancing exercise would be required. It would be one that was clearly focused on partnership, mutual benefit, and reciprocity, alongside sustainable management." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 590)

"At the least, section 8 of the Resource Management Act should be amended to state that nothing in the Act should be done in a manner inconsistent with the principles of the Treaty of Waitangi or a new reference with the wording stipulated previously should be added to section 5." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 590)

"Since 1991, the RMA has improved the situation as far as managing environmental effects on the harbours but has its limitations as described in section 22.4 and this issue needs to be addressed. To address that issue, section 8 of the Resource Management Act should be amended to state that nothing in the 1991 legislation should be done in a manner inconsistent with the principles of the Treaty of Waitangi or a new reference should be added to section 5." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 625)

"We discussed part 2 of the RMA in section 2.4 of chapter 2. We agreed with the Crown that sections 6–8 of the RMA introduced tikanga requirements into the statute law for freshwater management for the first time. The legislation prior to that was mono-cultural and did not recognise Māori values or interests. After 1991, RMA decision makers were required to recognise and provide for the relationship of Māori with their ancestral waters, to have particular regard to kaitiakitanga, and to take account of the principles of the Treaty. This was a significant improvement on the previous situation. But we also agreed with the claimants that there were key weaknesses in the operation of part 2 of the Act. These included the relative weakness of the Treaty clause (section 8), and the potential for Māori interests to be 'balanced out' in the hierarchy of matters to be considered by decision makers under sections 6–8."

"First, we agreed with many Tribunal reports that section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty. The Petroleum Management Tribunal found that the Crown's delegation of Treaty responsibilities in resource management must be done in a manner that ensures Treaty compliance.2 Our view is that section 8 should be amended to state that the duties imposed on the Crown in terms of Treaty principles are imposed on all those persons exercising powers and functions under the Act. Such an amendment would ensure that Māori interests are protected (not balanced out), that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that part 2 of the RMA is Treaty compliant. We make a recommendation to that effect later in this chapter."

"Secondly, we agreed with the Petroleum Management Tribunal that amending section 8 will not, on its own, ensure that RMA decision-making is carried out consistently with the principles of the Treaty.3 Māori must themselves be RMA decision makers for their freshwater taonga, and their role in this respect needs to be enhanced to meet the Treaty guarantee of tino rangatiratanga. We turn to that matter next." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We also noted the link between this issue and the earlier breaches found in respect of the RMA. We had already found that section 8 of the RMA was too weak to protect Māori interests, and that the RMA did not empower Māori in freshwater management and decision-making. The systemic failure of the RMA to deliver sustainable management of freshwater taonga was due in part to that fact and to those breaches." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend two specific amendments to part 2 of the RMA: [including]

- The amendment of section 8 to state that the duties imposed on the Crown in terms of the principles of the Treaty of Waitangi are imposed on all those persons exercising powers and functions under the Act." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"The Ngāwha Tribunal, said counsel, found that in enacting this legislation the Crown failed to include adequate provisions to ensure that the Treaty rights of the claimants ... are fully protected. As a consequence, the claimants have been, and are likely to continue to be, prejudiced by such a breach. (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"The implication of the Treaty of Waitangi Act 1975 is that the Crown is expected to act consistently with the principles of the Treaty, in that, where any Act, proposed legislation, regulation, Order in Council, policy, or practice is inconsistent with the principles of the Treaty, Māori may bring a claim about the matter to the Tribunal."

"The Crown has delegated most of its authority to carry out the duties of the RMA to local authorities. Along with that delegation is the requirement for the local authority to 'take into account the principles of the Treaty of Waitangi' when making decisions. However, as the Ngāwha Tribunal noted: Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources. In short, whereas the Crown itself is required to act consistently with the principles of the Treaty, that responsibility was significantly watered down under the Crown's delegation of authority to regional councils. Essentially, local authorities were not obliged to be Treaty-compliant in their decisions. The Ngāwha Tribunal found that this aspect of the legislation was 'fatally flawed'. The Ngāwha and CNI Tribunals recommended that the RMA be amended so that Crown delegates are required to 'act in a manner that is consistent with the principles of the Treaty of Waitangi'. (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"In terms of the RMA, we recommend, as the Tribunal has done many times before us, that it be amended to require decision-makers to act consistently with the Treaty."

"The Crown's failure to respond to the Tribunal's repeated recommendation to cure the RMA of its 'fatal flaw' is a continuing source of grievance for many claimants. Our inquiry has been closely focused on just one corner of the resource management system, and as a result we have been able to make specific recommendations to the Crown about how to make that corner Treaty compliant. While there are some differences between the petroleum 'corner' and the rest of the regime, we are confident that our recommendations for the reform of the petroleum corner will, if adopted, have beneficial flow-on effects right through the resource management system. In other words, we believe that, if the Crown 'gets it right' for Māori in the management of the petroleum resource, it will also get it right – or, at least, see how to get it right – for Māori throughout the entire resource management system. That is because our recommendations for reform have a very large procedural focus. And that is because, in an area of law as complex as resource management – where numerous interests are involved and very few fixed answers can be given in advance to any problems that may arise – we consider that the best way of ensuring Treaty-compliant outcomes is to ensure that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"Recommendations: The Resource Management Act 1991 be amended to require decision makers to act consistently with the Treaty principles." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"Several previous Tribunals have found that the Resource Management Act as it then was did not provide for rangatiratanga. The Ngawha Geothermal Resource Report concluded in 1993 that the Act was 'fatally flawed' because it does not require decision-makers to act in conformity with, and apply, Treaty principles. It stressed that the language used by the Act's provisions meant that the Crown's Treaty obligations could not be given proper priority."

"Though the Crown has since amended the Act, those amendments still do not address the principal concerns outlined in the Ngawha Report." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"As stressed in the Ngawha Report, the key provisions of part 2 of the Resource Management Act use comparatively weak language. In particular, section 8 (by which persons exercising powers and functions under the Act must only 'take into account' the principles of the Treaty) is a weak provision. It is weaker than the language used in sections 6 and 7, where decision-makers are to respectively 'recognise and provide for' and 'have particular regard to' various matters, some of which are relevant to Māori. It is also weaker than powers. In allowing this to occur the Crown is in breach of the principle of partnership, and of its duty of active protection of Māori rangatiratanga. Previous Tribunals have found that the Act ought to be amended to address these shortcomings. (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

'It is now settled law that those exercising powers under the RMA are not required to act in a manner consistent with the principles of the Treaty of Waitangi. Rather, they must engage in balancing each of these factors. Thus, all matters listed in sections 6 to 8 are evaluated one against the other. In chapter 17, we considered whether such an approach to Treaty rights is consistent with Treaty principles and concluded, as the Whanganui River Tribunal did, that it is not.'

"Furthermore – and again as Ms Chen points out – there is case law that suggests that section 8 does not give rise to any obligation on a decision maker under the RMA to consider additional obligations, beyond those listed in sections 6(e) and 7(a) of the Act.27 Thus, principles such as the partnership principle – with its accommodation between kawanatanga and rangatiratanga, its mutual benefit, and its reciprocity – cannot be weighed in the balance. Only those matters listed in sections 6 to 8 can. We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can exist only where there is rangatiratanga, because they are inextricably linked.' (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"There is no requirement on regional or district councils, when making decisions under the RMA, to give effect to Maori concerns because they are Treaty rights-holders. Contrast that with the requirement to give full expression to the purpose of the Act as set out in section 5. An example of the approach they must take comes from the decision in Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti District Council, where the majority of the Environment Court found that:

> We cannot see any way in which the principles of the Treaty of Waitangi, the principles of s 7, or the principles of s 6 can be applied in a manner which would cause us to set to one

> side the all embracing community thrust of s 5, aimed as it is in the present case, at a living community suffering extraordinary difficulties and grief as a result of substandard arterials.

"We note the option for transfer of power under section 33 of the Act. But it has never been used in the Central North Island. We also note that while a local authority may agree to enter into a joint-management agreement under the Resource Management Act Amendment Act 2005 (section 4 and section 36B of the RMA), it is not required to do so. Herein lies the problem for Maori: decisions to enter joint-management arrangements are at the discretion of a local or regional authority. This subordinates iwi or hapū rangatiratanga because they cannot expect that such decisions will be made or reviewed in accordance with Treaty principles. Such agreements could only ever operate in a manner consistent with the RMA, which, as we have explained, is deficient in Treaty terms." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"However, we have found that the Crown failed to make legislative provision for the involvement of Maori in the managing of the harbour and its resources until very recently, and we deplore this lack of provision during the period in which the harbour became seriously polluted. Under the Resource Management Act 1991, Maori values and the principles of the Treaty of Waitangi must now be taken into account when making decisions about resource management and there is greater provision for Maori to have input into resource management issues concerning the harbour. We consider, however, that the Act does not go far enough, in that it merely requires decision-makers to take into account the principles of the Treaty and does not ensure that persons exercising powers under the Act do so in a way that gives effect to and is consistent with the Treaty."

"While helpful, the Tribunal believes that the provisions of the Resource Management Act 1991 and associated policy statements are inadequate. The Tribunal's Ngawha Geothermal Resource Report 1993 was critical of the Resource Management Act on the ground that it does not require persons exercising functions under the statute to act in conformity with Treaty principles but merely provides that Treaty principles must be taken into account.85 This criticism was endorsed by the Tribunal in its 1993 Preliminary Report on the Te Arawa Representative Geothermal Resource Claims and its Te Whanganui-a-Orotu Report 1995. In its 1999 Whanganui River Report, the Tribunal found the Resource Management Act to be 'inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi'. This finding is equally relevant to Wellington Harbour." (Wai 145: Te Whanganui a Tara me ona Takiwa- Report on the Wellington District (2003)

"In the Ngawha Geothermal Resource Report 1993, the Tribunal found that:

> the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi."

"In the Te Whanganui-a-Orotu Report 1995, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga."

"We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues." (Wai 212: Te Ika Whenua Rivers Report (1998))

"We endorse the findings in the Ngawha Geothermal Resource Report 1993 that (para 8.4.6):

> 'The Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed.'"

Paragraph 8.4.7:

> 'We repeat here our finding that the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.' (Wai 55: Te Whanganui-a-Orotu report (1995))

"The Tribunal in its Ngawha Geothermal Resource Report (Wai 304) has recently expressed strong reservations about the effect of the words 'take into account' in section 8 of the Resource Management Act:

> 'It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so.'

"As a result of its inquiry into the Ngawha geothermal claim, the Tribunal has recommended that an appropriate amendment be made to the Resource Management Act 1991 to require that all persons exercising functions under the Act shall act in a manner consistent with the principles of the Treaty of Waitangi. We must now await and see how the Government responds to the Tribunal's recommendations. " (Wai 27: The Ngai Tahu Ancillary Claims Report (1995))

"The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi." (Wai 304: Ngawha Geothermal Resources (1993))

"The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi." (Wai 304: Ngawha Geothermal Resources (1993))

"Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed." (Wai 304: Ngawha Geothermal Resources (1993))

"We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi." (Wai 304: Ngawha Geothermal Resources (1993))

"We repeat here our finding in chapter 8 of the Ngawha Geothermal Resource Report that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi." (Wai 153: Te Arawa Geothermal Resources (1993))

"We reiterate our recommendation in chapter 8 of the Ngawha Geothermal Resource Report 1993 that an appropriate amendment be made to the Resource Management Act 1991 providing that, in achieving the purpose of the Act. All persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi." Wai 153: Te Arawa Geothermal Resources (1993)

RMA is not remedial

"In addition, as with the land use studies above, the RMA cannot be used to require historical rectification of environmental effects. Therefore, the historical destruction of wāhi tapu, archaeological sites, the desecration of Maniapoto's Cave and the historical effects of mining operations on the lakes at Tahāroa, are not matters that new consents can address. All that can be done is to make sure new resource consents (and associated conditions) are adhered to. Whether or not enforcement is undertaken depends on the views of the regional or local authority concerned or Heritage New Zealand, rather than Ngāti Te Wehi, Ngāti Maniapoto, Ngāti Mahuta or any other group affected." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 497)

"Fourthly, regional authorities and consent holders who were responsible for historical environmental effects that continue to plague the water and waterways/bodies considered taonga by Te Rohe Pōtae Māori are not required to address these matters under the Resource Management Act. We acknowledge that many of the problems associated with pollution are historical. That is exactly the issue with the Resource Management Act. It is not retrospective. Therefore, neither the Crown, nor any regional authorities in existence post 1991 or long-term consent holders, can be made accountable under the 1991 legislation for the mismanagement of water and waterways/bodies pre-1991, or before the issue of current consents." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 588)

"The historical management of waterways/bodies has been tantamount to treating them as sewers or drains into which pollutants such as sewage could be discharged. This has led to the significant decline in water quality in many waterways/bodies in the district and has significantly impacted on Māori spiritual and customary values and use. Because the RMA 1991 is not retrospective, the Crown, its agents, and long-term consent holders cannot be held accountable for the historical management of water pre-1991." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 670)

"In context of the claims before us, we consider another important issue raised by the RMA 1991 is that it is not remedial in its purpose or effect as outlined in section 5. That provision merely provides that the purpose of the legislation is to 'promote the sustainable

management of natural and physical resources'" (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

"As we discuss below and in chapter 20, the RMA fails to deal with historical issues. It does not look backwards in any substantial way. As a result, the historic degradation, damage, or pollution of a taonga cannot be raised as more than background during resource consent processes under the Act. Nor can a consent authority consider the historical issues concerning how an iwi or hapu has lost their ownership of a resource or taonga. There is no requirement for consent authorities to consider how Maori have been placed historically in terms of these resources. While they may do so, they are not required to do so by the RMA." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

Impact of Part 2: Balanced judgement

The Crown's position adopted in closing submissions for this inquiry (that it must treat Māori equitably with non-Māori in the application of its policies and practices in respect of waterways and take a balanced approach) was a position not apparent in any legislation until 1991. It did not treat Māori equitably with non-Māori because it did not recognise and provide for their rights and interests, and nor did it require those matters be balanced against other interests. The only exception being the Mōkau River Trust Act 1903, which did not remain on the statute books for long. The RMA has improved the situation, but it has its limitations." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 557)

"While the addition of Māori issues under Part 2 of the Resource Management Act has improved the situation for Māori communities, the 1991 Act does not accord an appropriate priority to Māori concerns. Obviously, there is improved recognition of Te Rohe Pōtae Māori relationships with water and waterways, their values and tikanga, but unfortunately as is evidenced by the Piopio case study, the application of section 5 of the Act does not necessarily result in an outcome that is consistent with Māori tikanga, values, and expectations for their taonga."

"The lack of priority accorded to the relationship between Māori groups and various waterways/bodies of water is because the Act also requires a number of other values to be recognised and provided for, taken into account or considered. Therefore, while there is space for Māori voices to be heard, this is limited by the other matters that can be given equal or greater weight. Furthermore, treaty rights and interests, and indeed all other matters listed in Part 2 of the Act, are trumped by section 5, which describes the purpose of the Resource Management Act as to 'promote the sustainable management of natural and physical resources.' As noted in chapter 21 on the Environment, all those exercising duties and powers under the Act, including the Environment Court, are required to give effect to this primary purpose. The Act then lists a hierarchy of matters decision makers must consider. Section 6 sets out what they must recognise and provide for and this includes the relationship of Māori with their ancestral lands and waters. Section 7 merely requires that the matters listed including kaitiakitanga be taken into account. Section 8 only requires that the court have regard to the principles of the Treaty of Waitangi." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 589-590)

"We discussed part 2 of the RMA in section 2.4 of chapter 2. We agreed with the Crown that sections 6–8 of the RMA introduced tikanga requirements into the statute law for freshwater management for the first time. The legislation prior to that was mono-cultural and did not

recognise Māori values or interests. After 1991, RMA decision makers were required to recognise and provide for the relationship of Māori with their ancestral waters, to have particular regard to kaitiakitanga, and to take account of the principles of the Treaty. This was a significant improvement on the previous situation. But we also agreed with the claimants that there were key weaknesses in the operation of part 2 of the Act. These included the relative weakness of the Treaty clause (section 8), and the potential for Māori interests to be 'balanced out' in the hierarchy of matters to be considered by decision makers under sections 6–8." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Previous Tribunal reports have found that a balancing exercise was widely applied under the RMA, which allowed Māori interests to be balanced out altogether in many RMA decisions. Māori have been significantly prejudiced as a result. Professor Jacinta Ruru, David Alexander, and other claimant witnesses confirmed that Māori interests have also been balanced away in freshwater management decisions during the period under review in chapter 2. We noted that this situation may improve to some extent, depending on the application of the Supreme Court's King Salmon decision.1 We also noted the Crown's view that there was an 'increasing sophistication' in the Environment Court's treatment of Māori interests. But litigation remained a costly exercise, time and expertise-intensive, which was beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori. In our view, statutory amendments are required to ensure that RMA decision-making on freshwater matters is Treaty compliant."

"First, we agreed with many Tribunal reports that section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty. The Petroleum Management Tribunal found that the Crown's delegation of Treaty responsibilities in resource management must be done in a manner that ensures Treaty compliance.2 Our view is that section 8 should be amended to state that the duties imposed on the Crown in terms of Treaty principles are imposed on all those persons exercising powers and functions under the Act. Such an amendment would ensure that Māori interests are protected (not balanced out), that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that part 2 of the RMA is Treaty compliant. We make a recommendation to that effect later in this chapter." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

'It is now settled law that those exercising powers under the RMA are not required to act in a manner consistent with the principles of the Treaty of Waitangi. Rather, they must engage in balancing each of these factors. Thus, all matters listed in sections 6 to 8 are evaluated one against the other. In chapter 17, we considered whether such an approach to Treaty rights is consistent with Treaty principles and concluded, as the Whanganui River Tribunal did, that it is not.'

"Furthermore – and again as Ms Chen points out – there is case law that suggests that section 8 does not give rise to any obligation on a decision maker under the RMA to consider additional obligations, beyond those listed in sections 6(e) and 7(a) of the Act.27 Thus, principles such as the partnership principle – with its accommodation between kawanatanga and rangatiratanga, its mutual benefit, and its reciprocity – cannot be weighed in the balance. Only those matters listed in sections 6 to 8 can. We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can exist only where there is rangatiratanga, because they are inextricably linked.' (Wai 1200 – He Maunga

Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"There is no requirement on regional or district councils, when making decisions under the RMA, to give effect to Maori concerns because they are Treaty rights-holders. Contrast that with the requirement to give full expression to the purpose of the Act as set out in section 5. An example of the approach they must take comes from the decision in Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti District Council, where the majority of the Environment Court found that:

> We cannot see any way in which the principles of the Treaty of Waitangi, the principles of s 7, or the principles of s 6 can be applied in a manner which would cause us to set to one side the all embracing community thrust of s 5, aimed as it is in the present case, at a living community suffering extraordinary difficulties and grief as a result of substandard arterials.

"While we recognise, in certain circumstances, the need to provide for all communities, an approach that can set aside Maori concerns in the manner described above is not acceptable. In our view, alternative options would need to be explored first before a proposal got to the point where it became a contest between competing interests." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

Kaitiakitanga section 7 inadequate, Kaitiakitanga is not separate from Rangatiratanga

"We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can exist only where there is rangatiratanga, because they are inextricably linked.'

"Other than broadening the category of taonga that may be considered, this provision takes Maori little further than the Town and County Act 1977. Furthermore, taking into account kaitiakitanga, as listed in section 7, does not recognise that, in order to exercise kaitiakitanga, there had to be rangatiratanga." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

"Not only is the definition of kaitiakitanga in the Resource Management Act 1991 inadequate, but in s.7 it is listed as only one of seven other matters that 'persons exercising functions and powers' under the Act 'shall have particular regard to'. In s.6 a number of 'Matters of national importance' are listed, including 'preservation of the natural character of the coastal environment' in s.6(a), and 'maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers' in s.6(d). Among all these is s.6(e): 'The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'." (Wai 45: The Muriwhenua Land Claims Post 1865 (2002))

Section 6 – Te Mana o te Wai as matter of national importance

"Carrying on the theme of providing better for Māori values in freshwater management, the Crown's significant reform in 2014 was the introduction of Te Mana o te Wai into the NPS-FM. The ILG sought to integrate Te Mana o te Wai in all parts of the national policy statement by inserting an overarching purpose statement, a new objective A1(c) in section A (the 'Water Quality' section), and links to the national values of the NOF in appendix 1."

"The Crown, however, was only prepared to agree to a very disjointed and watered-down version of Te Mana o te Wai in the NPS-FM 2014. There was no definition of Te Mana o te Wai or any explanation of it or how councils might provide for it. The overarching purpose statement was not part of the main body of the NPS-FM (and did not explain Te Mana o te Wai). The Crown rejected the ILG's proposed Objective A1(c). The many submissions from Māori during the consultation process, seeking to strengthen and integrate the Te Mana o te Wai requirements in the NPS-FM, were also rejected. Appendix 1 did use the titles 'Te Hauora o te Wai', 'Te Hauora o te Tāngata', and 'Te Hauora o te Taiao' for three of the national values. But the text of those values did not necessarily identify Māori values or correspond to the titles, nor was there any explanation that these titles were connected to Te Mana o te Wai."

"We concluded that the Crown's inclusion of Te Mana o te Wai in the NPS-FM was weak and ineffective. It did not enhance the Crown's objective that Māori values would be better reflected in freshwater management and plan-making. We made no Treaty finding, however, because the 2014 version of the NPS-FM did not represent the Crown's final decision on this issue." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"In 2017, the new 'National significance' statement and section AA of the NPS-FM provided a much-needed explanation of Te Mana o te Wai, and of the requirements that councils must meet in order to 'consider and recognise' it in their policy statements and plans. The inclusion of mātauranga Māori in the monitoring requirements was also a major improvement, and one which Māori had sought in their submissions on the 2014 version of the NPS-FM."

"Our view was that all of this has the potential to make the NPS-FM a more powerful instrument for the recognition of Māori values in freshwater management and the exercise of kaitiakitanga. If Māori values are to be identified and reflected in freshwater management (objective D1), then Te Mana o te Wai is a platform for achieving this (through the 'National significance' statement and objective AA1), and mātauranga Māori must now be used to measure its success (policy CB1). It is also a platform for the whole community's values because it is water-centric."

"As the Crown and the ILG had intended, Te Mana o te Wai was framed so as to put the health of freshwater bodies first in the discussions necessary to set objectives and limits under the NPS-FM. The potential for Te Mana o te Wai to have a significant impact is likely reflected in the submissions of those who tried in 2017 to disconnect it from the national values in appendix 1. We found, however, that there are some weaknesses in the tools for giving effect to Te Mana o te Wai."

"First, as already found in chapter 3, section D of the NPS-FM is relatively weak. It does not provide a co-governance approach to identifying Māori values and setting freshwater objectives. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. Secondly, the relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. Our view was that this is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management. Thirdly, the severing of Te Mana o te Wai from the NOF values in appendix 1 reduces its utility as an over-arching principle in freshwater plan making. Fourthly, the failure to include tools for cultural monitoring (policy CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and

freshwater management more generally." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"We recommend two specific amendments to part 2 of the RMA: [including]

- The amendment of section 6 to include Te Mana o te Wai as a matter of national importance that must be recognised and provided for by RMA decision makers. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

Direction/accountability

Absence/gaps in national direction

"Our findings on these issues [included]…" "councils very rarely provided an allocation to Māori in the absence of strong national direction (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Our finding was that the NPS-FM 2011 did not provide adequate controls and standards for the active protection of freshwater taonga, and it was not consistent with the principles of the Treaty of Waitangi. On the other hand, we accepted that the Crown had finally provided some belated direction to regional councils." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"In the National Park inquiry context, we make three recommendations which, taken together, will increase opportunity for ngā iwi o te kāhui maunga to exercise their kaitiakitanga over their waters. They include local action and national action and sit within the present resource management framework. Those recommendations are that:

That the Crown prepare a national policy statement for Māori participation in resource management (section 45(1) of the RMA). Such a policy statement should be consistent with the recommendations of Ko Aotearoa Tēnei and identify mechanisms for the exercise of kaitiakitanga, for partnerships between iwi and regional councils, and for the involvement of iwi in decision-making with respect to te ao tūroa, the sustainable management of resources." (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified, specifically:

Greater use of national policy statements: We recommend that the Ministry for the environment develop national policy statements on Māori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership and influence on environmental decision-making." (Wai 262: Ko Aotearoa Tēnei: (2011))

"Recommendation: The Crown produce National Policy Statements and National Environmental Standards to provide guidance to territorial authorities on enhancing and protecting taonga and wāhi tapu." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"However, a number of the key recommendations of the reviews that we have summarised have not been implemented. In particular, despite the unanimity of the reviews on these key

points, there is still no standalone Māori heritage agency, and there is still no national policy statement for heritage management. Other areas where significant issues remain almost entirely unaddressed include: the continuing ambiguity about the role of, and funding for, the trust's register; the lack of incentive funding at the local authority level; and the lack of funding to assist iwi and hapū to create heritage databases." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate**, it must do so in terms which ensure that its Treaty duty of protection is fulfilled**." (Wai 304: Ngawha Geothermal Resources (1993))

Monitoring/accountability of councils

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows:

- Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used. That is, there are high barriers within section 36B itself to its use by councils and iwi or hapū (as the Crown has acknowledged),6 and the Crown has not provided incentives for its use or any compulsion to actively consider its use. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We reiterate the recommendations of previous Tribunals that the Crown should monitor the Treaty performance of local authorities. For freshwater matters, this should be carried out by the co-governance body."

"We also reiterate the recommendation of the Wai 262 Tribunal, that councils make regular reports on their activities in respect of section 33 and 36B to the Parliamentary Commissioner for the Environment or – in the case of freshwater bodies – to the co-governance body if it is established."

"We are aware that monitoring and enforcement of consent conditions is also a significant issue in the freshwater management regime, but we did not receive sufficient evidence to make a recommendation (other than the recommendation made above in respect of Joint Management Agreements)." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We also recommend that a commissioner be established, perhaps with the title of Treaty of Waitangi commissioner, to monitor local authorities' performance in respect of Treaty obligations delegated to them by the Crown." "The Crown has failed to monitor the performance of its delegated Treaty responsibilities by local authorities. Although councils are trying, their efforts have been piecemeal and have not met with particular success. The Crown has failed to monitor this situation or assist with constructive solutions." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"We find that much more active Crown oversight is required if such transfers or sharing or powers are to occur. We find that they must occur, if the Crown is to avoid further breaches of the principle of partnership and its duty of active protection. As demonstrated by the history of customary fisheries, the Crown has a legacy of passing legislative provisions that would enable a measure of Māori rangatiratanga over their property and taonga, only to then leave the provisions unsupported and unpromoted so that they are never utilised. In such cases, as found by the Manukau Report, '[t]hose words mean nothing'. The principle of partnership and the duty of active protection oblige the Crown to ensure that under its legislation Māori can – and do – exercise rangatiratanga over their taonga." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate**, it must do so in terms which ensure that its Treaty duty of protection is fulfilled**." (Wai 304: Ngawha Geothermal Resources (1993))

Sharing and transfer of powers

Lack of use of transfer of powers functions, and/or provisions are inadequate

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows:

- Section 33 of the RMA has never been used to transfer power to iwi authorities. This is partly due to the existence of significant barriers within the terms of section 33 itself, partly to poor relationships between some councils and iwi, and partly to the Crown's failure to introduce either incentives or compulsion for councils to actively consider its use.
- Section 36B (as to joint management) has only been used twice since its introduction in 2005, apart from mandatory use in some Treaty settlements. This section of the RMA was supposed to compensate for the non-use of section 33. Instead, it has remained severely under-used for the same reasons that section 33 itself has not been used. That is, there are high barriers within section 36B itself to its use by councils and iwi or hapū (as the Crown has acknowledged),6 and the Crown has not provided incentives for its use or any compulsion to actively consider its use. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"For all the above reasons, we found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making."

"We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies: [including]

- A national co-governance body should be established with 50/50 Crown–Māori representation, to ensure that Treaty principles and Māori values, rights, and interests are fully incorporated in freshwater policy and management. The details should be arranged between the Treaty partners.
- Sections 33 and 36B of the RMA should be amended to remove statutory and practical barriers to their use, to provide incentives for their use, and to compel councils to actively seek opportunities for their use. Sections 33 and 36B should also be amended so that transfers of power and Joint Management Agreements cannot be revised or cancelled without the agreement of both parties. Section 33 should be amended so that transfers of power in respect of a water body or water bodies may be made to hapū. Joint Management Agreements for water bodies should apply to the whole catchment of a water body, and should include (among other things) 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- Sections 33 and 36B should also be amended to include a process for iwi authorities to apply to councils for transfers and Joint Management Agreements. A mandatory process of engagement would follow any application, with mediation and the assistance of the Crown (or the co-governance body for freshwater applications) to be available as required.
- Objective D1 of the NPS-FM should be amended to specify that iwi and hapū must be directly involved in freshwater decision-making, that Māori values, rights, and interests must be recognised and provided for in freshwater decision-making, and that councils must actively seek opportunities to enter into section 33 transfers and section 36B Joint Management Agreements for freshwater bodies (where Treaty settlements have not already established co-governance agreements for freshwater bodies). Consequential amendments should be made in policy D1, and further policies could be inserted as required. These amendments should specify 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.

"We also recommend that the national co-governance body should assess whether a separate Water Act is necessary. Whether such an Act is required or not, we do not recommend the duplication of authorities at the regional level. Land, water, and other natural resources should be managed in an integrated manner by regional councils on a co-governance/co-management basis with iwi and hapū." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"In the National Park inquiry context, we make three recommendations which, taken together, will increase opportunity for ngā iwi o te kāhui maunga to exercise their kaitiakitanga over their waters. They include local action and national action and sit within the present resource management framework. Those recommendations are that:

- That ngā iwi o te kāhui maunga and the regional councils for Manawatu–Wanganui and Waikato enter into a partnership arrangement for the management of the waters of te kāhui maunga (sections 36B, 36C, and 36D of the RMA provide a framework for this ; section 36E, which allows for termination at 20 days' notice, is not applicable). One of the tasks of this partnership would be the preparation of a water management plan. As a further aspect of the partnership, when applications for water-related consents are considered, the hearing committee should be appointed jointly by iwi and regional councils." (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway." " (Wai 262: Ko Aotearoa Tēnei: (2011))

"The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case." (Wai 262: Ko Aotearoa Tēnei: (2011))

"Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified, specifically:

- **Improved mechanisms for delivering control:** We recommend that the RMA's existing mechanisms for delegation, transfer of powers, and joint management be amended to remove unnecessary barriers to their use. We recommend that local authorities be required to regularly review their activities to see if they are making appropriate use of sections 33 and 36B, and be required to report annually to the Parliamentary Commissioner for the environment explaining why they made delegations or established partnerships in some circumstances and not in others. We also recommend that the Ministry for the environment be required to proactively explore options for delegations under section 188, and to report annually to Parliament on this." (Wai 262: Ko Aotearoa Tēnei: (2011))

"We recommend that the Government commit to a comprehensive review of these Acts that achieves…" "shared power and delegation of local authorities' functions to Māori entities in all appropriate areas and circumstances;" (Wai 863: Wairarapa ki Tararua Report (2010))

"For several reasons, the Act's provisions that enable Māori to exercise rangatiratanga and act as kaitiaki in environmental management have not yet been properly realised in practice. Councils have been slow to come to terms with the Act's requirements to engage with Māori in their planning processes. At present, the most potentially potent provisions in the Act for the exercise of Māori rangatiratanga are those relating to the transfer, delegation, or sharing of powers; however, councils in the region have made only very small and tentative

steps towards sharing powers." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

"In our view, the real issue with the Act, as it stands, is that the existing legislative provisions for Māori to exercise rangatiratanga and act as kaitiaki are not being properly implemented. In particular, after almost 20 years there has still not been a single instance of a transfer of powers to iwi. Nor, in Tauranga, has there been an explicit instance of joint management under section 36. There have been very tentative movements towards allowing Māori to participate in management functions and powers, but these fall far short of Māori aspirations, and do not reflect a true partnership. Clearly, given such a history, the provisions relating to Māori management or joint management or resources cannot be left solely at the discretion of local authorities. We find that much more active Crown oversight is required if such transfers or sharing or powers are to occur. We find that they must occur, if the Crown is to avoid further breaches of the principle of partnership and its duty of active protection. As demonstrated by the history of customary fisheries, the Crown has a legacy of passing legislative provisions that would enable a measure of Māori rangatiratanga over their property and taonga, only to then leave the provisions unsupported and unpromoted so that they are never utilised. In such cases, as found by the Manukau Report, '[t]hose words mean nothing'. The principle of partnership and the duty of active protection oblige the Crown to ensure that under its legislation Māori can – and do – exercise rangatiratanga over their taonga. The Crown must actively work with tangata whenua and local authorities to identify which natural resources and environments in Tauranga Moana will most help to restore tribal rangatiratanga over their taonga, and are suitable for a shift in the management regime." (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

"We note the option for transfer of power under section 33 of the Act. But it has never been used in the Central North Island. We also note that while a local authority may agree to enter into a joint-management agreement under the Resource Management Act Amendment Act 2005 (section 4 and section 36B of the RMA), it is not required to do so. Herein lies the problem for Maori: decisions to enter joint-management arrangements are at the discretion of a local or regional authority. This subordinates iwi or hapū rangatiratanga because they cannot expect that such decisions will be made or reviewed in accordance with Treaty principles. Such agreements could only ever operate in a manner consistent with the RMA, which, as we have explained, is deficient in Treaty terms."

"As we note in detail in chapter 20, consultation with Maori in the resource consent process is not a statutory requirement under the Act unless they are recognised landowners who may be affected by the grant of a consent. (See section 36A of the Act.) Rather, consultation is a matter left to the discretion of the staff of the consent authority or the applicant for the consent. While we note the decisions of the Environment Court and the High Court suggesting that it would be good practice to engage in such consultation, it is unlikely that the failure to consult (given the new section 36A of the Act), could now be used as the basis for rejecting a resource consent application." (Wai 1200 – He Maunga Rongo: Report on Central North Island Claims Stage 1 – Te Taiao The Environment and Natural Resources (2008))

Mana Whakahono provisions inadequate- need enhancement

"The Mana Whakahono a Rohe arrangements had the potential to improve iwi–council relationships and the way they work together, especially by providing a mechanism for the schedule 1 consultation process to occur. But many options that were omitted in 2016 were so crucial that, in our view, the Crown squandered a real opportunity to make the RMA and

its freshwater management regime Treaty-compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

"The Mana Whakahono a Rohe mechanism was one of the major achievements of the freshwater reform programme. As summarised above, the impetus for enhancing Māori participation began with a dual approach in Improving Our Resource Management System in 2013: new Iwi Participation Arrangements paired with statutory reforms to section 33, section 36B, and the provisions for iwi management plans. The period of Crown–ILG co-design in 2015 resulted in a renewed effort towards Iwi Participation Arrangements – in the form of the ILG's broader Mana Whakahono a Rohe – and reform of section 36B Joint Management Agreements."

"But the necessary link between these two things was severed in 2013 and again in 2016, with the result that the Crown pinned everything on the new participation arrangements alone."

"The claimants argued that the Mana Whakahono a Rohe arrangements are to be 'applauded' as an improvement, but 'they are too little, too late, and do not go anywhere far enough'. In particular, the claimants noted that these new arrangements have not removed the statutory barriers to section 33 transfers or JMAs, and that Māori utilisation of these arrangements is 'constrained by the same resourcing problems that inhibit effective Māori participation in RMA processes more generally'.[22] Crown counsel stressed that Mana Whakahono a Rohe offered the possibility of 'formal and permanent relationships' between councils and iwi, a possibility that had not been present before in the RMA. According to the Crown, they represent a significant step forward in the 'RMA's ability to give effect to the Māori role as kaitiaki'.[23] In terms of the particulars, the Crown relied mainly on the voluntary aspects of the Mana Whakahono a Rohe, and only one of the compulsory requirements (a role in monitoring) :"

> "During these discussions, Māori may demand more meaningful involvement in resource management processes, either through agreements to transfer local authority powers to an iwi authority, or in other forms, such as the co-management of resources. The agreements may include involvement in decision-making through the appointment of iwi commissioners on hearing panels, establishing joint management agreements or other mechanisms, and environmental monitoring. They can also be used to develop monitoring methodologies so that mātauranga Māori and Māori measurements can be consistently used in regional council processes."

"We noted that key points sought by the ILG to be matters for compulsory negotiation and agreement were relocated to the voluntary parts of the Mana Whakahono a Rohe in the Resource Legislation Amendment Act 2017."

"Our view was that this mechanism in its final form (in the 2017 Act) was important but limited. It was important because, in negotiating agreement on the compulsory parts of the Mana Whakahono a Rohe, there is an opportunity for iwi or hapū to seek co-management agreements, joint planning committees, or some other mechanism not provided for in the Mana Whakahono a Rohe itself. Also, a relationship/participation agreement was a vital step towards councils and iwi or hapū working together in freshwater management. Without the establishment of some kind of improved and enduring relationship, it is difficult to imagine a council agreeing to a Joint Management Agreement, for example, without the intervention of the Crown (as has occurred in some Treaty settlements). Further, iwi can initiate a Mana Whakahono a Rohe, councils are compelled to negotiate and reach agreement if iwi initiate one, and councils cannot end the agreement unilaterally ; these are all improvements over other RMA participation mechanisms. But the key problem with the Mana Whakahono a Rohe

arrangements is that the compulsory matters to be agreed are very limited. Apart from an increased role in monitoring, which does now have to be agreed upon, the mandatory parts of the agreement relate to the consultation required by the Act (which is limited to policy statements and plans) and the participation of iwi in plan preparation or changes. In reality, what this does is provide a mechanism for councils and iwi to do the things that schedule 1 of the Act already required them to do. Anything extra comes under the parts that the parties may discuss and agree but there is no requirement for them to do so."

"The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown."

"Further, even if relationships are improved and discussions are held through a Mana Whakahono a Rohe, statutory barriers still inhibit section 33 transfers and Joint Management Agreements. The evidence of the Crown was clear on that point. In all these circumstances, it is at best unlikely that Mana Whakahono a Rohe will result in a greater decision-making role for Māori in freshwater management, such as co-governance and co-management, without further statutory amendment."

"The issue of resourcing is also crucial. The ILG's view was that 'both local authorities and iwi must be resourced to ensure that the establishment and implementation of Mana Whakahono a Rohe agreements is as successful as possible'.25"

"We agreed. The evidence in our inquiry was that the lack of resources has prevented effective Māori participation in RMA processes. Mana Whakahono a Rohe arrangements will be no different in that respect unless resources are provided."

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty."

"We were not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found. The Mana Whakahono a Rohe agreements have the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans."

"They will likely result in an enhanced role for Māori in decision-making at the front-end, planning stage of the RMA. But the range of matters iwi and councils are compelled to

negotiate and agree on is very limited. Our finding was that the Mana Whakahono a Rohe provisions have not made the RMA Treaty-compliant."

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies: [including]

- The Mana Whakahono a Rohe provisions of the RMA should be amended to make the co-governance and co-management of freshwater bodies a compulsory matter that must be discussed and agreed by the parties. Other matters could also be made compulsory (as discussed in chapter 4), and the Crown should discuss and agree to any such further proposed amendments with the ILG, which designed the original Mana Whakahono a Rohe proposal. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019))

Crown to offer co-governance, co-management through all settlements

"We accepted, however, that Treaty settlements have delivered co-governance and co-management authority for a limited selection of freshwater taonga."

"Council practice and iwi-council relationships have also improved in some areas– mostly but not entirely due to Treaty settlements. Some councils have provided limited funding. But some of the participatory arrangements created by Treaty settlements, or by councils of their own initiative, have been limited to an advisory role. Some have also been limited to segments of the freshwater management process, such as plan-making. Our conclusion was that Treaty settlements have provided for the exercise of tino rangatiratanga over selected waterways, such as the Waikato and Whanganui Rivers. But not all iwi who have settled with the Crown obtained those kinds of arrangements, nor will they necessarily be available for groups which are yet to settle. In those cases, Māori participation in freshwater management remains limited in nature. The Crown could not reasonably rely on the Treaty settlement process, therefore, to avoid reforming the participatory arrangements in the RMA." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"The Crown rightly argued that one-off co-governance and co-management arrangements have been made for some iwi in Treaty settlements. The claimants were equally correct when they pointed out that many iwi have not obtained those kinds of mechanisms in their settlements, or have not yet had the opportunity to do so in settlement negotiations; in both cases these iwi are reliant on the RMA's provisions. The possibility of co-governance arrangements in future settlements (as well as the type and degree) will continue to be at the discretion of the Crown."

"The fact is that governance and co-management mechanisms have been available under the RMA for 28 and 14 years respectively. But Parliament has made those mechanisms virtually inaccessible to iwi, and the Crown has repeatedly omitted to introduce amendments and remove the unnecessary barriers. We found that this is profoundly unfair to Māori, and it is not consistent with the principles of the Treaty of Waitangi. Māori have been prejudiced by these repeated acts of omission. Those who lack co-governance and co-management arrangements in their Treaty settlements are unable to act effectively as Treaty partners in freshwater management. They are unable to exercise their tino rangatiratanga and kaitiakitanga in respect of their freshwater taonga, to the extent guaranteed and protected in the Treaty." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies:[including]

- The Crown should offer co-governance / co-management agreements for freshwater bodies in all future Treaty settlements, unless sole iwi governance of a freshwater taonga is more appropriate in the circumstances." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

Time focused on fighting consents, rather than being involved in decision making

Māori have expended considerable effort on fighting resource consents. This is a costly and ineffective way to try and shape planning processes, and as a result many Tauranga Māori have become extremely frustrated. The capacity of Tauranga Māori to participate in environmental management as kaitiaki is badly compromised by a lack of resources. (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

Plan-making

Plan development is not cognisant of Treaty relationship and interests in taonga

"As a consequence, it is virtually certain that a regional geothermal plan, such as that proposed to be publicly notified on or about 1 July 1993 by the Bay of Plenty regional council in respect of the Rotorua geothermal field, will fail adequately to protect Maori Treaty rights in their geothermal taonga. Such failure on the part of the Crown is inconsistent with its Treaty duty to protect the claimants' interest in their taonga. As a consequence, claimants are likely to be prejudicially affected by such breach of duty." (Wai 153: Te Arawa Geothermal Resources (1993))

Iwi Management Plans (IMPs) have little weight, or are not resourced

"In addition to references to Treaty principles and terms such as kaitiakitanga and wāhi tapu, the RMA provides specific mechanisms for iwi and hapū influence, and in some cases partnership or delegated control. However, although many iwi management plans have been developed, in the flora and fauna inquiry the Tribunal identified serious concerns within Māoridom about the effectiveness of these plans in practice. Moreover, while partnership over the control of taonga is provided for in theory, in practice it has only been attempted in the form of highly specialised Treaty settlements, as with the Waikato River settlement accord, and the Te Arawa (Rotorua) and Taupō lakes agreements." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV p 139)

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows: [including]

- Iwi management plans have not been accorded their due weight in RMA planning. The Crown has turned down repeated calls for the enhancement of their legal weight.

"[W}e found that the participatory arrangements of the RMA are not consistent with the principle of partnership and the Treaty guarantee of tino rangatiratanga. Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making."

"We also noted that none of the recommendations of the Wai 262 Tribunal in respect of section 33, section 36B, and iwi management plans have been carried out since that report was issued in 2011."

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies: [including]

- The RMA provisions for iwi management plans should be amended to provide that, in the case of water bodies where co-governance and co-management has not been arranged, the iwi and hapū management plans filed by kaitiaki will have greater legal weight in the process of developing or amending regional plans and in consenting processes. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Our recommendations recognise the very particular character of our inquiry district, the importance of the waters for the nga iwi o te kāhui maunga, the impacts of the TPD on these waters, and the opportunities and limitations of the RMA."

"In the National Park inquiry context, we make three recommendations which, taken together, will increase opportunity for ngā iwi o te kāhui maunga to exercise their kaitiakitanga over their waters. They include local action and national action and sit within the present resource management framework. Those recommendations are that:

- The Crown provides funding for the preparation of an iwi management plan for the waters of te kāhui maunga (section 61(2A)(a) of the RMA). This funding should be ongoing and take into account capacity building and monitoring needs" (Wai 1130: Te Kāhui Maunga – The National Park District Inquiry Report (2013))

"Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified, specifically:

- **Enhanced iwi management plans:** We recommend that the RMA be amended to provide for the development of enhanced iwi resource management plans; that these plans be developed by iwi in consultation with local authorities; that these plans identify iwi resource management priorities and opportunities for delegation of control to kaitiaki or establishment of partnerships; and that these plans be confirmed during a joint statutory negotiation process between iwi and local authority representatives, during which there may be compromise. We recommend that, once adopted, these plans have the same status under the RMA as any district or regional plan or policy statement as the case may be." (Wai 262: Ko Aotearoa Tēnei: (2011))

"Iwi management plans can also now be a powerful tool, but neither central nor local government has properly resourced such plans, and (at least initially), they had very little statutory weight."

"Instead of being involved in decision making and engaging in the preparation of plans, Tauranga Māori have expended considerable effort on fighting resource consents. This is a

costly and ineffective way to try and shape planning processes, and as a result many Tauranga Māori have become extremely frustrated. The capacity of Tauranga Māori to participate in environmental management as kaitiaki is badly compromised by a lack of resources. Further, their largely unsuccessful battles show that the values of Tauranga Māori, particularly those of a spiritual nature, are not well understood by the general public or local authorities, and are often given little weight in their planning processes." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

Crown definition of partner

Impact of iwi authority definition

"That the Crown take urgent action to amend the procedural provisions of the Resource Management Act 1991 to ensure that all Maori with interests in multiply-owned Maori land have the right to be informed on all matters affecting their land" (Wai 38: Te Roroa Report (1992)

"The Crown has identified a problem with multiply-owned Maori land in relation to resource management matters and has provided a solution, the "iwi authority", which is assumed to be a traditional concept. To provide what is thought to be a "Maori" solution suggests an assumption that it is a Maori problem. It is not. It is a Crown problem…" "In our view there is an urgent need for amendment to the Resource Management Act 1991 in order to overcome problems such as those in relation to s353 "iwi authorities" and the time limits throughout the Act." (Wai 38: Te Roroa Report (1992)

Tangata Whenua, Mana Whenua definitions

"We find that we must part company with the understanding of 'tangata whenua' and 'mana whenua' as used in the Reserves Act 1977, the Conservation Act 1987, and the Resource Management Act 1991. In section 2 of the latter, 'mana whenua' means 'customary authority exercised by an iwi or hapu in an identified area'. 'Tangata whenua', in relation to a particular area, is defined as meaning 'the iwi or hapu that holds mana whenua over that area'. We think that this confuses several things, not least by its association of 'tangata whenua' with power. We have thought it best to leave aside the legal definitions and to look at the matter solely in customary terms."

"As we see it, the core meaning of 'tangata whenua' relates to an association with the land akin to the umbilical connection between an unborn child and its mother. It comes from creation beliefs holding that Maori were born of Papatuanuku (Mother Earth) and is used to describe the first people of a place, as though they were born out of the land. However, it is also used to describe those who have become one with the land through occupation over generations. It is relevant to ask whether the newcomers placed the placenta of the new born on the land, whether their ancestors have been regularly buried in particular sacred sites, and whether regular respect for those ancestors and sites is still maintained."

"These and similar questions define the degree of permanence or transience in cultural terms."

"Accordingly, it is possible that some people can be more 'tangata whenua' than others, so that the term 'tangata whenua tuturu ake' or 'the true tangata whenua' might be used to

distinguish, for example, Moriori, from Ngati Mutunga of Rekohu. Moriori described the latter as 'tangata whenua iho' meaning 'afterwards'."

"But 'tangata whenua' is not customarily used to describe political power. Instead, it would be appropriate for Maori speakers to talk of conquerors on the one hand and the true owners of the soil, the tangata whenua, on the other."

"[W]e cannot support the approach adopted in the Resource Management Act 1991, which defines tangata whenua by asking who has the customary authority in a place. If that question can be answered at all, the answer will surely exclude many who are properly tangata whenua as well. If it is the intention of the Act that some special consideration should be given to Maori who have ancestral associations with particular areas of land, then we think that it would be best if that were said. It might then be found that more than one group has an interest. If in any particular case it is intended that particular Maori communities should be heard, then it would be best to describe the type of community, be it traditional or modern." (Wai 64: Rekohu- A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands (2001))

Wāhi tapu and heritage protection

Wāhi tapu protection – incl Crown-Māori working together to work this through

"That, while the RMA and the New Zealand Historic Places Trust Act 1993 have improved the situation, the statutes have not provided sufficient protection for important taonga sites and are in their present format therefore inconsistent with the principles of the Treaty with respect to the Crown's duty to actively protect taonga." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 497)

"One of the main issues, as previous Tribunals have found, lies in the RMA as far as Treaty principles are concerned. Section 8 needs to be amended to reflect wording more akin to that in section 9 of the State-Owned Enterprises Act 1986. Alternatively, it should be integrated into section 5 of the RMA. Left as it is the RMA is incapable of ensuring that the Crown's Treaty guarantees to Māori are honoured. Furthermore, the Crown's heritage system while improved to that which existed before the Historic Places Act 1993, continues the ad hoc approach to the protection of all sites important to the claimants. The problem is that registration under the Historic Places 1993 and its link to the RMA, recognises only a small proportion of their sites and their experience has been that protection for those sites registered is not guaranteed." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 394)

"The Crown, as part of this recognition and the development of these co-management regimes, should proactively look to restore taonga sites where practicable. These sites should be identified in conjunction with Te Rohe Pōtae Māori and may include wetlands, forests, wāhi tapu, or any other sites of environmental or heritage value." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 501)

"Some newer legislations, such as the Heritage New Zealand Pouhere Taonga Act 2014, have the potential to address environmental issues in the district, particularly regarding consultation, but they still do not go far enough. Under the RMA, for example, consultation for the completion of a resource consent application is not mandatory either by an applicant or

local authority and this provision was enacted as late as 2005." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 504)

"Recommendation: The Crown produce National Policy Statements and National Environmental Standards to provide guidance to territorial authorities on enhancing and protecting taonga and wāhi tapu." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"In 1992 the Te Roroa Tribunal provided a sustained analysis of the proper role of tangata whenua and the Crown in the management of Māori cultural heritage. That Tribunal found that Māori participation in what others decide to do with their taonga is not the proper partnership envisaged by the Treaty:

> Wahi tapu are taonga of Maori, acknowledged as such in article 2 of the Treaty. The role of the department and Historic Places Trust in the 'partnership' is not a decision making role or being 'included' in what is not theirs. Rather, it is to assist Te Roroa by the provision of services and advice when they are sought, to enable them to protect and care for the wahi tapu." p291

"That Tribunal further proposed that the Crown:

> re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wahi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment." p 292

"We endorse these findings of the Te Roroa Tribunal. The issue is whether Crown legislation and policy has since evolved to enable Tauranga Māori to exercise rangatiratanga (authority and control), and act as kaitiaki (protect and care for) over their cultural heritage."

"Before we address this issue however, we need to make clear that the capacity of the Crown to enable Māori to exercise rangatiratanga and to act as kaitiaki will differ depending on the specific category of land at issue, for example, Crown land, public land owned by local authorities, and private land. The latter categories present particularly complex problems of how to best reconcile public rights of access and enjoyment, or the legitimate property rights of private landowners, with the equally legitimate right of tangata whenua to retain links to their significant sites within their ancestral landscape. These issues are further complicated in situations where Māori have lost their ancestral lands in ways inconsistent with the principles of the Treaty. We acknowledge the complexity of the issues involved but consider that the Crown and Māori must not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of kaitiakitanga"

"To this day neither the Historic Places Act nor the Resource Management Act provide Tauranga Māori with any straightforward mechanisms to exercise rangatiratanga and act as kaitiaki over their ancestral places on any of these categories of land. One mechanism which might come closest is the possibility, under both the Historic Places Act and Resource Management Act, that Māori groups might become heritage protection authorities, able to issue heritage protection orders. Under the Resource Management Act, an iwi authority, Māori trust, or incorporation, can in theory become heritage authorities if constituted as a body corporate, and if the Minister for Culture and Heritage accepts their application."

"The Te Roroa Tribunal commented that there may be several issues for Māori in considering undertaking this process. First, that Tribunal felt that the requirement to be a body corporate

was inappropriate, since the trustees who administer marae, the cultural foci of Māori communities, do not constitute a body corporate. We note, however, that trusts and incorporations established under Te Ture Whenua Māori Act 1993, and Māori trust boards, are body corporates. Secondly, disclosing the location of wāhi tapu and scrutiny at public hearings could pose threats to their security. Thirdly, and most significantly, substantial costs are involved in making a heritage order, including one-off costs for applying (and a high likelihood of appeal) and ongoing costs in processing resource consent applications. In particular, landowners can apply for compulsory purchase and compensation by the heritage authority if they cannot sell or use their land in a reasonable manner. Making a heritage order therefore inevitably involves significant delays, financial costs, and considerable risks ; as the Parliamentary Commissioner for the Environment noted in 1996, it is a last resort option for protection." P 295 (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

"We acknowledge the role of the Resource Management Act in the protection of wahi tapu and taonga, and appreciate that this Act is an attempt by Government to provide a holistic approach to the management of resources and taonga. But we also consider that it should be noted that the legislation is complex, and specialist legal advice is currently required for access to the full range of legislative protections on offer. The various protective options provided by the Act are not used consistently by territorial authorities nationwide."

"We suggest that, for the Resource Management Act to be a more consistently effective tool for Maori (which the Crown has conceded is not always the case), the Government, local authorities, and Maori should work together to ensure an understanding of the processes on offer, as well as a consistent approach to their application. We acknowledge that the Resource Management Act already makes provision for these parties to work together, and we encourage the use of these available provisions for protection of wahi tapu to the fullest extent possible. Use of the existing provisions under the Resource Management Act should be carefully monitored, so that the Crown can put in place effective mechanisms should the existing provisions be less than fully adequate. In the Report on the Manukau Claim of almost 20 years ago, the Tribunal observed, and we agree, that wahi tapu protection procedures must be publicised. We note that such a step appropriately involves the full participation of both Crown and Maori as Treaty partners." p 965 (Wai 686: The Hauraki Report Volume 3 (2006))

"Use of the existing [Wahi tapu]provisions under the Resource Management Act should be carefully monitored, so that the Crown can put in place effective mechanisms should the existing provisions be less than fully adequate" p965 (Wai 686: The Hauraki Report Volume 3 (2006))

"To fulfil its obligations under the Treaty, we do not consider that the procedure under the Resource Management Act for the creation of heritage protection authorities is an option to be adopted by the Department of Conservation. We accept the claimants' submission that it would be a violation of their rangatiratanga." [More extensive section on wahi tapu] (Wai 38: Te Roroa Report (1992)

Funding and support for heritage protection including Historic Places Trust

However, a number of the key recommendations of the reviews that we have summarised have not been implemented. In particular, despite the unanimity of the reviews on these key points, there is still no standalone Māori heritage agency, and there is still no national policy

statement for heritage management. Other areas where significant issues remain almost entirely unaddressed include: the continuing ambiguity about the role of, and funding for, the trust's register; the lack of incentive funding at the local authority level; and the lack of funding to assist iwi and hapū to create heritage databases." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

Relationship with different categories of land

Clarification of no loss of treaty interest if land has been alienated

"We have stressed that the Crown has always acknowledged that it has been bound to uphold the property rights of Tauranga Māori over their lands, waters, and taonga, as determined by their own customs. Any abrogation of this standard by the Crown constitutes a breach of the Treaty."

"However, a further issue then arises – one which is critical in the context of these claims."

"This is the question of whether, if Tauranga Māori have lost legal rights over their taonga by means that are inconsistent with Treaty principles, they may not now retain any Treaty interests in their taonga. This is a very significant issue for the hapū of Tauranga Moana, since so much of their property has been alienated. They have thereby lost the ability to control or care for their taonga, including wāhi tapu (as discussed in chapter 8), and waterways."

"The Tribunal's Petroleum Report and He Maunga Rongo have each found that Māori retain 'a Treaty interest' whenever legal rights are lost by means that are inconsistent with Treaty principles. Further, when a Treaty interest arises:

> there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy." (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

Crown and Māori to not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of Kaitiakitanga (pertaining to different categories of lands)

"Before we address this issue however, we need to make clear that the capacity of the Crown to enable Māori to exercise rangatiratanga and to act as kaitiaki will differ depending on the specific category of land at issue, for example, Crown land, public land owned by local authorities, and private land. The latter categories present particularly complex problems of how to best reconcile public rights of access and enjoyment, or the legitimate property rights of private landowners, with the equally legitimate right of tangata whenua to retain links to their significant sites within their ancestral landscape. These issues are further complicated in situations where Māori have lost their ancestral lands in ways inconsistent with the principles of the Treaty. We acknowledge the complexity of the issues involved but consider that the Crown and Māori must not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of kaitiakitanga"

“To this day neither the Historic Places Act nor the Resource Management Act provide Tauranga Māori with any straightforward mechanisms to exercise rangatiratanga and act as kaitiaki over their ancestral places on any of these categories of land. One mechanism which might come closest is the possibility, under both the Historic Places Act and Resource Management Act, that Māori groups might become heritage protection authorities, able to issue heritage protection orders. Under the Resource Management Act, an iwi authority, Māori trust, or incorporation, can in theory become heritage authorities if constituted as a body corporate, and if the Minister for Culture and Heritage accepts their application.”

“The Te Roroa Tribunal commented that there may be several issues for Māori in considering undertaking this process. First, that Tribunal felt that the requirement to be a body corporate was inappropriate, since the trustees who administer marae, the cultural foci of Māori communities, do not constitute a body corporate. We note, however, that trusts and incorporations established under Te Ture Whenua Māori Act 1993, and Māori trust boards, are body corporates. Secondly, disclosing the location of wāhi tapu and scrutiny at public hearings could pose threats to their security. Thirdly, and most significantly, substantial costs are involved in making a heritage order, including one-off costs for applying (and a high likelihood of appeal) and ongoing costs in processing resource consent applications. In particular, landowners can apply for compulsory purchase and compensation by the heritage authority if they cannot sell or use their land in a reasonable manner.294 Making a heritage order therefore inevitably involves significant delays, financial costs, and considerable risks ; as the Parliamentary Commissioner for the Environment noted in 1996, it is a last resort option for protection.” p 295 (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

Māori-owned land

Interface with Te Ture Whenua Māori Act 1993

“As in 2013 (and in the research and reviews leading up to it), many people raised the issue of barriers to development that had not been addressed by the Crown and that were not the subject of the proposed reforms:

There is a clear view among hui participants that the success of any reforms does not rest on legislation alone but also needs to be backed with access to resources such as fresh water and financial support. At almost every hui we heard significant concerns about landlocked Māori land and the impact of other legislation, particularly the Resource Management Act 1991, the Local Government (Rating) Act 2002, and the Public Works Act 1981.” (p122 Wai 2478: He Kura Whenua ka Rokohanga- Report on Claims about the Reform of Te Ture Whenua Maori Act 1993 (2016))

“The Tribunal also highlighted problems with resource and fishery management regimes and recommended changes and improvements to ensure that these regimes were more consistent with the Treaty. The Crown admitted that the Resource Management Act 1991 was not being implemented in a manner that provided fairly for Māori interests. The Tribunal’s report highlighted a number of shortcomings with respect to the current ‘offer-back’ regime under the Public Works Act 1981. It recommended amendments to Te Ture Whenua Māori Act 1993 and the Public Works Act to address these issues.” (Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims (2008))

Issues impeding multiply-owned Māori lands

"That the Crown resource an advocacy service to represent all Maori with interests in multiply-owned Maori land and provide advice to Maori in relation to resource management and conservation issues" (Wai 38: Te Roroa Report (1992)

Remove impediments to Papakāinga across planning legislation including RMA

"We recommend that the Crown reviews the Resource Management Act and other planning legislation, policy, and practice, to ensure that Whanganui Māori are not unduly prevented from building houses on, or developing, their own land. It should work with local authorities to ensure that they have proper regard to the importance of Māori being able to maintain their papakāinga. It should also engage with iwi Māori on the kaupapa of regional development, with a view to creating opportunities for people to participate in economic ventures that make it viable for them to occupy their ancestral kāinga". P1176 (Wai 903: He Whiritaunoka – The Whanganui Land Report Volume 3 (2015))

Hapū/iwi capacity and resourcing

Capacity and resourcing to participate fairly

"Alongside these flaws in the RMA mechanisms themselves, we found that under resourcing has contributed to a lack of capacity and capability for many Māori entities in freshwater management. This has crippled their ability to participate effectively in RMA processes. Examples included the ability to meet the 'efficiency' requirements of sections 33 and 36B, to prepare effective iwi management plans, and to participate effectively (or at all) in consultation and RMA hearing processes." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"..the ongoing problems with resourcing and effective participation mean that some Māori groups will be unable to take proper advantage of this new mechanism in the NPS-FM – as the Ministry's 2017 review of the NPS-FM has acknowledged." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend that the Crown urgently take such action or actions as are necessary to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes, including freshwater management and freshwater decision-making. We also recommend that, in respect of fresh water, the resourcing measures be developed, and their effectiveness monitored, by the national co-governance body. If the national co-governance body has not been established, that role should be performed by the Crown in partnership with the Iwi Chairs Forum and NZMC. Because this issue of resources is not confined to RMA processes relating to fresh water, we have not specified the ILG and Te Kahui Wai Māori here. Necessarily, this recommendation includes the building of capacity and capability for iwi and hapū to enter into co-governance and co-management arrangements and Mana Whakahono a Rohe arrangements, and support for both councils and Māori to establish those arrangements." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified, specifically:

- **A commitment to capacity-building:** We recommend that the Ministry for the environment commit to building Māori capacity to participate in RMA processes and in the management of taonga, and that this commitment should include providing resources to assist kaitiaki with the development of iwi resource management plans, and assisting kaitiaki to develop the resources or technical skills needed to exercise their kaitiaki roles." (Wai 262: Ko Aotearoa Tēnei: (2011))

"We consider that there are fundamental flaws in the operation of the current regime for managing the petroleum resource which arise from the combined effect of the following features…" "the limited capacity of 'iwi authorities' to undertake the role envisaged for them in the regime" (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"We recommend that the Government commit to a comprehensive review of these Acts that achieves…" "increased capacity of tangata whenua to engage meaningfully in resource management decision-making (which will involve paying and training them)'" (Wai 863: Wairarapa ki Tararua Report (2010))

The capacity of Tauranga Māori to participate in environmental management as kaitiaki is badly compromised by a lack of resources. (Wai 215: Tauranga Moana 1886-2006 - Report on the Post-Raupatu Claims Volume 2 (2010))

"It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. As a result, iwi are faced with insufficient regard to, or even understanding of, their values and interests, and an inability to participate on a level playing field with consent applicants and authorities. Although the Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it. Clearly, the claimants have been prejudiced by these breaches of Treaty principle."

"The Tribunal also highlighted problems with resource and fishery management regimes and recommended changes and improvements to ensure that these regimes were more consistent with the Treaty. The Crown admitted that the Resource Management Act 1991 was not being implemented in a manner that provided fairly for Māori interests." (Wai 785: Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims (2008))

Government and council capability

Low level engagement with Te Ao Māori and Māori perspectives exhibited by central and local government decision-makers

"[Under 'Systemic problems in the current regime' We consider that there are fundamental flaws in the operation of the current regime for managing the petroleum resource which arise from the combined effect of the following features…" "the low level of engagement with te ao Māori and Māori perspectives exhibited by central and local government decision-makers." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

"We recommend that the Government commit to a comprehensive review of these Acts that achieves…" "substantial upskilling of council staff and councillors in understanding the Māori world-view, including enhanced skills in te reo Māori me ōna tikanga (the Māori language and related customs). Councils should also be required to provide incoming councillors and new staff with information and education material on (among other matters) local tribal boundaries and significant sites ; local tribal organisations, trust boards, corporations and leaders ; the current Treaty discourse ; Treaty settlements ; and Crown Treaty obligations and how they are expressed in the Resource Management Act 1991 and local government legislation." (Wai 863: Wairarapa ki Tararua Report (2010))

Further, their largely unsuccessful battles show that the values of Tauranga Māori, particularly those of a spiritual nature, are not well understood by the general public or local authorities, and are often given little weight in their planning processes." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

Greater willingness needed

"There is tremendous and largely untapped potential for Tauranga Māori to play a much greater role as kaitiaki over the environments of Tauranga Moana, and to help restore their ancestral landscapes and the taonga of their waterways. Realising their desire to be kaitiaki will require much more constructive working relationships to be forged between tangata whenua, councils, and the wider community. There is considerable scope for such relationships under current legislation; what is required is a greater willingness to realise the enormous potential benefits from Māori involvement." (Wai 215: Tauranga Moana 1886–2006 – Report on the Post-Raupatu Claims Volume 2 (2010))

Engagement/consultation

Timing of consultation

"The Crown has identified a problem with multiply-owned Maori land in relation to resource management matters and has provided a solution, the "iwi authority", which is assumed to be a traditional concept. To provide what is thought to be a "Maori" solution suggests an assumption that it is a Maori problem. It is not. It is a Crown problem…" "In our view there is an urgent need for amendment to the Resource Management Act 1991 in order to overcome problems such as those in relation to s353 "iwi authorities" and the time limits throughout the Act." (Wai 38: Te Roroa Report (1992)

Proper engagement not undertaken on specific issues

"After examining the evidence and submissions, we found that these participation mechanisms were flawed and had not delivered results that were consistent with either the intention behind some of them (sections 33 and 36B) or the principles of the Treaty. Our findings on flaws in the particular RMA mechanisms were as follows: [including]

- The consultation requirements of the RMA have been confined to the plan-making phase of freshwater decision-making (consultation is not required for the consenting phase). The consultation requirements have also suffered from under-resourcing and the lack of a clear path for consultation to take place in a meaningful and effective way. Crown counsel argued that the new Mana Whakahono a Rohe mechanism will provide just such a path

(our findings on that new mechanism are summarised below)." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"While the Act provides for consultation with iwi by local and regional authorities, Muriwhenua people feel that in the past this has either not occurred, or has been inadequate." (Wai 45: The Muriwhenua Land Claims Post 1865 (2002))

Claimants not consulted on gravel extraction

"In our inquiry, claimants said that they were not even properly consulted over environmental matters. Management of the Ohinemataroa River, in particular the selling of gravel, was cited as one instance in which the rights and interests of tangata whenua were virtually ignored." (Wai 894: Te Urewera Report Volume VII (2015))

Consenting

Resource consenting processes fails to respect, provide for and protect the special relationship of [tribe] with the [river]

"Improvements to land use planning under RMA due to part 2 requirements and the enactment of the New Zealand Historic Places Trust Act 1993 also came a little too late for other taonga sites of significance such as Maniapoto's Cave. While the legislation led to greater participation from affected Māori post 1991, in practice that participation has been reduced to consultation and information sharing. In Te Rohe Pōtae, this practice is evident in the case studies reviewed after the year 2000. Where consultation and participation has occurred in relation to planning and consents, Te Rohe Pōtae Māori consent was given with qualifications that they wanted respected. However, sites were and are still being disturbed, damaged or destroyed."

"Importantly, consultation for the completion of a resource consent application is not mandatory either by an applicant or local authority. This provision in the RMA was enacted as late as 2005. Thus any consultation is usually only undertaken to advance a local or regional authority planning process or an applicant's resource consent proposal, where they need to provide a cultural assessment of the sites or waterways subject to the application. Iwi rightly ask : What is the benefit to them of such a system, given the evidence is that decision makers rarely gave full consideration to Treaty of Waitangi principles, other than superficial tick box exercises around stating that they have complied with part 2 or section 8 of the RMA?" (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 497)

"Professor Jacinta Ruru, David Alexander, and other claimant witnesses confirmed that Māori interests have also been balanced away in freshwater management decisions during the period under review in chapter 2. We noted that this situation may improve to some extent, depending on the application of the Supreme Court's King Salmon decision.[1] We also noted the Crown's view that there was an 'increasing sophistication' in the Environment Court's treatment of Māori interests. But litigation remained a costly exercise, time and expertise-intensive, which was beyond the reach of many iwi and hapū. Also, RMA consent hearings have presented the same barriers, to the prejudice of Māori. In our view, statutory amendments are required to ensure that RMA decision-making on freshwater matters is Treaty compliant." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We recommend a number of paths and mechanisms for co-governance and co-management which, severally or in combinations, will enable iwi and hapū to arrive at the most appropriate arrangement for their particular rohe and for each of their water bodies: [including]

- Sections 33 and 36B of the RMA should be amended to remove statutory and practical barriers to their use, to provide incentives for their use, and to compel councils to actively seek opportunities for their use. Sections 33 and 36B should also be amended so that transfers of power and Joint Management Agreements cannot be revised or cancelled without the agreement of both parties. Section 33 should be amended so that transfers of power in respect of a water body or water bodies may be made to hapū. Joint Management Agreements for water bodies should apply to the whole catchment of a water body, and should include (among other things) 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- Objective D1 of the NPS-FM should be amended to specify that iwi and hapū must be directly involved in freshwater decision-making, that Māori values, rights, and interests must be recognised and provided for in freshwater decision-making, and that councils must actively seek opportunities to enter into section 33 transfers and section 36B Joint Management Agreements for freshwater bodies (where Treaty settlements have not already established co-governance agreements for freshwater bodies). Consequential amendments should be made in policy D1, and further policies could be inserted as required. These amendments should specify 'a leading role [for iwi and hapū] in developing, applying and monitoring/enforcing water quality requirements', and a decision-making role in both plan-making and relevant consents.
- The RMA provisions for iwi management plans should be amended to provide that, in the case of water bodies where co-governance and co-management has not been arranged, the iwi and hapū management plans filed by kaitiaki will have greater legal weight in the process of developing or amending regional plans and in consenting processes. (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"We are aware that monitoring and enforcement of consent conditions is also a significant issue in the freshwater management regime, but we did not receive sufficient evidence to make a recommendation (other than the recommendation made above in respect of Joint Management Agreements)." (Wai 2358: The Stage 2 Report on the National Freshwater and Geothermal Claims (2019)

"While the 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord' (2013) has created opportunities to work in partnership with local bodies, and that is to be applauded, under the RMA 1991 and the local government legislation Muaūpoko have no lawful rights to control or to enforce the commitments made in that accord In other words, Muaūpoko mana whakahaere (control and management) over their taonga is not fully provided for under the current legislative regime Such a situation can be compared to the rights that the Waikato-Tainui river tribes have in terms of the Waikato River under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. The 2010 legislation states that the 'RMA 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for river use'. It is further recorded that the RMA does not provide for the protection of the mana of the river or the mana whakahaere (ability to exercise control, access to, and management of the river) of Waikato. It notes the number of resource consent proceedings that the tribe had been involved in, and then the Crown acknowledges, among other things, that it 'failed to respect, provide for, and protect

the special relationship of Waikato-Tainui' with the river." (Wai 2200: Horowhenua- The Muaūpoko Priority Report (2017))

Joint consent committees put to greater use

"Recommendation: Joint consent hearings by local authorities be put to greater use." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

Enforcement

"In addition, as with the land use studies above, the RMA cannot be used to require historical rectification of environmental effects. Therefore, the historical destruction of wāhi tapu, archaeological sites, the desecration of Maniapoto's Cave and the historical effects of mining operations on the lakes at Tahāroa, are not matters that new consents can address. All that can be done is to make sure new resource consents (and associated conditions) are adhered to. Whether or not enforcement is undertaken depends on the views of the regional or local authority concerned or Heritage New Zealand, rather than Ngāti Te Wehi, Ngāti Maniapoto, Ngāti Mahuta or any other group affected." (Wai 898: Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV (2019) p 497)

Other

Extent of availability of legal aid

"In order to ensure the fullest possible protection of Māori interests, legal aid for appeals to the Environment Court (the final resort for objectors) should be more readily available to hapū and tribal authorities." (Wai 796: The Report on the Management of the Petroleum Resource (2010))

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Waitangi Tribunal. 2017. *Te Urewera Volume VII*. WAI 894. Wellington: Waitangi Tribunal. URL: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_134707622/Te%20Urewera%20Vol7WS.pdf

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Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Claims*. WAI 2358. Wellington: Waitangi Tribunal. URL: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152208791/Freshwater%20W.pdf

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Legislation:

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Appendix 1 – Environment Act 1986 excerpts

In summary:

The Ministry for the Environment, as established under the Environment Act 1986 is to **ensure that, in the management of natural and physical resources, full and balanced account is taken of… the principles of the Treaty of Waitangi.** The functions of the Ministry include '**providing to government, its agencies and other public authorities advice on the application, operation and effectiveness' on an extensive list of Acts in relation to Environment Act's objectives**, including the stated objective **[in bold]** above.

Extracts from: www.legislation.govt.nz/act/public/1986/0127/latest/whole.html#DLM99773

An Act to—

(a) provide for the establishment of the office of Parliamentary Commissioner for the Environment:

(b) provide for the establishment of the Ministry for the Environment:

(c) ensure that, in the management of natural and physical resources, full and balanced account is taken of—

(i) the intrinsic values of ecosystems; and

(ii) all values which are placed by individuals and groups on the quality of the environment; and

(iii) **the principles of the Treaty of Waitangi;** and

(iv) the sustainability of natural and physical resources; and

(v) the needs of future generations

31 Functions of Ministry

The Ministry shall have the following functions:

(a) to advise the Minister on all aspects of environmental administration, including—

(i) policies for influencing the management of natural and physical resources and ecosystems so as to achieve the objectives of this Act:

(ii) significant environmental impacts of public or private sector proposals, particularly those that are not adequately covered by legislative or other environmental assessment requirements currently in force:

(iii) ways of ensuring that effective provision is made for public participation in environmental planning and policy formulation processes in order to assist decision making, particularly at the regional and local level:

(b) to solicit and obtain information from any source, and to conduct and supervise research, so far as it is necessary for the formulation of advice to the Government on environmental policies:

(c) to provide the Government, its agencies, and other public authorities with advice on—

(i) the application, operation, and effectiveness of the Acts specified in the Schedule in relation to the achievement of the objectives of this Act:

(ii) procedures for the assessment and monitoring of environmental impacts:

(iii) pollution control and the co-ordination of the management of pollutants in the environment:

(iv) the identification and likelihood of natural hazards and the reduction of the effects of natural hazards:

(v) the control of hazardous substances, including the management of the manufacture, storage, transport, and disposal of hazardous substances:

(d) to facilitate and encourage the resolution of conflict in relation to policies and proposals which may affect the environment:

(e) to provide and disseminate information and services to promote environmental policies, including environmental education and mechanisms for promoting effective public participation in environmental planning:

(f) generally to provide advice on matters relating to the environment:

(g) to carry out any other functions that may be conferred on the Ministry by any enactment.

Schedule[3]

Legislation the Ministry might interface with or administer*	Other legislation
Resource Management Act 1991* (this document) Local Government Act 1974 Local Government Act 2002 Biosecurity Act 1993 Conservation Act 1987 Crown Minerals Act 1991 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* Fisheries Act 1983 Fisheries Act 1996 Hauraki Gulf Marine Park Act 2000 Hazardous Substances and New Organisms Act 1996* Heritage New Zealand Pouhere Taonga Act 2014 Marine Reserves Act 1971 National Parks Act 1980 Public Works Act 1981 Reserves Act 1977 Wild Animal Control Act 1977 Wildlife Act 1953	Antarctica Act 1960 Antarctica (Environmental Protection) Act 1994 Antarctic Marine Living Resources Act 1981 Atomic Energy Act 1945 Continental Shelf Act 1964 Electricity Act 1992 Forest and Rural Fires Act 1977 Forests Act 1949 Gas Act 1992 Government Roading Powers Act 1989 Harbours Act 1950 Hauraki Gulf Maritime Park Act 1967 Health Act 1956 Iron and Steel Industry Act 1959 Land Act 1948 Marine Mammals Protection Act 1978 Maritime Transport Act 1994 Radiation Safety Act 2016 Transport Act 1962: section 70AA

[3] Legislation is separated for ease of viewing

Appendix 2 – Identification of RMA and 'resource management' references by report

Legend:

	Reviewed - no findings about the RMA
	Reviewed – a number of references to RMA but not a critique of it
	Reviewed – other volume, subsequent or final report included findings
	Reviewed – extracts included

Wai #	Waitangi Tribunal Report Name	Year	Number of references to 'resource management' or 'RMA'
Wai 898	Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims Part IV	2019	160
Wai 2358	National Fresh Water and Geothermal Resources Inquiry	2019	811
Wai 2561	The Ngatiwai Mandate Inquiry Report	2017	2
Wai 2200	Horowhenua- The Muaūpoko Priority Report	2017	38
Wai 894	Te Urewera Volume VII	2017	81
Wai 894	Te Urewera Volume VI	2017	23
Wai 894	Te Urewera Volume I	2017	1
Wai 2522	Report on the Trans-Pacific Partnership Agreement	2016	8
Wai 2478	He Kura Whenua ka Rokohanga- Report on Claims about the Reform of Te Ture Whenua Maori Act 1993	2016	27
Wai 2417	Whaia te Mana Motuhake- In Pursuit of Mana Motuhake- Report on the Maori Community Development Act Claim	2016	1
Wai 2391 & 2393	The Final Report on the MV Rena and Motiti Island Claims	2015	23
Wai 903	He Whiritaunoka- The Whanganui Land Report Volume 3	2015	7
Wai 903	He Whiritaunoka- The Whanganui Land Report Volume 1	2015	3
Wai1130	Kahui Maunga- The National Park District Inquiry Report Volume 3	2013	144
Wai 1130	Kāhui Maunga- The National Park District Inquiry Report Volume 2	2013	2
Wai 1130	Kāhui Maunga- The National Park District Inquiry Report Volume 1	2013	5
Wai 45	The Ngāti Kahu Remedies Report	2013	1
Wai 2358	The Stage 1 Report on the National Freshwater and Geothermal Resources Claim	2012	31

Go to

Wai #	Waitangi Tribunal Report Name	Year	Number of references to 'resource management' or 'RMA'
Wai 796	The Report on the Management of the Petroleum Resource	2011	231
Wai 262	Ko Aotearoa Tēnei- A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Taumata Tuatahi	2011	59
Wai 262	Ko Aotearoa Tēnei- A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Taumata Tuarua Volume 2	2011	23
Wai 262	Ko Aotearoa Tēnei- A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Taumata Tuarua Volume 1	2011	234
Wai 863	The Wairarapa ki Tararua Report Volume 3	2010	116
Wai 863	The Wairarapa ki Tararua Report Volume 2	2010	3
Wai 863	The Wairarapa ki Tararua Report Volume 1	2010	3
Wai 215	Tauranga Moana, 1886-2006- Report on the Post-Raupatu Claims Volume 1	2010	37
Wai 1200	He Maunga Rongo- Report on Central North Island Claims, Stage One Volume 4	2008	287
Wai 1200	He Maunga Rongo- Report on Central North Island Claims, Stage One Volume 3	2008	2
Wai 1200	He Maunga Rongo- Report on Central North Island Claims, Stage One Volume 1	2008	3
Wai 785	Te Tau Ihu o te Ika a Maui- Report on Northern South Island Claims Volume 3	2008	47
Wai 785	Te Tau Ihu o te Ika a Maui- Report on Northern South Island Claims Volume 1	2008	2
Wai 1362	The Tamaki Makaurau Settlement Process Report	2007	1
Wai 1353	The Te Arawa Settlement Process Reports	2007	7
Wai 686	The Hauraki Report Volume 3	2006	48
Wai 686	The Hauraki Report Volume 1	2006	2
Wai 1090	The Waimumu Trust (SILNA) Report	2005	68
Wai 1071	Report on the Crowns Foreshore and Seabed Policy	2004	14
Wai 796	The Petroleum Report	2003	1
Wai 145	Te Whanganui a Tara me ona Takiwa- Report on the Wellington District	2003	7
Wai 958	The Ngati Awa Settlement Cross-Claims Report	2002	2
Wai 953	Ahu Moana- The Aquaculture and Marine Farming Report	2002	44
Wai 45	The Muriwhenua Land Claims Post 1865	2002	13
Wai 788 & 800	The Ngati Maniapoto-Ngati Tama Settlement Cross-Claims Report	2001	4
Wai 728	The Hauraki Gulf Marine Park Report	2001	9

Go to

Wai #	Waitangi Tribunal Report Name	Year	Number of references to 'resource management' or 'RMA'
Wai 64	Rekohu- A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands	2001	4
Wai 167	The Whanganui River Report	1999	86
Wai 46	The Ngati Awa Raupatu Report	1999	1
Wai 414	Te Whanau o Waipareira Report	1998	1
Wai 212	Te Ika Whenua Rivers Report	1998	31
Wai 84	Turangi Township Remedies Report	1998	1
Wai 45	Muriwhenua Land Report	1997	1
Wai 83	The Turangi Township Report	1995	6
Wai 55	Te Whanganui-a-Orotu Report	1995	31
Wai 27	The Ngai Tahu Ancillary Claims Report	1995	18
Wai 304	Ngawha Geothermal Resource Report	1993	53
Wai 212	Te Ika Whenua- Energy Assets Report	1993	2
Wai 167	Interim Report and Recommendation in Respect of the Whanganui River Claim	1993	9
Wai 153	Preliminary Report on the Te Arawa Representative Geothermal Resource Claims	1993	27
Wai 33	The Pouakani Report Part2	1993	4
Wai 119	The Mohaka River Report	1992	11
Wai 38	The Te Roroa Report	1992	18