Te Mana o te Wai
Mana Whakahaere

THE HEALTH OF OUR WAI,
THE HEALTH OF OUR NATION

Kāhui Wai Māori Report to Hon Minister David Parker
August 2021

Te Mana o te Wai

MANA WHAKAHAERE: SUMMARY OF FINDINGS PATHWAY FORWARD

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for Kāhui Wai Māori
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He mihi

Ko ngā roimata o Ranginui ka heke i te au o ngā mihi a Tāwhirimatea. Ka tae tonu atu ki a Papatuānuku, ki te ahu i te whenua. Koinei te mana o te wai, koinei te mauri o te wai ka heke i ngā atua.

Inā hoki, ko ngā awa te waiū o tōku tangata whenuatanga, taku aho tangai ki te mana o ōku atua.

Nō reira, whakahokia mai, whakahokia mai. Whakahokia mai te mana whakahaere o ngā wai ki ngā tāngata e tautiaki ana, e karapotia ana ngā kōawa, ngā puna, ngā awa me ngā roto e rere atu nei.

Tēnā koutou kei ngā kaitiaki o tēnā iwi, o tēnā hapū, o tēnā whānau, o ēnā ahi kā huri noa i te motu.

Anei ngā mihi ki a koutou kua noho mai nā ki te āta wetewete i te ara whakamua mō ngā wai.

Kei raro iho nei he kōrero e hāngai atu ana ki te mana o te wai, ā, he kōrero tēnei hei whakaarotanga mā koutou. Kua kite atu i ngā painga me ngā hē o tā koutou i whakatakoto ai.

Executive Summary

The framework for participation by tangata whenua[1] in freshwater management is problematic. Approaches to date have largely been dictated by the requirement in the Resource Management Act 1991 (the RMA). The inadequacies of the current system for all users have been highlighted in the Report of the Resource Management Review Panel.[2]

The National Policy Statement for Freshwater Management 2020 (NPS-FM)[3] uses the term mana whakahaere as one of six principles that relate to the role of tangata whenua and other New Zealanders in the management of freshwater. Mana whakahaere is a term that has the potential to deliver an inclusive tangata whenua participation in freshwater management.

This Summary of Findings report draws together the relevant findings from Phase 1 of the Mana whakahaere project. It explores the themes and learnings that will underpin and support the next step in the journey, Phase 2. This report concludes that Mana whakahaere has the potential to bring transformative change to the way in which freshwater is managed, to ensure the best possible outcome for our wai. A road map for Phase 2 implementation is set out at the end of this report in the section entitled *Mana whakahaere – a way forward*.

Kei te tangi a Ranginui	*Our primordial Sky Father weeps*
Kei te tangi a Papatūānuku	*As our Earth Mother mourns*
Kei te rere ngā roimata	*Their tears flowing forth*
Rere ki uta. Rere ki tai.	*Manifest in the mountain waters that percolate down to the sea.*
Kei hea ngā kaitiaki mō Te Mana o te Wai	*Where-art the earthly protectors of the water's authority?*
Te Mauri o te Wai?	*The guardians of its essence?*
Whakarongo mai!	*Pay heed to the abuses of our time and reinvigorate the water's power of life*
Whakaoratia!	*As sustenance for our spirit*
Hei oranga wairua!	*As wellbeing for our person*
Hei oranga tangata!	*And as health and prosperity for a vibrant New Zealand for all*
Hei oranga mō Aotearoa katoa	

[1] The term "tangata whenua" in this report refers to iwi, hapū, whānau, ahi kā, Māori landowners and other rōpū through which tangata whenua identify.

[2] Resource Management Review Panel, *New Directions for Resource Management in New Zealand*, June 2020.

[3] https://environment.govt.nz/publications/national-policy-statement-for-freshwater-management-2020/

INTRODUCTION

1. Te Mana o te Wai is the fundamental concept of the NPS-FM that regional councils must give effect to. Te Mana o te Wai is not new to the NPS-FM. The concept has been part of the NPS-FM since its inclusion in 2014, with changes recently made to how the concept is described and required to be applied. The inclusion of Te Mana o te Wai in the NPS-FM in 2014 marked a shift in the way freshwater, and the management of activities that affect freshwater, was viewed, incorporating mātauranga and Te Ao Māori worldviews. This was a significant achievement for tangata whenua, and Te Kāhui Wai Māori acknowledge the leadership of the Freshwater Iwi Leaders Group to bring tangata whenua worldviews to the forefront of freshwater management.

2. Te Kāhui Wai Māori was established in October 2018 to take this kaupapa forward. Key outcomes were the requirement to give effect to Te Mana o te Wai in the NPS-FM and the inclusion of mahinga kai as a compulsory value in the National Objectives Framework.[4,5] Te Mana o te Wai is a bi-cultural framework.

3. On 1 September 2021, the National Policy Statement for Freshwater Management 2020 (NPS-FM) came into effect. The NPS – FM contains a raft of provisions that require more active participation of tangata whenua across a range of roles in the management of freshwater. Those roles range from decision-making at a governance level to monitoring of values informed by mātauranga.

4. The six principles of Te Mana o te Wai relate to the roles of tangata whenua and other New Zealanders in the management of freshwater – these principles inform the NPS-FM and its implementation.[6] Mana Whakahaere is described as:[7]

   > *. . .the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater.*

5. Given the transformative nature of these changes, Te Kāhui Wai Māori, and the Regional Sector, both of whom were involved in the development of the NPS-FM, recognised the need for a comprehensive implementation programme to support tangata whenua, Councils, and communities to implement the requirements of the NPS-FM. This

[4] The National Objectives Framework (NOF) in the Freshwater NPS 2020 sets up requirements for regional councils and unitary authorities in setting objectives, policies, and rules to manage freshwater in their regions.

[5] Elevating mahinga kai to a compulsory value promotes Māori measures of freshwater health to the same status as other biophysical values. The provisions also acknowledge that tangata whenua are experts for the values and knowledge they hold for their local waterbodies and provide an avenue for the te ao Māori to be recognised in the freshwater management system.

[6] The concept of Te Mana o te Wai is described in Section 1.3 of the NPS – FM as: "Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment and the community. . .Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement."

[7] Ibid, Subpart 1.3(3) & (4) Fundamental Concept – Te Mana o te Wai – Framework.

resulted in collaboration between Kāhui Wai Māori, Regional Sector, the Ministry for the Environment, and relevant stakeholders, to develop the Freshwater Implementation Programme (the FIP).

6. The FIP includes a range of projects aimed at supporting the implementation of the NPS-FM. Kāhui Wai Māori is working closely with the Ministry for the Environment on the implementation of Te Kupenga[8], Te Mana o te Wai training, Mana Whakahaere and Mahinga Kai / National Objectives Framework.

7. The Mana Whakahaere Project is a part of the FIP, and aims to:
   - explore the concept of mana whakahaere to assist tangata whenua, Councils, and communities with the implementation of mana whakahaere as required by the NPS-FM
   - develop guidance and best practice approaches to fulfilling the Mana Whakahaere principle of Te Mana o te Wai.

8. This Summary of Findings Report brings together the collaborative efforts between tangata whenua, Kāhui Wai Māori, the Ministry for the Environment, Te Puni Kōkiri, Te Arawhiti, Ngā Kairapu,[9] and Tūānuku Ltd.[10]

9. This report examines the key findings of the following reports and draws out the themes and learnings. The purpose, to inform and support the next part of this implementation journey of Te Mana o te Wai.[11]

   i. The key findings and recommendations in the *Report of the Resource Management Review Panel*, June 2020 as they relate to Māori participation in the current Resource Management system.

   ii. The key findings and learnings from Phase 1 of the FIP Mana Whakahaere Project, specifically:

      a. A paper entitled *Māori participation in a reformed resource management system by Te Arawhiti*[12] and other resources provided to Kāhui Wai Māori as part of a series of engagements on Mana Whakahaere.

      b. A report commissioned by the Ministry for the Environment and undertaken by Tūānuku Ltd on how tangata whenua express and consider articulations of mana whakahaere within the context of Te Mana o te Wai.

      c. A report commissioned by Kāhui Wai Māori entitled *Discussion Document: Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai*, by Professor Jacinta Ruru, Professor Andrew Geddis, Mihiata Pirini and Jacobi Kohu-Morris.

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[8] Te Kupenga is a system containing contacts of those interested in Freshwater management to enable communication across Aotearoa and a system for storing info shared through this network.

[9] Ngā Kairapu is the Regional Sector Special Interest Group.

[10] Tūānuku Ltd are a taiao consultancy who provided the methodology for, and an analysis of, the kōrero that were held with tangata whenua across Aotearoa which informed this Summary of Findings Report.

[11] This report summaries or draws text directly from other documents. Refer to footnotes for relevant pages and/or documents.

[12] Te Arawhiti, Māori participation in a reformed resource management system, May 2021.

REPORT OF THE RESOURCE MANAGEMENT REVIEW PANEL

10. The terms of reference of the Randerson Review into the Resource Management Act included the requirement to:
    - Ensuring Māori have an effective role in the resource management system, including giving effect to Tiriti settlement agreements
    - Ensuring appropriate mechanism for Māori participation in the system, including giving effect to Tiriti settlement arrangements
    - Clarifying the meaning of 'iwi authority' and 'hapū'.
11. The Randerson Report[13] identified issues in the resource management system that prevent these aims from being achieved. These include:
    - Lack of recognition and provision for te ao Māori in the purpose and principles of the resource management system
    - Limited use of the mechanisms for mana whenua involvement in the Resource Management Act (RMA)
    - Māori involvement in the resource management system has tended to be at the later stages of resource management processes, and there is an opportunity in a new system to provide for a greater role for Māori at the strategic end of the system
    - Lack of monitoring central and local government Tiriti performance
    - Capacity and capability issues for both government (central, regional, and local) and Māori to engage on resource management issues, and lack of funding and support to address these issues
    - Local Authorities and applicants for resource consents can find it difficult to know who, is mana whenua, in an area, and therefore which mana whenua groups to engage with[14]
    - Engaging at the iwi or iwi authority level does not reflect the reality of kaitiakitanga, which may operate at the hapū or whānau level
    - Current provisions in the Resource Management Act constrain local authority engagement with hapū. Hapū often approach local authorities seeking to engage on resource management matters but the willingness of local authorities to do so at this level varies
    - Local authorities should not be the body determining who represents an iwi for the purposes of the RMA[14]
    - Determining which mana whenua groups should be engaged with is complex[15]
    - A lack of adequate resourcing continues to be a significant barrier to mana whenua participation in the resource management system.

[13] Resource Management Review Panel, New Directions for Resource Management in New Zealand, June 2020, Chapter 3.

[14] Ibid, Page 88.

[15] Ibid, Page 92.

12. The Randerson Report highlights local authorities and applicants for resource consents can sometimes find it difficult to know which mana whenua groups to engage with on resource management issues. A number of submissions from local government to the Randerson Review sought clarification of the meaning of iwi authorities and hapū, citing a lack of clarity on who has a mandate to initiate agreements.[16]

13. It also summaries the views of Iwi and hapū groups on this issue and highlights a more circumspect approach:
    - Ngāti Whātua Ōrakei acknowledged there was an issue with shared interests and lack of clarity and suggested that the meaning be co-designed
    - Ngāti Tahu – Ngāti Whaoa expressed concern that clarification would be done inappropriately and erode the rights of some Māori groups
    - Patuharakeke supported clarification but wanted to ensure the exercise recognised the importance of hapū in the resource management system and
    - Ngā Rangahautira considered engagement should be based on relationships, and not on whether those relationships were with iwi or hapū.[17]

14. The Randerson Report emphasises the desire for all parties for certainty in resource management decision making processes. In response the Panel recommends:
    - the comprehensive involvement of mana whenua through the new resource management system
    - the use of the term 'mana whenua' throughout the Natural and Built Environments Act[18], replacing the currently used terms 'iwi authority' and 'tangata whenua'
    - the term 'mana whenua' be defined as 'an iwi, hapū or whānau that exercises customary authority in an identified area".[19]

15. It seems from the Randerson Report that the reason for a 'more expansive' definition of mana whenua is to reflect the view of the Panel that in some circumstances a hapū or whānau level mana whenua group is the appropriate group to be engaging with on particular matters.[20] This appears to be consistent with the principles of Te Mana o te Wai which requires an inclusive approach.

16. The Randerson Report provides some guidance on how they envisaged this working:
    - Mana whenua groups should self-identify
    - There should be a transparent mechanism for identifying mandate to discuss resource management matters on behalf of their group
    - The Panel's proposed National Māori Advisory Board to have a role in assisting local authorities and mana whenua groups to identify who to engage with on resource matters.[21]

[16] Ibid, Page 112.

[17] Ibid, Refer pages 112, 139 & 140.

[18] Ibid, Page 5 for an explanation of the proposed Natural and Built Environment Act.

[19] Ibid, Page 112.

[20] Ibid, Page 113.

[21] Ibid, Page 112.

17. Te Kāhui Wai Māori note that there is significant level of opposition by Māori to the Randerson Report proposal for the role of Māori at the national level to be of an advisory nature only.

18. Other relevant recommendations as they relate to tangata whenua participation in the Resource Management system were:

    - The current Mana Whakahono ā Rohe[22] provisions should be enhanced to provide for an integrated partnership process between mana whenua and local government to address resource management issues[23]
    - The current legislative barriers to using the transfer of power provisions and joint management agreements should be removed[24] and there should be a positive obligation on local authorities to investigate opportunities for their use.[25]

19. These recommendations form part of the current Resource Management reform work programme, and further policy development work. We note that these provisions have not been well utilised in the past. For example, only one Mana Whakahono a Rohe agreement has been put in place since the introduction of this provision in April 2017.

MĀORI PARTICIPATION IN A REFORMED RESOURCE MANAGEMENT SYSTEM

20. As part of Phase 1, Te Kāhui Wai Māori held over a number of months, meetings on Mana Whakahaere with Te Arawhiti, Te Puni Kōkiri, Ngā Kairapu, and the Ministry for the Environment. The contribution by Te Arawhiti included a paper entitled *Māori participation in a reformed resource management system*.[26] This paper had been prepared at the request of the Secretary for the Environment as part of the current Resource Management reform work programme.

21. In relation to the Randerson Report proposal to redefine 'mana whenua' the Te Arawhiti paper notes:

    - The use of 'mana whenua' in the RMA has been controversial and the mechanism to resolve uncertainty has not proved to be very effective.[27] The Māori Land Court has indicated a preference for traditional means of dispute resolution rather than a Court Order.[28]

[22] Sections 58L-58U Resource Management Act 1991, Mana Whakahono ā Rohe (MWaR) provisions allow iwi authorities or local authorities to initiate a negotiation towards a relationship agreement between one or more iwi authorities and one or more local authorities. Local authorities must respond to an invitation from an iwi authority to enter into MWaR negotiations.

[23] Resource Management Review, New Directions for Resource Management in New Zealand, June 2020, Page 116.

[24] Ibid, at page 108 recommends removing reference to the grounds under section 33(4)(c) of the RMA upon which both authorities must agree before powers are transferred. For joint management agreements.

[25] Ibid.

[26] Refer Appendix for the full report.

[27] Section 30 of Te Ture Whenua Māori Act 1993.

[28] Ngāti Paoa Iwi Trust v Ngāti Paoa Trust Board, 2018, 173 Waikato Maniapoto MB 51.

- The proposed redefinition of 'mana whenua' does not really help with the problems of identifying the right mana whenua groups or the implementation problems.
- The Panel's redefinition is incorrect, in that it shifts the meaning of 'mana whenua' from a class of authority (i.e., a thing) to a class of people (i.e., who).

22. Kāhui Wai Māori also note that in *Ngāti Maru Trust v Ngāti Whātua Ōrakei Whaia Maia Ltd* (2020) NZHC 2768 the High Court said in relation to 'mana whenua' that there is no way of determining who has 'primary' mana whenua. These matters can only be assessed through reference to tikanga Māori and mātauranga on the questions posed.

23. For the purposes of this Summary of Findings, Te Kāhui Wai Māori wish to highlight the insights from this Te Arawhiti paper as it relates to the Mana Whakahaere principle in Te Mana o te Wai. The concept of :
    - 'Mana whakahaere' is a term that is used in 19 Acts (mostly settlement Acts). In the majority of those Acts 'mana whakahaere' appears with or without English equivalents in Crown acknowledgements. The English equivalents of 'mana whakahaere' are 'control', 'mandate', 'power', 'authority', 'complete authority', 'legal ownership', 'tribal control' and 'effective control.'
    - *Reporting Environmental Impacts on Te Ao Māori: A Strategic Scoping Document* prepared for the Ministry for the Environment 2016 uses 'mana whakahaere' to denote 'decision-making authority' and 'leadership', describes 'mana whakahaere' as "a cornerstone of mana whakahaere is the active participation of Māori in resource management decision-making', and sets out 5 principles of environmental reporting, including –
        - Mana whakahaere (decision-making authority) is concerned with the effective participation of iwi/hapū in resource management and monitoring. This decision – making is derived from whakapapa or ancestral connections to an area or natural resource.

24. Te Kāhui Wai Māori note that mana whakahaere is not a new concept in environmental management.

25. This Te Arawhiti paper also offers some important considerations as they relate to engagement with Māori:
    - Māori are not a homogenous group
    - Environmental matters impinging on Māori interests always require engagement
    - Engagement with Māori needs to respect and accommodate Māori norms of consensus decision making. It may need to include hui where information is received, further hui where Māori debate and consider the information, and then again, hui where Māori make their views known. It requires face to face consultation or kanohi ki te kanohi, kanohi kitea
    - Prejudice to owners of Māori land cannot continue. In resource management processes, the land tenure system unfairly disadvantages owners of Māori land compared with other landowners.

26. The Te Arawhiti paper states that "officials can't and shouldn't judge the relative merits of tikanga based concepts" such as 'mana whenua' and 'mana whakahaere'. Te Arawhiti recommend further engagement and consultation with Māori on these concepts as part of the resource management reforms.

27. Te Arawhiti also provided Kāhui Wai Māori with information summarising current co-governance and co-management arrangements. Many of these arrangements have been put in place as a result of Treaty settlements. There are a number though that have been implemented within the existing Resource Management and Local Government Act legislation. These documents and presentations are at Appendix 1.

GIVING EFFECT TO MANA WHAKAHAERE – A COLLATION OF VIEWS FROM TANGATA WHENUA

28. Another part of Phase 1 Te Mana Whakahaere Project has been a report commissioned by the Ministry for the Environment from Tūānuku Ltd to gain a better understanding of how tangata whenua express and consider articulations of mana whakahaere within the context of Te Mana o te Wai. A total of 14 kōrero were carried out with iwi, hapū and Māori landowners across the motu, all with varying organisational structures and status in relation to crown settlement.

29. The Tūānuku report explores perspectives on mana whakahaere through the framework of "People, Place and Process" and provides some important insights for consideration, application, and guidance for Phase 2 of the Mana Whakahaere Project. These observations and reflections from tangata whenua are important for local authorities to be cognisant of, as they respond to the new directives of the NPS-FM through and across their statutory policies and plans.

30. A summary of the key themes from the kōrero analysis are:

Mana whakahaere has value but is not the only or defining way to be kaitiaki	Kōrero affirmed the value of mana whakahaere but noted that this is not the only or defining way to be kaitiaki. However, the underlying principles that inform mana whakahaere are widely understood by tangata whenua.
Mana whakahaere is based in whakapapa	Whakapapa binds iwi/hapū/landowners with their wai and their greater relationships with the taiao must be the guiding premise for all engagement and decision making.
Tangata whenua have multiple and layered expressions of mana whakahaere	There is no one size fills all approach to how this concept is defined or practised. Councils will need to be guided by tangata whenua as to how they express and demonstrate what mana whakahaere looks like to them.

Mana whakahaere is about decision-making	A commitment to investing increasing decision-making power in mana whenua groups regarding water is an important consideration of Te Mana o te Wai.
Co – Management and Partnerships	Iwi and hapū should be supported in the negotiations for unique co-management or partnership frameworks that they wish to see implemented in their rohe as a matter of urgency. Councils will need to embed systems and structures that have the capacity to adapt to the outcomes of co-management and partnership arrangements between tangata whenua and Council.
To limit engagement is to limit expression of kaitiakitanga	To limit engagement to certain entities is to limit expression of kaitiakitanga and is not consistent with the concept of mana whakahaere.
Engagement with tangata whenua must be flexible, and responsive	Council must prioritise engagement processes that respect the multiple and often overlapping interests of tangata whenua with freshwater.
Listen to tangata whenua priorities	Te Mana o te Wai provides opportunities for Councils to put water ahead of other agendas and to prioritise the first right of water to water and to commit to addressing the inconsistencies that have detracted from tangata whenua views and relationships to water.
Councils are complex too	Inconsistences across Councils can divert important resources and energy for tangata whenua who more often than not have to engage with multiple local authorities.
Responsiveness and innovation will be required by all	For Councils this signals the need for them to be responsive and innovative in offering pathways for implementation.
Councils must build their cultural capacity and understanding	It is crucial for local government to build their cultural capacity and understanding with regards to engagement with tangata whenua. This will ensure that mistakes of the past are not repeated, and a more meaningful relationship can be established moving forward.

Resourcing is of critical importance	Resourcing remains a key obstacle for meaningful engagement by tangata whenua with Council. Adequate provision of technical and financial resourcing is fundamental to enable greater participation in Council processes.
Utilise existing RMA tools more and better	Investigating the use of existing mechanisms within the Resource Management Act such as Section 33 transfer of powers, Joint Management Agreements, Te Mana Whakahono a Rohe Agreements should all be prioritised as part of the implementation of TMoTW.

DEMOCRATISING MĀORI DECISION-MAKING TO GIVE EFFECT TO TE MANA O TE WAI

31. Also, as part of Phase 1, Kāhui Wai Māori commissioned a report from Professor Jacinta Ruru, Professor Andrew Geddis, Mihiata Pirini and Jacobi Kohu-Morris to provide an initial, high – level, legally informed discussion regarding the possible processes for operating new regional (or local) Māori decision-making entities or mana whakahaere councils at a water catchment level.

32. The report by Ruru et al is a Discussion Document to provide ideas about new ways of operating at the new regional (or local) water catchment levels. The report sets out the **existing** Māori decision-making entities: a post – settlement governance entity; an iwi authority; a hapū; an urban Māori authority; a Māori Trust Board; a Māori association; the Māori Trustee; a board, committee, authority recognised under iwi participation legislation; any entity or persons who have an ownership interest in Māori land; any entity or persons appointed to administer a Māori reservation; a customary marine title group or protected customary rights group; and an entity that is authorised to act for a natural resource with legal personhood.[29] This is the definition of 'Māori entity' in s.9 of the Urban Development Act 2021. Te Arawhiti paper highlights the same point.[30]

33. Ruru et al explores existing statutory tools that could support mana whakahaere but note the limitations of those tools to enable the full consideration of mana whakahaere.[31]

[29] Professor Jacinta Ruru, Professor Andrew Geddis, Mihiata Pirini and Jacobi Kohu-Morris, Discussion Document: Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai, June 2021, paragraph 20.

[30] Te Arawhiti, Māori participation in a reformed resource management system, May 2021, Page 14, paragraph 89.

[31] Ruru et al, Discussion Document: Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai, paragraph 94.

34. This Discussion Document highlights the provisions in the UN Declaration on the Rights of Indigenous Peoples.

> **Article 18 reads:**
>
> *Indigenous peoples have the rights to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutes.*

35. This report emphasises that any new governance and management entities must be organised in a manner that can easily accommodate future recognition of Māori proprietary rights, interests, and responsibilities in water.[32]

36. It also examines some of the existing co-governance and co-management arrangements, and Treaty Settlements arrangements. The report highlights that mana whakahaere is already in use in some water catchment areas, for example, mana whakahaere is a central component of the Waikato River Claim Settlement.[33]

37. The authors of this Discussion Document conclude there is value in the creation of new mixed skills / representative based local water catchment mana whakahaere management committees focussed on the implementation of regional and local rules.

38. The authors suggest a process for implementing mana whakahaere committees:

Identification of relevant interests – whose connection is recognised

Designing mana whakahaere committees first requires defining who possesses a sufficient connection with the catchment to hold a relevant interest in decision-making for that catchment.

Turning connection into voice – who is chosen to speak on/for the water catchment

The report examines two different models of representation: a delegate representation model and a participant representation model.

Turning voices into voice – how are decisions on/for the catchment made

The authors recommend that mana whakahaere committees be set up with guiding tikanga principles that emphasise the importance of cooperating for the mauri and mana o te wai.

Keeping the voice accountable – how to ensure those who speak do so for those with relevant interests

Accountability mechanisms will tie in with the initial selection process for how relevant interests are represented on the mana whakahaere committee. If individuals' members are selected through regular forms of "election", that itself will be an important method of accountability.

[32] Ibid, paragraph 18.

[33] Ibid, paragraph 57

However, and particularly if a participant representation model is adopted, there will need to be additional mechanisms to ensure that the decisions designed to progress / achieve tikanga-informed principles remain acceptable to those with relevant interest in the catchment.

> *"Political theory is alive to the risk of established "in" groups being able to unfairly exclude "out" groups, with a consequent need for some arbiter to resolve disputes. This is true too in Te Ao Māori. With the ramifications of colonisation and the disempowerment of centuries of systems of tikanga, we need to continue to build systems and guidelines that re-empower Māori decision-making."*
>
> Professor Jacinta Ruru Professor, Andrew Geddis, Mihiata Pirini and Jacobi Kohu – Morris, Discussion Document: Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai, June 2021, paragraph 73.

MANA WHAKAHAERE – A TRANSFORMATIVE APPROACH TO FRESHWATER MANAGEMENT

39. Mana whakahaere depicts a wider relationship with natural features, resources, and the environment than terms such as 'mana whenua' – a phrase that is restricted to those who have authority over a specific area. As such, mana whakahaere as a concept has potential to better reflect the full range of iwi, hapū, ahi kā and Māori landowner relationships to water. This could address widely held concerns, highlighted in the Randerson Report and the Tūānuku Ltd report relating to the participation of tangata whenua in freshwater management.

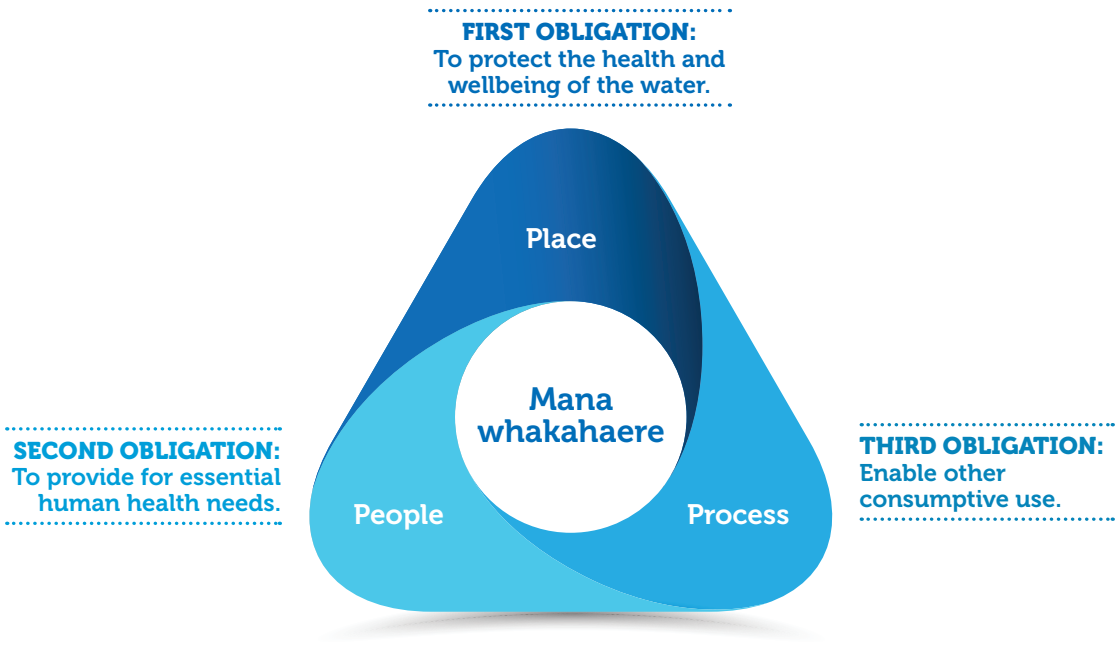


Figure 1: Tūānuku Ltd Conceptualisation of Mana Whakahaere

40. Figure 1 provides a framework through which the underlying principles of mana whakahaere can be conceptualised as guided by the mana whakahaere kōrero set out in the Tūānuku Report. This framework was provided by Tūānuku Ltd who analysed the mana whakahaere kōrero and considers this "...provides a framework to consider the broadness in which mana whakahaere is referred to in conversations regarding iwi/hapū/landowner relationships to their fresh waterscapes but also recognises the specificities that may exist for each hapū, iwi, landowner relationship."[34]

41. This framework has synergies with the principles set out in the *Discussion Document Further Democratising Māori Decision-Making to give effect to Te Mana o te Wai*:

    - **Place** (Identification of relevant interests – whose connection with the water catchment is recognised)
    - **People** (Turning connection into voice – who is chosen to speak on / for the water catchment)
    - **Process** (Turning voices into voice – how are decisions on / for the catchment made).

42. The Randerson Report highlights the need for fundamental changes across the entire resource management system. One of their recommendations is the use of the term 'mana whenua' throughout the Natural and Built Environments Act, replacing the currently used terms 'iwi authority' and 'tangata whenua'. The paper from Te Arawhiti raises concern about the Panel's redefinition of 'mana whenua'.

43. The views of iwi/hapū summarised in the Randerson Report also supports the voices of tangata whenua set out in Tūānuku Ltd report.

44. For some rohe, the current arrangements work. In others, tangata whenua simply feel left out.

45. Te Kāhui Wai Māori acknowledge that these are complex issues – on which achieving consensus is challenging.

46. This Summary of Findings report will now draw together the richness of the kōrero to date, the analysis from legal and constitutional experts and set out the key themes and learnings. These are brought together to inform Phase 2 of the Mana Whakahaere Project.

[34] Tūānuku Ltd, Ministry for the Environment Freshwater Implementation Programme Mana Whakahaere Project, June 2021, pages 12 - 13.

KEY THEMES AND LEARNINGS

Mana whakahaere is based in whakapapa

47. Whakapapa forms the basis of the legitimate exercise of mana whakahaere. Tangata whenua receive their power, authority, and obligation to practice mana whakahaere through their whakapapa to wai. Whakapapa cannot be challenged or debated out of existence – it is a fundamental truth. As such, whakapapa provides a powerful basis for determining mana whakahaere.

48. The way in which those with whakapapa to wai are represented varies – iwi authorities, hapū organisations, marae committees, Māori land entities, whānau groupings, and kaitiaki groupings.

49. The conclusive line of whakapapa that dictates freshwater management, is our shared whakapapa to the wai. This whakapapa imposes kaitiaki obligations on all, the most pertinent obligation being to the mauri of the wai itself.

Mana whakahaere supports kaitiakitanga

50. Given mana whakahaere is based in whakapapa, mana whakahaere does not distinguish between the various entities that represent the voices of those with whakapapa to wai. In this respect, mana whakahaere requires inclusive tangata whenua participation in freshwater management.

51. Mana whakahaere does not focus on one type of tangata whenua entity, it can capture all. Most importantly, it provides space for those with the most intimate, consistent relationship to the wai to participate in freshwater management. Inclusive participation strengthens tangata whenua decision-making, providing a powerful platform from which decisions can be made that are informed by those with the best knowledge of the needs of that wai.

52. Excellent decision-making must be achieved – without this we will not achieve the goals and aspirations we have for the wai. Should we not achieve these goals, we will not fulfil our inherited obligation of kaitiakitanga.

Mana whakahaere is flexible

53. Given mana whakahaere is based in whakapapa, and not dictated by statutory entitlements, mana whakahaere enables a flexible approach to how whakapapa connections to an awa are represented. This can enable for different types of arrangements suited to an area. For some kōrero participants documented in the Tūānuku Ltd report, it is clear that current arrangements work for some, and not others. The relationships between hapū, ahi kā, marae, Māori landowners and iwi differs from rohe to rohe. The important factor is that each entity has the right to speak for themselves and determine their own pathway. There is strong interest in some areas to moving towards a more inclusive and collaborative approach amongst tangata whenua.

54. Freshwater management arrangements agreed to in Treaty settlements are the result of significant efforts expended by iwi. Given mana whakahaere is flexible in approach, it can, and should, ensure existing Treaty settlement provisions that relate to freshwater management are protected, and ideally enhanced.

Mana whakahaere provides for whānaungatanga

55. Mana whakahaere provides for inclusive processes that will best represent the various complex tangata whenua rights and interests that exist in relation to taonga, whenua, and wai. Mana whakahaere can be viewed as an opportunity to unite tangata whenua at various levels where once there may have been disconnection as a result of Crown processes that have served to divide and rule tangata whenua.

56. Iwi and hapū must play a leadership role in ensuring that the various rights and interests of the various tangata whenua are appropriately considered and represented in freshwater management. A progressive iwi leadership position will be one that is seeking a framework that provides for the power and responsibilities of tangata whenua at various levels to be expressed to their fullest extent.

Mana whakahaere enables streamlined external engagement

57. Mana whakahaere enables an inclusive approach based in tikanga concepts that are familiar throughout Aotearoa. A successful mana whakahaere structure will ensure that tangata whenua are able to engage effectively with external agencies. Decision-making will be informed by those with the closest relationship with wai through to those with strategic oversight of tangata whenua aspirations. Streamlined external engagement will provide for powerful engagement by tangata whenua and the ability to ensure tangata whenua values are influencing freshwater decision-making.

Mana whakahaere – a transformative approach to freshwater management

58. Tangata whenua inherit kaitiaki obligations to maintain and enhance the mauri of freshwater. Tangata whenua will not meet their kaitiaki obligations where they cannot participate in freshwater management. Mana whakahaere presents an opportunity for tangata whenua and regional councils to adopt an inclusive approach to freshwater management which will enable tangata whenua to fully achieve their kaitiaki obligations.

MANA WHAKAHAERE – A WAY FORWARD

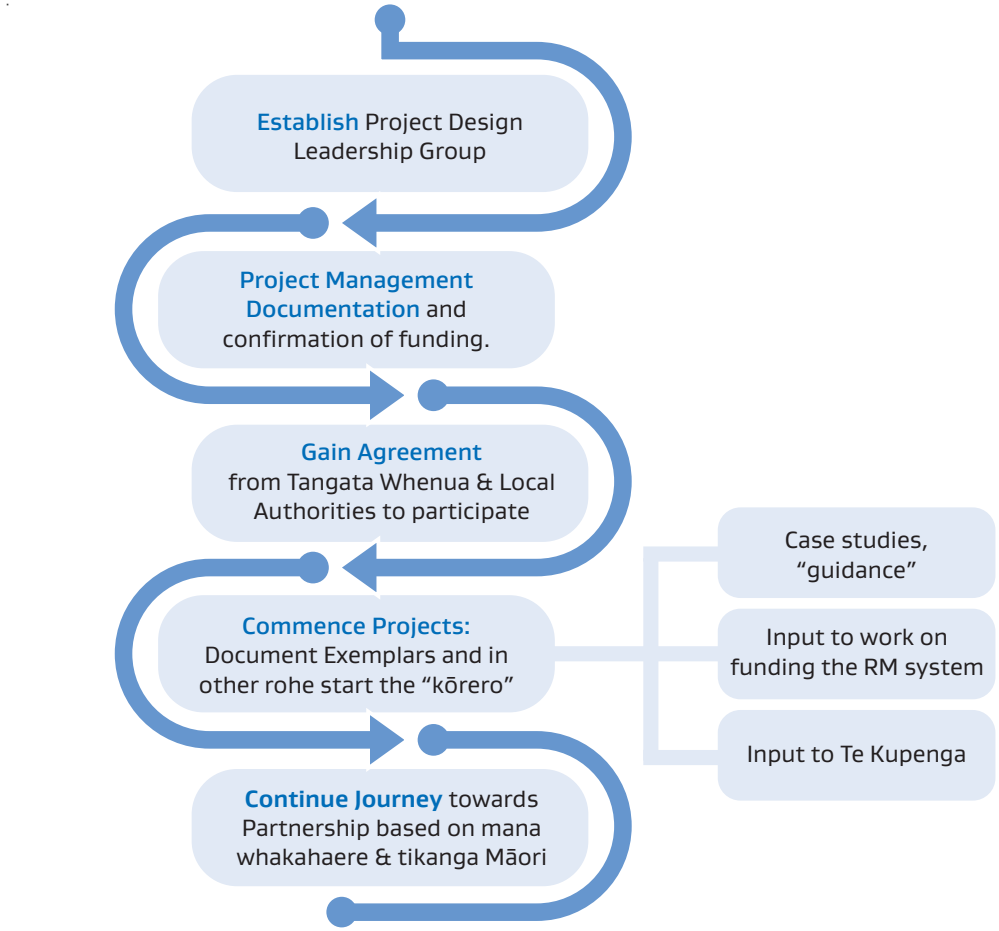
59. Mana whakahaere requires tangata whenua to organise themselves in a manner that ensures:
    - The health of freshwater is paramount
    - Relationships of all tangata whenua groups with freshwater are recognised, respected, and provided for
    - Structures are established to ensure tangata whenua can input, at the level they desire, into any decision-making, planning use and actions that affect freshwater.
60. Local Authorities have told Kāhui Wai Māori that support, and guidance is critical to assisting them to engage with tangata whenua and give effect to the principle of Mana Whakahaere in Te Mana o te Wai. A key finding of the Tūānuku Ltd report is that resourcing remains a key obstacle to meaningful engagement by tangata whenua with Councils. This is supported by the findings of the Randerson Report.
61. Phase 1 is now completed. Mana whakahaere has the potential to guide the transformation of how freshwater is managed. It will be complex, particularly in areas where there are long histories of disconnection of non-iwi entities from freshwater management. This is not, however, a reason to discourage the implementation. Rather, this is a reality that once accepted, provides a pathway for tangata whenua to collectively begin the work to repair relationships, and build structures that enable full mana whakahaere participation in freshwater management.

THE ROADMAP

62. The overarching framework for Phase 2 remains unchanged. It is to give effect to, and be guided by the obligations, principles and values in Te Mana o te Wai.
63. Support from tangata whenua leadership, Crown (through the Ministry for the Environment) and local authorities will be required for this next phase. Capability, capacity and funding will be required. Kāhui Wai Māori acknowledge the leadership of those Local Authorities that have already expressed an interest in involvement in this next phase: Bay of Plenty Regional Council, Hawkes Bay Regional Council, and Southland Regional Council.
64. Proposed Project Governance Structure:

> *Project Governance: Kāhui Wai Māori (Annette Sykes); Ministry for the Environment; Ngā Kairapu, and the Freshwater Iwi Leaders Group.*
>
> Project Management: Kāhui Wai Māori and Ministry for the Environment.

65. In broad terms the "roadmap" forward is as follows:



Mana Whakahaere Phase 2: Objectives & Outcomes

Objective: test the principle of mana whakahaere at the regional and / or local (catchment) level.

Outcomes:

1. Development of case studies, guidance and best practice by September 2021.
2. Arrangements between tangata whenua and local authorities at the regional and catchment level develop over time, are sustainable and give effect to the principle of partnership in te Tiriti, to achieve the best possible outcomes for our wai.

Mana Whakahaere Phase 2: Criteria for Selection of Projects

A mix of existing exemplars of Mana Whakahaere to document and form the basis of case studies and guidance; and

"Greenfield projects" – geographical spread, diverse range of existing Māori entities "at place".

Regions / local catchments that have different economic, social and environmental profiles, including rating bases.

Urban / rural profile.

IN SUMMARY

66. This next phase is about starting the kōrero at-place and focussing on ways in which mana whakahaere could be discussed and agreed upon in accordance with tikanga.

67. This Summary of Findings report concludes that mana whakahaere has the potential to bring transformative change to the way in which freshwater is managed in Aotearoa. The ultimate goal, to enable tangata whenua to participate in and make decisions for freshwater management and implement Te Mana o te Wai.

APPENDIX OF

TE KĀHUI WAI MĀORI

The following papers and resources have been provided to, or commissioned by Te Kāhui Wai Māori as part of the first phase of the Mana Whakahaere Project.

Appendix 1

(1) Māori participation in a reformed Resource Management System, Te Arawhiti, May 2021

(2) Co-governance / Co-management Structures, Te Arawhiti

Appendix 2

Giving Effect to Mana Whakahaere: A Collation of Views from Tangata Whenua, Tūānuku Ltd, June 2021

Appendix 3

Discussion Document: Further Democratising Māori Decision – Making to give effect to Te Mana o te Wai.
By Professor Jacinta Ruru, Professor Andrew Geddis, Mihiata Pirini and Jacobi Kohu–Morris. Commissioned by Kāhui Wai Māori June 2021.

APPENDIX 1

(1) Māori participation in a reformed Resource Management System, Te Arawhiti, May 2021

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

HE KARERE

Date	**25 May 2021**
Subject	**Māori participation in a reformed resource management system**
Author	**John Grant, Principal Adviser**
File reference:	

Purpose

This paper examines approaches for Māori participation …

1. The purpose of this memorandum is to provide initial analysis on approaches for identifying who, in the context of Māori participation, should be able to be involved in the reformed resource management system at the levels at which it will operate.

… and is to inform a response to a request about future governance arrangements

2. This memorandum is intended to inform a response to a request from the Secretary for the Environment for Te Arawhiti advice on how to articulate who is involved on joint committees. The Secretary for the Environment noted the Resource Management Review Panel recommended 'mana whenua' as a basis and that various other options are being floated and that any landing place will likely have its challenges.

This paper focuses on the 'who' aspect of participation

3. In the context of Māori participation, a question arises as to which Māori should be able to be involved in the resource management system at the levels at which it will operate (e.g. by region, by locality, by catchment), and who represents them. This question needs to be considered from a rights perspective (i.e. who is entitled to participate) and an obligations perspective (i.e. who must be engaged with).

4. This memorandum focuses on the question of how to identify who should be involved, rather than the wider question of the mechanisms for participation (i.e. the 'who' rather than the 'what').

Executive summary

5. The Resource Management Review Panel recommended a reformed resource management system should provide "greater recognition of Te Tiriti o Waitangi and te ao Māori throughout" and incorporate Māori values in decision-making.

6. Māori participation in a reformed resource management system has been identified as a key outcome. The Review Panel's report identified "difficulties knowing which mana whenua groups to engage with" as an issue.

7. The issue to be resolved is to design a statutory framework for Māori participation in a reformed resource management system that has integrity from a Māori perspective, is practical to implement, and addresses difficulties with the status quo that were identified by the Review Panel.

8. This is an issue that is brought into focus by the question of how the new legislation should identify which Māori should be able to participate in governance arrangements in the new system. The review panel recommended future regional spatial and environment planning committees should include "mana whenua" membership, while noting that the number of iwi and hapū in some regions would make it impractical for each one to have their own appointee.

9. The Review Panel recommended, as part of the framework for determining who would have express right to participate in this way and to whom obligations of engagement would be owed, that the current RMA definitions of 'iwi authority' and 'tangata whenua' be replaced with a new definition of 'mana whenua', which the Panel proposed to be "an iwi, hapū or whanau that exercises customary authority in an identified area."

10. The NZMC/FOMA/KWM group has proposed 'mana whakahaere' as an alternative to 'mana whenua' because they consider 'mana whakahaere' is a more inclusive concept in relation to the environment.

11. Because the essence and origin of these terms is derived from tikanga, it is neither appropriate nor competent for officials to make judgements or provide definitive advice about which is the more fit for purpose within a statutory framework.

12. Instead, this is an issue on which the Crown should inform itself through, and be guided by, a broader engagement processes with Māori, beyond the engagement with the FILG/TWMT and NZMC/FOMA/KWM groups.

13. Providing for Māori participation in a reformed resource management system might be achieved through procedural mechanisms rather than definitions, or a sympathetic combination of both. This paper outlines a context for approaching these policy and legislative design questions.

14. Key policy considerations, including principles, are discussed in paragraphs 60 to 71.

15. Given the different types and layers of participation that will be required, a one-size-fits-all approach is unlikely to be fit for purpose. This paper discusses the issues that should be considered for each type of participation point (starting at paragraph 72).

16. Resource management reforms will have distinct impacts for existing arrangements with iwi and hapū both within and outside Treaty settlements. Unless these arrangements can be preserved or accommodated with a reformed system there will be a significant risk to the Crown's Treaty settlement framework and Māori Crown relations.

17. To mitigate the risks, it is imperative that—

a. The challenge of upholding existing arrangements is addressed in a collaborative way, in partnership with all affected entities; and

b. Provision for existing arrangements is 'built in' to the design of the new system, not 'clipped on' as an afterthought.

What the review panel said

Māori participation was identified as a key issue in the panel's terms of reference

18. The Terms of Reference for the Resource Management Review Panel approved by Cabinet in November 2019 included the following in the list of key issues for the Panel—

a. Ensuring that Māori have an effective role in the resource management system that is consistent with the principles of the Treaty of Waitangi;

b. Ensuring appropriate mechanisms for Māori participation in the system, including giving effect to Treaty settlement agreements;

c. Clarifying the meaning of 'iwi authority' and 'hapū'.

The panel identified the 'who' question as an issue …

19. The Review Panel's report highlighted "difficulties knowing which mana whenua groups to engage with." The panel said—

> "Determining which mana whenua groups should be engaged with is complex. The rohe of mana whenua do not follow local government boundaries and may overlap or be contested. Mana whenua within an area may have differing views, as may Māori within mana whenua groups. Input from these groups may be multifaceted and require considerable effort from government to understand and act upon. It is challenging to provide information and guidance on such matters."

And—

> "Local authorities should not be the body determining who represents an iwi for the purposes of the RMA."
>
> "Central government has not provided sufficient support to local authorities or mana whenua groups to help resolve these issues."

… and noted it tends to work against hapū participation

20. The Review Panel noted—

> "The current approach in the RMA is designed to allow mana whenua groups to self-identify. This is because only Māori can define who has the mana over the whenua. However, this makes it difficult for local authorities to work out which groups represent mana whenua for any specific resource management matter. In addition, local authorities can refuse to engage with any group other than an 'iwi authority', even if the appropriate group to engage with on a particular matter is a hapū or whānau."

21. Problems the panel saw included—

a. Engaging at the iwi or iwi authority level does not reflect the reality of kaitiakitanga, which may operate at the hapū or whānau level;

b. Current provisions constrain local authority engagement with hapū. Hapū often approach local authorities seeking to engage on resource management matters but the willingness of local authorities to do so at this level varies.

The review panel proposed a new partnership process …

22. The Review Panel—

    a. Said the policy solution is to provide for comprehensive involvement of mana whenua throughout the new resource management system;

    b. And proposed rationalising the RMA tools related to mana whenua involvement into a single integrated partnership process between mana whenua and local authorities that would include agreed processes to enable mana whenua groups to nominate candidates for mana whenua representation on spatial and/or combined planning committees.

… with new definitions …

23. The panel proposed repealing and replacing the current definitions of 'iwi authority' and 'tangata whenua' with a new definition for 'mana whenua' that would provide for comprehensive involvement in a new resource management system.

24. The panel's preferred approach was—

    a. To use the term 'mana whenua' throughout the Natural and Built Environments Act, replacing the currently used terms including 'iwi authority' and 'tangata whenua';

    b. To define the term 'mana whenua' as "an iwi, hapū or whānau that exercises customary authority in an identified area".

… and a process for resolving participation disputes …

25. The panel proposed a graduated approach to disputes between competing mana whenua groups starting with facilitated hui or wānanga between the groups, escalating to formal dispute resolution, and ultimately escalating to the Māori Land Court for a determination.

… and 'mana whenua' representation on planning committees …

26. The panel recommended combined planning processes led by regionally-based joint planning committees comprising a representative of the Minister of Conservation and appointees from the regional council, territorial authorities and 'mana whenua' within the region.

… while noting in some regions it would be impractical for every iwi and hapū to be represented

27. The panel noted that the number of iwi and hapū in some regions would make it impractical for each one to have their own appointee and said—

    a. We recognise this will sometimes mean delegates will have to represent the interests and perspective of more than one group;

    b. To recognise these committees are not always fully representative of every iwi and hapū in the region, we consider it is important to use consensus-based decision-making as much as possible, so voting rights are not at stake;

    c. Each constituent group will continue to be entitled to make submissions on the notified plan, be heard by the Independent Hearings Panel, and have standing for appeal.

Challenges with definitions

The purpose of definitions is to provide legal certainty …

28. Māori participation in the resource management system involves distinct legal rights (*i.e.* a legally guaranteed entitlement to participate) and distinct legal obligations (*i.e.* a legally enforceable duty to engage with the holders of participation rights). The need for legal certainty around who holds those rights and to whom those obligations are due is met, in part, with the inclusion of definitions in the relevant statute.

… but current RMA definitions do not work well …

29. As the Review Panel noted, the current RMA definitions work against local authority engagement with hapū despite the reality of kaitiakitanga, which may operate at the hapū or whānau level more than at the iwi level.

30. Although the RMA defines 'tangata whenua', in relation to a particular area, as the **iwi or hapū** holding mana whenua over that area and defines 'mana whenua' as customary authority exercised by an **iwi or hapū** in an identified area, 'iwi authority' is the term used widely in the RMA to denote who is entitled to participate in various processes or arrangements, such as delegations, joint management agreements, transfers of powers and mana whakahono a rohe.

31. 'Iwi authority' is defined in the RMA as the authority which represents an **iwi** and which is recognised by that **iwi** as having authority to do so. Hapū are not referred to in this key RMA definition.

32. 'Mana whenua' is only used for the purposes of the definition of 'tangata whenua' which, in turn, is used in places to denote who should be consulted under a particular process, such as plan preparation, and to denote in one instance, relating to freshwater planning, a right to nominate panel members.

… and tikanga sourced concepts are not easily defined in law without compromising their integrity

33. Among the objectives and outcomes the Review Panel sought to achieve in its recommendations is a resource management system "that provides greater recognition of the Te Tiriti o Waitangi and te ao Māori throughout" and incorporates Māori values in decision-making.

34. While that is a positive development, there are challenges involved with incorporating tikanga sourced concepts within a statutory framework, as illustrated by the following observations—

    Arnu Turvey, *Te Ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation*, (2009) 40 VUWLR 531—

    > *Both the incorporation of Māori concepts into legislation and the interpretation and implementation of those concepts by the courts and relevant legal authorities have raised questions about the ability of Western institutions to properly consider and apply Māori concepts in a way that will promote rather than subvert Māori culture.*

    Tai Ahu, *Te Reo Māori as a Language of New Zealand Law: The Attainment of Civic Status*, (2012) LLM dissertation, VUW—

    > *The ability of Māori words to determine legal outcomes is hampered by the uncertainty of whether a word incorporates Māori custom, and so therefore requires an interpretation consistent with tikanga Māori, or whether a word is to be given general statutory application. … [I]n the absence of any explicit statutory requirement that Māori words be interpreted*

according to, or consistently with, tikanga Māori, courts tend to adopt general meanings that distort the meaning of the word from a tikanga Māori perspective.

Natalie Coates, *Should Māori Customary Law be Incorporated into Legislation?* (2009) LLB(Hons) dissertation, University of Otago—

When Māori customary law is incorporated into legislation it usually becomes subject to enforcement, interpretation and application by non-Māori decision-makers, in particular the judiciary. Some negative effects may flow from this. Firstly, the decision-makers will often have very little understanding or background in tikanga Māori. This is problematic because it leaves open the possibility of misinterpretation, or for meaning to be lost in translation, and for misunderstandings. In the state legal system these distorted constructions run the risk of becoming codified in judicial precedent.

Catherine Iorns Magallanes, *The Use of Tangata Whenua and Mana Whenua In New Zealand Legislation: Attempts at Cultural Recognition*, (2010) 16 NZACL Yearbook 83—

[There are] *difficulties with the use of Māori words in legislation. The need for certainty suggests the adoption of legislative definitions, while the need for cultural respect and accuracy suggests flexibility and the need to not define the Māori terms used. The latter creates uncertainty in the process, method and result of interpretation, and of the place of Māori knowledge and thus people within that process. It certainly puts legislative drafters between a rock and a hard place.*

… but tikanga based concepts are an increasingly important part of our legal framework

35. In a Study Paper, *Māori Custom and Values in New Zealand Law* (2001) NZLC SP9, the Law Commission observed that the RMA pertains to an enormous area of law in which local government, central government and the mainstream courts have been required to understand and apply tikanga Māori. This will be even more imperative in a reformed resource management system that, as envisaged by the Review Panel, provides greater recognition of the Te Tiriti o Waitangi and te ao Māori throughout and incorporates Māori values in decision-making.

36. In her 2000 Ethel Benjamin Commemorative Address, Dame Sian Elias said "Effective protection of cultural rights and effective protection of the rights to equality ultimately rest on community commitment, not the statement of rights, nor the courts. But where a case is properly brought before the courts, judges cannot avoid making decisions simply because the matter is difficult or politically contentious."

37. The following cases further illustrate this point—

In *Khyentse v Hope* [2005] 3 NZLR 501 (High Court), Sir David Baragwanath said, "*Mere unfamiliarity with the relevant concepts does not excuse a Court from educating itself sufficiently to deal sensitively and justly with them, as indeed New Zealand Courts are having to do in recognising Māori values.*"

In *Takamore v Clarke* [2013] 2 NZLR 733 (Supreme Court), Dame Sian Elias said, "*Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms. … Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony". … Maori custom according to tikanga is therefore part of the values of the New Zealand common law*."

In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (Court of Appeal), Justice Goddard said, "*Customary rights and interests are not less deserving of recognition, and cannot be disregarded as "existing interests" under s 59(2)(a), merely because they do not conform with English legal concepts. … We consider that it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.*"

'Mana whenua' and 'mana whakahaere'

'Mana whenua' (redefined) has been suggested as a basis for identifying participants …

38. The Review Panel has recommended using a redefined version of 'mana whenua' as a single term to describe who has rights to participate in a reformed resource management system. However, the panel's report demonstrates there will be challenges. On the one hand, the proposals for membership of combined planning committees implies mana whenua participation would be through iwi and hapū (with not all of them always able to have direct representation) while, on the other hand, the panel's proposed mana whenua definition would involve participation by iwi, hapū and whānau. Left unresolved, these discrepancies are likely to lead to legal difficulties and increased potential for disputes.

… but, as used in the current RMA, has not been straightforward …

39. The use of 'mana whenua' in the RMA has not been uncontroversial. For example, in its 2001 WAI 64 report, *Rēkohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands*, the Waitangi Tribunal said—

> *We are inclined to think that the term "mana whenua" is an unhelpful 19th century innovation that does violence to cultural integrity. However, subject to such arrangements as may have been settled by the people themselves, our main concern is with the use of the words "mana whenua" to imply that only one group can speak for all in a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration. Some matters may be rightly within the purview of one group but not another.*

… and the mechanism to resolve uncertainty has not proved to be very effective

40. Section 30 of Te Ture Whenua Māori Act 1993 confers jurisdiction on the Māori Land Court to advise other courts, commissions, or tribunals as to who are the most appropriate representatives of a class or group of Māori or to determine, by order, who are the most appropriate representatives of a class or group of Maori. The jurisdiction applies, among other things, to proceedings, consultations "or other matters."

41. Although this jurisdiction has sometimes been resorted to for RMA matters, the Māori Land Court has shown a reluctance to make representation decisions because, as the Court said in *Ngāti Paoa Iwi Trust v Ngāti Paoa Trust Board* (2018) 173 Waikato-Maniapoto MB 51, "it is in fundamental opposition to the tribe's right to appoint its own representatives. Placing one party in a position of strength by way of a court order is unlikely to be the most acceptable solution to the iwi. Therefore, traditional means of dispute resolution should be encouraged."

42. In *Re Tararua District Council* (1994) 138 Napier MB 85, the Māori Land Court identified issues that remain relevant when it said—

> *The case before us takes place at a time when the Māori social political order is under stress. The words of the Chief no longer bind all members of the body. The full membership of the body is not always known. The desire for people to draw hapū and individuals together under the*

name of iwi is resisted by others who wish to promote hapū or re-establish different iwi as a basis for identity.

The conflict grows as some people believe the only authentic system is that of the iwi. Others argue that authenticity must flow from consensus within the people. They also insist old forms cannot be transplanted to perform new functions. Rather an adapted form must be built around the new functions which Māori need to cope with.

Redefining the definitions or redefining the problems?

43. Definitional problems identified by the Review Panel were—

    a. The definitions led local authorities to default to 'iwi' over 'hapū';

    b. The challenges of identifying the right mana whenua groups in any given circumstance;

    c. The implementation challenge where there are multiple iwi and hapū.

44. The panel's proposal to do away with a definition of 'iwi authority' is designed to recognise the importance of hapū and avoid defaulting solely to iwi but won't resolve the problems of identifying the right mana whenua groups or the implementation challenge. It has the potential to make those problems more difficult, not less difficult.

45. The panel's proposed redefinition of 'mana whenua' from "customary authority exercised by an iwi or hapū in an identified area" (which more correctly identifies 'mana whenua' as a class of authority; *i.e.* a 'thing' not a 'who') to "an iwi, hapū or whānau that exercises customary authority in an identified area" (which incorrectly identifies 'mana whenua' as a class of people; *i.e.* a 'who' not a 'thing').

46. The proposed redefinition of 'mana whenua' does not really help with the problems of identifying the right mana whenua groups or the implementation problem and, arguably, adds further complexity to those problems, particularly regarding governance participation, by adding 'whānau' to the mix.

'Mana whakahaere' has been suggested as an alternative …

47. Kahui Wai Māori has been undertaking analysis of the merits of 'mana whakahaere' as a key tool for the implementation of the National Policy Statement for Freshwater Management 2020, with 'Te Mana o te Wai' as its fundamental concept. The stated principles of 'Te Mana o te Wai' include 'mana whakahaere' which is described in the NPS as the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater.

48. This has led the NZMC/FOMA/KWM group to suggest 'mana whakahaere' as an alternative to 'mana whenua' for identifying those who should have participation rights in a reformed resource management system. Their stated reasons for making this suggestion include—

    a. 'Mana whenua' is a more exclusive concept entirely connected to land and those who possess authority at a given point in time;

    b. 'Mana whakahaere' is a more inclusive concept that recognises the multiple entities and individuals connected with the environment through whakapapa.

… and is referred to, but not defined, in legislation …

49. 'Mana whakahaere' is a term that is used in 19 Acts (mostly settlement Acts). In the majority of those Acts 'mana whakahaere' appears with or without English equivalents in Crown acknowledgements. The English equivalents of 'mana whakahaere' are 'control', 'mandate', 'power', 'authority', 'complete authority', 'legal ownership', 'tribal control' and 'effective control'.

50. In the Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017, the phrase 'ngā mana whakahaere ā-iwi' is translated as 'tribal structures' and the phrase 'te mana whakahaere o te iwi me ōna hapū' is translated as 'iwi and hapū integrity'.

51. Schedule 1 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 sets out the principles described in the Kiingitanga Accord, which include—

> **Mana whakahaere (authority and rights of control)**
> (1) Mana whakahaere refers to the authority that Waikato-Tainui and other Waikato River iwi have established in respect of the Waikato River over many generations. Mana whakahaere entails the exercise of rights and responsibilities to ensure that the balance and mauri (life force) of the Waikato River are maintained. It is based in recognition that if we care for the River, the River will continue to sustain the people.
>
> (2) In customary terms mana whakahaere is the exercise of control, access to, and management of the Waikato River, including its resources in accordance with tikanga (values, ethics, governing conduct). For Waikato-Tainui, mana whakahaere has long been exercised under the mana of the Kiingitanga.

… and is referred to in government and institutional websites …

52. 'Mana whakahaere' is the term used to denote 'governance' on the websites of the Ministry of Health, the National Library, the Wellington City Council and the Whanganui Regional Museum. The Canterbury District Health Board website uses Te Pae Mahutonga framework for its community and public health services, in which 'mana whakahaere' denotes 'autonomy'.

53. *Reporting Environmental Impacts on Te Ao Māori: A Strategic Scoping Document* prepared for the Ministry for the Environment 2016 uses 'mana whakahaere' to denote 'decision-making authority' and 'leadership', describes 'mana whakahaere' as "a cornerstone of mana whakahaere is the active participation of Māori in resource management decision-making", and sets out 5 principles of environmental reporting, including—

> **Mana whakahaere** (decision-making authority) is concerned with the effective participation of iwi/ hapū in natural resource management and monitoring. This decision-making right is derived from whakapapa or ancestral connections to an area or natural resource.

… but officials can't and shouldn't judge the relative merits of tikanga based concepts

54. Both 'mana whenua' and 'mana whakahaere' are tikanga based terms with the potential to be used as the basis for describing which Māori should be able to participate in a reformed resource management system, noting, though, that once either of these terms is defined in a statute they become legal concepts, not tikanga concepts.

55. Because the essence and origin of these terms is derived from tikanga, it is neither appropriate nor competent for officials to make judgements or provide definitive advice about which is the more fit for purpose within a statutory framework.

56. Instead, this is an issue on which the Crown should inform itself through, and be guided by, a broader engagement processes with Māori, beyond the engagement with the FILG/TWMT and NZMC/FOMA/KWM groups.

A previous approach was based on the concept of 'authorised voices' for iwi …

57. Part 3 of the repealed Rūnanga Iwi Act 1990 contained a process for iwi with a body corporate to register the body corporate as the 'authorised voice' of the iwi. There was provision for 2 or more iwi to register one body corporate as their 'authorised voice' and a dispute resolution mechanism in the event of disagreement. Māori Land Court registrars were made registrars for authorised voices and there was a set of registration requirements, including a requirement to obtain support at a hui.

58. The Rūnanga Iwi Act 1990 defined 'the essential characteristics of an iwi' as including descent from a tupuna, hapū, marae, belonging historically to a takiwa, and an existence traditionally acknowledged by other iwi.

… which unexpectedly led to fragmentation into smaller groups

59. In *Changing Property Regimes in Māori Society: A Critical Assessment of the Settlement Process in New Zealand* (Journal of Polynesian Society, 2012), Toon van Meijl wrote—

> *In order to implement the policy of devolution the government introduced the Runanga Iwi Act in 1989. This Act was to enable the empowering of tribal authorities to administer government programmes formerly operated by the Department of Māori Affairs. It induced a discussion, however, about which tribal or chiefly authorities should be empowered to manage and administer community development programmes. … In rural areas many local communities refused to surrender their autonomy to some tribal authority at a higher level of their traditional hierarchical structure and applied for legal recognition of their autonomy. By the same token, many tribes were reluctant to recognise super-tribal authorities as the principal statutory authority to which they would be answerable about the implementation of devolution programmes. This tendency towards tribal division was paralleled in urban environments where a large number of autonomous Māori organisations emerged.*

Key considerations

Māori are not a homogenous group

60. Participation arrangements cannot be based on a presumption that Māori are a homogenous group.

61. In its 1990 *Radio Frequencies Report*, the Waitangi Tribunal said "Māori are not a homogenous group and the Treaty talks of tribes rather than an amorphous body now called "Māoridom". The protection of tino rangatiratanga means that iwi and hapū must be able to express their autonomy in the maintenance and development of their culture. This inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms".

The Māori consensus process requires a high level of community involvement and debate

62. If it is to meaningfully recognise te ao Māori and incorporate Māori values in decision-making, a reformed resource management system needs to respect and accommodate Māori norms of consensus decision-making.

63. In its 1998 *Muriwhenua Fishing Claim Report*, the Waitangi Tribunal said there is a strong preference within Māori communities for face to face consultation or kanohi ki te kanohi, kanohi kitea. The Māori consensus process requires a high level of community involvement and debate and tribal leaders are reluctant to express views that have not been tribally approved. Thus, to fulfil the purpose of consultation, the process may need to include hui where information is received, further hui where Māori debate and consider the information, and then again, hui where Māori make their views known.

Environmental matters impinging on Māori interests always require engagement

64. Engagement will always be necessary on matters impinging on Māori interests.

65. In its 1991 *Ngāi Tahu Report*, the Waitangi Tribunal said consultation by the Crown is required if legitimate Treaty interests of Māori are to be protected. On matters which might impinge on a tribe's rangatiratanga, consultation is necessary. Environmental matters, especially as the may affect Māori access to traditional food sources, also require consultation. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Māori interests, give rise to the need for consultation.

Prejudice to owners of Māori land cannot continue

66. The imposition of the Native land tenure system is an acknowledged Treaty breach. In resource management processes, that tenure system has continued to unfairly disadvantage owners of Māori land compared with other landowners.

67. The Māori land update published by the Māori Land Court in June 2020 shows there are 27,538 Māori land parcels with an average size of 50.99 hectares and an average 107 owners per title. 15,956, or 58%, of Māori land parcels have no formal management structure.

68. If a Māori land parcel has no management structure and more than 10 owners, under Part 10 of Te Ture Whenua Māori Act 1993 any notice required under a planning or consenting process to be given to the owners of land must, in that instance, be given, instead, to the registrar of the Māori Land Court.

69. The registrar is required to notify every owner whose address is known (many are not known) and refer the notice to the Māori Land Court to call a meeting of owners or, if there isn't time to do that, to appoint an agent for the owners. Under s.181(4)(b) of Te Ture Whenua Māori Act 1993 and s.353 of the RMA time periods under the notice for owners to respond are extended.

70. These measures are frequently overlooked and, in any event, are seldom sufficient to enable owners of affected Māori land to participate. A reformed resource management system designed to provide greater recognition of the Te Tiriti o Waitangi and te ao Māori needs to remove impediments to participation by owners of Māori land.

Principles can guide difficult participation calls

71. Approaches to resolving contested or unclear participation rights could be more effective if underpinned by clearly understood principles. As noted by the Law Commission in a Study Paper, *Determining Representation Rights Under Te Ture Whenua Māori Act 1993* (2001) NZLC SP8, the Māori Land Court developed principles to guide it on questions of representation. Those principles are—

    a. **He ritenga ano** — An assessment should be made of the historic circumstances of the group seeking to participate;

b. **He rourou** — Participation is an expression of obligations more than an assertion of rights, so an adversarial approach should be discouraged;

c. **He au rere tonu** — Given the changes in social organisation, the economy and society in general, the exact manner in which land title was determined in the 19th century is not necessarily a reliable guide; ascertainment of tangata whenua status requires a more dynamic approach;

d. **Marae** — It is best to look to local marae in matters of customary authority; the marae is probably the single most enduring institution within Māoridom; the functioning of the marae can be seen as the expression of authority through customary practices;

e. **Customary authority** — Many hapū, for a number of reasons, were assimilated with or integrated into other hapū and their separate identity became submerged; in recent times they have re-emerged and claimed their former status; if this re-emergence is accepted by the others through a consensual process relying on customary concepts such as whanaungatanga, it can be recognised as a basis for separate participation.

Types of participation

Approaches to Māori participation need to reflect the type of participation

72. This analysis focuses on four primary types of participation—

a. Participation in the development and creation of plans and instruments;

b. Participation in governance and decision making;

c. Participation in in implementation processes, such as consenting;

d. Pre-existing rights of participation (e.g. Treaty settlement arrangements).

Plans and instruments

Key plans and instruments

73. Key instruments and plans proposed for a reformed resource management system are—

a. A national planning framework;

b. National-level instruments such as government policy statements;

c. Regional spatial strategies;

d. Natural and built environment combined plans.

National planning framework

74. It is expected that the national planning framework will include natural environmental limits set nationally, targets, methods and rules. The framework is expected to be developed by Ministry officials and Māori technicians and will be informed by public consultation.

75. Two questions arising from this are—

a. How are Māori technicians identified and who appoints them?

b. Which Māori groups or entities should be specifically consulted over and above general public consultation?

Appointment of Māori technicians

76. Cabinet's agreed reform objectives include giving effect to the principles of Te Tiriti o Waitangi and providing greater recognition of te ao Māori, including mātauranga Māori. Given that objective—

    a. Technicians should be appointed for their skill and expertise to bring te ao Māori concepts into the national planning framework;

    b. Technicians should be appointed or identified by Māori to reflect consistency with the partnership principle inherent in Te Tiriti o Waitangi.

77. Given this is a national framework, there needs to be clarity about which Māori representative entities should be entitled to, and have responsibility for, appointing technicians. That question is best resolved through discussion within the engagement channels currently utilised as part of the reform process. Potentially—

    a. The National Iwi Chairs Forum could be considered because it has iwi and hapū as its base;

    b. The New Zealand Māori Council could be considered because it has Māori communities as its base;

    c. The National Urban Māori Authority because it has urban communities as its base;

    d. Te Hunga Rōia Māori o Aotearoa because its members are familiar with regulatory frameworks and utilise technicians to support their clients.

Specific consultation

78. Because the national planning framework will provide direction to the regionally-focused planning, it would be appropriate for the same groups who would be consulted at the natural and built environment plan stage to be consulted on the national planning framework.

79. In addition to those groups, it would be appropriate to consult national organisations, such as those referred to above.

National-level instruments

80. National-level instruments, such as Government Policy Statements, are used to communicate the government's overall direction and priorities and are usually required by legislation (for example, s.66 of the Land Transport Management Act 2003 requires a Government Policy Statement on Land Transport; s.22 of the Kāinga Ora—Homes and Communities Act 2019 requires a Government Policy Statement on Housing and Urban Development).

81. When formulating a Government Policy Statement pursuant to an Act that invokes the principles of the Treaty of Waitangi, the partnership principle includes a duty to be sufficiently informed on matters affecting Māori (*New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641; *Te Rūnanga o Tauramere v Northland Regional Council* [1996] (Planning Tribunal); *Mangonui Sewerage Report* (1988) (Waitangi Tribunal)).

82. In order to meet the duty to be informed, a decision-maker must consult. Even when representative Māori entities participate in consultation on matters such as national-level instruments, the rangatiratanga of individual iwi must be respected. Individual iwi are entitled to be consulted.

Regional spatial strategies and natural and built environment plans

83. Regional spatial strategies will draw on the purpose of the other Acts in the reformed resource management system (as well as the Local Government Acts, the Land Transport Management Act and the Climate Change Response Act) and coordinate desired outcomes and issues that need to be managed spatially. Regional spatial strategies will also set long term objectives and methods to achieve the objectives and guide more detailed plans. Spatial plans can help resolve conflicts between outcomes and priorities by, for example, identifying areas for development and areas where development should not occur and will have application in the coastal marine area.

84. Natural and built environment plans will implement direction from the national planning framework and regional spatial strategies by translating that direction into a regulatory plan, including rules, zones, overlays and infrastructure designations) that will replace existing sets of regional policy statements, regional plans and district plans.

Appointment of Māori technicians

85. To meet the reform objectives of giving effect to the principles of Te Tiriti o Waitangi and providing greater recognition of te ao Māori, including mātauranga Māori—

a. Technicians should be appointed for their skill and expertise to bring te ao Māori concepts into the regional spatial strategies and natural and built environment plans;

b. Technicians should be appointed or identified by Māori to reflect consistency with the partnership principle inherent in Te Tiriti o Waitangi.

86. Given these will be regional instruments, there needs to be clarity about the identity of iwi and hapū in the region who should be entitled to, and have responsibility for, appointing technicians. That question is best resolved through a regional process, including contact with marae in the region.

Specific consultation

87. Because spatial strategies and natural and built environment plans are regional instruments, the iwi and hapū in the region should be consulted (including those who appointed technicians), as well as marae, urban Māori organisations, Māori land entities and post settlement governance entities. The *Guidelines foe engagement with Māori* published by Te Arawhiti is a resource that can be used to help identify who should be consulted in these types of process – see https://www.tearawhiti.govt.nz/assets/Tools-and-Resources/Guidelines-for-engagement-with-Maori.pdf

Governance and decision making

Something more specific than a general definition is needed

88. Governance participation is about a right to appoint a member of a decision-making body, as distinct from a general requirement to be consulted. The proposed broad definitions of 'mana whenua' and 'mana whakahaere' might not be the best approach for this purpose.

89. Examples of a more specific approach, in other contexts, include—

a. The definition of 'Māori entity' in s.9 of the Urban Development Act 2020 as—
   - a post-settlement governance entity:
   - an iwi authority:

- a hapū:
- an urban Māori authority:
- a Māori Trust Board:
- a Māori association (under the Māori Community Development Act 1962):
- the Māori Trustee:
- a board, committee, authority, or other body, incorporated or unincorporated, recognised in, or established under, iwi participation legislation:
- a body corporate, the trustees of a trust, or any other entity or persons who have an ownership interest in Māori land:
- a body corporate or the trustees of a trust appointed to administer a Māori reservation:
- a customary marine title group or protected customary rights group:
- the entity that is authorised to act for a natural resource with legal personhood;

b. The definitions of 'relevant iwi authority' and 'Treaty settlement entity' in s.7(1) of the COVID-19 Recovery (Fast-track Consenting) Act 2020—

- In relation to work on infrastructure, a 'relevant iwi authority' is an iwi authority whose area of interest includes, overlaps with, or is immediately adjacent to the area in which the work will occur;

- In relation to listed projects and referred projects, a 'relevant iwi authority' is an iwi authority whose area of interest includes the area in which a project will occur;

- A 'Treaty settlement entity' is—
  - a post-settlement governance entity:
  - a board, trust, committee, authority, or other body, incorporated or unincorporated, that is recognised in or established under a Treaty settlement Act:
  - an entity or a person that is authorised to act for a natural resource with legal personhood:
  - a mandated iwi organisation:
  - an iwi aquaculture organisation.

Key decision making points

90. Key proposed decision-making points are—

a. National planning framework sign-off involving central government and Māori;

b. Regional spatial strategy sign-off involving central government, local government and Māori;

c. Natural and built environment plan sign-off involving local government (regional and territorial) and Māori;

d. Water services entity governance involving local government and Māori.

National planning framework

91. As envisaged by the Review Panel, the national planning framework will set objectives, policies, limits, targets, standards and methods in respect of matters of national significance. Sign-off would be by Ministers, as it is now, following a Board of Inquiry process.

92. The Review Panel proposed a National Māori Advisory Board whose functions could include participating with the Crown in the development of a policy statement on the Treaty as part of the national planning framework.

93. The FILG/TWMT group and the NZMC/FOMA/KWM group are advocating for a more substantive role for Māori in jointly signing-off the instruments comprising the national planning framework. The FILG/TWMT group consider this should involve representatives of iwi and hapū. The NZMC/FOMA/KWM group also see a role for iwi and hapū but not necessarily exclusively.

Regional spatial strategy and natural and built environment plan

94. Joint decision-making committees for regional spatial planning and natural and built environment Acts will be structured to include representatives of Māori in the region based, primarily, on iwi and hapū within the region. As envisaged by the Review Panel, having a representative from every iwi or hapū with mana whenua in some regions will mean committees are simply too large to function effectively.

95. The practical realities of finding a way to address the challenge of regions with multiple iwi and hapū suggests—

a. There will need to be a procedural solution rather than a structural solution to ensure each iwi and hapū has—

i. an input into, and influence over, decisions; and

ii. a say on who is appointed to the joint committees;

b. As well as having an avenue to have their views reflected by iwi/hapū members on joint committees, iwi and hapū, as suggested by the Review Panel, should also be able to influence local government views through much greater, possibly mandatory, use of integrated partnerships with councils (as suggested by the Review Panel), enhanced mana whakahono a rohe and joint management agreements.

Water services governance

96. The proposed water services framework will be designed to have no more than 4 water services entities across the country. Those entities will be statutory entities. Their management teams will be appointed by their boards and their board members will be appointed by an independent selection panel.

97. Water services entities will be responsible for infrastructure and services relating to drinking water, wastewater, and stormwater, and will own the associated assets. There is ongoing policy work on a complex set of issues, assets, and legislative arrangements relating to the stormwater system, and links with catchments and land-use planning.

98. There will be a Government Policy Statement to provide national direction to water services entities relating to three waters infrastructure and service delivery, and to provide a mechanism to consider outcomes relating to public health, the environment, housing and urban development, climate change mitigation and adaptation, resilience to natural hazards, water security, and social wellbeing – in addition to the statutory objectives of the entities.

99. For each water service entity, it is proposed to have a Governor Representative Group (with limited decision-making powers) appointed by local authorities and Māori within the water services area. It is envisaged that iwi and hapū would be responsible for appointing non-local government members to the Governor Representative Group.

100. The main functions of the Governor Representative Groups will be—

a. Establishing and monitoring the independent selection panel that appoints and removes members to the water services entity board;

b. Providing the water services entity with a Statement of Strategic and Performance (expectations that will influence the Statement of Intent that an entity produces).

101. The practical issues arising from the number of iwi and hapū in a large water services area will be a significant challenge in determining how Māori representatives are appointed to Governance Representative Groups and who the appointers will be. As with joint committees for regional spatial strategies and natural and built environment plans, this is likely to require a procedural solution.

102. An example of a procedural approach, based on the requirement under s. 35A of the current RMA mechanism (*i.e.* process) for local authorities to keep certain records of each iwi and hapū within its region or district, can be found in clause 5 of Schedule 4 of the COVID-19 Recovery (Fast-track Consenting) Act 2020. Clause 5 requires infrastructure agencies to engage with—

a. iwi authorities about which the relevant local authority keeps records under section 35A of the Resource Management Act 1991;

b. any groups about which the relevant local authority keeps records under that section;

c. Treaty settlement entities whose area of interest overlaps, or is adjacent to, the area where infrastructure works will occur.

Implementation

Consenting and designations

103. Given there will be greater recognition of te ao Māori and mātauranga Māori within the reformed resource management system, the necessary knowledge and skills in these areas for the plan development and governance functions will also be relevant and necessary in the consenting and designation functions and should be reflected in the make-up of committees making these decisions.

104. It will also be essential that there is provision for affected Māori land owners and their entities to participate in these processes through robust notification processes and meaningful opportunities to make submissions and, where relevant, to participate as parties.

Monitoring

105. In terms of Māori participation, there are three types of monitoring to consider. There is the function of monitoring activities and compliance, there is monitoring the effectiveness of the plans and of components of the national planning framework, and there is monitoring of the state of the environment.

106. Again, greater recognition of te ao Māori and mātauranga Māori makes it essential to provide for Māori participation in these functions. Monitoring system effectiveness and state of the environment monitoring are proposed to be led by a nationally coordinated environmental monitoring system. Māori participation in this system could align with the model adopted for national level governance (for example, the Review Panel suggested a National Māori Advisory Board).

107. Iwi, hapū and marae should ideally be involved at local levels with gathering information, observations and insights to feed into the wider monitoring system and should also have a role with local authorities in monitoring activities and compliance locally.

Pre-existing participation arrangements

Resource management reforms will have distinct impacts for existing arrangements …

108. Resource management reforms will have distinct impacts for 74 groups whose Treaty of Waitangi settlements interact, some quite significantly, with the RMA. There will also be impacts for RMA related arrangements made with iwi and hapū outside Treaty settlements. Examples of the latter include joint management agreements entered into with the Tūwharetoa Māori Trust Board by the Taupō District Council and with Te Runanganui o Ngāti Porou by the Gisborne District Council and the s.33 transfer of powers by the Waikato Regional Council to the Tūwharetoa Māori Trust Board.

… creating risks for the Treaty settlement framework that will need to be closely managed

109. Replacing the RMA will impact Treaty settlement deeds and their enacting legislation to differing degrees and will require amendments to reflect the new legislative framework. Unless this is addressed in a collaborative way, in partnership with all affected settlement entities, it will create a significant risk to Crown's Treaty settlement framework which is based on the finality and durability of settlements.

Provision for existing arrangements need to be 'built in' to the new system not 'clipped on'

110. There are clear risks involved, including a risk that a reformed resource management system may end up too different to enable settlement arrangements to be preserved or equivalent arrangements to be possible. To mitigate these risks, it is essential that provision for existing arrangements are 'built in' to the design of the new system, not 'clipped on' as an afterthought. This point was made strongly at an engagement hui last month with the NZMC/FOMA/KWM group.

111. Building in existing arrangements will require contemporaneous engagement with affected post settlement and other entities that are parties to those arrangements. Engagement on governance arrangements during the design phase also provides an opportunity to seek input on the wider issues canvassed in this analysis, including, for example, the definitional challenges.

Some conclusions

Using a framework for defining the issue will help to focus on the right solutions

109. The issue to be resolved is to design a statutory framework for Māori participation in a reformed resource management system that has integrity from a Māori perspective, is practical to implement, and addresses difficulties with the status quo that were identified by the Review Panel.

110. The analysis in the preceding paragraphs focuses on four primary types of participation—

a. Participation in the development and creation of plans and instruments;

b. Participation in governance and decision making;

c. Participation in in implementation processes, such as consenting;

d. Pre-existing rights of participation (e.g. Treaty settlement arrangements).

111. Based on those four types of participation, a way to frame the issue is to ask—

a. How should the proposed right of Māori to appoint members to governance bodies such as joint planning committees be prescribed in legislation?

b. How should the legislation identify Māori who, in Treaty terms, must be provided with an opportunity to be specifically consulted on the development and approval of planning instruments (other than as members of the public at large)?

c. What rights and interests are affected by implementation actions, such as consenting and designation processes, and how should the legislation identify Māori who, in Treaty terms, must be notified of implementation actions?

d. How should the legislation provide for existing arrangements for Māori participation, such as those arising from Treaty settlements?

The right to appoint members of governance bodies is a key participation mechanism …

112. Among other things, the Review Panel recommended a combined planning process led by a regional joint planning committee comprising—

- A representative of the Minister of Conservation;
- Appointees from the regional council;
- Appointees from constituent territorial authorities;
- Appointees from mana whenua within the region.

… but broad definitions of who is eligible to make appointments will create tensions

113. The panel noted that, for some regions, having a representative from every iwi or hapū with mana whenua in the region will mean committees are simply too large to function and this will sometimes mean delegates will have to represent the interests and perspective of more than one group.

114. This issue is compounded by the panel's proposed changes to relevant definitions in the RMA, such as the proposed definition of 'mana whenua'. The alternative proposal to identify those entitled to appoint representatives to those exercising 'mana whakahaere' will not resolve the issue.

115. Given that governance participation is about a right to appoint a member of a decision-making body, as distinct from a general requirement to be consulted, the use of broad definitions of 'mana whenua' and 'mana whakahaere' might not be the most helpful approach.

It's better to be specific about which entities can appoint members of governance bodies

116. A better approach for governance appointments is to be more specific in the legislation about who can make appointments. Options could be iwi and hapū whose details are held by the regional council and constituent territorial authorities (in accordance with s.35A of the RMA), or iwi and hapū belonging to a takiwā that is wholly or partly within the region, or for the legislation to include a list of eligible entities (by type: e.g. a subset of the entities listed in the definition of 'Māori entity' in s.9 of the Urban Development Act 2020 – see paragraph 89).

Identifying who to consult on plan development suits a broader definitional approach …

117. Discussions about 'mana whenua' and 'mana whakahaere' seem to reflect an inherent tension between a regional lens (iwi and hapū) versus a local or catchment lens (hapū, whānau, marae, landowners). If that perception is correct then a way to look at the issue is that while, on the one hand, the governance framework, where plan sign-off occurs, needs to be regionally focused, on the other hand plan development can still have a local input through robust consultation and engagement processes.

118. Identifying Māori within a region who, in Treaty terms, must be provided with an opportunity to be specifically consulted on the development and approval of planning instruments (other than as members of the public at large) would be more easily approached on the basis of a wider net than with governance arrangements.

119. An option could be to approach this on the basis of 'mana whenua' or 'mana whakahaere' definitions coupled with a list of examples (attached to the definition) that might include entities representing those iwi and hapū entitled to appoint members of governance bodies, plus, customary marine title groups, protected customary rights groups, Māori incorporations, trusts, or other entities or persons who have an ownership interest in Māori land in the region, and the other entities listed as Māori entities in s.9 of the Urban Development Act 2020.

… and plan development needs to include technicians who are able to reflect Māori concepts

120. Plan development teams should include technicians with the skill and expertise to bring te ao Māori concepts and mātauranga Māori into the overall planning framework. Consistent with the partnership principle of Te Tiriti o Waitangi, those technicians should be appointed or identified by iwi and hapū.

Identifying who to notify in consenting and designation processes is driven by dual considerations

121. Given there will be greater recognition of te ao Māori and mātauranga Māori within the reformed resource management system, knowledge and skills in these areas will be relevant and necessary in the consenting and designation functions and should be reflected in the make-up of committees making these decisions.

122. A reformed system is proposed to have fewer requirements for consent applications but, to the extent some level of consenting will remain, meaningful opportunities to participate in consenting and designation processes will be required. Those processes should include robust notification requirements and fair and reasonable opportunities to make submissions and participate as parties, taking proper account of the logistical challenges and realities of hapū and Māori land structures and decision-making processes.

123. Identifying Māori within a region who, in Treaty terms, must be notified of implementation actions such as consenting and designation processes would preferably be approached on the basis that—

    a. There will be owners of potentially affected Māori land and land held for the collective benefit of groups of Māori (such as Treaty settlement land and holders of customary marine title) who should receive specific notice; and

    b. There will be groups where the proposed activity or proposed infrastructure has the potential to have implications for their customs and values derived from their tikanga, such that they, too, should receive specific notice.

The legislation should specifically enable existing arrangements to be reflected in the new system

124. In order to mitigate or avoid the risk that existing Treaty settlement and other participation arrangements are too misaligned with the reformed resource management system for them to be preserved, or for equivalent arrangements to be possible, the legislation should contain enabling provisions to accommodate existing arrangements within each of the new participation mechanisms. This will require those provisions to be 'built in' to the design of the new system.

Decisions on a preferred approach need to be informed by prior engagement

125. Decisions about mechanisms for Māori participation in a reformed resource management system, and about which tikanga-based approach to use, cannot be made without prior engagement with Māori to inform those decisions, especially in matters that specifically affect Māori. A workshop on governance arrangements has been held with, respectively, the FILG/TWMT group and the NZMC/FOMA/KWM group, but wider engagement with Māori should be undertaken to ensure final decisions are adequately informed.

126. The duty to make informed decisions is a Treaty principle. This is clear from, for example, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* published by Te Puni Kōkiri, the *Crown Engagement with Māori Framework* published by Te Arawhiti, and from Cabinet Office Circular CO(19) 5 *Te Tiriti o Waitangi/Treaty of Waitangi Guidance*.

127. Accordingly, the conclusions and suggestions outlined above are intended as examples of what to think about and are not intended to pre-empt informed decision-making on the appropriate policy approach to the matters discussed.

JAG

APPENDIX 1

(2) Co-governance / Co-management Structures, Te Arawhiti

Co-governance/Co-management Structures

Following is a broad sample of co-governance and co-management structures. Generally, co-governance structures are those in which a primary focus is on influencing policy direction and regulatory instruments (*e.g.* Te Upoko Taiao) and co-management structures are those in which on-the-ground strategies and activities are a primary focus (*e.g.* Te Maru o Kaituna). Some structures do both (*e.g.* Waikato River Authority).

Included in the sample are—

- Waikato River Authority
- Rotorua Te Arawa Lakes Strategy Group
- Rangitaiki River Forum
- Ngai Tāmanuhiri Local Leadership Body
- Tūpuna Maunga o Tāmaki Makaurau Authority
- Te Maru o Kaituna/Kaituna River Authority
- Te Tau Ihu River and Freshwater Advisory Committee
- Te Oneroa-a-Tohe Board
- Taranaki Standing Committees (consents and regulatory)
- Taranaki Standing Committees (policy and planning)
- Te Kōpuka nā Te Awa Tupua
- Te Kōpua Kānapanapa
- Ngā Wai Tōtā o Te Waiū
- Te Waihora Co-Governance Group
- Komiti Māori (Bay of Plenty Regional Council)
- Te Roopu Ahi Kaa (Rangitīkei District Council)
- Te Upoko Taiao (Wellington Regional Council)
- Canterbury Water Zone Committees
- Ruamāhanga Whaitua Committee
- Whaitua Te-Whanganui-a-Tara Committee
- Tuhituhi o ngā Mahi O Te Kāhui Māori O Taitokerau
- Hawke's Bay Regional Planning Committee
- Whakamana te Waituna
- Waiapu Catchment Joint Governance Group

Structures that focus more on sea-water than fresh water, structures that are not yet final, and non-structural arrangements (such as joint management agreements) are not included in the sample. Examples of arrangements not included are—

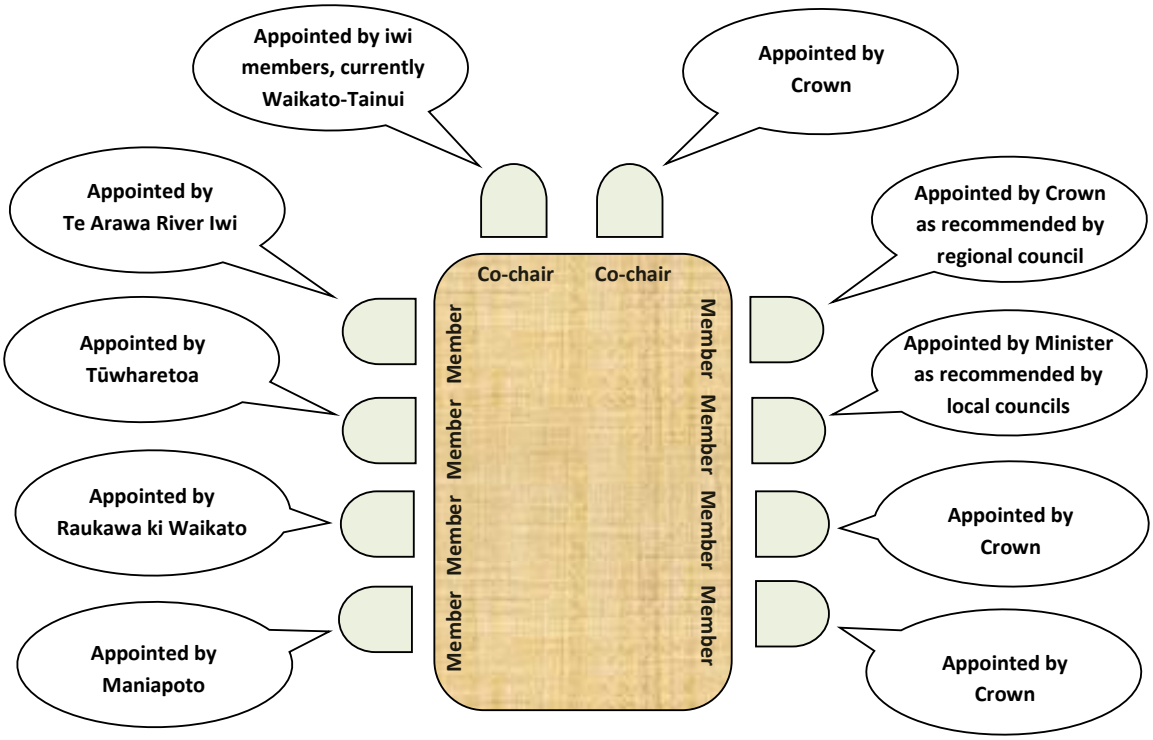
- Kaipara Harbour Management Group
- Tauranga Moana Governance Group
- Fiordland Marine Guardians

- Hauraki Gulf Forum
- Local Leadership Body (Gisborne District Council)
- Waikato River Joint Management Agreements
- Te Urewera Board
- Wairarapa Moana Statutory Board
- Te Komiti Muriwai o Te Whanga (Ahuriri)
- Manawatū River Catchment Advisory Board
- Tarawera Awa Restoration Strategy Group
- Tūwharetoa Joint Management Agreements
- Regional Water Management Committee (Canterbury Regional Council)
- Manawatū River Accord
- Ngā Poutiriao ō Mauao
- Ngāti Porou Joint Management Agreement
- Resource Management Committee (West Coast Regional Council)

Māori land entities are notably absent from participation in both the listed and unlisted structures. This is despite their significant influence on, and experience with, environmental and resource management and the significant impact on them of environmental and resource management regulatory frameworks. Nearly 33% of all land in Aotea is Māori land. In Tairāwhiti it is more than 23% of all land, and in Waiariki it is more than 15%. Examples of significant Māori land entities are—

- Pārengarenga A Incorporation
- Ngāti Hine Forestry Trust
- Taharoa C Incorporation
- Mangorewa Kaharoa Te Taumata Trust
- Ngāti Whakaue Tribal Lands Incorporation
- Rotoiti 15 Trust
- Kapenga M Trust
- Tumunui Lands Trust
- Tuaropaki Trust
- Tauhara North No. 2 Trust
- Mangatū Incorporation
- Ātihau Whanganui Incorporation
- Parininihi ki Waitotara Incorporation
- Wairarapa Moana Incorporation
- Wakatū Incorporation
- Māwhera Incorporation

Waikato River Authority



Needs bespoke legislation – can't be established under RMA or LGA

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

Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010

Purpose

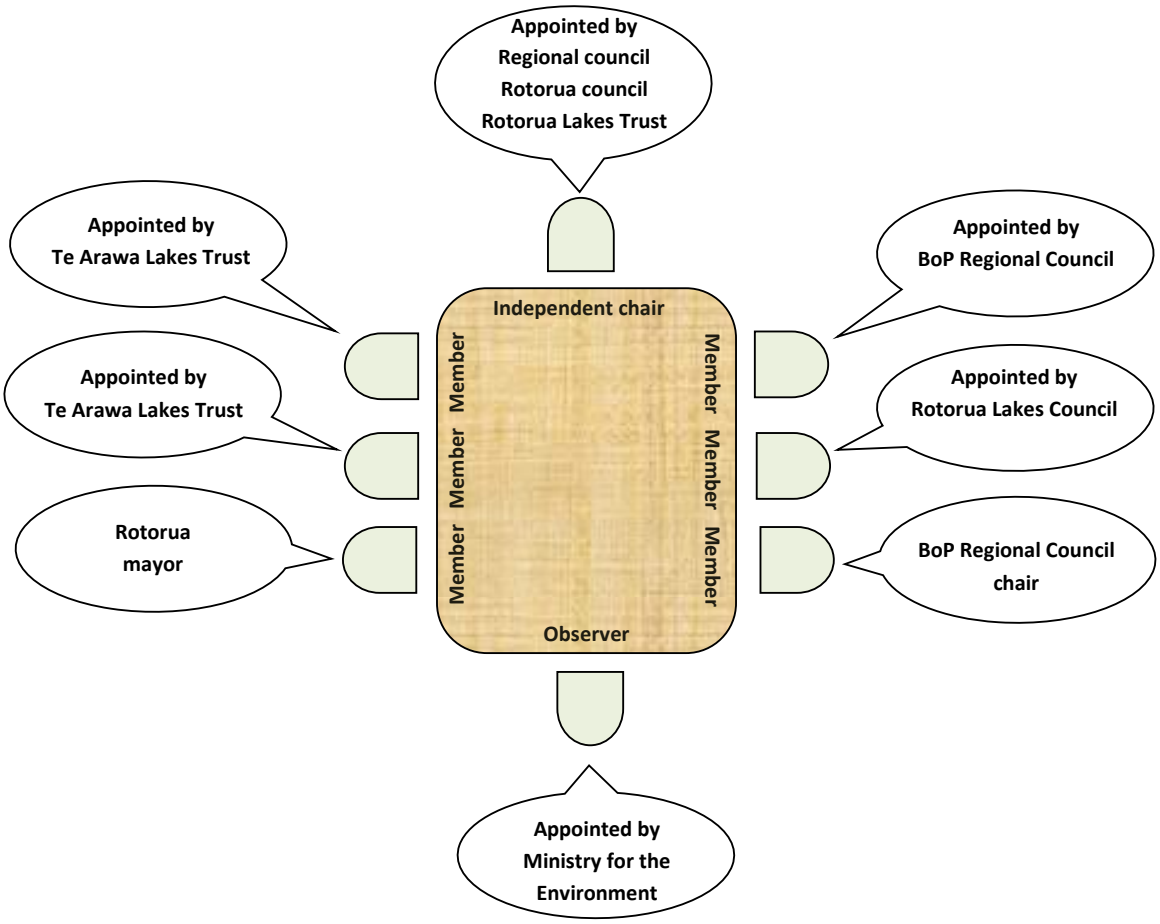
Set the primary direction through the vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations

Promote an integrated, holistic, and co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River

Fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-up Trust

Independent statutory entity

Rotorua Te Arawa Lakes Strategy Group



Can be established under LGA but needs bespoke legislation to make it permanent

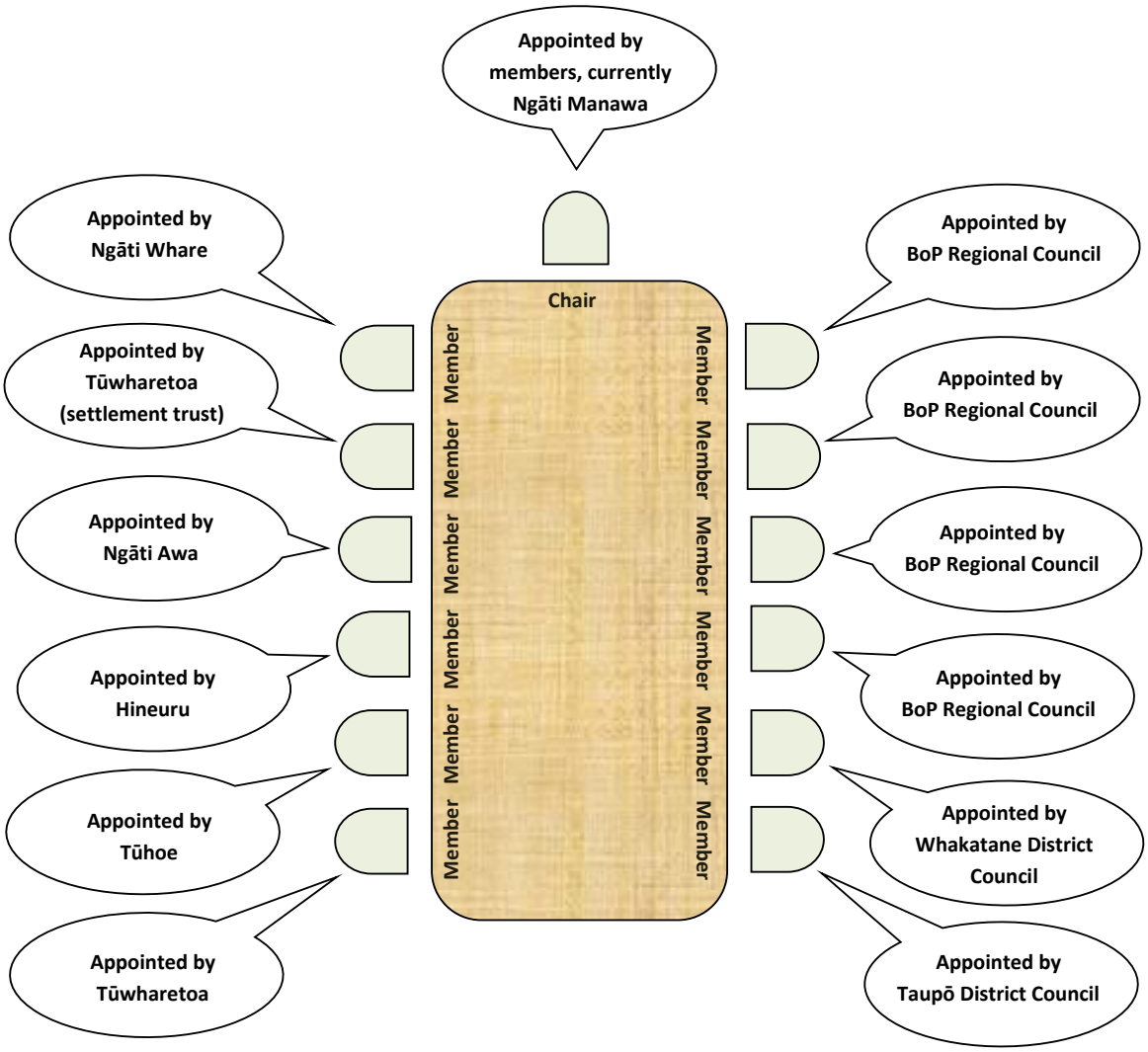
Te Arawa Lakes Settlement Trust 2006

Purpose

Contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes

Deemed joint committee of councils

Rangitaiki River Forum



Can be established under LGA but needs bespoke legislation to make it permanent

Ngāti Whare Claims Settlement Act 2012

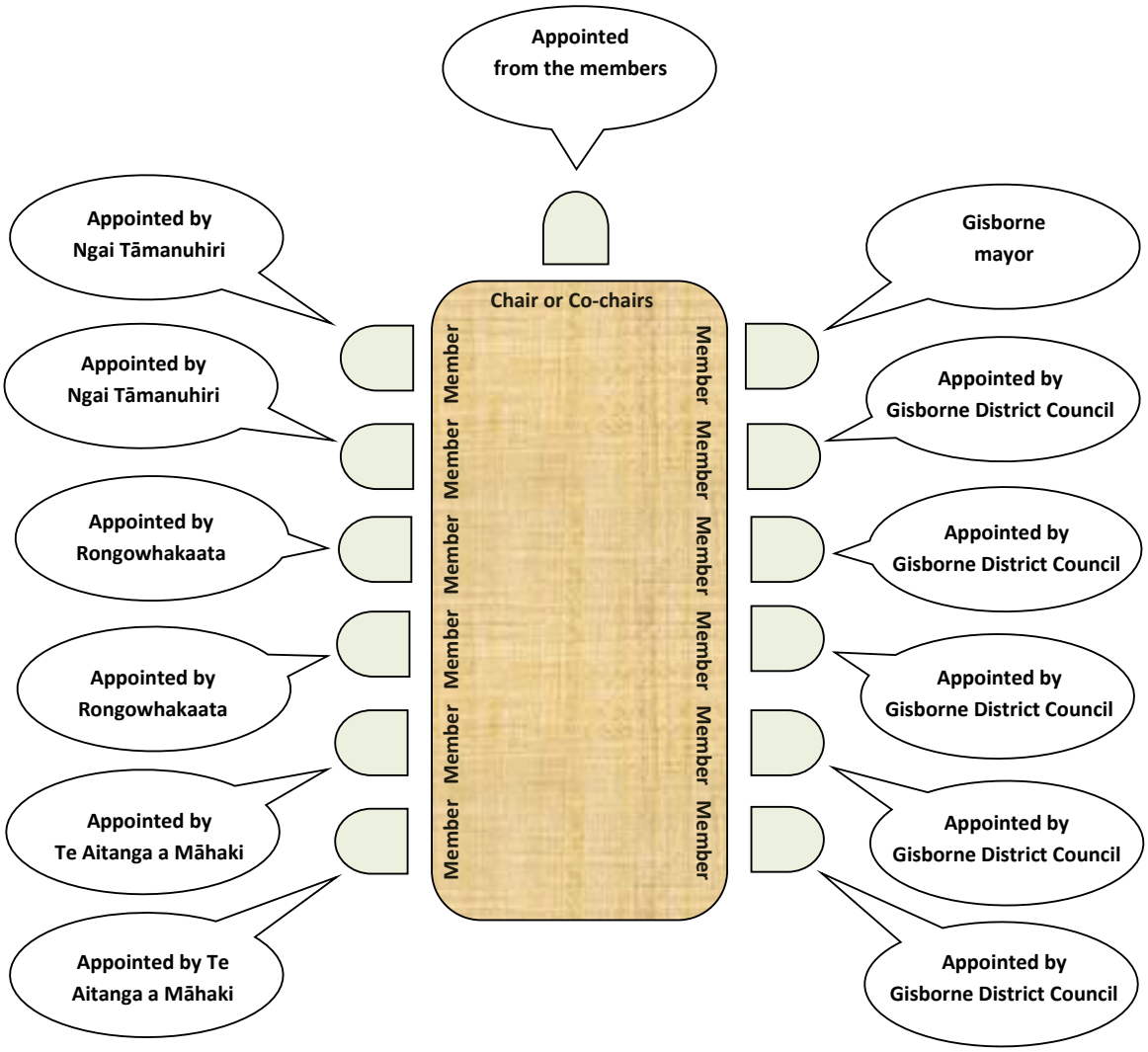
Ngāti Manawa Claims Settlement Act 2012

Purpose

The protection and enhancement of the environmental, cultural, and spiritual health and wellbeing of the Rangitaiki River and its resources for the benefit of present and future generations

Deemed joint committee of councils

Ngai Tāmanuhiri Local Leadership Body



Can be established under LGA but needs bespoke legislation to make it permanent

Ngai Tāmanuhiri Claims Settlement Act 2012

Purpose

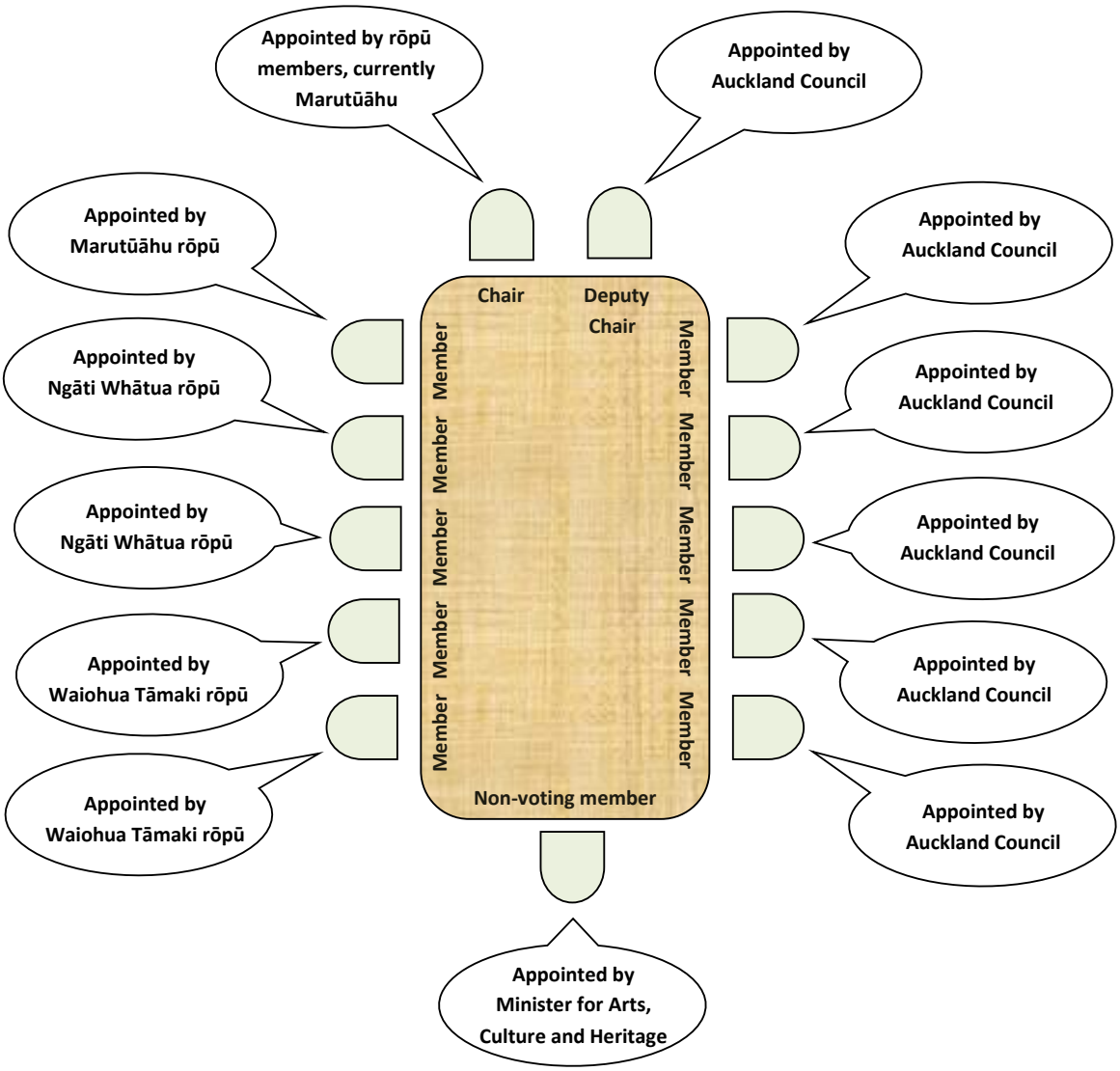
Contribute to the sustainable management of the natural and physical resources in the LLB area for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Ngai Tāmanuhiri, Rongowhakaata, and Te Aitanga a Māhaki and Affiliates with their ancestral lands, water, sites, wāhi tapu, and other taonga

Enable individuals and communities within the LLB area, as resources allow, to provide for their social, economic, and cultural well-being; and to achieve improved outcomes in respect of the environment

Ensure that the Council is appropriately informed of its statutory obligations within the LLB area, including obligations in respect of Te Tiriti o Waitangi arising under the Local Government Act 2002 and the Resource Management Act 1991 and any other relevant enactment

Deemed joint committee of councils

Tūpuna Maunga o Tāmaki Makaurau Authority



Needs bespoke legislation – can't be established under RMA or LGA

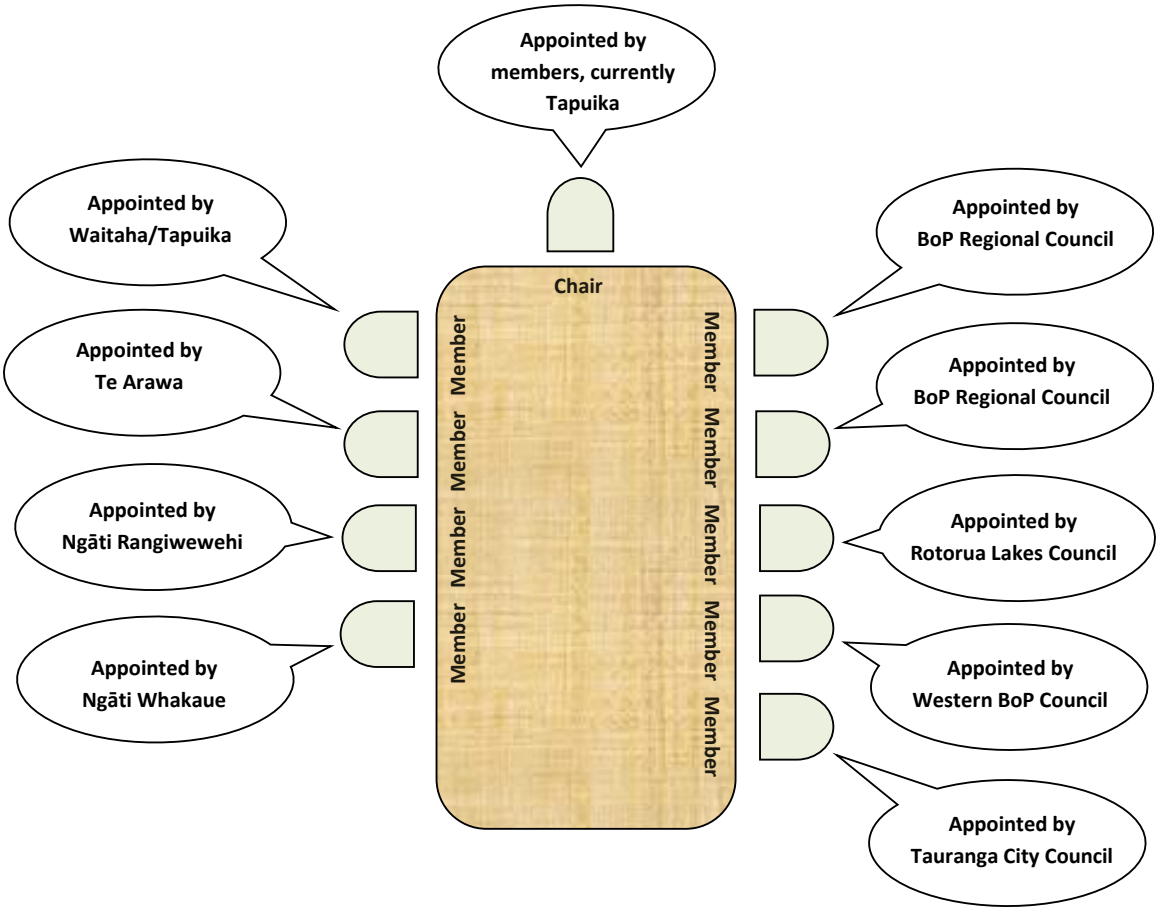
Ngā Mana Whenua o Tamaki Makaurau Collective Redress Act 2014

Purpose

Govern the fourteen Tūpuna Maunga (ancestral mountains) of Tāmaki Makaurau / Auckland

Independent statutory entity

Te Maru o Kaituna/Kaituna River Authority



Can be established under LGA but needs bespoke legislation to make it permanent

Tapuika Claims Settlement Act 2014

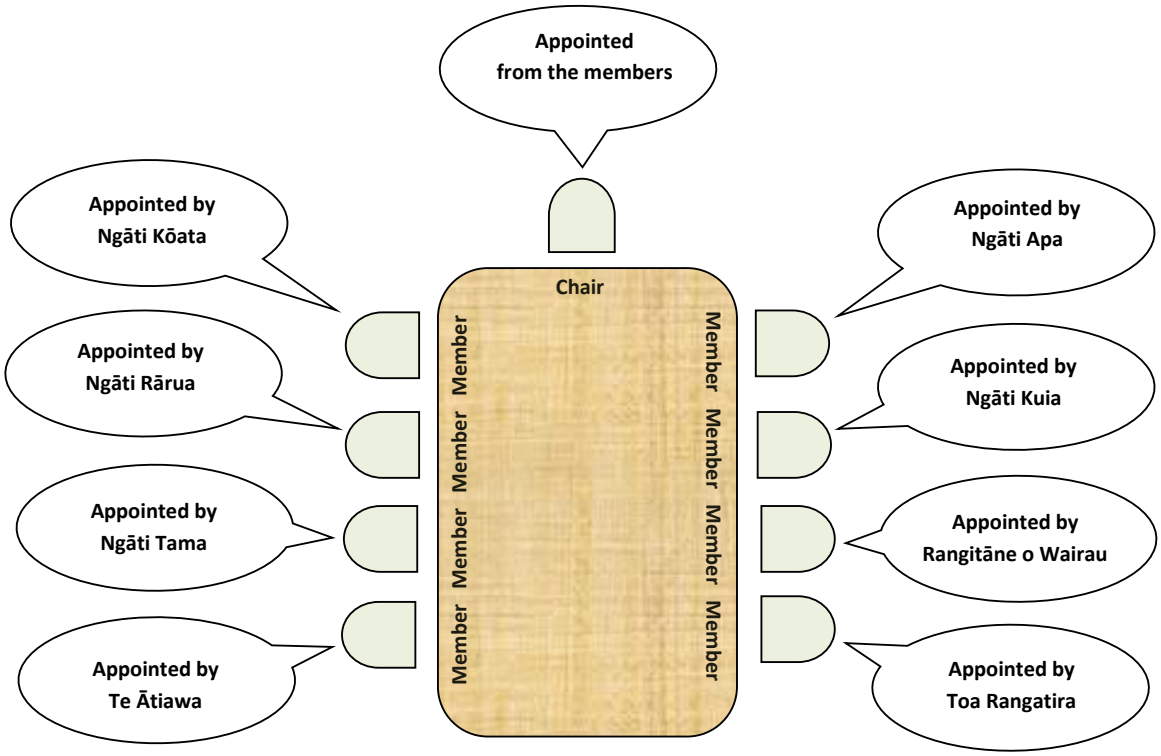
Purpose

The restoration, protection, and enhancement of the environmental, cultural, and spiritual health and well-being of the Kaituna River

In seeking to achieve its purpose, the Authority may have regard to the social and economic well-being of people and communities

Deemed joint committee of councils

Te Tau Ihu River and Freshwater Advisory Committee



Can be established under LGA but needs authority of bespoke legislation

Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014

Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014

Ngati Toa Rangatira Claims Settlement Act 2014

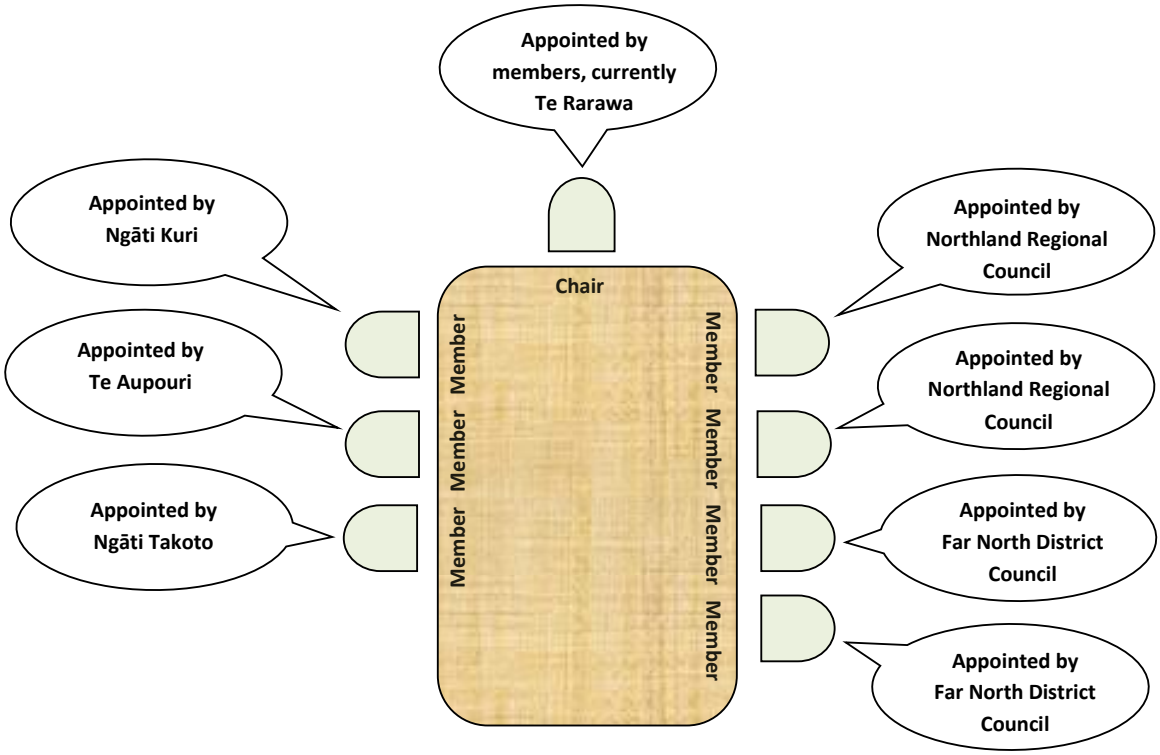
Purpose

Provide written advice, in reply to an invitation from a relevant council, in relation to the management of rivers and fresh water within the region of the council before the council makes any decisions on the review of a policy statement or plan under the Resource Management Act 1991; or starts to prepare or change a policy statement or plan under that Act; or notifies a proposed policy statement or plan under that Act

If agreed, provide advice on any other matter in relation to the Resource Management Act 1991

Statutory committee

Te Oneroa-a-Tohe Board



Can be established under LGA but needs bespoke legislation to make it permanent

Te Rarawa Claims Settlement Act 2015

Te Aupouri Claims Settlement Act 2015

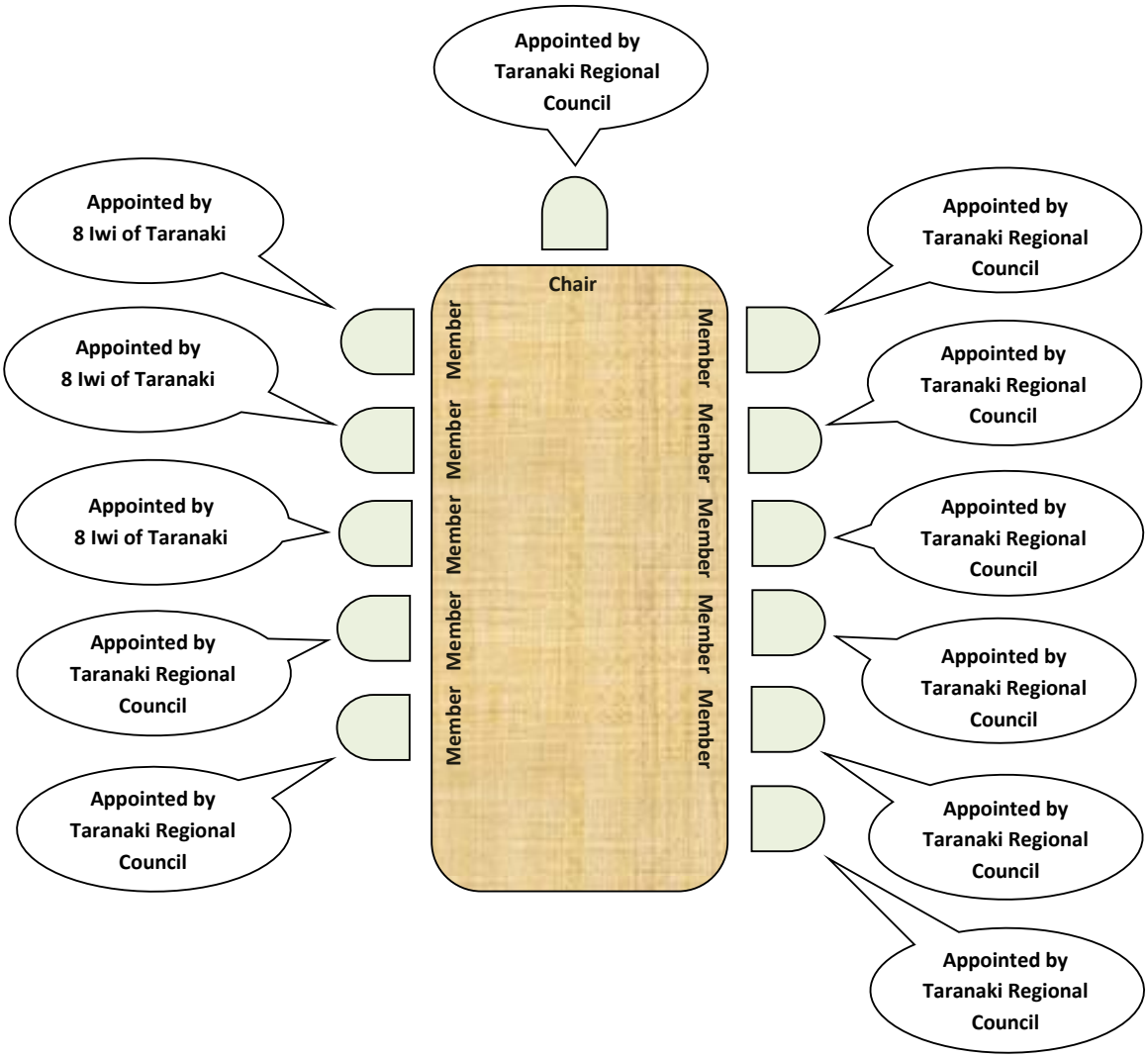
Ngāti Kuri Claims Settlement Act 2015

Purpose

Provide governance and direction to all those who have a role in, or responsibility for, the Te Oneroa-a-Tohe management area, in order to protect and enhance environmental, economic, social, cultural, and spiritual well-being within that area for the benefit of present and future generations

Deemed joint committee of councils

Taranaki Standing Committees (consents and regulatory)



Can be established under LGA but needs bespoke legislation to assure iwi membership

Te Atiawa Claims Settlement Act 2016

Ngāruahine Claims Settlement Act 2016

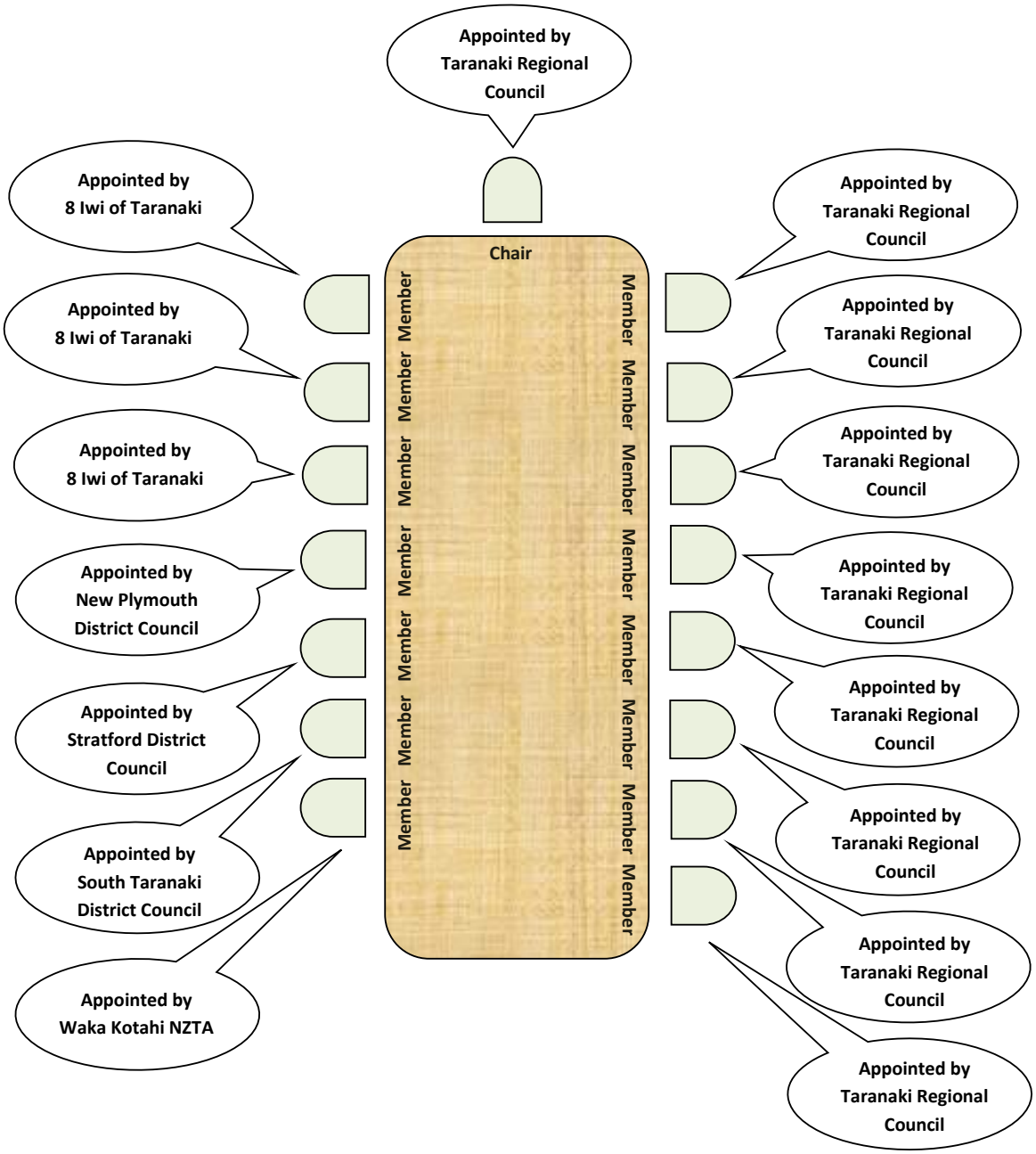
Taranaki Iwi Claims Settlement Act 2016

Purpose

Provide an effective mechanism for the iwi of Taranaki to contribute to the decision-making processes of the Council

Committee of council

Taranaki Standing Committees (policy and planning)



Can be established under LGA but needs bespoke legislation to assure iwi membership

Te Atiawa Claims Settlement Act 2016

Ngāruahine Claims Settlement Act 2016

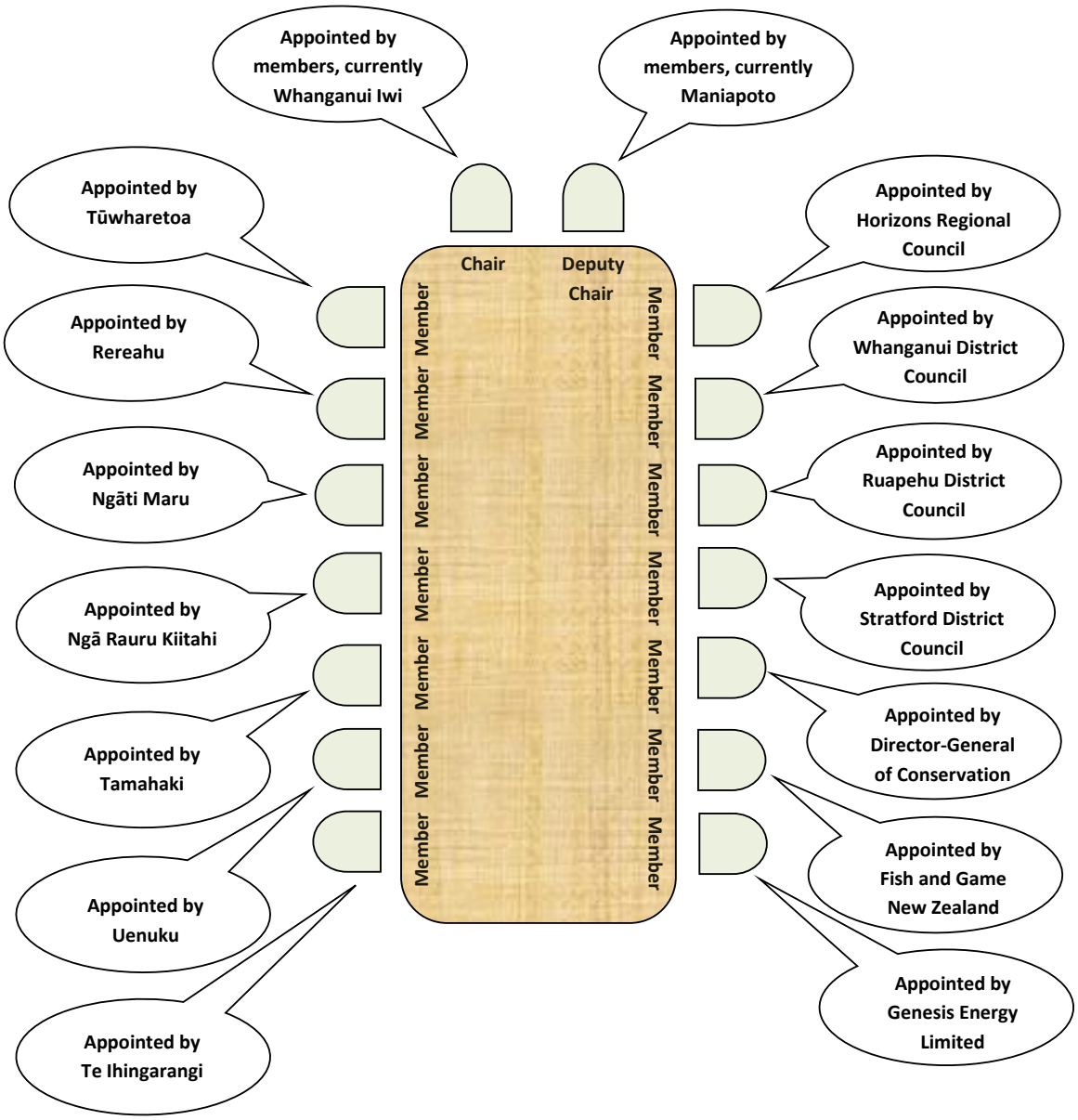
Taranaki Iwi Claims Settlement Act 2016

Purpose

Provide an effective mechanism for the iwi of Taranaki to contribute to the decision-making processes of the Council

Committee of council

Te Kōpuka nā Te Awa Tupua



Can be established under LGA but needs bespoke legislation to assure membership

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

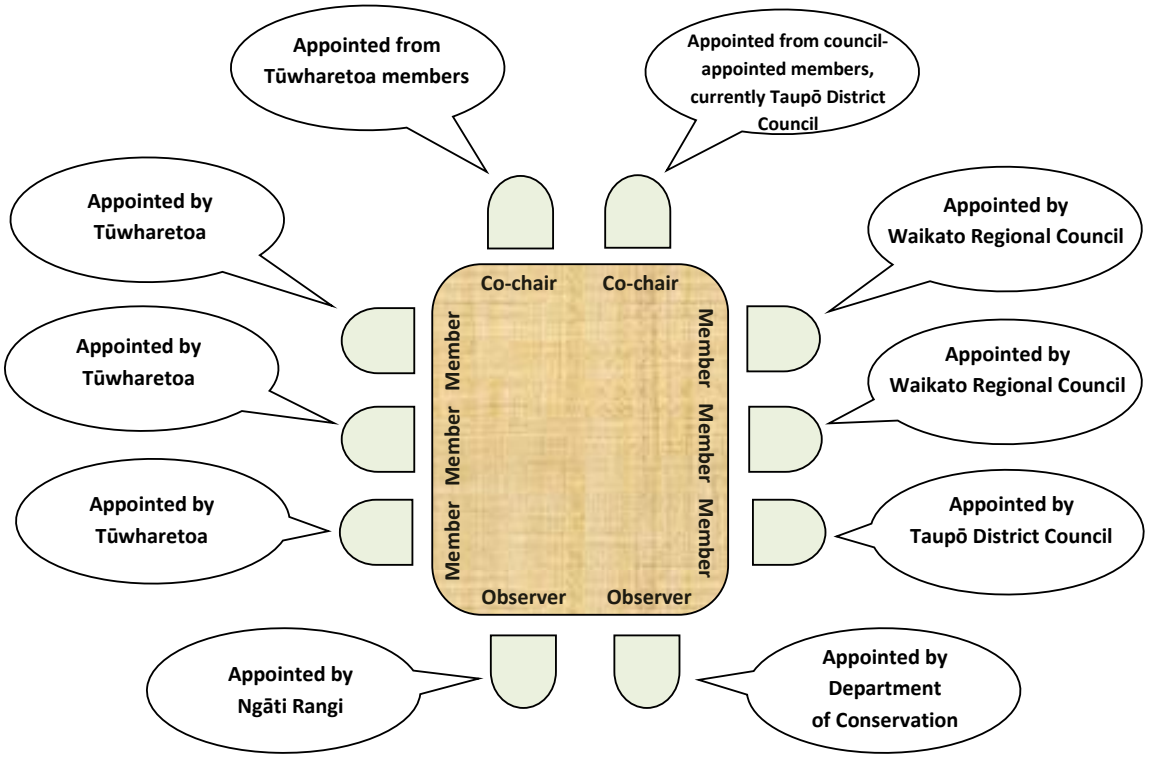
Purpose

Act collaboratively to advance the health and well-being of Te Awa Tupua

Develop and approve Te Heke Ngahuru

Deemed joint committee of councils

Te Kōpua Kānapanapa



Can be established under LGA but needs bespoke legislation to make it permanent

Ngāti Tūwharetoa Claims Settlement Act 2015

Purpose

Restore, protect, and enhance the environmental, cultural, and spiritual health and well-being of the Taupō Catchment for the benefit of Ngāti Tūwharetoa and all people in the Taupō Catchment (including future generations)

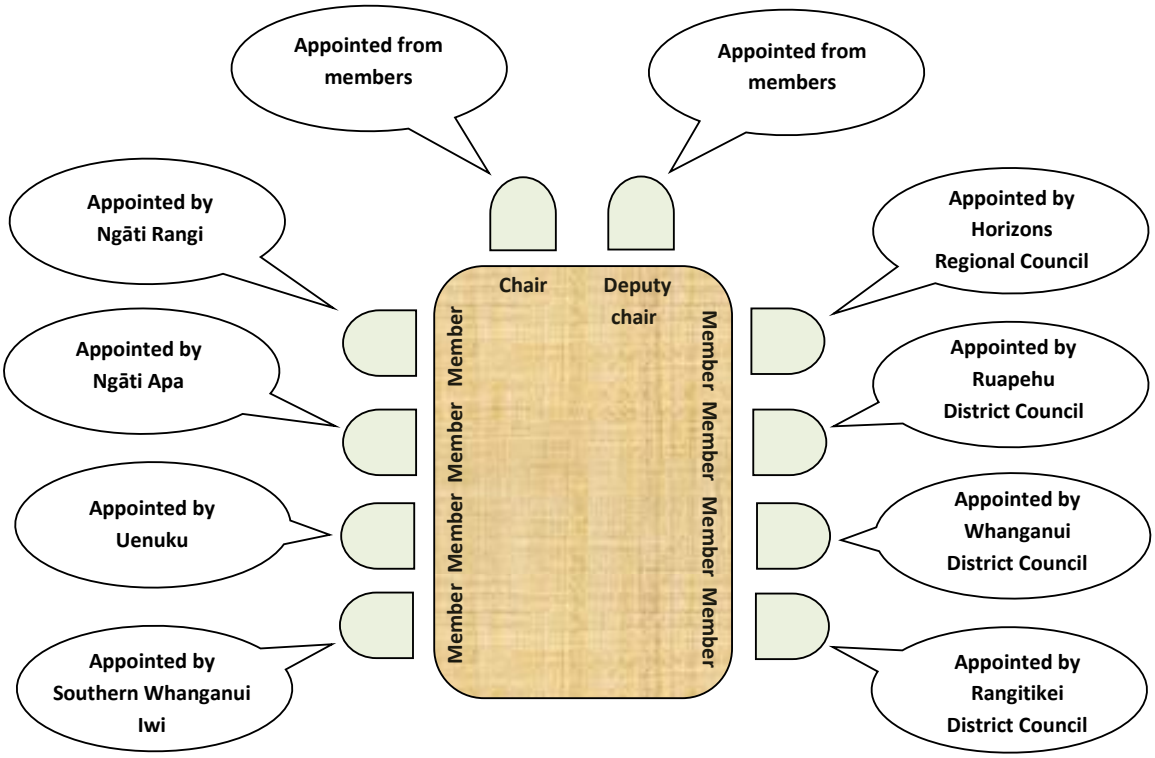
Provide strategic leadership on the sustainable and integrated management of the Taupō Catchment for the benefit of Ngāti Tūwharetoa and all people in the Taupō Catchment (including future generations)

Enable Ngāti Tūwharetoa to exercise mana and kaitiakitanga over the Taupō Catchment, in partnership with the local authorities

Give effect to the vision in Te Kaupapa Kaitiaki

Deemed joint committee of councils

Ngā Wai Tōtā o Te Waiū



Can be established under LGA but needs bespoke legislation to make it permanent

Ngāti Rangi Claims Settlement Act 2019

Purpose

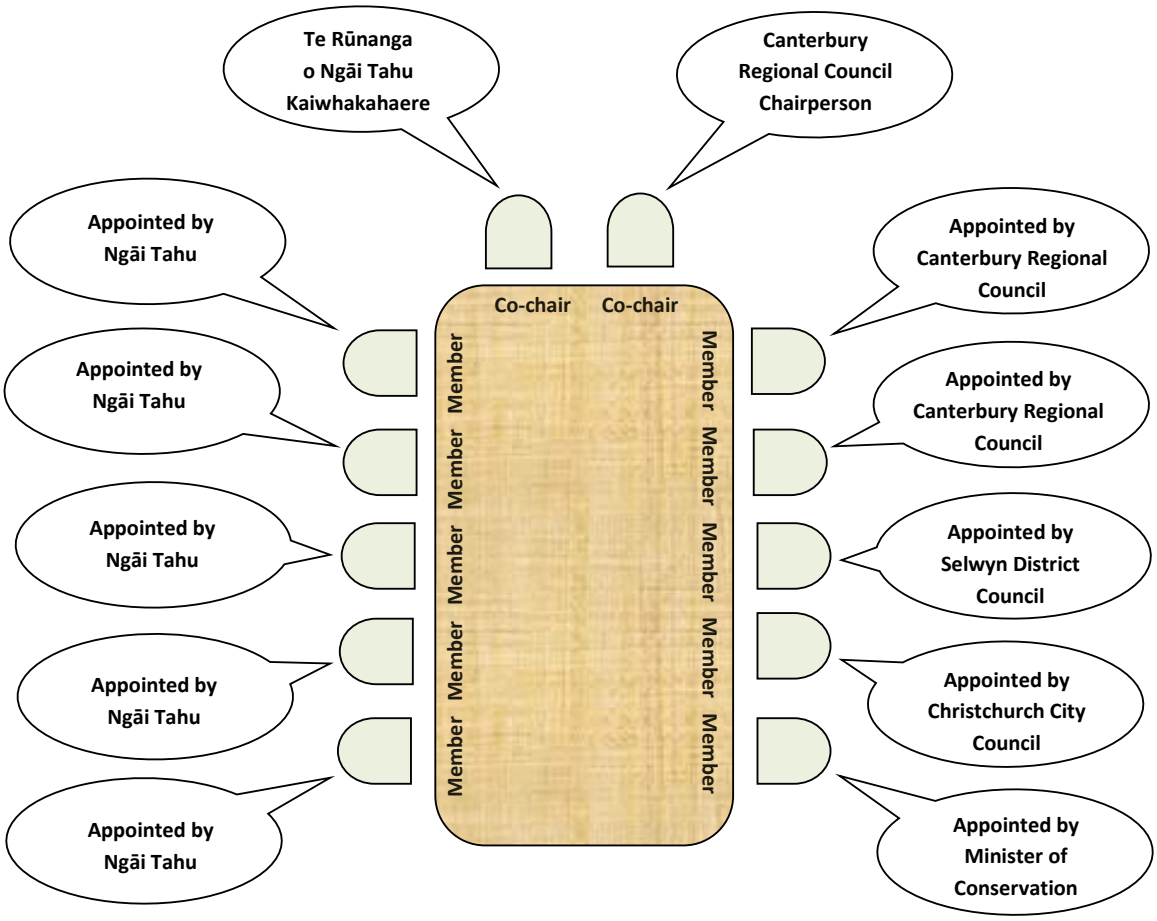
Provide strategic leadership—

- To promote Te Mana Tupua and Ngā Toka Tupua
- To advance the health and well-being of the Te Waiū-o-Te-Ika catchment
- To advance the integrated management of the Te Waiū-o-Te-Ika catchment, including through the co-ordination of the agencies with responsibilities under this Act or any other enactment

Give expression to the relationship of Ngā Iwi o Te Waiū-o-Te-Ika and their kawa, tikanga, and ritenga with the Te Waiū-o-Te-Ika catchment

Deemed joint committee of councils

Te Waihora Co-Governance Group



Does not require legislation

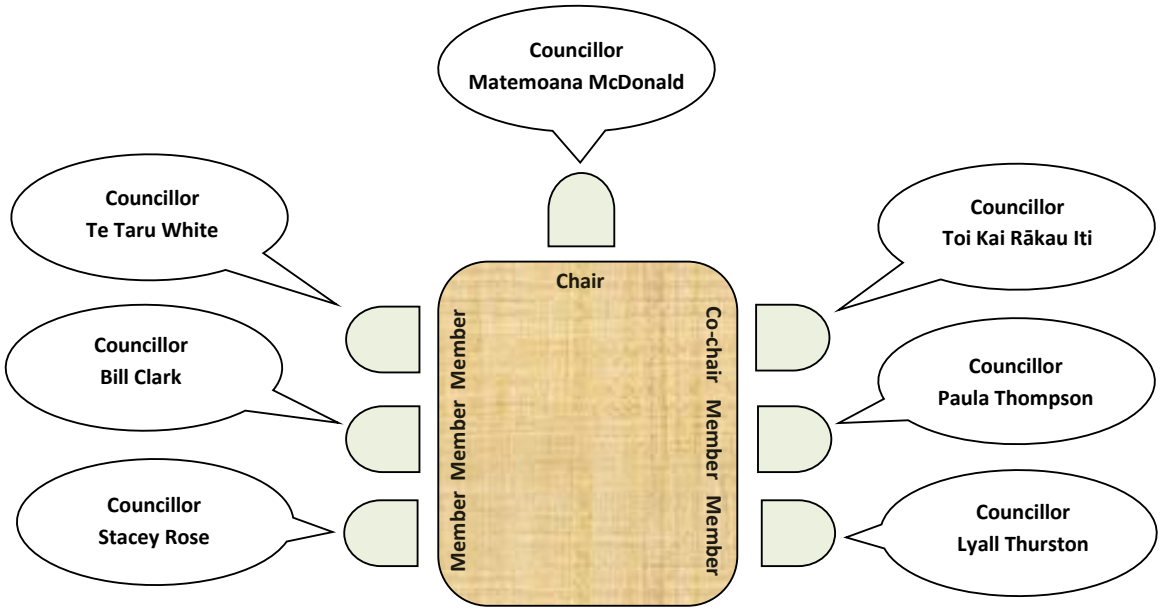
Te Waihora Co-Governance Agreement, January 2019

Purpose

Provide for an enduring, collaborative relationship between the Parties that includes shared exercise of functions, duties and powers under the Resource Management Act 1991, the Local Government Act 2002, the Conservation Act 1987, the Reserves Act 1977, the Wildlife Act 1953, and other relevant statutes

Contractual arrangement – not a statutory entity

Komiti Māori (Bay of Plenty Regional Council)



Can be established under LGA – does not depend on bespoke legislation

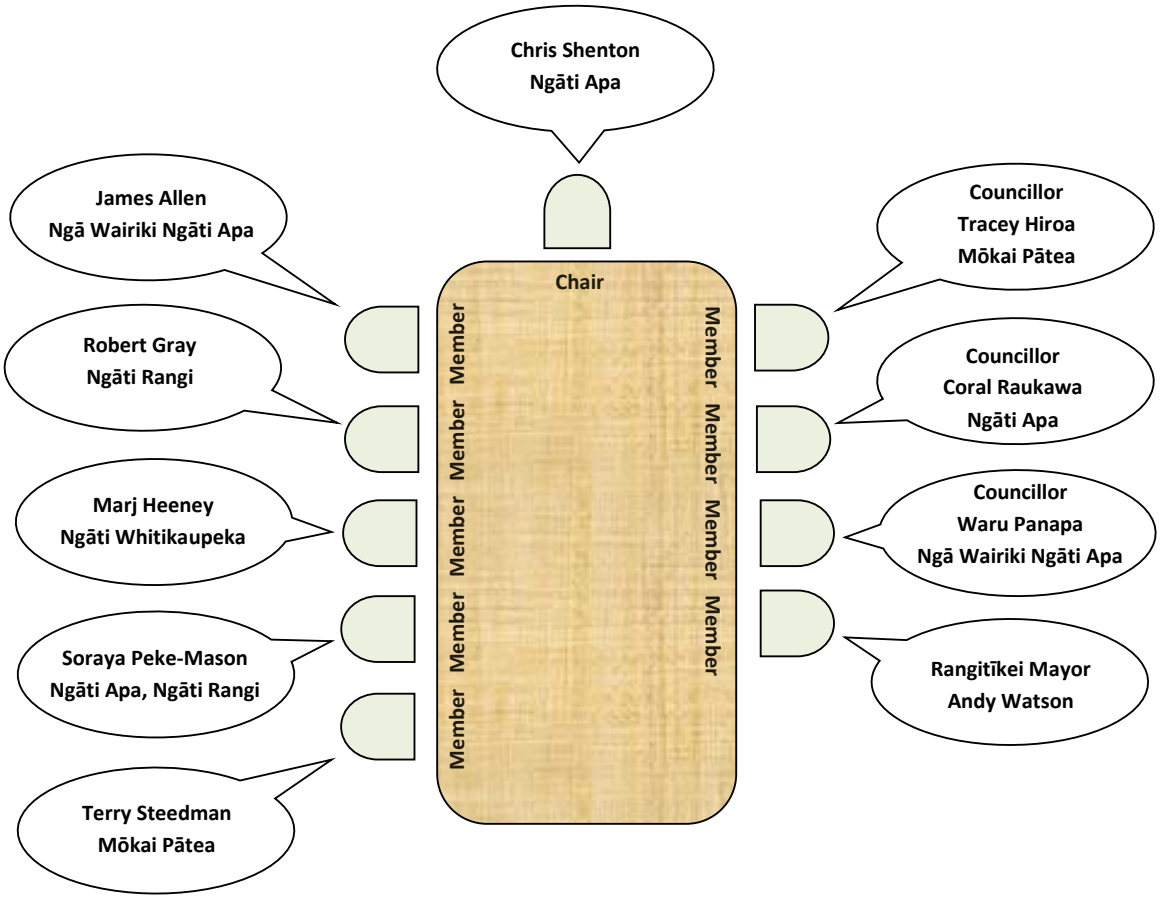
Local Government Act 2002

Purpose

Provide direction and guidance on Council's obligations to Maori in relation to growth of authentic partnerships with Tangata Whenua, strategic direction, emerging issues, legal requirements, effective engagement, awareness and understanding

Committee of council

Te Roopu Ahi Kaa (Rangitīkei District Council)



Can be established under LGA – does not depend on bespoke legislation

Local Government Act 2002

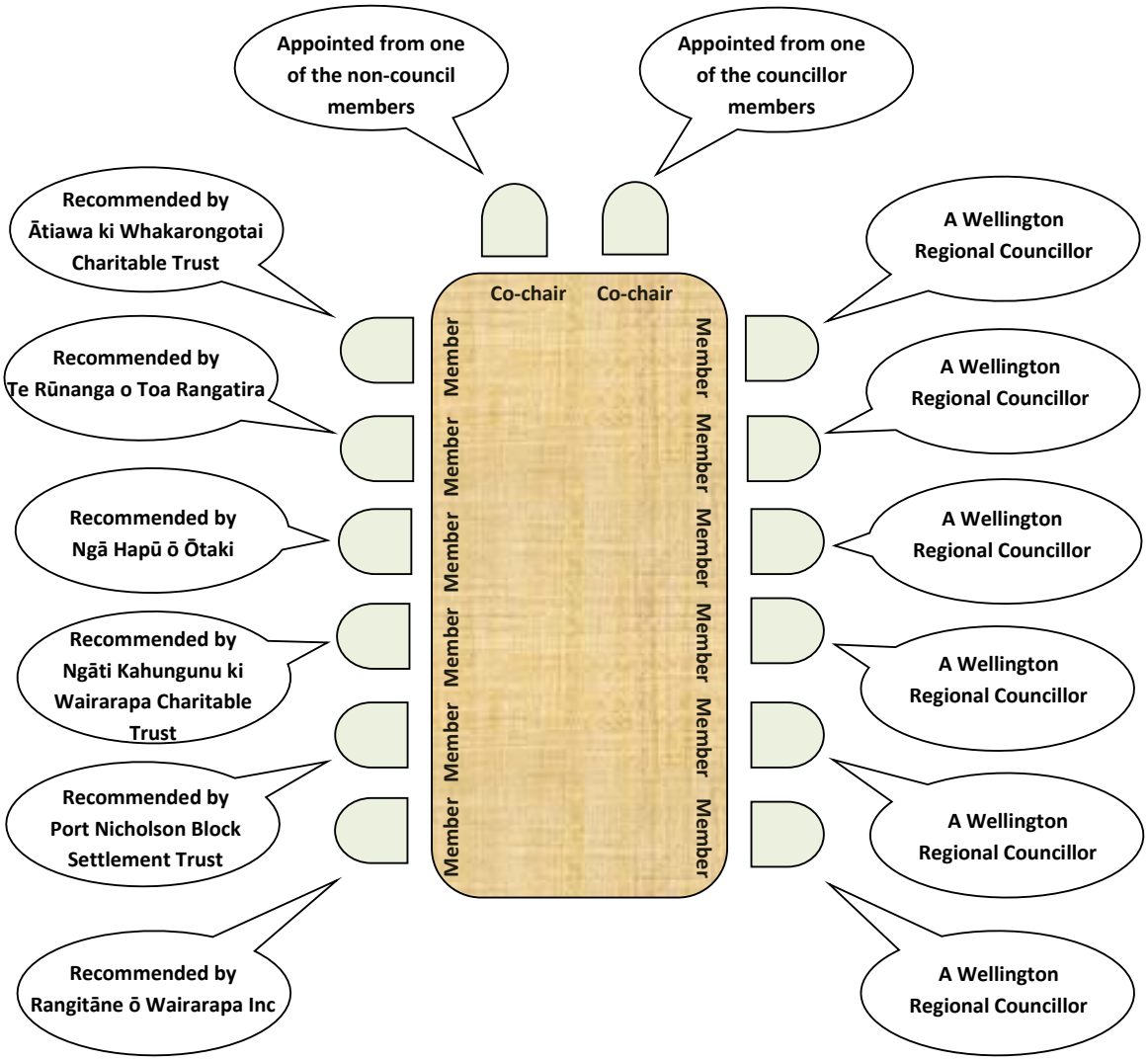
Purpose

Assist the Council to develop **a** partnership through engagement with tangata whenua

Identify and advise on issues of concern to tangata whenua, the Rātana Community and Council and facilitate resolution in the best interests of the residents, ratepayers, and tangata whenua of the Rangitīkei District

Committee of council

Te Upoko Taiao (Wellington Regional Council)



Can be established under LGA – does not depend on bespoke legislation

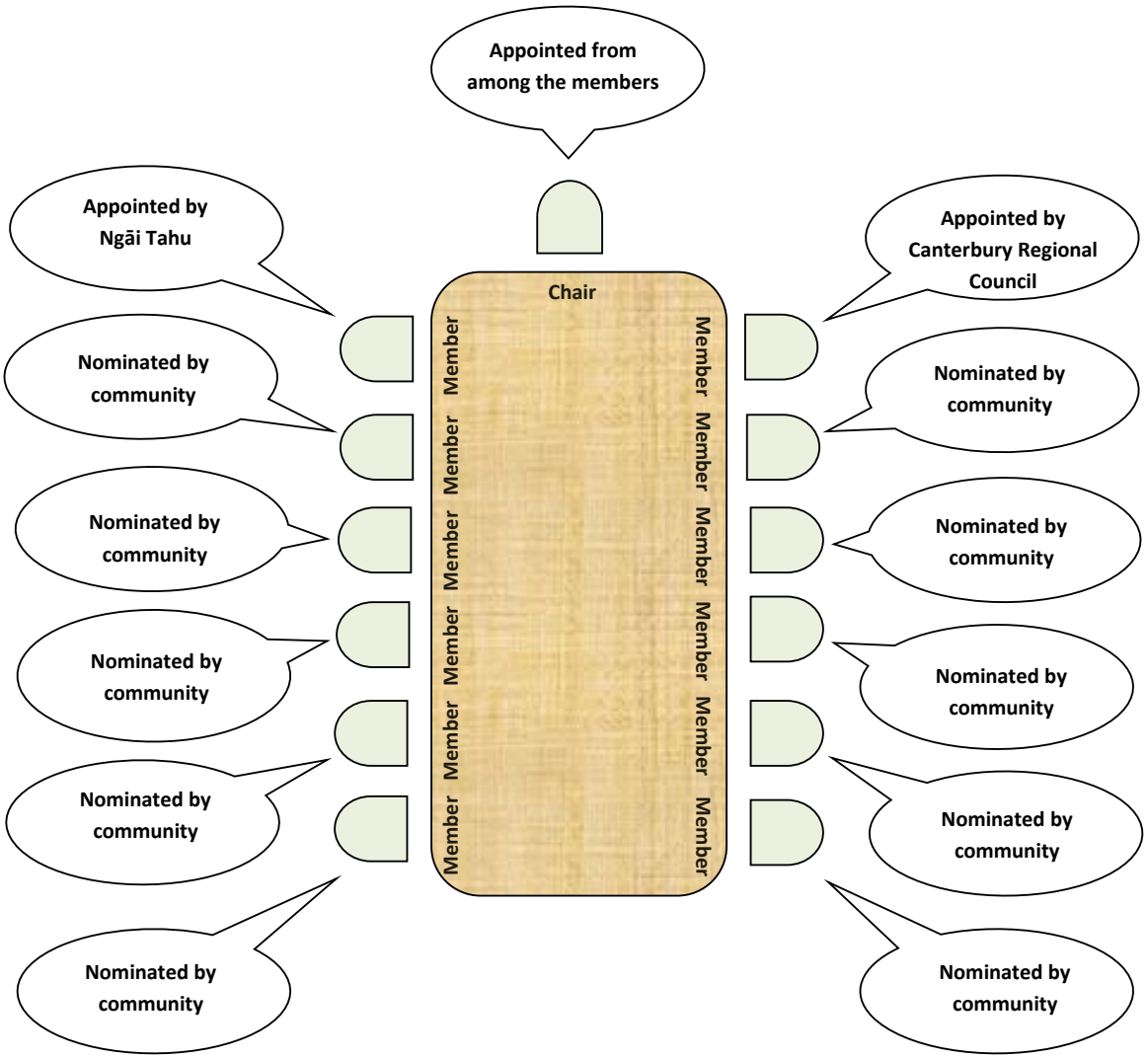
Local Government Act 2002

Purpose

Promote the sustainable management of the region's natural and physical resources by overseeing the review and development of regional plans, changes and variations for the Wellington Region, as required under the Resource Management Act 1991

Committee of council

Canterbury Water Zone Committees



Can be established under LGA – does not depend on bespoke legislation

Local Government Act 2002

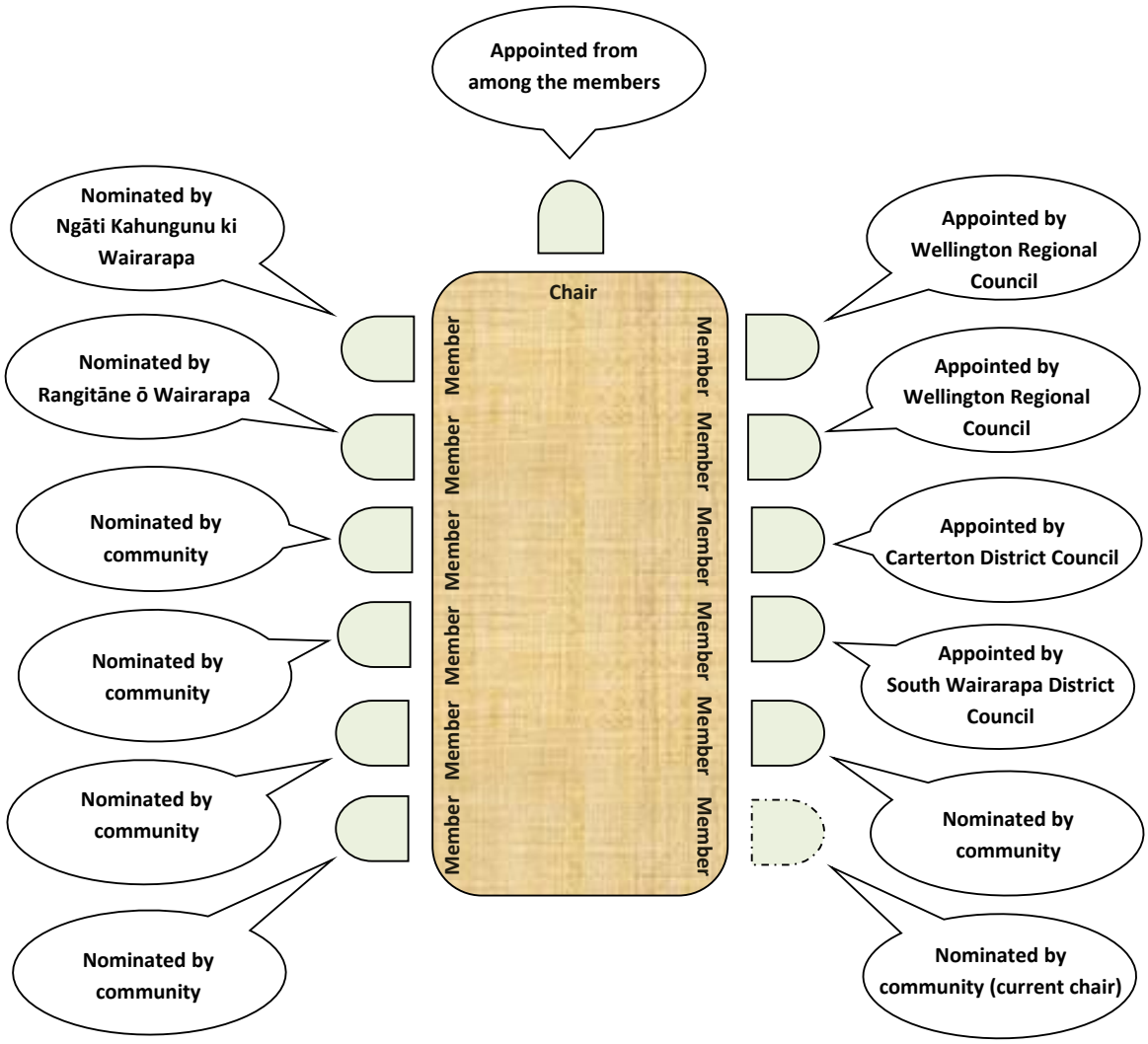
Purpose

Recommend actions and tactics to councils and other organisations involved in water management, which are recorded in Zone Implementation Programmes

Oversee and champion the implementation of these recommendations by Environment Canterbury and other Canterbury Water Management Strategy partners

Advisory committees of council

Ruamāhanga Whaitua Committee



Can be established under LGA – does not depend on bespoke legislation

Local Government Act 2002

Purpose

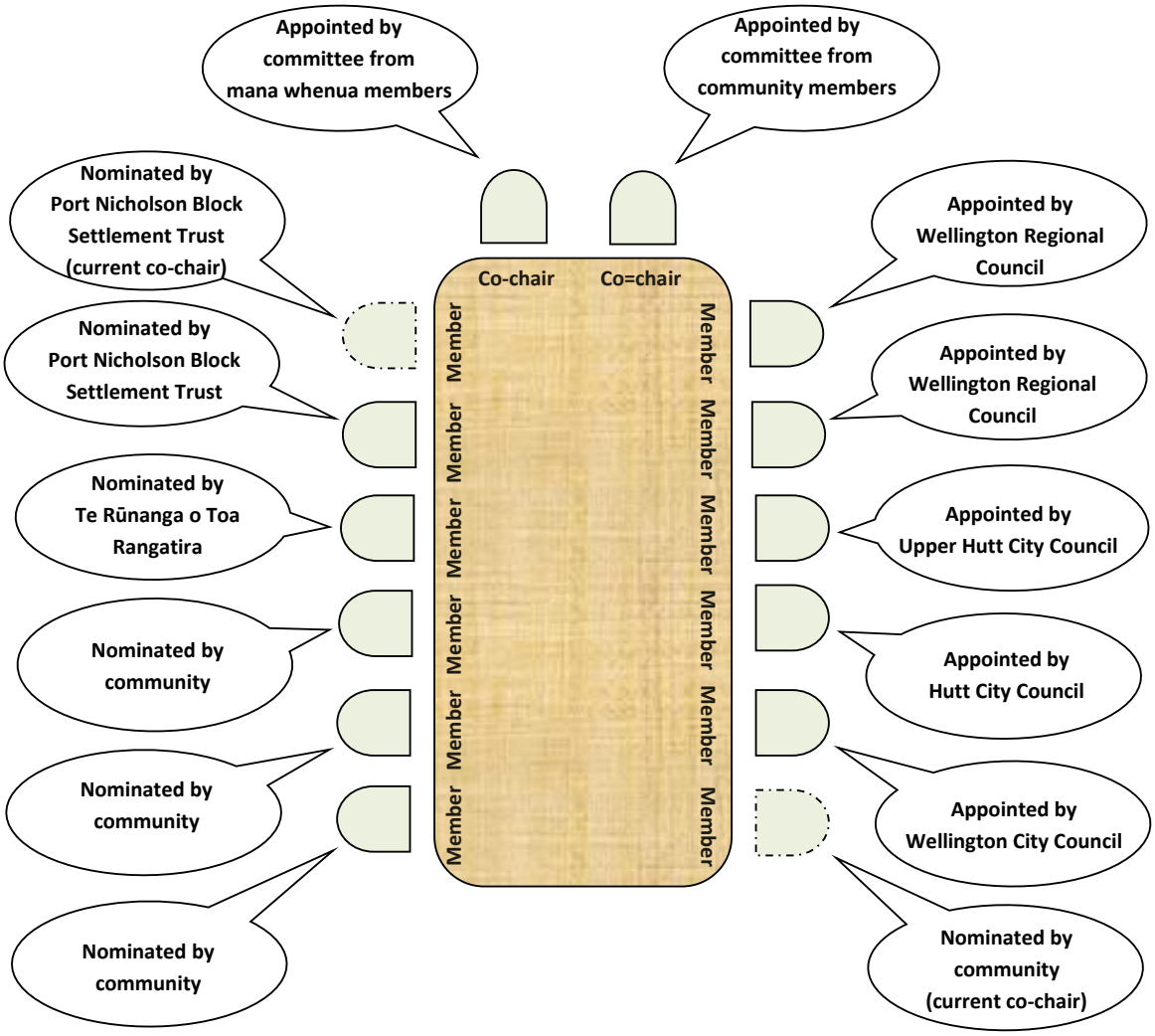
Advise Te Upoko Taiao – Natural Resources Plan Committee and Greater Wellington officers as the regulatory components of the Ruamāhanga Whaitua Implementation Programme (WIP) are integrated into the Proposed Natural Resources Plan

Recommend ways to maintain and improve the quality of fresh water in the Ruamāhanga catchment

Develop a Whaitua Implementation Programme (WIP) together with the community that outlines regulatory and non-regulatory proposals for integrated land and water management within the Ruamāhanga whaitua boundary, including measures to implement the National Policy statement for Freshwater Management

Advisory committee of council

Whaitua Te-Whanganui-a-Tara Committee



Can be established under LGA – does not depend on bespoke legislation

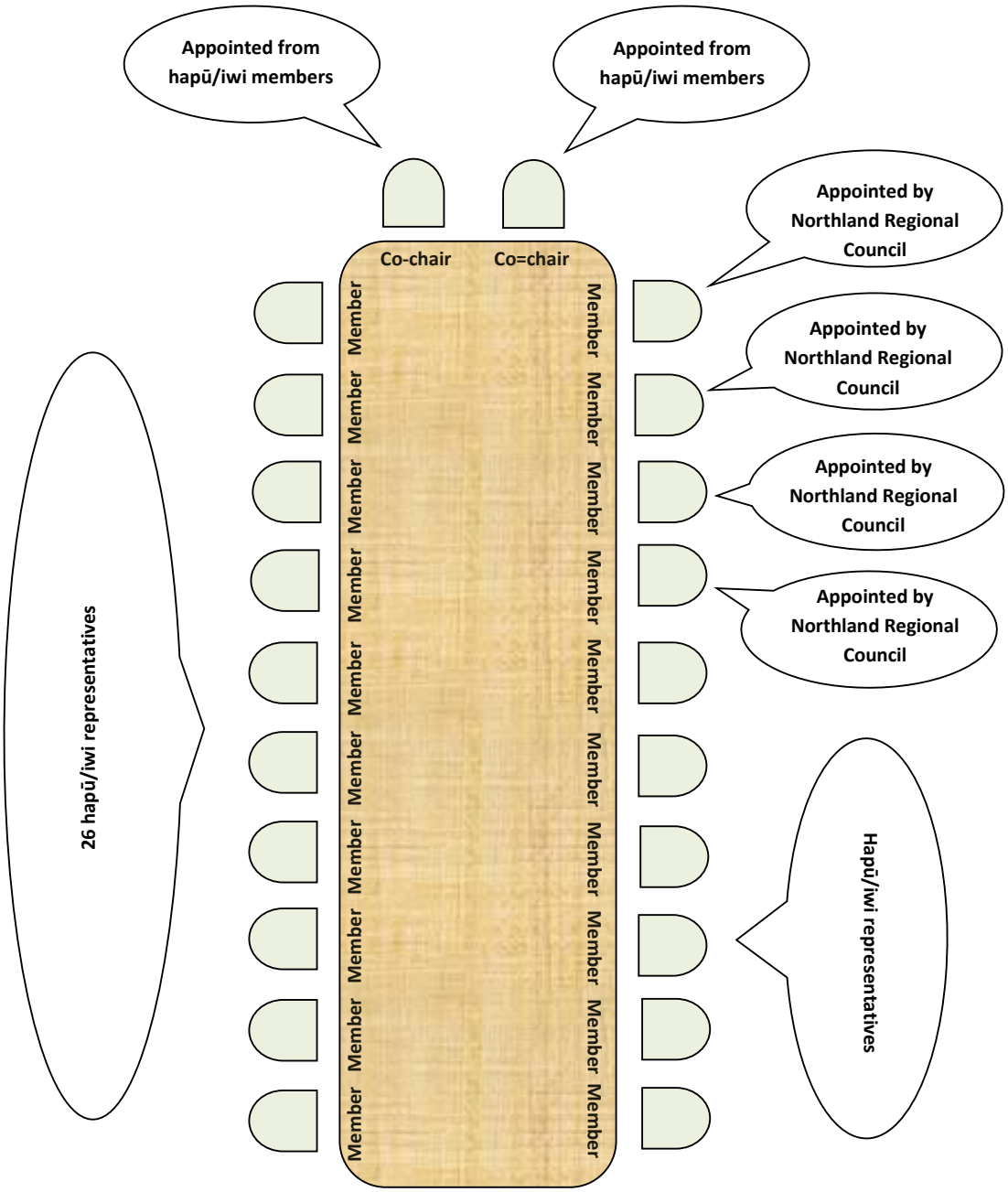
Local Government Act 2002

Purpose

Facilitate community and stakeholder engagement in the development of a Whaitua Implementation Programme, being a non-statutory report to Council containing recommendations (including regulatory and non-regulatory proposals) for specific plan provisions and work programmes for the integrated management of land and water resources within the whaitua boundary

Advisory committee of council

Tuhituhi o ngā Mahi O Te Kāhui Māori O Taitokerau



Can be established under LGA – does not depend on bespoke legislation

Local Government Act 2002

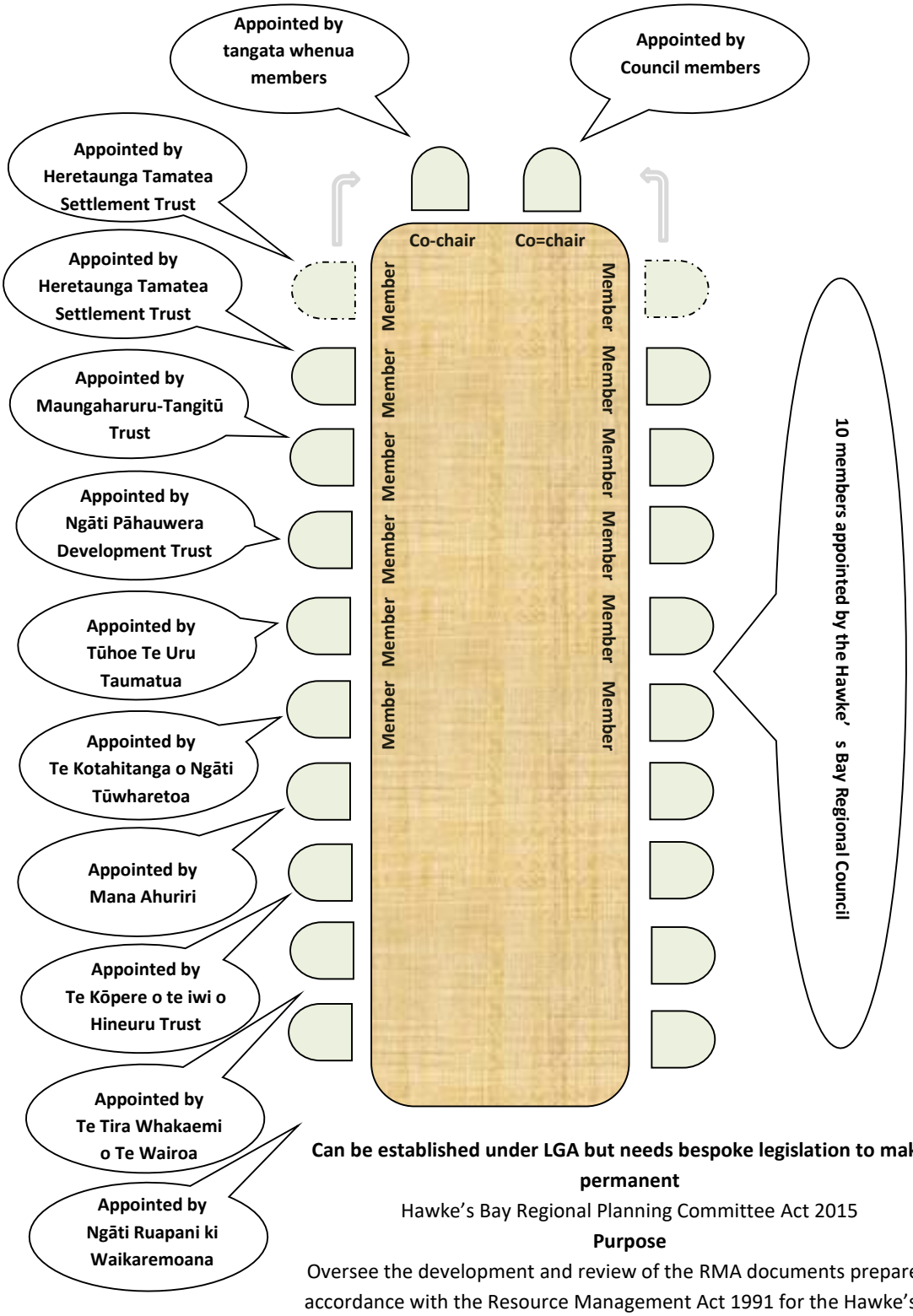
Purpose

Develop more meaningful relationships with Māori

Develop Māori capacity to participate in our decision-making processes

Standing committee of council

Hawke's Bay Regional Planning Committee



Can be established under LGA but needs bespoke legislation to make it permanent

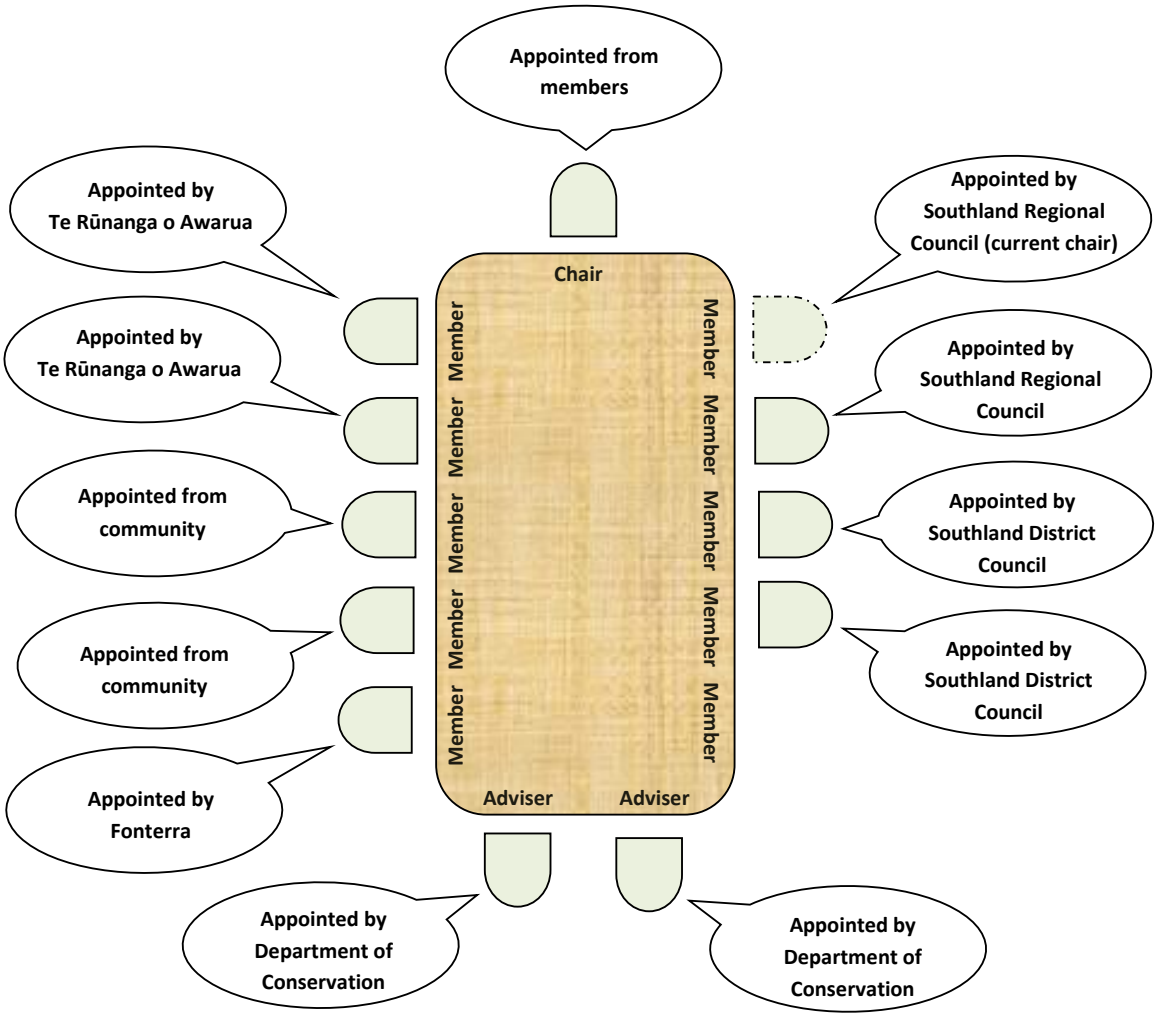
Hawke's Bay Regional Planning Committee Act 2015

Purpose

Oversee the development and review of the RMA documents prepared in accordance with the Resource Management Act 1991 for the Hawke's Bay region

Statutory body (deemed committee of council)

Whakamana te Waituna



Does not require legislation

Waituna Partners Group Agreement 2013

Whakamana Te Waituna Charitable Trust Deed 2018

Purpose

Promote the wellbeing of the people, the land, the waters, the ecosystems, and the life-force of the Waituna Catchment and the surrounding area, now and for the benefit of future generations

Protect and enhance the spiritual, physical and cultural values of the people, the land and the waters for present and future generations

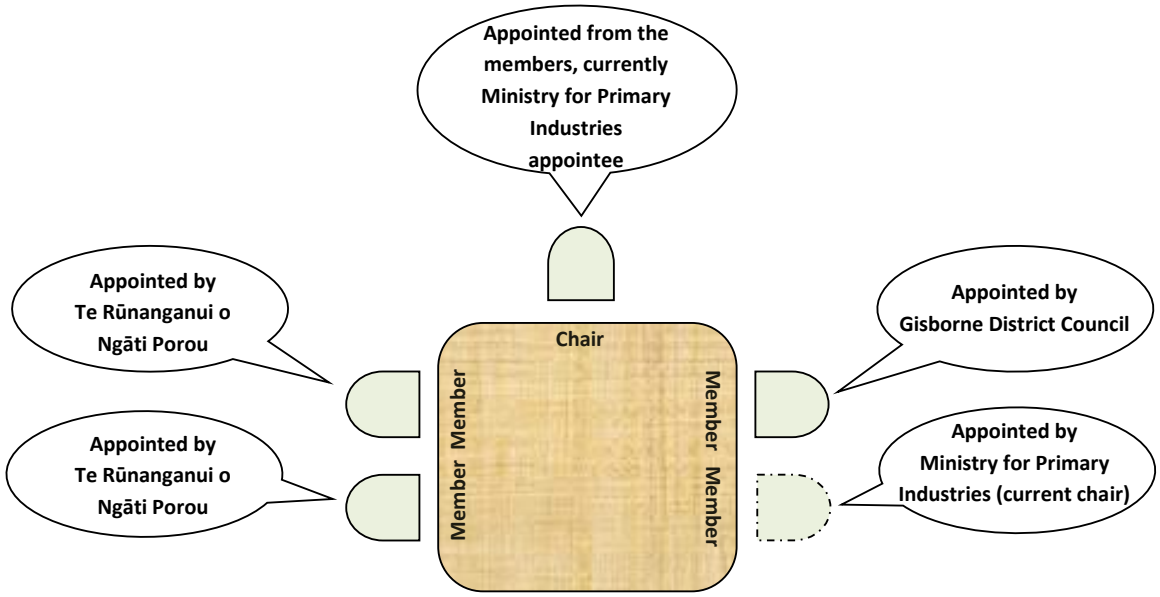
Restore and enhance the cultural and natural resources of the Waituna Catchment and the surrounding area as a mahinga kai

Protect and restore the indigenous ecological values present at the Waituna Catchment

Promote the educational values of the Waituna Catchment

Contractual arrangement – not a statutory entity

Waiapu Catchment Joint Governance Group



Does not require legislation

Memorandum of Understanding in Relation to the Restoration of the Waiapu Catchment 2014

Purpose

Work in partnership to restore the Waiapu Catchment over a 100 year period

Set the goals and mid-term objectives for, and oversee, the Waiapu Catchment restoration programme

Contractual arrangement – not a statutory entity

APPENDIX 2

Giving Effect to Mana Whakahaere: A Collation of Views from Tangata Whenua, Tūānuku Ltd, June 2021

Ngā mihi whānui ki ngā waka, ki ngā iwi,
ki ngā hapū e tautoko nei i te kaupapa.
Tēnei te tino mihi nunui ki a rātou ngā kaikōrero.
Kei te tino mihi hoki ki ngā whānau,
ngā kaitiaki i pupuri i te ahi kā i te wā kāinga.

EXECUTIVE SUMMARY

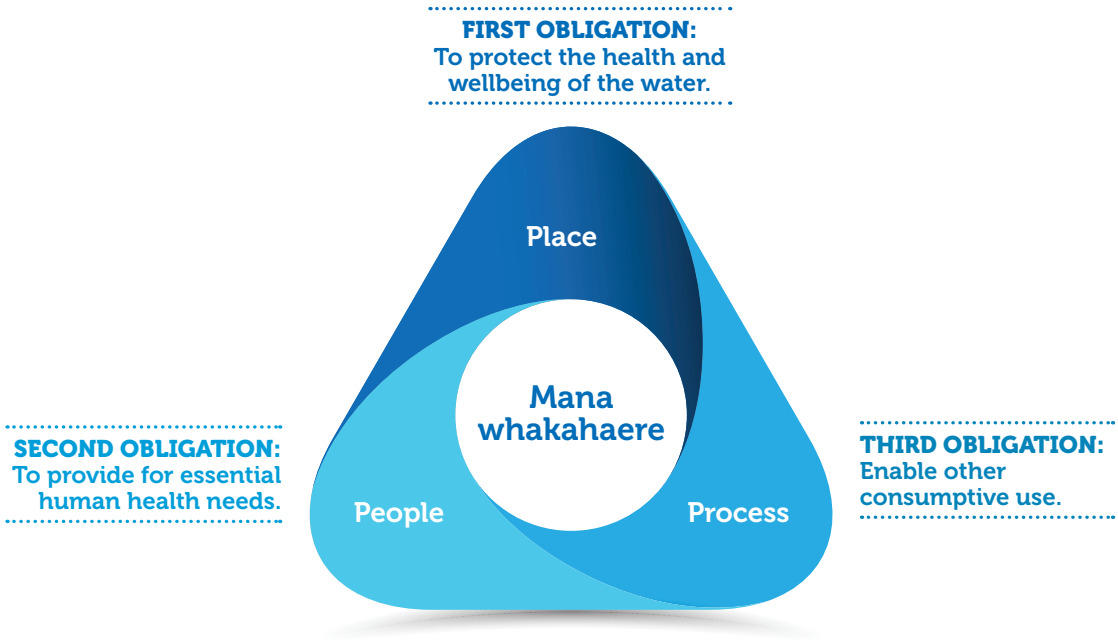
Aotearoa is amidst a time of freshwater reform as increased attention on the health of our waterways continues to drive renewed calls for the Government to overhaul current legislative direction. Tangata whenua are crucial to driving the changes to current and future management of freshwater and continue to apply sustained pressure on the Government to address the fundamental issue of tangata whenua rights and interests with freshwater. Tangata whenua have unique and enduring rights to wai Māori as a taonga that is inherited through whakapapa, this was affirmed, and should be upheld, under Te Tiriti o Waitangi.

In September 2020, the National Policy Statement for Freshwater Management 2020 (NPS-FM) came into effect and signals the changing landscape of freshwater management with Te Mana o te Wai now uplifted to a "fundamental concept". The NPS-FM includes changes that require increased involvement of tangata whenua in the use and care of freshwater, and the management of activities that affect freshwater. Regional Councils are directed to give effect to Te Mana o te Wai across all freshwater management guided by six principles: Mana Whakahaere, Kaitiakitanga, Manaakitanga, Governance, Stewardship and Care and respect.

The Ministry for the Environment (MfE) has initiated a Freshwater Implementation Programme that includes multiple projects aimed at supporting tangata whenua involvement in freshwater management. The purpose of the Mana Whakahaere Project is to develop guidance and best practice approaches to fulfilling the Mana Whakahaere principle of Te Mana o te Wai.

The Mana Whakahaere Project Team consists of representatives from the Kāhui Wai Māori, MfE and the Regional Sector. Tūānuku Ltd supported the Project Team with the methodology, data analysis and writing of this report. Positioned within a kaupapa Māori framework, a key objective was to understand how tangata whenua express and consider articulations of Mana Whakahaere within the context of Te Mana o te Wai. A total of 14 kōrero were carried out and included iwi, hapū and Māori landowners across the motu, all with varying organisational structures and status in relation to crown settlement.

Exploring perspectives on Mana Whakahaere through the framework of "People, Place and Process" provides some important insights into the implementation of Te Mana o te Wai. While the size, organisational structure and geographical location of the participants differed, there were strong and similar themes as well as precautionary statements across all the kōrero shared. These provide important guidance for local authorities who are charged with the responsibility to respond to the new directives of the NPS-FM through and across their statutory policies and plans.



Kōrero affirmed the value of mana whakahaere but noted that this is not the only or defining way to be kaitiaki and that tangata whenua have multiple and layered expressions anchored in their relationships to wai and the greater taiao. While the NPS-FM 2020 offers opportunities to improve freshwater management through the implementation of Te Mana o te Wai, this requires a shift in how Council responds to their legislative responsibilities. Despite sustained attention for fairer, more equitable provision of support to tangata whenua by Council, technical and financial resourcing still remains a critical barrier to involvement and decision making. This runs the risk continuing a legacy that fails to give effect to Te Mana o te Wai. A summary of the key points from the kōrero analysis are provided below.

Prioritise

- Council must prioritize engagement processes that respect the multiple and often overlapping interests of tangata whenua with freshwater. Limited engagement by Council with certain entities is not acceptable under the new directive of Te Mana o te Wai. The whakapapa that binds iwi/hapū/landowners with their wai and their greater relationships with the taiao must be the guiding premise for all engagement and decision making. To limit engagement to certain entities is to limit expression of kaitiakitanga which sits in contrast to the concept of Mana Whakahaere.

Invest

- Local government must invest in increasing their cultural capacity and understanding to improve engagement with tangata whenua and to ensure that the engagement mistakes of the past are not repeated. This is critical to more meaningful relationships and provides for greater tangata whenua involvement as directed by the NPS-FM 2020.

- There is no one size fills all approach to how this concept is defined or practiced so Council need to be guided by tangata whenua as to how they express and demonstrate what mana whakahaere looks like to them. This will vary in size, shape and scope and accordingly, will require Councils to be responsive and innovative in offering pathways for implementation.
- Importantly, mana whakahaere is about power. A commitment to investing increased decision-making power in mana whenua groups regarding water is an important consideration of Te Mana o te Wai.

Transform

- Tailored approaches to increasing capacity and capability that responds to the unique needs of tangata whenua must be prioritised, otherwise the implementation of Te Mana o te Wai will continue to be compromised.
- Supporting tangata whenua in their own aspirations for water is key to mana whakahaere, otherwise tangata whenua resources are tied up in reactionary work to the agenda that is set by local government. This detracts from the ability to focus internally on important work to reconnect with and restore waterbodies that are vital for a thriving hapū/iwi.
- Inconsistences across Councils can divert important resources and energy for tangata whenua who often have to engage with multiple local authorities. Te Mana o te Wai directs Councils to put water ahead of other agendas and to prioritise the first right of water to water and to commit to addressing the inconsistencies that have detracted from tangata whenua views and relationships to water – which impacts the ability to express mana whakahaere over their wai.
- The all-encompassing intent of Te Mana o te Wai and its ability to protect, sustain and enable, requires Council to embed systems and structures that have the capacity to respond and adapt to the outcomes of co-management and partnership arrangements between tangata whenua and Council. Iwi and hapū should be supported in the negotiations for unique co-management or partnership frameworks that they wish to see implemented in their rohe as a matter of urgency. Investigating the use of existing mechanisms within the Resource Management Act such as Section 33 transfer of powers, Joint Management Agreements, Te Mana Whakahono a Rohe Agreements should all be prioritised as part of the implementation of TMoTW.

As Aotearoa enters a time of freshwater reform, the call for transformative change to the way freshwater is managed is urgent. Attention must be directed to lessons from the past that have operated in a reverse model from the hierarchy of obligations of Te Mana o te Wai. Consequently, our freshwater, whenua and greater taiao have suffered deeply to maintain the life-giving bloodline bestowed to it by Papatūānuku. As kaitiaki, tangata whenua will always be an enduring voice of care, protection and advocacy for wai as they remain present and active across the changing legislative landscape.

WĀHANGA TUATAHI: NGĀ KŌRERO TIMATANGA

Introduction

As a result of sustained attention on the state of freshwater in Aotearoa, we are amidst a time of freshwater reform. There have been renewed calls for the Government to overhaul current legislative direction. Tangata whenua are crucial to driving both the changes to freshwater legislation and policy and are pivotal to the current and future management of freshwater. Tangata whenua have unique and enduring rights to wai Māori as a taonga that is inherited through whakapapa, this was affirmed, and should be upheld, under Te Tiriti o Waitangi.

On 1 September 2020, the National Policy Statement for Freshwater Management 2020 (NPS-FM) came into effect and replaces the National Policy Statement for Freshwater Management 2014 (amended 2017). The operative NPS-FM signals the changing landscape of freshwater management with the concept of Te Mana o te Wai carrying increasing weight as understanding, acknowledgment and necessity of Te Mana o te Wai as a fundamental principle to guide freshwater legislation gains momentum due to the sustained and collective voice of tangata whenua.

The NPS-FM includes changes that require increased involvement of tangata whenua in the use and care of freshwater, and the management of activities that affect freshwater. These changes include giving effect to Te Mana o te Wai, of which Mana Whakahaere is a key principle.

The conversation is ongoing and multifaced, but for tangata whenua the concept of mana whakahaere can provide pathways for transforming the freshwater management framework, in Aotearoa. Importantly, Mana Whakahaere recognises and supports the aspirations of tangata whenua in their roles and responsibilities as kaitiaki of wai Māori in their respective rohe.

It is important to note that there is complexity concerning the use of different phrases such as tangata whenua, mana whenua, kaitiaki, ahi kaa, landowner etc. Terms such as “tangata whenua” and “mana whenua have been the subject of significant litigation in various processes and can carry with them layered meaning and interpretation within the context of relationships with the Taiao and expression of identity. For the purpose of this report, “tangata whenua” is used as an all-encompassing expression unless expressly stated by participants to use another kupu.

Project Context

Prior to the adoption of the operative NPS-FM 2020, Te Mana o te Wai (TMotW) featured in the previous version but as strongly documented by tangata whenua, the original provisions of Te Mana o te Wai failed to provide the necessary weight to influence positive change, and as a consequence, this left local authorities with little guidance about how to adequately provide for Te Mana o te Wai in a meaningful way.

As directed by the Minister for the Environment, an independent review was issued in 2016 to evaluate the effectiveness of the NPS-FM. Given the myriad of challenges and complexities faced by regional authorities, it is of little surprise that the implementation of the NPS-FM and the effectiveness of such processes, vary across the motu.

A key finding of the National Policy Statement for Freshwater Management Implementation Review,[1] found that *'engagement with iwi and hapū is improving in many regions, but remains one of the biggest challenges for successful implementation of the NPS-FM.'* A key component of this relates to the need for Councils to support iwi and hapū capacity and resourcing to meaningfully participate in the implementation of the NPS-FM.

The Ministry for the Environment (MfE) has initiated a Freshwater Implementation Programme that includes multiple priority projects aimed at supporting tangata whenua involvement in freshwater management. The Freshwater Implementation Programme identifies the following areas that require guidance to achieve effective tangata whenua participation in local government:

a. Effective tangata whenua participation in Freshwater Plan preparation

b. Tangata whenua governance of technical plan processes including mahinga kai and NOF processes

c. Effective tangata whenua participation in Plan Hearing Processes

d. Effective tangata whenua involvement in resource consent processing.

e. Effective tangata whenua involvement in compliance, monitoring and enforcement.

Noting the areas requiring guidance above, the Freshwater Implementation Programme includes several targeted priority projects[2]. The Mana Whakahaere Project has been established as part of the Fresh Water Implementation Programme to focus on capability engagement with Māori as part of a wider objective to develop *"policy guidance and best practice approaches to fulfilling the mana whakahaere principle of Te Mana o te Wai via Māori partnership in freshwater governance, management and care"* (MfE Fresh Water Implementation Programme 2020).

The objectives of the Mana Whakahaere Project are to:

1. Assist regional councils with their statutory responsibilities under the NPS-FM 2020 in relation to Mana Whakahaere and tangata whenua engagement.

2. Support the practice of Mana Whakahaere to ensure successful engagement in the implementation of NPS-FM 2020.

[1] Ministry for the Environment. 2017. National Policy Statement for Freshwater Management Implementation Review: National Themes Report. Wellington: Ministry for the Environment. https://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/npsfm-implementation-review-national-themes-report.pdf

[2] FWI Programme includes several priority projects: Strategic Engagement & Communications; Te Mana o te Wai – Capability and Capacity; Mana Whakahaere – Engagement; Te Kupenga – Communications and Networks; Mahinga Kai – National Objective Framework; Identification of Topic Gaps for NPS; National Objectives Framework; Data and Systems Performance and National Environmental Standards.

The Mana Whakahaere Project is led by the Kāhui Wai Māori and MfE. The Project Team consists of representatives from Kāhui Wai Māori, MfE and the Regional Sector. As part of this project, the role of Tūānuku Ltd was to design and support Mana Whakahaere Kōrero (discussed below) and analysis of those kōrero. This report introduces the concept of Te Mana o te Wai within the context of the NPS-FM, the methodology employed for the Mana Whakahaere Project, and some key themes captured from the kōrero with tangata whenua. It is intended that these findings will assist Council to better understand how they can support Māori in their freshwater spaces and provide an analysis of Mana Whakahaere perspectives to support the development of this concept in practice by tangata whenua.

WĀHANGA TUARUA – TE MANA O TE WAI

How tangata whenua frame, understand and articulate Te Mana o te Wai is unique to the specificities of their relationships, experiences, and interaction with the taiao. However, within the legislative environmental planning space of Aotearoa, the term is coined in a broader sense as Māori continue to contribute insight into the importance of the concept to steer the way in which Aotearoa addresses the management of waterscapes in Aotearoa.

A key document that provides strong directive and a comprehensive description was produced by Kahui Wai Māori in a report to Hon Minister David Parker in 2019. Entitled *The Health of our Wai, the Health of our People*, Kahui Wai Māori provide a list of clear principles and obligations to guide all freshwater activities. These principles are anchored by Te Tiriti o Waitangi - as the founding legislation between the Crown and Tāngata Whenua - Te Tiriti upholds Te Mana o te Wai.

The concept of Te Mana o te Wai is based on a hierarchy of obligations to help conceptualise, prioritise, and manage the way freshwater management is considered which very clearly prioritises the innate life of water - mauri:

a. the first obligation is to protect the health and mauri of the water;

b. the second obligation is to provide for essential human health needs, such as drinking water;

c. the third obligation is to enable other consumptive use, provided that such use does not adversely impact the mauri of freshwater.

This relationship is concisely depicted in the following diagram:

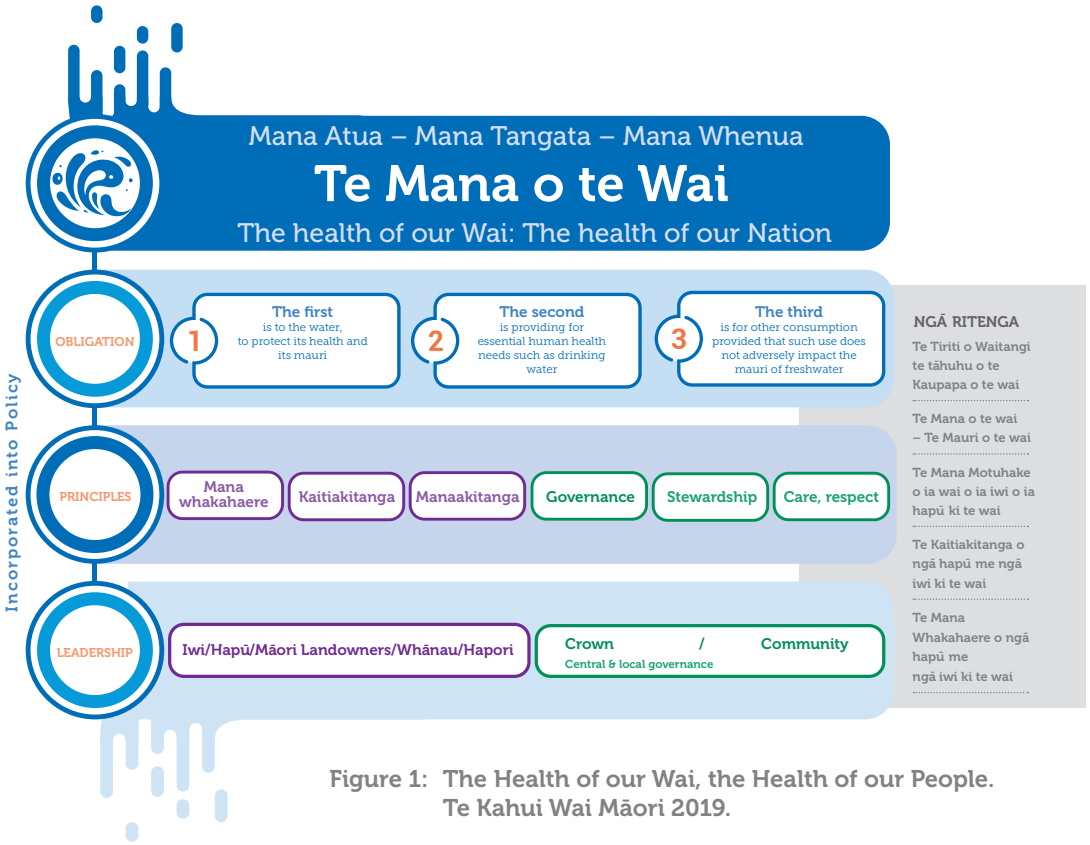


Figure 1: The Health of our Wai, the Health of our People. Te Kahui Wai Māori 2019.

The diagram above expresses how tangata whenua understand the mana that exists within the wai, and the whakapapa which binds mana whenua with and through the waters of their takiwa to ngā atua. The mana atua, mana tangata, mana whenua model sees the mana of water understood in a unique context which centre on the responsibilities handed down from tūpuna to mana whenua to protect, preserve and maintain ngā wai o te atua as captured in Ngā Ritenga above.

Importantly, this diagram depicts the relationships that are essential for successful management of our freshwater. It delineates not just the responsibilities of tāngata whenua but the obligation of the Crown as a Treaty Partner and the subsequent requirements for the Crown to acknowledge, respond and embed Te Mana o te Wai as the foundational base for all freshwater decision making.

Kahui Wai Māori send a clear directive to the government for immediate structural and system reform. Kahui Wai Māori advocate for a values-based approach which upholds the integrity of Te Mana o te Wai. This requires a suite of changes that need to be collaboratively integrated to affect progressive freshwater management – of which, Māori as leaders are central.

The critique of the current approach to freshwater management is well documented with some of the more pronounced issues centred on the complexities of freshwater rights more

generally, which is being exacerbated by a system of legislative policies that are ineffective in sustainably and fairly managing the use of freshwater resources. This is underpinned by the inadequacies of the Resource Management Act to provide clear direction to local authorities.

A necessary starting point for effective system and structural reform is the recognition of iwi/hapū rights. Te Kahui Wai Māori speak to the urgent need to address this kaupapa and that Māori have been in a state of readiness for a long time.

Other mechanisms put forward are:

- A declaration of a moratorium on further water takes and any further intensification of land use that will increase discharges to waters.
- Resource Management Act reform due to the inadequacies to accommodate for Māori water rights, interests, and obligations in RMA processes.
- Establishment of a Te Mana o te Wai Commission.
- Improve accountability and partnership of local Government.
- Develop te Mana o te Wai capability and best practice strategies.
- Allocation system founded on the hierarchy of Te Mana o te Wai.

NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

The operative National Policy Statement for Freshwater Management 2020 sees a marked difference to the pronunciation of reference to Te Mana o te Wai. The move from the Preamble to the inclusion as a "Fundamental Concept" indicated a strong change to the weight provided to it in providing direction in freshwater management.

A definition of Te Mana o te Wai is provided in section 1.3 (NPS-FM 2020 5) followed by a framework based on six principles:

CONCEPT

(1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

(2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

FRAMEWORK

(3) Te Mana o te Wai encompasses 6 principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, and these principles inform this National Policy Statement and its implementation.

(4) The 6 principles are:

(a) Mana whakahaere: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater

(b) Kaitiakitanga: the obligation of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations

(c) Manaakitanga: the process by which tangata whenua show respect, generosity, and care for freshwater and for others

(d) Governance: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future

(e) Stewardship: the obligation of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations

(f) Care and respect: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.

Councils are required to implement the Freshwater NPS in their policies and plans by 31st December 2025. It is important to note that while Te Mana o te Wai features much more predominately than the preceding version of the NPS-FM, the lead up to this point has been an evolution over a 9-year period with concerted and sustained pressure applied by tangata whenua to integrate the concept as a guiding korowai over freshwater management. This attention and momentum is necessary to ensure that local authorities set up systems and processes to enable the changes that Te Mana o te Wai requires for effective and meaningful implementation.

As noted in earlier sections, prior to the 2020 NPS-FW, the effectiveness of implementation of the former version was put under the spotlight in 2016 as Hon Minister David Parker issued a nationwide review of how Councils were tracking against the requirements of the NPS. The MfE Report entitled *"National Policy Statement for Freshwater Management Implementation Review: National themes report and regional reports (2017)"* revealed some significant challenges including representation, effective and timely involvement of iwi/hapū, the translation of engagement outcomes into regional plan rules, implementation and monitoring regimes and internal Council capacity.

Following on from this review, the Land and Water Forum noted the need for the Ministry for the Environment to develop a "freshwater reform implementation strategy" noting that the current state of implementation lacks an overall "roadmap" regarding the various government phases of water reforms. This has resulted in a disjointed approach to implementation. A Freshwater implementation strategy was suggested as a method to better connect, sequence, and align the various phases of the water reform (MfE 2017 6).

The Fresh water Implementation Programme: Te Mana o te Wai Priority Project has been established as part of the Fresh Water Implementation Programme which focuses on capability engagement with Māori as part of a wider objective to develop *"policy guidance and best practice approaches to fulfilling the mana whakahaere principle of Te Mana o te Wai via Māori partnership in freshwater governance, management and care"* (MfE Fresh Water Implementation Programme 2020).

WĀHANGA TUATORU – METHODOLOGY

Positioned within a kaupapa Māori framework, this project is designed to centre and prioritise the voices, perspectives, and position of tangata whenua in relation to their freshwater. A key objective was to understand how tangata whenua express and consider articulations of Mana Whakahaere within the context of Te Mana o te Wai. The design and application of a research methodology that was responsive and flexible to support the direction of the kōrero as determined by tangata whenua was important.

A total of 14 kōrero were carried out by a range of members from the project team and included iwi, hapū and Māori landowners across the motu, all with varying organisational structures and status in relation to crown settlement[3]. While kanohi ki te kanohi was preferred, timeframe and Covid-19 precautions resulted in the majority of hui being conducted by zoom.

Drawing on existing relationships, potential participants were identified by Kāhui Wai Māori, Ngā Kairapu (Regional Sector Special Interest Māori Rōpū), Ministry for the Environment and the Mana Whakahaere Project Team. Whakawhanaungatanga is essential to encouraging participation and it is through established relationships that provided an opportunity for the kōrero schedule to be appropriately adapted to the particular structures of the participating group/entity/rōpū .

Invitation to participate was extended across the motu with the intention of seeking a geographical spread, however pressure on iwi and hapū for time given their engagement in multiple processes made it difficult for them to participate within the limits of this project timeframe. In addition, some contacts indicated their preference for direct engagement with MfE on this kaupapa and chose not to participate[4].

A semi structured interview schedule was designed to guide, support, and encourage tangata whenua to determine the flow, content and direction of their kōrero. This approach to interviewing allows the nuances of each rōpū to be expressed within the context of Te Mana o te Wai as understanding their perspectives on freshwater management, current engagement capability and capacity and relationships are key to understanding possible opportunities and improved freshwater management structures.

Anonymity was a key component to the development of the methodology. Individual participants and the rōpū they were representing were not named in the research outputs and data was aggregated to ensure that descriptions of any entity structures and geographical identifiers/relationships to waterbodies were unidentifiable.

[3] Where a participant represents an Iwi entity, they are referred to in the report as an "Iwi Participant".

[4] A total of 22 entities were contacted but due to the reasons provided above and internal project management issues that were out of the control of Tūānuku Ltd, only 14 interviews were received for analysis.

WĀHANGA TUAWHA - SUMMARY OF FINDINGS

In this section some key themes that emerged from the kōrero are discussed. The diagram below illustrates some of these components and provide a useful structure in which to consider the findings of this project. Drawn from key themes expressed from the kōrero, the conceptualisation of Mana Whakahaere across "People, Place and Process" provides a framework to consider the broadness in which Mana Whakahaere is referred to in conversations regarding iwi/hapū/landowner relationships to their fresh waterscapes but also recognises the specificities that may exist for each hapū, iwi, landowner relationship.

The section below explores some of these themes in greater detail and highlights the importance of, and potential to, provide pathways of improved freshwater management that is determined by tangata whenua and supported through collaborative/partnerships with local authorities. Given the provision of Mana Whakahaere as a core principle in the implementation of Te Mana o te Wai, a key objective of this project was to gain insights into iwi/hapū and landowners articulations and expressions of mana whakahaere. While high level definitions are provided using kupu such as "authority", "right to self-autonomy"," rights and responsibilities" etc, focused kōrero can provide rich narratives to the nuances, fluidity and multiple applications in which the concept can be applied within the context of freshwater management.

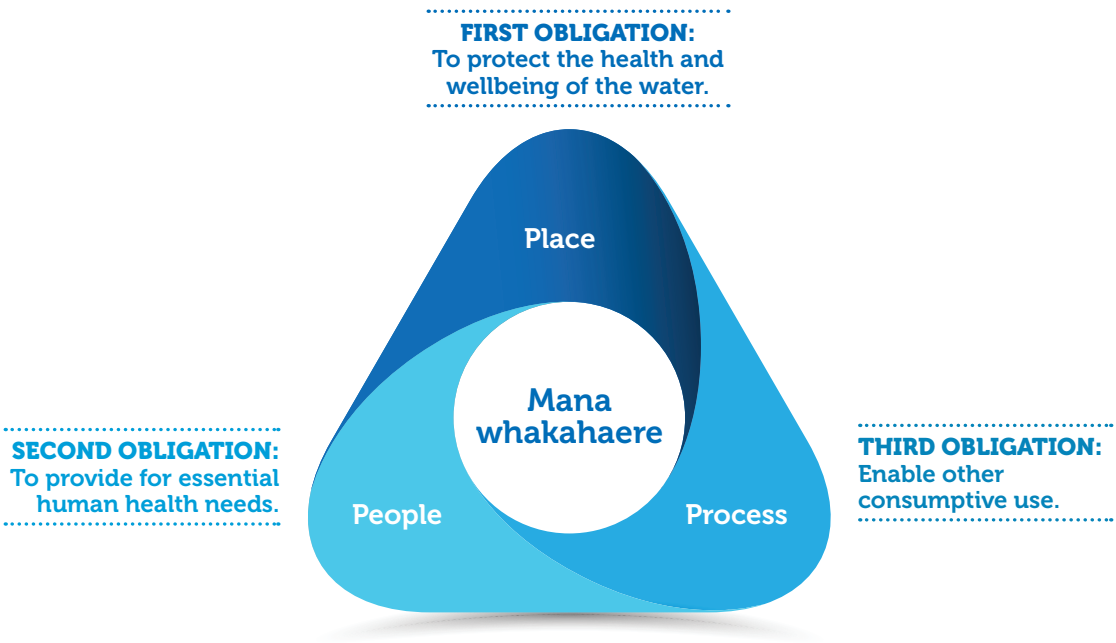


Figure 2: Framework for analysis of interview material

MANA WHAKAHAERE

Articulations of Mana Whakahaere by tāngata whenua are unique and are grown from the whakapapa and mātauranga of each iwi/hapū, Mana whakahaere is therefore, a concept that is difficult to express in a way that captures its full intent, however it is often associated with the rights and obligations of Māori to exercise their tino rangatiratanga or mana motuhake over their rohe/takiwa and *"emphasises the power of controlling destiny and is synonymous with Māori endeavours for self-determination* (Manaia 2001 23).

Kahui Wai Māori state that *"Māori receive the authority to practice mana whakahaere through the mana they hold as tangata whenua and Rangatira within Aotearoa"* (2021 41). It is through this inherited authority from mana atua and mana tupuna that provides capacity for tangata whenua to be leaders, protectors, restorers, enhancers, and advocates of the wai that flow under, through and on Papatūānuku.

Mana whakahaere enables mana whenua in their decision making, responsibilities and actions and is pivotal to freshwater reforms. Within the taiao, this often relates to the ability of mana whenua to realise their aspirations as kaitiaki for their wai, whenua, and the interconnected systems that rely on the healthy life-giving properties and regenerative capacity. In relation to freshwater management, Mana Whakahaere was traditionally considered the exercise of control of the waterbodies, including access to and management of the wai and its resources and exercised in accordance with tikanga.

Mana Whakahaere is described in the NPS-FM as a core principle informing Te Mana o te Wai and its implementation, and as the:

> *"Power, authority and obligation of tangata whenua to make decisions that maintain, protect and sustain the health and wellbeing of, and their relationship with, freshwater" (NPS-FM 2020 5).*

Councils are legislatively compelled in their development and implementation of their Regional Plan and associated policies, to demonstrate how they are giving effect to Te Mana o te Wai, which includes Mana Whakahaere. The NPS-FM provides explicit instruction that every Regional Council must actively engage with Tangata Whenua to determine how Te Mana o te Wai can be applied to water bodies and freshwater ecosystems in their rohe. This includes in decision making processes concerning the:

- Identification of a localised approach to Te Mana o te Wai.
- Amendments to the Regional Policy Statements, Regional Plans and District Plans.
- Implementation of the National Objectives Framework
- Development and implementation of mātauranga Māori and other monitoring.

(NPS-FM 2020 4.4 (1) a-d)

Given that relationships of iwi/hapū span across and through waterways, consideration as to how to reflect these multiple interests presents a challenge that requires appropriate mechanisms to support integrated management. Key values of whāngaungatanga, manaakitanga and kaitiakitanga provide essential insights into how mana whakahaere is exercised and expressed in the freshwater space.

Place

Anchoring the whakapapa of wai was a key theme across all kōrero, and often provided a starting point. Affirming mana whenua, the relationships to their wai and the associated responsibilities as kaitiaki framed these kōrero and demonstrated the enduring relationships with the taiao and the tūpuna mātauranga that guided their care of it.

> *"We are permanently invested in how the resource is being managed. (Iwi Collective)".*

As these kōrero spoke about ngā atua, taiao, wai, whenua etc, they highlighted how any discussion about freshwater management needs to be positioned within the wider context of tangata whenua values, knowledges, mātauranga, perspectives, tikanga, relationships and not uplifted "out of place" in which it is given its value. This is by no means an unfamiliar sentiment, it has been a strong critique of current western frameworks of environmental resource management by tangata whenua yet it still remains a predominant theme that often cuts across many environmental kaupapa, that is, that tangata whenua are still having these frequent and revolving conversations about the need for an holistic approach to sustainably and responsibly manage the taiao and the interconnected life providing ecosystems it provides – as oppose to a siloed perspective on waterways which isolates the natural system from its sounding environs.

This is captured in the NPS-FM through the directive that Te Mana o te Wai requires an *"integrated approach"* – Ki utu ki tai which acknowledges the interconnectedness of the whole environment and the interactions between *"freshwater, land, water bodies, ecosystems and receiving environments"*. While the current operative NPS-FM provides mandate to widen the lens of freshwater management through Te Mana o te Wai, some participants questioned the effectiveness of the NPS directives if Councils are not yet in a state of readiness (and willingness) to adapt and reform their systemic structures to allow for a transition to a freshwater management approach that considers all supporting ecosystems in the health and wellbeing of the wai.

Kaitiakitanga

Being able to express kaitiakitanga according to tikanga and traditional ways is critical for tangata whenua to ensure they are adhering to inherited ancestral responsibilities. Ensuring that natural environs and associated ecosystems within their takiwa are respected, preserved, and protected for the benefit of past and future generations remains a priority for tangata whenua. The inability or restriction to fully express kaitiakitanga has widespread impacts on iwi/hapū that extend through all dimensions of Māori wellbeing (taha tinana,

taha wairua, taha whānau and taha hinengaroa) which ultimately affects the environmental, spiritual, social, and cultural indicators of a well and healthy Taiao and community.

> *"For tangata whenua to properly exercise kaitiakitanga, mana whakahaere must be successfully actioned through structures that appropriately capture and enable those with relationships to freshwater to practice kaitiakitanga on all levels of freshwater care i.e. governance on decision-making bodies, input into policy and planning development, monitoring awa, and daily interactions with the awa"* *(Draft MfE Mana Whakahaere Guidelines 2021).*

Language

A key point expressed by one participant representing a multi-iwi river collective, was that a good starting point in Crown initiated projects, was the acknowledgement of the whakapapa of these terms that are being discussed. Concepts such as Te Mana o te Wai, Kaitiakitanga, Mana Whakahaere have an innate and intrinsic wairua to them that tangata whenua experience and express through their relationships with the whenua, with each other and wider taiao, they state:

> *"We contribute concepts and ideas like te mana o te wai, mana whakahaere, kaitiakitanga but then pakeha institutions take possession and control of it when they shouldn't be in charge of it"* *(Multi Iwi River Collective).*

As one participant noted, articulating what those kupu mean can be challenging on several levels including the risk of isolating terms out of (place) context, intent for which the definitions are being applied (and by who), and the problematic nature of compartmentalising these concepts for certain agendas. These can be difficult processes for tangata whenua to participate in when they are understood in more interconnected and holistic ways through lived experiences. This rōpū goes on to state:

> *"When you have new concepts brought in, the nitty gritty is around how these concepts are adopted, little thought is given to how that concept is communicated and how that concept requires change in the agency itself, Government want the ideas but they want to shape them, often they miss the point that when you provide a concept there needs to be work done to identity "what does it mean?", how can we roll this out? how can we communicate this to non Māori?, how do we communicate it when different iwi might refer to it in different ways?, different narratives, how do we deal with that? – all too often it is bundled up in a too hard basket and put on the back shelf and they do what they want to do anyway, that's a denigration of the koha that that concept was given in"* *(Multi Iwi River Collective).*

This kōrero was extended by some participants to include what they saw as dilution of the kupu through the integration into Council processes without the level of acknowledgement, understanding and obligation that is associated with the concept. In addition, the frequency in which it was referred to, how they have been appropriated, litigated, and reduced can result in tokenistic inclusion into policy. This sentiment was often the prelude for why

tangata whenua need to be present and active in the implementation of how Councils give effect to the terms that are embedded within resource management legislative frameworks;

> *Councils don't really 'get' the depth and layered meanings of our kupu and so a large part of our role as kaitiaki really comes down to ensuring that our relationship to water and place is understood by Councils but by all who use our taonga. We have endured a vast range of kupu that have been used to push for ultimately what we see as our rangatiratanga over lands, waters and ngā taonga katoa – these kupu are continually defined and redefined by others but our role still stays the same – we are kaitiaki borne of this land working for this land, regardless of how that is discussed at the policy level that will always be our rohe (Hapū participant).*

A strong theme that came across in the kōrero was the actual use of the term "Mana Whakahaere". Some participants felt there was a presumption that because the term is included as a principle of Te Mana o te Wai, that the term is familiar and resonates to all tangata whenua. As described by one hapū;

> *"We refer to ourselves as mana whenua and because of that, we have mana whakahaere but it isn't really a concept that we utilise on a day to day basis. Mana motuhake and tangata whenua are used often but actually more often than not we talk about ourselves as kaitiaki: (Hapū participant)".*

This was echoed by another Iwi participant, who stated that Mana Whakahaere was not a phrase they used to describe their rights as kaitiaki over their wai, they preferred mana motuhake or rangatiratanga. However, it was noted that both the iwi and hapū participants spoke to the importance of being present and active in freshwater management and so any opportunity (and where capability and capacity allowed) to do so was embraced:

> *"Council's still get a bit scared when you use terms like mana motuhake and rangatiratanga so mana whakahaere could be a useful phrase" (Iwi participant).*

> *"Regardless of the terms, we actively seek recognition, provisions and ultimately the return of our decision-making ability over water and our wider land and environment. Whatever words get us there I guess we will engage with as and when needed" (Hapū participant).*

A Land Trust added that it was a symptom of a system that is the "wrong way around" and that Councils should not be trying to get whānau to give these terms meaning:

> *"Those kupu are modern day kupu that were invented for a Crown process for a reason. They have been good tools, but they are not relevant to our people and we should not be trying to make those kupu relevant. Otherwise, you are making something esoteric and academic when it should be very practical. The more things can be practical to what people need and how they live their lives, it is mana whakahaere (Land Trust Participant).*

People

Whānaungatanga

Whānaungatanga centres on the whakapapa and relationships between ngā atua, te taiao and ngā tangata. Whakapapa provides the foundation of kaitiaki rights and responsibilities of tangata whenua. What is more, within whakapapa are concepts, values and practices that help to guide the relationship that tangata whenua have with the natural environment and provides a framework for decision making that ensures the struggles and triumphs of ancestors are taken into account and that future generations are provided for in a way that continues the unique relationship between people and the environment.

Whakapapa is therefore an essential component to all freshwater discussions as it is these inseverable relationships between people and the land that sit at the heart of iwi/hapū rights, interests and *"mana whakahaere structures in accordance with leadership lines"* (Draft MfE Mana Whakahaere Guidelines 2021).

Relationships

> *"Who are the mana whenua? Who is practicing ahi kaa? It is important that it is the people who are living and working with the land. For us, its been a journey of taking control of our future, it requires a lot of skills, thinking, strategy, ability to execute and implement. We're a proven model in our big region. We can govern, manage and add value to community Kaupapa"* *(Iwi Collective).*

The network of relationships that some entities must navigate are complex, both internally as representatives of their iwi/ hapū/ whānau/marae/land trusts, but also external relationships with Crown agencies on a national and local scale. Understanding the structure of the participating entities and the relationships of iwi/hapū/land trusts that share interests in the same waterbodies was an important part of understanding the unique specificities which shape and inform their perspectives not just of Te Mana o te Wai but also how associated arrangements, partnerships and relationships with local authorities can give effect to Te Mana o te Wai. The kōrero often began with a snapshot of the current structures of the rōpū the participant(s) was representing and a summary of current freshwater processes they were involved in. Not surprisingly, reference was often made to the fact that tangata whenua historically have always been kaitiaki and practiced a conduct of care for the taiao but since the institutionalisation of environmental management through Crown governance, tangata whenua have had to continuously operate, navigate, and advocate for opportunities to participate in local authority processes. As noted by a River Collective Member, tangata whenua will never leave the land, yet the current state of environmental management is reactive and strategic depending on political cycles, funding rounds and various prioritised agendas – this remains a fundamental challenge when trying to achieve improved long-term environmental outcomes.

> *"Our ancestral pre-existing rights have never been extinguished"* *(Iwi Collective).*

A frustration shared by hapū and landowners that is particularly relevant to the expression of Mana Whakahaere is the imbalance in representation within Council engagement

processes. Again, this is not a new message.

> *The Trusts would like to be involved to assist with standards setting, including for Te Mana o te Wai. However, the first goal is to be a part of the debate and have a seat at the table (Maori Landowner).*

But in the context of Councils responsibilities under the NPS-FM to give effect to Te Mana o te Wai and its principles, a shared concern is how this will be achieved if mana whenua, and those who are intimately involved with the management of the whenua are not supported to effectively participate. This inequity of representation for some, was seen as a key barrier to effective participation. In some cases, not only was a source of contention between Council and Māori entities but also perpetuated discontent internally (between iwi, hapū and land trusts) as Councils continued to determine the "hierarchy of voice". This was exemplified by one participant who noted that despite processes in place for direct hapū engagement, communication was still predominately directed to the "mandated iwi authority". Or, alternatively, Council would limit engagement to an existing or familiar relationship,

> *"They (Council) expect that they will appoint one person who will know everything about everything Māori" (Landowner).*

Further, it was stated that regardless of how long or complex Council may find engagement with multiple iwi/hapū/landowners, they have an obligation to do so if they are to give effect to their legislative requirements. Participants noted that timeframes, frustration, or confusion cannot continue to be used as a justification for exclusion or limited engagement. One participant noted that a key message was that if we are to have a conversation about expressions of mana whakahaere, then all iwi/hapū/marae/landowners need to be included in freshwater management processes (through processes defined by those entities themselves), otherwise the principle of mana whakahaere is compromised and leaves Council falling short of their legislative responsibilities under Te Mana o te Wai.

In a similar vein, several participants mentioned the ongoing issue of notification. An example of this was provided by a Hapū collective who raised the issue of notification and Council's sole ability to determine the notification status. They described occasions where they only had the opportunity to review certain resource consent applications (for a major power station on their awa no less) because a whānau member happened to send it to the Hapū collective. This significantly reduced the level of attention they could give to producing a cultural impact assessment due to RMA timeframes.

This echoes a wider standing criticism voiced by Māori regarding the category of "affected party". Even when an activity is notified, tangata whenua are not differentiated from "community" status. This impacts the ability of tangata whenua to express mana whakahaere over their wai and respond in a way that enables them to exercise kaitiakitanga;

> *"Our views are those of mana whenua, we are not just a stake holder or community group that has an interest because the Council did some riparian planting" (Iwi Participant).*

Relationship with Council

All the participants provided insight into their respective relationships with their local Councils. While some provided some positive experiences of collaborative partnership, others noted the work still to be done in terms of fostering a meaningful relationship that better reflected the expectations by tangata whenua. Reference was made by one hapū that Co-Management arrangements have provided a vehicle for greater voice and influence over freshwater spaces largely because of the rights that iwi/hapū pushed for within those Co-Management frameworks. They added that:

Mana Whakahaere in co-management frameworks are the unique things that each iwi engages in along the river as opposed to the collective 'whole of river' mechanisms in the arrangement. What this means for us as a hapū really varies, in part it means we have access to some funding for river restoration work but it also means we are asked to engage in multiple council processes to support them in building their understanding of wai, kaitiakitanga and mana whakahaere (Hapū participant).

In addition, they noted that they also must continually remind Council/Government Agencies of their role as mana whakahaere/mana whenua and that just because these concepts are included within policy, settlements and other partnership/relationship mechanisms, it does not always mean they are being implemented by these entities in a meaningful way.

> *"We still have to fight for the word 'meaningful engagement' in the JMA because Council just wanted "engagement" as they said meaningful was too subjective" (Hapū Participant).*

Process

Manaakitanga

Te Mana o te Wai is an expression of manaakitanga through the hierarchical prioritisation of water preservation for its own right over all other uses of water. The protective, enabling, and sustainable elements of Te Mana o te Wai reflect the importance of care, compassion and empathy that is afforded not just to people but to all aspects of Te Ao Māori. Protection of the lifegiving properties of water, is protection of all the life that requires sustenance from water to survive, thrive and continue through time. In this way, manaakitanga as a value or principle in freshwater management provides guidance as to how to care and respect for our relationships with water and how tangata whenua can practice Mana Whakahaere through the establishment of self-determined structures and processes.

Decision making

Te Mana o te Wai has been included in the NPS since 2014, yet participants noted the urgency for engagement since the uplift of Te Mana o Te Wai in the NPS-FM 2020 from the preamble to a "Fundamental Concept". As noted by one hapū, while the increased weight is encouraging, the concept of Te Mana o te Wai and the importance of preserving and protecting the mauri have always driven their approach to taiao management and decision

making and is based on a deep and enduring tupuna mātauranga. This tupuna kōrero provides constant and unwavering direction for the hapū as they exercise their inherited rights and responsibilities as kaitiaki.

This emerged as a key theme, that is, that increased attention sparked by new legislative timeframes and requirements needed to be accompanied with sufficient resources and support to enable effective opportunities for tangata whenua engagement to occur.

One rōpū noted that if Te Mana o te Wai is to inform Council Policy, it should provide clarity over decision making and reveal the inconsistencies or piece meal planning processes currently employed by Council. The premise being, if the hierarchy of obligations are honoured, tested against, and used to provide justification of Council decision making, then improved outcomes for freshwater should emerge. This was in reference to the frustration and confusion over what appeared to be contradictory decision making for freshwater e.g., on the one hand encouraging opportunities to clean up the river, while issuing consents for activities that cause(d) the paru in the first place. An example was provided by members of a Resource Management Unit that was made up of representative of the three hapū within the rohe. Established to advocate on resource management and environmental matters of their respective hapū, the members noted the lack of strategic management when consents are issued. In this instance, consent for a mining operation was granted regardless of vehement iwi/hapū opposition and despite serious historical incidence of contamination from the activity, the effects of which are still being experienced today. Meanwhile the receiving waterbody was the subject of a $300million grant issued by the government to improve water quality from sediment and dairy effluent.

In contrast, a participant who was part of a River Co-Governance Group established between Iwi and Council representatives, stated that Mana Whakahaere can be expressed through several different projects/initiatives and that it was important that Council turned to successful past and current kaitiaki projects as they provide insight into collaborative opportunities between tangata whenua and Council in terms of giving effect to Te Mana o te Wai. They noted that there are a multitude of examples that while not always explicitly referenced in terms that align with Council, they provide practical and proactive examples of Mana Whakahaere according to mana whenua driven priorities. An example shared from this rōpū was the implementation of a River Action Plan. A key focus was prioritising projects internally as a group, then negotiating with Council a project split that would see Council led projects and Iwi led projects;

> *"The working Action Plan – that is where our Mana Whakahaere comes in. It was important that iwi led projects too, because otherwise we fall into that trap of council led projects where iwi only participate rather than drive, we need to shift this balance in our favour" (River Co-Governance Group).*

SUMMARY

Exploring perspectives on Mana Whakahaere from tangata whenua through the framework of People, Place and Process provides some important insights into the implementation of Te Mana o te Wai. As noted in earlier sections, Te Mana o te Wai is not a new edition to the NPS-FM 2020, yet the impending timeframe of 2025 has created an urgency with regards to implementation and ensuring that it reflects the weight it now carries as a Fundamental Principle of the operative NPS-FM.

14 kōrero with a range of hapū, iwi and landowners were carried out to better understand Mana Whakahaere in the context of Te Mana o te Wai. While the size, organisational structure and geographical location of the participants differed, there were strong and similar themes as well as precautionary statements across all the kōrero shared. These provide some important guidance for local authorities who are charged with the responsibility to respond to the new directives of the NPS-FM through and across their statutory policies and plans.

Kōrero affirmed the value of mana whakahaere but noted that this is not the only or defining way to be kaitiaki and that tangata whenua have multiple and layered expressions anchored in their relationships to wai and the greater taiao. While the NPS-FM 2020 offers opportunities to improve freshwater management through the implementation of Te Mana o te Wai, this requires a shift in how Council responds to their legislative responsibilities. Despite sustained attention for fairer, more equitable provision of support to tangata whenua by Council, technical and financial resourcing still remains a critical barrier to involvement and decision making. This runs the risk of continuing a legacy that fails to give effect to Te Mana o te Wai. A summary of the key points from the kōrero analysis are provided below.

Prioritise

- Council must prioritize engagement processes that respect the multiple and often overlapping interests of tangata whenua with freshwater. Limited engagement by Council with certain entities is not acceptable under the new directive of Te Mana o te Wai. The whakapapa that binds iwi/hapū/landowners with their wai and their greater relationships with the taiao must be the guiding premise for all engagement and decision making. To limit engagement to certain entities is to limit expression of kaitiakitanga which sits in contrast to the concept of Mana Whakahaere.

Invest

- Local government must invest in increasing their cultural capacity and understanding to improve engagement with tangata whenua and to ensure that the engagement mistakes of the past are not repeated. This is critical to more meaningful relationships and provides for greater tangata whenua involvement as directed by the NPS-FM 2020.

- There is no one size fills all approach to how this concept is defined or practiced so Council need to be guided by tangata whenua as to how they express and demonstrate what mana whakahaere looks like to them. This will vary in size, shape and scope and accordingly, will require Councils to be responsive and innovative in offering pathways for implementation.
- Importantly, mana whakahaere is about power. A commitment to investing increased decision-making power in tangata whenua groups regarding water is an important consideration of Te Mana o te Wai.

Transform

- Tailored approaches to increasing capacity and capability that responds to the unique needs of tangata whenua must be prioritised, otherwise the implementation of Te Mana o te Wai will continue to be compromised.
- Supporting tangata whenua in their own aspirations for water is key to mana whakahaere, otherwise tangata whenua resources are tied up in reactionary work to the agenda that is set by local government. This detracts from the ability to focus internally on important work to reconnect with and restore waterbodies that are vital for a thriving hapū/iwi.
- Inconsistences across Councils can divert important resources and energy for tangata whenua who often have to engage with multiple local authorities. Te Mana o te Wai directs Councils to put water ahead of other agendas and to prioritise the first right of water to water and to commit to addressing the inconsistencies that have detracted from tangata whenua views and relationships to water – which impacts the ability to express mana whakahaere over their wai.
- The all-encompassing intent of Te Mana o te Wai and its ability to protect, sustain and enable, requires Council to embed systems and structures that have the capacity to respond and adapt to the outcomes of co-management and partnership arrangements between tangata whenua and Council. Iwi and hapū should be supported in the negotiations for unique co-management or partnership frameworks that they wish to see implemented in their rohe as a matter of urgency. Investigating the use of existing mechanisms within the Resource Management Act such as Section 33 transfer of powers, Joint Management Agreements, Te Mana Whakahono a Rohe Agreements should all be prioritised as part of the implementation of TMoTW.

As Aotearoa enters a time of freshwater reform, the call for transformative change to the way freshwater is managed is urgent. Attention must be directed to lessons from the past that have operated in a reverse model from the hierarchy of obligations of Te Mana o te Wai. Consequently, our freshwater, whenua and greater taiao have suffered deeply to maintain the life-giving bloodline bestowed to it by Papatūānuku. As kaitiaki, tangata whenua will always be an enduring voice of care, protection and advocacy for wai as they remain present and active across the changing legislative landscape.

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APPENDIX 3

Discussion Document: Further Democratising Māori Decision – Making to give effect to Te Mana o te Wai.

By Professor Jacinta Ruru,
Professor Andrew Geddis,
Mihiata Pirini and
Jacobi Kohu–Morris.

Commissioned by
Kāhui Wai Māori, June 2021

DISCUSSION DOCUMENT
FURTHER DEMOCRATISING MĀORI DECISION-MAKING TO GIVE EFFECT TO TE MANA O TE WAI

Preliminary Material

1. Kāhui Wai Māori, and Te Tai Kaha Māori Collective, have asked us to provide an initial, high-level, legally informed discussion regarding the possible processes for operating new regional (or local) Māori decision-making entities or mana whakahaere councils at a water catchment level.
2. We emphasise that this discussion document has been prepared over a period of two weeks and should be understood in light of this limited time constraint.
3. Professor Jacinta Ruru FRSNZ (Raukawa, Ngāti Ranginui) is a professor of law at the University of Otago and holds an inaugural University Sesquicentennial Distinguished Chair, Co-Director of Ngā Pae o te Māramatanga New Zealand's Centre of Māori Research Excellence, fellow of the Royal Society Te Apārangi, and a member of Kāhui Wai Māori. Her research considers Indigenous' peoples' rights, interests, and responsibilities to own and care for lands and waters. She holds a PhD from the University of Victoria, Canada.
4. Professor Andrew Geddis (Pākehā) is a professor of law at the University of Otago with a research interest in constitutional law and democratic processes. He is the author of *Electoral Law in New Zealand: Practice and Policy* and has been asked to advise the Ministry of Justice on matters of electoral law on numerous occasions.
5. Mihiata Pirini (Tūwharetoa, Whakatōhea) is a lecturer at the University of Otago law faculty specialising in Treaty of Waitangi and tikanga issues, and has prior experience practising in Treaty of Waitangi law for the Crown and working for the New Zealand Law Commission.
6. Jacobi Kohu-Morris (Ngāi Te Rangi, Ngāti Awa, Ngāti Ranginui) is a recent LLB(hons) and BA graduate from the University of Otago where he completed his law honours dissertation entitled "Ko Wai to Mana Whenua. Identifying Mana Whenua Under Aotearoa New Zealand's Three Laws". He is currently clerking at the New Zealand Court of Appeal in Wellington.

Introduction

7. The government has committed to reforming the Resource Management Act 1991 (RMA). The exposure draft for the Natural and Built Environment Bill (the Bill) is expected to be released for public comment this month.

8. Any new approach to resource management law in the Bill should significantly **strengthen** the gains made by iwi and hapū in the past forty years in order to move further towards the expectation of the exercise of tino rangatiratanga and power sharing encapsulated in te Tiriti o Waitangi, supported by the United Nations Declaration on the Rights of Indigenous Peoples, and recommended in, for example, the Te Puni Kokiri established technical working group's report *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (2019) and the independent Māori authored report *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (2016).

9. It is timely for Aotearoa New Zealand legislation to more fully embrace the complexity of decision-making models in Te Ao Māori across both governance and management realms. This can be done in a twofold manner: 1) by **meaningfully enhancing** the existing participatory relationships between local authorities and Iwi authorities; and 2) by **adding** new Māori decision-making entities where appropriate from a Māori perspective.

10. This paper is focused on the latter: it contemplates the addition of new Māori decision-making entities modelled on mana whakahaere as per *Te Mana o te Wai* strategy for water catchments.[1]

11. Central and local governments have a multitude of decision-making entities, just as do Iwi nations.

12. Justice Sir Joe Williams made this important observation, in 2012, while sitting in the High Court:[1]

> *The problem with statutory acknowledgements and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA-based acknowledgements dumb down tikanga Māori.*

13. The RMA's replacement provides an opportunity to address this "dumbing down of tikanga Māori" in representative decision-making. We can do this by connecting central and local government decision-making with Te Ao Māori in a more sophisticated manner.

[1] *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181at [95] per Williams J.

14. The new Bill ought to empower tikanga Māori and embrace the full complexity of Te Ao Māori. All societies are complex including Te Ao Māori.

15. This reform provides an opportunity for an even more sophisticated engagement with Te Ao Māori to create positive structural change to better recognise the full extent of the mana of Māori leadership, governance and management.

16. This preliminary paper is focused on the creation of Māori decision-making entities at the local water catchment level and principally the role of Aotearoa New Zealand's state law to establish the framework for who could sit on these entities. As such, it explores a possible model for enabling Māori, as Māori, to formulate and express a collective voice regarding how particular water catchment areas will be managed, maintained and developed. It does not consider how that voice will be inserted into wider resource management decision-making processes under the Bill, except to note that any such co-governance processes must be consistent with the exercise of tino rangatiratanga and power sharing encapsulated in te Tiriti o Waitangi.

17. This paper is divided into three parts: what is happening in the current law; what the Randerson Report recommends; and, the possibilities for the new Bill to specify how new water catchment Māori decision-making entities could be constituted.

18. We emphasise that any new governance and management entities must be organised in a manner that can easily accommodate future recognition of Māori proprietary rights, interests and responsibilities in water. Any change to law should comply with the possibilities for the full recognition of the rights, interests and responsibilities of Māori to own, govern, manage, use, and care for water bodies.[2]

[2] Kāhui Wai Māori report to Hon. Minister David Parker *Te Mana o te Wai – The Health of our Wai, The Health of our Nation,* April 2019.

Part A – What is Happening in the Current Law?

19. Several different areas of Aotearoa New Zealand law provide frameworks for creating Māori decision-making entities.

20. Māori decision-making entities include: a post-settlement governance entity; an iwi authority; a hapū; an urban Māori authority; a Māori Trust Board; a Māori association; the Māori Trustee; board, committee, authority recognised under iwi participation legislation; any entity or persons who have an ownership interest in Māori land; any entity or persons appointed to administer a Māori reservation; a customary marine title group or protected customary rights group; and, an entity that is authorised to act for a natural resource with legal personhood. For a full list, see the Urban Development Act 2020 definition of 'Māori entity'. We provide some brief overview of some of these entities as useful background context for later discussion regarding the creation of new Māori decision-making entities modelled on mana whakahaere.

HOW DOES AOTEAROA NEW ZEALAND'S LEGAL SYSTEM ALREADY RECOGNISE MĀORI DECISION-MAKING ENTITIES?

New Zealand Māori Council

21. The New Zealand Māori Council has a broad role in respect of all Māori to, for example, 'to consider and discuss such matters as appear relevant to the social and economic advancement of the Māori race' (s 18(1)(a) Maori Community Development Act 1962).

22. Each District Māori Council appoints three members to the New Zealand Māori Council. District Māori Councils are formed by persons appointed by their district Māori Executive Committees. Election of members to Māori Executive Committees occurs every third year on the last Saturday of February. All Māori aged 20 and over who are ordinarily resident in a Māori Committee area are entitled to vote at elections for members of their Māori Committee (s 19 Maori Community Development Act 1962).

Māori land

23. Māori land legislation provides for the establishment of specific Māori land entities to make management decisions for Māori land.

24. The shareholders of a Māori incorporation must elect a committee of management in accordance with the constitution of the incorporation (Te Ture Whenua Maori Act 1993, s 269(1)(2)). Also, the Māori Land Court can appoint "any qualified person" to the committee of management (s 269(5)).

25. When the Māori Land Court appoints an individual or body to be a trustee of a Māori land trust, the Court shall have regard to "the ability, experience, and knowledge of the individual or body; and, shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries" (s 222(2)).

Treaty of Waitangi Claim Settlement Negotiations and Post Settlement Governance Entities

26. Each claimant group needs to choose representatives to act on their behalf in negotiations with the Crown. As suggested on the New Zealand Government website, the representatives may come from existing groups (rūnanga, an iwi authority, Māori Trust Board) or might be members of the community who have suitable skills, like a background in law or experience in public speaking.[3]

27. In order to receive Treaty of Waitangi settlement assets, the Crown requires the establishment of Post Settlement Governance Entities (PSGEs). A PSGE is designed by an iwi nation to suit the iwi. However, the Crown requires a PSGE to be representative of the iwi, transparent in its decision-making and dispute resolution procedures, accountable to the iwi, for the benefit of the members of the iwi and ratified by the iwi.

28. There are five different models commonly used by iwi members to vote for representatives to sit on their PSGE:

    a. vote via your marae. Members vote for a representative through their marae. Each marae then appoints a representative on the PSGE.

    b. vote via your hapū. Members vote for a representative through their hapū. Each hapū appoints a representative on the PSGE.

    c. vote as an individual. Members vote for their preferred candidate. The highest polling candidates are appointed to the PSGE.

    d. vote in a takiwā. Members vote through a) their marae and b) their hapū. Each marae and hapū appoints a representative on the PSGE.

    e. a combination of the above, with many variations.

29. The Māori Fisheries Act 2004 requires mandated iwi organisations. All adult members of an iwi must have the opportunity, at intervals not exceeding three years, to elect the directors, trustees, or officeholders of the mandated iwi organisation of the iwi (sch 7(1)).

Co-Governance and Co-Management Agreements

30. There are now a plethora of co-governance and co-management agreements.[4]

31. Some examples include:

    – The Waikato River Authority consists of 10 members. Five members are appointed by the Waikato River Iwi Trusts: Waikato-Tainui, Te Arawa River Iwi, Tūwharetoa, Raukawa and Maniapoto. Five members are appointed by the Minister for the Environment in consultation with other specified Ministers (two of which are on the recommendation of the Waikato Regional Council and the territorial authorities) (see sch 6(2) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010).

[3] See: https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/pre-negotiations/

[4] Te Arawhiti paper presented to Kāhui Wai Māori, *Co-governance / Co-management Structures,* May 2021.

- The Rangitāiki River Forum consists of eight members. Each of the four Iwi appoint one member (Te Rūnanga o Ngāti Whare, Te Rūnanga o Ngāti Manawa, Te Rūnanga o Ngāti Awa, Ngāti Tūwharetoa (Bay of Plenty) Settlement Trust). The other four members are appointed by the Councils (see, for example, s 108 of the Ngāti Manawa Claims Settlement Act 2012).
- Te Urewera Board, which from its third anniversary consists of nine members. Six members are appointed by the trustees of Tūhoe Te Ure Taumatua and three members appointed by the Minister of Conservation (s 21(2) of Te Urewera Act 2014).

32. It is common for co-management entities to require each appointer to consider whether the proposed member has the mana, standing in the community, skills, knowledge, or experience (a) to participate effectively in the committee; and (b) to contribute to achieving the purposes of the committee. For example, see s 21(3) of Te Urewera Act 2014.

33. Not in the realm of co-governance but relevant is the Independent Māori Statutory Board. The selection body, established for this purpose under the direction of the Minister of Māori Development and consisting of mana whenua representation, must choose the nine members of the Board. The selection body simply chooses the seven mana whenua representatives (and may choose people on the selection body for the Board). The selection body chooses the mataawaka representatives from nominees received via a public notification process (Schedule 2 of the Local Government (Auckland Council) Act 2009).

WHAT ABOUT THE RESOURCE MANAGEMENT ACT 1991?

34. The RMA provides some mechanisms under which only **iwi authorities** can hold some decision-making responsibilities. An iwi authority is defined as "the authority which represents an iwi and which is recognised by that iwi as having authority to do so" (s 2).

35. Iwi authorities can be positioned in a mana to mana relationship with local authorities. For example, a local authority can transfer any of its functions, powers or duties under the RMA to an iwi authority (s 33).

36. Further definition of Iwi authorities occurs in the context of Mana Whakahono a Rohe agreements with local authorities. **Initiating iwi authorities** represent tangata whenua (s 58O(1)) in such agreements. A relevant iwi authority is defined as an iwi authority whose area of interest overlaps with, or is adjacent to, the area of interest represented by the initiating iwi authority (s 58L).[5] **Participating iwi authorities** are those iwi authorities that have agreed to participate in a Mana Whakahono a Rohe agreement and have agreed the order in which negotiations are to be conducted (s 58L).

[5] Other legislation also uses this term. For example, see COVID-19 Recovery (Fast-track Consenting) Act 2020.

37. **Tangata whenua** "in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area" (s 2). **Mana whenua** means "customary authority exercised by an iwi or hapu in an identified area" (s 2).

38. Many, including the Waitangi Tribunal, critique the RMA for establishing a restrictive tangata whenua participation regime.

39. For example, even in regard to the new mechanism for Mana Whakahono a Rohe agreements, the Waitangi Tribunal's *Stage 2 Report of the National Freshwater and Geothermal Resources Claims* report (Wai 2358, 2019) concluded (p 542):

> *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.*

Part B – The Randerson Report and New Possibilities

40. Significant work is underway on how to redesign a resource management system that is more Te Tiriti o Waitangi compliant.

What does the Randerson Report recommend?

41. The Minister for the Environment appointed retired Court of Appeal Judge, Hon Tony Randerson, QC to chair the independent Resource Management Review Panel. In July 2020, the Panel published its comprehensive recommendations for reform in a report entitled *New Directions for Resource Management in New Zealand* ("the Randerson Report").

42. The Randerson Report prioritises "mana whenua" as the Māori entities that ought to be in partnership in decision-making across central and local government. It is precise as to terminology:

> *Throughout our report 'Māori' is used as a broad term that encompasses all of the indigenous people of Aotearoa including both mana whenua and mātāwaka. 'Mana whenua' is used when referring to whānau, hapū and iwi who have customary authority over an area, and 'mātāwaka' is used when referring to whānau, hapū and iwi Māori living in an area where they are not mana whenua. Other terms are only used when the context demands it, such as, in quotations or when referring to specific sections of the RMA. For example, the term 'tangata whenua' is used in the RMA in several places. (p 6)*

43. The Report states: "The Tiriti partners are mana whenua and the Crown" (p 89).

44. The Report recognises several problems with the current approach in the RMA including (p 92):

    - *engaging at the iwi or iwi authority level does not reflect the reality of kaitiakitanga, which may operate at the hapū or whānau level*
    - *current provisions constrain local authority engagement with hapū. Hapū often approach local authorities seeking to engage on resource management matters but the willingness of local authorities to do so at this level varies*
    - *local authorities should not be the body determining who represents an iwi for the purposes of the RMA*
    - *central government has not provided sufficient support to local authorities or mana whenua groups to help resolve these issues.*

    The current approach in the RMA is designed to allow mana whenua groups to self-identify. This is because only Māori can define who has the mana over the whenua. However, this makes it difficult for local authorities to work out which groups represent mana whenua for any specific resource management matter. In addition, local authorities can refuse to engage with any group other than an 'iwi authority', even if the appropriate group to engage with on a particular matter is a hapū or whānau.

    Determining which mana whenua groups should be engaged with is complex. The rohe of mana whenua do not follow local government boundaries and may overlap or be contested. Mana whenua within an area may have differing views, as may Māori within mana whenua groups. Input from these groups may be multifaceted and require considerable effort from government to understand and act upon. It is challenging to provide information and guidance on such matters.

45. The Report recommends that, before an integrated partnership process is initiated between mana whenua and local authorities, a mana whenua group should have developed an iwi management plan. The plan is to be "a record of an agreed position within the mana whenua group, which then forms the basis of discussing a partnership with local government" (p 104).

46. The Report clearly states:

    Our preferred approach is to use the term 'mana whenua' throughout the Natural and Built Environments Act, replacing the currently used terms including 'iwi authority' and 'tangata whenua'. The term 'mana whenua' would be defined as "an iwi, hapū or whānau that exercises customary authority in an identified area" (p 112).

and:

To be clear, our intention is not a widespread devolution of engagement activities in all circumstances from an iwi level to a hapū or whānau level. That being said, different engagement needs will call for different approaches and in some circumstances a hapū or whānau level mana whenua group is the appropriate group to be engaging with on particular matters. As a general principle, consistent with the implementation principles in section 9(2)(b) and (c) of our proposed Natural and Built Environments Act, engagement should occur at a scale, within timeframes and with a degree of effort that is commensurate to the scale and potential impact of the decisions being made. (p 113)

RESPONSE

47. Te Arawhiti The Office for Māori Crown Relations has made some informal statements, emphasising the current problems in the operation of the RMA in a similar manner to the Randerson Report.

48. Te Tai Kaha Collective Leadership Group's paper 'Definitions: Mana Whakahaere' (4 April 2021) summarises an informal comment from Te Arawhiti in this way (p 2):

    There clearly are problems with the current RMA definition of iwi authorities. It places iwi entities as gate keepers for engagement and left engagement with hapū uncertain. A more inclusive approach is likely to better reflect the reality of rangatiratanga. The recommendation for a new definition of 'mana whenua' from the independent panel seems to be driven by a recognition of this problem, as well as the need for councils/consent applicants to have clarity about who to talk to, and problems with current 'self-identification' system.

49. Te Arawhiti, in its paper presented to KWM in May 2021, made this important observation: "Māori land entities are notably absent from participation in both the listed and unlisted structures. This is despite their significant influence on, and experience with, environmental and resource management regulatory frameworks" (pg 2). This observation demonstrates a recognition that current problems exist with representative decision-making at the Iwi level; a point that the Randerson Report also highlights.

HOW TO BUILD ON THE RANDERSON REPORT'S RECOMMENDATIONS?

50. Any new approach to resource management specific to water catchments should more strongly align with the three fundamental kaupapa that are required to give effect to Te Tiriti o Waitangi and Te Mana o te Wai:

    a. Mana whakahaere

    b. Manaakitanga

    c. Kaitiakitanga

51. The Randerson Report recognises the problems with the current RMA system and different engagement needs will call for different approaches.

52. While the Randerson Report indicates a preliminary preference for mana whenua as capturing the role of Māori in resource management decision-making, Te Tai Kaha Collective Leadership Group prefer a mana whakahaere approach especially at the water catchment level.

53. We emphasise that there is value in multiple and more expansive, Māori-led terms and definitions.

54. We particularly caution against any attempt to dilute the definition of mana whenua to an exercise of mere "customary authority" when it entails rights of continuing tino rangatiratanga, self-determination, power and control.

55. Turning to mana whakahaere as a possible additional Māori governance practice specific to local water catchment areas, mana whakahaere already has some traction in law and policy. Mana whakahaere is a fundamental principle of Te Mana o te Wai, along with kaitiakitanga and manaakitanga, as detailed in the National Policy Statement for Freshwater Management 2020. Mana whakahaere is defined in this National Policy Statement as:

> *. . .the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater.*

56. Mana whakahaere is already in use in some water catchment areas.

57. For example, mana whakahaere is a central component of the Waikato River Claim Settlement. In developing joint management agreements and when working together, the local authority and the Trust must act in a manner consistent with several guiding principles including "they must respect the mana whakahaere rights and responsibilities of Waikato-Tainui" (s 44(b) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010). Mana whakahaere is used in this Settlement Act to describe the relationship between Waikato-Tainui with the Waikato River (preamble (2)):

> *Mana whakahaere embodies the authority that Waikato-Tainui and other River tribes have established in respect of the Waikato River over many generations, to exercise control, access to and management of the Waikato River and its resources in accordance with tikanga (values, ethics and norms of conduct).*

58. This year, Te Tai Kaha Collective Leadership Group has drafted detailed papers on mana whakahaere including: 'Definitions: Mana Whakahaere (4 April 2021)' and 'Version 1 Mana Whakahaere Guidelines'.

59. Te Tai Kaha Collective Leadership Group recommends the following as a draft definition for mana whakahaere in the Natural and Built Environments Bill:

> *Iwi/hapū/ahi kā (Māori landowners) who exercise mana whakahaere (authority) and other obligations (kaitiakitanga and manaakitanga) to a particular area, water source, space and resource.*

60. In considering Māori terminology, we are reminded of Moana Jackson's warning that "our tikanga has been diminished and constrained by the labels of colonisation".[6] We thus acknowledge the Māori leadership and the depth of care that has gone into providing these definitions of mana whakahaere.

61. We see much value in taking notice of the Randerson Report's concerns about the RMA and Te Tai Kaha Collective Leadership Group's recommendation for creating mana whakahaere Māori decision-making entities at the water catchment level. It is possible for law to recognise the complexity of Te Ao Māori decision making in both mana whenua and mana whakahaere levels.

Part C – Next Step: Local Māori Decison-Making Entities

62. Given the Bill's intention to create an even more enhanced connection to Te Ao Māori, we provide some preliminary discussion about how an additional model of Māori decision-making can be enabled in the resource management realm at the water catchment level.

63. We provide this discussion on the assumption and basis that the Bill will be **adding** more opportunities for the exercise of Māori decision-making.

64. We acknowledge this approach is expected in the UN Declaration on the Rights of Indigenous Peoples (Indigenous Declaration). Article 18 reads:

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

65. We see value in the creation of new mixed skills/representative based local water catchment mana whakahaere **management** decision-making committees focused on the implementation of regional and local rules, permissions of consents and such like.

66. With this in mind, we provide some preliminary discussion focused on the possible creation of water catchment mana whakahaere decision-making management committees ("mana whakahaere committees"). We draw on political and legal theory and experience to make these preliminary points.

[6] Moana Jackson, *"Labels, Reality and Kiri Te Kanawa: The Origins of the Culture of Colonisation and their Influence on Tikanga Māori"* (paper presented at the Mai I te Ata Hapara Conference, Te Wānanga o Raukawa, Otaki, 2000 at 8-9.

IDENTIFICATION OF RELEVANT INTERESTS – WHOSE CONNECTION WITH THE WATER CATCHMENT IS RECOGNISED

67. Designing mana whakahaere committees first requires defining who possesses a sufficient connection with the catchment to hold a relevant interest in decision-making for that catchment.

68. The Randerson Report proposes defining such sufficient connection in terms of "mana whenua". It further defines mana whenua in terms of "an iwi, hapū or whānau that exercises customary authority in an identified area." However, as previously noted, this may not be expansive enough to ensure a mix of broad mana whenua representation and skills relevant for specific water catchment decision-making. A more expansive "sufficient connection" test will seek to also accommodate relevant interests and skills, such as those of Māori land owners, Māori scientists and Māori planners.

69. Te Tai Kaha Collective Leadership Group's recommended use of mana whakahaere is an attempt to clarify the sufficient connection test to:

> *Iwi/hapū/ahi kā (Māori landowners) who exercise mana whakahaere (authority) and other obligations (kaitiakitanga and manaakitanga) to a particular area, water source, space and resource.*

70. Adopting a broader understanding of who possesses a sufficient connection with the catchment to hold a relevant interest in decision-making for that catchment will engage a greater diversity of local Māori skills and experiences. It can ensure that resource management decisions in relation to the catchment are made in a way that more fully incorporates the values and viewpoints of Te Ao Māori.

71. However, whatever definition of a sufficient connection with the catchment is adopted, we can foresee clashes over whether or not some individual/group/entity meets it. Who will get to decide this issue?

72. The Indigenous Declaration emphasises that Indigenous peoples must have the ability to decide their own membership. The Indigenous Declaration also reminds us of the importance of paying particular attention to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities.

73. Political theory is alive to the risk of established "in" groups being able to unfairly exclude "out" groups, with a consequent need for some arbiter to resolve disputes. This is true too in Te Ao Māori. With the ramifications of colonisation and the disempowerment of centuries old systems of tikanga, we need to continue to build systems and guidelines that re-empower Māori decision-making.

74. In addition to tikanga Māori first resolving disputes in Te Ao Māori, the Māori Land Court Chief Judge could help by facilitating, as far as is possible, successful resolution of differences concerning "who are the most appropriate representatives of a class or group of Māori" (s 30(1) Te Ture Whenua Māori Act 1993).

TURNING CONNECTION INTO VOICE – WHO IS CHOSEN TO SPEAK ON/FOR THE WATER CATCHMENT

75. Whatever definition of a sufficient connection to the catchment is adopted—whether this be the Te Tai Kaha Collective Leadership Group's proposed understanding of mana whakahaere, or otherwise—it must be decided how those with relevant interests then participate in a mana whakahaere committee.

76. A critical preliminary point relates to the nature of those acting as representatives on a mana whakahaere committee:

- Are they **delegates** of those possessing relevant interests in the catchment? Under a delegate model of representation, individual representatives are selected by those with relevant interests in order to bring those interests into the decision-making process and then advocate to advance them. Hence, representatives chosen by (for example) the ahi kā in a given catchment will have the primary role of seeking to achieve the best management outcomes for the ahi kā that they represent. Or,
- Are they **participants** in decisions aimed at progressing/achieving certain tikanga-informed principles? Such participants do not seek to advance the pre-existing interests of any particular individuals or groups with sufficient connection to the catchment, but rather bring to bear their individual skills, knowledge and experience in a collective effort to achieve some form of "best" outcome for the catchment (as defined in tikanga terms). Hence, participants collectively may discuss and decide upon management measures designed to protect (for example) the mauri of the wai. Or,
- Will there be some mix of the two models, where some who sit on a mana whakahaere committee do so as delegates and others do so as participants?

A delegate representation model

77. If a delegate model of representation is adopted, two issues arise:

- How to ensure that those on the mana whakahaere committee are fully representative of the various interests identified as having a sufficient connection with the catchment; and,
- How to choose which specific individuals will represent those interests.

78. In relation to the former issue, consideration should be given to requiring designated positions on the mana whakahaere committee to ensure a range of viewpoints are represented. Amongst the various viewpoints to be included are:

- Iwi authority representatives;
- Hapū representatives;
- Ahi kā representatives;
- Māori land representatives;
- Women representatives;
- Youth representatives;
- Expert skills representatives.

79. In relation to the latter question, the selection of properly representative delegates may require some form of voting by those with relevant interests. If so, the precise mechanism for electing representatives will need to be determined in relation to each mana whakahaere committee. As is the case with PSGEs, there are a range of different ways that such elections may be structured, depending on the tikanga and circumstances of those with a sufficient connection to a given catchment.

80. The election of representatives to act as delegates for Māori interests has a long tradition in Aotearoa-New Zealand. It has formed a part of our national governing arrangements since 1867, with the dedicated Māori parliamentary seats described by the High Court as constituting a "Treaty icon".[7] An increasing number of local government authorities are choosing to include dedicated Māori wards in their local electoral arrangements. And, of course, members of a PSGE elect representatives using the variety of methods described at [28] above. There is therefore precedent for Māori electing Māori to represent their interests on decision making bodies.

A participant representation model

81. Rather than being bodies of delegates representing and advocating for discrete interests, mana whakahaere committees instead may encompass a skills-based decision-making ethos designed to progress/achieve tikanga-informed principles.

82. Who will be the appointer? Drawing on the Indigenous Declaration's expectation that Indigenous peoples choose their own representatives, we suggest that the relevant Iwi authorities (or the chairs of mana whakahono a rohe agreements if more appropriate) could either directly appoint or recommend "any qualified person" to the mana whakahaere committees.

a. If the power is to appoint, a similar process as used by the Independent Māori Statutory Board could be adopted via the creation of a selection body for each catchment for the sole purpose of appointing persons to the catchment's mana whakahaere committee.

b. If the power is recommendatory only and there is a role for the Crown, then the Minister of Māori Development, the Māori Land Court or the National Māori Advisory Board (if it is created as recommended by the Randerson Report) could make the formal appointments, after ensuring that those recommended meet the necessary qualifying criteria.

83. Drawing on the common wording in co-management entities, each proposed qualified person should have the mana, standing in the community, skills, knowledge, or experience (a) to participate effectively in the mana whakahaere committee; and (b) to contribute to achieving the purposes of the mana whakahaere committee.

84. The appointer could be required to ensure a mix of skills, knowledge and experience including in mātauranga, tikanga, sciences, law, and planning. Appointments also should constitute a broad representation of Māori society in the catchment as much

[7] *Taiaroa v Minister of Justice (No 1)*, unreported, High Court, Wellington, CP No 99/94, October 4, 1994.

as is possible, mindful particularly of women, youth and gender diversity, and possibly urban Māori if the location of the catchment requires this. A residential requirement in the catchment may be useful for at least some of the appointed members (for example, sch 6(2)(c) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 requires the Minister to ensure that at least two of the members appointed are ordinarily resident in the Waikato region).

TURNING VOICES INTO VOICE – HOW ARE DECISIONS ON/FOR THE CATCHMENT MADE

85. Decisions regarding a given catchment should be principle-orientated. Mana whakahaere committees should be set up with guiding tikanga principles that emphasise the importance of cooperating for the mauri and mana o te wai (for the health and wellbeing of the catchment). Decision-making guidelines need to support the decision-makers to approach discussions of these issues free from entrenched positions.

86. Good decision-makers will need to activate the integrity of the purpose of mana whakahaere. There will need to be guidelines (as all entities require) to support robust decision-making that emphasise the core principles of *Te Mana o te Wai*, and principles such as tino rangatiratanga, kaitiakitanga, maanakitanga, good faith, participation and equity.

87. The goal for principles-based mana whakahaere committee decision making should be "consensus", as this practice is most consistent with tikanga and already expected of co-management entities (for example, see sch 1 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010). However, it is important to distinguish "consensus" from "unanimous agreement". Most usages of "consensus decision-making" actually reference an approach to deciding, rather than an outcome from that approach.

88. For example, in Canada's Nunavut Assembly the features that constitute consensus decision-making are said to be "intangible and relate more to the manner in which politics is conducted and decisions are made, rather than what is written in law or formal policy."[8] In particular, the practice is considered to be quite consistent with voting where full agreement cannot be reached, provided the matter first has been properly discussed and considered.

89. As such, the focus should be on how issues must be addressed and on governing principles for decisions to focus those ultimately making the decision. This process will need to be heavily guided by the relevant tikanga of those with a sufficient connection to the catchment. Only where this process of discussion and decision fails to achieve unanimity will the majority rule.

KEEPING THE VOICE ACCOUNTABLE – HOW TO ENSURE THOSE WHO SPEAK DO SO FOR THOSE WITH RELEVANT INTERESTS

90. In part, accountability mechanisms will tie in with the initial selection process for how relevant interests are represented on the mana whakahaere committee. If individual members are selected through regular forms of "election", that itself will be an important method of accountability.

91. However, and particularly if a participant representation model is adopted, there will need to be additional mechanisms to ensure that the decisions designed to progress/achieve tikanga-informed principles remain acceptable to those with a relevant interest in the catchment. Amongst these may be:

    - Requirements to regularly report to and consult with those who hold relevant interests; and
    - Some mechanism to allow for the recall of members of the mana whakahaere committee believed to be failing in their roles by those with relevant interests in the catchment. Such a recall mechanism may be triggered by a petition signed by a sufficient number of those connected to the catchment (as occurs in various states in the USA, as well as British Columbia), or else through a process mirroring the removal and replacement of trustees by the Māori Land Court.

A POSSIBLE SELECTION MODEL FOR A CATCHMENT

92. To illustrate the general comments above, we provide a basic possible mixed-based selection model consisting of both delegates and participants to demonstrate how selection of members for the mana whakahaere committees *might* occur. The selection mechanisms reflect criteria already in use in conservation, environmental and local government legislation.

93. We note that this is not intended to be a template model for use in choosing members for every mana whakahaere committee. Rather, it is an example of how a selection model could work in a region, if more fully fleshed out with detail.

94. In this option, we assume Mana Whakahono a Rohe agreements continue under the reformed law, but with new positive transformative funding and support, and positioned at the governance level of making strategic, policy and planning decisions. These are operating as mana to mana agreements between Iwi authorities and local authorities.

95. Where a Mana Whakahaere Committee (the Committee) is to be established in a catchment where Mana Whakahono a Rohe agreements are in place, the selection process *could be* as follows – sample 1:

[8] Government of Nunavut, "Consensus Government", <https://www.gov.nu.ca/consensus-government>.

i. Every Committee shall consist of not more than 8 members.

ii. The members of the Committee shall be determined by a combination of the following procedures, as is appropriate given the tikanga governing the catchment:

    1. Four persons elected by those with sufficient connection to the catchment; and,

    2. Four persons appointed by Iwi entities and the Chair of Mana Whakahono a Rohe agreement relevant to the catchment.

iii. If there is more than one Mana Whakahono a Rohe agreement in place for the catchment, the Chairs of each agreement must collectively determine a selection process for appointments to the Committee.

iv. When making appointments to the Committee, the Chair (or Chairs) of Mana Whakahono a Rohe relevant to the catchment must have regard to:

    1. The particular features of the catchment including marae and Māori land ownership;

    2. the interests of kaitiakitanga, manaakitanga and ahi kā;

    3. the mix of skills, knowledge and experience required including in tikanga, mātauranga, sciences, planning, commerce and law;

    4. the desire for broad representation of Māori society within the catchment, as much as is possible, being mindful particularly of youth and women and gender diversity.

v. All members must have the mana, standing in the community, skills, knowledge, or experience (a) to participate effectively in the mana whakahaere committee; and (b) to contribute to achieving the purposes of the mana whakahaere committee.

96. This is a simplified sample 1 model. Appendix 1 provides insight into the kind of additional details that might be required. It is labelled as 'sample 2' and uses schedule 2 of the Local Government (Auckland Council) Act 2009 as a template to provide the extra detail. We have amended schedule 2 of the 2009 Act by replacing terminology and process that potentially makes more sense for mana whakahaere committees.

97. A more complicated model than that provided in sample 1 or 2 would account for, for example: a) when Iwi authorities or Mana Whakahono a Rohe agreements cover only part of the water catchment area (see sections 6P(7B) and (7C) of the Conservation Act for a possible solution), and, b) honouring pre-existing Iwi rights of participation as negotiated in Treaty of Waitangi claim settlements.

CONCLUSION

98. This preliminary paper has focused on the creation of Māori decision-making entities at the local water catchment level and principally the role of Aotearoa New Zealand's state law to establish the framework for who could sit on these entities. This paper has not been widely peer-reviewed.

APPENDIX 1

Sample 2: Mana Whakahaere Committee

Appointment to membership and cessation of membership

1 Committee's membership

(1) The committee consists of 8 members appointed under clauses 5 to 8.

(2) The membership is composed of—

(a) 4 persons elected by those with sufficient connection to the catchment; and

(b) 4 persons appointed by relevant Iwi authorities.

2 Selection body's establishment and function

(1) A selection body is established when the persons chosen as Iwi authorities' group representatives under clause 4 meet for the first time.

(2) If a person on the selection body tells the Minister of Māori Development that he or she resigns, the Minister must notify the relevant Iwi authority that nominated the person and ask the entity to nominate a replacement.

(3) The selection body's sole function is to appoint members to the committee.

(4) In appointing members to the committee, the selection body—

(a) must be guided only by the committee's purpose, functions, and powers; and

(b) is not subject to directions from the relevant local authorities or any of its committees or councillors; and

(c) may seek advice from any source it considers appropriate.

(5) The selection body ceases to exist when it has performed its function.

(6) If the selection body is unable to perform its function, the Minister of Māori Development must appoint the members of the committee as if the Minister were the selection body.

3 Costs of selection process

(1) Each relevant Iwi authority must meet the costs of mandating its representatives as persons on the selection body.

(2) The relevant local authority must meet the costs of selecting members of the board.

4 Minister gives notice that relevant Iwi authorities' group representatives needed for selection body

(1) The Minister of Māori Development must give written or electronic notice to relevant Iwi authorities that mandated representatives of relevant Iwi authorities are needed for the selection body.

(2) The notice must state a time by which each entity must tell the Minister the name of the person who is to be the group's mandated representative on the selection body.

(3) Each relevant Iwi authority that receives the notice may choose 1 person to be its mandated representative on the selection body.

5 Qualifications of members

(1) To be a member of the committee, a person must—

(a) be a natural person; and

(b) consent to being appointed to the committee; and

(c) not be disqualified under subclause (2); and

(d) must have the mana, standing in the community, skills, knowledge, or experience (i) to participate effectively in the mana whakahaere committee; and (ii) to contribute to achieving the purposes of the mana whakahaere committee.

(2) The following persons are disqualified from being members:

(a) a person who is under 18 years of age:

(b) a person who is an undischarged bankrupt:

(c) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, or the Financial Markets Conduct Act 2013, or the Takeovers Act 1993:

(d) a person who is subject to a property order under the Protection of Personal and Property Rights Act 1988:

(e) a person in respect of whom a personal order has been made under that Act that reflects adversely on the person's—

(i) competence to manage his or her own affairs in relation to his or her property; or

(ii) capacity to make or to communicate decisions relating to any particular aspect or aspects of his or her personal care and welfare:

(f) a person who has been convicted of an offence punishable by imprisonment for a term of 2 years or more, or who has been sentenced to imprisonment for any other offence:

(g) a current member of Parliament:

(h) a current Auckland councillor or current local board member:

(i) a person who is disqualified under another Act.

6 Selection body approves nominations for sufficient connection elected members

(1) All persons must have a whakapapa connection to the catchment to be eligible for nomination and election under this category of sufficient connection.

(2) The selection body must determine and administer the election process for the sufficient connection delegates by following a process that, at a minimum,—

(a) includes public notification of the election process that the body proposes to use for choosing the representatives; and

(b) provides an opportunity for nominations to be received; and

(c) encourages nominations from a broad range of persons with sufficient connection to the catchment including Māori land representatives, ahi kā representatives, women representatives, youth representatives and expert skills representatives.

(d) administers the election process.

(2) The selection body must apply clause 5 when accepting nominations.

7 Selection body chooses relevant Iwi authorities' group representatives for committee

(1) The selection body must choose the committee's 4 relevant Iwi authority group representatives.

(2) The selection body may choose people on the selection body for the board.

(3) The selection body must apply clause 5 when choosing the 4 relevant Iwi authority group representatives.

(4) The selection body must have regard to the following when choosing relevant Iwi authority representatives:

(i) The particular features of the catchment including marae and Māori land ownership; and,

(ii) the interests of kaitiakitanga, manaakitanga and ahi kā; and,

(iii) the mix of skills, knowledge and experience required including in tikanga, mātauranga, sciences, planning, commerce and law; and

(iv) the desire for broad representation of Māori society within the catchment, as much as is possible, being mindful particularly of youth and women and gender diversity.

8 Process for appointing members

(1) A person whom the selection body is proposing to appoint to the committee must give a written certificate to the selection body stating that the person—

(a) is not disqualified under clause 5(2); and

(b) consents to being appointed to the board.

(2) The selection body must give the members it chooses a certificate of appointment that—

(a) states the date on which the appointment starts; and

(b) is signed by at least 2 persons on the body.

(3) The selection body must give copies of the certificates of appointment to—

(a) the Minister of Māori Development; and

(b) the relevant local authority.

(4) The selection body must complete the process in this clause at least 2 months before the ending of the terms of office of the members of the board.

9 Cessation of membership

(1) The term of office of a member of the committee is 3 years.

(2) A member of the committee remains a member until the earliest of the following:

(a) he or she becomes disqualified under clause 5(2):

(b) he or she is removed under clause 10:

(c) his or her term of office ends:

(d) he or she dies:

(e) he or she resigns.

(3) A member may resign from the board by giving 4 weeks' written or electronic notice to—

(a) the committee; and

(b) the Minister of Māori Development.

(4) If a member of the committee dies or resigns or is removed under clause 10, the selection body must appoint a replacement member in the manner described in whichever of clause 6 or 7 applies.

(5) However, if the member dies or resigns or is removed under clause 10 less than 12 months before polling day for the next election of the relevant local authority, the remaining members of the committee may choose not to have a replacement member appointed before polling day.

(6) A replacement member's term of office is the uncompleted term of the member he or she replaces.

(7) Members may be reappointed.

10 Removal of members

(1) A majority of the committee may, at any time for just cause, remove a member appointed by the selection body:

(2) In subclause (1), **just cause** includes misconduct, inability to perform the functions of office, neglect of duty, and breach of any of the collective duties of the committee or the individual duties of members (depending on the seriousness of the breach).

(3) The removal must be made by written notice to the member (with a copy to the Minister of Māori Development and the relevant local authority).

(4) The notice must—

(a) state the date on which the removal takes effect, which must not be earlier than the date on which the notice is received; and

(b) state the reasons for the removal.

(5) The committee may remove a member with as little formality and technicality, and as much expedition, as is permitted by—

(a) the principles of natural justice; and

(b) a proper consideration of the matter; and

(c) a proper consideration of tikanga; and

(d) the requirements of this Act.

11 No compensation for loss of office

A member of the committee is not entitled to any compensation or other payment or benefit relating to his or her ceasing, for any reason, to hold office as a member.