TE KĀHUI WAI MĀORI SUBMISSION TO THE
RESOURCE MANAGEMENT REVIEW PANEL

BACKGROUND AND APPROACH


2. We consider that reform needs to be systemic and meaningful so as to realise Treaty partnership governance. It must result in positively disrupting the current decision-making, which is consistently “balancing out” Māori rights and interests in environmental management.  

3. We are conscious that the Panel would have received strong support for a range of its proposals, including:
   a. Establishing a National Māori Advisory Board on Planning and the Treaty.
   b. Giving greater status to Iwi Management Plans in Part 5 of the RMA.
   c. That allocation of functions in the resource management system to appropriate institutions ensure the principles of the Treaty and relationship between the Crown and Māori is given due recognition.
   d. Strengthening independent oversight and review to develop an outcomes monitoring system that is culturally appropriate and recognises mātauranga Māori, and provides for regular auditing of council performance in meeting Treaty requirements. In this regard, we refer to the opportunity to expand our recommendation of a Te Mana o te Wai Commission to undertake this broader resource management audit function.  
   e. Require a mandatory national policy statement on Te Tiriti o Waitangi.
   f. Provide funding mechanisms to support Māori participation. This is crucial, and we encourage the Panel to make an express recommendation of the need for funding support to address chronic under-resourcing of Māori.

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1 Our view was that Aotearoa New Zealand’s current resource management system is broken. It is failing to achieve its purpose and has become complex, dysfunctional and inaccessible. The promises of the RMA to Māori have not been realised; and Māori have had to use valuable Treaty credits to achieve what the RMA was supposed to deliver in any event. Treaty-based structural and system reform is required.
3 See our Te Mana o te Wai Report, page 9.
4. We endorse the above proposals, considering them minimum requirements to ensure that the RMA is Treaty compliant, protecting and promoting Māori interests.

5. This submission focuses on amendment recommendations to address key issues, namely, a revised Part 2 and Māori involvement in resource management decision-making.

REVISED PART 2

6. In this part we consider two matters:
   a. ‘Giving effect to’ Tiriti o Waitangi principles.
   b. Purpose and principles of the RMA.

‘Giving effect to’ Tiriti o Waitangi principles

7. We strongly agree with the Panel’s statements that Te Tiriti o Waitangi is “an important part of New Zealand’s unique constitutional arrangements” and that the current RMA system provides insufficient recognition of the Treaty.4 The WAI 2358 Stage 2 Report has found that “Section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty.”5

8. Our revised Part 2 elevates references to Te Tiriti o Waitangi so as to direct RMA decision makers to “give effect to” Te Tiriti o Waitangi.

9. We also adopt the Waitangi Tribunal’s recommendation to include a direction that: “The duties imposed on the Crown in terms of Treaty principles are imposed on all persons who exercise powers and functions under the Act.”6 We agree with the Tribunal that such an amendment ensures that Māori interests are protected, that local authorities and all RMA decision makers carry out Treaty responsibilities and obligations, and that Part 2 of the RMA is Treaty compliant.

Implementation implications

10. We consider that the “give effect to” drafting is clear and well understood, in light of EDS v King Salmon. The direction and the clarification as to duties imposed represents a clear elevation of the expectations on RMA decision-makers when carrying out Treaty responsibilities and obligations.

Purpose and Principles of the RMA

11. We support reform of sections 5, 6, 7 and 8 to better reflect te ao Māori, including Māori law, Māori rights and interests, Māori decision-making and to recognise Te Mana o te Wai.

12. The reform should position a move away from an effects-based approach to a values-based approach, to ensure the change is holistic and empowering of a bicultural management approach.

13. Any recasting of the purpose and principles of the RMA needs to catch up with the specific innovation in Tiriti o Waitangi settlement legislation, and more

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5 WAI 2358 Stage 2 Report, page 66.
6 Ibid.
generally in Māoridom. The RMA is outdated in its framework when compared to statutes such as Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Te Awa Tupua Act), Te Urewera Act 2014 and the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (refer specifically, Te Ture Whaimana – the Vision and Strategy).

14. Tiriti settlements are endorsing Māori knowledge about caring for Papatūānuku and reasserting a founding place for Māori law to once again guide natural resource governance and management. This new national recognition of Māori law for the environment ought to be at the forefront of any significant foreseeable review and reform of the RMA.

15. In fact, the reform should be future-proofed as much as possible. This includes embracing notions that our current state legal system is in the early stages of adapting to become bicultural, bilingual and bijural.

a. **Bicultural** - meaning a legal system that implements structures, develops processes and provides resources grounded in Te Tiriti o Waitangi, including the sharing of resources and decision-making with hapū, iwi and Māori.

b. **Bilingual** - meaning a legal system that utilises Te Reo Māori broadly in the learning, reading and practice of law.

c. **Bijural** - meaning a legal system that presupposes the existence of Māori Law founded on kaupapa tuku iho and tikanga and recognises Māori law as a legitimate and continuing source and influence on the rights, obligations, rules and policy in Aotearoa New Zealand’s legal system.

16. The Te Mana o te Wai framework in the NPS-FM may be useful for reframing section 5. Te Mana o te Wai inherently seeks to give effect to our bicultural, bilingual and bijural legal system; so too the frameworks to be found in the innovative settlement legislation referred to in paragraph 13. This framework could be adapted to become a concept such as ‘Te Mana o te Taiao’, which frames expectations of a revised section 5, providing an interpretive aid. An example can be found in Tupua Te Kawa - the intrinsic values that represent the essence of Te Awa Tupua (the Whanganui River) – in the Te Awa Tupua Act. While in that Act Tupua Te Kawa must be recognised and provided for, we would suggest any such Te Mana o te Taiao equivalent is elevated to an interpretive aid.

17. In providing this advice we note that, before advancing further in any consideration of the adaptability of Te Mana o te Wai to become Te Mana o te Taiao, or some other such concept, there will be a need to engage widely to consider the appropriate reflection of such a proposal.

18. Whatever the precise amendments, there ought to be an opportunity to entwine into our country’s understanding of sustainable management recognition of the important role Māori law can have in further enabling us as a country to care for and use natural resources.

19. Our current thinking on a revised Part 2 is included as **Appendix 1**.

**Implementation implications**

20. We understand that the Panel has been reflecting on how a framework like Te Mana o te Taiao might be reflected, and that a key concern is not to create...
uncertainty for users of the RMA system. Use of Māori concepts is not fatal to understanding, if clear direction is given. What is more, New Zealanders are receiving these concepts favourably. Officials have reported that, in relation to Te Mana o te Wai, public submissions demonstrated that New Zealanders are overwhelmingly in favour of Te Mana o te Wai as a concept and framework for freshwater management that councils would have to ‘give effect to’.

21. Tensions between use and development versus protection and restoration will remain when taking a whole of environment approach. Where the aforementioned settlement legislation has overcome that tension, it has done so by taking a stand, elevating one consideration over another, rather than relying on a balancing approach. Such an elevation does not have to be categorical.

22. For example, initial feedback on Te Mana o te Wai was that the hierarchy of obligations7 risks dictating a return to a pre-human natural water state. This was never the intention so the feedback was helpful in recognising the need for greater clarity – that there must first be expectations of water being available for it to then meet the needs of people and communities.

RESOURCE MANAGEMENT DECISION-MAKING

23. In the context of the Essential Freshwater reforms, Te Kāhui Wai Māori has been pushing for a direction, through proposed section 3.38 of the draft National Policy Statement for Freshwater Management (NPS-FM), for a direct, co-governance level of involvement in freshwater decision-making.9 Resource management decision-making, typically conflated with statutory governance mechanisms that are a means to provide for a role in decision-making (s 33 transfer of powers, s36B JMAs and mana whakahono ā-rohe), currently sits with local authorities pursuant to sections 30 and 31 of the RMA.

24. The distinction is important. Some of the most widely acknowledged co-governance mechanisms, such as the ability of Waikato and Waipā River iwi to ‘jointly decide’ on the preparation of RMA planning documents relating to the Waikato and Waipā River catchments, relate only to ‘final recommendations to the local authority’, who remains the ultimate decision maker.

25. That said, the Panel is also aware that statutory governance mechanisms are severely underutilised in an RMA context. Indeed, in our Essential Freshwater discussions with the Ministry for the Environment and Crown Law, those agencies are suggesting the NPS-FM cannot direct a co-governance level relationship through the RMA. This is on the basis that the language in sections 33, 36B and the mana whakahono ā-rohe provisions means the NPS-FM cannot make compulsory what is voluntary.

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7 That resources are managed in a way that prioritises: first, the health and wellbeing of waterbodies and freshwater ecosystems; and second, the essential health needs of people; and third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.
8 Section D of the 2017 NPS-FM.
9 We have received advice from Dr Somerville QC confirming that the NPS-FM can direct co-governance relationships.
26. While we disagree on the basis of the advice that we have received, considering in fact that officials have narrowed the issue; the agency approach speaks to the problem lying squarely within the RMA.

27. The Kāhui therefore consider that the reforms must address both issues:

a. They must confer resource management decision-making directly on iwi and hapū via 50/50 involvement in decision-making in resource consents and plan-making hearings.

b. The RMA’s existing statutory governance mechanisms for transfer of powers, joint management and iwi participation (in the case of mana whakahono ā-rohe) must be amended to be made compulsory.

28. In respect of the statutory governance mechanism, lesser recommendations that have been made in the past (e.g. that local authorities be required to regularly review their activities to see if they are making appropriate use of sections 33 and 36B, and be required to report annually on their efforts) are matters iwi and hapū are reluctantly pursuing within the confines of the existing framework. They are not satisfactory reform options.

**Implementation implications**

29. The key questions that routinely arise when considering compulsion is, how would a mandatory expectation or 50/50 arrangement work where you have multiple iwi, and what are the engagement (and accordingly cost) expectations on councils?

30. We caution the Panel against seeing the existence of multiple iwi with which the Council would need to engage as a barrier to practical implementation; particularly in the context of repeated reports that Tiriti settlement arrangements that create these roles are providing what the RMA was supposed to provide in any event. When considering the Treaty settlement relationship, we need to act our age. Existing settlement arrangements demonstrate that a collective model, incorporating multiple hapū and iwi, is workable. We posit that for an opportunity to finally have a seat at the decision-making table hapū and iwi will make it work.

31. What we see as crucial is allowing hapū and iwi to come up with their preferred collective engagement model with Councils where there are overlaps. We therefore suggest a variation of the mana whakahono ā-rohe approach, where iwi/hapū initiation triggers engagement hui of all other relevant iwi/hapū, providing an opportunity to wānanga.

32. We suggest that a dispute resolution mechanism that, as a circuit breaker, uses the Māori Land Court’s section 30 Te Ture Whenua Māori Act 1993 jurisdiction to advise on or determine representation of Māori groups, could be effective in ensuring matters are not stalled.

**HE MIHI**

33. This submission is deliberately succinct and speaks to matters that we understand are at the front of the Panel’s mind at this time. It should be read in conjunction with our Te Mana o te Wai Report.

34. We would be happy to offer supplementary comments should the Panel find it of value.
APPENDIX ONE

Section 5 Purpose

(1) The purpose of this Act is to promote the bicultural sustainable management of natural and physical resources for the health of the environment and for the health of the nation.

(2) In this Act, bicultural sustainable management means enabling mana whakahaere, respecting the maori, and managing the care, use, development, and protection, of natural and physical resources in a way, or at a rate, which sustains people and communities to be healthy and safe, and be culturally, socially and economically well while—

(a) safeguarding the life-supporting capacity of air, water, soil, and ecosystems from the mountains to the sea; and
(b) giving effect to the principles of Te Tiriti o Waitangi; and
(c) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations.

The new wording proposed in this reframed section 5 (highlighted in bold) is wording that is for the most part already in use in other legislation or policy.

1. “Bicultural” sustainable management would signal a new era in resource decision-making. The existing ‘sustainable management’ jurisprudence developed under the RMA will need to be entirely rethought from a new starting point that values equally Māori and Pākehā laws and decision-making. The core framework of any new law must have at its heart biculturalism to make real and possible the giving effect to the principles of Te Tiriti.

2. “For the health of the environment and for the health of the nation” is an important purpose statement that clearly links into the positioning of Te Mana o te Wai. This expression would help create the new jurisprudence for developing a bicultural jurisprudence. Some other statutes make similar commitments. For example, section 3 of the Waikato-Tainui Taupou Claims (Waikato River) Settlement Act 2010 reads “The overarching purpose of the settlement is to restore and protect the health and wellbeing of the Waikato River for future generations”.

3. “enabling mana whakahaere” is purposefully positioned here to demonstrate systemic power-sharing change (and not business as usual).

4. “mauri” and “care”, are insertions that seek to ensure ‘bicultural sustainable management’ has an equally firm footing in te ao Māori.

5. “from the mountains to the sea” reinforces an important Māori legal principle.

6. “giving effect to” Treaty principles is already required by section 4 of the Conservation Act 1987. We have deliberately prioritised the sole mention of Te Tiriti of Waitangi, rather than the Treaty, because it is the Māori language version that must be given effect to. The repositioning for a systemic change ought to be holistic. To enable a true practice of bicultural sustainable management, we need
to be comfortable as a nation with Te Tiriti o Waitangi. This will signal a new change for Treaty jurisprudence.

7. With Te Tiriti o Waitangi upfront in section 5, we recommend the deletion of section 8.

Section 6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to respecting the mauri and mana, and managing the care, use, development, and protection, of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the tikanga and mātauranga of tangata whenua including the inalienable connection tangata whenua have with, and responsibility for, natural and physical resources; and
(b) effects of climate change;
(c) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;
(d) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;
(e) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
(f) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;
(g) the protection of historic heritage from inappropriate subdivision, use, and development;
(h) the protection of protected customary rights;
(i) the management of significant risks from natural hazards;
(j) any finite characteristics of natural and physical resources;
(k) the benefits to be derived from the use and development of renewable energy.

Section 7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to respecting the mauri and mana, and managing the care, use, development, and protection, of natural and physical resources, shall have particular regard to—

(a) the efficient use and development of natural and physical resources:
(b) the efficiency of the end use of energy:
(c) the maintenance and enhancement of amenity values:
(d) intrinsic values of ecosystems:
(e) maintenance and enhancement of the quality of the environment: