Next steps for freshwater

Unpacking the Waitangi Tribunal’s recommendations for freshwater reform

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INTRODUCTION

Freshwater is firmly on New Zealand’s agenda, with both the Waitangi Tribunal’s Stage 2 Report on the National Freshwater and Geothermal Resource Claims (Report) and the Ministry for the Environment’s discussion document “Action for healthy waterways - A discussion document on national direction for our essential freshwater” sparking significant debate across interest groups, political parties and the general public.

The Ministry’s proposals include amending the National Policy Statement for Freshwater Management (NPS-FM) to give effect to Te Mana o te Wai (the health of the water body must come first), reinforce a holistic approach to freshwater management including by strengthening the role of Māori values, and protect indigenous freshwater species.

The Ministry proposes that both the NPS-FM and new Freshwater National Environmental Standards (NES) should be used to prevent further draining or development of wetlands, and that this NES should, among other things, tightly restrict further intensification of ecosystem-degrading land uses until all regions have operative freshwater management plans. The Ministry has also drafted proposed regulations to exclude stock from waterways.

Although their development preceded the Tribunal’s Report, these proposals reflect some of the Tribunal’s recommendations. This appears to be a result of both the Tribunal and the Ministry receiving similar input from Māori freshwater experts. We anticipate that the Tribunal’s findings will influence further debate about the Ministry’s reform proposals. There is a lot of work being done on potential freshwater reforms, so we expect to continue to see overlapping initiatives influencing each other, and could well see rapid shifts in policy and regulation soon.

On 28 August 2019, we gave an overview of the Tribunal’s key findings and recommendations. In this paper, we explore those recommendations further and consider the potential outcomes if the radically altered freshwater management scheme recommended by the Tribunal is implemented.

Despite the differences that have been expressed across the board in reaction to the Report, one theme remains consistent - the state of New Zealand’s water quality must be significantly and rapidly improved.

WHAT WAS THE TRIBUNAL ASKED TO CONSIDER?

In February 2012, claims were filed with the Waitangi Tribunal (the Tribunal) by the New Zealand Māori Council, supported by co-claimants and many interested parties. The claims were consolidated in the Wai 2358 National Freshwater and Geothermal Resources inquiry.

The inquiry has been heard in stages, with the Stage 1 Report completed in December 2012. This was followed by a period in which the Crown developed its freshwater reforms. The inquiry was adjourned in 2015-16 so that the Crown and the Freshwater Iwi Leaders Group could co-design reforms to address Māori rights and interests in fresh water. Stage 2 hearings were held from November 2016 to November 2018. The Tribunal congratulated the Crown for the innovation of adopting a co-design process, and noted that this should become a standard part of government policy-making.

In Stage 2 the claimants argued that the present law in respect of fresh water (predominantly the Resource Management Act 1991 (RMA) and associated case law) is not consistent with the principles of Te Tiriti o Waitangi (the Treaty), and that reforms have failed to provide adequately for Māori rights and interests in fresh water. The Tribunal confirmed the focus of the Stage 2 inquiry to be as follows:

(a) Is the current law in respect of fresh water and freshwater bodies consistent with the principles of the Treaty?
(b) Is the Crown’s freshwater reform package consistent with the principles of the Treaty?

In answering (b), the Tribunal made a range of recommendations to address shortcomings that it found in respect of how the Crown’s freshwater reform package recognises Māori rights and interests in specific freshwater resources.

The Tribunal undertook an analysis of proposed or completed reforms from 2003 to the present day but mostly concerned itself with the “Next Steps for Fresh Water” released in February 2016.
The Waitangi Tribunal is a standing commission of inquiry only, which makes recommendations on claims brought by Māori relating to legislation, policies, actions or omissions of the Crown that are alleged to breach the promises made in the Treaty. Although the Tribunal's recommendations are not binding on the Crown, these particular recommendations are strong and direct, and also timely given the current government's resource management reform project. Given the positive and negative reactions in the short time since the Report was released, it is apparent that the Report will create pressure for significant legislative and policy reform.

WHAT DID THE TRIBUNAL FIND?

As a broad determination the Tribunal found:

... that the RMA and its allocation regime are not consistent with Treaty principles, including the principle of equity. Māori have been prejudiced by the ongoing omission to recognise their proprietary rights, barriers that have prevented their participation in the first-in, first served allocation system, and the lack of partnership in allocation decision-making. Economic opportunities have been foreclosed by the barriers to their access to water.

Further, the Tribunal noted that many of its previous reports have already found the RMA to be in breach of the Treaty (including the Wai 262 Report), but that very few RMA-related recommendations made in previous Tribunal Reports have been implemented or addressed.

The Tribunal criticised inadequate initial consultation and legislative drafting by the Crown, and a failure to intervene and implement change where deficiencies have been identified. Recognising that the issues presented are complex and multifaceted, the Tribunal gave credit for the work carried out so far, acknowledging the Crown's "difficult and intensive work carried out to develop a better national framework for freshwater management".2

The Tribunal's key criticisms relate mostly to water allocation and the health of New Zealand's freshwater and freshwater bodies. The Tribunal reviewed legislative mechanisms and government policy, finding that:

(a) the RMA makes a proviso for pre-existing rights of farmers,3 but does not do the same for Māori, and does not otherwise recognise or provide for Māori rights of a proprietary nature;

(b) even if the prior rights of Māori had been provided for in the Act, the first-in, first served system of allocation does not allow applications for water permits to be compared or prioritised;

(c) the first-in, first-served system is also unfair to Māori, especially in over-allocated catchments, because of statutory and other barriers that prevent Māori landowners from participating in RMA processes, meaning that Māori have had little say, and in some cases no say, in decisions on water allocation and use;

(d) Councils very rarely provide an allocation to Māori in the absence of strong national direction; and

(e) the first-in, first-served system results in widespread over-allocation and environmental problems and needs urgent reform.

PURPOSE AND PRINCIPLES - THE DECISION-MAKING HIERARCHY OF PART 2 OF THE RMA

The Tribunal reviewed the purpose and principles of the RMA, and in particular the place of the Treaty in the decision making hierarchy. Three crucial issues were identified in the operation of Part 2, namely the relative weakness of the Treaty clause (section 8); a lack of national direction to councils; and the way in which the RMA enables the 'balancing out' of Māori interests.

Section 8 is currently applied as part of a hierarchy in which it comes last. This stems from the phrase "take into account" imposing a lesser requirement than "have particular regard to" (section 7), which in turn is a lesser requirement than "recognise and provide for" (section 6).

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2 Waitangi Tribunal The Stage 2 Report on the National Freshwater and Geothermal Resources Claims at xxiii.

3 RMA, section 20A.
The Tribunal notes that section 8 has sometimes confined the interpretation of Treaty principles to a “narrow focus of the values expressed in the RMA environment”\(^4\). In practice, interpretation of the Treaty has been restricted to:

(a) recognising and providing for “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”;\(^5\) and

(b) having "particular regard to... kaitiakitanga".\(^6\)

The Tribunal reasoned that the relative weakness of section 8 often results in Māori interests being eroded in the course of freshwater decision-making. Amendment of section 8 is recommended - to state that the duties imposed on the Crown in terms of the principles of the Treaty are imposed on all those persons exercising powers and functions under the Act. The aim being that such an amendment would lead to RMA decision makers better protecting Māori interests and, in the view of the Tribunal, make Part 2 Treaty compliant.

The Report further recommends that section 6 (matters of national importance) be amended to include Te Mana o te Wai.

This is an area that will be watched keenly by RMA decision-makers. So far the Crown has declined to implement Tribunal recommendations that section 8 be amended. It is unclear what the practical implications of imposing Crown duties in terms of the principles of the Treaty on all RMA decision makers would be. However, the intent is clear that Treaty principles, including partnership and active protection, should be given more prominence in decision-making.

The Tribunal identifies that simply amending section 8 will not guarantee Treaty-compliant RMA decision-making. Promoting tino rangatiratanga (Māori self determination and autonomy) requires empowering Māori to be involved in decision-making.

In the meantime, stakeholders should continue to take an active role in considering Treaty principles and engaging with Māori when taking part in RMA processes. The Tribunal has reiterated the ongoing importance and relevance of the Treaty to Māori-Crown relations, including where the Crown devolves its decision-making to local government.

**FRESHWATER MANAGEMENT AND DECISION-MAKING**

While sections 33 and 36B of the RMA allow for councils to transfer functions and powers to iwi, in order to enable a high level of Māori participation in decision-making, councils have only devolved decision-making powers to Māori on a handful of occasions without Crown intervention. The Report is highly critical of the Crown for a lack of leadership and support on this matter.

The failure of the RMA to do much to encourage and promote meaningful participation in resource management decisions is a key criticism of the Report. In the Tribunal’s view, sections 33 and 36B have not been utilised partly due to legislative barriers contained within the provisions, partly due to poor council-iwi relationships, and partly due to a lack of incentive or compulsion from the Crown. The Tribunal found that iwi management plans, another mechanism which could be used to empower Māori, are not given sufficient legal weight.

The Report recommends that sections 33 and 36B are amended to provide a process where iwi authorities can apply to councils for transfers of power and joint management agreements - with a mandatory process of engagement following any application, and mediation and/or the assistance of the Crown or the proposed co-governance body (discussed further below), if necessary.

\(^4\) Citing the report of Antoine Coffin and Matt Allott (Boffa Miskell Ltd), “Exploration of Māori Participation in Freshwater Management” prepared for the Ministry for the Environment, September 2009 and reproduced in closing submissions for counsel for interested parties.

\(^5\) RMA, section 6(e).

\(^6\) Section 7(a).
THE “TREATY STANDARD” FOR FRESHWATER MANAGEMENT AND DECISION-MAKING

The Wai 262 Tribunal found that there should be a sliding scale of Māori involvement in RMA decision-making regarding natural resources, depending on the strength of the kaitiaki interest in the particular resource, the nature and extent of other interests in the resource, and the interests of the resource itself. This scale would have:

(a) "full kaitiaki control of the taonga" at the high end;
(b) joint control through a partnership arrangement in the middle; and
(c) at the low end, kaitiaki should be able to influence decision-making, without having full or joint control.

The Tribunal adopted this model in its Report, reasoning that:

The Crown’s guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga.

Under this model, most often, the approach to the management of water bodies would require a co-governance/co-management partnership between Māori and the relevant council. This is referred to as “the Treaty standard for freshwater management”. It would only be in some instances that this “standard” will need to be departed from, where Māori interests in a water body are such that they require Māori governance of that taonga. The recommended amendment of Mana Whakahono a Rohe (iwi participation arrangement) provisions to make co-governance and co-management of freshwater bodies compulsory may go some way to achieving this.

The findings of the Tribunal reflect broad recognition of the rights of Māori to be involved in environmental decision-making, as well as the inherent advantages of increased participation for the durability and robustness of decisions made under the RMA.

INDEPENDENT NATIONAL WATER COMMISSION

A major recommendation made by the Tribunal is for an independent, national water commission "established on a co-governance basis with Māori." The Tribunal recommends that the national co-governance body should play a prominent role in the actioning of many of its other recommendations, including:

(a) investigating mechanisms for Māori proprietary redress, including water royalties;
(b) assessing whether a separate Water Act is necessary;
(c) promulgating national environmental standards for ecological and cultural flows;
(d) devising measures to absolutely protect wetlands, and save freshwater native fish species from the threat of extinction; and
(e) assisting "councils to dispose of sewage to land wherever feasible."

If this recommendation is implemented by the Crown, the constitution of such a body would be a crucial matter for consideration. Stakeholders may have their own views on who should sit on such a commission, what its functions and processes should be and quite importantly, the ambit of its powers.

We note that the recommendation by the Tribunal anticipates a 50/50 partnership between the Crown and Māori. To give effect to the decisions of a commission we would expect that the “Crown” component of such a partnership would include local authority groups to provide practical, grass roots level, advice and recommendations.
STRIKING THE RIGHT BALANCE

The co-governance that would be the baseline under the recommended “Treaty standard for freshwater management and decision-making” will likely be viewed as a step too far by some, and by others as not going far enough to ensure the sole governance of freshwater taonga by Māori. The degradation of fresh water bodies that has occurred under Crown control could generate some sympathy for the latter view.

Achieving the “Treaty standard” of co-governance/co-management partnerships in decision-making and freshwater management has the potential to strike a good balance between state control and Māori participation in processes which are key to the health of freshwater and communities. At the very least, such an arrangement would give stronger effect to Treaty principles.

We consider that the potential for increased participation of Māori in decision-making and management of freshwater should be viewed with optimism. The insights that Te Ao Māori provides into conceptualising water quality standards, when compared to the status quo, is one benefit that would come from co-governance/co-management. There are already some co-management models in operation for the Waikato and Whanganui Rivers, so the development of such an approach on a larger scale would not need to start from scratch.

Whilst current laws and policies are expressed in terms of “bottom lines” and standards that water quality cannot fall below, the expression of standards through Tikanga Māori is typically more aspirational - standards to strive for rather than minimums to not fall below. The embedding of participatory rights for Māori in RMA processes will likely serve to strengthen the health of the environment, including freshwater, and will allow for robust decision-making that lessens the need for appeal processes.

For participatory mechanisms to be successful, they would need to be accompanied by provisions relating to funding, national level guidance and review procedures. The Report is critical that the Crown has not previously provided local authorities and Māori with the necessary guidance and resources for enabling RMA participation. As a matter of urgency, the Tribunal calls on Crown action to "ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes".

Funding more meaningful Māori participation in the RMA process will be a major challenge for a government that is regularly under fire for its spending decisions. However, the Tribunal suggests that a solution lies in levying commercial users, in order to provide funding for water restoration. Though this is not entirely inconsistent with the RMA, significant reform would be required. Some key ownership-related questions would need to be addressed if a charging regime was to succeed including who (if anybody) owns water. The Tribunal expressed its view as to water allocation rights, and this is discussed further below.

Irrespective of ownership or proprietary rights, regard must be had to all users of water and what a levy scheme may look like for them. Will all use of water be charged, or just “extraordinary” or commercial use, and what about those who currently rely on the free flow of water to support their livelihood? Implications of a levy scheme would be far reaching and may impact industries such as energy generation (ie hydropower), secondary industries such as food and beverage production, and parts of the tourism industry.

The principle of equity under the Treaty makes answering such questions a complex exercise which the Crown has historically struggled with. With many water resources being over-allocated already, the transition period of such a scheme, if implemented, would call for detailed consideration by the government.
WATER ALLOCATION REGIME

A key finding of the Report is that the current water allocation regime under the RMA is inequitable for Māori, in breach of the Treaty principle of equity.

In its Stage 1 Report, the Tribunal found that:

Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of hapū and iwi to control access to and use of the water while it was in their rohe.

The Crown has proposed, in the form of Cabinet papers published by the previous government in 2016, and assurances made to the Supreme Court in the Mighty River Power case (New Zealand Māori Council v Attorney-General [2013] NZSC 6), allocating use and/or discharge rights to Māori (potentially in the form of proprietary or economic rights). However, no decision has been made about the nuts and bolts of such a regime; namely how it would look, whether it would exclude some rights (such as those currently allocated by consents), who would hold the rights on behalf of Māori, and ultimately whether it should happen at all.

It is also unclear what impact this would have on local government controlled municipal water supplies and wastewater treatment. It may be that an exception for public supply and discharges could be carved out if Māori rights to water were recognised to the exclusion of other rights.

Both the previous and current government have reviewed options for reforming the regime, in part to address issues of inequity, but have not made any firm decisions on what reforms might eventuate. Three "significant reform options" that were developed by the Crown in 2016 were:

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

The Tribunal has made a range of recommendations on what, in its view, is necessary to make water allocation compliant with the Treaty. Its view is that merely allocating use and discharge rights for Māori land, as has been proposed by the previous and current government, is insufficient, particularly because Māori have lost most of the land that could have otherwise brought with it equitable water rights.

The Tribunal recommends that the Crown should recognise Māori water rights through proprietary redress. This will include phasing out the first-in, first-served water allocation system, and making water allocations, on a percentage basis, for the exclusive use of iwi and hapū, with these water rights being inalienable other than by lease, and perpetually renewable. We see the potential for this to generate significant potential for disputes between iwi and hapu, as has occurred in relation to the marine and coastal area.

It is proposed that there should be "a wider conversation within Māoridom on proprietary rights and how these might be recognised." Parallels are drawn in the Report between this proposal, and how commercial aquaculture and fisheries rights have been allocated to Māori.

The Tribunal also recommends allocating water for the development of Māori land, and providing urgent funding and expertise to allow for the provision of safe drinking water to marae and papakāinga (Māori communal housing).

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7 Waitangi Tribunal The Stage 1 Report on the National Freshwater and Geothermal Resources Claim at 87.
Conceptual issues with water “ownership” under a Westminster system have arisen in previous debates and so we expect this argument to again be raised by the Crown as a reason against affording proprietary rights. However, given that decolonisation is becoming an increasingly prominent theme in addressing historic issues such as land rights, the justice system and state care, the future of water allocation could be influenced by this becoming a more central tenet of government reforms generally. Stakeholders - including central and local government, Māori, and commercial users, may begin to ask what a “decolonised” freshwater regime could, or should, look like.

Freshwater reform, including increasing Māori participation, and the reversal of degradation will be a costly exercise. The levying of water use at some level almost seems an eventual inevitability, whether this be through allocation of economic rights, the recognition of proprietary rights, or the vesting of water in the Crown (as has been done with minerals).

Issues such as the management of wastewater, what a commercialised allocation scheme may look like, and the precise role and obligations of local authorities are not explored in depth by the Tribunal Report. However, it is not difficult to anticipate that these will be key areas of concern for those with an interest in the preservation and use of freshwater in New Zealand.

The Tribunal's recommendations would, if carried forward, impose further obligations on central and local government, and potentially both everyday and commercial water users. However, the recommendations look to empower Māori and the public generally to better protect and enhance freshwater for the benefit of current and future generations.

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