*Tēnā koutou katoa*

*Below is a template submission covering the Spatial Planning and Natural and Built Environments Bill. Te Tai Kaha suggest that you personalise your submission. Tell your story as kaitiaki and how you fulfil kaitiakitanga obligations to te taiao. Tell the Environment Select Committee your expectations of what this means for the expression of mana motuhake in the reformed resource management system.*

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*Template Submission*

Insert Date

Committee Secretariat

Environment Committee

Parliament Buildings

Wellington

By Email: en@parliament.govt.nz

Tēnā koe

**SUBMISSION TO THE ENVIRONMENT COMMITTEE ON THE SPATIAL PLANNING BILL AND THE NATURAL AND BUILT ENVIRONMENT BILL**

**Introduction and context**

This is a submission by [insert name].

“Mana whakahaere” is defined in the National Policy Statement for Freshwater Management 2020 (“the **NPSFM**”) 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”. This concept is inclusive of iwi, hapū, whānau, ahi kā, landowners and marae. As such, it is a far better term for the existing holders of Māori rights, interests and responsibilities concerning the taiao than the term “iwi and hapū” that is used in the Bills. For the Spatial Planning Bill (SP Bill) and the Natural and Built Environment Bill (NBE Bill) to limit rights and responsibilities to “iwi and hapū”, as they currently do, is contrary to tikanga, te Tiriti and State law. It is a backwards step to the RMA.

A backwards step should not be taken in reforms that represent a once in a generation opportunity to transform the RM landscape of Aotearoa for the better. To protect the environment, provide for sustainable and smart development, and to provide for a fair and equitable allocation of freshwater and other resources to Māori. A system which delivers equity and fairness to all of Aotearoa, and to all holders of Māori rights relevant to the taiao.

**Concern about timeframe**

[Name] records its concern about the short timeframe that has been set for Select Committee submissions. Not only is RM reform an issue of special significance for all Māori, but the SP Bill and the NBE Bill contain lengthy and complicated proposals – between them running to 891 pages (which is 1 page longer than the RMA, which the two Bills are intended to replace).

**Problems to be fixed**

1. ***The Spatial Planning Bill and the Natural and Built Environment bill need a preamble***

[Name] are concerned that neither the SP Bill nor NBE Bill contain a te reo Māori preamble that explains the te ao Māori worldview which is intended to be woven into the new RM system. The SP Bill and NBE Bill will have a daily impact on Māori communities across the motu at least as great as Te Ture Whenua Māori Act 1993 does. Like that legislation, an appropriate preamble, in te reo Māori and followed by its English translation, should be included.

1. ***Te Tiriti clause needs to be stronger***

Clause 4 of the NBE Bill and clause 5 of the SP Bill propose a stand-alone te Tiriti clause that has been drafted in the following identical terms:

*All persons exercising powers and performing functions and duties under this Act must give effect to the principles of te Tiriti o Waitangi.*

This clause is too narrow in its focus on “the principles of te Tiriti”, rather than te Tiriti text.

The principles of te Tiriti water down te Tiriti (the Māori text) and reaffirm the essence of the English text. More recently, there has been a move towards greater focus on the text of te Tiriti: Cabinet issued a ‘circular’ in 2019 encouraging policy-makers to use the text, not the principles of te Tiriti;[[1]](#footnote-1) the Supreme Court in its recent *Ellis* decision acknowledged the criticism of referring to only the principles of te Tiriti;[[2]](#footnote-2) and there are precedents referring to te Tiriti text in s 9(1) of the Education and Training Act 2020, s 6 of the Children and Young People’s Commission Act 2022 and s 6 of Oversight of Oranga Tamariki System Act 2022.

Te Tiriti clause should be part of the purpose clause of the NBE Bill (clause 3), not separate to it, to avoid diluting te Tiriti clause. The Government has previously adopted such an approach in the Education and Training Act 2020 (ss 4 and 9).

Recommended changes:

[Name] ask that clause 4 of the NBE Bill is deleted, and that te Tiriti clause is re-homed in the purpose provision, clause 3, amended to read as follows:

*(1) The purposes of this Act are to–*

 *(a) give effect to te Tiriti o Waitangi; and*

*(b) recognise and uphold Te Oranga o te Taiao, including—*

*(i)The interconnectedness of the taiao*

*(ii)The fundamental role of ecosystem health/ecological integrity to sustain the well-being of the wider environment.*

*(iii)The relationships between Māori and te taiao in accordance with tikanga.*

*(c) enable the use, development, and protection of the environment in a way that—*

*(i) supports the well-being of present generations without compromising the well-being of future generations; and*

*(ii) promotes outcomes for the benefit of the environment; and*

*(iii) complies with environmental limits and their associated targets; and*

*(iv) manages adverse effects.*

*(2) Any person who exercises any power or discretion, or performs any function or duty under this Act, must exercise that power or discretion, or perform that function or duty, in a manner that is consistent with the purposes of this Act.*

This drafting will ensure that te Tiriti clause operates as the korowai (cloak) that it needs to, informing the understanding as well as the application of all aspects of the new RM system.

1. ***Te Oranga o te Taiao needs to better reflect a Māori worldview.***

[Name] supports embedding an integrated Māori view of the environment (including a te ao Māori concept) as a key policy intent of the NBE Bill, not just in order to uphold te Tiriti obligations, but because a te ao Māori concept can inform an effective approach to environmental decision-making that reflects the core value that the health of ecosystems is integral to the health and wellbeing of people and communities, and gives effect to the fundamental truth that life itself depends on ecosystem health.

But te Oranga o te Taiao is not fit for purpose as it has been defined in the NBE Bill.

Clause 5 defines te Oranga o te Taiao with a focus on the “health of the natural environment”. It takes the Māori concept of ‘taiao’, which is understood by Māori to encompass all aspects of the environment, including social, cultural, and economic, and redefines it to mean something much more limited, to what might be thought about as just ecosystems.

There are two key problems with this approach. Firstly, it reflects a western mindset that continues throughout the Bill: that the health of ‘nature’ and ecosystems can be thought about separately from humans and the rest of the environment. This is not consistent with a Māori worldview which recognises that economic, social, and cultural values are interdependent with ecosystem health, and that the taiao is an integrated system. It fails to give the clear direction that ecosystem health must be prioritised to the extent that it can support economic, social, and cultural well-being. Instead, there are many examples in the Bill that provide for ecosystem health to be traded off for particular economic values.

Secondly, the definition proposes recognising and upholding the “intrinsic relationship between iwi and hapū and te Taiao”, meaning the “natural environment”. This is a step backwards from the more inclusive approach of the RMA which recognised and required provision for the relationships of all Māori to the taiao, not just iwi and hapū. Additionally, those protections are not provided for relationships to the economic, social, and cultural parts of the taiao. Yet mātauranga Māori sees the taiao, the world we live in, as an integrated system, and does not make the distinction that the western scientific tradition makes that there are ‘natural’ and ‘non-natural’ elements of the world. A mātauranga Māori view then, would not look at a relationship between people in general and the taiao as a separate entity, but rather be concerned with how people function as a part of the taiao. From this it follows that to include the proposed definition of “natural environment” within te Oranga o te Taiao concept wrongly alienates Māori from utilising their own practices, tools, and values in order to implement te Oranga o te Taiao.

We are also concerned that the NBE Bill provides for ‘market-based allocation methods’, which would mean that resources like water, air, soil, coastal waters could be allocated to the sectors and groups that are seen to generate the higher economic, particularly financial, benefits, rather than first ensuring that the state required to maintain ecological integrity is provided for, and then the human health needs are allocated for. The problems that this will pose to the taiao are exacerbated by the fact that there is not a clear overarching national direction of what to prioritise in the purpose of the Bill, and that various layers of the Bill are contradictory in terms of how decisions are made. This worsens a key issue of the RM system where a lack of central government direction is a source of significant complexity, and there is regional variation in how the legislation is interpreted and applied.

The RMA experience is that wherever there is no certainty about priorities in decision-making, decisions tend to favour those who can afford to participate and push their interpretation of what’s important. This is of significant concern for Māori who struggle to afford to participate in decision-making currently and will continue to under this new regime.

In connection with these issues, we are concerned with the use of the ‘environmental limits’ as proposed by the NBE Bill. Environmental limits as proposed in the Bill will not protect ecosystems, because the Bill only requires setting environmental limits that prevent ecosystems degrading from their current state. This is despite the situation across many different domains of the environment, where maintaining ecosystems at their current state is not sustainable. The Bill requires that ‘targets’ are set for each of those limits, but there is no direction to set these at a state that is sustainable, and there is no certainty about when these targets will have effect. Under the NBE Bill, targets could never be set at a standard that is sustainable, and in the meantime, ecosystems could reach tipping points. The current RMA regime at least requires sustainable management and environmental standards to reflect the safeguarding of life-supporting capacity of ecosystems.

The NBE Bill also provides for limits to be set at worse than current state if the current state will cause continuing degradation. This takes an approach that where the environment is really degraded, we should not pursue recovering it, or even maintaining it. This approach is in conflict with the Tiriti obligation to protect taonga including the environment.

Recommended changes:

As outlined in the previous section, we recommend that any reference to the ‘natural environment’ in connection to Te Oranga o te Taiao, or te taiao generally is removed, as is consistent with the drafting that Te Oranga o te Taiao refers to the interconnectedness of the taiao.

We also ask that a ‘hierarchy of obligations’ as in the National Policy Statement for Freshwater Management 2020 is applied, to require that first the health of ecosystems is prioritised, second the health needs of people, and third their social, economic, and cultural well-being. This should also be supported by a requirement for limits to be set at a state of health that is sustainable and ensures the protection of ecosystems, rather than merely current state.

1. ***All Māori rights holders must be recognised***

The SP and NBE Bills are both drafted on the basis that it is in most cases only “iwi and hapū” who have rights and responsibilities relevant to the taiao, and in some cases it is only iwi/post-settlement governance entities (“**PSGEs**”) who matter.

That is wrong as a matter of tikanga, te Tiriti and State law, as it ignores and makes invisible rights that are held by ahi kā / landowners/ individuals, whānau and urban Māori.

In accordance with tikanga and te Tiriti the primary ‘rights holders’ in the natural resources space are primarily hapū, with ancillary or relational rights held by ahi kā / landowners/ individuals, whānau and hapū collectives / confederations. In this respect we refer the Committee to the work of Te Tai Kaha Māori Collective on the Hierarchy of Rights and Interests, which identifies the layers of Māori rights and responsibilities relevant to the RM system. This document is available at [www.foma.org.nz](http://www.foma.org.nz)

Treaty Settlements with PSGEs are important and legally binding agreements between the Crown and Māori, negotiated through the ‘Large Natural Groupings’ policy the Crown has dictated. PSGEs under Treaty Settlements are given some legal rights and responsibilities, and those legal rights and responsibilities need to be transferred into the new RM system. But other Māori rights holders must not be excluded, or invisibilised, in the process. PSGEs have no general mandate to represent hapū, whānau, ahi kā, landowners and marae and should not be assumed to do so unless free and prior informed consent to do that is demonstrated.

The approach in the NBE Bill is also a backwards step. Currently, s 6(e) of the RMA includes as a matter of national importance that “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” must be recognised and provided for. The Bill is a backward step in its use of the less inclusive term “iwi and hapū” in place of “Māori”.

Colonialism, and damaging Crown policies and practices over many decades, have created ‘complexity’ in terms of who are the Māori rights holders and what rights they have relative to other Māori rights holders. As the Supreme Court recognised in its recent Pouakani lands resumption decision, this ‘complexity’, and the resulting layers of overlapping Māori rights, is a reality that needs to be recognised and accommodated, not ignored in a way that diminishes the rangatiratanga of some Māori rights holders contrary to tikanga.[[3]](#footnote-3)

Recommended changes:

Accordingly, and as is explained at the outset of this submission, we ask that the primary reference term that is used in the SP and NBE Bills for Māori rights and responsibilities holders is “mana whakahaere”, based on the definition in the NPSFM (or, as a second best alternative, that the approach taken in s 6(e) of the RMA is retained).

We prefer “mana whakahaere” as it is a more expansive term in depicting a wider relationship with natural features / resources / environments than “iwi and hapū” does. That in turn better reflects the full range of overlapping rights, interests and responsibilities held by iwi, hapū, whānau, Māori landowner and urban Māori. It also helps to achieve a te Tiriti compliant regulatory framework by ensuring that all kaitiaki can fulfil their kaitiakitanga obligations to the taiao. The Crown’s approach of “picking winners” in terms of iwi, hapū and PSGEs is unnecessary, it is unhelpful, and it is contrary to tikanga and te Tiriti.

We also consider that the underlying issue that Māori communities who have rights and responsibilities are ignored should be addressed by the Crown providing resources to Māori, in the exercise of their tino rangatiratanga rights, to design, create and then control and administer a national register of all Māori rights holders, broken down by sub-catchment/catchment/region. The register can be used to identify (overlapping) Māori rights holders, and to ensure that all Māori rights holders are able to participate in the new RM system in a way that appropriately recognises and respects the nature of the rights they hold.

1. ***Land rights must be better protected***

Clause 497 of the NBE Bill defines “protected Māori land” for the purposes of both the SP and NBE Bills. This definition is too narrow in only including General Land if that was transferred from the Crown with the intention of returning it to mana whenua. The definition needs to be widened to extend to any land Māori owners regard as taonga, to avoid the perverse outcome of culturally significant land bought by Māori from private owners, perhaps out of Treaty settlement proceeds, not qualifying as “protected Māori land”.

Recommended changes:

Accordingly, we ask that clause 497 is amended by adding a new paragraph (f) to bring within the definition of “protected Māori land”: “*any other land that is a taonga tuku iho for the owners of the land and the mana whakahaere associated with the land*”.

1. ***Water rights must be better protected***

Clause 814 of the NBE Bill preserves Māori rights in freshwater. But it is too weak as it is drafted. The assurance in clause 814(1) of no further prejudice to Māori rights in freshwater does not provide for or even protect future water rights claims. It is also undermined by clause 814(3), which says that nothing in clause 814 affects the lawfulness or validity of any action under the legislation. This appears to mean that the assurance of no further prejudice in clause 814(1) cannot have any practical effect on how the new RM laws are interpreted and applied. If that is its purpose or effect, clause 814 provides no protection.

The NBE Bill goes on in clauses 689-693 to propose a Freshwater Working Group, which it appears will be made up of Crown and “iwi and hapū” representatives who the Crown must approve (and, potentially, may choose). But it is a toothless tiger, because clause 692 allows the Crown to choose to ignore its recommendations. After the Group’s report has been released, clause 693 allows “iwi and hapū” – but not other Māori rights holders, even if they have greater rights than iwi/PSGEs in relation to bodies of water at the (sub-) catchment level – to try to negotiate with the Crown to agree on a statement for how freshwater should be allocated at a regional, catchment or sub-catchment level. But the Crown has to agree to any statement, effectively giving it a power to veto any statement. If it does not veto it, and a freshwater allocation statement is made, clause 693(7) allows for the impact of a freshwater allocation statement to be delayed for up to 5 years if the regional planning committee wants to. It is quite possible that, in those 5 years, the water bodies that mana whakahaere seek to protect through a freshwater allocation statement will tip beyond a point of no return.

We are also concerned that the narrow focus in clauses 689-693 on iwi and hapū alone as the Māori rights holders is an example of the Crown prioritising some Māori rights holders over others. As the NBE Bill is written, this could also lead to iwi/PSGEs deciding who get water rights at a sub-catchment level and choosing to allocate water rights to PSGEs rather than to the ahi kā / landowners/ individuals, whanau who live by the affected rivers and lakes and have been working so hard as kaitiaki for so many generations to save them.

Recommended changes:

Accordingly, we ask that clause 814 is amended by deleting clause 814(3) and by amending clause 814(2)(a) by adding at the end of it “*that would or may prejudice Māori rights or interests in freshwater or geothermal resources*”.

To address the problems it has identified with the Freshwater Working Group proposals, we also ask that in clauses 691-693 (as elsewhere) “*mana whakahaere*” is substituted for “*iwi and hapū*”; that clause 692(2) instead reads “*Not later than 6 months after receiving the report, the Minister, on behalf of the Crown, must present a response on the report to the House of Representatives that explains how the recommendations of the Working Group will be implemented and within what timeframe*”; and that clause 693 is amended as follows:

*(2) The outcome of the engagement undertaken under subsection (1) must be reflected in an allocation statement on the issues relevant to the allocation of freshwater, if mana whakahaere wish to have such a statement.*

*(3) An allocation statement must be prepared by the Crown and mana whakahaere in partnership and it may be developed — …*

*…*

*(7) … (b) the date that is 12 months after the relevant regional planning committee receives the allocation statement.*

1. ***Regional Planning Committees must be genuine partnership bodies***

Clause 2 of Schedule 8 of the NBE Bill provides that regional planning committees must comprise at least 6 members, at least 2 of whom must be appointed by 1 or more Māori appointing bodies of the region. This is well short of the 50:50 partnership te Tiriti requires.

Recommended changes:

Accordingly, we ask that clause 2(5) is amended as follows: “*Not less than half of all members must be appointed by 1 or more Māori appointing bodies of the region*”.

1. ***The National Māori Entity must be stronger***

The powers proposed for the National Māori Entity do not go far enough.

Clause 664(1)(a) of the NBE Bill gives the Crown the ability to take up to 6 months to respond to a report by the National Māori Entity. A 6-month delay will become the ‘default’ for the Crown’s response in every case, which might sometimes mean the Crown does not address identified harm to the taiao until it is too late.

Second, the National Māori Entity should have the right – and responsibility – to work closely with the Minister for the Environment on the National Planning Framework (“the **NPF**”) – which will set national ‘baselines’ and rules that will determine what can and cannot be done regionally and locally – to ensure that the NPF gives effect to te Tiriti. One way the National Māori Entity can help to ensure that is for the Bill to require the Minister to collaborate and attempt to agree with the National Māori Entity on what limits the NPF should set on uses of water bodies to protect and preserve the mauri of water bodies, and to ensure that Māori communities will get equitable allocations of use rights in the new system.

To help to inform and to support positive progress in giving effect to te Tiriti, the National Māori Entity also needs to have the power to educate people and communities about risks that they and the taiao face, and how those risks can be avoided. If it has such a power, the National Māori Entity will be able – for instance – to publish ‘primers’ on climate change responses it sees as necessary or appropriate in te reo Māori and English. Similarly, it will be able to make and to show videos that explain the benefits of having – for instance – regional rules that require new water treatment plants to be built in locations that are more expensive to build at, but that will better protect tuna populations in small but culturally, socially, and environmentally important gullies or streams. In these kinds of ways, the National Māori Entity will be able to help prevent problems arising, rather than having to be an ‘ambulance at the bottom of the cliff’ that is forced to respond to problems that are too late to avoid.

The National Māori Entity should also have enforcement tools available to it to help to try and stop breaches of te Tiriti when they are happening. One obvious tool would be to give the National Māori Entity the power – and responsibility – to bring litigation to support positive progress on Māori rights at the national, regional, or local levels, where it considers that it is necessary for the National Māori Entity to bring litigation of that kind. The National Māori Entity should also have a fund that it manages, and which Māori communities can apply to for grants to support them bringing litigation to protect or preserve tikanga or te Tiriti rights. That fund could be modelled on the Environment Legal Assistance Fund, which the Ministry for the Environment currently manages, but instead be managed by the National Māori Entity and exist to help Māori communities who need financial support to protect their taonga.

It is also critical to the effectiveness of the National Māori Entity that it receives the funding that it will need each year to be an effective actor. That will avoid problems the Waitangi Tribunal – and claimants to it – have faced when the Crown has chosen, for its own purposes, to hold back funds necessary for the Tribunal to operate as effectively as Māori needed it to.

Recommended changes

[Name] asks that clause 662(1)-(2) is amended as follows:

*(1) The primary functions of the National Māori Entity are to develop the national planning framework collaboratively with the Minister and to independently monitor and assess the cumulative effect of the exercise of functions, powers, and duties under this Act and the Spatial Planning Act 2022 by (monitored entities) in giving effect to the principles of te Tiriti o Waitangi (see section 4).*

*(2) In carrying out its primary functions, the National Māori Entity must—*

*…*

*(e)* *publish such material as it considers to be necessary or appropriate to educate people and communities about risks that they and te taiao face, and how those risks can be avoided; and*

*(f) bring or support any legal proceeding it considers to be necessary or appropriate to ensure that te Tiriti o Waitangi is being given effect to (see section 4).*

We also ask that clause 664(1)(a) is changed to require the Crown to respond to National Māori Entity reports “*as soon as practicable but not later than 6 months after receiving the report from the National Māori Entity*”.

Finally, we request the Environment Committee stress in its report that it will be critical to the effectiveness of the National Māori Entity for it to receive funding at a level which will enable it to have the capacity and capability to effectively discharge its functions, powers, and duties. Mana whakahaere will also need to be provided funding to support their capacity and capability to act in the various roles that are proposed for them as decision-makers and participants in the new RM system.

**Request to make oral presentation**

The RM reforms process presents what will be a once in a generation chance to get our environmental settings right. Te Tiriti responsibility to get those right is a shared one. Accordingly, [Name] wish to speak to the Environment Committee on its submission.

[Name] support the submission of Te Tai Kaha Māori Collective which advocates for full recognition and strong protection of te Tiriti o Waitangi (“**te Tiriti**”) rights and interests in all areas impacted by the RM reform programme,

1. Refer to CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance (22 October 2019). Online at <https://dpmc.govt.nz/publications/co-19-5-te-tiriti-o-waitangi-treaty-waitangi-guidance>. [↑](#footnote-ref-1)
2. Refer to *Ellis v R* [2022] NZSC 114 at footnote 118. Online at <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-114.pdf>. Both the text and the principles of te Tiriti were also recognised by the Supreme Court to be legally relevant and important in *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142 at paragraph 75. Online at <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-142.pdf>. [↑](#footnote-ref-2)
3. Refer to *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142, particularly at paragraphs 74-84, 88 and 94-95. Online at <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-142.pdf>. [↑](#footnote-ref-3)