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For: Susan and Lee Short

Dear Susan and Lee

Taumata Arowai-the Water Services Regulator Bill

1. Thank you for your instructions seeking our advice on the role of the Maori Advisory Group (**MAG**) under Taumata Arowai-the Water Services Regulator Bill (**the Bill**). You have asked whether the MAG will be a power sharing entity or an advisory board. In particular, you want to know:
 - (a) how much power the MAG would have to determine the new agency's policies;
 - (b) how much influence the MAG would have on the functions of the proposed regulatory authority;
 - (c) whether the MAG would have the right to veto regulations; and
 - (d) how much power the MAG would have to influence the agency's decision making.
2. Below, we:
 - (a) explain the provisions in the Bill that relate to how the MAG would operate (focusing on how the courts have interpreted "give effect to" and "have regard to" and what this means for the MAG and its input into the Board's processes and decisions, including in relation to Te Mana o Te Wai); and
 - (b) use comparable regulatory frameworks to illustrate how the MAG might operate in practice and identify potential refinements to the Bill.

Background

3. The Bill is part of a broader package of reforms to New Zealand's three waters regulatory system, following the Government's cross-agency Three Waters review. The new water regulator, called Taumata Arowai, will be established as a statutory Crown entity. Taumata Arowai will have a governance board and will operate at arms-length from ministers, but must give effect to the Government's policy directions.
4. Taumata Arowai will have a wide range of regulatory objectives and functions covering drinking water as well as wastewater and stormwater networks. Those objectives and general functions are set out in clauses 10 and 11 of the Bill. However, clarity as to what exactly these functions and objectives entail is unlikely to be obtained until further

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legislation is introduced to reform the regulation of these water networks. The regulator's detailed functions and powers are likely to be located in the Water Services Bill, which is expected to be introduced in 2020.

5. Clause 18 of the Bill sets out Taumata Arowai's operating principles, which must guide and inform its performance and delivery of its objectives, functions and duties. As stated in the explanatory note to the Bill, many of the operating principles have an outward focus, relating to engagement and relationship-building with consumers and regulated parties, including Maori. Principles that appear to be directly relevant to that outward focus include developing sector capability by promoting collaboration, education and training, and partnering and engaging with other people and organisations and with Maori.
6. The Bill also establishes a Maori Advisory Group to advise Taumata Arowai on Maori interests and the scope and effect of Te Mana o te Wai, and to ensure that the regulator acts consistently with the principles of the Treaty of Waitangi.

Operation of the relevant provisions

7. In order to provide the context for our answers to your questions, we first provide a brief overview of the operation of Taumata Arowai and the MAG.
8. Under clause 10(d), one of Taumata Arowai's objectives is to give effect to Te Mana o te Wai, to the extent that Te Mana o te Wai applies to the functions and duties of Taumata Arowai. Te Mana o te Wai is not defined in the Bill.¹
9. Clause 14 of the Bill establishes the MAG and provides its membership requirements, clause 15 sets out how the MAG's members are appointed and clause 16 applies certain provisions of the Crown Entities Act 2004 to the MAG.

Role of the MAG

10. Clause 17 is the key provision for present purposes.
11. Under clause 17(1), the role of the MAG is to advise the Board and Taumata Arowai on Maori interests and knowledge, as they relate to the objectives, functions, and operating principles of Taumata Arowai and the collective duties of the Board.
12. According to clause 17(2), that role includes:
 - (a) developing and maintaining a framework that provides advice and guidance for Taumata Arowai on how to interpret and give effect to Te Mana o te Wai;
 - (b) providing advice on how to enable matauranga Maori, tikanga Maori, and kaitiakitanga to be exercised; and
 - (c) any other matters requested by the board.
13. Clause 17(2)(a) directly reflects Taumata Arowai's objective to **give effect** to Te Mana o te Wai set out in clause 10(d). The MAG's role under this provision is to develop a framework that provides **advice and guidance** to Taumata Arowai on what this objective involves so that Taumata Arowai can then set out to achieve it.

¹ The meaning of Te Mana o te Wai is discussed in greater detail below.

14. Matauranga Maori refers to the body of knowledge originating from Maori ancestors, including the Maori world view and perspectives, as well as Maori creativity and cultural practices. Tikanga Maori is a broad term encompassing the customary system of Maori values and practices that have developed over time and are deeply embedded in the social context. And Kaitiakitanga translates to guardianship and protection, and is a way of managing the environment based on the Maori world view.
15. Requiring the MAG to advise on how to enable these concepts to be exercised under clause 17(2)(b) is part of the Crown's recognition of its responsibility to consider and provide for Maori interests. This is made express by clause 5(d)(ii).
16. Clause 17(2)(c) is a catch-all provision allowing Taumata Arowai to seek additional guidance from the MAG, presumably where the regulator is required to make a decision that may affect Maori interests.
17. Under clause 17(3), the board must:
 - (a) **have regard to** the advice of the MAG; and
 - (b) demonstrate how it has had regard to that advice in Taumata Arowai's annual report, prepared under section 150 of the Crown Entities Act 2004.
18. Clause 17(3)(a) determines how much weight the board must attach to advice provided by the MAG. The level of power and influence that the MAG will have over Taumata Arowai is therefore ultimately determined by what it means for the board to "have regard to" the MAG's advice, as discussed further below.
19. Clause 17(3)(b) requires the board to provide evidence that it has complied with clause 17(3)(a). This provision is likely to require the board to set out reasons for any decisions on which the MAG has provided advice in order to demonstrate that it did in fact have regard to that advice.

Interpretation of "have regard to" and "give effect to"

20. A statutory requirement to "have regard to" certain matters or advice is conceptually distinct from a requirement to "give effect" to them. Both terms are used in the Resource Management Act 1991 (**RMA**), and we have drawn on case law under the RMA to outline the way in which those terms are applied in practice.
21. If a decision maker is required to "give effect to" something, it must be utilised, implemented or followed. On its face, this is a strong directive creating a firm obligation. However, the implementation of this directive will be affected by what it is that must be given effect to. A requirement to give effect to a policy framed in a specific and unqualified way may, from a pragmatic perspective, be more prescriptive than a requirement to give effect to a policy that is phrased more broadly.²
22. Where a decision maker must "have regard to" certain matters, those matters must be taken into account and considered, as a guide in the decision making process, but there remains an ultimate discretion. The matters to which the decision maker must have regard do not have to be utilised or implemented if the decision maker is of the view that they are not applicable in the circumstances.³

² *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442 at [75]-[77] and [80].

³ *Stanton Investments Ltd v Chief Executive Ministry of Fisheries* [2004] NZAR 68 citing *Ishak v Throwfeek* [1968] 1 WLR 1718; and *New Zealand Co-operative Dairy Company vs Commerce Commission* [1992] 1 NZLR 601.

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23. In *The Warehouse Ltd v Dunedin City Council* and *R v C D*, the Court emphasised the importance of the decision maker's discretion when applying the duty to "have regard to" in the context of section 104 of the RMA (consideration of resource consent applications). Although a specified matter must be considered, it may be rejected or given whatever weight the decision-maker considers appropriate.⁴

Discussion

24. Under clause 17(3), the board is required to **have regard to** the advice of the MAG. Accordingly, the board would be required to turn its mind to the advice provided by the MAG, but would ultimately retain the discretion to decide the matters set out in clause 17(2) itself. If the board considered that the MAG's advice was outweighed by some other relevant consideration, the board would be entitled to reject the advice wholly or in part, exercising its own judgement.
25. This obligation is different to what Taumata Arowai would need to do to meet the objective set out in clause 10(d). In order to "give effect" to Te Mana o te Wai, Taumata Arowai would need to go beyond mere consideration and actually implement it. However, as discussed below, Te Mana o te Wai is a concept that necessarily involves a flexible or high level approach. Therefore, despite the firm directive to give effect to Te Mana o te Wai, Taumata Arowai would retain some discretion about how it did that.
26. The MAG's role would be to provide advice and guidance on how Taumata Arowai should go about exercising that discretion. However, after considering that advice, the board would still be able to adopt a different approach to giving effect to Te Mana o te Wai. We anticipate it would still need a sound basis in support of that different approach.
27. It necessarily follows that the clause 17(3)(b) requirement for the board to demonstrate how it has had regard to the advice provided by the MAG in Taumata Arowai's annual report would only require the board to record evidence that the advice was considered. The board would not necessarily need to show that it had implemented or followed the advice, but in practice it would be reasonable to expect that the MAG's advice would be given weight.

Memorandum of Understanding and Terms of Reference

28. Clause 17(4) requires the board and the MAG, acting jointly, to:
- (a) prepare a memorandum of understanding, setting out how they will work together; and
 - (b) prepare and agree the terms of reference for the MAG.
29. A memorandum of understanding (**MOU**) is an agreement between two or more parties in which they agree to co-operate. While not legally binding, a MOU signals the willingness of the parties to move forward. In this context, the MOU is likely to communicate the mutually accepted expectations of the board and the MAG relating to how they will interact and co-operate in the future.
30. The terms of reference will set out the scope and limitations of the MAG's activities. In a practical sense, the terms of reference will determine how the MAG performs its roles and functions, and interacts with the board.

⁴ *The Warehouse Ltd v Dunedin City Council* EnvC C101/01; *R v C D* [1976] 1 NZLR 436.

Answers to your questions

How much power would the MAG have to determine the new agency's policies?

31. The MAG will not have any power to determine Taumata Arowai's policies but, as noted below, its advice can be expected to guide and influence Taumata Arowai's decision-making.

How much influence would the MAG have on the functions of the proposed regulatory authority?

32. The MAG would be able to influence how Taumata Arowai carries out its functions by providing the board with the framework noted above and advice pertaining to the fulfilment of Taumata Arowai's objectives, but the Bill does not give the MAG influence over what those functions are.
33. Under clause 10(d), one of Taumata Arowai's objectives is to give effect to Te Mana o te Wai, to the extent that the concept applies to its functions. Accordingly, the advice of the MAG on developing and maintaining a framework that provides guidance on how to interpret and give effect to Te Mana o te Wai is likely to influence the way in which Taumata Arowai carries out its functions, to the extent that the advice is taken on board and implemented.
34. However, the Bill does not give the MAG any control over what Taumata Arowai's functions actually are. Clarity on Taumata Arowai's specific functions is likely to be obtained when further legislation and regulations are introduced.

Would the MAG have a right to veto regulations?

35. There is currently no indication that the MAG would have such a power under the Bill, and we would not expect an advisory group to hold such power.

How much power would the MAG have to influence the agency's decision making?

36. As explained above, the requirement to "have regard to" the advice of the MAG requires the Board to take into account and consider the MAG's advice. The extent to which the MAG actually influences Taumata Arowai's decision making on any given matter is a matter for the board.
37. Clause 15(4) requires the MAG to be comprised of subject matter experts. This suggests the board is likely to hold the MAG's advice in high regard.
38. However, the operation of the MAG and how it interacts with the board will be determined by the terms of reference. Therefore, it is likely that the extent to which the MAG's advice will ultimately affect Taumata Arowai's decision making in a practical sense will depend on the terms of reference which the board and MAG ultimately agree to.

Other examples of a regulator having an advisory group

39. In order to illustrate how the MAG and board might potentially interact in practice, we have looked at other statutory schemes to determine whether they have similar arrangements.

Environmental Protection Authority – Maori Advisory Committee

40. Section 18 of the Environmental Protection Authority (**EPA**) Act 2011, the empowering legislation of the EPA, establishes a Maori Advisory Committee (**MAC**) which performs an advisory role that is broadly similar to the MAG. Under section 19(1), the functions of the MAC are:
- (a) to provide advice and assistance to the EPA on matters relating to policy, process and decisions of the EPA Act and other environmental acts; and
 - (b) to provide advice to a marine consent authority when the committee's advice is sought under section 56(1)(b) of the Exclusive Economic Zone and Continental shelf Act (Environmental Effects) 2012 (**the EEZ Act**).⁵
41. Section 19(2) provides that the advice and assistance must be given from a Maori perspective and come within the terms of reference as set by the EPA under section 20.
42. The MAC's terms of reference outline that the MAC will:
- (a) provide the board with advice on organisational planning, policy development and procedure to assist the board to take account of Maori perspectives including tikanga Maori, Te Tiriti o Waitangi (The Treaty of Waitangi), economic, scientific and other Māori aspirations;
 - (b) recommend and assist with the development, implementation and monitoring of strategies that will enhance the knowledge, understanding and participation of Maori in relation to the functions of the EPA;
 - (c) when requested by the Board or a committee of the Board, the MAC may advise on the membership of sub-committees with delegated authority to make decisions, in accordance with the EPA's statutory functions;
 - (d) provide delegated decision-making committees with advice and/or independent reports on applications to the EPA in accordance with the environmental Acts within which such decisions are being made;
 - (e) review and recommend processes and protocols for ensuring the satisfactory incorporation of Maori perspectives in decision making;
 - (f) advise on and monitor the activities of the EPA, including statutory decision making, to ensure the timely, appropriate and effective incorporation of Maori perspectives; and
 - (g) provide advice on other functions of the EPA as required.
43. The advice provided by the MAC carries different weighting or recognition depending on which piece of legislation it is being applied to. Under the EEZ Act, in addition to the role set out by the EPA Act and the MAC's terms of reference, the MAC may advise a marine consent authority on any matter related to an application for a marine consent, if its advice is sought under section 56(1)(b). Section 59(3)(c) requires a marine consent authority to **have regard to** any advice received from the MAC.

⁵ According to section 5, "environmental act" means: the Climate change Response Act 2002; The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; the Hazardous Substances and New Organisms Act 1996; the Imports and Exports (Restrictions) Act 1988; the Ozone Layer Protection Act 1996; and the Resource Management Act 1991.

44. The EEZ Act's reference to "have regard" means that the advice provided to a marine consent authority by the MAC carries the same weight as the MAG's advice to the board would carry under the Bill. Accordingly, the treatment of the MAC's advice by a marine consent authority is likely to be a broadly accurate reflection of how the MAG's advice might be treated by Taumata Arowai's board.
45. The following extract is from a decision in relation to a non-notified marine consent application for drilling an exploration well, Whio 1 in the Taranaki Basin:
- The (MAC) report recommends that we provide for the ongoing kaitiakitanga role of Māori by requiring OMV to maintain an ongoing relationship and engagement with relevant Māori existing interests. (The MAC) has requested that this be made a condition of consent. The IA states that OMV has undertaken extensive consultation and developed good relationships with Ngāti Ruanui, Ngā Ruahine and the Taranaki Iwi Trust and that OMV is committed to developing these relationships into the future. We therefore do not consider it necessary to impose such a condition on this Marine Consent. Even if we had agreed that such a condition was necessary, the mechanics of constructing and implementing such a condition would be very difficult to construct let alone enforce.
46. The marine consent authority's decision not to impose the condition on the consent clearly illustrates the non-binding nature of advice to which a decision maker must have regard. The MAC's recommendation was one matter for consideration and was ultimately outweighed by other factors.

National Animal Ethics Advisory Committee

47. Another example of an advisory group being legislated to advise policy-makers/regulators is under the Animal Welfare Act. Section 62 of that Act establishes the National Animal Ethics Advisory Committee. Examples of this committee's functions include:
- (a) giving the Minister responsible for animal welfare advice on animal welfare issues relating to the use of animals in research, testing and teaching;
 - (b) providing information and advice to animal ethics committees; and
 - (c) making recommendations to the Ministry for Primary Industries, concerning the codes of ethical conduct under which animal research is carried out.
48. The concept of an advisory board that is legislated to provide advice to a regulatory decision maker to assist in the decision making process is not entirely novel. The way the MAG is being set up is tailored for the particular circumstances rather than being an exact copy of either of the above examples, and we anticipate there is potential for further refinement. You may wish to further investigate the way in which the above examples operate if this would be of value in informing your views.

Te Mana o te Wai

What is Te Mana o te Wai?

49. The National Policy Statement for Freshwater Management 2014 (**NPSFM**) is a policy document created under the RMA to guide RMA decision-makers, and council planning documents must give effect to the NPSFM.

50. The NPSFM describes Te Mana o te Wai as the integrated and holistic well-being of a freshwater body, and confirms that it incorporates the values of tangata whenua and the wider community in relation to each water body. We have set out the NPSFM's explanation of Te Mana o te Wai in full below for ease of reference:

National significance of fresh water and Te Mana o te Wai

The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management.

The health and well-being of our freshwater bodies is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) and our communities.

Te Mana o te Wai is the integrated and holistic well-being of a freshwater body.

Upholding Te Mana o te Wai acknowledges and protects the mauri of the water.

This requires that in using water you must also provide for Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people).

Te Mana o te Wai incorporates the values of tangata whenua and the wider community in relation to each water body.

The engagement promoted by Te Mana o te Wai will help the community, including tāngata whenua, and regional councils develop tailored responses to freshwater management that work within their region.

By recognising Te Mana o te Wai as an integral part of the freshwater management framework it is intended that the health and well-being of freshwater bodies is at the forefront of all discussions and decisions about fresh water, including the identification of freshwater values and objectives, setting limits and the development of policies and rules. This is intended to ensure that water is available for the use and enjoyment of all New Zealanders, including tangata whenua, now and for future generations.

51. Te Mana o te Wai is not defined in the Bill, and the explanatory note to the Bill indicates that this was intentional, to provide flexibility and enable interpretations to change over time and adapt to different circumstances. Te Mana o te Wai, as a concept, does not lend itself to being the subject of a comprehensive statutory definition, hence the use of a description rather than a definition in the NPSFM as set out above. The Waitangi Tribunal's stage two report on the National Freshwater and Geothermal Resources Claims explained that a statement of Te Mana o te Wai should take a "flexible or high level approach" because of:

- (a) the wide range of opinions on how best to express tangata whenua values;
- (b) the need for regional variation on how to express those values; and
- (c) the difference in values (and how to express them) between different groups.

52. The enactment of a statutory definition would usually create an opportunity for those with an interest in the relevant term to have input into the way in which it is framed in the legislation. For the reasons set out above, including a comprehensive definition of Te Mana o te Wai in the Bill may not be appropriate. However, as discussed below, we consider that there may be some other options for enabling public input into the way Te Mana o te Wai is applied in the context of Taumata Arowai.

Importance of Te Mana o te Wai

53. The incorporation of Te Mana o te Wai in New Zealand's freshwater management framework is intended to ensure that water is available for the use and enjoyment of all New Zealanders. The implementation of Te Mana o te Wai is therefore important for the entire community, as has been recognised by the Government in the NPSFM.
54. In turn, the MAG's responsibility to develop and maintain a framework that provides advice and guidance for Taumata Arowai on how to interpret and give effect to Te Mana o te Wai is an important responsibility, and the framework itself has the potential to strongly influence the way in which Taumata Arowai's decisions are made.
55. Accordingly, it would be reasonable to carefully consider what would be an appropriate level of public input into the framework itself and/or how it is applied by Taumata Arowai. Input from those who might be directly affected by Taumata Arowai's decisions would also be consistent with the principles of natural justice, which include that people affected by decisions should have the opportunity to be heard before decisions are taken which affect them.
56. Whether public input is appropriate in relation to any particular Taumata Arowai decision, and the way in which any public input is enabled, would depend on the type of decision being made. For example, public input might reasonably be expected in relation to the development of drinking water composition standards (clause 11(c)) but not in relation to compliance decisions (clause 11(e)). It may be that further detail about the extent and nature of public input into each of these functions is to be specified in further legislation or in regulations, but if public input was something you wished to ensure, there may be benefit in expressing that in a submission on the Bill as well as in relation to the anticipated Water Services Bill.

Conclusion and potential refinements to the Bill

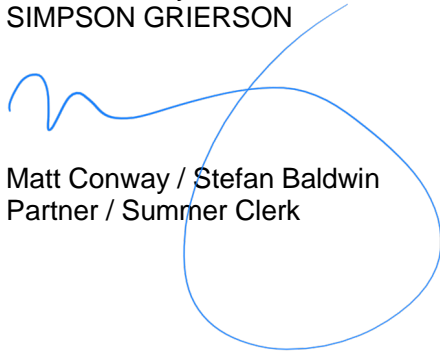
57. As the Bill currently stands, the MAG does not appear to be a power sharing entity and can properly be characterised as an advisory board.
58. The MAG is likely to have a degree of influence over Taumata Arowai's decision making, in a manner that bears some resemblance to advisory committees associated with other regulatory bodies, albeit tailored to the particular circumstances of Taumata Arowai.
59. A key difference from those other advisory committees is the MAG's role of developing and maintaining a framework that provides advice and guidance for Taumata Arowai on how to interpret and give effect to Te Mana o te Wai. In practice, it would be natural and expected for this framework and the advice surrounding it to influence the way in which Taumata Arowai carries out its functions.
60. In light of the matters outlined above, below we set out some potential refinements to the Bill for your consideration, some of which are alternatives to each other:
 - (a) Include a definition or other description of Te Mana o te Wai in the Bill, in order to create more certainty about it and its application. As noted above, however, Te Mana o te Wai does not lend itself to being the subject of a comprehensive statutory definition, so such an approach may not be appropriate or may not provide substantially more clarity than already exists.
 - (b) Provide further clarity about the extent and nature of any public input that will be provided for in relation to either Taumata Arowai's processes and decisions

as a whole, or particular decisions that are of interest. This clarity could be provided either by adding to or adjusting the operating principles set out in clause 18 of the Bill, or by including more process-related provisions elsewhere in the Bill.

- (c) Provide further clarity about the extent and nature of any public input that will be provided for in relation to the development of the framework and/or how it is applied by Taumata Arowai. This could potentially include a requirement for the MAG to consult with the public in the development of the framework, in a manner broadly analogous to the consultation that occurs when the Government is developing a national policy statement under the RMA.
- (d) Ensure that any advice and recommendations provided to Taumata Arowai by the MAG relating to a proposed action or decision would be made publicly available and easily accessible. This would allow members of the public to consider the MAG's views on how Te Mana o te Wai should be interpreted and given effect to before expressing their own opinion.

61. In making the above comments, we note that the Bill is only a preliminary step in what is set to be major reform. The EPA Act is also very brief, with the vast majority of the substantive rules relevant to its regulatory functions contained in other pieces of legislation. It may be that the government has already envisaged and is intending to adopt a framework of this kind in the anticipated Water Services Bill or in regulations.

Yours faithfully
SIMPSON GRIERSON



Matt Conway / Stefan Baldwin
Partner / Summer Clerk