KO NGĀ TAKE TURE MĀORI

Murky Waters: The Recognition of Māori Rights and Interests in Freshwater

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In recent years, New Zealand has gained international profile on innovative legal arrangements to recognise indigenous rights and interests in water, such as co-management arrangements or granting the Whanganui River legal personhood. Despite this, the Crown continues to fail to recognise Maori tino rangatiratanga over, and ownership of, freshwater resources to the full extent of the Crown's obligations under the Treaty of Waitangi and in customary law. With the onus of resolving the freshwater debate placed firmly in the political sphere, a more robust recognition of ownership and decision-making authority over relevant rivers and lakes for iwi and hapu must be negotiated.

I INTRODUCTION

From being a living ancestor to providing swimmable rivers to supporting new irrigation schemes, freshwater in Aotearoa New Zealand inspires vigorous public debate. The social, cultural and environmental significance of this increasingly contested resource has been recognised by Māori long before colonisation and our current legal framework for freshwater management was imposed. This article considers the interests of Māori in rivers, lakes and freshwater aquifers, and the Crown's obligations to give legal recognition to these interests under the Treaty of Waitangi and international law.

The article takes the following path. First, Part II sets out how the common law and tikanga Māori take different views on the human relationship with freshwater resources. The section discusses the current legal status of freshwater, including the ways in which modern water rights are trending towards property-like interests. Part III considers the sources of Māori rights and interests in freshwater. The Waitangi Tribunal recently recognised that Māori interests in 1840 equated to full authority and

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customary ownership.[1] Accordingly, the section argues that this customary ownership of water has not been extinguished and that Māori tino rangatiratanga over, and ownership of, freshwater resources is protected under the Treaty of Waitangi and te Tiriti o Waitangi. This places obligations on the Crown to recognise these interests in law. The case for protection is supported by the increasing recognition of indigenous rights in international law. Part IV offers a comparative analysis of the statutory treatment of customary title to water in Australia. The comparison is useful to show the spectrum of rights and interests that can be recognised to give effect to customary ownership. Then, Part V critiques the Crown's current recognition of Māori interests in freshwater and considers possible ways for the Crown to better give effect to these interests.

This article concludes with a vision of tikanga operating as a legal system over water bodies in the future is a possibility in the future, despite the political and constitutional challenge this presents. This is reflected in the increasing use of tikanga frameworks in Treaty settlements and the development of international indigenous rights. In the meantime, it is necessary to continue case-by-case negotiation of Māori freshwater interests through political settlement of Māori ownership and decision-making authority within the current resource management framework over bodies of water.

II CONTEXT

The Common Law Understanding of Freshwater

The common law views freshwater as a fugitive resource: incapable of ownership until it is captured. It compartmentalises bodies of water, such as rivers and lakes, into components such as the bank, the bed and the water itself. The banks and bed are capable of being property, but the water is not.[2] Rather, the flowing water is treated as *publici juris*, meaning rights to it are common to all people.[3] This understanding is qualified by use rights, such as fishing and navigation rights, and riparian rights of the adjacent landholder, which allows use for domestic purposes and the watering of livestock.[4] The Crown also maintains prerogative rights in tidal waterways as an extension of its jurisdiction over the sea. All of these rights primarily relate to access, use and management of water, rather than to ownership.[5]

1 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [*Wai 2358 Report*] at 76.
2 Tom Bennion "Introduction" in John Burrows and Elizabeth Toomey (eds) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 1 at [1.7.02].
3 Stephen Hodgson *Modern water rights: Theory and practice* (Food and Agriculture Organisation of the United Nations, Rome, 2006) at 11.
4 At 12.
5 At 12.

The Tikanga Māori Understanding of Freshwater

Tikanga Māori considers waterways as taonga (treasured ancestral objects or resources).[6] In te ao Māori, land and water are not separate or compartmentalised. Instead, they are viewed holistically as part of the natural world. The land, water and skies sustain life together and the relationship of tangata whenua to these is one of "reciprocal obligations embodied in the words manaakitanga and kaitiakitanga [meaning guardianship]".[7] Therefore, the interests, rights and obligations of tangata whenua to water cannot be separated from the rest of the natural environment. Nor can water bodies be separated from other water bodies or divided into beds, banks and water.[8] Māori have a relationship to these natural resources that goes beyond physical interest: the connection is also spiritual and cultural.

The Current Legal Status of Freshwater in New Zealand

Since colonisation, the New Zealand legal system has treated water as incapable of ownership, with its use now regulated by legislation. The Water and Soil Conservation Act 1967 vested in the Crown all rights to take, use, dam and discharge contaminants into water.[9] Following the enactment of the Resource Management Act 1991 (RMA), these management rights were delegated to Regional Councils.[10] The beds and banks of rivers and lakes can be property, but the water cannot. Private rights in relation to the use of water under the RMA take the form of permits and consents, but these privileges are not considered to give rise to real or personal property.[11] Furthermore, the Crown currently maintains this common law understanding of water in its approach to Treaty settlements. It believes that "it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake — including the water — in a settlement."[12]

The Move Towards Property-Equivalent Interests in Water

The law of modern water rights has trended towards recognising property-equivalent interests in water, that is interests that are property rights *in their effect* but *not in law*.

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6 *Wai 2358 Report*, above n 1, at 76.
7 At 34.
8 At 35.
9 Water and Soil Conservation Act 1967, s 21(1).
10 Resource Management Act 1991 [RMA], s 30.
11 Section 122(1).
12 *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna. Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, March 2015) at 103.

1 Allocation and Transferability

Statutory water permits under the RMA have extended to include allocations of specific quantities of water.[13] These allocations are transferable, catching up with the trend of the rest of the legal system as they contribute towards making natural resources "commodified, fungible and transferrable" to fit within the market-based economy.[14] The ability to identify and transfer someone's interest in a resource is characteristic of traditional property rights.

2 Procedural and Substantive Priority of Resource Consents

Case law has developed to recognise other features (of water permits) that provide consent-holders with property-like entitlements in relation to water. A consent-holder has procedural priority to the water they are allocated over future consent applications. Future applications and plan changes must also be assessed for their effects in light of the "factual baseline" of pre-existing consents.[15] This equips existing consent-holders with substantive priority to their allocation.

3 Exclusive Use

In *Aoraki Water Trust v Meridian Energy Ltd*, the High Court held that a permit essentially grants a right not only to take water but also, by implication, to exclude others from taking that water.[16] Exclusive access is another characteristic of a property right.

4 Deriving an Economic Benefit

The ability to use a resource for commercial purposes is another feature of a private property right. Over time, private interests have increasingly derived commercial benefits from water permits — for example, by bottling and selling water. However, there is growing public concern about the continuation of this trend as there is no public compensation for the benefit that permit-holders derive.[17]

The Land and Water Forum has been deeply divided on the issue. Some sectors, particularly environmental groups and iwi, have called for a royalty regime like those for other natural minerals and resources. They argue

13 Klaus Bosselmann and Vernon Tava "Introduction: Water in Context" in Klaus Bosselmann and Vernon Tava (eds) *Water Rights and Sustainability* (New Zealand Centre for Environmental Law, Auckland, 2011) at 8. See also L Keenan, M Thompson and D Mzila *Freshwater allocation and availability in the Wellington region: State and trends* (Greater Wellington Regional Council, 2012) at 14.

14 At 8.

15 Trevor Daya-Winterbottom "New Zealand Sustainability Laws and Freshwater Management" in Klaus Bosselmann and Vernon Tava (eds) *Water Rights and Sustainability* (New Zealand Centre for Environmental Law, Auckland, 2011) at 48–49.

16 *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) at [31].

17 See, for example, Helena O'Neill "40,000 urge council to drop Ashburton water deal" (30 June 2016) Stuff <www.stuff.co.nz>.

that royalty regimes better reflect the wealth transfer that takes place between the community at large and private permit-holders when water is taken and used for an economic purpose.[18] On the other hand, the farming sector is opposed to ending its free use of water for irrigation purposes.[19]

5 Summary: Uncertainty Going Forward

Two trends emerge from this context. First, there are growing property-like interests over freshwater that private parties can acquire. Secondly, there is increasing public discussion about the need for the Crown to shift from merely managing the use of freshwater to treating itself as the owner or trustee of the public's ownership in freshwater. Both of these developments raise questions about the status of the interest of Māori, as tangata whenua, in freshwater.

To complicate matters, freshwater became a major political issue in the 2017 general election. The National Government of the time maintained that water cannot be owned.[20] In contrast, the Labour Party, Green Party and New Zealand First all committed to charging for the use of water to some degree. Both Labour and Green recognised the process needs to acknowledge and resolve the Māori customary interest in water.[21] A condition of the Labour Party's coalition agreement with New Zealand First is that Labour will not pursue its proposed resource for the entirety of the 2017–2020 Parliamentary term. However, Parliament intends to introduce a royalty on the export of bottled water.[22] Cabinet papers from July 2018 noted that "there is a building sense among Maori that there is no clear 'path ahead' for the Crown's engagement with Māori and addressing Māori rights and interests in freshwater."[23] Since then, a new approach to the Maori and Crown relationship for freshwater was released by the Government immediately prior to publication.[24]

It is not yet clear what impact this will have on resolving Māori interests in freshwater. Therefore, the need to clarify what these interests are, and how they can best be recognised, has never been more pressing.

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18 Land and Water Forum "Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water" (Land and Water Trust, 2012) at 69.

19 "Farmers not getting water for free, says Irrigation New Zealand" Irrigation New Zealand <www.irrigationnz.co.nz>.

20 See Patrick Gower "Public, politicians divided over water tax" (7 September 2017) Newshub <www.newshub.co.nz>.

21 "Policy: Election 2017 — Water" (2017) The Spinoff: Policy <https://policy.nz>.

22 Coalition agreement between the New Zealand Labour Party & New Zealand First Party (New Zealand House of Representatives, 24 October 2017) at 5.

23 Cabinet Environment, Energy and Climate Change Committee "A New Approach to the Crown/Maori Relationship for Freshwater" (3 July 2018) ENV 18/32 at [4].

24 Ministry for the Environment and Māori Crown Relations Unit "Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater" (October 2018).

III SOURCES OF MĀORI RIGHTS AND LEGAL INTERESTS IN FRESHWATER

This Part sets out the three main sources for Māori rights and interests in freshwater, and the corresponding rights and duties of the Crown. These rights are sourced in the Treaty of Waitangi and te Tiriti o Waitangi, the doctrine of customary title and international law.

Te Tiriti o Waitangi and The Treaty of Waitangi

1 The Extent of Māori Interests in Freshwater in 1840

Prior to colonisation, Māori "exercised a complete regime of rights" under their own customs over all of Aotearoa.[25] It is well established that the western conception of property rights and ownership does not fit smoothly with the Māori relationship with the natural world.[26] Under tikanga, the human relationship with water goes beyond possession in the limited sense. Instead, it encompasses:[27]

> … [the] originating ancestral relationship and the ongoing cultural and spiritual relationship with the waterway; the use of resources associated with the waterway; the exercising of control and authority over the resources; and the fulfilment of obligations to conserve, nurture and protect the waterway.

The Waitangi Tribunal found that these "customary indicia of ownership" at the time of making the Treaty are equivalent to "'full-blown' ownership of property in the English sense" in our modern legal framework.[28]

There is a tension — and, some would say, a trade-off — in using the Western concept of ownership to define Māori rights in relation to water. Some Māori see it as the strongest conceptual tool for giving effect to the aims of protecting and exercising authority over waterways. Other Māori reject the language of ownership as being at odds with viewing some water bodies as ancestors.[29] There is, however, strong support for the claim that Māori had, at the time, rights in the nature of ownership in water, as well as exercising authority and control over rivers and lakes.[30]

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25 Bennion, above n 2, at [5.2].

26 Andrew Erueti "Maori Customary Law and Land Tenure: An Analysis" in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Maori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [3.2].

27 *Wai 2358 Report*, above n 1, at 51.

28 At 76.

29 Linda Te Aho "The 'False Generosity' of Treaty Settlements: Innovation and Contortion" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) at 110.

30 See generally "Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui, Whiringa a Rangi" (2014) <iwichairs.maori.nz> at 11.

2 Protection Under the Treaty and te Tiriti

Under art 2 of te Tiriti o Waitangi, Māori were guaranteed tino rangatiratanga (the exercise of chieftainship or authority) over their lands, villages and taonga katoa (all treasured things).[31] The scope of this guarantee is widely accepted to include water bodies, such as lakes or rivers. There are two reasons for this. First, the Māori understanding of whenua (land) does not separate the interest in the land from the water that flows over it. Secondly, rivers, lakes and springs are capable of being taonga, established through clear indicia of ownership.[32]

The English version of art 2 guarantees chiefs "exclusive and undisturbed possession of their Lands … and other properties".[33] This possessory interest is clearly intended to protect the existing customary relationship of Māori with the natural world. Therefore, both translations can be seen to protect a possessory right of Māori over freshwater bodies such as rivers and lakes.

Supplementary to the protection under art 2, the Crown also has a duty under art 3 to ensure that Maori enjoy the rights and privileges of British citizens. The Waitangi Tribunal has found that this duty includes recognising the Māori possessory interest in water and devising a form of title rights that protects this.[34]

The Doctrine of Customary Title

1 Customary Title and Water in New Zealand

Independent of the Treaty, Māori also have a possessory interest in water under the doctrine of customary title. This doctrine recognises that, prior to colonisation, customary laws existed to distribute rights and responsibilities, and that the common law must adapt to these laws, particularly in respect of property interests.[35] These laws survived the acquisition of sovereignty by the Crown.[36] In *Attorney-General v Ngati Apa*, the Court of Appeal recognised that "the principle of respect for [customary] property rights until they were lawfully extinguished was of general application" across colonial jurisdictions.[37]

Recently, the Supreme Court applied the *Ngati Apa* principle in *Paki v Attorney-General (No 2)*.[38] The Court recognised the potential for Māori to hold customary title in riverbeds where the common law presumption of

31 Claudia Orange "Treaty of Waitangi — Interpretations of the Treaty of Waitangi" (20 June 2012) Te Ara — the Encyclopaedia of New Zealand <https://teara.govt.nz>.
32 *Wai 2358 Report*, above n 1, at 75–76.
33 Treaty of Waitangi 1840, art 2.
34 At 80.
35 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [17].
36 At [21].
37 At [19].
38 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

ownership of riverbeds *usque ad medium filum aquae*[39] may not have been known or understood by Māori at the time of land sales and surveying.[40]

Both *Ngati Apa* and *Paki* apply to customary ownership of land, whether above or below water. The extension of the doctrine to encompass water bodies in their entirety would be compatible with the doctrine's purpose of protecting indigenous people's ownership of their properties, particularly given that Māori see land and water as one holistic entity.[41] In *Ngati Apa*, Elias CJ hinted at the need to view the concept holistically:[42]

> … it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank … and on the other to the hapuka grounds … or reefs.

2 Has Māori Customary Title to Water Been Extinguished?

The above cases demonstrate that common law presumptions do not displace customary law. Displacement requires express statutory extinguishment and "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain".[43]

New Zealand's statutory treatment of water is oriented around the Crown's role in the management of water and its allocation. It is not concerned with ownership, unlike other natural resources expressly vested in the Crown as "property" under the Crown Minerals Act 1991.[44] The main statutory vesting of ownership of parts of water bodies in the Crown is in the beds of navigable rivers.[45] However, it is contestable whether this procedure is express enough to extinguish customary title.[46] Acts regulating the use of water remain silent about Māori customary rights in water, or indeed on the issue of its ownership.[47] Water is not property under the common law, and since the statutory regime has not adequately extinguishment customary title in water, the statutory regime does not displace Māori customary law which understands water to be property. Therefore, as well as the possibility for customary title to exist in the land under which freshwater sits, customary title to water itself has not been extinguished.

A possible customary title claim gives Māori an avenue to gain judicial recognition of their ownership of freshwater resources from the courts. Each claim would be decided on a case-by-case basis.[48] As was seen

39 To the middle of the flow.
40 *Paki (No 2)*, above n 38, at [142] per Elias CJ
41 Jacinta Ruru "Property Rights and Māori: A Right to Own a River?" in Klaus Bosselmann and Vernon Tava (eds) *Water Rights and Sustainability* (New Zealand Centre for Environmental Law, Auckland, 2011) 51 at 63.
42 *Attorney-General v Ngati Apa*, above n 35, at [51].
43 At [148].
44 Crown Minerals Act 1991, s 10.
45 Coal Mines Act 1979, s 261(2).
46 *Attorney-General v Ngati Apa*, above n 35, at [161] per Keith and Anderson JJ.
47 See, for example, Water Power Act 1903; Water and Soil Conservation Act 1967; and RMA.
48 Edward Taihākurei Durie and others *Ngā Wai o te Māori: Ngā Tikanga me Ngā Ture Roia - The Waters of the Māori: Māori Law and State Law* (Paper prepared for New Zealand Māori Council, 23 January 2017) at [170].

in the aftermath of the *Ngati Apa* decision, a finding of native title over a body of water would likely prompt the Crown to take one of two actions: it would either affirm the legal status of Māori customary ownership of freshwater resources through legislation, or modify or extinguish this right through legislation.

Qualifying the Customary Interests in Freshwater

While te Tiriti o Waitangi protected both Māori authority over, and ownership of, freshwater, neither interest is absolute.

1 Treaty Obligations on Māori

The Waitangi Tribunal outlined two main ways in which the reciprocal obligations of the Treaty and te Tiriti modified Māori interests at the time of signing. First, the principle of partnership under the Treaty, combined with the expectation that colonial settlement would occur, may have raised a general expectation that non-Māori would be able to access and use water resources for non-commercial purposes.[49] Access would be on Māori terms, and Māori maintained the right to refuse access and use under the guarantee of tino rangatiratanga. However, the concept of good faith meant they could not say *no* unreasonably.[50] Secondly, Māori ceding governance to the Crown gave the Crown the right to govern in the interests of the nation and environment by establishing "a principled regime for environmental management".[51] Thus, the Crown has an ongoing role in managing freshwater resources. [52]

This creates a "sliding scale" of kaitiaki rights to balance competing interests of Māori and the Crown in any one case. It considers both management and proprietary rights to protect the environment, the health of the taonga and the weight of competing interests of stakeholders such as existing property owners and local government.[53]

2 Treaty Obligations on the Crown

The Waitangi Tribunal found that the Crown has a duty of active protection of Māori property interests in water. This includes protecting development rights, and redressing historical and ongoing breaches of these duties.[54]

49 *Wai 2358 Report*, above n 1, at 77.
50 At 78.
51 At 78.
52 At 78. It should be noted that the Tribunal also discussed the way in which a further unilateral obligation imposed on the Crown by the Treaty modified Maori interests.
53 See at 69.
54 At 79.

3 The Supreme Court's Treatment of a Treaty Claim in Respect of Freshwater Interests

In *New Zealand Maori Council v Attorney-General*, the Supreme Court was met with an opportunity to clarify the Crown's Treaty obligations in light of the Waitangi Tribunal's finding.[55] The Court did not decide on the status of Māori customary rights in freshwater. Instead, it considered whether the sale of assets in Mighty River Power would materially impair the Crown's ability to provide redress to Tainui for future breaches of its Treaty obligations in respect of water.

Thus, the Supreme Court neither discounted nor applied the findings of the Tribunal. Rather, it unanimously deferred to the Crown's ongoing process for clarifying how Māori interests could be met, through the Land and Water Forum and the stage two report of the Waitangi Tribunal's National Fresh Water and Geothermal Resources Inquiry, which is still in progress as of 2018.[56]

This deference is part of a trend in the courts to find the content of Treaty settlements non-justiciable. Combined with the non-binding nature of Tribunal decisions, this leaves the ability to progress the recognition of Māori customary interests in freshwater in the Crown's hands and thus vulnerable to political whim.[57] The absence of a legislative approach to Treaty settlements gives the Executive the power to set the terms of negotiation. Hence, it is the Executive's definition of water interests (or of tino rangatiratanga) that will prevail.

International Law and Māori Rights to Freshwater

The United Nations' development of international human rights and indigenous rights has had an impact on the Crown's obligation to recognise Māori rights and interests in natural resources, including water. Broadly, individual human rights have some application to water, which New Zealand is legally bound to recognise. There are also many non-binding applications of collective indigenous rights.

1 The International Covenant on Civil and Political Rights

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) protects minority rights to culture, language and religion.[58] As New Zealand is a party to the Convention, it is bound in international law to protect this right. Accordingly, New Zealand's commitment to the ICCPR has been

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55 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

56 At [145]. See "National Fresh Water and Geothermal Resources Inquiry" (9 April 2018) Waitangi Tribunal <www.waitangitribunal.govt.nz>.

57 Andrew Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27(3) NZULR 715 at 727.

58 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 27.

enshrined in domestic legislation through the New Zealand Bill of Rights Act 1990.[59] The right to culture applies to the government's protection of customary practices in relation to natural resources, such as fishing rights and protecting taonga. However, the limits of these international legal obligations are exposed in instances where the Government has acted to limit culturally significant economic activities. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 declared the settlement of Māori commercial fishing claims to be full and final, and barred recourse to the courts.[60] The United Nations Human Rights Committee did not find this to be a breach of the ICCPR, as Māori had been consulted on how the settlement would affect their rights, and held that participation in the decision-making process was enough.[61] This was despite also finding that the enactment limited the rights of Māori to enjoy their culture and acknowledging that the settlement did not have full approval from Māori stakeholders.[62]

Comparable complaints to the Committee concerning natural resource interference show a requirement for effective consultation of affected indigenous communities under art 27 of the ICCPR.[63] However, the Committee is unlikely to find states in breach where customary rights have been balanced with economic development.[64]

2 The United Nations Declaration on the Rights of Indigenous Peoples

The ratification of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the New Zealand Government in 2010 created obligations to give effect to the rights protected within it.[65] However, its status as a declaration means it is non-binding at international law.

(a) UNDRIP and Freshwater

A number of UNDRIP rights expand on the protection of a right to culture in the ICCPR. They also develop rights already recognised by the Crown in its dealings with Māori in relation to freshwater:

1. the right to practice cultural traditions, which includes the right to protect and develop sites of cultural significance;[66]
2. "the right to participate in decision-making";[67]

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59 New Zealand Bill of Rights Act 1990, s 20.

60 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9.

61 *Mahuika v New Zealand* Communication No 547/1993, CCPR/C/70/D/547/1993, 27 October 2000, (2000) 8 IHRR 372, IHRL 1733 (UNHRC 2000) at [9.6].

62 At [9.5].

63 At [9.6].

64 *Poma v Peru* Communication No 1457/2006, CCPR/C/95/D/1457/2006, 27 March 2009, (2009) IHRL 3331 (UNHRC 2009); and *Länsman v Finland* Communication No 511/1992, CCPR/C/52/D/511/1992, 26 October 1994, (1995) 2 IHRR 287, IHRL 2798 (UNHRC 1994).

65 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007) [UNDRIP]; and Simon Power "Ministerial Statement: UN Declaration on the Rights of Indigenous Peoples - Government Support" in (20 April 2010) 662 NZPD 10229.

66 UNDRIP, art 11.

67 Article 18.

3. the right to "maintain and strengthen their distinctive spiritual relationship" with traditionally used waters;[68]
4. "the right to the conservation and protection of the environment and the productive capacity of their … resources";[69] and
5. "the right to determine … priorities and strategies for the development or use of their … resources".[70]

However, a number of rights go beyond the Crown's current recognition of Māori interests in freshwater resources. These rights challenge the current mechanisms for recognition:

1. the right to self-determination;[71]
2. the obligation on the state to obtain "free, prior and informed consent" before making legislative or administrative decisions that will impact indigenous peoples;[72]
3. the obligation to obtain consent prior to the approval of any project affecting the utilisation of indigenous resources, such as water;[73]
4. the right to means of subsistence and development;[74]
5. the right to traditionally owned or used resources, with states obliged to give legal recognition to these;[75] and
6. the right to redress for resources traditionally owned or used that have been confiscated, used or damaged without consent. This includes the right to restitution or, where this is not possible, to just, fair and equitable compensation.[76]

(b) The New Zealand Government's Treatment of UNDRIP

On ratifying UNDRIP, the Government immediately qualified its effect on New Zealand law. The Government separated the elements of the Declaration into those that were "an affirmation of accepted international human rights" and those collective rights that were "new, and non-binding aspirations".[77] The existing legal and constitutional frameworks for recognising Māori rights were affirmed, particularly the Treaty settlement process in regards to where the Declaration sets out aspirations for "rights to and restitution of traditionally held land and resources".[78]

Collective indigenous rights more broadly do not align with conventional human rights instruments, such as bills of rights. The Crown's approach derives from an international rule of law that prioritises liberalism, individual human rights and property rights within nation states. Thus, in

68 Article 25.
69 Article 29(1).
70 Article 32(1).
71 Article 3.
72 Article 19.
73 Article 32(2).
74 Article 20.
75 Article 26.
76 Article 28(1).
77 (20 April 2010) 662 NZPD 10230.
78 At 10230.

negotiating UNDRIP, New Zealand and other colonial states "sought to displace [collective rights] into the realm of politics by insisting that they be made subject to negotiated agreement" between indigenous peoples and the Crown.[79] Their recognition would also challenge existing use rights of third parties, such as adjacent property owners and those with resource. Thus, the Crown has ensured that its settlements do not displace existing rights.[80]

(c) Assessing the Impact of UNDRIP on Māori Freshwater Interests

Prioritising negotiated agreements over collective Māori rights in the political sphere has meant that the courts are hesitant to intervene in the content of settlements. The Supreme Court did refer to UNDRIP to interpret the principles of the Treaty of Waitangi more broadly where the principles were incorporated into legislation.[81] However, the Court was doubtful whether the Declaration added much more than that.[82] Declaration rights are unlikely to create new obligations on the Crown without the Crown creating them itself.

However, UNDRIP can add to the internalisation of norms at different levels of the social, political and legal spheres. This is because it is used in legal proceedings and Tribunal claims.[83] The Declaration can be seen as an expansion of the rights and interests over water protected in the Treaty of Waitangi. These help to confirm the interpretation of the Treaty that views tino rangatiratanga and the "exclusive and undisturbed possession" of property as encompassing self-determination, self-governance and collective property rights in water. This contrasts with the Crown's more limited interpretation of kaitiaki interests in water as the best expression of rangatiratanga. This denies Māori full decision-making authority over water bodies, and resists creating property interests in the water itself.[84]

UNDRIP gives more content to claimant negotiators to address "the power imbalance and further expand[s] the parameters of Treaty settlement negotiations" beyond the vague and variedly effective Treaty principles.[85]

(d) The De Facto Nature of Indigenous Ownership under UNDRIP

UNDRIP also has the potential to allow Māori to avoid the onerous requirement under the doctrine of customary title to prove a level of continuity in a relationship with a natural resource to establish a right.[86] It recognises that there exist de facto indigenous rights of ownership in natural resources.

79 Kirsty Gover "Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26 EJIL 345 at 361.

80 See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 46–47.

81 *New Zealand Maori Council v Attorney-General*, above n 55, at [92].

82 At [92].

83 See Claire Charters "Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) at 146–147.

84 *Wai 2358 Report*, above n 1, at 38.

85 Te Aho, above n 29, at 116.

86 Durie and others, above n 48, at [228].

UNDRIP places a duty on states to provide restitution or redress, even where those rights are no longer exercised in fact or have been extinguished.[87]

However, Declaration rights remain largely aspirational without effective adoption into New Zealand's laws. They are limited to being cited to try and garner concessions from the Crown's dominant negotiating position.

Summary of Māori Rights in Freshwater Resources

According to the Waitangi Tribunal, Māori interests in freshwater, protected under the Treaty of Waitangi, are a form of ownership. These interests are capable of including a reasonable right to veto public access to, and use of, water bodies, particularly commercial uses. They also extend to political authority as interpreted through tino rangatiratanga but are qualified by a kawanatanga (governorship) interest of the Crown. At common law, Māori customary ownership of freshwater survives if it can be proven in the courts. Meanwhile, in international law, UNDRIP affirms indigenous ownership of natural resources, encouraging legal recognition by the Crown, albeit being non-binding. The findings of the Waitangi Tribunal, the deference shown by the judiciary to the Crown on the issue, and the development of international indigenous rights provide cause for a reassessment of the statutory treatment of water. Any such reassessment should ensure that the Crown is fulfilling its duties under the Treaty and giving effect to Māori interests in the current legal setting. This is particularly pertinent as modern water rights trend towards property-like interests.

IV A COMPARATIVE ANALYSIS OF AUSTRALIAN RECOGNITION OF INDIGENOUS RIGHTS TO WATER

It is helpful to compare the status of Māori interests in freshwater with the status of those of Aboriginal and Torres Strait Islander peoples in Australia. There, statutory recognition of indigenous title to water provides a spectrum of rights to indigenous people. A study of the situation in Australia shows the benefits and limitations of legal recognition.

Aboriginal and Torres Strait Islander Rights to Water

1 The Native Title Act 1993

In Australia, customary title to freshwater is a statutorily-recognised, justiciable right of Aboriginal people and Torres Strait Islanders. The Native Title Act 1993 subsumed and protected indigenous rights and interests in both land and bodies of water.[88] "Waters" includes:[89]

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87 *United Nations Declaration on the Rights of Indigenous Peoples*, art 27.
88 Native Title Act 1993 (Cth), s 223(1).
89 Section 253.

(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or
(b) the bed or subsoil under, or airspace over, any waters … or
(c) the shore, or subsoil under or airspace over the shore, between high water and low water.

However, the nature of the right granted is not clear in the legislation. The interpretation of a customary interest could vary from exclusive ownership, to a *bundle of rights* to use and access the water.

(a) *Commonwealth of Australia v Yarmirr*

In *Commonwealth of Australia v Yarmirr*, the High Court of Australia was divided on an interpretation issue.[90] The case concerned a claim for exclusive possession of an area of territorial sea under the Native Title Act. The majority took as their starting point the sovereign rights asserted under the common law, before trying to accommodate customary law within those sovereign rights.[91] They held that customary rights amounted to rights to take and access the water to maintain traditional customs such as fishing, hunting and gathering. Customary rights were seen to safeguard places of cultural and spiritual importance, rather than exclusive ownership.[92] The assertion of sovereignty by the state of what became territorial waters brought with them public rights that limited the customary claim of exclusive possession.[93]

Kirby J's dissent held that the decision in *Mabo v Queensland (No 2)* and the subsequent Native Title Act had brought about a "new legal reasoning" for reconciling common law with customary law.[94] His Honour held that rights asserted under traditional laws and customs became a distinct part of the common law unique to Australia.[95] There may be "scope for the recognition of a qualified exclusive native title right",[96] which could include the right to "insist on effective consultation and a power of veto over other fishing, tourism, resource exploration … within their sea country".[97]

(b) Limits to Native Title Act Rights

Subsequent case law on claims under the Native Title Act has made clear that, in light of water resource legislation regulating water, native title rights do not equate to exclusive possession.[98] Claims under the Act are limited by an onerous burden of proof. In order to succeed, claims require evidence of traditional custom and practice, and proof of native title rights that have been

90 *Commonwealth of Australia v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1.
91 At 51.
92 At 66.
93 At 68.
94 At 141. See *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 195 CLR 1.
95 At 142.
96 At 121.
97 At 142.
98 See, for example, *Akiba v Commonwealth of Australia* [2013] HCA 33, (2013) 250 CLR 209; and *Western Australia v Ward* [2002] HCA 28, (2002) 13 CLR 1 at [34].

essentially "frozen" in time to only encompass traditional uses.[99] A native title right under the Act also provides a very limited right to be notified and to comment in relation to proposed water development projects.[100]

2 Customary Interests in Water and Land Rights Legislation

Aboriginal land rights legislation has affirmed a greater set of aboriginal rights in relation to water. In *Northern Territory v Arnhem Land Aboriginal Land Trust*, a differently constituted High Court to *Yarmirr* went further than both the *bundle of rights* approach and Kirby J's *qualified exclusivity* approach to accept exclusive ownership.[101] The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) granted fee simple estate to Aboriginal customary owners over a bay.[102] The fact that the area of water was tidal meant that the land under which the water flowed was capable of being *owned* by private persons, removing the barrier to the courts recognising that customary rights over water amounted to exclusive property rights.[103] The fee simple estate thus allowed Aboriginal owners to exclude, for example, fishermen from tidal waters within a bay area, and any derogation from exclusive property rights required express legislation.

Thus, while the Native Title Act recognises a customary interest in the water itself, the limitations imposed on that interest by the Act and the courts' interpretation of it means Aboriginal groups can gain more recognition of their customary rights through a proprietary interest in the land on which the water sits.

3 Insights from Australia's Recognition of Customary Interests in Water

The Australian statutory regime gives insight into the spectrum of rights and interests in water that can be recognised. These rights and interests range from full exclusive access (through ownership of the land under which the water sits) to a *bundle of rights* approach that focuses on the distinct cultural use of the body of water. However, in the absence of land rights statutes, native title rights in freshwater in the jurisdiction amount to "a limited, non-exclusive, and non-commercial right to use water without a license".[104]

This demonstrates the potentially limiting effect of statutory recognition of customary title to water. The Crown would not want to impact existing and future common law rights and commercial development by enacting broad, rights-affirming legislation. The Australian statutory regime also shows the limiting effect the courts can have in interpreting statutory title by requiring a high evidential burden. In contrast, a land right establishes

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99 Alex Gardner and others *Water Resources Law* (LexisNexis, Chatswood (NSW), 2009) at [13.33].
100 Native Title Act, s 24HA.
101 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, (2008) 236 CLR 24.
102 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 12(1).
103 *Arnhem Land*, above n 101, at 63–64.
104 Poh-Ling Tan and Sue Jackson "Impossible dreaming — does Australia's water law and policy fulfil Indigenous aspirations?" (2013) 30 EPLJ 132 at 141.

certain rights and interests *per se* without requiring proof in the courts. This suggests that Treaty settlements have the potential to provide a level of certainty that a customary title right to water may not be able to, despite the limited ownership interests recognised in those settlements. This is because settlements can include the vesting of title to the bed of water bodies, alongside management rights.[105]

V MEANS OF RECOGNISING, PROTECTING AND REDRESS OF MĀORI FRESHWATER INTERESTS

So far, this article has shown that the onus to give effect to Maori freshwater interests rests firmly on the Crown. Now, Part V will critically analyse the ways that this responsibility has been, and could be, performed.

Co-Management

Over time, the Crown has incorporated Māori into co-governance and co-management roles over rivers and lakes through the settlement of historical Treaty claims. For example, the settlement of Tainui's Treaty claim included creating the Waikato River Authority, with equal iwi and Crown membership.[106]

One of the key benefits of this governance framework is the creation of an "integrated, holistic and co-ordinated approach to the implementation of the vision and strategy and the management" of the entire river. Tainui have been able to exercise significant influence over this implementation. Different regional and district councils have been brought into the plan, alongside stakeholders.[107] The Waikato River Authority has influence over the uses of the river because they make up half of the representation on a hearing committee granting resource consents.[108] Linda Te Aho has noted that the co-management regimes:[109]

> … provide more freedom for Māori to carry out customary activities, and have led to more collaborative planning processes, joint projects, and generally more effective relationships between local government and Māori.

However, Tainui representatives are only one half of the Waikato River Authority — effectively one quarter of the decision-making authority over the use of the river. Furthermore, the legislation explicitly notes that the Crown and Tainui have different understandings regarding relationships with the

105 Melanie Durette "A comparative approach to Indigenous legal rights to freshwater: Key lessons for Australia from the United States, Canada and New Zealand" (2010) 27 EPLJ 296 at 314–315.
106 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22. See also sch 6, cl 2.
107 Section 22(2)(b).
108 Sections 28, 42 and 56–63.
109 Te Aho, above n 29, at 110.

river, and do not try to reconcile these differences.[110] Therefore, the agreement gives limited effect to Māori customary ownership of the river. In contrast, local government representatives and Crown appointees maintain most of the decision-making authority.

The inability to resolve the status of "ownership" in the river and the limits of management rights were revealed when the Crown partially privatised shares of Mighty River Power without accommodating Tainui's claim to a development right in the shares. This led to the Wai 2358 claim on National Freshwater and Geothermal Resources in the Waitangi Tribunal, and the Supreme Court's decision in *New Zealand Maori Council v Attorney-General*.[111]

Other co-management agreements have gone further in recognising Māori ownership interests in water bodies by vesting, where possible, lake or river beds with iwi. This was the approach taken with Te Waihora (Lake Ellesmere) and the thirteen freshwater lakes in the Rotorua region.[112] The vesting of title to the bed of Te Waihora, along with some of the adjacent land that was not conservation estate, gave Ngāi Tahu some authority over the lake as property owners.[113] This authority allowed them to, for example, control the level of eel fishing that takes place, remove grazing stock on their land and undertake riparian planting to improve the water quality.[114] However, this was effectively a land, rather than water, management plan, with Ngāi Tahu being limited to taking an advocacy role with the local government regarding the water catchment.[115]

In the case of Te Arawa Lakes, the ownership over the water itself was once again left unresolved — or, some would say, explicitly rejected. The Te Arawa Lakes Settlement Act 2006 states that the Crown retains "Crown stratum" of the space occupied by water and air above the lakebed.[116] While, at the time, the Crown rejected the claim that this stratum entailed ownership of the water itself,[117] Te Aho suggests that it seems to preclude future recognition of Māori ownership of the water.[118]

In summary, co-management agreements can generate some combination of interests for Māori in freshwater bodies. Such agreements can recognise customary uses, create a limited property right in the bed of the water body, and allow for Māori input in the regulatory environment for management of the water. But these rights are limited, with local government maintaining much of the decision-making power. Furthermore, Māori interests can conflict with Crown policies such as the selling of state assets

110 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 64(1).
111 See *Wai 2358 Report*, above n 1; and *New Zealand Maori Council v Attorney-General*, above n 55.
112 See Ngāi Tahu Claims Settlement Act 1998; and Te Arawa Lakes Settlement Act 2006.
113 PA Memon and N Kirk "Role of indigenous Māori people in collaborative water governance in Aotearoa/New Zealand" (2012) 55 Journal of Environmental Planning and Management 941 at 950.
114 At 950.
115 At 950.
116 Te Arawa Lakes Settlement Act, s 23.
117 Mark Burton "Maori Party misses the mark" (13 September 2006) New Zealand Government <www.beehive.govt.nz>.
118 Te Aho, above n 29, at 110.

that use water for hydropower or the intensification of land use around waterways through subsidised irrigation schemes. Without recognition of tino rangatiratanga, Māori are forced to face these limitations when resorting to co-management arrangements.

Legal Personality

In 2017, the Te Awa Tupua Act 2017 accorded legal personality to the Whanganui River in a historic and innovative Treaty settlement.[119] The new legal recognition aligns with Whanganui iwi's spiritual identification of the river as a tupuna (living ancestor). It also aligns with the tikanga world view that combines the river, bed and banks from the mountains to the sea.[120] The Act vests the fee simple estate in the Crown-owned parts of the bed in this legal person.[121] This arrangement goes further than the Te Arawa Lakes settlement by including the "subsoil, the plants attached to the bed, the space occupied by the water, and the airspace above the water" in the definition of "bed".[122] However, the Act sidesteps ownership of the water itself because the vesting of the bed does not create a corresponding proprietary interest in the water. Thus, "Te Awa Tupua will own its bed, but have no rights to its waters."[123]

The Te Awa Tupua Act sets up similar governance structures to the Waikato River settlement to provide for iwi co-management and plan-making in relation to the River through a guardianship trust. However, the Act does not create a proprietary interest in the water, and protects existing private and public rights.[124] Importantly, when balancing competing interests under the resource management system, the Act recognises that the guardian trustees (made up of iwi and Crown representatives) have an interest greater than the public.[125] However, local authorities retain decision-making power of resource consents in the use of the river. Furthermore, consent from the Trust is not required before granting resource consents to use the water, though it may be required in relation to the use of the bed.[126] This leads to the illogical situation where Te Awa Tupua owns the space which the water occupies, but its guardians do not have the ability to veto what happens in that space.

Legal personality has its merits in advancing a framework that better reflects the Māori understanding of the water body and the human relationship with water. But, as Carwyn Jones points out, legal personality is still a Western legal concept.[127] Under the legal ownership approach, as with an

119 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.
120 Section 12.
121 Section 41.
122 Section 7.
123 Laura Hardcastle "Turbulent times: speculations about how the Whanganui River's position as a legal entity will be implemented and how it may erode the New Zealand legal landscape" (2014) February Maori LR 1 at 4.
124 Te Awa Tupua (Whanganui River Claims Settlement) Act, ss 46(1)–(2).
125 Section 72(d).
126 Section 46(3).
127 Carwyn Jones *New Treaty, New Tradition – Reconciling New Zealand and Māori Law* (University of British Columbia Press, Vancouver, 2016) at 98.

ownership approach, "Māori legal traditions [are] not recognised on their own terms but instead only through the closest legal equivalent from the Western legal tradition."[128] This limits the possibility of Māori traditions to shape New Zealand law to their full potential and continues the positioning of Western frameworks as the default lens to create law through, rather than being on an equal footing with tikanga.

The RMA

Local government, operating under the RMA, leads the day-to-day governance of natural resources. The RMA, therefore, has the potential to provide a general framework for the recognition of Māori customary rights to freshwater. As it currently stands, the Act provides for recognition of stewardship and kaitiakitanga interests of Māori in natural resources. The Act also intends to allow Māori to have effective participation in decision-making, and requires that decision-makers "take into account" the principles of the Treaty of Waitangi.[129] This is criticised by Edward Taihākurei Durie and others, filing expert and technical evidence on custom law to the Waitangi Tribunal for the Wai 2357 inquiry, as a "right to culture model" with no recognition of Māori decision-making powers or political authority over natural resources.[130] Although Māori interests are recognised under this current framework, it is not enough. The Act's overall purpose of achieving the sustainable management of physical and natural resources means that, when local authorities are making a decision, Māori interests will be need to be balanced with — and thus qualified by — other economic, social and environmental goals.[131]

1 Consultation

The RMA also requires local and central government to consult affected iwi in the preparation of a proposed plan or policy statement before they become notified. Local authorities must have particular regard to advice received from iwi authorities.[132]

2 Joint Management Agreements and Mana Whakahono ā-Rohe

The RMA granted local authorities the ability to make joint management agreements that allow for iwi participation in the management of freshwater resources through, for example, hearing committees.[133] A 2017 amendment also enabled the creation of Mana Whakahono ā-Rohe (iwi participation agreements).[134] The key difference between joint management agreements

128 At 98.
129 RMA, s 8. See also ss 6(e) and 7(a).
130 Durie and others, above n 48, at [202].
131 RMA, ss 5–7.
132 Schedule 1, cl 4A(1).
133 Section 36B.
134 Sections 58M–58Q. See Resource Legislation Amendment Act 2017, s 51.

and Mana Whakahono ā-Rohe is that iwi can initiate a process for entering into the latter, and local authorities have certain obligations when developing and implementing them.[135] Hopefully, this will increase the incidence of such agreements.

3 Power of Transfer

Since the RMA was enacted in 1991, local authorities have been able to transfer some of their powers under s 33 to an iwi authority, such as decision-making powers relating to resource consents over rivers and lakes.[136] However, despite this power having existed since 1991, it has never been used. The default approach of local authorities is co-management agreements that avoid the devolution of real decision-making power or rights of veto.

4 Opportunities for Reform

To better recognise Māori interests in freshwater resources, the RMA could be amended to mandate the use of the s 33 power of transfer through a national policy statement, where customary interests in water bodies have been proven through the Waitangi Tribunal or Treaty settlements. Another option for reform is to strengthen the use of tikanga principles such as kaitiakitanga by incorporating them within the definition of sustainable management in section 5. Rather than treating kaitiakitanga as only one of several matters that administrative bodies have regard to under s 7, this approach may provide more consistency of approach in the principle's recognition.[137]

Royalties

The Waitangi Tribunal raised royalties, remuneration for the right to use water, as a distinct form of recognition of Māori interests in freshwater resources. The Tribunal found that such a "commercial option for rights recognition or redress … is essential", given the nature and extent of Māori rights in their water bodies.[138] It is "essential" in circumstances where recognition of ownership is not possible.[139] Commercial remuneration could be as a share of Crown royalties from the commercial use of water, or solely given to Māori.[140]

A royalties regime can give broad recognition to Māori interests rather than requiring case-by-case claims in the courts. However, it would require the authorities to determine which iwi and hapu authorities are entitled

135 RMA, ss 58M–58Q.
136 Section 33.
137 Nin Tomas "Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff, Leiden, 2011) at 232-233.
138 *Wai 2358 Report*, above n 1, at 142.
139 At 142.
140 At 102.

to the royalties. This would raise difficulties with apportionment, similar to those following the introduction of the fishery Quota Management System.[141]

Monetary payment is compatible with the tikanga concept of utu as it restores balance and mana of the parties for wrong that has been done. However, it would be problematic if the payments are used to *pay off* the Māori interest without reconciling the Treaty obligation to recognise tino rangatiratanga and other customary interests. Payments are a way of remedying harm that does nothing to confront the issue of who has authority over water resources, and so should not be used in isolation from the Crown's other obligations.

After the 2017 general election, in which water pricing featured regularly in policy discourse, the Labour-New Zealand First coalition Government has ruled out a general resource rental on water for the current Parliamentary term.[142] However, the Government has indicated that it will charge a royalty on the export of bottled water.[143] It is not clear at the time of writing whether a Māori interest in freshwater will be accommodated as part of the proposed royalty regime.

"'Full-Blown'" Ownership[144]

The possibility of reconciling tikanga Māori and common law frameworks of understanding freshwater to recognise the exclusive possession of certain bodies of water should not be discounted. The modern legal conception of water rights is shifting towards property-like interests, and accommodating indigenous frameworks "will play a great role in the amount of agency accorded to indigenous peoples to govern water resources."[145]

1 Statutory Customary Title

One potential way forward is to create a statutory customary title in water as a property interest distinct from land. This approach would be grounded in tikanga principles and reflect the holistic relationship of Māori with water resources. It would also recognise water as a moveable, variable resource.

A legal title in the water would grant Māori authority over water use, the charging of royalties and the ability to exclude access to the water resource.[146] Common law public rights to water could be subject to this statutory customary title. This approach would therefore adopt the legal reasoning of *Ngati Apa* that the common law applied only so far as it was

141 See *Mahuika v New Zealand*, above n 61.
142 Coalition agreement (Labour & New Zealand First), above n 22, at 5.
143 At 5. See also Ministry for the Environment *Essential freshwater: Healthy water, fairly allocated* (October 2018) at 37: "officials have provided initial advice on how to give effect to the Labour/New Zealand First coalition agreement to introduce a royalty on exports of bottled water. Work to date has involved information gathering and exploration of options. Further work is exploring the costs and implications of options."
144 *Wai 2358 Report*, above n 1, at 76.
145 Memon and Kirk, above n 113, at 954.
146 Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand", above n 57, at 738.

appropriate to the circumstances of New Zealand.[147] This property right could be qualified by a reasonableness requirement, as proposed by the Waitangi Tribunal, to reflect the Treaty principle of partnership.[148] The property right would also be subject to RMA regulation to ensure sustainable management, albeit within an enhanced recognition of tikanga Māori principles.

The Crown and iwi would need to negotiate allocation of title to particular water bodies. These negotiations should be open to the potential for more than one iwi or hapu to identify a customary relationship with the body of water, particularly where the water runs through multiple rohe (iwi territory or boundaries).

However, as was seen in Australia, there are dangers with such a statutory approach. The interest is vulnerable to being weakened through statutory amendment, and as well as the potential for the courts to impose a significant evidential burden to prove the existence of customary title. In New Zealand, for example, although customary marine titles convey only very limited rights, they must satisfy rigid evidential standards requiring exclusive use and occupation with high levels of continuity since 1840.[149]

The main benefit of statutory title would be to create a legal interest in water that is collective, allowing for Māori to exercise authority in a way that caters to the unique features of water. Iwi would have the ability to develop commercial interests in the water or earn a resource rental from the commercial use. This would allow them to better exercise their rights under te Titiri o Waitangi while according an ongoing kawanatanga role for the Crown.

2 The Novelty of Water Ownership

Restitution of a proprietary nature raises difficulties with its effect on existing property rights, since "the concept of property, in its classic conception … secures inviolability from state interventions subject to acquisitions permissible in constitutional law."[150] Thus, in the Whanganui River settlement, a patchwork of property interests in the river bed was created through the vesting of only the Crown-owned parts of Te Awa Tupua so as not to dispossess existing property owners.[151]

However, due to there currently being no property interest in water at law, there would be no dispossession if title to water were to be accorded to Māori. What would be affected — thus needing clarification as to its effects — is the impact on existing consents and permits to the water as well as on common law public rights. A clash of access rights could also arise where Māori are granted ownership of water while a private landowner owns the bed on which the water sits or the banks by which it can be accessed.

The threat to private property rights would inevitably raise political difficulties; public opinion is prone to focus on the liberal principle of equal

147 *Attorney-General v Ngati Apa*, above n 35, at [85].
148 *Wai 2358 Report*, above n 1, at 78.
149 Marine and Coastal Area (Takutai Moana) Act 2011, s 58.
150 Gover, above n 79, at 372.
151 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 41.

human rights, viewing indigenous restitution as preferential treatment. The difficulty of incorporating historical injustices into the present debate on the distribution of rights makes full ownership a difficult option, requiring robust education, advocacy and time to bring the general public on board.

A Contextual Combination of Rights Recognition

Any of the above methods of recognition could be used and in any combination. The Waitangi Tribunal has advocated for a flexible approach:[152]

> … so as to determine what degree of priority should be accorded the Māori interest in any one case. We also agree that a sliding scale is necessary. Sometimes kaitiaki control will be appropriate, sometimes a partnership arrangement, and sometimes kaitiaki influence will suffice. The approach depends upon the balance of interests (including the interest of the taonga itself).

One combination that would not radically challenge the legal foundations of water rights would be to reform the RMA to incentivise the use of s 33 power of transfer, and to establish royalties on resource consents over water bodies in which iwi exercise an established customary relationship. Furthermore, the Government can (continue to) grant Māori decision-making authority and legal title in the land under water as part of Treaty settlements, to enable Māori to exercise rangatiratanga to a degree.

A more comprehensive approach would be to vest ownership of water in iwi and hapu groups through individual Treaty settlements. This ownership could be vested in iwi trust boards and authorities directly, or through the legal personality mechanism developed in Te Awa Tupua (Whanganui River Claims Settlement) Act. Such settlements could strengthen the incorporation of tikanga in environmental management through the use of tikanga principles and Māori language in operational provisions rather than merely the preambles.[153] While this would produce the difficulties associated with extant property rights and permits discussed above, case-by-case negotiation of these rights might have more chance of reaching a solution acceptable to all parties.

Tino Rangatiratanga and a Tikanga-based Legal System Over Natural Resources

1 Authority and Ownership

So far in this article, ownership has been discussed as a problematic but pragmatic way of giving equivalency to the customary relationship that Māori exercised with water bodies prior to colonisation, as recognised by the Waitangi Tribunal. Closely bound up in the claim to ownership is the claim to

152 *Wai 2358 Report*, above n 1, at 78.
153 Jones, above n 127, at 104–105.

political authority or tino rangatiratanga over water resources protected in art 2 of te Tiriti o Waitangi.

Māori advocacy of rights and interests in water has oriented around ownership due to the difficulty of accommodating a comprehensive recognition of tino rangatiratanga within the current constitutional framework where the Crown asserts itself as the sole sovereign. Ownership through a property rights framework grants a level of authority and decision-making power over land and resources that is not otherwise recognised in the current legal framework through the right to use, exclude and exploit the water resource autonomously.[154]As Andrew Erueti surmises:[155]

> … practically speaking, a claim to ownership can accommodate the Crown's right to govern, whereas to claim a right to tino rangatiratanga over a resource challenges the government's right to govern.

2 Constitutional Coexistence

An approach that better recognises tino rangatiratanga would require a reframing of the constitutional set-up whereby Māori would obtain full self-determination and exercise tikanga as a legal system within autonomous areas, or over particular bodies of water. While this approach challenges the current structure with the Crown as the sole sovereign authority, it would provide more security for Māori interests by not confining their validity within Western legal thinking. Admittedly, constitutional coexistence is far from the current reality in New Zealand where ongoing Māori sovereignty is not recognised, and common law recognition of tikanga is subject to being overridden by Parliamentary sovereignty. However, autonomous indigenous regions operate adequately in other jurisdictions such as the United States.

One way to view the negotiated settlements in relation to rivers and lakes as they currently stand is as steps on the pathway to developing this more equal Māori-Crown constitutional relationship, by accommodating more and more tikanga principles as key pillars of the legal framework surrounding water bodies.[156] The international recognition of indigenous rights to self-determination, self-government and property through UNDRIP also adds to the conceptual mechanisms for understanding this set-up. Nin Tomas asserts that the Crown's claim to sovereignty and Māori assertion of tino rangatiratanga are best viewed as "successive, coexisting layers of power and authority lying over the territory of Aotearoa/New Zealand."[157] Thus, a more comprehensive recognition of tino rangatiratanga over water bodies under a tikanga-based legal framework is not outside the realm of possibilities.

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154 Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand", above n 57, at 738.
155 At 738.
156 Tomas, above n 137, at 242.
157 At 222.

VI CONCLUSION

While common law and te ao Māori clash in their perceptions of water, the trend towards property-like commercial interests in freshwater necessitates a form of collective ownership of water so as to recognise and protect the relationship that Māori exercise with bodies of water under customary law. This position was recognised by the Waitangi Tribunal in its stage one findings of the Freshwater and Geothermal Resources inquiry. Furthermore, the doctrine of native title, which was developed under the common law, means that Māori customary *ownership* of freshwater has not been extinguished by legislation. Thus, there is an onus on the Crown to recognise, modify or expropriate this interest. But Māori interests are more than ownership: they encompass the exercise of tino rangatiratanga over natural resources. The Treaty and te Tiriti protect both Māori political authority and ownership over bodies of water, and so the Crown has obligations to protect and give effect to these.

Australia proves a comparative example where statutory recognition of customary ownership over water is limited to a *bundle of rights*. These rights centre around a right to exercise customary practices in the absence of legal title in the land on which the water flows. Recognition of indigenous rights in international law through the UNDRIP reveals a more comprehensive collective right of indigenous peoples over water. This collective right encompasses both authority and ownership, expanding on the interests protected under the Treaty of Waitangi. However, the UNDRIP right currently has limited domestic legal effect.

The limited domestic legal enforcement of international indigenous rights and the Supreme Court's deference to the Crown's Treaty settlement process has placed the negotiation of Māori freshwater interests firmly in the political sphere. The Crown's current framework of recognising Māori freshwater interests, through individual Treaty settlements and the RMA, maintains the view that water is not capable of being owned. Accordingly, the Crown presents a range of legal rights, from the exercise of customary practices over water, to a right to be consulted, to co-management rights and involvement in decision-making. Recently, the Crown has also incorporated indigenous frameworks into legislation through the use of tikanga principles and legal personality. However, in law, the Crown and local government still dominate the exercise of authority over freshwater, and that water still cannot be owned. Therefore, the status quo, though tending towards greater recognition of Māori interests, has failed to address the fundamental issues of authority and ownership. These remain politically divisive issues, but a modern system of water management requires them to be resolved soon, either comprehensively or through case-by-case negotiation with Māori.

There are a number of ways our current legal system can better recognise Māori freshwater rights, such as by devolving more decision-making to iwi authorities and by implementing royalties over commercial water use. The Government can grant Māori a form of statutory customary

title, or Treaty settlements could vest ownership of water bodies in Māori groupings. But this article argues that, in the absence of a more comprehensive renegotiation of the constitutional position of tikanga as an operative law in Aotearoa New Zealand, the exercise of Māori rights to freshwater resources will always be compromised within a Western legal framework that views the Crown as exercising sole political authority.

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