NGĀ WAI O TE MĀORI
Ngā Tikanga me Ngā Ture Roia

The Waters of the Māori: Māori Law and State Law.
A paper prepared for the New Zealand Māori Council
23 January 2017

HE WHAKAMĀRAMA

Purpose

1. This paper is for filing in the Waitangi Tribunal in relation to a claim that existing laws do not adequately accommodate the Māori proprietary interest in natural, water resources. The claim was initiated by the New Zealand Māori Council in association with ten tribal groups. It was later accompanied by 166 other Māori groups, whom the Tribunal joined as interested parties.

2. The inquiry has progressed through stage one, where the Tribunal found that a Māori proprietary interest in natural water resources had been proven. The Supreme Court endorsed that finding. A long recess followed while the Crown developed its proposals to reform water laws.

3. In the current stage 2, the Tribunal is considering the adequacy of the Crown's present and proposed laws. It is anticipated that in the middle of the current year, geothermal water will be addressed as stage 3 and in stage 4, the inquiry may focus on how the Māori interest may be provided for in law.

4. The Māori Council considered that technical evidence on custom law would be filed in the final stage after the tribal groups had given their customary evidence. However, on 16 November, an interested party sought leave to file expert and technical evidence on custom law by 20 January 2017. The Tribunal accepted that custom law evidence should be filed by that date. This paper responds to that directive.

Explanation of terms

5. This paper uses 'Tikanga Māori' for custom law. Māori spoke of that which is 'tika' or 'right' and thus used 'tikanga' in the nominalized form - the desirable standards by which correctness, justice or rightness is maintained.[1] The addition of "Māori" is modern, for previously, there was no other tikanga.

[1] For the origin, meaning and use of the term 'tikanga' see Richard Benton, Alex Frame, Paul Meredith *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* Victoria University Press 2013 p 429. Note that 'tikanga' was used for 'rights' in the Treaty of Waitangi and in the 'fourth article' referred to by Colenso, 'ritenga' is used for 'custom'. Bishop Manuhuia Bennett regarded tikanga as 'doing things right, doing things the right way, and doing things for the right reasons.' See *Matapunenga* at 431.

6. ‘Ritenga’, has also been translated as ‘custom’, but it is not used here as it is more regularly used for customary practices and ritual and is now associated with the Christian Book of Common Prayer.

7. ‘Ture Roia’ is an 19th century transliteration which is used for ‘state law’. ‘Ture’ was introduced for the Biblical torah, or Hebrew Law and became used also for ‘state law’, especially when used with ‘roia’, a transliteration of ‘law’.

Explanation of Content

8. Part A seeks to describe Tikanga Māori in relation to water and water bodies. It considers the law’s spiritual foundation, how the spiritual foundation shaped the customary use of water and water bodies and how water bodies were possessed by hapū as though they were property, even although they were not so described as property by Maori (but simply as land and water).

9. This is not proposed as a definitive analysis of the tikanga on water. The purpose is to identify those key points that are likely to assist in developing a state law that is more cognisant of Māori interests. The failure of those brought up under English law, to appreciate the essential aspects of the native tenure, is the primary reason why Māori freehold land is now beset by problems of multiple and absentee ownership. The same failure is evident in our own time, in the Government control of the recent shaping of Post Settlement Governance Entities. This Part therefore follows the 1994 monograph, *Custom Law* by Chief Judge Durie, as he then was, which compiled the essential elements of Tikanga Māori generally to assist practitioners in the Waitangi Tribunal and Māori Land Court.

10. Part B considers the cultural conflict between certain key concepts of Tikanga and Te Ture Roia which impact on the use and management of water bodies. It considers the principles by which state law has endeavoured to accommodate the conflict in the past, and which informs on how the same may be accommodated today.

11. The conclusions for Part A and B are located at paragraph 142.

12. Part C considers the state’s limited recognition of the Tikanga on water today and how this contrasts with the larger recognition of Tikanga in the past. This part considers a much larger recognition is due in terms of the legal doctrines and precedents of the common law states, especially New Zealand, England, Canada, United States and Australia, and in terms of the universally accepted norms of the United Nations. It compares the Māori view that the hapū held both political control and the exclusive use-rights, or ownership, of water bodies, with the Crown view (apart from exceptional cases) that the Crown has the political control and that the Māori interest is limited to caring for waterways. This does not provide for a property interest but only a cultural one and because, it seems, that in the Crown’s view, Māori had no conception of ownership and property.

13. Accordingly, this part looks to the precedents of the common law which require that the laws of the indigenous people are also respected, and which signal that, as a result, certain assumptions of the state Law, may be inapplicable outside of England. The part examines how the native law is given effect in state law through the doctrine of aboriginal title and by statutes giving effect to negotiated Treaty settlements. It also considers the adequacy of certain settlements, proposed law changes and current statutes, like the Resource Management Act ("RMA"). A failure to provide adequately for Tikanga Māori is considered to relate to assumptions that Māori did not have mana in relation to water, with its twin components of political authority and exclusive possession, but had only kaitiakitanga, or an interest in management. This part also highlights the significant role of the Waitangi Tribunal in findings of fact on Tikanga Māori for transmission to the general courts.

14. This part finally examines the significant drivers for statutory change, the Waitangi Tribunal, in its interpretation of the Treaty of Waitangi and its findings on the relevant facts, and the norm setting work of the United Nations, as it relates to both states and the state-like appearance of international business.

Authors

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16. Part A was written by Sir Edward Taihākurei Durie and Dr Robert Joseph.
Part B was written by Sir Edward Taihākurei Durie, Dr Robert Joseph and Dr Valmaine Toki.
Part C was written by Dr Andrew Erueti and Dr Valmaine Toki.

17. Set out below is a brief on each author and peer reviewer.

Hon Sir Edward Taihākurei Durie:
BA, LLB (Victoria University)
Sir Edward (Ngāti Kauwhata, Ngāti Raukawa, Rangitāne) has been involved in the regular hearing and assessment of Māori Tikanga in relation to natural resources, management structures and communal relationships first as a Judge of the Māori Land Court from 1974, and in addition, from 1980, as chair of the Waitangi Tribunal. In those roles he worked alongside senior kaumātua with specialist Tikanga knowledge including Irikau Kingi (Te Arawa), Hapi Winiata (Te Arawa),T Bill Herewini (Ngati Maniapoto), Ned Nathan (Te Roroa), Sir Monita Delamere (Whakatohea), Bishop Manuhuia Bennett (Aotearoa), Emarina Manuel (Ngati Kahungunu), Turirangi Te Kani (Ngai Te Rangi), Hēpora Young (Te Arawa), Mac Taylor (Ngāpuhi), Makarini Te Mara (Tuhoe), Keita Walker (Ngati Porou), Sir John Turei (Tuhoe) and Tikanga academics within the Tribunal, including Professor Sir Hugh Kāwharu and Dr Ngāpare Hopa and as claimants to the Tribunal including Sir Hirini Moko Mead. Sir Edward brings that experience to this

paper. He served also as a High Court Judge. He authored a paper on Custom Law which has long been an aid to students and practitioners in the Māori Land Court and Waitangi Tribunal. He holds honorary degrees from Wellington, Massey and Waikato Universities.

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Is a Barrister and Solicitor of the High Court of New Zealand and was a senior research fellow for the Te Mātāhauariki Research Institute at the University of Waikato under the leadership of Judge Michael Brown and Dr Alex Frame. Dr Joseph recently co-published the Rangitikei River Cultural Perspectives Report: Meredith, P., Joseph, R.A., & Gifford, L. (2016). *Ko Rangitīkei Te Awa; The Rangitikei River and Its tributaries. Cultural perspectives report.* Crown Forestry Rental Trust, Wellington.

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Andrew researches and teaches in the area of indigenous rights law with a focus on comparative rights and international indigenous rights. His PhD defended in 2016 presents a novel means of interpreting the UN Declaration on the Rights of Indigenous Peoples based on the political history of its negotiation in the UN. Prior to working for the University of Auckland, Andrew was the expert adviser to Amnesty International's head office in London. He has also taught at the law schools of Victoria University and University of Waikato (Te Piringa).

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Carwyn is the Co-Editor of the Māori Law Review. He has published numerous journal articles and book chapters on subjects related to the Treaty of Waitangi and legal issues affecting Indigenous Peoples and he is the author of the recent monograph, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press and VUP, 2016).

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Ko Ngāti Raukawa, Ngāti Toa, Te Atiawa, Ngāti Tama, Ngāti Mutunga ngā iwi.
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18. The authors acknowledge the assistance of Legal Aid Services.

PART A: HE TIKANGA MŌ TE WAI

Tikanga and the spiritual relationship to water

Understanding Tikanga

19. The Waitangi Tribunal has noted before that lakes, rivers and springs are taonga (treasured possessions) which are highly significant to Māori well-being and ways of life.[2] But as the Environment Court has considered, to understand that significance and how it affects Māori conduct, one must step deeply inside Māori thinking. One must see the world through Māori eyes, and assess Māori values within a Māori worldview.[3] A culture cannot be understood in terms of the worldview of another.[4]

20. Canon Māori Marsden described the world view of a culture as the central systemisation of conceptions of reality to which the members of that culture assent and from which stems their value system. The worldview, he considered, lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.[5] It is by understanding the world-view of a culture that we can come to understand its values and ultimately, mātauranga Māori (Māori knowledge systems) and Tikanga Māori (Māori law).

21. But is Tikanga Māori, law or lore? Anthropologists now generally accept that where there is a society of people there is law.[6] Dame Joan Metge for example recognises that law prevails whether through the law making and law enforcing institutions of complex state societies, or through the informal

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[2] Waitangi Tribunal, *He Maungarongo – Report on Central North Island Claims, Stage One,* (Waitangi Tribunal Report 2008. Volume 4) p.1281.

[3] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC). Refer also the 1921 decision of the Judicial Committee of the Privy Council, *Amodu Tijani v Secretary, Southern Nigeria*, (1921), 2 AC 399.

[4] Understanding a culture in its own terms is difficult when simply writing in English will convey meanings that do not exactly fit with the native comprehension and when the understanding of difference is sought through comparative studies. In *Exploring Māori Values* 1992 Dunmore Press, John Patterson attempts, as an investigative philosopher, to come to grips with personal, embedded limitations that inform any look into one world-view from the perspective of another. However, a seminal text on the topic is James Clifford and George E. Marcus (eds) *Writing Culture The Poetics and Politics of Ethnography* 1986 University of California Press. Refer also to the important discourse on Kaupapa Māori methodology, led by Professor Linda Tuhiwai Smith, which emerged, inter alia, as an affirmation of Indigenous (Maori) ways of knowing and worldviews and making space for post-colonial transformation. See Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples (*Zed Books, London, University of Otago Press, 1999); Battiste, M, *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) and Friere, P, *Pedagogy of the Oppressed,* (Penguin, London, 1996)

[5] Royal, C.T, *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, 2003) at 56. See also Royal, C, *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report Prepared for the Ministry of Education, Version 4, January 2007) p 38.

[6] N Rouland *Legal Anthropology* (The Athlone Press, London, 1994) and see the discussion by R, Boast "Māori Customary Law and Land Tenure" in R Boast, A Erueti, D McPhail and N Smith *Māori Land Law* (Butterworths, Wellington, 1999) at 2. See also Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 1-2.

and multi-purpose structures of small scale societies, as with the small hapū which constituted the Māori community.[7] Early colonial officials also had no difficulty in accepting that Māori customs and usages had the character and authority of law.[8]

22. Although this paper concerns tikanga in relation to water and water bodies, there are a number of values that apply to all tikanga. These are introduced now. Tikanga was based on a worldview in which all things descended from the Gods, and were passed down through the generations to the present by meticulously memorised whakapapa (genealogies) which establish the relationship of all people and all things.[9]

23. From this worldview come the cardinal tikanga values of wairuatanga (spirituality including placating the departmental Gods), whanaungatanga (maintaining kin relationships with humans and the natural world, including through protocols of respect), koha (gift exchange), mana (authority including the authority which groups derive from land and waterways), tapu (the recognition of an inherent sanctity or a sanctity established for a purpose – to maintain a standard for example), noa (liberating a person or situation from tapu restrictions, usually through karakia and water), utu (maintaining reciprocal relationships and balance with nature and persons), mauri (recognition of the life-force of persons or objects), hau (respect for the vital essence of a person, place or object), rangatiratanga (appreciation of the attributes of leadership), manaakitanga (enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires); and kaitiakitanga (stewardship). Tikanga and ritenga also include adherence to a proper form and process in karakia, waiata, genealogical recitations, oratory and debate.[10]

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[7] Metge, J, 'Commentary on Judge Durie's Custom Law' (Unpublished Custom Law Guidelines Project Paper, 1997) at 5.

[8] See for example the instructions of James Stephen to Governor Hobson 9 December 1840, *GBPP*, 1841, No. 311, at 24 cited in McLintock, A.H *Crown Colony Government in* New Zealand (Government Printer, Wellington, 1958) at 393-394. Also, in 1832, after a stay in New Zealand, R.W Hay reported to the Colonial Office in London: The property of the soil is well defined, their jurisprudence extensive, and its penalties are submitted to without opposition, even from the stronger party". 'Notices of New Zealand' from Original Documents in the Colonial Office, communicated by R.W. Hay, Esq., reported in *The Journal of the Royal Geographical Society* (Vol. 2, 1832).

[9] A concise and focused account of the creation of the world, the appearance of the Gods, and the descent to a range of lifeforms and inanimate objects, from the viewpoint of an ethnologist, is provided by Te Rangi Hiroa in *The Coming of the Māori* Whitcoulls 1949 Reprint 1977 (drawing on such previous ethnographers as Elsdon Best, Raymond Firth, HD Skinner, S Percy Smith and John White). However, two distinctive approaches which seek to capture in modern context the Māori sense of imagery in recitation see (a) the papers under *The Achievement of Authentic Being* in *The Woven Universe, Selected Writings of Rev Māori Marsden* edited by Te Ahukaramū Charles Royal (2003), Jones, Pei Te Hurinui, 'Māori Genealogies', in *The Journal of the Polynesian Society* (Volume 67, No. 2, 1958) p 162. and Jones, Pei Te Hurinui *He Tuhi Mārei-kura* (2013) Aka & Associates Ltd.

[10] Pierre Tohe "Maori Jurisprudence: The Neglect of Tapu" (1996 – 1999) 8 Auckland University Law Review 884. Tohe argues that a sense of divine responsibility, encapsulated in tapu, underlies the Maori legal system and enforces compliance with community norms. See also Mead, H, 'The Nature of Tikanga' (Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) at 3-4.

24. Accordingly, the value system on which Tikanga Māori is based, is aspirational, setting desirable standards to be achieved.[11] Thus, where our state law sets bottom lines, or minimum standards of conduct below which a penalty may be imposed, Tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward. With that background this paper now turns to the concepts that underlie Tikanga Māori in relation to water and water bodies.

Tikanga

25. Tikanga Māori reflects a metaphysical cosmology which is pervasive in determining how Māori relate to landforms and all forms of life.[12] That includes how they relate to each other. Their conception of the origin of all things on earth determines their ritenga (ritual), tikanga (law or customary values) and their perceptions of what is tika (right) or hē (wrong). Their law is aspirational, setting standards of best conduct based on ancestral exploits, with prescription mainly reserved for ritenga including the propitiation of hara (spiritual offences).[13] Compliance is largely self-enforced, driven by whakamā (shame) or mataku (fear of spiritual retribution). Muru (community stripping of the goods of a whānau) was also practised, as utu (redress or restoration of balance) for some aituā (misfortune) like the careless loss of life or property or some breach of social laws. Muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong).[14]

26. Fundamental to Tikanga Māori is a conception of how Māori should relate to land, water, all lifeforms and each other. It is a conception based on:
    - Whakapapa or the physical descent of everything; and
    - Wairuatanga or the spiritual connection of everything.

    It is a law which recognises a legal responsibility to care for the world in which we live, and to constrain its exploitation.[15]

Whakapapa

27. Whakapapa may be introduced with the pepehā "ko tātou ngā kanohi me ngā waha korero o rātou mā, kua ngaro ki te pō" (we are but the seeing eyes and speaking mouths of those who have passed on).[16] Traditional Māori knowledge is encoded in a mental construct called whakapapa. The word derives from papa, which is anything broad and flat such as a flat rock, board or slab, and from whaka, a causative prefix that enables something to occur.

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[11] This is explored from a philosopher's viewpoint by John Patterson in *Exploring Māori Values* 1992 Dunmore Press Ltd. See also Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at 25-32.

[12] Korero by Te Rangikaheke on āwhina, among other topics, as cited in Grey, G, *Polynesian Mythology* (Whitcombe & Tombs, Wellington, 1956) at 15.

[13] Patterson, J, *Exploring Maori Values* (Dunmore Press, 1992).

[14] See the topic 'Muru' in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 254.

[15] For a more extensive, general summary see Margaret Orbell (1985) *The Natural World of the Māori* William Collins Publishers, Auckland pp 215-217

[16] Ministry of Justice, *Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) 'Māori Social Structures.'

Whakapapa means to place layer upon layer.[17] A leading example of this concept is the orderly recitation and naming of genealogies according to successive generations and specific lineages. This form of whakapapa envisages a building upon the past, layer by layer, towards the present and into the future.

28. John Rangihau identified whakapapa as the most fundamental aspect of how Māori come to know the world and their place in it.[18] It tells how people connect to the Gods, land, waterways, mountains and people and helps define their rights and responsibilities.

29. Hence, in Māori cosmology, all things are related by descent. It is not just all Māori who are connected in genealogical tables. All things descend from departmental atua (ancestral deities) at various generational levels, all ultimately descending from Io Matuakore and through Io, Ranginui (the sky) and Papatūānuku (the earth).[19] Accordingly, the atua are tūpuna (ancestors), whose wairua (spirits), like those of all tūpuna, continue to have influence. The people, and the resources they use for food, clothing or shelter, are not the victims of the atua, but their progeny. The atua serve to protect, but they also serve to punish takahē/takahanga (transgressions).

30. This shapes the way that Māori relate to the environment and to each other. In taking fish for food or trees for timber, for example, they are encroaching on the domain of particular atua. They must show respect, not exploiting mindlessly, but taking only that which is necessary and beneficial to others. So, greed is frowned on. The first fish caught is given away.[20] The catch is offered first to the elderly. In taking from the bounty of Tangaroa, one thinks not of oneself but of the needs of others.

31. Similarly, in entering te wao nui (the forest domains) of Tāne, no great tree is felled without seeking permission by karakia,[21] and the thought is not for

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[17] Williams, H, A *Dictionary of the Māori Language*. (Reprint of 7th ed. A R Shearer, Government Printer, Wellington, 1975, 7th ed first published in 1971) p 259.

[18] Rangihau, J, 'Being Māori' in King, M (Ed), *Te Ao Hurihuri: The World Moves On* (3rd Ed, Longman Paul Press, Auckland, 1981) pp 165-175.

[19] On the place of Io, and the possibility of post-Christian reconstructions, see Te Rangihoroa *The Coming of the Māori* 1949 Whitcoulls Limited, 526, 531-536. For an ethnography on the Creation, the departmental Gods and the origins of mankind see pp 431 – 472. For modern summaries see Law Commission, *Maori Custom and Values in New Zealand law* (Study Paper 9, Wellington, 2001) at 32; New Zealand Ministry of Justice *He Hinatore ki te Ao Māori: A Glimpse Into the Māori World* (New Zealand Government, Wellington, 2001); Department of Conservation, 'Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy' (14 Feb 1994) cited in Nolan, D, (ed.) *Environmental and Resource Management Law* (4th Ed, LexisNexis, Wellington, New Zealand, 2011) at para 14.2.

[20] At least in the authors' experience and as recorded by the Waitangi Tribunal *Motunui-Waitara Report 1983* section 4.5 but Glen P Te Awaawa Firmin writes in *Kei Hea Ngā Mānu* in *Ahunga Tikanga* 2012 at 85 that amongst Te Ātihaunui ā Paparangi "the first fish caught was always thrown back" and in other districts "they hang it in a tree and leave it there". See also Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at 25-32. See also Patterson, J, *Exploring Maori Values* (Dunmore Press, 1992) at 195. Refer also to 'Manaakitanga' in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 205-209.

[21] And so the story of Rata who was unable to complete the construction of his waka until he had completed the appropriate ritual for the felling of a tree. See Alpers *Māori Myths and Tribal Legends* 1964 Longman Paul 127.

personal benefit, but to build a great house, or waka or the like, for everyone. It was also common that in the papakainga (villages), the whare (house) of the rangatira (leaders) was no grander than that of others. The grand house, the whare rūnanga, was the house of everybody and the place for the visitors.

32. One need not go beyond the proceedings on a marae today to appreciate that there are elaborate respect protocols too when hapū (bands or tribes) greet one another, or when hapū come together as an iwi (confederation). Social gatherings do not begin with mix and mingle. The process is again, a spiritual one which involves the recognition and respecting of difference, the acknowledgement of the spiritual world of the ancestors, the acknowledgement of tangata whenua and manuhiri each according to their karanga (call), the acknowledgment of commonality through whakapapa (genealogies), and individual acknowledgments by hongi.[22]

33. The first law for Māori is probably therefore, a law of relationships, about how Māori relate to their environment and to one another.[23] Whether one is talking with visitors on a marae, or is fishing, hunting, building, weaving or foraging, protocols of respect are paid to keep peace in the spiritual and earthly realms. The protocols are replete with whaikōrero (orations), pepeha (sayings), whakatauakī (proverbs), whakapapa (genealogies), karakia (incantations), and waiata koroua (traditional chants). Central to this is the recitation of whakapapa, which traverse both spiritual and physical realms. The land and waterways are shared between those who have passed on to te arai (the spirit world), the living and those yet to be born. Ancestors, whether remote or recent, occupy a spiritual world that is as real to Māori as the physical world. Accordingly, forebears are not spoken of but are spoken to, and creation stories are not myths but beliefs, beliefs which are the foundation of Māori law.[24]

Wai me te wairuatanga

Since all things come from the spiritual realm, all things are tapu, that is, they exist under the protection of an atua. Consequently, there are restrictions on the use of places and things and on what people may do. In addition, there are particular restrictions on places, things, or people that perform functions of spiritual significance. For example, the tapu on an urupa (burial site) or tuahu (shrine) limits activities in the vicinity, or a pouwhenua (post marker) may prevent certain persons from entering on particular territory or waters, for fear of spiritual (and physical) retaliation. Women in childbirth, warriors, carvers, tohunga, corpses or persons in close contact with corpses are also under particular tapu restrictions.[25]

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[22] Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at 117-132.

[23] See Waitangi Tribunal *Muriwhenua Land Report* 1997 at 21-23 and especially the evidence cited of Dame Anne Salmond – "… Māori were operating in a world governed by *whakapapa* … Ancestors intervened in everyday affairs, *mana* was understood as proceeding from the ancestor-gods and *tapu* was the sign of their presence in the human world. Life was kept in balance by the principle of *utu* (reciprocal exchanges) which operated in relations between individuals, groups and ancestors."

[24] Ibid, at 133-150.

[25] Ibid, at 35-64. See also Firth, R, *The Economics of the New Zealand Maori* (Government Printer, London, 1929) at 235; Waddy, P, 'Early Law and Customs of the Maoris' (LLM Thesis, Sydney, 1927) at 21; and

34. Water, when sprinkled on the body, serves as a medium to protect people when undertaking special functions like those mentioned, or when embarking on an expedition. It also serves to assist those suffering ill health through spiritual imbalance or contamination. In addition, water may be used to remove various tapu restrictions, as when people sprinkle themselves with water on leaving a cemetery, or when people return from battle to resume a life of peace.

35. Freshwater then, is closely associated with the wairua, having come directly from the atua.[26] It is termed waiora (lifegiving water). Te Rangikaheke records wai (water) as coming from the separation of Ranginui and Papatūānuku, firstly from their tears during the period of separation, and then from the rains used as a weapon by Tāwhirimātea, atua of winds and storms, during his battles with his brothers.[27] Wai may be wai māori (normal or fresh water) wai tai (seawater) or wai ariki (thermal water) but wai on its own refers to freshwater (except that it is also used for roimata (tears)). As a medium wai is linked to wairua (spirit), waiora (also used for soundness of body and mind) and wairangi (a temporary, unbalanced state of mind).

36. Wai is regularly used for spiritual strengthening in rituals. Punawai or springwater is especially preferred for its purity. Flowing water is used for example, in the tohi rite, to endow a child with desired mental and physical attributes. The still water of a pool, known as a waiwhakaika, is used for rites to assist the retention of knowledge.

37. Māori distinguish persons or things according to whether they are in a high state of tapu and therefore restricted, or in a state of noa, relieved from extraordinary restrictions. Water is an important medium to remove certain tapu restrictions so that persons may function normally, freed from the risks of tapu, or may utilise certain resources the use of which would otherwise be prohibited or restricted.

    Accordingly, things will be treated differently according to the degree of tapu attaching to them.

Ngā whakapūtanga o te wai

38. As discussed above, wai, as a naturally occurring substance, has its own wairua or spirit in Māori thinking. A water body, on the other hand, has also its own mauri (life-force) and hau (vitality) which gives it a distinct personality or mana (authority).[28] This applies to all water bodies, the puna

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Barlow, C, *Tikanga Whakaaro: Key Concepts in Maori Culture,* (Oxford University Press, Auckland, 1994) at 128-129.

[26] Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at at 66 but note that Mead considers water itself is not tapu, but is a medium for removing tapu. See *Te Mātāpunenga* .. entry Wairua.

[27] Cited by Hohepa, P and Habib, G, 'Maori Terminology and Water' (Unpublished Support Report, Claims Wai 2357: Sale of Power Generating SOEs, Wai 2358: National Freshwater & Geothermal Resources, no date) at paragraph 2. For a Ngāti Pahauwera perspective of the same, see Waitangi Tribunal, *The Mohaka River Report* (Wai 119, Brooker and Friend Ltd, Wellington, 1992).

[28] For a fuller appreciation of these terms see Te Mātāpunenga … entries for Mauri, Hau and Mana. The bracketed words 'life-force', 'vitality' and 'authority' provide an introduction only. No English word is an exact equivalence. Some would probably dispute the term 'life-force' arguing that mauri is not life but that on

wai (springs), repo (wetlands), awa (rivers), manga (tributaries), roto (lakes), waitomo (underground water bodies) wainuku (ground water), ngutuawa (estuaries) and muriwai (lagoons).

39. The strength or health of the water body may be measured by the abundance of wildlife and taniwha which inhabit it. In custom, the water fowl and taniwha are presented as kaitiaki (guardians) who protect both the waterbody and the associated hapū.[29] Manu (birds) are well known to Māori as warning people of danger, as for example when they cut across the pathway of an ope (travelling party) or farewell the dead, as when they attend at a tangi or at the whare of a person who has passed away. Observations in nature were critical to survival and the manu were closely read.

40. However, when the manu and other kaitiaki abandon a water body, they portend of disaster. Their absence or reduction in numbers is a serious omen for the hapū. Accordingly, the removal of a tree on which birds depend is a serious offence. The same applies to the removal of bed-rocks on which fish depend. For example, if a rock is removed to take the koura underneath, the rock must be replaced in the location and position in which it was found so that the mauri is not compromised.[30]

41. The taniwha (also called tūpua) exercise a powerful influence on the hapū as they are also hapū protectors and ensure safe journeys. Like the birds, the health of the water fowl and taniwha indicates the strength or health of the associated hapū. The underground waters without wildlife may be inhabited by taniwha that emerge at different places, as with the taniwha called Pekehaua for whom the spring at Awahou on lake Rotorua, is named.

Te whanaungatanga ki te wai

42. In customary accounts, each cold-water body is a manifestation of the ancestral atua and is imbued with the essentials for life - mauri, mana and hau. The water-body is thus an ancestor itself and so in the case of a river, is revered as an awa tūpuna or awa tūpua (river of the ancestor or ancestral taniwha). As a consequence ancestral figures in turn remind the people who live along the water-way, of their relationship to the past and to one another.

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which life depends. It has been said that trees grow, land is fertile, birds are numerous, fish abound and men are skillful and prosperous, only while the mauri remains inviolate – Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at p 241.

[29] Today it is usual to refer to the people themselves as the kaitiaki (kaitieki in some dialects). This is understandable since hapū cared meticulously for their water bodies. Nonetheless in former times the credit was usually given to other creatures. Each family frequently had their own species of kaitieki. For example, the ruru (morepork) was a common family minder. See the discussion of 'kaitiaki' in Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262 Claim, Waitangi Tribunal, Wellington, 2006) at 93, 111-112.

[30] The Waitangi Tribunal reported on much further evidence of customary practices on food collection, including the replacement of stones, in *Motunui-Waitara Report* 1983 at section 4.5 and in several subsequent reports.

43. Dr Patu Hohepa elaborated further in stage 1 of the water claim in describing the relationship between his iwi and their waters as follows:

> Wai is the ultimate protector of the life force of Ngapuhi. The settler ancestor Nukutawhiti cast his sacred amokura (feathers of the tawake or frigate bird) headdress into the waters of the raging Hokianga and that and his incantations allowed Ngatokimatawhaorua(the waka of Kupe) to safely enter the harbour. "Ko te Mauri o Ngāpuhi he mea huna ki te wai" – the life force of Ngāpuhi is hidden in the water - has been reiterated by many Ngāpuhi elders.[31]

Ngā hāparu o ngā wai

44. To hāparu is to dirty the essence of life. Hā is the breath of life, and part of the hau. Paru means dirty or muddy. Hāparu is a desecration, debasement or defilement of the breath of life. Hāparu originally referred to the intentional destruction of a sacred place or significant resource for revenge against another or to provoke a battle. To defile a river as a matter of course may never have happened because it was so abhorrent to Māori. Today however, hāparu has become the norm.

45. Tikanga Māori did not permit the discharge of waste of any kind to water. Bodily waste, food scraps, fish scales and gut, or even pipi shells, were discharged only to land.[32] The contamination of water was not just a hē or wrong, but a hara or spiritual offence which would bring serious misfortune to the offenders and their hapū. When Māori built homes in western form they commonly built both washhouses and toilets a distance from the house to prevent the contamination of the house. Still today, on many marae, the ablution blocks are invariably discrete buildings.[33]

46. Water may become hāparu or contaminated in various ways. It becomes impure or unsanitary when its natural flow is disturbed or modified by unnatural means, or when separate watercourses are fused so that the mauri of the waters mix by unnatural means. Boiled water used for cooking is seen to be wai mate (dead water). It should not be discharged to living water that supplies food. Similarly, a river or lake loses its power or force and may become dead when there is a discharge of effluent into an awa.[34] In such a case, the mauri has diminished and can only be restored through Papatūānuku. Discharging sewerage and other waste material into waterways is highly offensive to Māori, no matter how well treated.[35]

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[31] Hohepa, P and Habib, G, 'Maori Terminology and Water' (Unpublished Support Report, Claims Wai 2357: Sale of Power Generating SOEs, Wai 2358: National Freshwater & Geothermal Resources, no date) at 25.
[32] The Waitangi Tribunal reported on the customary aversion to the discharge of waste to water in *Motunui-Waitara Report* (see above) at section 4.5.
[33] Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at 65-95. See also Salmond, A *Hui: A Study of Māori Ceremonial Gatherings* (Penguin Group, 2009); and Walker, R 'Marae: A Place to Stand' in King, M (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishers, Auckland, 1992) at 174.
[34] Ministry of Justice, *Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) 'Traditional Māori Concepts: Whenua.'
[35] Hayes, S, 'Defining Kaitiakitanga and the Resource Management Act 1991' in *Auckland University Law Review* (Vol 8, 1998) 893 at 897. Hayes was referring to the Court decision of *Rural Management Ltd v Banks Peninsula District Council* [1994] NZRMA 412.

47. Water used for washing the body or clothing should not be mixed with water used for drinking or preparing food. This finds expression today in the abhorrence about using the kitchen sink where food is prepared, for washing clothes or the body. In tradition, there were separate streams for washing clothes or bodies and for food preparation and drinking. Where that was not possible clothes and persons were washed a discrete distance from the water body.

48. Today, hāparu has become common, as with the pollution of a river or lake or the draining of a wetland. As the Tribunal heard in the opening week of stage 2, in the 1960s Ngāti Kauwhata hapū placed a rāhui (prohibition on use) on the Oroua river, because of the hāparu.[36]

Tikanga and the use of water

Mō te aha, ngā wai?

49. The water bodies supplied all that might be expected of water bodies for human survival. They supplied drinking water and a great range of fish (approximately 40 indigenous freshwater species), water fowl and edible plants. Water bodies provided the materials for clothing, especially from swamp harakeke, feathers from water birds, and decorative dyes. They provided the material for shelter, especially from raupō and the timber of the water-based, kahikatea. The water bodies provided rongoā (medicines) and the water for physical and spiritual cleansing and rites. They provided the means for transport.

50. This section does not document the vast variety of fish, water fowl and plants that once existed or the wide range of materials for clothing, shelter, implements, weapons, waka and medicines. Suffice it to say that an abundance of those things have been recorded.

51. Rather, this section considers how the reliance of Māori on water bodies compared with the greater British reliance on land based resources, influenced Māori culture, values and law, and accounts for the greater attention which Māori once gave to their proprietary interests in water.

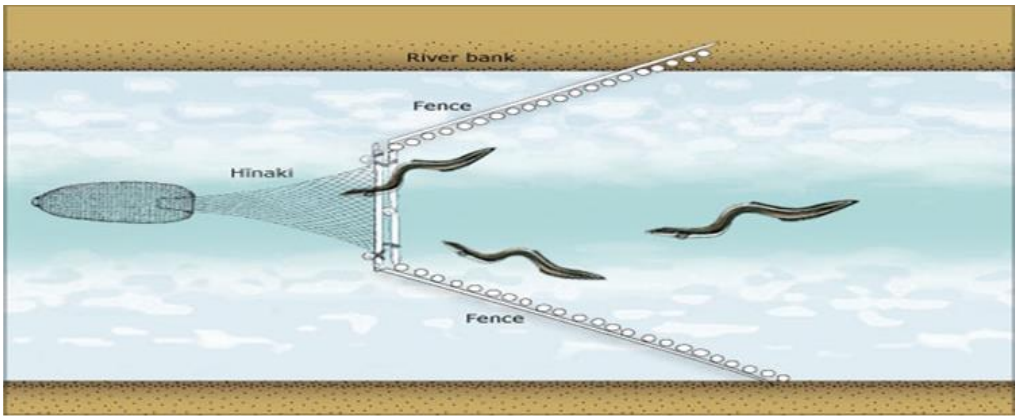
52. To appreciate the primacy of the water bodies, one has to imagine Aotearoa as it once was. Before European contact, Aotearoa was as much a land of water as it was of dry land. The dry land was mainly the hill country, the ranges and mountains. In between the higher lands were vast areas of repo (wetlands) linked by rivers and streams providing extensive aquatic highways. Hohepa and Habib[37] record thousands of waterways across the country today: 3,820 lakes with a surface area of more than one hectare; many thousands of recognisable rivers collectively extending over 200,000

[36] Evidence of Dennis Emery in opening the second stage of the water claim at Waiwhetu marae in October 2016.
[37] Cited by Drs Patu Hohepa and George Habib Hohepa, P and Habib, G, 'Maori Terminology and Water' (Unpublished Support Report, Claims Wai 2357: Sale of Power Generating SOEs, Wai 2358: National Freshwater & Geothermal Resources, no date) at paragraph 92.

kilometres; tens of thousands of small streams; more than 200 sizeable groundwater aquifers; thousands of mainly small freshwater springs; and about 89,000 ha of freshwater wetlands. They estimate however, that in 1840, the wetlands were over 7 or 8 times more extensive so that tens of thousands of hectares are considered to have been drained. The Maori ancestors saw the wetlands as major resource areas, rivalling the sea resource in several, coastal districts.

53. To appreciate the primacy of the water bodies one has also to consider the main sources of food. Apart from the kurī (dog) and kiore (rat) there were no animals and few crops. This is quite unlike the vast array of animals and crops in Britain, and so the perspective of water as a resource is quite different. In the Aotearoa rivers, lakes and wetlands there was an abundance of food, with kahawai, tāmure, kanae, makawhiti, pātiki and various shellfish at the river mouth, and then īnanga, ūpokororo, kōkopu, kakawai, piharau, koura, kākahi, a huge abundance of tuna (Māori having over 100 names for the various species in different stages of development), and a variety of water fowl, including the ducks, especially the whio. The ducks were caught in their thousands, notably in Waikato, the Bay of Plenty and Marlborough. When they were moulting in the summer they were fat and unable to fly, and were easily driven into inlets and on to the shore.

54. Accordingly, the largest structures for catching any form of wildlife were in water. The pā tuna and utu piharau (eel and lamprey weirs) were built across large rivers in their hundreds supporting large numbers of hinaki (pots or nets) at the end of wooden frames and fences.



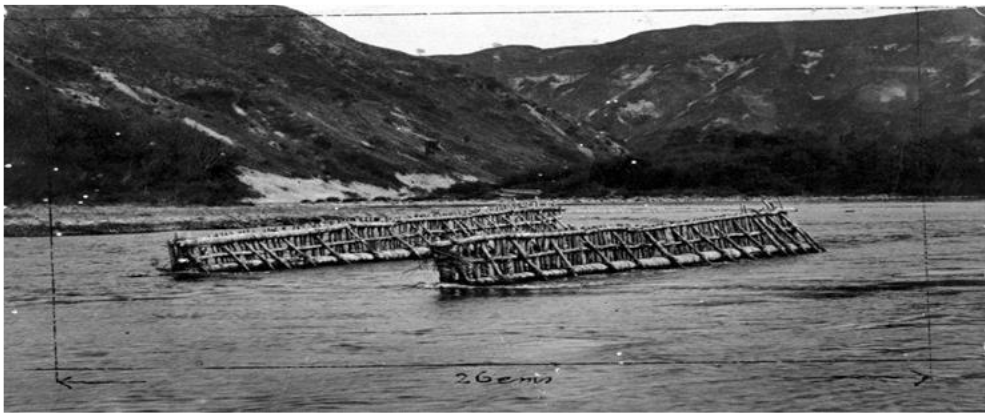
55. Similarly, just as the British enclosed land in private ownership to expand agricultural development by individual families, so also the Māori "enclosed" the water for individual, extended families, mainly by pa tuna and by rocks and markers. James Cowan wrote:

> At 1840 each hapu occupied and defended the boundaries of a territory on which it was dependent for its survival and nourishment, its continuity and identity. In the central plateau lakes 'the fisheries were jealously guarded... the boundaries of the various hapu were carefully defined by the leading marks. Every yard of these lakes had its owners...

sometimes a rahui or close-season mark, or post indicative that such a place was tapu, was set up.[38]

56. The same applied generally, with specified use rights applying along rivers, lakes, coastal reefs and pools, for the benefit of particular groups. It should be noted however that land and water resources may be shared by more than one tribal group.[39] Each tribes' rights and responsibilities to land and natural resources could be quite different. For example, one tribe may have had the rights to harvest birds in an area at a particular time of the year, while another tribe may have had the fishing rights for the area, and a third tribe may have had the rights to grow crops.[40]

Pa Tuna Eel Weirs, Whanganui River, 1924



Traditional Pa Tuna Eel Weirs, Whanganui River, circa. 1910[41]

[38] Cowan, J. 1930: The Maori: Yesterday and Today. Whitcombes & Tombs, Wellington pp 182

[39] For example, the Waitangi Tribunal reported on the evidence of the division of the reefs of Waitara amongst 6 hapū in *Motunui-Waitara Report* 1983 at section 4.5 and in the *Muriwhenua Fishing Report* 1988 on the use of the same reefs by different hapū at different seasons. The latter report includes extensive detail on Māori fishing experience and beliefs at sections 2.2 to 3.4.

[40] Firth 1929) at 43; Ballara, A, 1998) at 194-195, 197.

[41] Alexander Turnbull Library, Manuscripts and Pictorial Collection, Ref 1/2-140011-F

57. As with land, a particular area may be reserved for a special purpose (whenua tāpui) and boundaries may be defined to enclose a place for a particular person or whānau (whenua i rohea), but it is only the use that is given, and while the use may be passed down to descendants, it is nonetheless given at will, and may be taken back if the user fails to maintain customary responsibilities, caring for the same and contributing to the common good.

58. Indeed, the waters were frequently awash with private or whānau usages. The basis for the right was usually that one's father and his father had fished at some place but complexity of the use rights framework is illustrated by the fact that different persons might fish in the same spot for different species at different times of the year, the whole hapū may need to engage together when particular fish are running without regard to 'private' locations and as mentioned, more than one hapū might share in particular resources. [42]

Te ara wai me te horapa hāere o ngā hapū

59. A further major point of difference between Britain and Aotearoa was that in Britain the major means of transport and physical communication was by road – on land. For Māori, it was by water.

60. The Māori had no beasts of burden, no horses or oxen, and consequently no carts, carriages or carriage ways. A huarahi, in those days was not a roadway. A hua was a linear cut in a carving and a hua-rahi or large, linear cut, was a track in the ground. The forests were dense and foreboding and the coastal flats were divided by foothills. Transport and communications were primarily by water on the lowlands, and if by foot, the paths, to the most practical extent, followed water courses.

61. In similar vein, as hapū grew they divided, laterally, and tended to divide and spread along the water-way edges. Māori were not forest dwellers. They lived along the open ground of the waterways or on cleared hilltops near to the water. As a result, the spreading papakāinga alongside the rivers and lakes, became a genealogical lineage on land. The papakāinga record the history of descent from the first Māori settlers as they journeyed inland. As was graphically illustrated in the Whanganui River Claim to the Waitangi Tribunal, the Whanganui River represents a lineage of descent relationships, figuratively called te taura whiri o Hinengākau, or the plaited rope of Hinengākau. The river itself is divided into upper, central and lower parts, named for three siblings from whom all trace descent, so that the river presents as a unifying force in which all descend from the parents of those

[42] Thus Major Rapata Wahawaha asserted that "Ancestral authority prevails over one's iwi or hapū. The authority is solely over one's own land if the parent has bestowed that authority on their child…" Captain Gilbert Mair, who led Te Arawa troops against Te Kooti in the 1870's, described how Ngāti Whakaue bestowed the fishing ground Te Ruru on him personally. See 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 184 and 177A respectively.

three. And so again, the river is a single, living entity and an important symbol of spiritual and cultural prowess.

There were aspects of the same in the evidence of the Tapuika people of the Kaituna river, in stage 2 of the water claim, when protesting the division of the river into different administrative sections for local body purposes.[43]

62. The waterways were the highways of the day, and these highways were in the possession of the hapū, more emphatically than the forests on the land.

Nā te wai, ngā kaupapa

63. From the spiritual dimension that Māori have with the natural order comes also particular policies on how water is used. This paper has already considered the spiritual relationship with water and water bodies. The same spiritual relationship engenders the values that are the basis of Tikanga Māori, as introduced at the beginning of this Part. It is thus expected that the resources of the watery domains will be treated with respect, without any sign of greed or excessive exploitation, and with the good of the people and future generations, at heart. Equally associated with the spiritual regime is the concern to maintain the purity of the water, as earlier discussed, so that there is no discharge of waste to water, but only to the land, and separate streams are maintained for drinking, for washing clothes or bodies and for the preparation of food.

Nā te kaupapa, te tikanga me te pono

64. Associated with the spiritual awareness and well-being, or wairuatanga, that comes with water, is the display of respect for the inhabitants of the natural world, and the virtue of displaying respect when dealing with one another.

65. When dealing with one another, the key conceptual regulator of conduct is the ideal or value of manaakitanga. Manaakitanga, as earlier explained, refers to the reciprocal enhancement of the mana of each other when people engage. It is most commonly associated with the generous hosting of visitors or with the respect protocols when Māori formally engage with one another in discussion. Nonetheless, it is a concept which informs best standards in Māori conduct generally. It requires that one should seek to enhance the mana of others through words and by demonstrative acts showing love, generosity and care. In this context mana refers to both individual status and human dignity generally. Mana is something that all people have, although some have more mana than others, as is evident in the demeanour of the senior rangatira, whose word is law. So, everyone must be acknowledged, and those of significant mana most especially so.

66. In oratory, a most common way of respecting others and building stronger relationships is through the use of whakapapa to kindle ancient bonds of consanguinity. This connects to the related value of whakawhanaungatanga which involves the nurturing and building of filial relationships.

[43] See the same in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, Waitangi Tribunal, Wellington, 1984) at 27-32.

67. Under the heading of Manaakitanga, Te Mātāpunenga cites as follows from *The Lore of the Whare Wananga* "By honouring (manaaki) people the mana endures (ma te manaaki i te tangata e tu ai te mana). Under the heading of Whanaungatanga, Te Mātāpunenga recites the farewell from Te Rama of Tuwharetoa (Taupo) to Tamahau Mahupuku of Wairarapa:

> He poroporoaki ki a koutou e noho mai ra i Wairarapa, ia Ngaati Tuwharetoa e noho atu nei i konei, … he whanaunga tuturu koutou no Ngaati Tuwharetoa i runga i o tatou whakapapa.
>
> This is a farewell to you who reside at Wairarapa from Ngati Tuwharetoa, you are indeed relatives of Tuwharetoa based on our genealogies.

68. The virtue of whakawhanautanga thus applies not only to building relationships amongst the several hapū of common descent, but to relationships far and wide.

69. This paper has already considered the lineage of descent relationships traced by the Whanganui River. The same applies to other rivers, as referred to below, and each gives expression to the traditional value of whakawhanaungatanga.

Tikanga and the traditional control of water

Outline of this section

70. Initially, this section considers the groups or persons holding customary rights and interests in water bodies, and how they are known by the water bodies with which they associate.

71. Ultimately, this section considers the scope of the customary interest. In Tikanga Māori, is the interest limited to using water for fishing, gathering and transport or is it limited to setting standards for the water's use as a kaitiaki? Or, is the position that in Tikanga Māori, the hapū have an autonomous authority and power to manage and control the use of their territorial waters by their members and if need be, to the exclusion of others?

Te whenua me te iwi

72. The land and their associated waters were initially occupied by clusters of whānau taking possession of different parts. These were the hapū, which might typically comprise a few hundred persons. The hapū constituted the everyday community. They also operated autonomously. They have been assessed as the primary, political and land-holding unit of Māori society.[44]

73. As the hapū grew they divided, and in dividing they spread across the district, or typically, along the rivers or around the lakes. Consequentially, the hapū of a district most usually shared a common ancestry. Collectively the people

[44] Ballara, A, *Iwi: The Dynamics of Maori Tribal Organisation from c. 1769 to c. 1945* (Victoria University Press, Wellington, 1998) at 279-325.

of common ancestry were known simply as the people, or in te reo Māori, the iwi.

74. Since all Māori are related by whakapapa, post-contact Māori also spoke increasingly of the iwi Māori, meaning Māori as a people.

Ngā tohu a te whenua

75. For Māori iwi, hapū and whānau, their water bodies, including in this instance the open seas and the hot-water rivers and springs, are integral, defining parts of their personal and tribal identity, security and prosperity.

76. The water bodies are usually addressed as living organisms and as the forebears connected to the local hapū. The hapū in turn describe themselves and their place in the universe by reference to their river or lake. Accordingly, when Māori inquire "who are you" they may say "ko wai koe?" or "who is your water" (although in polite idiom they would ask where a person is from, which again is intended to refer to a lake, mountain or river).[45] So it is, that Māori define themselves and their place in the universe in terms of their pre-eminent landforms, especially the mountains and waterbodies closest to their papakainga. They introduce themselves by reference to their awa or moana (waterway) as an important part of their mihi (greeting) alongside their maunga (mountain), iwi (tribal group), hapū (tribe) and tūpuna (forebears). Hence, waterways are intrinsically linked to one's whakapapa and tribal identity.

77. Numerous whakatauakī (proverbs) and pepeha (tribal sayings) identify the connectedness and metaphysical relationships of the people and their mountains, rivers or lakes. Two examples are:

Ko Waikato te Awa
Ko Taupiri te maunga
Ko Potatau te tangata
Waikato taniwha rau
He piko he taniwha
He piko he taniwha

Waikato is the River
Taupiri is the mountain,
Potatau is the leader.
Waikato of a hundred taniwha
On every bend is a taniwha

Ko Tongariro te maunga
Ko Taupo te moana,
Ko Tūwharetoa te iwi
Ko Te Heuheu te tangata

Tongariro is the mountain

[45] "Ko wai koe" to older Māori could be offensive, like saying 'who do you think you are' or 'do you think your river/lake is the only one'. No hea koe – where are you from – is the safer expression.

Taupo the waters
Tūwharetoa the people and
Te Heuheu the leader.

78. The distinctive features of the land and waters of the several hapū of common descent, became the symbols of the hapū as a whole, and the sense of power inherent in those natural features, generated the perceived power of the people. The Mohaka River Report provides another classic example of how a river is symbolic of the identity and authority of a people, the Ngāti Pahauwera in that instance.[46]

79. Other tohu or signs of tribal possession were in the multitudinous names for different parts of the land and waters. Some were named on discovery, for the person or body parts of a significant forebear to support a claim to possession on that basis (take taunaha). It should then be noted that Māori did not usually change the names of places, following a conquest, so that the history remains written in the land. For example, Wellington harbour is named Te Whanganui a Tara or the great harbour of Tarataraaika after an original possessor whose descendants now live in Horowhenua-Manawatu and Wairarapa. Their forebears were driven out by Taranaki and Ngāti Toa hapū. However, the name of the harbour remains. Taranaki and Ngāti Toa will claim a proprietary interest by conquest and occupation, while recognising the non-proprietary, associational interest of Ngāti Tara (the descendants of Tarataraaika).

80. Another form of naming, called tapa whenua, recorded subsequent persons and events. These evidence on-going occupation following discovery or conquest and so confirm the right to possess (discovery or conquest conferring no rights unless followed by occupation). As a result, the landscape is a historical treasure trove of names ranging from major battles affecting the right to a large district, to the spot for a hinaki (eel trap) on a river. The claim to land by naming was a settled part of Tikanga.[47]

81. The rāhui was another means of declaring ownership of certain lands or waters. Usually demonstrated by a carved or decorated pou (post) is was at once a warning against use by others and a declaration of ownership.[48] There were several types but reference need only be made to what Meade calls the ‘conservation’ rāhui, and the ‘trespass’ rāhui. The former was to retire a resource until it had recovered from over-use or from pollution, as where a person had been killed or had drowned in the water. A breach of that rāhui was not necessarily fatal. The possessory rāhui was imposed when it appeared that the land of a hapū was under some threat of invasion or intrusion by an unwelcome person or persons. It was a sign on a track or waterway that anyone who proceeded beyond that point would be

[46] Waitangi Tribunal, *The Mohaka River Report* (Wai 119, Brooker and Friend Ltd, Wellington, 1992) at 1, 7, 8, 15, 21, 36-38 and 60.
[47] Take taunaha is explored in detail by Hohepa and Habib in ….
[48] A great deal has been written about rahui but see for example Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 197.

proceeding on the land of the hapū and was liable to divine punishment or to be promptly killed if not a member of the hapū or an invitee. The aukati, or a line which no-one could cross without authority, served the same purpose. The government agent Falloon was killed for crossing an aukati across the mouth of the Whakatane River. It led to the Ngati Awa land confiscations.

82. The trespass rāhui and aukati were highly political and likely to lead to a battle and so were imposed only by the leading rangatira after an intensive, public debate. The conservation rāhui might be imposed by a tohunga and removed when the objective was seen to have been achieved.

Nōku te wai.

83. Māori distinguished between goods (taputapu, rawa), which were possessed as property, and real estate (whenua) which was not.[49]Authority consistent with their perception that lands and waters were used by divine permission, they did not talk of land and waters as property in absolute ownership but simply referred to them as ancestral beings with the mana (authority) to use being vested in a rangatira as the hapū representative (mana being a personal endowment rather than an institutional capacity).

84. Given the philosophy of divine permission, Māori had no word to fit precisely with the English verb 'to own' insofar as 'to own' includes a right to transfer that which is held absolutely, in addition to a right to exclude others. However, the lack of an equivalent word for ownership was not because that which the hapū possessed was less than ownership but because in Tikanga Māori it was, on balance, more. The expression which Māori regularly used to describe the relationship between a hapū and its water was that 'so and so has the mana of the water'.[50] Mana in such context means the absolute and exclusive power and authority over something. Accordingly, mana covers not only the private right to own, but also the public right to control.

85. Nonetheless, Māori today are often considered to possess something less than ownership because Māori considered the whenua (which includes wai) was something that could not be owned. Philosophically, that was correct, but the claim of a hapū to possess (whai, whiwhi) a water resource, to the exclusion of other hapū, and independently of other hapū, amounts to an assertion of ownership.

[49] Taputapu or implements, weapons and ornaments were seen to be invested with the hau of the maker, the hau being transferred to the original possessor and carried within the object to succeeding generations. Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 76-84, 402-403 and 424-425.

[50] See Ngata, H, *English-Maori Dictionary* (Learning Media, Wellington, 1993) at 319. Rangatiratanga is also used for 'ownership'. But see also Te Mātāpunenga reference on Rangatiratanga in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 331-334. 'Rangatiratanga' appears to have been coined for the purposes of the Treaty of Waitangi.

86. A further common assumption is that Māori have less than ownership because they were merely kaitiaki or stewards of the resource. However, so long as Māori claimed exclusive use on some proper take (ground), the restriction which Māori placed on themselves in the exercise of that use did not create something less than ownership but was evidence of responsible ownership. Whatever the motivating belief behind the policy, kaitiakitanga is an incident of ownership, not an alternative to ownership.

87. Alternatively, Māori may be considered to have less than ownership because they do not believe that the land (and waters) can be traded or sold. However, a requirement or expectation that a property be capable of sale is not inherent in the concept of property ownership but is merely a capitalist perception of what property ought to be. In any event, the reality is that even for customary Māori, the water could in fact be sold, as for drinking, as the early sailors found in the Hokianga Harbour when they sought to provision their ships with water from local streams.[51]

88. Nor does it matter that Māori had different views from the settlers about what could be held as private property. For example, the rangatira, Apihai Te Kawau, informed the Governor at Orakei in 1879 "It was only the land that I gave over to the pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods."[52] Hori Tauroa added: " I was not aware of the Government taking all my large pipi-banks and shoals in the Manukau (Manukau harbour). Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property".[53] The question here is not which is the correct view of property but what the Māori view was. It appears that for Māori, fish (and presumably other wild creatures), are property for so long as they are in the hapū territory. They are in the same position as water, in that respect.

89. The Māori view that a water resource and a land resource were conceptually the same, and were capable of being owned as hunting grounds, is supported by several 19th and 20th century observers. Thus, the 1921 Native Land Claims Commission reported with reference to Napier Inner Harbour that in Native custom Maori rights were not confined to the mainland, but extended as well to the sea where "deep-sea fishing grounds were recognized by boundaries fixed by the Maoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them". In 1918 Captain Gilbert Mair described the same in relation to the sea at Maketu, saying "… they had marks on the land which were only disclosed to the favoured few, and even those miles out off Maketu were

[51] British Resident, James Busby, refers to this in 1835 in a dispatch to the Colonial Secretary: "A payment has been pretty regularly exacted in this harbour for permission to water and I have heard of a demand for harbour dues having been made by one of the chiefs of the Hokianga River." Despatch from British Resident,' (ATL, qMS-0344, No. 65/2)

[52] Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 2nd ed. Wellington, 1989) at 113.
[53] Ibid

the property of tribes and not common grounds.[54] The Claims Commission added that the inshore fishery had more restricted rights where "particular spots would be recognized as the sole privilege of a single family, just as eel-weirs in fresh-water rivers".[55]

90. Writing in 1930, James Cowan, a noted author on Māori life, considered that in 1840 in the central plateau lakes 'the fisheries were jealously guarded … the boundaries of the various hapū were carefully defined by the leading marks. Every yard of these lakes had its owners … sometimes a rahui or close-season mark or post indicative that such a place was tapu was set up".[56] In 1918 Captain Gilbert Mair advised the Native Land Court that "no land in New Zealand has been more absolutely, more completely and more thoroughly under Maori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experiences that has been used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.[57]

91. Te Rangi Hiroa (Sir Peter Buck) wrote "It will be seen that the tumu (stakes) in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes ... it was far more valuable to the old-time Maori than any equal area of land."[58]

92. Te Rangikaheke, an advisor to Governor Grey, emphasised how no distinction was made between land and water resources. Elsdon Best recorded him as saying: "The tumu on which Hinemoa rested in Rotorua Lake was a post (or stake) erected in a shoal part of the lake. It was named Hinewhata and was erected as a token of mana of Umukaria. Ka whiwhi te tino rangatiratanga i te one, whiwhi ana ki uta, whiwhi ana ki te moana. … When a chief of high rank gains possession of land he possesses it on shore and in the lake, hence it is said that some of his lands are ashore and some in the water."[59]

93. The numerous Māori claims to lakes, in petitions and Court proceedings, need not be recorded here. It is sufficient to say here that in Tikanga Māori, the lakes (and rivers) as a resource, with water included, could be owned by one or more hapū. In addition, particular use rights were reserved for whānau and while they were held at the will of the hapū, they could be transmitted by ohāki (a statement in contemplation of death) or by descent. Some Judges of the Native Land Court accepted the Māori ownership of

[54] 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 270.
[55] 'Whanganui-o-Rotu' in '*Report of the Native Land Claims Commission', AJHR*, (1921, Vol.2, G-5) at 13.
[56] Cowan, J, *The Maori Yesterday and Today* (Whitcombe & Tombs, Wellington, 1930) at 182.
[57] 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 184.
[58] Te Rangi Hiroa, P, "Maori Food-supplies of Lake Rotorua,' in *Transactions of the New Zealand Institute*, (Vol III, 1921) at 433-451.
[59] Letter to Solicitor-General Salmond, (5 October 1918, National Archives, Wellington, File CLO 174, Part 2). Translation of Maori in original text.

lakes, as in the 1929 decision of Judge Acheson in relation to Lake Omapere.[60]

94. The intense division of water resources applied also to the rivers, with their impressive pā tuna, their carved markers to anchor eel-pots, nets or lines and to reserve fishing spots, and their several rahui posts to reserve particular areas. The Waitangi Tribunal has determined that hapū also owned along the rivers, with numerous use rights, in its reports on the Kaituna River (1984), Mohaka River (1992), Ikawhenua Rivers (1998) and Whanganui River (1999). This was so evident to early officials that although rivers are only indirectly referred to in the Treaty of Waitangi in the context of fisheries or taonga (prized possessions), in 1842, George Clark, Chief Protector of Aborigines, felt able to assure rangatira that their rivers were also protected to them. He wrote, in the Government newspaper *Te Karero o Niu Tireni*:

> E hoa ma, kua wareware pea koutou ki te pukapuka i tuhituhia ki Waitangi, i roto i taua pukapuka ka waiho nga kauri katoa, nga awa katoa. Ma te tangata Maori hei aha noa atu kia a ia …
>
> Friends, perhaps you would have forgotten that document which was written at Waitangi. In that document, all of the kauri, the rivers and everything else are left for the Maori to deal with as he wishes.[61]

95. In accordance with that view, the Government has consistently treated with Māori as though they had ownership of their lands and not merely some right of user. Accordingly, while the first Chief Judge of the Native Land Court considered that 'ownership' did not fit with the Māori idea of a land holding, the legislation under which he worked required him to treat the Māori land holding as no less than ownership.[62]

96. The Court, having been directed to determine the title to Māori Land in accordance the Native custom, concluded that the Native custom had a clear view on the right to land, by one group as against another, finding that there were four kinds of right arising from Māori tradition: take taumou (discovery) and the related take taunaha (claiming by naming), take ahi kā (occupation), take tuku (gift) and in certain instances, take raupatu (conquest).[63] Although most judges of the Native Land Court considered the Court could deal only with dry land, because their statute so required, there was no reason why the customary principles for determining the title to the land could not have applied also to water. And that is in fact what was done by those judges who considered that the Court could in fact deal with the ownership of certain lakes, including lakes Omapere, Rotokawau, Rotongaio and Rotoaira. The owners were determined in the same way as they were for the land.

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[60] *Bay of Islands Native Land Court MB 11*, (1 August 1929).
[61] *Te Karere o Niu Tireni,* (Vol. 1, No. 7, 1842).
[62] Fenton, F, 'Papers Relating to Sitting of Compensation Court at New Plymouth State of the Proceedings of the Compensation Court at the Sittings at New Plymouth, from the first day of June, to the twelfth day of July, 1866.' In *AJHR* (1866, A-13, No. 1) at 3
[63] For example, conquest was not a source of title if it was not followed up by occupation.

97. Māori themselves took "whenua" to include the water bodies, unless a distinction was required. For example, it was written in Te Waka Māori o Niu Tireni of 24 February 1874: "Haere mai ki Rotorua, te whenua o Ngāti Whakaue, moana kau", or 'welcome to Rotorua, the land of Ngāti Whakaue, which is principally water'.[64] For the hapū, the roto, awa and repo, being a major source of food and materials and frequently the transport route, were taonga (prized possessions), just as much if not more so than the ngahere (forests), maunga (mountains) and mānia (plains) were taonga of the territorial whenua (takiwā).

98. It appears therefore, that the Crown's decision that a Court should determine the title to Māori land according to Māori custom, but should not determine the title to lakes and rivers, has nothing to do with Māori custom, but was a decision of the Crown made for other reasons.

99. It was also, presumably, a conscious decision since the previous practice of several of the Crown purchase agents was to assume that Māori owned the lakes and rivers in accordance with their customs, and so specific provision was made to include these water bodies in Land Sale deeds. The agents appear to have known that Māori had a distinctive view of property law for in several deeds for the conveyance of land they provided for each of land, water, stones and trees as separate properties.[65] After all, as every Māori knew, the land, waters, stones and trees are on different descent lines. Māori continue to contend that their right to river gravel or pounamu for example, has not been extinguished in various land sales where these were not specifically enumerated.

Mō te tini, te wai

100. Some points of clarification remain. It appears to be tika that the land and waters are held under the mana of a leading rangatira on behalf of the hapū, for, as postulated earlier, mana is a personal endowment rather than an institutional capacity. For that reason, some modern terms like mana whenua and mana moana are inapt when they are used to suggest that the mana is in the land or sea itself or in the people of the hapū as a whole. It needs to be borne in mind that only the person of highest mana in the community should ultimately confer the right to use resources, for each use is an intrusion on the domain of a significant ancestor. It is also only in the context that a mountain or river is a living being that these too can be seen to have mana.

101. Conversely, the rangatira is not an absolute ruler. It was the mana of a rangatira to claim that "all the land belongs to me". It was also the mana of

[64] *Te Matapunenga* above, p 541

[65] For example, this extract is from a Wairarapa Deed of Sale: "Now we have assuredly bade farewell to and forever transferred these portions of our ancestors' lands, descended from them to us – that is, we have transferred them under the shining sun of the present day, with its lagoons, lakes, rivers, waters, trees, grasses, stones, and all and everything above the ground and under the ground, and all and everything connected with the land…". See Report by Commissioner Mackay, 'Claims of Natives to Wairarapa Lakes and Adjacent Lands' in *Appendices to the House of Representatives* (1891, Sess II) G4, at 3.

the rangatira to claim "I have nothing, for all that I have is for the people". [66] The people, undoubtedly, would agree and, as has often been observed, a rangatira who flouted the opinion of the people, was unlikely to remain one.[67]

102. It is in the context of the real politic that no issue is taken with the significant conclusion of Angela Ballara that the hapū are the entities exercising regular corporate functions, while respecting, as Ballara does, the rise of iwi formations from the 19th century.[68]

103. The assertion that hapū held the natural resources according to some system of law is confirmed by early officials and visitors. To the opinion already cited of RW Hay in 1832 can be added the conclusion of Lord John Russell in 1840 that Māori had established by their own customs a division and appropriation of the soil with usages having the character and authority of law.[69] It is the Treaty itself that provides the conclusion that the governing institution was the hapū, as hapū alone are cited as the tribe. [70]

104. Finally, while an attempt has been made to isolate the tikanga relating to water with some precision, in several respects the tikanga is actually fluid. The problem seems to be that while in western tradition the lawyer seeks the ground norm for a particular topic, the Māori delight in a smorgasbord of norms or broad based and aspirational values, in which the skill is in finding the norm best suited to the occasion. In similar vein, boundaries can be extremely precise at the micro level of a māra (garden plot), and equally imprecise at the macro level of a political boundary between hapū. Some things ought to remain vague if the alternative is to invite a major battle.

105. The main conclusions for this Part are at the end of Part B.

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[66] The recognition that the rangatira held the land for the people is evident in this assertion by Rawiri Te Puaha of Ngāti Raukawa and Ngāti Toa to Governor Grey in 1852 concerning land at Takapuwahia - Kaore he Tangata kua riro mai i taku mana, e hoa e hara i tena Tangata i hoatu te whenua ki a koe na matou na te iwi katoa i hoatu kia koe ma te iwi katoa e hapai taku hoatutanga whenua kia koe…(No man has my mana. Friend, that man did not give the land to you, it was us, all the tribe who gave it to you, and it is for the whole tribe to sanction my handing over land to you.). 'Rawiri, Te Puaha to Governor Grey,' (14 July 1852, Shortland Papers, GNZ MA 646, Special Collections, Auckland Public Library) at 64-65.

[67] For example, Joseph Williams as cited in *Māori Custom and Values in New Zealand Law* Study Paper 9 2001 at 34, that rangatira who failed to confirm the consensus of the people were likely to be abandoned in favour of a contender more willing to lead to where the people wish to go.

[68] Ballara, A *Iwi: the Dynamics of Māori Tribal Organisation from c 1769 to c 1945* (Victoria University Press, Wellington, 1998) at 279-325.

[69] Lord John Russell to Governor Hobson, 9 December 1840 in GBPP (Vol. 3, 1841 (311) at 149.

[70] There is a reference to iwi in the 1835 Declaration of Independence but iwi in that context may mean simply the people rather than a tribe or could refer to the tribes as a whole.

PART B: TIKANGA AND OTHER LEGAL SYSTEMS

This part considers Tikanga in the context of other country laws.

The Distinctive Concepts of Tikanga Māori

The concept of community law and communal ownership

106. The first most distinctive context for Tikanga Māori, as compared with the environment in which the English law grew, is probably that for Māori, the land was owned communally. The second was probably that the community (the hapū) was autonomous, able to operate effectively without the supervision of an overarching authority. However, there were also elements of private or individual ownership, amongst Maori. It was tika, or correct, that those persons or families who, for at least a generation, had used a particular resource for a specific purpose generally or for a given season or time, should continue doing so. However, these private interests had not the security of English tenure. They were held privately or exclusively only for so long as that continued to be tika in the eyes of the community. They could be displaced for some good cause like the need for concerted effort in hosting a hakari (public feast). Ultimately, that which was in the best interests of the hapū as a whole prevailed.

The concept of a water body

107. Rivers and lakes are not water on land as in England, but are resources with their own distinctive character, distinct from the forests and plains on land. They are single, living entities in which different hapū would have separate interests in distinct parts.

108. Accordingly, it is not just a spring that is owned, but the water flowing down from the spring to the point where it leaves the hapū area of influence.[1] The river or lakebed is not valued as a reservoir or canal for water but the bed and water are valued as a single, natural entity. Water then would be an integral part of the resource while remaining within the takiwā (the hapū area of influence).

109. As the Waitangi Tribunal has noted in relation to the Whanganui River, a water body is to be seen as a whole and integrated system in which rivers, tributaries, wetlands, and lakes may all be connected. The surrounding cliffs or river flats will likewise be part of the system insofar as they determine the river's ahua (character and form). It is not like the English law where a distinction may be made between the river or lake bed, and the water on it.[2]

[1] See for example the evidence for Poroti Springs, water claim stage 2, first week, Waiwhetu marae.
[2] Waitangi Tribunal, *The Whanganui River Report* (Wai 167, Legislation Direct, Wellington, 1999 at 39. See also Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wai 212, GP Publications, Wellington, 1998); Waitangi Tribunal, *The Mohaka River Report* (Wai 119, Brooker and Friend Ltd, Wellington, 1992) and the Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, Waitangi Tribunal, Wellington, 1984).

The concept of a divine inheritance

110. The conception of land and water as a divine inheritance was not unique to Māori but prevailed throughout the Pacific, including both Melanesia and Polynesia. Kenneth Brown, a former Solomon Island magistrate, cites Dr Sir Gideon Zoloveke of Melanesia as saying:

> Land thus was the most valuable thing and could not be lightly parted with. This is based on the belief that the departed ancestors superintended the earthly affairs of their living descendants, protecting them from disasters and ensuring their welfare, but demanding in return strict compliance with time-honoured ethical prescriptions. Reverence for ancestral spirits was a cardinal point of traditional faith and such reverence dictated the preservation of land which the living shared with the dead.[3]

111. Brown quotes also Bonnemaison as follows:

> In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. Land is at the heart of the operation of the cultural system. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land just as the clan is its ancestors. The clan's land, its ancestors and its men are a single indissoluble reality – a fact which must be borne in mind when it is said that Melanesian land is inalienable.[4]

112. Times may have changed, at least in the Environment Court, but the difficulty for Māori in conveying these concepts to European lawmakers was frustratingly apparent in the mid-1970s when the New Zealand Māori Council sought to explain the Māori relationship to land to a parliamentary select committee which was considering amendments to the Town and Country Planning Act 1952. Eventually, at the Committee's request, the Council suggested a clause to give effect to their concern. It became s3(1)(g) of the Act. The section required planners to have regard to the Māori relationship with their ancestral land. The trouble was that planners and the Planning Tribunal, not unreasonably, had no idea at that time, of what was intended. The Planning Tribunal concluded that ancestral land must be an urupa (tribal cemetery) and that ancestral land could not include land that had ceased to be Māori land.[5]

113. In Māori thinking, rights and responsibilities to land, waterways and other natural resources are not dependent upon ownership at English law or even on continual occupation. Ancestral associations are a fire which always burns. Even if the land and waterways have been alienated, the sacred connection remains. However, the link is conceptual, rather than proprietary. In 1992, a claimant put the position to the Waitangi Tribunal in these terms:

> The link between the person and the land by virtue of their history can never be erased. … ngā tapuae o ngā tūpuna [footsteps of our ancestors] .. remain on the land forever. The fires never go out.[6]

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[3] Kenneth Brown, 'The Language of Land: Look Before You Leap' in *Journal of South Pacific Law* (Volume 4, 2000).

[4] Bonnemaison, J, 'Social and Cultural Aspects of Land Tenure' in Larmour, P, (Ed), *Land Tenure in Vanuatu* (Institute of Pacific Studies, Suva, 1984) at 1-2.

[5] Knuckey v Taranaki County Council (1980) 6 NZTPA 609.

[6] Evidence of Alex Nathan (Wai 38, Doc D27) cited in the Waitangi Tribunal, *The Te Roroa Report* (Wai 38, GP Publications, Wellington 1992) at 49.

114. Sometimes, Māori have omitted the supernatural altogether. In a redraft of what became the RMA, Māori members of the Ministry for the Environment introduced Māori as the kaitiaki or caretakers of the land and waterways, omitting that the kaitiaki were more usually certain birds, taniwha and other creatures invested with the spirits of ancestors or closely related to remote ancestors by whakapapa.[7] While it is the people who are now posited as the monitors and caretakers, traditionally it was the close observation of the kaitiaki creatures that informed Māori of whether all is well in the world or whether some action is needed. The Tribunal has heard evidence of the result, as when Ngāti Kauwhata elders placed a rahui on the Oroua River after it was deserted by the native birds.[8]

115. Unfortunately, the recognition of kaitiaki has been taken as an alternative to ownership, when it is in fact an incident of ownership.

The concept of mana

116. Mana, which confers a larger capacity than kaitiakitanga, appears not to be provided for in the modern management of water and yet it is the basic concept in giving expression to Māori rights. Mana covers both ownership (the right to use and possess against all others), and the over-riding political authority to control the use and management. In custom, the hapū had the mana over their territorial lands and waters.

117. Based upon *Next Steps for Freshwater*, it is the State which has that which Māori call mana – the power to possess and to control – leaving to Māori, a cultural interest in the maintenance of natural, water regimes. The State provides a benefit for the commercial exploiters of water, does not provide a benefit for the customary owners, but recognises the customary responsibility of the hapū, as kaitiaki, to maintain clean waterways. Māori may do so through co-management agreements with local authorities. The structure provides a free ride for commercial exploiters and for the hapū and local Māori and Pākehā communities, the cost of cleaning up the tracks.[9]

118. In this context, Māori may observe that their forebears did not cede their mana in the Treaty of Waitangi. In the Declaration of Independence of 1835 the "tino rangatira" (great chiefs) were recognised as having "ko te Kingitanga, ko te mana" (all sovereign power and authority) within their territories, and thus, all sovereign power and authority over their respective forests and fisheries, lakes and rivers. This Kīngitanga and mana were not ceded to the Crown in the Treaty of Waitangi. Instead the tino rangatira gave

[7] The complexity of the whakapapa is evident in a letter to a Māori newspaper, the translation of which includes "The headland at Uruti belongs to the Ngäi-Teao people… plus the house sites of Ngäi-Teao and their eel lakes and Wairongo as well which was passed down to me from my ancestors. I still live on that headland now… The tipua [taniwha] which live on the outskirts of Uruti are guardians [kai tiaki] that descend from crayfish, they are called Turuawahine, they are female and are ancestors of Ngäi-Teao. I am their descendant". Harawira, A, *Te Puke ki Hikurangi*, (Vol. 5, No. 15, 30 January 1903) at 3.

[8] See evidence of Dennis Emery, stage 2, first week, at Waiwhetu.

[9] This is not intended to disparage Te Whakahonotanga a Rohe. The authors appreciate the efforts of Iwi Leaders to extend the benefits of the settlements affecting the Whanganui and Waikato rivers to the hapū of other waterways.

to the Crown the power to make laws, but so as not to infringe upon their tino rangatiratanga.[10]

The concept of responsibility

119. Embedded in Tikanga Māori is a concept which transcends the right to use. It is the responsibility to so use as to maintain to the fullest practicable extent, pure, freshwater regimes. It is a concept which requires a balancing of the benefits of ownership with the responsibilities of ownership. It is a responsibility which is owed to one's forebears and one's descendants. The concept, based upon the natural world as a divine inheritance, questions our current understanding of what constitutes sustainable development and points to the need for greater constraint in the interests of the survival of the natural world and human survival.

State Recognition of Custom Law

The principles of State recognition

120. This part considers that three principles for the recognition of Tikanga were established on the colonisation of New Zealand. They were:
    (a) that a colonising state will, within bounds, respect the colony's native law;
    (b) that the property rights of the native people will be determined in accordance with the native law; and
    (c) that any elements of divinity in the native law need not be an impediment to its recognition.

121. The extent to which these principles were followed once the colonists achieved numerical supremacy is questionable. However, the more recent avenues for recognising tikanga will be considered in Part C with a view to informing the Tribunal on the ultimate question of how Māori proprietary interests in water may be provided for today, having regard to current legal doctrines and international norms.

The principle of respecting the Native Law

The Treaty of Waitangi

122. Māori custom is recognised in the Treaty of Waitangi. It is indirectly recognised in Article 2 of the Māori text in these terms:

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani **te tino rangatiratanga** o o ratou wenua o ratou kainga me o ratou **taonga** katoa …. [emphasis added]

123. McHugh suggests that the Article 2 promise of 'te tino rangatiratanga' implies the continued viability of customary law where Māori were concerned.[11] He

[10] (Wai 1040, November 2014) at 528-529 which finds that the chiefs who signed the Treaty did not cede sovereignty to the British Crown but agreed "to share power and authority with Britain."
[11] McHugh, P *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 287.

added: 'The chiefs thought simply that they were to retain their customary authority over and amongst their own people.'[12] On the 5th February during the debates preceding the Treaty's signing, for example, the Nga Puhi rangatira, Tamati Waka Nene, was recorded as stating:

> O Governor … You must preserve our customs, and never permit our lands to be wrested from us … Stay thou here, dwell in our midst.[13]

Waka Nene's view was decisive in persuading those present to sign the Treaty.

124. Where the English text refers to the protection of Māori properties the Māori text, as cited here, refers to the protection of all those things treasured by the Māori people ("me o ratou taonga katoa") and so gives effect to the wide view that Māori have of 'property'. A taonga also includes intangibles like customs, language and song.[14]

125. A direct reference to Māori custom is in the "fourth article" of the Treaty (as it has been called). This was an amendment to the Treaty in the debate at Waitangi. While it does not occupy much attention today, it very likely had considerable significance for Māori at the time. It was debated in the presence of Māori, in the manner of the oral tradition, an agreed position was read out, and it was debated by the missionaries who, over the previous 25 years, had competed with the tohunga as advisors on te taha wairua (life's spiritual dimension). At the request of Bishop Jean Baptiste Pompallier, Reverend H. Williams with the assistance of W. Colenso drafted the article as follows:

> E mea ana te Kawana, ko ngā whakapono katoa, o Ingarani, o ngā Weteriana, o Roma, me te ritenga Māori hoki, e tiakina ngatahitia e ia.
>
> The Governor says that the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.[15]

126. Alan Ward has described how official messages recognising Māori customary rights were then conveyed throughout the country.[16] These included a circular from Governor Hobson and a message from him through Willoughby Shortland that "the Queen will not interfere with your native laws and customs."[17]

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[12] Idem.
[13] Buick, L *The Treaty of Waitangi* (3rd ed, Avery Press, Auckland, 1936) at 143.
[14] *Report Findings and Recommendations of the Waitangi Tribunal ...in Relation to Fishing Grounds in the Waitara District* (Wai 6) 17 March 1983 (Te Atiawa Report) para. 10.2 (a). *Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori* (WAI-11) 29 April 1986, para. 4.2.4; 4.2.8.
[15] W Colenso *The Authentic and Genuine History of THE Signing of the Treaty of Waitangi* Capper Press Christchurch Reprint 1971. "[beliefs]" is part of the original text.
[16] Ward, A, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Reprinted with Corrections, Auckland University Press, 1995) at 45.
[17] The source of Shortland's statement in Kaitaia is John Johnson's journal, 23 April 1840, Auckland Public Library.

The English Laws Act and the Courts

127. The English Laws Act 1858 then provided: "The laws of England as existing on the 14th day of January 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force (from that day and thereafter)".[18] The limitation on the application of English law has been held to include the situation where the same would be inconsistent with Māori custom.[19] For that reason the doctrine of the riparian ownership of river and lake beds may not be applicable.[20] In addition, Māori custom has now been recognised as part of the New Zealand common law.[21]

128. Even the Solicitor-General, Sir John Salmond, when appointed to argue the case for the Crown's putative interest in Lake Rotorua, advised the Attorney-General in 1914:

> The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, foreshores and tidal waters in the Dominion ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that *by native custom the Natives own not merely the land but the water of this country* and freehold titles will be issued accordingly [emphasis added].[22]

129. In 1927 the Privy Council, then the highest legal authority for New Zealand, recognised that English legal doctrines might have no application in English colonies where they differed from native laws. The Privy Council warned against "… a tendency operating at times unconsciously, to render (Native title to land) in terms which are appropriate only to systems which have grown up in English law'. The Privy Council pointed out that "the notion of individual ownership is quite foreign to native ideas" and that "All the members of the community, village or family, have an equal right to the land, but in every case the Chief or headman of the community or village, or the head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner."[23]

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[18] Section 1. See also s. 2, English Laws Act 1908.
[19] *Baldick v Jackson* (1910) 30 NZLR 343 (HC).
[20] *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at para 67; and *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at para 18.
[21] See Chief Justice Elias in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at para 73 (citing to fn 113);
[22] Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913-15*, cited in Alex Frame, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.
[23] *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403

The Principle for Determining the Native Title to Land

130. There was no question but that the title to Māori Land should be determined according to Māori custom. Agents were appointed for that purpose and land purchases were purportedly affected on the basis of their inquiries. However, by 1865 when the Native Land Court was established, attitudes had changed. While entitlement would be determined on the Judge's interpretation of Māori custom, the titles themselves would issue as freehold titles in individual ownership. And, with some limited exceptions as already mentioned, the principle that the native right to property would be determined in accordance with custom, was not extended to water bodies.

The Principle of Religious Neutrality.

131. The principle of religious neutrality in the fourth article of the Treaty applied also to Māori custom, so that no question could be raised on the basis of the divine origin of mana and of property. This was hardly surprising. On a similar basis English law had recognised the divine origins of certain rights of the Kings and of the Monarch's right to the radical title to all land.

132. The principle was confirmed however by the Privy Council in 1925 in *Pramatha Nath Mullick v Pradyumna Kumar Mullick*[24] when admitting an Indian idol as a suitor in respect of temple funds, clothing the idol with legal personality for that purpose.[25] Many years' later, the New Zealand Government would recognise by statute, the legal personality of the Whanganui River having regard to Tikanga Māori.

133. The New Zealand Courts are now cognisant of Māori spiritual relationships. In 1987 in *Huakina Development Trust v Waikato Valley Authority* on the discharge of cow-shed effluent to the Waikato River, the High Court concluded that "customs and practices which include spiritual elements are cognisable in a court of law provided they are properly established, usually by evidence".[26]

Recognition in Comparable Jurisdictions

134. A growing body of law recognises and supports an Indigenous Peoples right to the control, allocation and management of water within tribal territories.

Canada

135. Many aboriginal First Nations peoples continue to assert their sovereignty in accordance to their customs and traditions.[27] Historic treaties contain express

[24] Pramatha Nath Mullick (Appeal No.59 of 1924) v Pradyumma Kumar Mullick and another (Fort William (Bengal)) [1925] UKPC 33 (28 April 1925) (a copy of which is accessible through bailii Http://www.bailii.org/cgi-bin/format.cgi?doc+/uk/cases/UKPC/1925/1925_33.html&quiry=(%Pradyumna+Kumar+Mullick%22

[25] See BA Wortley *Jurisprudence* Manchester University Press 1967 p75 and see PW Duff *The Personality of an Idol* The Cambridge Law Journal Vol 3 Issue 1 November 1927 pp 42 – 48.

[26] [1987] 2 NZLR 37, 59.

[27] Nowlan, Linda, 'Customary Water Laws and Practices in Canada' (Unpublished Report, Commissioned by FAO/IUCN, Research Project, 2004) at 6. See also J Borrows 'Learning from the Land' (Lecture at Victoria University Law School, 11 February 2016) where Professor Burrows discusses the unique relationship the Cree

provisions relating to water and a Treaty may protect water rights when that right is under threat. *Claxton v Saanichton Marina Ltd*[28] provides an example where a proposed marina threatened the eel grass that sustained a traditional fishery. However, even in the absence of an express treaty right to water, a reserve-based sovereign right may be found to exist from the interpretation of the treaty that created the reserve.[29]

Navajo

136. In the United States of America, the sovereign right of the Navajo peoples over their water resources is reflected in the Navajo Nation Water Code (1984). This provides that the Navajo Nation is 'the owner of the full equitable title to all waters …' of the reservation.[30] The Navajo Nation Water Code further provides operational provisions associated with the granting of permits and enforcement functions.[31]

137. The Navajo Nation stretches across four States with 298,000 citizens.[32] The Navajo reservation is located within the treaty-guaranteed traditional territory of the Navajo, encompassed by their four sacred mountains.[33] The Navajo Nation operates a three-branch government of legislators, executives and judiciary. Uniquely, it is a leader in the development of legal institutions and substantive law that is consistent with Navajo tradition and practices, resulting in traditional law siting alongside the legislative code and judicial decisions.[34]

138. The Navajo traditional and sovereign right to water is clearly articulated within their Navajo Nation Water Code (1984). The Declaration of Purposes 1101, contained in the General Provisions section notes:

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peoples have with water and their creation stories. Online at: http://www.victoria.ac.nz/law/about/events/nz-centre-for-public-law/learning-from-the-land-indigenous-legal-education-in-context.

[28] British Columbia Court of Appeal, Hinkson, Lambert and Locke JJ.A., March 30, 1989.

[29] See *Winters v. United States* 207 U.S. 564 (1908). The Supreme Court of the United States held that 'a reserve right of a sufficient amount of water necessary to fulfill the purposes of the Indian reservation was implied in the creation of reservations of land.' A reserve right to water is a right created by federal law, senior to all future users, and cannot be lost by non-use. See also the decision, *US u Truckee-Carson Irrigation District* where the Court found that 'the Secretary of the Interior was not authorized to take Indian water rights for the benefit of reclamation projects' and also the Court ruled that 'when the United States represents Indians in litigation it is obligated to act as a trustee and not to compromise the Indian's interests owing to its conflicting responsibilities'. Although not adopted per se, it does hold some logic that this doctrine should apply to the prairies in Canada.

[30] Navajo Nation Water Code, 1103, Nature of Ownership. Any legal title held by the United States to those waters is as trustee only for the Navajo peoples. This is consistent with the *Winters* doctrine where the US Supreme Court laid down a basic tenet of Indian law – that with 'the establishment of an Indian reservation was an implied reservation of sufficient water to enable the Indians to live on these lands which were drastically reduced in size from the aboriginal lands they were ceding in treaties with the United States, and to which they were being forcibly relocated.' Subsequently this right is not dependent on State law and Indian water rights are 'prior and permanent' meaning that water rights are not lost by non-use.

[31] See generally Subchapter 6 of the Code and 1402.

[32] Kristen Carpenter and Angela Riley 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' *California Law Review*, Vol 102, 2014, at 222.

[33] Ibid.

[34] See Raymond Austin *Navajo Courts and the Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009). See also John Borrows *Drawing Out the Law* (University of Toronto Press, Toronto, 2010).

In order to provide for a permanent homeland for the Navajo People; to protect the health, the welfare and the economic security of the citizens of the Navajo Nation; to develop, manage, and preserve the water resources of the Navajo Nation; to secure a just and equitable distribution of the use of water within the Navajo Nation through a uniform and coherent system of regulation; and to provide for the exercise of the inherent sovereign powers of self-government by the Navajo Nation, the Navajo Nation hereby asserts its sovereign authority over all actions taken within the territorial jurisdiction of the Navajo Nation which affect the use of water within the Navajo Nation.

In the Application of the Code section 1102 provides:

Upon the effective date of this Code, it shall be unlawful for any person within the territorial jurisdiction of the Navajo Nation, as defined in 7 N.N.C. §254, to impound, divert, withdraw, otherwise make any use of, or take any action of whatever kind affecting the use of water within the territorial jurisdiction of the Navajo Nation unless the applicable provisions of this Code and regulations and determinations made hereunder have been complied with. No right to use water, from whatever sources, shall be recognized, except use rights obtained under and subject to this Code.

139. In addition to the Water Code, in 2006, the Navajo legislative council established the Navajo Nations Human Rights Commission to address discriminatory actions against the citizens of the Navajo Nation. The Nations Human Rights Commission has successfully lobbied for the recognition of water and subsistence rights against powerfully aligned federal, tribal, and corporate interests.[35]

Standing Rock

140. The Sioux Nation has historically faced challenges from the State over adjudication of water rights, a challenge that cuts across their recognised sovereign rights to water.[36] More recently the Dakato Access Pipeline, a subsidiary of Energy Transfer Partners, is planning to construct a pipeline that will infringe on Indigenous sacred sites of the Lakato peoples. Originally the route of the pipeline was through Bismarck and Mandan, North Dakota, which would have adversely affected these primarily non-Native Indian communities.[37] After opposition the alternative pathway now crosses underneath the Missouri River, 800 metres from the Standing Rock Indian

[35] See Mission/Vision, Navajo Nation Human Rights Commission, http://www.nnhrc.navajo-nsn.gov/mission_vision.html (last visited Nov. 7 2013) as cited in in Kristen Carpenter and Angela Riley, 'Indigenous Peoples and the Juris-generative Moment in Human Rights' *California Law Review*, (Vol 102, 2014) at 176.

[36] For example in March 1980 the State of South Dakato filed a suit in the state court for control over all water rights in the Missouri River system affecting the water rights of seven South Dakato Sioux tribes. See *South Dakato v Rippling Water Ranch, et al.* , (No. CIV-80-3031-DJP, D.S.D, 1980).

[37] Both Bismarck and Mandan communities comprise around 90 per cent non-Indigenous peoples.

Reservation, subsequently placing this water source at risk from spillage and pollution.[38]

141. The underlying issue for the Standing Rock community is a sovereign right to water, a right that has been challenged by the State. This right is further exacerbated by a determination by the World Health Organisation that perceives a right to water as a human right noting that "Access to safe drinking water by indigenous peoples is closely linked to their control over their ancestral lands, territories and resources. Lack of legal recognition or protection of these ancestral lands, territories or resources can, therefore, have far-reaching implications for their enjoyment of the right to water." The issues articulated at Standing Rock have resulted in the largest collective action by Indigenous peoples across the world against the non-recognition of an Indigenous right to water.

Conclusions on Parts A and B

142. The following are the key conclusions from Parts A and B.

143. Tikanga Māori offers an alternative view of what is sustainable development and postulates the need to constrain economic development and growth in the interests of human survival and the survival of the natural world.

144. Māori possessed territory, or areas over which they had influence or mana, and the territory which they possessed was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps and inland seas.

145. The fish, water-fowl and water plants of the water bodies were especially significant because of the lack of land-based animals and paucity of crops; and for lack of horses and other beasts of burden, and the consequential lack of carriages and carriage-ways, the water bodies were singularly important for transport, trade and social intercourse.

146. Having regard to Tikanga Māori, the political assertion that nobody can own water is a trite response to a complex issue of cultural difference. It merely invites the equally unhelpful rejoinder that, if that is the Pākehā law, then let it be the law for the Pākehā, but it is not the law for the Māori who, by their own law, owned the water and water bodies.

147. Unlike English law, there was no concept of someone owning the bed of the river, lake or harbour but not the associated water. To Māori, the water was as much held or possessed as the associated bed, and it was held for so long as the water remained or flowed over the tribal territory.

[38] In December, 2016 the permit to cross the pipeline under the lake was withheld granting a temporary reprieve to the Indigenous peoples. However, with the change in government the status remains uncertain.

148. The water bodies were held by or for the hapū, as the autonomous, political unit along with the related hapū along the water's edge, with whom associations were made from time to time for defence, trade and social intercourse. The water bodies were symbolic of the identity and authority of the hapū and of the iwi of the combined hapū. The evidence of occupation of the water's edge was also evidence of their authority over the water bodies.

149. Although there were private interests in the water, in the form of individual or whānau use rights, these were subordinate to the community of ownership represented by the hapū.

150. In Tikanga Māori, Māori had the mana of their lands and waters that is, the absolute and exclusive power and authority thereover. That covers not only the private right to own but also the public right to control. It includes, but is not limited to kaitiakitanga. Kaitiakitanga is an incident of ownership, not an alternative to it.

151. There is domestic and international precedent for the following principles

    i. that a colonising state will, within bounds, respect the colony's native law;
    ii. that the property rights of the native people will be determined in accordance with the native law; and
    iii. that any elements of divinity in the native law need not be an impediment to its recognition.

PART C: CUSTOM ON WATER AND ITS RELATIONSHIP TO WESTERN LEGAL CONCEPTS, THE TREATY AND HUMAN RIGHTS

I Introduction – property and political authority in natural resources

152. This section discusses customary rights claims to natural resources with a focus on water bodies through the westerns concepts of political authority and proprietary rights (ownership). This is important because it pervades thinking about Indigenous rights in New Zealand – including the water claim considered by the Waitangi Tribunal in the Stage 1 Report on the National Freshwater and Geothermal Resources claim ("Stage 1 Report").[1] The approach in this section is to consider these issues in the context of recent international and comparative law debates about Indigenous rights and theoretical framework for thinking about rights in terms of a "right to culture", "right to property" and "tino rangatiratanga" models. The proposition is that in New Zealand Indigenous rights reforms are largely directed at recognition of a right to culture and right to property (in some instances), with little recognition of a right to tino rangatiratanga.[2]

153. Māori generally argue for tino rangatiratanga over natural resources in both senses of political authority and proprietary rights in that they seek virtually all rights in relation to the resource.[3] In other words, tino rangatiratanga subsumes proprietary rights.[4] Tino rangatiratanga is at the heart of Te Tiriti o Waitangi and the growing principles of the Treaty of Waitangi jurisprudence".

154. Ownership is not the typical means by which Māori describe their right to water bodies but this is largely prompted by Government privatization of water rights.[5]

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[1] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Legislation Direct, Lower Hutt, 2012) [*Stage 1 Report*].

[2] On this debate, See Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010). Karen Engle has critiqued Indigenous rights movements for giving up "strong self-determination claims" in favour of the right to culture category. See also Courtney Jung *The Moral Force of Indigenous Politics* (Cambridge University Press, New York, 2008); and Andrew Erueti "UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach" (SJD thesis, University of Toronto, 2016).

[3] As noted in the *Stage 1 Report*, The claimants' position is that article 2 of the Treaty of Waitangi guaranteed them the "full, exclusive and undisturbed possession" of their properties (in English) and te tino rangatiratanga (full authority) over their taonga (treasured possessions) (in te reo Māori). They presented conclusive evidence that Māori hapū and iwi had customary rights and authority over water bodies – as distinct from land – in 1840.

[4] The Tribunal held that "te tino rangatiratanga was *more than ownership:* it encompassed the autonomy of hapu to arrange and manage their own affairs in partnership with the Crown." *Stage 1* at 100**.**

[5] As Richard Boast observes, "It is no accident that those natural resources which have been privatised by statute (fisheries, the radio spectrum) have attracted the greatest amount of litigation from Māori groups. If a resource is unowned, or is nationalised, there is at least some hope of securing interests in it; but it is quite otherwise once

However, it is the right to use, exclude and exploit the water body that is the heart of the matter.[6] Property is sometimes referred to as a bundle of rights. As Paul McHugh notes, "the essence of property was not the physical thing itself but the rights in relation to the thing; rights which other members of the particular society were bound to observe."[7] In *Yanner v Eaton*, the High Court of Australia observed:[8]

> The word 'property' is often used to refer to something that belongs to another. But ... 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.

155. According to Western notions of ownership, property in a natural resource gives a right to exclude, and use the natural resource as you wish including allowing others to exploit it and to gain some benefit from its use (for example, its use for electricity generation). But even owners are subject to the rights of the state, which may for example take property for public works subject to compensation and the use of natural resources in New Zealand is regulated by the modern resource management regime. As a result, in thinking about proprietary rights it is often useful to think of a set of relevant rights that relate to the natural resource in question and to consider how those rights are to be allocated to various interested parties. Presently the Crown reserves the right to regulate the use of water. The Crown receives benefits (indirectly by taxing profits made from use of water) from the use of the resource through the RMA consent system. Those who take water under the RMA acquire rights to the water captured and can benefit from its use.[9] This idea of different types of rights held by different parties obviously has many parallels with Māori customary tenure.[10]

156. The freshwater claimants sought "proprietary interests in particular water resources." This is the primary argument made and it is clearly directed to the right to use and occupy water exclusively and to allow others to use the natural

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privatised." See Richard Boast, "Māori Fisheries 1986-1998: A Reflection" (1999) 30(1) Victoria University of Wellington Law Review 111 at 134. Boast was speaking in the context of fisheries and efforts to privatize that industry, but the parallels to water are very close and one of the issues considered below is whether legal uncertainty as to the Crown's rights to water will mean it is unable it to pursue a policy of privatisation.

[6] Generally, property includes the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away. See, *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See also: Kevin Gray, "Property in Thin Air" (1991) 50 Cambridge Law Journal 252.

[7] PG McHugh, *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 73. This notion of a bundle of rights is the conception applied in thinking about the content of "native title" in Australia as opposed to a "right in land" approach, which pressupposes an underlying title to which are attached pendant rights, See *Western Australia v Ward* [2002] HCA 28, (2002) 191 ALR 1. For the development of the 'bundle of rights' approach, see Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking" (2011) 36 Monash University Law Review 50 at 54–56.

[8] *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351 at 365-366.

[9] B Barton "Different kinds of argument for applying property law to resource consents" (2016 April) *Resource Management Journal* 7-10.

[10] See above Section A.

resource. Similar rights to excusive occupation of property arose in the *Ngati Apa* (2003) judicial decision, which opened up the possibility of Māori acquiring freehold titles in the foreshore and seabed.[11] This meant that Māori could potentially exclude others from their freehold titles (this being a right associated with Māori freehold land under Te Ture Whenua Māori 1993) and even the sale of the land to others. The prospect of exclusive interests possessed by Māori in the foreshore and seabed, while not clear,[12] was too much for the government of the day which effectively overrode the decision and replaced it with a statutory scheme for recognition of non-exclusive rights and that remains in place today.[13]

157. So far, the Waitangi Tribunal has not had any difficulty in finding that the customary interests held by Māori in rivers are akin to proprietary rights.[14] In the Stage 1 Report, the Waitangi Tribunal accepted the claimants' contention that western-style legal ownership – while not a comfortable fit with Māori customary authority (mana, or the Treaty equivalent, tino rangatiratanga) over particular resources – is the closest English cultural equivalent.[15] But it also recognized that tribes have political authority over their resources or tino rangatiratanga.[16] According to the Waitangi Tribunal, the claimants were entitled to enhanced authority and control in how their taonga are used. The Stage 1 Report found that claimants may be entitled to commercial redress for the use of rivers for electricity generation and that this might be in the form of both compensation for past losses[17] and royalties for future use.[18] It takes the same

[11] See *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) [*Ngati Apa*]. This was the Māori Land Court's original mandate. That is to convert lands "owned by Natives under their customs or usages" into a Crown granted fee simple title. In other words, the Native Land Legislation saw Māori customary title as translating readily into a right of ownership.

[12] See Elias CJ's judgment in *Ngati Apa*, above and 11, at [45], which notes that freehold was not necessarily the outcome of an inquiry because the Māori Land Court may now make a declaration of status of customary land without making a vesting order changing the status of customary land to Māori freehold land. At [45]. Justice Gault, at [121] noted that few customary interests in the foreshore and seabed would be capable of supporting a vesting order and an estate in fee simple. but contrast with Boast noting this "may well have been overstating the position". Contrast Richard Boast, *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 97, noting that this "may well have been overstating the position."

[13] Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act 2011], which repealed the Foreshore and Seabed Act 2004. Note that under the Takutai Moana Act 2011, s83 it is possible to acquire ownership of sub-surface minerals excepting "Crown Minerals" under the Crown Minerals Act 1991.

[14] See, Waitangi Tribunal *Stage 1 Report*, above n 1; Waitangi Tribunal, The Ika Whenua Rivers Report (Wai 212, 1998); Waitangi Tribunal, The Whanganui River Report (Wai 167, 1993); Waitangi Tribunal The Ngawha Geothermal Resource Report (Wai 304, 1993); Waitangi Tribunal, He Maunga Rongo: Report on Central North Island Claims , Stage 1 (Wai 1200, 2008). In relation to the Stage 1 Report, Jacinta Ruru describes it, as "the most legally significant Waitangi Tribunal report to date, ever. It grapples with the toughest issues at the heart of our legal system – ownership of property, commercial rights to benefit from that property and inherent rights to development. See Jacinta Ruru, "Maori rights in water – the Waitangi Tribunal's interim report" (Sep 2012) *Maori Law Review*.

[15] See Stage 1 Report n 1 at 137.

[16] Stage 1 Report above n 1 at 76.

[17] Stage 1 Report, above n 1, at [3.9.1].

[18] Stage 1 Report, above n 1, at [3.8.3(1)].

view in respect of geothermal resources.[19] The Crown's general negotiating stance is against the recognition of ownership interests or the provision of commercial redress in respect of existing generating capacity and its future use. But it is "open to discussing the possibility of Māori proprietary rights in water, short of full ownership".[20] By this the Crown seems to be saying that it will not entertain the right of Māori to use and occupy and exploit the natural resource. Instead, for the Crown tino rangatiratanga equates with protection and preservation, so that the natural resource may be cared for, used, and enjoyed by present and future generations of tangata whenua, and shared with tauiwi (non-Māori) as appropriate.

158. Thus, the dominant model for the Crown in the context of freshwater, is largely a "right to culture model."[21] By this we mean the protection of a traditional way of life, procedural rights to consultation and tribal self-management of property. For example in the *Muriwhenua Fishing* inquiry, the Crown submitted that rangatiratanga was "something less than ownership" and suggested that stewardship was more important in Māori society, and that in reality rangatiratanga meant "stewardship".[22] Ultimately ownership rights were acquired by Māori in commercial and traditional fisheries but only after Māori obtained significant legal leverage. In the context of water, the Crown clearly prefers stewardship without ownership, or a shared-management right such as those that the Crown has negotiated with Waikato-Tainui and Whanganui tribes in treaty settlements.[23] The right to culture is a prominent part of New Zealand's reforms and this follows from the emphasis on making reparations to the *tribe*.

159. But Indigenous rights reforms are also based on a property model. This seeks to restore to Māori a "resource base" of property rights and monetary compensation. Treaty settlements, for example, provide "commercial redress".[24] And iwi have acquired commercial rights to natural resources on the basis that Māori possess *de facto* property rights in the resource.[25] One can understand why the property category might be so prominent given the dominant role property has played in Indigenous-state relations in New Zealand. The Treaty itself in the English version of Article 2 speaks of Māori rights to "Lands and

[19] Waitangi Tribunal, He Maunga Rongo: Report on Central North Island Claims (Wai 1200, 2008) at 1590 and Waitangi Tribunal, The Ika Whenua Rivers Report (Wai 212, 1998) at [10.4].
[20] *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [113].
[21] See Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010).
[22] Waitangi Tribunal *Muriwhenua Fishing Claim Report* (Wai 22, 1988) at 10.3.3 (b). See also *Ngai Tahu Māori Trust Board v Attorney-General* HC Wellington CP559/87, 2 November 1987 at X noting, successive governments were wrong in assuming that the Māori fishing right was merely "recreational or ceremonial".
[23] Te Awa Tupua (Whanganui River Claims Settlement) Bill (129-2); Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
[24] Office of Treaty Settlements *Ka Tika A Muri, Ka Tika a Mua: Healing the Past and Building a Future* (March 2015).
[25] See discussion below.

Estates Forests Fisheries".[26] Property was a strong motivating factor for the Treaty as the colonial office sought to regulate land sales. Often property is the only means by which tribes could assert rights against the state.[27] Property thus is an ancient means of thinking about Indigenous rights in New Zealand. In the early years of settlement, common law decisions including *R v Symonds* (1847) drew a distinction between *imperium* and *dominium*.[28] And this has been more clearly elucidated and confirmed in the aboriginal rights jurisprudence forged over the last four decades.[29] Land was infused with both *imperium*, representing the Crown's interest as the sovereign, and *dominium* being the pre-existing proprietary right retained by Indigenous peoples. Once the land was alienated or sold however (or confiscated), and it could only be acquired by the Crown under its pre-emptive right, *imperium* and *dominium* merged so that the Crown acquired the absolute beneficial interest in the land.[30] In recent decades, the common law doctrine of aboriginal rights has revitalised such property-based claims by Indigenous peoples. Generally the Crown prefers the proprietary rights model – because it does not threaten or call into question current configurations of political power. But it is not only sought by Government. During the early 1980s Māori leaders also sought a more robust economic-base for tribes.[31] The Freshwater Water Tribunal claim is a recent example of this quest for greater economic self-sufficiency. But of course in relation to freshwater the Crown is rejecting the proprietary rights model.

160. These property and right to culture models can lead to significant reforms – witness especially the economic fruits of the treaty settlements. The economic redress has had a profound impact on the Māori economy, estimated in 2016 to be worth $42 billion and growing by 1 billion each year.[32] Ngai Tahu is the largest private land owner in the South Island.[33] Ngai Tahu and Waikato-Tainui received $170 million in reparations in 1993 but the value of their assets is now over $1 billion.[34] Māori are major stakeholders in the commerical fishing, forestry, and aquaculture industries. However, the Crown's focus on property and the right to culture has resulted in a lacuna in terms of political authority.

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[26] See Treaty of Waitangi Act 1975, sch 1.

[27] See for example Native Land Act 1865; *Lake Omapere Case* (1929) 11 Bay of Islands MB 253.

[28] *R v Symonds* (1847) NZPCC 387 (SC). See also, *Ngati Apa* above n 11 at [21] "[I]n New Zealand, the Crown's notional "radical" title, obtained with sovereignty, was held to be consistent with and burdened by native customary property." See also *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

[29] Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, New York, 2011).

[30] See *Mabo v. Queensland (No.2),* (1992) 175 C.L.R. 1.

[31] Alan Ward, *An Unsettled History* (Bridget Williams, Wellington, 1999) at 29.

[32] Liz Te Amo, New Zealand Trade and Enterprise, "The Māori economy is Big Business"; at https://www.nzte.govt.nz/en/news-and-media/blogs-and-commentary/2015/7/29/the-m%C4%81ori-economy-is-big-business/.

[33] Ngāi Tahu Claims Settlement Act 1998.

[34] See Waikato-Tainui *Annual Report* (2014) <www.tgh.co.nz/admin/documentlibrary/waikato-tainui%20annual%20report%202014.pdf>.

Political authority in this context refers to the right to tino rangatiratanga, self-government or self-determination. Tino rangatiratanga is grounded in many ideas but is closely related to concepts of prior sovereignty or historical sovereignty and the international law right to self-determination.[35] According to these concepts, Indigenous peoples of Aotearoa New Zealand were independent peoples and possessed full authority over their lands and peoples and are therefore entitled to recognition of their right to self-determination.[36] James Anaya refers to Indigenous peoples exercising internal self-governance powers and external relations with states.[37] In New Zealand it is often said by political leaders that self-government would be impracticable either because sovereignty was ceded, or we do not have the landmass to accommodate North-American style "reservations".[38] But in the New Zealand context, the self-government concept tends to be more nuanced and relates to constitutional reform, and political authority and control over natural resources. In relation to treaty settlements for example there is no recognition of any form of political authority. Instead iwi have the right to "self-management" of their tribal property. This gap is also evident in relation to Māori interests in natural resources, including water as iwi seek a greater say in the regulation of water.[39] Government has responded through treaty settlements relating to water such as the Whanganui agreement[40] and proposed reforms to the RMA.[41] However, these grant procedural rights (effective participation in decision-making) for example and not stronger rights such as free, prior and informed consent. The law relating to International Indigenous rights is informative in this respect because it endorses not only property rights but also political authority in terms of a right to self-determination, self-government and free, prior and informed consent (what we call the "self-determination framework").[42]

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[35] For an account of these "conceptual categories", see Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYUJIntl Law & Pol 189.

[36] As the Waitangi Tribunal notes in its *Whaia te Mana Motuhake* (Wai 2417, 2014) at 36:, "tino rangatiratanga has been interpreted as absolute authority and can include freedom to be distinct peoples; the territorial integrity of their land base; the right to freely determine their destinies; and the right to exercise autonomy and self-government." In Waitangi Tribunal *Ko Aotearoa Tenei: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 80, the Tribunal noted that tino rangatiratanga conveys concepts of authority and control but added there is more to the concept including expectations about right behaviour, appropriate priorities and ethical decision-making that are deeply embedded in Māori culture." Waitangi Tribunal, *Ko Aotearoa Tenei: Te Taumata Tuarua*, Vol 1, at 80.

[37] S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, 2004).

[38] See for example Sir Douglas Graham, Minister of Treaty Negotiations in the early 1990s, equating tino rangatiratanga with iwi self-mangement in Douglas Graham *Trick or treaty?* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1997) at 20–21: "But unlike the First Nations people in the US who were left with their own sovereign rights to a large degree, at least initially, Māori ceded sovereignty in exchange for a concomitant guarantee of rights.".

[39] For an exception, see Fisheries (Kaimoana Customary Fishing) Regulations 1998: provides tangata whenua with power to make bylaws about customary fishing including imposing rahui (prohibitions) on customary gathering.

[40] Te Awa Tupua (Whanganui River Claims Settlement) Bill.

[41] See Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) at 29.

[42] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [The Declaration].

161. Successive Governments in New Zealand have rejected the notion of any form of political authority residing in iwi. This is partly due to the controversial nature of such claims. But it also stems from an originalist understanding of the bargain between the Crown and Māori in the Treaty of Waitangi that seeks to "read up" the Crown's Article 1 right to sovereignty and "read down" the Article 2 guarantee to Māori of tino rangatiratanga.[43] The implication is that tribes may have possessed historical sovereignty but this was willingly given up and so there is no right now to seek self-determination or political authority. According to "Principles for Crown Action on the Treaty of Waitangi" issued by the fourth Labour Government in 1989, there was no question that tribes ceded sovereignty to the Crown and the Government has the right to govern and make laws (the principle of government).[44] However this principle was subject to the "rangatiratanga principle" which was concerned with: "The preservation of a resource base, restoration of iwi self-management and the active protection of taonga, both material and cultural."[45] According to Geoffrey Palmer, then Minister of Justice, the Article 2 tino rangatiratanga obligation, with its focus on culture and property, is "the price the Crown paid for" sovereignty in Article 1.[46] And this reading has been crystalized by New Zealand's unitary government and the now "outdated" notion of Parliamentary sovereignty.[47]

162. For successive Governments this has been the orthodox means of reading the Treaty. But Government also supplements this restrictive originalist construction with the contemporary position that the Treaty is "always speaking" and the foundation of a "relationship" or "partnership" between Māori and Government.[48] Indeed there is a long tradition of political negotiations between Māori and the state,[49] and this continues in the context of modern Indigenous rights reforms. Almost all aspects of Indigenous rights reforms have been initiated and controlled by the Executive branch of Government which exercises

[43] Here we use the "originalist" versus "living constitutionalism" models of interpretation where in the latter case instead of focusing on the intentions of those who create a constitution, a constitution is seen as an evolving, living entity that is capable of adapting to changing social circumstances and contemporary moral and political beliefs. See, Ran Hirschl *Constitutional Theocracy* (Harvard University Press, Cambridge (Mass), 2011).
[44] Department of Justice *Principles for Crown Action on the Treaty of Waitangi* (Department of Justice, 1989) [*Principles for Crown Action*]. See also Geoffrey Palmer "The Treaty of Waitangi - principles for Crown action (New Zealand)" (1989) 19 VUWLR 335.
[45] At 8.
[46] Palmer, above n 44, at 340.
[47] Andrew Butler and Geoffrey Palmer *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 111 (critiquing the "outdated" doctrine of parliamentary sovereignty).
[48] See *Principles for Crown Action*, above n 44. Many scholars also advocate this approach: see for example Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008): "[instead of] looking more closely at the words or the original intent [of the Treaty]", like the terms of a contract, we ought to see the treaty as expressing "the parameters of a relationship" and as such we must resolve any issues through dialogue within the context of the time. See also Kenneth Coates and PG McHugh *Living Relationships: Kōkiri Ngātahi: the Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998).
[49] Mark Hickford, *Lords of the Land* (Oxford University Press, Oxford, 2011).

considerable control over Parliament.[50] This remains the case even under an MMP electoral system. As Palmer and Butler note, while "the effects of MMP have weakened the Executive and increased the power of [Parliament] by making it more likely that the government will have to negotiate arrangements for confidence and supply with other parties in order to achieve a majority … the challenge to executive power offered by MMP has largely been seen off."[51] According to Palmer and Butler this is largely due to the large size of Cabinet relative to Parliament and the influence wielded by the Prime Minister.[52] There is, for example, no legislation governing treaty settlements, only policy established by the Executive. And while treaty settlements are ultimately given effect in legislation, there is a convention that Parliament will not re-open them when the settlements reach Parliament.[53] Treaty settlements also exist beyond the scope of judicial review given their non-justiciable subject matter.[54] The limited judicial decisions on the Treaty are largely due to statutory references to the Treaty and only a few cases have resulted in success for Māori litigants. As Matthew Palmer noted in 2011, "there had been only two decisions since 1990 in which a court has found the Crown has breached the principles of the Treaty of Waitangi."[55] This control by the Executive can allow for innovation and flexibility in deal-making,[56] but the emphasis on the political raises serious concerns about the rule of law. The extensive executive power coupled with the fact that most of this power is sourced in the royal prerogative,[57] not law,[58] and the absence of an entrenched bill of rights and limited judicial review means Indigenous rights are vulnerable in this Indigenous-state partnership. In using a restrictive originalist reading of the Treaty that undermines tino rangatiratanga, while advocating a contemporary partnership approach, the government is

[50] In *Te Runanga o Wharekauri Rekohu Ltd v Attorney-General* [1993] 2 NZLR 301 (CA) where the legality of the deed was challenged, Cooke P found himself unable to see the deed as a simple contract, and described it, very aptly, as "a compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for legal rights": at 308.

[51] Butler and Palmer, above n 47, at 125 and 130.

[52] At 125–126.

[53] See, McGee, David, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Limited, Wellington, 2005. Hon Christopher Finlayson "Submission to Standing Orders Committee on Procedures for historical Treaty of Waitangi settlement bills" at [25].

[54] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31, which shows deference to the Executive in resolving claims to freshwater. Compare *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, 1 NZLR 1056; *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53, which directed the Waitangi Tribunal to hear an urgency application for redress; *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298; and *Proprietors of Wakatu Inc v Attorney-General* [2012] NZHC 1461, which considered whether to uphold Māori claims to Crown breaches of fiduciary duty type obligations with respect to early land transactions. See also Claire Charters "Māori rights: Legal or Political?" (2015) 26(4) PLR 231.

[55] Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 125.

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

[57] Another potential source is the "third source" which again has no legal basis: see Bruce Harris "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26(1) *NZULR* 60.

[58] Butler and Palmer, above n 47, at 95–96, who propose that the prerogative be abolished so that government powers have their source in law.

reducing the Treaty to whatever the Executive thinks it should be.

163. The courts adopt a similar approach. While the colonial courts infamously dismissed the treaty as a nullity,[59] the orthodox position is that the Treaty is a treaty of cession that must be incorporated in statute to have any legal status.[60] Statutory references to the "principles of the Treaty" have sparked a body of contemporary jurisprudence about the meaning of this phrase. However, like government, the courts adopt a conservative originalist reading of the treaty,[61] while advocating that the treaty be seen as expressing ideals of "partnership" and "mutual respect."[62] On the other hand, the Waitangi Tribunal analysis has been more searching and bolder. As a commission of inquiry comprised of roughly equal numbers of Māori-Pakeha with power to consider the Treaty as a whole, "as embodied in its two texts",[63] when determining whether the Crown has acted consistent with the "principles of the Treaty," the Tribunal has greater scope than the courts to investigate the Treaty's meaning. But each inquiry results in a distinct report written by different tribunal members and there have been variable approaches. Some of the early reports implied that Māori in 1840 did not cede sovereignty to the Crown and that tino rangatiratanga meant much more than self-management.[64] The Motunui–Waitara Tribunal wrote in 1983 that "te tino rangatiratanga", the retention of which was guaranteed to Māori, 'could be taken

[59] *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) SC 7.
[60] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC). Contrast Palmer, above n 55, at 164: "On the basis of what we know today, an interpretation of the Treaty of Waitangi that accorded to most rangatiratanga an intention to cede sovereignty is, in my view, untenable. The implication of this view is that the treaty is not a treaty of cession … [r]ather it is more analogous to [an international] treaty of cession."
[61] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663-664 [*Lands case*]. As Cooke P noted in the *Lands case* at 702: "[Māori] ceded rights of government in exchange for guarantees of possession and control of their lands and precious possessions for as long as they wanted to retain them." See also the judgment of Somers J at 690, noting cession of sovereignty "is not in doubt". For a more recent statement, see *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 (CA) at [68]: "The cession of sovereignty to the Queen of England in 1840 did not affect the property of Māori".
[62] See *Lands case*, above n 61.
[63] Treaty of Waitangi Act 1975, s 5(3).
[64] See also Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990) at 42: "as we see it the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources."; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 188: Māori have "full authority over their lands, homes and things important to them". Waitangi Tribunal *The Manukau Claim* (Wai 8, 1985) at 66-67: "In the Māori text of the [Treaty] the Māori chiefs ceded to the Queen 'kawanatanga'. We think this is something less than the sovereignty (or absolute authority) ceded in the English text. As used in the Treaty it means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Mäori interests."; Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxv: "Vis-a-vis the Crown, the principle of rangatiratanga means that a particular Māori community should control their own tikanga and taonga, including their social and political organisation, and, to the extent practical and reasonable, fix their own policy and manage their own programmes."; Waitangi Tribunal *Māori Electoral Option Report* (Wai 413, 1994) at 3-4: "… it is clear that the exercise of tino rangatiratanga, like kawanatanga, cannot be unfettered; the one must be reconciled with the other ... In constitutional terms this could be seen as entitling Māori to a measure of autonomy, but not full independence outside the nation State they helped to create in signing the Treaty".

to mean "the highest chieftainship" or indeed, "the sovereignty of their lands".[65] Other reports have regarded a cession of sovereignty as being very clear to both parties.[66] The recent *He Whakaputanga* Report took up the issue more directly and its conclusion is that Māori did not cede sovereignty and under the Treaty power was to be shared:[67]

> we believe … rangatira understood kāwanatanga primarily as the power to control settlers and thereby keep the peace and protect Māori interests accordingly; that rangatira would retain their independence and authority as rangatira, and would be the Governor's equal; that land transactions would be regulated in some way; that the Crown would enforce the Māori understanding of pre-treaty land transactions, and therefore return land that settlers had not properly acquired; and that it may also have involved protection of New Zealand from foreign powers. We think that few if any rangatira would have envisaged the Governor having authority to intervene in internal Māori affairs – though many would have realised that where the populations intermingled questions of relative authority would need to be negotiated on a case-by-case basis, as was typical for rangatira-to-rangatira relationships.

164. This view sits with those of most historians of the Treaty of Waitangi,[68] who accept that, while the Crown may have been seeking sovereignty over New

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[65] Waitangi Tribunal *Motunui–Waitara Claim* (Wai 6, 1983). See also Waitangi Tribunal *Taranaki Report - Kaupapa Tuatahi* (Wai 143, 1996) at 5 and 19: "The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Māori words are 'tino rangatiratanga,' as used in the Treaty, and 'mana motuhake,' as used since the 1860s".

[66] See for example Waitangi Tribunal *Muriwhenua Fishing Claim Report* (Wai 22, 1988) at 187: "In any event on reading the Māori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga, therefore, refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government".

[67] Waitangi Tribunal *He Whakaputanga me te Tiriti: the Declaration and the Treaty Report* (Wai 1040, 2014)[*He Whakaputanga* Report] at 524: "Our view is that, on the basis of what they were told, the signatories were led to believe that Hobson would be a rangatira for the Pākehā and they would retain authority within their own autonomous hapū".

[68] See Claudia Orange *The Treaty of Waitangi* (Bridge Williams Books, Wellington, 2010) at 36: "As presented, the Treaty seemed to be confirming the chiefs' authority and directing its effects mainly at Pakeha, aiming specifically at better control of British subjects. Such control might be to the advantage of the Māori people, even though it would mean accepting an increased British authority and sharing the ruling power of the land". See also Ned Fletcher who disagrees with historical accounts that view the Treaty of Waitangi as a cynical attempt to secure sovereignty to enable wholesale colonization of New Zealand. Based on an extensive review of writings of the drafters of the English version of the Treaty, he argues that the Treaty was primarily aimed at the protection of Māori from settlers. Ned Fletcher *A Praiseworthy Device for Amusing and Pacifying Savages?* (PhD thesis, University of Auckland, 2014). Compare this with the Waitangi Tribunal's conclusion in *He Whakaputanga*, above n 67, that the "British's intention … was that Māori would cede sovereignty to the Crown and so become subject to British law and government." See also *He Whakaaro Here Whakaumu mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation* (January, 2016) [*He Whakaaro Here Whakaumu mō Aotearoa*]. <www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf> at 101: "Te Tiriti o Waitangi provided for the continuation of the Māori constitutional order. It created a new constitutional configuration with the grant of kāwanatanga for the Crown to exercise authority over its people while providing for a joint site of power where Māori and the Crown could work together in a Tiriti-based relationship". Compare PG McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, New York, 2004) at 150, describing a shift in practice from an earlier pre-1840 pluralistic model of sovereignty to one at the time of the Treaty in which sovereignty was absolute, exclusive and territorial.

Zealand, Māori for their part would not have consented to cession of absolute sovereignty and expected that there would be power sharing between the British and Māori chiefs. The broader idea of shared sovereignty has support normatively in political and legal theory[69] and recently international law in the form of the UN Declaration on the Rights of Indigenous Peoples as discussed in more detail below. How then, was sovereignty ceded to the British Crown? Raw political power or a "revolution" it seems.[70] Māori outnumbered Pakeha forty-to-one at the time of the signing of the Treaty. While many chiefs were aware of the might of the British, there were strong cultural imperatives to preserve their mana and for many the Treaty provided a means to augment that mana by securing a powerful ally. However, if we take the view that a form of political power sharing was envisaged, as Matthew Palmer notes "there was no common understanding of the extent to which the British were to govern, and the continued authority of rangatira, were to interact. The precise terms on which power was to be exercised respectively by the British and Māori signatories cannot be said to have been specified or mutually agreed."[71] Furthermore, many tribes did not sign the Treaty.

165. So what are the implications of this framework of thinking of Indigenous rights in New Zealand? The focus of Indigenous rights reforms in New Zealand has been property and the right to culture.[72] So why does the Government not accept the right to property claim to water by Māori? The problem is that the ownership model only applies in certain cases, and in many other cases, the property model is rejected by Government. The reason for this seems to be political and fiscal expedience.

166. The area in which the Crown is consistent is its rejection of tribal political authority over natural resources. In the Freshwater Waitangi Tribunal inquiry the

[69] Duncan Ivison, Paul Patton, Will Sanders eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) Roger Maaka and Augie Fleras, *The Politics of Indigeneity: Challenging The State in Canada and Aotearoa New Zealand* (University of Otago Press, 2005); James Tully Strange *Multiplicity Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995). Jeremy Waldron has argued that an original wrong may be superseded by subsequent circumstances such as the size of the population, or the availability of resources, so that any entitlement based on the wrong may fade in their moral importance: Jeremy Waldron "Redressing Historic Injustice" (2002) 52 UTLJ 135. But Waldron's critique mostly assumes that matters will improve when in most cases for Indigenous peoples an original grievance continues overtime and becomes worse. Jeff Spinner-Halev refers to this type of injustice as an "enduring injustice" and he argues that they persist because they cannot be adequately addressed by a system of distributive justice: J Spinner-Halev "From Historical to Enduring Injustice" (2007) 35 PolTheory 574. But they also persist because the injustice is so deeply embedded in our society: see Courtney Jung *The Moral Force of Indigenous Politics* (Cambridge University Press, New York, 2008).

[70] FM Brookfield "Revolutions, referendums and the treaty (New Zealand)" [1997] NZLJ 328.

[71] Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

[72] Of course the distinction between the different models (culture, property and tino rangatiratanga) are not so cut and dry, in particular virtually all reforms are to some degree sourced in the notion of prior sovereignty that tino rangatiratanga rests upon. And in the case of the property model, this is closely related to the right to culture model, in that restoring property is a means of promoting an Indigenous peoples culture. However, the argument is that the right to culture and property are the prominent models.

Crown argued that it would be better for Māori to characterize the claim as one based on tino rangatiratanga or kaitiakitanga and not ownership. But according to the Freshwater claimants, this was an attempt by government to limit the range of rights made available to iwi. For the Crown, tino rangatiratanga in the context of the water claim is equated with co-management rights, iwi representation, and enhanced iwi participation in resource management, which "deal primarily with the restoration and protection of the health and wellbeing of the waterways, not the issue of recognising their rights and interests in their water bodies."[73] In other words, the government is advancing the right to culture model, while also rejecting the proprietary rights model which give iwi relatively extensive rights (the exclusive right of hapū and iwi to control access to and use of the water while it was in their rohe). In Part III below we consider the extent to which the RMA and recent treaty settlements promote political authority. In Part II we consider aboriginal rights jurisprudence in the common law countries and the statutory schemes in New Zealand for the recognition of proprietary rights in natural resources claimed by iwi as well as those claims to proprietary rights rejected by government.

II Property

167. Concern about Indigenous peoples' claims to political authority is one of the reasons why aboriginal jurisprudence arose in the common law countries in the last four decades. It was a workable jurisprudence that did not question sovereignty and in fact was premised on it. It could never achieve what many Indigenous advocates sought from it in terms of political authority. But that still gives iwi considerable assets of value to establish an economic base. These property rights are not just any property but based on the notion of an original and enduring right to the natural resources as Indigenous peoples. Examples include the settlement of fisheries and aquaculture claims whereby the Crown has shoehorned the Māori interest into a statutory scheme. But the question is why not water? Why does the Crown draw a distinction between water and aquaculture? The aquaculture treaty settlement, especially is analogous to claims to freshwater bodies, given that it recognizes a right to exclusively occupy a water space.

A Common law aboriginal rights to water

168. Common law aboriginal rights litigation emerged in response to the rise of Indigenous movements in the common law states. McHugh argues that the judiciary were basically prodded into action due to the ambivalent political

[73] Linda Te Aho "The 'False Generosity' of Treaty Settlements – Innovation and Contortion" in Andrew Erueti (ed) *The UN Declaration on Rights of Indigenous Peoples: Implementation in Aotearoa* (Victoria University Press, Wellington, 2017).

action on land claims.[74] Scholars, legal academics and Indigenous advocates took advantage of the rise of public interest litigation and judicial review to bring claims to lands and resources before the courts resulting in a series of "breakthrough" decisions including *Calder v. Attorney-General of British Columbia* in Canada,[75] and in Australia, the decision of *Mabo v. Queensland (No.2),* (1992),[76] which overturned as discriminatory the common law rule that Australia was *terra nullius* when sovereignty was asserted over the country. Many of these early decisions were quite non-commital on the specific naure of the right.[77] But it was clear that the rights themselves were justiciable after many decades of being characterised as only political in nature (hence the epithet, breakthrough) and *sui generis* in that the rights had their origins in a pre-colonial aboriginal life and not the property system created by the state. And the courts seemed to see their decision as a basis for political negotiations between Indigenous peoples and the state. There were Government responses in the form of contemporary treaty settlements in Canada for example.[78] Yet little progress and disappointment about the content of rights meant that aboriginal rights continued to be litigated. The result according to McHugh is a "disfigured jurisprudence" – the move from the new dawn to the cold light of day – as the courts developed complex evidential standards of proof relating to continuity of connection and the legal extinguishment of aboriginal rights.[79] McHugh attributes this result to the focus on property rights by the courts, which was simply unable to accommodate the many dimensions of aboriginal rights claims making but especially political authority over territory.[80] It was a mistaken attempt to use private property to address a public end.[81] The greatest criticism has been of the evidential test for proof of *existing* aboriginal rights. Aboriginal rights law is not restorative or reparative but based on a right that has survived

[74] P.G. McHugh, "A Common Law Biography of Section 35" in Patrick Macklem and Douglas Sanderson *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) [McHugh, "A Common Law Biography of Section 35].

[75] *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313.

[76] *Mabo v. Queensland (No.2),* (1992) 175 C.L.R. 1.

[77] McHugh, "A Common Law Biography of Section 35, above n 74.

[78] See Nisga'a Final Agreement Activities 1999 at http://www.bclaws.ca/civix/document/id/complete/statreg/99002_01.

[79] See, Paul *McHugh*, '*New Dawn* to Cold Light: Courts and Common Law Aboriginal Rights' [2005] New Zealand Law Review 485. For critique of this jurisprudence, see, for example, Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7:1 *Newcastle Law Review* 1; Kirsten Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*' (2004) 28(1) *Melbourne University Law Review* 1; Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review* 35; Greg McIntyre, 'Native title rights after *Yorta Yorta*' (2003) 9(1) *James Cook University Law Review* 268; Lisa Strelein '*Members of the Yorta Yorta Aboriginal Community v Victoria*—Comment' (2003) 2(21) *Land, Rights, Laws: Issues of Native Title*; Simon Young, 'The Trouble with "Tradition": Native Title and the *Yorta Yorta* Decision' (2001) 30(1) *University of Western Australia Law Review* 28.

[80] McHugh, "A Common Law Biography of Section 35", above n 74.

[81] P.G. McHugh, "A Common Law Biography of Section 35." See also Richard Boast, Treaty rights or Aboriginal rights [1990] NZLJ 32 at 36, noting "Another criticism [of aboriginal rights] is that the rule forces indigenous claims and indigenous rights into the rather procrustean bed of an obscure feudal rule of the common law".

and endured. The difficulty of course are the many intervening years in which the Crown has displaced Indigenous peoples and allocated rights in land and formalised those rights in the form of land grants.

169. There is not much cause to bring an aboriginal rights claim to land in New Zealand because most of the land is considered extinguished at law given the Crown's acquisition of land through land confiscation, purchase and through the Māori Land Court mechanism of making tribal titles into westernised freehold titles. That has resulted in exceptional cases of riverbeds (*Paki v Attorney-General (No.2)* [2014])[82] and the foreshore and seabed (*Ngati Apa*). *Ngati Apa* (2003) arose because most had assumed that any aboriginal rights in that area had long been extinguished. Recently in *Paki*, the Supreme Court recognised the potential for aboriginal rights in riverbeds. Freshwater seems to be another exceptional and overlooked interest. This is unusual because with water, there seems to be much potential for such an aboriginal rights claim due in large part to the repeated insistence by the Crown that no one owns water in New Zealand. The Crown policy is that this is not possible at common law due to the common law doctrine of capture.[83] Water is only capable of ownership once captured or contained (for example, put in a tank or bottled). For this reason, Government says, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a Treaty settlement.[84] However, according to New Zealand common law and statute, common law presumptions such as the doctrine of capture cannot displace an Indigenous interest in a natural resource. The English common law applied in New Zealand from 1840 only "so far as applicable to the circumstances of the ... Colony of New Zealand."[85] In *Baldick v Jackson* (1910) for example the court rejected the argument that there was a common law royal prerogative in stranded whales.[86] In *Ngati Apa* Elias CJ, rejected the English common law presumption that the Crown is entitled to the foreshore and seabed noting "if any Māori custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different."[87] The Supreme Court decision of *Paki (No.2)*, found that the presumption that the Crown had obtained title to the bed of the river in accordance with the *ad medium*

[82] *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 [Paki No 2]. Lack of experience with aboriginal rights law may explain why the claimants did not raise this in *Paki* assuming instead that any aboriginal right was displaced by the common law presumption of *ad medium filum aquae*.

[83] Office of Treaty Settlements Settlement Redress at 111.

[84] At 111.

[85] As was later confirmed by the English Laws Act 1858 for the avoidance of doubt. This provision was continued, in relation to New Zealand, by the English Laws Act 1908 and is confirmed today by the Imperial Laws Application Act 1988, s 5. See also, *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403.

[86] *Baldick v Jackson* (1910) 30 NZLR 343 (HC). At common law whales taken in the territorial waters of the United Kingdom or stranded ashore were regarded as royal fish and belonged to the sovereign, but in *Baldick v Jackson* Stout CJ said this rule could have no applicability in New Zealand for two reasons: it had never been asserted in New Zealand waters by the Crown, and would in any case be contrary to the Treaty of Waitangi "for they [the Māori] were accustomed to engage in whaling."

[87] *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

filum aquae or mid-point presumption could not apply unless it was consistent with Māori custom.[88] The issue the court said had to be determined on a case-by-case basis depending on the customary law of the tribe in question. By saying that no one owns water the Crown is of course also saying *it* does not own water. This can be compared with legislation that expressly states that the Crown has "property" in a resource such as the Crown Minerals Activities 1991.[89] In the case of rivers and lake bodies the Crown could assert extinguishment of any aboriginal right by implication – the exclusion of Māori without their consent from their development, governance and management by legislation and Crown actions including the Water-power Act 1903, the Water and Soil Conservation Act 1967 and the RMA. However, there is much authority that to regulate is not to extinguish in Australian and Canadian aboriginal rights law. In *R v Agawa* (1988) the Ontario Court of Appeal ruled that a provincial licensing requirement did not extinguish an aboriginal right to fish. The right had been regulated and not extinguished by the fishing legislation.[90] In *Sparrow*, the Supreme Court of Canada said that to extinguish an aboriginal right the intention must be "clear and plain."[91] The court found that the subjection of Indians to a licencing system under federal law for the exercise of any fishing rights was "simply a matter of controlling the fisheries not defining underlying rights." The Australian High Court in *Yanner v Eaton* (1999) found legislation vesting "property" in "all fauna" in the Crown did not extinguish a native title right to catch juvenile estuarine crocodiles for food without a permit.[92] The use of the word "property" in the Act did not give the Crown absolute, beneficial ownership in the fauna.[93] Instead the Act was intended to regulate, not abolish, the practice of hunting native fauna.[94] However, in the case of water in New Zealand there is as noted no vesting of property in the Crown only its regulation by the RMA. In *Ngati*

[88] *Paki No. 2* thus recognises the possibility that there may be unextinguished Māori customary title in the beds of non-navigable rivers; a possibility that some had assumed was precluded by the *Re the Bed of the Wanganui River* precedent. As a result, it is now possible for iwi to apply to the Māori Land Court for investigation of title to the non-navigable segments of the bed of the Waikato River.

[89] For example, the Crown Minerals Act which says petroleum is the "property" of the Crown. But even if a statute does vest property in the Crown that does not mean any aboriginal right is extinguished. The *Ngati Apa* decisions found that section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (which deems the seabed and subsoil 'to be and always to have been vested in the Crown') was not sufficient to extinguish aboriginal rights in the seabed. See also *Yanner v Eaton* (1999) 201 CLR 351.

[90] *R v Agawa* (1988) 65 O.R. (2d).505 (C.A.).

[91] *R v Sparrow*, [1990] 1 S.C.R. 1075.

[92] *Yanner v Eaton* (1999) 201 CLR 351.

[93] At [115]. The Majority in *Yanner* did not consider that property had to be construed as meaning something like all rights attached to a thing. contrats with the mr decision of McHugh: McHugh J held that the use of the word "property" gave the Crown "every right, power, privilege and benefit that does or will exist in respect of fauna ... to exclude every other person from enjoying those rights, powers, privileges and benefits" (at [49]). This reasoning led to the conclusion that the Crown's rights were so broad that the appellant's native title rights must have necessarily been extinguished.But see *Hayes v Northern Territory* (1999) 97 FCR 32, Olney J found particular vestings did not operate to extinguish native title, because they did not imply exclusive possession (at 114–16), and in another case because land was merely vested in 'an emanation of the Crown' (at 130).

[94] In that case, the majority also took account of the fact that the common law had only ever recognised a qualified or limited property right in wild animals. At common law, like the doctrine of capture, wild animals are not capable of owernship unless captured.

Apa the New Zealand Marine Farming Association argued that Māori claims to ownership of property in foreshore and seabed are inconsistent with the controls of the coastal marine area under the RMA. It was suggested that any Māori customary property interests amounting to rights less than ownership can be recognised now only under the statutory regime provided by the Act. Elias CJ rejected this argument observing that while the management of the coastal marine area under the RMA "may substantially restrict the activities able to be undertaken" by Māori with customary property in the area, "the statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property."[95]

170. As a result one of the greatest potential challenges to an aboriginal rights claim to water in New Zealand – that the right has been supplanted by statute – does not seem to be an issue in the context of a Māori claim to water. The question then, would be whether there was an interest to begin with and whether that interest had been maintained. The common law jurisprudence generally requires continuity of use and connection as noted above and this has proved to be a major issue for many Indigenous peoples.[96] In New Zealand, each resource claimed would have to be decided on a case-by-case basis.

171. As developed by Ruru, if a court in Aotearoa New Zealand was asked to determine if an claimant still had aboriginal rights or native title in a specific stretch of freshwater, it is likely that a series of interrelated issues would be canvassed.[97] First, is native title applicable to water? Second, can the doctrine of native title trump other common law doctrines, specifically the doctrine of publici juris of fresh water (the idea that at common law the water cannot be owned because it is a common good). Third, can the claimant prove that, according to its tikanga, that the claimant has a recognised customary property interest in a precise river. Fourth, can the Crown identify any statute law that has clearly and plainly extinguished that native title property right? Only if the claimant win on the first three points, and the Crown fails on the fourth point, will it be possible for a court to recognise native title in freshwater. But in doing

[95] At [76] per Elias CJ; At [123] per Gault P: "[the RMA] provisions are not wholly inconsistent with some private ownership"; and at [192] per Tipping J: ("[T]he prescribed restrictions on activities within the coastal marine area, stringent as they are, do not inevitably lead to the view that the potential for an underlying status of Māori customary land has thereby been extinguished.) Compare *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139, where the majority of the Court of Appeal found that the taking of trout by *McRitchie* without a license was unlawful despite a statutory reference to the protection of a "Mäori fishing right" because the taking of trout has always been controlled by law. The majority concluded that the legislative history "demonstrates beyond doubt that the appellant and his hapu did not have a Mäori fishing right to take trout in the Mangawhero River." However, the Court of Appeal majority did not fully consider the nature of the right (the appeal was only on the question of law of effect of legislation) and especially the law of aboriginal rights, and did not consider jurisprudence in Australia and Canada and New Zealand about regulation of aboriginal rights.

[96] See *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 194 A.L.R. 538.

[97] For example, see Jacinta Ruru "Maori legal rights to water: ownership, management or just consultation?" (2011) *RM Theory & Practice* 119 and Jacinta Ruru "Undefined and Unresolved: Exploring Indigenous rights in Aotearoa New Zealand's freshwater legal regime" (2010) 5 Journal of Water Law 236.

this, native title itself encompasses a wide spectrum where exclusive ownership falls to the far right. It is possible that a claimant might get to this point, and the court finds that they simply have a bundle of rights to use and access the water that are already provided for to all citizens. This is essentially what the majority decision of the High Court of Australia did to an Australian Indigenous group in 2002.[98] However, *Ngati Apa* does suggest the possibility of exclusive ownership by recognising how the doctrine has developed in Canada. Elias CJ stated:[99]

> The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidence equivalent to those recognised by fee simple title.

172. And, President Gault reflected that the RMA provisions "are not wholly inconsistent with some private ownership"[100] of the coastal marine area. Keith and Anderson JJ, in their joint judgment, suggest an approach that Kirby J, in the High Court of Australia, has been advocating for some time: Indigenous qualified exclusive ownership. They stated "[s]ubject to such qualifications arising from the circumstance of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation".[101] It is possible that a court might conclude similarly in the context of freshwater, assuming of course that those first four hurdles could be successfully crossed.

173. In the case of the use of geothermal resources for example there would be little difficulty meeting continuity tests. For example there could be no doubt that Ngati Whakaue have used the geothermal water in their rohe consistently since 1840. In the case of the Waikato river, raupatu undermined the ability of Waikato-Tainui iwi to exercise control over their use of the Waikato river. But there is no doubt about a continuing connection with the river. The Waitangi Tribunal has issued five reports on iwi claims to rivers and they all attest to the continued close association between tribes and rivers as taonga.[102] Proof of ownership, as accepted in the native Land Court and later in the Waitangi Tribunal, and as demonstrated by the claimants in the Stage 1 Report, rests on the following customary proofs or 'indicia of ownership', which have been accepted by the Crown:

> the water resource has been relied upon as a source of food; the water resource has been relied upon as a source of textiles or other materials; the water resource has been relied upon for travel or trade; the water resource has been used in the rituals central to the spiritual life of the hapū; the water resource has a mauri (life force); the water resource is celebrated or referred to in waiata; the water resource is celebrated or referred to in

[98] *Commonwealth v Yarmirr* [2001] 208 CLR 1 (HCA).
[99] *Ngati Apa* at 656.
[100] *Ngati Apa* at 677.
[101] *Ngati Apa* at 679.
[102] See, for example Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Claim* (Wai 2358, 2012).

> whakataukī; the people have identified taniwha as residing in the water resource; the people have exercised kaitiakitanga over the water resource; the people have exercised mana or rangatiratanga over the water resource; whakapapa identifies a cosmological connection with the water resource; and there is a continuing recognised claim to land or territory in which the resource is situated, and title has been maintained to 'some, if not all, of the land on (or below) which the water resource sits'.

174. The Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act 2011] imposes rigid evidential standards focused on ideas of "occupation", "exclusivity", and "continuity" as has been the case in relation to aboriginal title litigation in Canada.[103] In brief to obtain customary title, claimants need to show they have occupied land without interruption and to the general exclusion of others. The requirement to establish aboriginal exclusive occupation has been a vexed issue in Canadian litigation. However, the recent Canadian Supreme Court decision of *Tsilhqot'in Nation v British Columbia* (2014) has confirmed that both "occupation" and "exclusion" are considered with reference to the aboriginal perspective as well as that of the common law.[104]

175. It should be noted too that the common law is capable of recognizing Indigenous proprietary rights. In *Mabo* Brennan J, noted "a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people."[105] Accordingly Brennan J accepted that the customary land claims of Aboriginals comprise a 'proprietary community title'. In Canada also aboriginal rights include the right to exclusively occupy land and ownership of subsurface minerals.[106] Canadian aboriginal title law also recognizes the potential for joint-aboriginal title ownership in those cases where two or more aboriginal communities shared the use of particular territories.[107]

176. In addition, there is a long-standing practice in New Zealand law – recognised recently in the *Ngati Apa* decision – of readily translating a Māori customary property into a right of ownership and that is the conversion process recognized in Māori land legislation since 1862. The original legislation allowed for the conversion of lands "owned by Natives under their customs or usages" into a

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[103] See Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989), for argument about aboriginal prior occupation granting a right to exclusive occupation at common law that cannot be displaced by adverse possession, Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989). Similarly, aboriginal title in Canada is based on exclusive occupation at sovereignty. See *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [*Tsilhqot'in Nation*], in which aboriginal title to land was recognized. At the same time, aboriginal title is not based on aboriginal law and sovereignty but on "prior occupation" of land. Aboriginal law is adopted as a tool to ensure that the common law tests of occupation are modified to accommodate different perspectives.

[104] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

[105] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51; 107 ALR 1 at 36.

[106] *Delgamuukw v British Columbia* [1997] 3 SCR 1010; and *Tsilhqot'in Nation.*

[107] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 58.

Crown granted fee simple title.[108] The Māori Land Court retains that power though of course not in relation to the coastal marine area due to the Takutai Moana Act 2011.

177. Any judicial recognition of aboriginal rights to water in New Zealand would likely lead to negotiations between aboriginal rights-holders and government. However, there is no guarantee that a judicial decision would result in robust set of rights as is evidenced with the experience following *Ngati Apa*. However, an important difference between *Ngati Apa* and any future judicial declaration of rights to water, is that in the latter case there would be actual justiciable rights and so it would be much harder for the government to oust the rights without the consent of the claimants. In the case of *Ngati Apa* the central issue was about *jurisdiction* to investigate whether such rights existed and so there was no recognition of any legal rights as such and disagreement about the potential scope and nature of any rights.[109] What is clear is that any judicial finding of aboriginal rights would likely add significant impetus for negotiation of reforms. The Waitangi Tribunal reports have no doubt provided momentum for the proposed RMA reforms for example. However, it is not clear how much leverage this will provide Māori seeking proprietary rights in water. For example, the Stage 1 Report was not sufficient to leverage a settlement when the Government decided to sell 49 per cent of the shares in Mighty River Power (MRP) and other SOEs. The Crown has undertaken that it will not rely on the privatisation of the hydro-electric generating companies so as to diminish any claimed rights**.** Yet the partial privatization of MRP (now Mercury) has been achieved.[110] The Supreme Court found that the government could proceed with partial privatization because this would not materially impair the Crown's ability to take the reasonable action needed to comply with the principles of the Treaty of Waitangi. But we do not think the Supreme Court fully appreciated the potential rights available to Māori as yet not *de jure* but *de facto* and so substantial, on their face, that there is a compelling case for Māori ultimately obtaining *de jure* rights through the common law doctrine of aboriginal rights. And the Supreme Court seems to have over-estimated the potential gains to be made through the political process of negotiation with the Crown. The Supreme Court was very much convinced by the Crown's argument that this was the appropriate process. But, while this is the typical means of addressing Māori claims, the position of Māori in such negotiations is relatively very weak unless tribes have some type of legal right to confront the Crown with.

178. A significant dimension to any aboriginal rights claim in New Zealand will be human rights law. In over-throwing the doctrine of *terra nullius* Justice Brennan in *Mabo (No.2),* noted the need to ensure that the common law kept abreast with

[108] Native Lands Act 1862 (N.Z.); see also Native Lands Act 1865 (N.Z.).

[109] McHugh speculated that the common law would not be able to recognize exclusive interests in the foreshore and seabed drawing on Australian jurisprudence especially *Yarmirr v Northern Territory*, [2001] HCA 56; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (Wai. 1071, 2004).

[110] Mercury remains 51 percent government-owned after partial privatisation in 2013.

developments in international law human rights law especially nondiscrimination principles. Similarly international human rights bodies have relied on the principle of equality to recognize an Indigenous rights to land.[111] The New Zealand Supreme Court has also noted the significance of these international developments in cases relating to Māori customary rights.[112] The recognition of the right to ownership of land follows from the right to equality in that Indigenous rights to land – even though *sui generis* given their basis in Indigenous rights land tenure – ought to be accorded the same status and respect as non-Indigenous peoples' property.[113] [114]

B Negotiated proprietary rights in natural resources

179. An interesting dimension to claims to natural resources are the many treaty settlements made that give effect to Māori proprietary rights. Treaty settlements are directed towards providing compensation for dispossession of rights to lands and natural resources (most of which are now in private ownership or Crown ownership, for example conservation estate). This is in contrast to the modern treaty settlements in Canada which are directed at extinguishing *existing* aboriginal property rights in land in exchange for treaties that allow for forms of self-government, and legal rights to natural resources. However iwi have been successful in negotiating a right of "ownership" over specific natural resources as means of re-claiming control over them. This includes deals relating to the right to commercial and customary fisheries,[115] lakebeds,[116] forests,[117] Crown lands,[118] and aquaculture[119] and minerals in the coastal marine area.[120] The claims have been assisted by the development of the common law doctrine of aboriginal rights. While these agreements are framed as treaty settlements, all of them are based on a similar notion to that underpinning modern treaties in Canada, ie, the

[111] The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua, Series C (No. 79) (2001) (Awas Tingni).
[112] *Takamore v Clarke* [2012] NZSC 116.
[113] The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua, Series C (No. 79) (2001) (Awas Tingni).
[114] Note also the right to culture in s 20 of the New Zealand Bill of Rights Act 1990
[115] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Fisheries (Kaimoana Customary Fishing) Regulations 1998.
[116] Te Arawa Lakes Settlement Act 2006, s 23(1): the fee simple estate in each Te Arawa lakebed is vested in trust in the Trustees of the Te Arawa Lakes Trust.
[117] Central North Island Forests Land Collective Settlement Act 2008. The proposed sale of forests lands, resulted in objection by Māori who claimed an interest in the forests, and a treaty settlement that led to the Crown keeping ownership and creation of the Crown Forestry Rental Trust (CFRT) to manage rental gained from selling of cutting rights and leasing of forest lands.
[118] State-Owned Enterprises Act 1986.
[119] Māori Commercial Aquaculture Claims Settlement Act 2004.
[120] See *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA); and Marine and Coastal Area (Takutai Moana) Act 2011.

notion of tribes possessing existing *de facto* property rights in natural resources. In other words, there are no established *legal* rights in the resource in question, though there is an arguable case for legal rights on the basis that Māori once possessed these resources, the resource or rights to the natural resources are now in the possession of the Crown, and the Crown's interest is challenged by the prior Indigenous rights.[121] Indeed these agreements acknowledge potential property rights in the natural resource in question by expressly providing that all claims in relation to the natural resource in question, are fully and finally settled, satisfied, and discharged."[122] This includes claims "founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise." The Treaty on its own of course cannot give rise to justiciable property rights, but treaty rights to natural resources can be referred to in legislation as was the case in relation to the Māori right to fisheries. In addition to such treaty rights, is the common law aboriginal right. These "extinguishment clauses" thus anticipate and foreclose any potential rights based on the treaty and common law aboriginal rights.[123]

180. The validity of the *de facto* property right is typically established through a Waitangi Tribunal inquiry into the historical claims of iwi. Claimants seem to prefer the Waitangi Tribunal given it is not as adversarial as the general courts (as a commission of inquiry), is less costly than an aboriginal rights judicial inquiry, and the Waitangi Tribunal is likely to be more open to such a claim than the courts, which have been generally conservative in hearing aboriginal rights claims. In addition legal aid funding is available to groups in Tribunal but not to groups in general Courts. There is also the fact that most aboriginal rights cases are a prelude to political negotiations so claimants may hope that a successful Waitangi Tribunal inquiry would lead to negotiation of a fair settlement. This has proven to be the case in relation to claims to fisheries and aquaculture. But of course despite several Waitangi Tribunal findings of iwi proprietary rights to rivers, Māori claimants have not achieved proprietary rights to water or forms of political authority over freshwater.

[121] To this extent at least there are more similarities between the agreements and the modern agreements made in Australia and Canada in relation to aboriginal title than many commentators assume.

[122] See for example, Māori Commercial Aquaculture Claims Settlement Act 2004, section 6(2)(i): settlement of Māori claims to commercial aquaculture activities are "fully and finally settled, satisfied, and discharged" in relation to "rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise."

[123] See Boast who considers the fishing treaty settlements have their origins in the Treaty, noting the 1989 and 1992 settlements and their implementing enactments explicitly invoke the Treaty of Waitangi. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is described in its long title as an Act "to make better provision for the recognition of Māori fishing rights secured by the Treaty of Waitangi". See, Recitals, especially cls (a), (c), (d), (f), (j) and (k) and s 10 (a) and (b). The common law doctrine of Native or Aboriginal title is the other obvious candidate.

(a) The "Sealord deal"

181. The "Sealord deal" can find its original source in legal action based in part on an aboriginal right to fisheries. The Courts found that there was a case for such a proprietary interest[124] – that successive governments were wrong in assuming that the right was merely "recreational or ceremonial" – and granted an injunction to stop privatisation of fishing rights.[125] The declaratory judgment was influenced by the wealth of evidence produced by the Waitangi Tribunal in the *Muriwhenua Fishing Report* (1988) and the *Ngai Tahu Sea Fisheries Report* (1992).[126] The Government and Māori then negotiated an "interim settlement" in the form of quota and money assuming that the substantive issue of rights would be determined by the courts. And then latter agreed to finance the acquisition of shares in Sealord, which held a significant share of New Zealand's commercial fishing quota.[127] The package also included customary fishing regulations and further quota in exchange for Māori agreeing to stop litigation and give up legal claims. At no point have any of the substantive legal questions been definitively answered. As Boast notes, "with the injunctions in place, and the substantive proceedings looming, a deal had to be struck, and indeed was. The necessity for a deal and the re-emergence of statutory pragmatism was due to legal uncertainty."[128]

(b) Lake Beds

182. When Māori customary rights were recognised by the Native Land Court, the

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[124] See *New Zealand Māori Council v Attorney-General* (8 October 1987) unreported, High Court, Wellington, CP 553/87); *Ngai Tahu Māori Trust Board v Attorney-General*, (2 November 1987) unreported, High Court, Wellington, CP 559/87, 610/87, 614/87.

[125] *Ngai Tahu Māori Trust Board v Attorney-General* at 6. According to Boast, "Arguably Greig J's interim declarations against the Crown of 30 September and 2 November 1987 were the boldest and most decisive step in the entire sequence. All of the following negotiations were conducted under the shadow of these declarations, which effectively halted the allocation of quota until a settlement of some kind was worked out." Note that it is not clear whether the fishing right in question was sourced in either the treaty as recognised by statute in s88(2) of the Fisheries Act, or a common law aboriginal right to fish, although arguably the right can be recognised either as a statutory or common law right as was possible with rights to the foreshore following *Ngati Apa*. Richard Boast, Treaty rights or Aboriginal rights [1990] NZLJ 32 at 36, noting "a compelling argument can be made that s 88(2) refers to treaty rights."

[126] See also the Law Commission Preliminary Report. 1989.

[127] The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Act provided for the Crown to pay $150 million to fund Māori to purchase Sealord Products Ltd (in a 50-50 joint venture with Brierley Investments) which held 26 percent of the total fishing quota. Māori were also to receive 20 percent of all new species of fish brought under the QMS. Contrast *Mahuika v New Zealand* (2000) 7 HRNZ 629, Comm No 547/1993, CCPR/C/70/D/547/1993 (2000). The UN Human Rights Committee ruled that Sealord deal did not violate Article 27. The committee seemed to be influenced by the fact that the deal addressed both their commercial interests and "the cultural and religious significance of fishing for the Māori." The claim that the deal undermined their right to self-determination was not addressed on the disingenuous basis that it is a collective right and the Committee can only hear claims from individual petitioners not collectives. Broader tino rangatiratanga type claims were thus not before the Committee, only property and culture.

[128] Richard Boast, "Māori Fisheries 1986-1998: A Reflection" (1999) 30(1) Victoria University of Wellington Law Review 111 at x

Crown negotiated with Arawa tribes in 1922 to have the beds of the Rotorua Lakes vested in the Crown in exchange for an annuity.[129] A similar agreement was reached with Ngati Tuwharetoa in relation to Lake Taupo in 1926. The Te Arawa Lakes Settlement Act 2006 recognizes the significant relationship between Te Arawa and the fourteen lakes within their rohe. And in addition to a Crown apology for past wrongdoings, vests the ownership of the lakebeds in Te Arawa,[130] and establishes a co-management arrangement between Te Arawa and the local council.

(c) Pounamu

183. The Crown undertook in the Arahura purchases of 1860 to protect Ngai Tahu's right to pounamu. The Waitangi Tribunal found that pounamu is a taonga to Ngai Tahu and recommended that it be owned and controlled by Ngāi Tahu.[131] The Crown agreed. The Ngāi Tahu (Pounamu Vesting) Act 1997, (Ngāi Tahu) vested all pounamu in the takiwā (area of traditional tribal ownership) to Te Rūnanga o Ngāi Tahu.[132] By virtue of the Act, pounamu management is exempt from the legal framework that controls ownership and mining of other minerals in New Zealand.[133]

(d) Land

184. Most treaty settlements include the return of tribal land that is owned by the Crown. The Ngai Tahu agreement for example included high country pastoral property in Crown title and forest lands and the right to first refusal over some urban Crown lands including airports. Ngai Tahu also obtained title to precious sites and title to certain reserves. Treaty settlements may also include private land formerly owned by the Crown. The Treaty of Waitangi Act 1988 gave the Waitangi Tribunal powers in respect of Crown land transferred to SOEs. All such land when privatised would be subject to a memorial on the cert of title so that if the Waitangi Tribunal found that the land had been acquired in breach of the treaty it could order that the land be returned to the claimants (not merely

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[129] In *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 held that the applicants could not be prevented from applying to the Native Land Court for investigation of their title to the bed of Lake Rotorua unless it was shown that native title had been extinguished by Proclamation, cession of the owners, or Crown grant (at 345 per Stout CJ, at 348 per Williams J, at 351 per Edwards J, at 356 per Chapman J).

[130] Te Arawa Lakes Settlement Act 2006, s 23(1): the fee simple estate in each Te Arawa lakebed is vested in trust in the Trustees of the Te Arawa Lakes Trust.

[131] Waitangi Tribunal, 1991, p. 131.

[132] Section 3 of the Ngāi Tahu (Pounamu Vesting) Act 1997 provides that "All pounamu occurring in its natural condition in – (a) The Takiwā of Ngāi Tahu Whānui; and (b) Those parts of the territorial sea of New Zealand [...] that are adjacent to the Takiwā of Ngāi Tahu Whānui and the seabed and subsoil beneath those parts of the territorial sea – that, immediately before the commencement of this Act, is the property of the Crown, ceases, on the commencement of this Act, to be the property of the Crown and vests in and becomes the property of Ngāi Tahu Whānui."

[133] Section 5 of the Ngāi Tahu (Pounamu Vesting) Act 1997 prohibits the Minister of Energy from granting any further permit or mining privilege in respect of any pounamu to which s. 3 applies. However, section 4 protects existing mining privileges and the rights and obligations of holder of existing privileges.

recommend). Although this power has been used sparingly, -- too rarely for some (See Haronga) – it has been used by the Waitangi Tribunal.[134] [135] To assist with return of land the government adopted a mechanism for land-banking land for future treaty settlements. In addition, the Central North Island Forests Land Collective Settlement Act 2008 gives effect to the so-called Treelords deal which involves $195.7m of Crown forest land covering 176,000 hectares, plus about $223m in rentals that have accumulated on the land since 1989 and an annual income stream of $13m.[136]

(e) Māori Commercial Aquaculture

185. The Māori Commercial Aquaculture Claims Settlement Act provides for the full and final settlement of contemporary Māori claims to commercial aquaculture space in the coastal marine area. The Settlement Act gives iwi rights to 20% of the new aquaculture space created from 1 January 2005. The treaty settlement has its genesis in the notion of Māori interests in the coastal marine areas as recognised by the Waitangi Tribunal in the *Ahu Moana: The Aquaculture and Marine Farming Report* (2002, Wai 953)[137] and the Sealord deal and the *Ngati Apa* decision.

(f) minerals (excepting Crown-owned in foreshore and seabed).

186. The Marine and Coastal Area (Takutai Moana) Act 2011 grants the holders of a customary marine title to ownership of minerals in the reserve with the exception of crown-owned minerals such as petroleum and gold.

C Government rejection of ownership interests in natural resources

187. However, government has resisted many Māori legal claims to "ownership" of resources – especially those of "national interest" that are of high value and the grant of which could potentially interfere with public rights of access, navigation, fishing and recreational use. The Sealord deal was politically palatable because it would not directly impact on non-Māori rights and was not a significant drain on the public purse. In other words, Crown policy is not based on the question of whether there is an original and enduring tribal interest in the natural resource but political considerations resulting in inconsistency in state recognition of natural resources.

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[134] For example, the memorialised property in private commercial use in the Turangi Settlement with Ngati Turangitikua.

[135] Most recently the Supreme Court has found that the power should have been used in relation to Mangatū forest see, Haronga v Waitangi Tribunal and Ors SC 54/2010 [19 May 2011], The Attorney-General v Alan Paerekura Torohina Haronga [2016] NZCA 626 [19 December 2016]

[136] See also, the Crown Forests Agreement entered into on 20 July 1989 between representatives of Māori and the Crown and the Crown Forest Assets Act 1989.

[137] Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (2002, Wai 953).

(a) conservation estate

188. The general Crown principle is that whenua within the New Zealand's conservation estate is not able to be returned to iwi. Conservation groups have resisted the return of conservation lands to iwi in treaty settlements given concerns over protection of endangered species and access to walkways. A significant exception is the Te Urewera Act 2014 that has removed the national park status from Te Urewera.[138]

(b) petroleum and other precious minerals.

189. Successive governments have refused to engage with Māori on petroleum ownership and other precious minerals which as noted are declared under the Crown Minerals Act 1991 to be Crown owned but in the case of petroleum was nationalised under the Petroleum Act 1937. The matter came to a head following a Waitangi Tribunal claim by Taranaki hapu to petroleum. Taranaki is the only region in the country where petroleum is extracted on a regular basis. It is also a region where many iwi lost land due to settler-government confiscation legislation following the land wars. The Waitangi Tribunal agreed with the argument advanced by the hapu that the Crown had violated the principles of the Treaty by taking the land (and thus the minerals) and through the nationalisation of the lands without compensation in those cases where areas of land had been retained by Māori.[139] While the Māori interest may have been lost, the Waitangi Tribunal ruled that the hapu had a "Treaty interest"[140] in petroleum which entitled Māori to a remedy for its wrongful loss.[141] The Government refused to accept the Waitangi Tribunal recommendations stating that the nationalisation of petroleum was, and continues to be, in the public interest. In a subsequent Petroleum Management Report, the Waitangi Tribunal inquired into Māori participation in the regulation of petroleum and called for reforms that would facilitate the more effective engagement with regulators including more robust forms of iwi management plans,[142] and the creation of a fund based on royalties to enhance their capacity to participate in RMA and CMA processes. The Waitangi Tribunal also advocated that there should be increased application of

[138] Jacinta Ruru "Tuhoe – Crown settlement – Te Urewera Act 2014" (2014 October) *Maori Law Review*.
[139] *Waitangi Tribunal The Petroleum Report* (Wai 796, 2003).
[140] *Waitangi Tribunal The Petroleum Report* (Wai 796, 2003).
[141] *Waitangi Tribunal The Petroleum Report* (Wai 796, 2003). See also, Craig Coxhead, 'Māori Title to Petroleum: the Waitangi Tribunal Petroleum Report' (2004) 7 *Yearbook of New Zealand Jurisprudence*, 66, at 71-72.
[142] See Waitangi Tribunal *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 280-283 (Critiquing the RMA and noting the "lynchpin" of a Treaty-compliant RMA system would be enhanced iwi management plans, called iwi resource management plans, at 281). The Government has introduced a proposal to amend the RMA to promote greater efficiency. Included in the suite of changes is the notion of 'iwi participation arrangements' (IPA), with the idea being that iwi be more proactively involved at the front end of the planning and policy-making stage instead of reacting to plans and consent applications.

user pays principles by the private sector with companies funding for example cultural impact assessments.[143]

(c) foreshore and seabed

190. The *Ngati Apa* (2003) decision of the Court of Appeal affirmed the orthodox postion under the doctrine of aboriginal rights that the Crown acquired *imperuim* on assertion of sovereignty but this was subject to the pre-existing Indigenous property. Applying this principle to the coastal marine space (the land between high-tide and the end of the territorial sea), the Court of Appeal found that it was not clear that legislation had extinguished any customary title thus clearing the way for Māori to seek customary rights under both the Māori Land Court's and the High Court's jurisdiction. The Māori Land Court jurisdiction was the most controversial because it seemed to allow for the granting of freehold titles. Politicians exploited the uncertainty created by the decision raising the spectre of tribes excluding non-Māori from the coast.[144] Instead, of allowing Māori to seek recognition of aboriginal rights in the courts as has been the case in Australia and Canada, the Government enacted legislation – Marine and Coastal Area (Takutai Moana) Act 2011 – that declares that the area cannot be owned by anyone.[145] At the same time, the Act guarantees the continuation of free legal public access in, on or over the common marine and coastal area. As noted in the Government's guide, "anyone can continue to walk, swim, sail, kayak, fish or have a picnic in the common marine and coastal area." The Act also preserves and protects existing recreational fishing rights, navigation rights and all other existing uses.

191. The Act allows Māori to apply to the High Court for recognition of: (i) "protected customary rights" (if exercised by Māori since 1840 and continue to do so in accordance with tikanga); and (ii) "customary marine title" (CMT) (if Māori held the area in accordance with tikanga and exclusively occupied from 1840 without substantial interruption)[146] in the coastal marine space subject to the claimants meeting the evidential requirements. The former results in limited rights to engage in customary activities such as launching waka, and gathering hangi stones while the latter results in a "title" established over the area claimed and a set of procedural rights (eg permission rights under the RMA) and specified substantive rights (eg, to subsurface minerals excepting precious minerals). This title does not confer the right to ownership as was hoped for by iwi following *Ngati Apa*, and indeed it is not premised on the idea of property but instead is said to recognise "the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and

[143] Waitangi Tribunal, Report on the Management of Petroleum (2011, WAI 796) at 182.
[144] Don Brash "Nationhood" An address by Leader of the National Partyto the Orewa Rotary Club on 27 January 2004.
[145] Section 11.
[146] Section 58.

seabed and on the principle of manaakitanga."[147] The Act is thus underpinned by the right to culture concepts contained in the RMA. The permission rights include the right to say no to certain activities in the CMT (including withholding permission for a new activity that is carried out under a resource consent[148] or specified conservation activities such as declaring/extending marine reserves).[149] Although in the latter case there is an exception for any project the Crown considers "nationally significant." The Act is clear that the CMT does not allow the land to be sold or for the public to be excluded. Free public access, fishing and other recreational activities are allowed to continue in customary title areas. Although it is possible to obtain recognition of a wāhi tapu in the CMT, which allows prohibitions or restrictions on access.[150]

192. The primary object of the Act is to make clear that no-one, including Māori may possess ownership rights in the coastal marine space and while the customary marine title does result in some potentially significant rights (short of ownership of the land), including the permission rights, to obtain these rights, tribes must prove that the area claimed has been continuously occupied and used, without substantial interruption, from 1840 to the date of legislation's enactment, which for many tribes will be a difficult test to meet, especially those tribes that have land confiscated from them.[151]

(d) water

193. Māori have made claims to "ownership" of freshwater bodies (lakes and rivers) but these have been rejected by the Government on the basis that water is not capable of ownership under the common law.[152] According to government, "New Zealand has a multi-dimensional society with cultural, recreational and commercial claims on the water resource, and the task of government ultimately is to balance and reconcile those in some way that recognises the long-term needs of new Zealanders." The Crown also argues – drawing on Waitangi Tribunal's report on the 'Indigenous flora and fauna and Māori cultural and intellectual

[147] Preamble.
[148] Sections 66 to 70;
[149] Sections 71 to 75;
[150] The wāhi tapu may be recognised if there is evidence to establish the connection of the group with the wāhi tapu and access prohibitions or restrictions can be put in place if the evidence establishes this is needed to protect the wāhi tapu.
[151] Mallon J in the recent and first High Court decision of *Re Tipene* [2016] NZHC 3199 under the Takutai Moana Act 2011, had no doubt that the applicant for a CMT had established exclusive and continuous occupation of the coastal area claim off the Titi islands. There was ample evidence of extensive use given the use of the islands for gathering mutton birds and exclusively so in large part due to the remoteness of the area, which meant Mallon J did not need to inquire deeply into the meaning of these concepts, although he clearly drew on the *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 decision of the Canadian Supreme Court in noting that the Act needed to be "applied with an appreciation for the context in which the particular claim arises" and "[r]emoteness, the environment and changes in technology are all relevant when considering notions of occupation, use and continuity." This was important in the context of the case given there were seasons when the titi islands were not occupied and used yet this did not raise any issue of lack of continuous connection. At [149].
[152] See Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Claim*, above n 1.

property claim' (Wai 262) – that english-style ownership is not in fact the best english cultural equivalent for Māori rights and that instead a "kaitiaki model" is more appropriate, whether full kaitiaki control, partnership (co-governance or co-management), or a lesser interest (kaitiaki influence through consultation). But as noted above, the claimants argue in response that this model is likely to be reduced to kaitiaki influence through consultation (with rangatiratanga and mana then forgotten in favour of a narrow interpretation of kaitiakitanga).

D Conclusion

194. In summary there are a range of agreements made that relate to an enduring interest in natural resources in New Zealand. To this extent then, there are parallels with native title and aboriginal rights declarations of proprietary rights. But in many cases the Crown will not recognize proprietary rights in natural resources. What can be gleaned from this approach to natural resources?

195. First, it is clear that Government prefers to negotiate agreements to address Māori claims to natural resources. For water, the Government asserts that the process of rights definition is best left to collaboration between iwi and the Crown, which, it says, is already occurring with the Iwi Leaders Group in the Fresh Start for Fresh Water program. It is a 'complex exploration still in dialogue'. The challenge with this approach for Māori as noted is that the process is controlled by the executive branch of government with little means of legal review. This can still result in rights of substance but it seems that Māori must seek leverage in negotiations by obtaining some *prima facie* legal right to the natural resource.

196. Secondly, the proprietary rights recognised do not impact significantly on non-Indigenous peoples' rights or the Crown – the rights granted to Māori do not overtly deprive others of rights. In contrast lakes and rivers and the coastal marine area, and the conservation estate are politically challenging because of issues of public access, navigation and public fishing rights. New Zealanders are anxious about the prominent role of treaty settlements and their potential to entrench ethnic divisions, undermine civil unity and create special rights.[153]

197. Thirdly, the proprietary rights are based on the idea of prior Indigenous ownership or traditional use and some type of enduring interest. The Sealord deal and the aquaculture agreement was supported by ample evidence of an extensive Māori fishery in New Zealand at 1840 gathered by the Waitangi Tribunal in two major claims involving fisheries; pounamu was based on its well-recorded significance to Ngai Tahu; the return of Crown land is clearly based on tribal occupation of the land – if not physical then a close connection and the

[153] Kenneth Minogue, *Treaty of Waitangi Morality and Reality* (New Zealand Business Roundtable, Wellington, N.Z, 1998); and David Round, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998). Don Brash "Nationhood" An address by Leader of the National Party to the Orewa Rotary Club on 27 January 2004.

significance of land to culture and identity; aquaculture is based on evidence of a close relationship between hapu and the coast and freshwater. Fisheries and land are expressly referred to in article 2 of the Treaty of Waitangi. Many see the rational behind such claims compared say to claims to petroleum and other minerals and the radio spectrum where there is little evidence of historical and contemporary use. With water of course, as we have seen there is a rich repository of evidence of use and connection with water resources. However, this requirement of continuity of traditional use – sharply applied in the case of Australian native title law[154] – has to be viewed with caution given: (i) the effects of European settlement; and (ii) its close connection with the right to culture – do Māori for example have to show traditional use of petroleum, or instead show that the land containing the natural resource was subject to their tino rangatiratanga?[155]

198. Fourthly, proprietary rights recognition to date are based on natural resources that may be of high value but will not break the fiscal envelop bank. The high economic value of proprietary rights in water, petroleum etc raises the question of the relativity of treaty settlements.

199. To bring it all together, there seems no basis in principle for denying an Indigenous right to water in New Zealand (given substantial evidence of its continuous use by Māori), other than the political risks of recognition and the value of the natural resources to the state. Government as was the case with *Ngati Apa* and the foreshore and seabed are concerned about public opposition to Indigenous rights recognition.

200. One means for the government to avoid the ownership question over natural resources of national interest is to establish co-management agreements with iwi. Government has negotiated co-management deals in Treaty settlements with iwi that demonstrate a connection with a river. These agreements do not address the Indigenous peoples' right to property – in fact they expressly defer consideration of proprietary interests.[156] The co-management agreements are largely directed at promoting the right to culture. The Government concedes that it may recognise the right of "full kaitiaki control". However, the claimants in the Stage 1 Report countered this was not likely – in most the Crown would likely give effect to the types of rights contained in the current co-management agreements.

III Political authority and natural resources

201. So far we have discussed the notion of proprietary rights in natural resources in New Zealand. As Part A makes clear the Māori right to natural resources

[154] See *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 194 A.L.R. 538.
[155] See for example, *Suriname v Saramaka Peoples* accepting that the tribal community in question had a right of property to forests but not gold in their tradiitonal lands because there was no evidence of its traditional use.
[156] See also the Tuhoe deal where the Crown rejected ownership of conservation land and offered instead to vest the park with legal personality to be co-chaired by Māori and the Crown: Te Urewera Act 2014.

cannot be reduced to ownership only and does not fall on all fours with the common law conception of property. As noted tino rangatiratanga subsumes the ideas underlying proprietary rights in that the Māori concept envelopes both a political conception of authority as well as rights attached to resources, including rights to exclusive possession and use. In short, tino rangatiratanga encompass both political authority and proprietary rights. In turning to the recognition of natural resources in the last four decades of Indigenous rights recognition, it is evident that the Crown has accepted that Māori can be accorded rights of ownership in natural resources and that this is based on the notion of an enduring interest to the resource in question. This practice is supported by the common law doctrine of aboriginal rights. In other cases, however, politics prevents the recognition of rights of ownership – for example in the case of petroleum and foreshore and seabed. This seems to be the rationale behind the refusal of the Crown to recognize Māori proprietary rights in water. However, as noted the matter does not end with property, because for Māori another significant dimension is political authority (usually expressed as tino rangatiratanga) and the Crown here is consistent in refusing to recognize such rights. Instead the regulatory code relating to natural resources and the treaty settlements reached to date give effect to the right to culture model by seeking to enhance stewardship, effective participation in decision making and a cultural and spiritual connection to a natural resources. These rights are of course significant to iwi. However, as iwi have consistently asserted, their rights and interests in their rohe cannot be reduced to the right to culture. Efforts to address the many criticisms directed at the RMA, in the form of the legistative reforms introduced in 2015,[157] appear again to pursue this objective of promoting the tribal right to culture. Recognition of the right to property is significant. But ownership rights only take iwi so far if they lack governmental authority over the natural resource.[158]

A The RMA and Māori interests – right to culture model

202. Compared to many other countries, New Zealand has a robust regulatory process for environmental regulation of natural resources – including water bodies – and this includes important protections for Māori interests. The principal legislation for regulating the use of New Zealand's physical environment is the RMA[159] which refers to a set of Māori interests. These Māori interests reflect the right to culture model in that they are not aimed at granting political authority to Māori but rather focus on stewardship, the "relationship" of Māori with their environment, and effective participation in decision-making that may impact on them.[160] There is no reference in the RMA to tino rangatiratanga over natural

[157] Resource Management Legislation Bill 2015.
[158] Stephanie Milroy, *The Māori Fishing Settlement And The Loss Of Rangatiratanga*, (2000) 8 Waikato L. Rev. 63.
[159] There is also legislation governing the exclusive economic zone (EEZ).
[160] Resource Management Act 1991, s 6, 7 and 8.

resources in their rohe or mana whenua and mana moana. Instead, all decision makers under the RMA must "take into account the principles of the Treaty of Waitangi,"[161] and have "particular regard" to "kaitiakitanga" [guardianship by the tangata whenua],[162] and "recognise and provide for … the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], and other taonga [treasures]."[163] As a result of these provisions, when a local council draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua's customary law as it relates to kaitiakitanga for example. However, these interests do not appear to be advancing the interests of Māori. As the Waitangi Tribunal has said many times, iwi and hapu feel sidelined by the RMA consent process.[164] Part of the challenge lies with the weak statutory directions to "take into account" the principles of the Treaty and the fact that the Māori interests are one of several other competing interests including the overall commitment to sustainable development. Additionally, section 36A of the RMA explicitly states that neither an applicant nor a local authority have a duty to consult any person (including Māori).

203. The RMA was amended in 2005 to strengthen the role for Māori by creating an obligation to consult with tangata whenua in the preparation of a proposed policy statement or plan if they may be affected by the policy or plan. A further amendment provided for public authorities and iwi to enter into "joint management agreements" under which decisions taken have the legal effect of a decision of the local authority.[165] But these have only been used on a few occasions. In addition, local authorities now must have regard to iwi management plans in the preparation of their own plans and policy statements. Regional policy statements must set out the resource management issues of significance to the region's iwi authorities. There is also provision under the Act for local authorities to transfer functions to iwi authorities after following a requirement of special consultation under the Local Government Act 2002.

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[161] Resource Management Act 1991, s 8.

[162] Section 7.

[163] Section 6.

[164] See Waitangi Tribunal *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) [*Ko Aotearoa Tenei* Report]. See also, Ruru, Jacinta Indigenous restitution in settling water claims: the developing cultural and commercial redress opportunities in Aotearoa, New Zealand Pacific Rim Law & Policy Journal, March, 2013, Vol.22(2), p.311(42) (noting in 2013 that "Since the enactment of the RMA in 1991, there have been about twenty instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water.").

[165] See section 2 and 36B of the Resource Management Act 1991. See for example the agreement between Taupo District Council and Ngati Tuwharetoa; at http://www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/Joint-Management-Agreement.pdf. Some iwi have entered into joint management agreements. Ngāti Porou recently entered into such an agreement with the Gisborne District Council in relation to the Waiapu River. The purpose of the JMA is "to provide a mechanism for Ngā Hapū o Ngāti Porou to share in RMA decision-making … within the Waiapu Catchment". The "broader aspiration of Ngāti Porou hapū is to move to a transfer of powers under the Resource Management Act 1991 (RMA), within five years." See *www.gdc.govt.nz/assets/Uploads/15-346-X1-Appendix-reduced.pdf*.

204. Despite the introduction of enhanced consultation requirements and provision for the consideration of iwi management plans, the current RMA regime has not empowered iwi. A major issue has been the weak impact of iwi management plans. Regional or district plans are not required to be consistent with iwi management plans. There is no requirement to consider iwi management plans when determining whether or not to grant resource consents. The RMA is also silent as to the purpose and content of iwi management plans. Consequently, iwi management plans tend to be uneven in style and content. Their quality depends on the extent to which iwi have the resources "to get legal and technical advice, consult on and develop the plan, and engage in RMA processes."[166] The Waitangi Tribunal has called upon the Ministry for the Environment to "step up with funding and expertise, to ensure that [Māori] are not prevented from exercising their proper role by a lack of resources or technical skills."[167] Māori communities struggle to keep up with the paperwork associated with resource consent applications and planning.[168]

205. As a result of these shortcomings, in December 2015, the Government introduced a proposal to amend the RMA and included in the suite of changes is the notion of 'iwi participation arrangements' (IPAs).[169] The IPAs are intended to strengthen the current iwi management plans. The Bill aims to provide more meaningful and effective iwi participation in resource management processes by placing a statutory obligation on local authorities "to invite iwi to form an iwi participation arrangement."[170] The proposal provides a statutory process for negotiation between iwi and local authority as well as a mechanism for review and monitoring of that relationship. It is hoped that by introducing a compulsory requirement to invite iwi to establish IPAs, the Bill will improve consistency in iwi engagement in plans development.[171] Since the Resource Management Legislation Bill was intoduced to Parliament, an alternative to IPAs has been proposed in relation to the management of freshwater resources.[172] The Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) has proposed a new mechanism, known as Mana Whakahono a Rohe (MWaR), which shares many similarities with IPAs.[173] However, unlike

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[166] *Ko Aotearoa Tēnei*, above n 162 at 254.
[167] *Ko Aotearoa Tēnei*, above n 162 at 283.
[168] See, Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 94 (noting "how time consuming - and protracted - the processes can be. Indeed, they show that for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast of petroleum activities so that taonga can be protected is relentless. … All the claimants we heard from were volunteers for their hapu. The sheer size of the files that they had assembled about particular projects to which they had objected provided some indication of the extent of the work required of them, which was done in their own time").
[169] Resource Management Legislation Bill 2015.
[170] At clause 58L.
[171] Ministry for the Environment, Department Disclosure Statement at 4: at http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2015-101.pdf
[172] See Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) at 29. http://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/next-steps-for-freshwater.pdf
[173] At 30.

the IPA process, the MWaR process is iwi-initiated. Also, the scope of MWaR goes further than participation in plan-making processes to include "consenting, appointment of committees, monitoring and enforcement, bylaws and regulations and other council statutory responsibilities."[174] It is therefore possible under the MWaR programme for iwi to negotiate agreements that are akin to those negotiated by iwi in treaty settlements such as the co-management agreements contained in the Waikato-Tainui and Whanganui River treaty settlements.

B Co-governance agreements over water in lieu of ownership interests – right to culture model

206. Despite the government's rejection of Māori ownership of freshwater bodies, it has negotiated alternatives to ownership in the form of co-governance agreements. Most of the agreements have been negotiated as tribal-specific treaty settlements but also tribal-specific joint committee agreements under the RMA. In relation to the largest river in the North Island, the Waikato river, for example, Waikato-Tainui tribes negotiated an agreement given effect in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. This establishes the Waikato River Authority (the Authority), which is made up of roughly equal numbers of tribal and government representatives.[175] The Authority is responsible for establishing the "vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations."[176] Following the confiscation of Waikato Tainui tribal lands in the late 1800s, the Crown assumed control of the river and the river suffered from pollution from farm run-off, coal mining and sewage.[177] This "clean up" is to be assisted by a series of agreements with the local council that seek to better integrate Waikato Tainui tribes into the RMA planning processes, including the preparation of an 'integrated river management plan' and an 'environmental plan' that local councils must consider when preparing planning documents.

207. More recently the government has reached a novel co-management agreement with affected tribes which vests the Whanganui River, Te Awa Tupua, with legal personality and establishes a trust, Te Pou Tupua, constituted equally of tribal and government members to co-manage the river.[178] Recognition of the independent autonomy of the river roughly accords with the customary view that

[174] At 29.

[175] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 22, and Schedule 6 Waikato River Authority.

[176] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, 22 Establishment and purpose of Authority

[177] Linda Te Aho, "Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa NZ – the Waikato River Settlement" (2010) 20 The Journal of Water Law 285.

[178] Te Awa Tupua (Whanganui River Claims Settlement) Bill (section 14 Te Awa Tupua declared to be legal person). The Bill gives effect to the Whanganui River Deed of Settlement signed on 5 August 2014, which settles the historical claims of Whanganui Iwi as they relate to the Whanganui River.

rivers possess their own mauri (life force). Like the Waikato agreement, the focus is on the future health and well-being of the river and its people. And measures are provided to facilitate tribal engagement in the RMA planning and consent making processes associated with the river.[179] But by vesting the river with legal personality, the Government has effectively side-stepped the issue of ownership.[180] The tribes thus cannot gain any benefit from use of the resource.

208. And while Whanganui River and Waikato River tribes have a greater say in RMA decisions, they cannot, for example, stop the issuing of natural resources consents over the river to extract, or divert water or build dams on them.[181] This outcome is a far cry from the recommendation made by the Waitangi Tribunal that the river in its entirely be vested in the tribes which would mean that any resource consent application would require the tribe's approval.

209. These agreements promote tribal enaggement in RMA regulatory processes. Yet they remain directed at the right to culture in so far as they are limited to effective participation and the overall objective of restoring and protecting the health and wellbeing of the [river] for future generations.[182] Tribes are not granted the right to give their free, prior and informed consent in relation to the use of the river for hydro-electric projects for example.[183] The Whanganui River and Waikato River tribes cannot, for example, stop the issuing of natural resources consents over the river to extract, or divert water or build dams on them. Nor do they gain any benefit from use of the resource. And the issue of water ownership over the river remains unresolved.

210. The Tribunal has been heavily critical of the use of treaty settlements to stop gaps in the RMA. As the Waitangi Tribunal observed:[184] "It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management law Reform project (now two decades ago) promised would be delivered anyway."

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[179] Sections 8 and 63.

[180] See also the Tuhoe deal where the crown rejected ownership of conservation land and offered instead to vest the park with legal personality to be co-chaired by Māori and the Crown: Urewera Act 2014. See also the Takutai Moana Act 2011, which simply declares that no one owns the foreshore and seabed.

[181] However, the consent of Te Pou Tupua may be required in relation to the use of the bed of the Whanganui River; see, section 41.

[182] Linda Te Aho, The 'False Generosity' of Treaty Settlements – Innovation and Contortion in Erueti (eg) "The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa" (Victoria University Press, 2017). Te Aho also notes that the issue of ownership is expressly deferred by the treaty settlement, see Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, sections 64 and 90.

[183] The requirement in the Declaration that states obtained the FPIC of Indigenous peoples before engaging in any activity that could significantly affect them is pertinent here.

[184] *Ko Aotearoa Tēnei*, above n 162 at 279.

C Other co-governance agreements over natural resources

211. There are of course other co-management agreements including the customary fisheries regulations which significantly allow for iwi to establish bylaws in relation to the taking of kaimoana.

(a) customary fisheries regulations

212. Tangata Whenua may establish Mataitai reserves -- being areas where Tangata Whenua manage all non-commercial fishing by making bylaws -- following consultation with the local community – ie people who own land in the proximity of the proposed mataitai reserve.[185] Reserves can only be applied for over traditional fishing grounds and must be areas of special significance to the Tangata Whenua. Tangata Whenua may establish bylaws for the reserves which may restrict or prohibit the taking of a particular species within a mataitai reserve. However, the process of establishing reserves and the bylaws themselves are heavily scrutinised by the Minister of Fisheries.

D Conclusion

213. The emphasis in the RMA is on a right to culture model and not political authority or proprietary rights to natural resources. The co-management agreements with Waikato-Tainui and Whanganui further that same object in that there is no right to prevent a resource consent being issued over the Waikato and Whanganui rivers. Hence the reason for claims to proprietary rights in water bodies by tribes. The efforts to introduce IPAs and MWar go some way towards promoting iwi effective participation in RMA processes but again like the co-management agreements in the treaty settlements, the emphasis is on consultation, and effective participation in decision-making under the RMA.

IV Human Rights, Indigenous Rights and Water,

214. This section discusses human rights and water, drawing on the Declaration on the Rights of Indigenous Peoples and UN Guiding Principles on Business and Human rights but also the jurisprudence of the Inter-American Human rights Court and UN human rights treaty bodies. The focus in these international standards is on property to natural resources but also Indigenous peoples' political authority over natural resources.

[185] There are two sets of regulations in place, one for the North Island and one for the South Island, although they are similar in most respects. The regulations in the North Island are called the Kaimoana Customary Fishing Regulations 199861 and cover non-commercial customary fishing, which means fishing to provide food for hui (meetings) and tangi (funerals), and which does not involve the exchange of money or other form of payment. See also, the Taiapure provisions are contained within sections 174-185 of the Fisheries Act 1996

A What is the Declaration?

215. The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)[186] has been heralded as a "landmark" achievement for Indigenous peoples.[187] With the Declaration's adoption by the UN General Assembly in 2007 by 143 states, international Indigenous rights has become a significant field in international law. Although other international treaties, standards and policies on Indigenous rights exist, notably International Labour Organization Convention No 169,[188] no other international instrument provides such robust protections for groups within states. This includes Article 3 of the Declaration which provides: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[189] This restates the language in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR), but with reference to *Indigenous* peoples. Despite the continuing controversy over the meaning of self-determination and whether it can apply to "peoples" outside of the colonial context, Indigenous peoples succeeded in having it included in the Declaration, albeit conditioned by states' rights to territorial integrity.[190] Not only that, the Declaration also includes the right to self-government;[191] historical redress;[192] the right to free, prior and informed consent (FPIC);[193] and the right to the recognition, observance and enforcement of treaties.[194] We describe these rights as the self-determination framework. In addition to these breakthrough rights, there are many others that apply classic human rights to the circumstances of Indigenous peoples including the right to religion,[195] property,[196] and the right to practise and revitalize their cultural traditions and customs.[197] For example the human right to property – which is normally directed at the right of individual ownership – is adapted to provide:

[186] *United Nations Declaration on the Rights of Indigenous Peoples*, above n 42.
[187] Claire Charters "The road to the adoption of the Declaration on the Rights of Indigenous Peoples" (2007) 4 N Z Yearb Int Law 121; Claire Charters and Rodolfo Stavenhagen *Making the Declaration work* (IWGIA, 2009).
[188] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991). See also, Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No. 107].
[189] The Declaration, above n 42, art 3.
[190] Art 46(3).
[191] Art 4.
[192] At art 5.
[193] At art 10, 19 and 32.
[194] At art 31.
[195] At art 12.
[196] At art 26.
[197] At art 11.

Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[198]

216. But what relevance does the Declaration have to a country like Aotearoa New Zealand – a long-established, liberal democracy with many checks and balances on governmental power and a relatively robust set of rights aimed at promoting and respecting the rights of Māori? In particular New Zealand has instigated institutions in the form of the Waitangi Tribunal[199] and Office of Treaty Settlements[200] to investigate and negotiate the settlement of historical injustices.[201] New Zealand has a Bill of Rights Act,[202] constitutional rights and conventions that act as safeguards for rights enjoyed by Māori,[203] including statutory protections of Māori interests in legislation affecting them,[204] and common law rights.[205] One challenge of course is that even states with comprehensive rights protections can fail to fully implement them or argue that the rights have been fulfilled when the case is not clear. States may prefer majority interests or elites over marginalised groups.[206] As evidenced by the Government's response to *Ngati Apa* for example. Moreover, there may be significant gaps in domestic Indigenous rights architecture. The Declaration offers supranational standards to guide states and Indigenous peoples in their quest to establish fair terms of co-existence. And these standards can also be used by international bodies to evaluate and monitor New Zealand compliance with international law Indigenous rights.

B The Declaration and the Self-determination framework

217. The Declaration addresses claims to property as noted below. But also significantly, the Declaration addresses the public law or political dimension of Indigenous Peoples' interests in natural resources including water. The Declaration for example endorses the right to self-determination, self-Government and FPIC. These rights are dismissed by the Government as non-binding "aspirations". As a matter of international law UN General Assembly declarations are not binding. However, the UN Special Rapporteur on the rights

[198] Art 26.
[199] See Treaty of Waitangi Act 1975.
[200] Office of Treaty Settlements *Ka Tika A Muri, Ka Tika a Mua: Healing the Past and Building a Future* (2nd ed, Office of Treaty Settlements, Wellington, 2015).
[201] Nicola R Wheen and others *Treaty of Waitangi settlements* (Bridget Williams Books with the New Zealand Law Foundation, Wellington, NZ, Wellington, New Zealand, 2012).
[202] New Zealand Bill of Rights Act 1990.
[203] Constitution Act 1986.
[204] See for example Resource Management Act 1991, sections 6,7 and 9.
[205] See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (Court of Appeal); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
[206] A useful example, and one that encouraged many Indigenous advocates in Aotearoa New Zealand to pay greater attention to international human rights, was the government response to *Attorney-General v Ngati Apa* decision (above n 24) that indicated that Māori might possess exclusive property in New Zealand's coastal waters. See Claire Charters and Andrew Erueti *Māori Property Rights and the Foreshore and Seabed* (Victoria University Press, 2007).

of Indigenous peoples and pre-eminent scholar on the rights of Indigenous peoples under international law, James Anaya, states, "to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight."[207] As noted by the UN Office of Legal Affairs, "in United Nations practice, a "declaration" is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."[208] Many of the rights expressed in the Declaration – including the right to self-determination -- reflect rights and freedoms included in widely ratified human rights treaties such as, for example, rights to non-discrimination, culture, property and the right to self-determination as set out in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. New Zealand has ratified both conventions. Indeed several rights in the Declaration are considered to have the status of customary international law, according to some commentators.[209] As argued by Claire Charters, expert on international law of Indigenous rights, the Declaration has acquired significant legitimacy as a result of the process by which it was drafted and then adopted.[210] Charters points to the fact that the process followed in its development and adoption was fair and robust. For example, the substance of the Declaration was debated for over two decades and included states, Indigenous peoples, international institutions, non-governmental organisations and academics amongst others. She also argues that the substance of the Declaration is equally legitimate, responding, in part, to historical discrimination against Indigenous peoples under colonial regimes and international law. Macklem for example when reviewing the development of international Indigenous rights argues that they serve the purpose of remedying international law's denial of their right as peoples to sovereignty. "Indigenous peoples in international law", Macklem argues thus are:[211]

> … communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization. They are located in States whose claims of sovereign power possess legal validity because of international law's refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself.

218. Self-determination is the linchpin but other related rights in the self-determination framework including the righty to free, prior and informed consent. The right to FPIC is cited several times in the Declaration. Article 19

[207] Report of the UN Special Rapporteur on the rights of Indigenous peoples, James Anaya, to the UN General Assembly (2013) A/68/317.
[208] Economic and Social Council *Report of the Commission on Human Rights* (18th Sess, March-April 1962) UN Doc E/3616/Rev 1, para 105.
[209] Siegfried Weissner, "Indigenous Sovereignty: A Reassessment in the Light of the UN Declaration on the Rights of Indigenous peoples" (2008) 41 Vanderbilt Journal of Transnational Law 1141.
[210] Claire Charters "The Legitimacy of Indigenous Peoples' Norms under International Law", PhD thesis, January 2011.
[211] Patrick Macklem *The Sovereignty of Human Rights* (Oxford University Press, New York, 2015) at 135.

specifically addresses the requirement to obtain Indigenous peoples' FPIC before adopting any measure etc:[212]

> Article 19
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them

219. States were generally opposed to the inclusion of FPIC in the Declaration, arguing that it provided Indigenous peoples with a right of veto.[213] However, a body of policy, scholarship and jurisprudence has provided greater clarity about the content of the right to FPIC. In particular, the Inter-American Court of Human Rights has given perhaps the most comprehensive authoritative guidance on the content of FPIC. In the *Case of the Saramaka People v. Suriname* (2007),[214] the Court held that Indigenous peoples have the right to say "no" to activities that have potential to significantly impact them and their territories.[215] The right to FPIC has been affirmed in several UN human rights treaty body decisions, including the UN Human Rights Committee,[216] the UN Committee on the Elimination of Racial Discrimination,[217] and the African Commission on Human and Peoples' Rights.[218]

220. The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has stressed the need to focus not only on consent, but on establishing a process that will result in Indigenous peoples' full engagement with a proposed development. The key is ensuring that Indigenous peoples are involved early in the process including in the preparation of regulatory frameworks on relevant areas such as the environment, and natural resource allocation and strategic planning for resource extraction.[219]

221. The right to FPIC certainly influenced the Waitangi Tribunal in its Whaia te Mana Motuhake Report. But the Waitangi Tribunal has also being developing

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[212] The United Nations General Assembly. *Declaration on the Rights of Indigenous People*, 2007, Article 32.

[213] Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations, 13 September 2007; http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php (the Declaration implies that Indigenous peoples have a right of veto over a democratic legislature and national resource management, in particular Articles 19 and 32(2)).

[214] *Saramaka People v. Suriname*, Judgment of the Inter-American Court of Human Rights, 28 November 2007. Ser c No. 172, at para. 129-134.

[215] The Court ruled that, regarding large-scale development or investment projects that would have a *major impact* within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. *Saramaka People v. Suriname*, above n 22.

[216] See *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009.

[217] General Recommendation No. 23: Indigenous Peoples: 18/08/97.

[218] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/03, Judgment of November 2009, see http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

[219] James Anaya, Extractive industries and Indigenous peoples, Report of the Special Rapporteur on the rights of Indigenous peoples,Report to the Human Rights Council A/HRC/24/41, 2013, para 49-51.

its own conception based on treaty principles of partnership. The Wai 262 Waitangi Tribunal noted for example, a spectrum of possibilities in relation to Crown engagement with Māori from consultation to "full-kaitiaki control" which would vary depending on the degree of impact of a proposal on Māori. This notion thus closely mirrors the ideas of FPIC being developed by international human rights bodies.

C The indigenous right to property

222. The Declaration advances rights to property (land and natural resources) and culture.

> Article 26
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.
>
> Article 27
> States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, *including those which were traditionally owned or otherwise occupied or used*. Indigenous peoples shall have the right to participate in this process.

223. The Declaration is not the first international instrument to recognize Indigenous peoples property. The ILO established the ILO Convention 107 and then later revised it in the 1980s and both treaties require states to recognize indigenous peoples' rights of "ownership and possession" to the lands they "traditionally occupy."[220] Significantly, international instruments are directed at according rights of "ownership" to Indigenous peoples in relation to those lands occupied and used under traditional tenure.[221] But with ownership comes the all-important right to control access to traditional lands and natural resources. The objective is to provide Indigenous property with the fullest form of protection available. The recognition of the right to ownership of land follows from the right to equality in that Indigenous rights to land – even though *sui generis* given their basis in Indigenous rights land tenure – ought to be accorded the same status and respect

[220] *Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [*Convention (No 107)*]; *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).
[221] Art 26(2) Indigenous peoples have the right to *own*, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership [emphasis added].

as non-Indigenous peoples property.[222] There is also recognition that retention of property is an important means of maintaining and strengthening Indigenous peoples political institutions and identities.[223] The right to ownership of natural resources enables Māori to build a base to develop their political authority and culture. The right to property thus, as with all the rights in the Declaration, is connected to and should be read in conjunction with the key right to self-determination. The point in the case of aboriginal rights to water in Aotearoa New Zealand is that Māori as prior occupants possessed right to tino rangatiratanga over their natural resources and because property is recognised and respected in New Zealand law, to deny that to Māori would be discriminate against them.

224. Protection of Indigenous peoples' land rights has frequently been emphasized by UN human rights treaty bodies.[224] The UN Human Rights Committee comments on states' reports and in its decisions in relation to petitions made under the ICCPR and has repeatedly endorsed Indigenous peoples right to property.[225] The

[222] The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua, Series C (No. 79) (2001) (Awas Tingni).

[223] *Convinced* that control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

[224] See, also, *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006); and *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005). See, UN Human Rights Committee 'CCPR General Comment 23 Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 7.

[225] For example, the HRC has recognised Indigenous peoples' non-traditional economic cultural rights, see *Lansmann et al v Finland No 1* Communication No 511/1992 (Views adopted 26 October 1994) UN Doc CCPR/C/52/D/511/1992, UN General Assembly 'Report of the Human Rights Committee Vol II', 50th Session Supp No 40 UN Doc A/50/40 at pp 66-76; and *Apirana Mahuika et al v New Zealand* Communication No 547/1993 (Views adopted 27 October 2000), UNGA 'Report of the Human Rights Committee Vol II' 56th Session Supp No 40 UN Doc A/56/40. In the *Lubicon Lake* communication, Chief Ominayak, on behalf of his Band, alleged that the Canadian government allowed the Alberta provincial government to expropriate its territory for the benefit of private corporate interests. Report of the Human Rights Committee *Lubicon Lake Band v Canada*, Communication No 167/1984 (26 March 1990) UN Doc Supp No 40 A/45/40, at 1 para 2.3. UN Human Rights Committee (UNHRC), *Lubicon Lake Band v Canada* Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40); UNHRC *Länsman et al v Finland* Communication No 511/1992 (1992) UN Doc CCPR/C/52/D/511/1992 para 9.2–9.3 (land-related reindeer herding protected by art 27 ICCPR); UNHRC 'Concluding Observations on Mexico's Fourth Periodic Report' (27 July 1999) UN Doc CCPR/C/79/Add.109 para 19; UNHRC 'Concluding Observations on Chile's Fourth Periodic Report' (30 March 1999) UN Doc CCPR/C/79/Add.1094, para 22; UNHRC 'Concluding Observations of the Human Rights Committee: Republic of Guatemala' (27 August 2001) UN Doc CCPR/CO/72/GTM; UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation XXIII: Indigenous Peoples' (18 August 1997) UN Doc A/52/18, annex V; CERD 'Decision 1(53): Australia' (11 August 1998) UN Doc A/53/18; CERD 'Concluding Observations on United States of America' (14 August 2001) UN Doc A/56/18 paras 380–407; CERD 'Concluding Observations: Argentina' UN Doc CERD/C/65/CO/1 (August 2004), para 16; CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Suriname' UN Doc CERD/C/64/CO/9 (2004); CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Suriname' ibid; CERD 'Decision 1(66): New Zealand Foreshore and Seabed Act 2004' (11 March 2005) CERD/C/66/NZL/Dec.1; UN Committee on Economic, Social and Cultural Rights (CESCR)

Committee on the Elimination of Racial Discrimination's (CERD Committee) interpretation of freedom from racial discrimination as expressed in its General Recommendation 23, calls upon States parties:[226]

> to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

225. New Zealand has been criticized by the CERD Committee for its treatment of Indigenous rights under its early warning procedure.[227] The Committee was concerned with the Foreshore and Seabed Act 2004, which removed the ability of Māori to claim proprietary rights in the foreshore and seabed and instead allowed Māori to claim non-exclusive customary rights in the area. According to the Committee the proposed legislation contained "discriminatory elements."[228]

226. But Declaration also recognizes that Indigenous peoples may be displaced from their lands and natural resources. And in such cases a rectification process is called for which includes a right to restitution. Article 27 refers to a mechanism for lands that were formerly possessed and occupied by them.[229] But article 28 specifically notes the right to redress.

> Article 28
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

227. The right of Indigenous peoples to their lands, territories and resources that they have been dispossessed of is endorsed by a number of decisions including *Yakye*

'Concluding Observations: Bolivia' (21 May 2001) UN Doc E/C.12/1/Add.60, CESCR 'Concluding Observations: Ecuador' (7 June 2004) UN Doc E/C.12/1/Add.100; UN Committee on the Elimination of Discrimination Against Women 'Concluding Observations: Australia' UN Doc A/52/38/Rev.1 Part II (12 August 1997) at para 119.

[226] General Recommendation 23.

[227] Claire Charters and Andrew Erueti (eds), *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington: VUP, 2007).

[228] CERD/C/DEC/NZL/1 (March 2005).

[229] The preamble of the Declaration also notes "that Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

Axe v Paraguay and *Sawhoyamaxa v Paraguay*,[230] which upheld the Indigenous peoples' rights to lands, territories and resources titled to third parties under Paraguayan law without their knowledge let alone consent.

228. As noted above, the aboriginal rights to natural resources is premised on the idea of there being extant rights that can be given effect in law. Thus if rights have expired (so they are not exercised in fact due to the pressures of colonisation) or been legally extinguished the common law cannot recognize the rights. In contrast, International Indigenous rights law recognizes extant rights (for example Article 26 of the Declaration) but goes further in recognizing the right to restitution in those cases where the rights may have expired or been extinguished at law (Article 27). That means there is less pressure on Indigenous peoples to show continuity of connection and use although there would still be a requirement to show that the aboriginal rights holder is extant.

D Conclusion

229. Government persists in advancing a right to culture model in relation to Māori rights to water, rejecting both political authority or tino rangatiratanga in the resource and proprietary rights. As we saw in the first section, aboriginal rights law and legal practice support Māori proprietary rights to natural resources and the treaty recognised the continuing right to political authority over natural resources. International Indigenous rights law recognises both the right of Indigenous peoples to own their traditional lands and natural resources as well as exercise self-determination over those natural resources. In fact the rights set out in the Declaration are influenced by the types of normative arguments and legal practice that emanate from New Zealand and the other Anglo-common law nations.[231]

V Business and human rights and Māori proprietary rights to water.

230. The intersection of water as a private property right and yet a fundamental human right emphasizes the importance of the UN Guiding Principles on Business and Human Rights[232] ('UN Guiding Principles'), in particular the requirement to satisfy due diligence. In light of the corporatisation of water rights and the existing and unrecognised Indigenous rights to water the first part of this section will review the UN Guiding Principles before examining differences that may exist between such an approach and that of due diligence. The final parts will

[230] *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006); and *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005).
[231] See Kingsbury "Competing Conceptual Approaches"; Andrew Erueti "Comparing domestic principles of demarcation with emerging principles of International Law" *Arizona Journal of International and Comparative Law*, *23*(3), 543.
[232] 16 June 2011, Human Rights Council, Geneva

discuss the requirement to undertake due diligence as it relates to Indigenous rights to water before some concluding thoughts.

Part One

UN Guiding Principles on Business and Human Rights

231. In June 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles as the first global standard for preventing and addressing the adverse human rights impacts of business activities, such as the effect of the commodification of water for agricultural purposes or for the operation of hydroelectric facilities on a human right to water.[233] This endorsement effectively established this Guide as "the authoritative global standard for addressing business related human rights challenges".[234] The UN Guiding Principles set out a three-pronged "Protect, Respect and Remedy" framework[235] and applies in all operational contexts including those that have a bearing on Indigenous peoples.[236]

232. The first pillar confirms the State duty to protect against human rights abuses by third parties, especially business enterprises.[237] Therefore, States are not by itself, responsible for the human rights abuses of third parties.[238] However, States may breach their human rights obligations where such abuses can be attributed to them, or when they fail to take appropriate steps to prevent and redress corporate-related harm. Although businesses are not expected to be surrogate states, when states have a weak rule of law and provide inadequate services for Indigenous peoples, often businesses are perceived in this light.[239] Thereby highlighting the need for states and businesses to work together to protect human and Indigenous rights, including an Indigenous right to water.

233. The second and most important pillar is the corporate responsibility to respect human rights.[240] It requires business to ensure that they do not adversely impact

[233] For a discussion of the relationship between the UN Guiding Principles and the UN Global Compact see explanatory note at <http://www.unglobalcompact.org>.
[234] Anaya "Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision Making with a Focus on Extractive Industries (A/HRC/EMRIP/2012/CRP1)" para 21.
[235] A/HRC/17/31 para 6.
[236] Anaya A/HRC/EMRIP/2012/2, above n 231, para 23. Although it is noted that Indigenous peoples are not referred to in the text of the UNGPs only in a footnote – this could be viewed as a flaw in the UNGPs.
[237] For a full discussion of how this first pillar relates to Indigenous peoples see Anaya A/HRC/EMRIP/2012/2 above n 231, para 26.
[238] General Assembly Report A/68/279 "Human rights and transnational corporations and other business enterprises" August 6 2013 at p 7.
[239] United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: Business Reference Guide* (United Nations Global Compact Office, New York, 2013), p 6.
[240] For a full discussion of how this second pillar relates to Indigenous peoples see Anaya A/HRC/EMRIP/2012/2, above n 231, para 27.

on the rights of others and address such impacts when they do occur.[241] The corporate responsibility to respect human rights is based on the notion that, even though business are not subjects of international human rights law, they nonetheless have a tremendous impact on the human rights and well-being of people around the globe.[242]

234. The Guiding Principles further recognizes "the role of business enterprises as specialized organs of society performing specialized functions" and businesses are required *to respect* human rights throughout their operations. That is, businesses should avoid infringing on the human rights of others, including Indigenous Peoples, and should address adverse human rights impacts with which they are involved.[243] In particular, businesses must:[244]

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and

(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

235. Finally, the third pillar encompasses both the State duty to provide an effective remedy and the corporate responsibility to address and remedy human rights impacts that they contribute to.[245]

236. Importantly, the UN Guiding Principles do not create any new binding rules of international law or impose additional obligations on business. Instead they build on existing rules of human rights law and clarify the respective roles of states and businesses.

237. When the Guiding Principles first appeared before the UN Human Rights Council in March 2011, there was no singular reference to the rights of

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[241] Principle 11 of the UN Guiding Principles. For further discussion see The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, UN Office of the High Commission for Human Rights <http://www.business-humanrights.org>

[242] See discussion in Gavin Hilson 'Corporate Social Responsibility in the extractive industries: Experiences from developing countries' Resources Policy, Volume 37, Issue 2, June 2012, Pages 131–137.

[243] Principle 11 of the Guiding Principles. For a discussion of this, see *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Office of the High Commissioner for Human Rights (http://www.business-humanrights.org/media/documents/corporate-responsibility-to-respect-interpretive-guide-nov-2011.pdf)

[244] Principle 13 of the Guiding Principles, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Nonetheless see discussion by Emma Gilberthorpe and Glenn Banks 'Development on whose terms? CSR discourse and social realities in Papua New Guinea's extractive industries sector' Resources Policy Volume 37, Issue 2, June 2012, pp 185 – 193 where they note one of the weaknesses include 'ill-conceived and inappropriate development programmes that generate inequality, fragmentation, and social and economic insecurity'

[245] For a full discussion of how this third pillar relates to Indigenous peoples see Anaya A/HRC/EMRIP/2012/2, above n 231, para 28.

Indigenous Peoples. In June 2011, however, the Council directed the Working Group on Business and Human Rights to give special attention to persons living in vulnerable situations, including Indigenous Peoples.[246]

UN Guiding Principles on Business and Human Rights and Due Diligence

238. The UN Guiding Principles is relatively new and to some degree untested but empowers Indigenous peoples and creates more of an obligation on businesses than due diligence which is a more measured approach. Unlike many international human rights instruments, the UN Guiding Principles is unique in that it recognises Indigenous rights whereas general international human instruments do not.[247]

239. As a general starting point, it has been observed that the UN Guiding Principles are opaque in precisely what they require of states and businesses.[248] It could be that they empower Indigenous peoples to request a higher standard when engaging with businesses, providing a capacity to empower Indigenous peoples. Equally, however, it could be that they only require a bare minimum of consultation, as some businesses have implemented. It is possible to argue that the UN Guiding Principles can provide a better outcome for Indigenous peoples when read together with the UN Declaration on the Rights of Indigenous Peoples. This approach would provide a creative opportunity to ensure that fundamental Indigenous rights are recognised, such as consultation in accordance to Indigenous culture and norms, by Māori for Māori, empowering Māori, as the rights holder, from the beginninng of the process to the end. Māori should be equal decision makers as active consultation cannot exist without Indigenous peoples. In effect this could be viewed as akin to a veto right.[249]

240. Nonetheless, regardless of its precise contours, the concept of due diligence as it relates to businesses seeking to engage with Māori as rights holders is considered to be an orthodox starting point for Indigenous peoples to explore, and is therefore the focus of this section. This obligation of due diligence is ongoing and more than just regard to the existing legal framework. Once established systems must also be in place to mitigate any human rights violations should they occur. This would include issues such as pollution of water ways, damaging the ecosystems and associated environmental loss.

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[246] The UN Permanent Forum on Indigenous Issues is actively collaborating with this working group.
[247] Instruments such as the ICESCR and ICCPR contain general human rights and, on their own, do not meet the cultural and political concerns of indigenous people. However, considered in light of favourable general comments and creative legal interpretations of treaty monitoring-body decisions can, advance indirectly indigenous rights.
[248] Human Rights Clinic (Columbia Law School) and International Human Rights Clinic (Harvard Law School) 'Righting wrongs? Papua New Guinea, Key Concerns and Lessons Learnt' (November 2015),
[249] Human Rights Clinic (Columbia Law School) and International Human Rights Clinic (Harvard Law School) 'Righting wrongs? Papua New Guinea, Key Concerns and Lessons Learnt' (November 2015).

Part Two

241. It is impossible for any businesses to anticipate how its future operations may impact on the specific rights of all Indigenous groups, subsequently, the issue of due diligence is important.

Due Diligence

242. As the corporate responsibility to respect human rights exists independently of the states willingness to fulfil its human rights obligations, business enterprises should not assume that compliance with State law equals compliance with international standards on Indigenous rights.[250] Rather, businesses should conduct due diligence[251] to ensure that their actions do not trample on the international Indigenous rights of Indigenous Peoples, including a right to water.

243. Due Diligence is a term used for a number of concepts including the requirement to an act with a certain standard of care. So, with respect to the intersection between corporate responsibility and Indigenous rights, including an Indigenous right to water, due diligence should place an onus on businesses to act with a certain standard of care when engaging with, or seeking to operate on, Indigenous lands and territories.

244. The initial step is to identify relevant domestic laws and policies relating to Indigenous rights. In particular, businesses should determine whether the government recognises collective ownership rights, and the extent to which the Indigenous peoples have received a formal title.[252] This is a typical area of risk for businesses as some countries do not recognise collective rights of Indigenous peoples, or only provide title for an area smaller than the groups have traditionally used or occupied.[253] This also means that the domestic law might not require the State to consult with Indigenous peoples prior to granting concessions or water permits on or near their lands.

245. Due diligence can assist businesses to recognise and address any gaps between New Zealand's domestic law and international law. Where these gaps are readily apparent, businesses should consult experts with specialised knowledge in international human rights law, especially those relating to Indigenous peoples' rights. This will allow businesses to not only identify areas where the New

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[250] Anaya, above n 231, [53].
[251] See also United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: Business Reference Guide* (United Nations Global Compact Office, New York, 2013) pp 15 20.
[252] Many States will claim natural resources, such as water, are 'State owned' dispossessing Indigenous peoples of their lands, territories and resources. See Anaya A/HRC/EMRIP 2012/2, above n 226, paras 32 – 35. This highlights the importance of due diligence.
[253] United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: Business Reference Guide* (United Nations Global Compact Office, New York, 2013) at 16.

Zealand's domestic law falls short, but also to better understand the nature and scope of Indigenous rights.

246. Businesses should also exercise due diligence to determine the potential impacts their projects may have on Indigenous rights. The idea is to understand the specific impacts on specific groups, within the context of the business' operations.[254] In this connection, businesses should be aware that not all Indigenous groups are the same and that each has its own unique relationship with traditional lands, territories and resources. It is, of course, quite possible that a particular activity may not have an adverse impact on the rights of one Indigenous group, but may severely impact the rights of another group. Businesses need to be aware, and perform their due diligence in a manner that is respectful to the Indigenous groups concerned.

247. With this in mind, businesses should consider developing a joint impact statement with the Indigenous group. A joint impact statement will allow the business to identify potential risks as the Indigenous group will often have specialised knowledge on their lands, natural resources and culture. It can also assist to foster a relationship between the business and the Indigenous community, which in turn, strengthens the business's social license to operate within their territories.

248. Once the due diligence process is complete, businesses should integrate the findings from their impact assessments and take appropriate actions. These findings should be made available to the affected Indigenous peoples in a manner and form that they can easily understand. It should also allow for input and suggestions from the affected Indigenous groups in accordance with their own customs, systems and decision-making processes. Effective integration also requires that the responsibility for addressing adverse human rights impacts be assigned to the appropriate level and function within the business.

249. Indigenous peoples should be able to participate in this process and ensure that the business is taking appropriate steps to address those impacts.

250. In assessing human rights impacts, businesses will need to look for both actual and potential adverse impacts, especially those that have been identified by the Indigenous community itself. Potential impacts should be prevented or at least mitigated across all parts of the business by drawing on the knowledge and recommendations of the Indigenous peoples concerned. Actual impacts, on the other hand, should be addressed immediately and be subject to remediation. Moreover, the business should also track and monitor the impact of its activities

[254] See Report by OECD 'Stakeholder engagement due diligence in extractive industries' which states that 'the rationale for due diligence is when the 'proper mode of engagement is not identified an applied stakeholders perspectives may not be adequately integrated into project decisions and an enterprise may face liabilities (e.g. if it does not comply with relevant legal obligations regarding engagement such as an obligation to obtain consent)'. Available https://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm.

on the Indigenous community. This can be achieved through regular consultations and inviting feedback from the Indigenous peoples.

251. In sum, due diligence requires businesses

a. To not contribute to the State's failure to meet international obligations in relation to Indigenous rights
b. To not replace the role of the State in fulfilment of those obligations, but promote the full assumption by States of such responsibility
c. To identify Indigenous ownership or possession of land and natural resources
d. To identify in advance the existence of Indigenous peoples that may be affected by their activities
e. To consult with Indigenous peoples prior to the adoption of measures that may affect them

252. If businesses continued with projects knowing that the State has failed to carry out for example, consultation or identification of Indigenous ownership – businesses would fall short of their due diligence. In this regard, due diligence requires businesses to identify and address potential risks that their activities may have on the rights of Indigenous peoples. Indigenous peoples have a right to be consulted on those risks and to influence how those risks will be addressed.

Part Three

Remedies

253. The UN Declaration articulates that Indigenous Peoples builds on and manifests the long-standing common body of opinion of principles that recognise the rights of indigenous peoples such as a right to water. The UN Declaration, clearly articulates these rights.

> Article 32:
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, ***water*** or other resources.
>
> Article 25:
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard [emphasis added].
>
> Article 26
> 1. Indigenous peoples have the right to the lands, territories and resources which they

have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

254. When these articles are read together with the key article of the Declaration asserting self- determination for Indigenous peoples[255];

> "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

255. These clauses provide that Māori as Indigenous people "have the right to maintain and strengthen their distinctive relationship with their traditionally owned water and the New Zealand Government is required to consult and cooperate with Māori to obtain their free prior and informed consent prior to the approval of any development, utilization or exploitation of water."

256. Despite this the New Zealand Government and businesses often fail to recognise these rights. Businesses often act on the fact that Indigenous rights have not been adequately recognised by the New Zealand Government and not recognised in international instruments and therefore do not consider these rights when carrying out their business activities, often pointing to economic benefits of the project and emphasise the national benefits as a justification. However, economic benefit is often not a priority for Indigenous peoples and many are sceptical of any benefit.[256]

257. New Zealand has a duty to protect the rights of Indigenous people against adverse Corporate behaviour and the Business has a responsibility to act consistently with the UN Declaration. Just because the UN Declaration may not be incorporated into domestic legislation does not mean these rights do not exist and indeed does not mean that these rights should not be respected by the Business.

[255] Article 3.
[256] Anaya A66/288 (20111) para 107.

258. Businesses cannot state “we are complying with domestic law” as a way to abscond from adhering to the rights contained in the UN Declaration, these Indigenous rights exist independently. Even if the State fails to recognise these rights in the UN Declaration, the business has a responsibility to respect Indigenous rights.

259. In particular, the Indigenous right of self-determination should be respected and the “protect, respect and remedy” framework articulated in the Guiding Principles on Business and Human Rights should be applied the same way as human rights are applied. So, when property rights law has been established, the same standard attaches. Arguably for Indigenous people a higher standard applies due to the cultural component when compared to a non-Indigenous peoples property right.