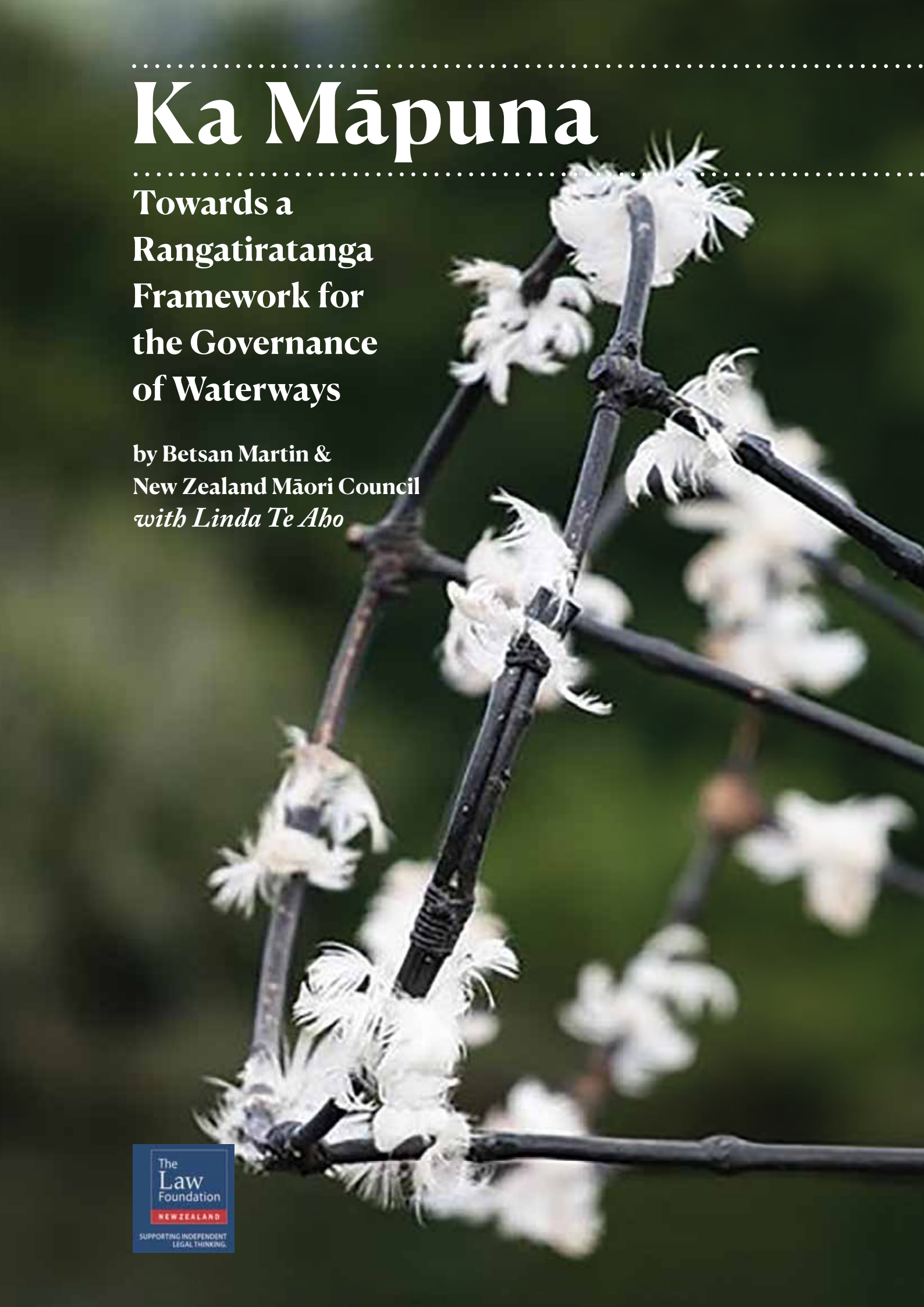
Ka Māpuna

Towards a Rangatiratanga Framework for the Governance of Waterways

by Betsan Martin &
New Zealand Māori Council
with Linda Te Aho



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This cover image is of karu atua, affixed when waka are used in ceremonial occasions. They represent eyes through which the way ahead is viewed.

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RESPONSE Trust

NGĀ PAE O TE MĀRAMATANGA NEW ZEALAND'S MĀORI CENTRE OF RESEARCH EXCELLENCE

THE UNIVERSITY OF WAIKATO *Te Whare Wānanga o Waikato*

Te Kaunihera Māori o Aotearoa New Zealand Māori Council

HE MIHI
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Ngā mihi me ngā manaakitanga,

Nā Linda Te Aho and Betsan Martin

[1] Referred to as Tā Taihākurei, or Tā Taihākurei Durie in this paper

HE WHAKAPUTANGA RANGATIRATANGA

RANGATIRATANGA EXPRESSIONS

E tou matou matua i te rangi, kia tapu tou ingoa, tukua mai tou rangatiratanga, kia meatia tou hiahia ki te ‘wenua me tou hiahia i te rangi . . .

(Kenehihi, An early translation of the Lord’s prayer into Māori by missionaries, 1827. This translation likens God’s will in respect of earth and heaven to rangatiratanga)

Ko matou ko nga Tino Rangatira o nga iwi o Nu Tireni

(He Wakaputanga o te Rangatiratanga o Nu Tireni, 1830s - A Declaration of Rangatiratanga)

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.

(Te Tiriti o Waitangi, 1840s. Fundamental guarantee of rangatiratanga in Te Tiriti o Waitangi)

Envisaging Rangatiratanga
He Kupu Whakataki *by Linda Te Aho*

Rangatiratanga refers to authority that existed prior to, and was affirmed and guaranteed in, Te Tiriti o Waitangi. Society was collectively organised with whakapapa forming the backbone of a framework of descent groups led by Rangatira. Rangatiratanga endures within its own cultural and social context and aligns to sovereignty and self-determination. It encompasses law, property, material and metaphysical realms and authority held within a system of inter-related order, or tikanga. Rangatira signed He Whakaputanga in the 1830s declaring, "Ko matou ko nga tino Rangatira" asserting sovereign power and authority in the face of rapid change, including the right to make and enforce laws.[2] The fundamental guarantee under Article 2 of te Tiriti o Waitangi was that hapū maintained the right to exercise te tino rangatiratanga over their lands, resources, taonga and affairs.

For almost 200 years, conflicts have arisen between the Crown and tāngata whenua[3] due to differences in world views and the systems of law and governance that ensue. The nature of obligations under Te Tiriti o Waitangi has been at the centre of those controversies, exemplified by claims in respect of water as a taonga. The legacy of the fact that prior to colonisation Aotearoa was inhabited by autonomous sovereign nations adds layers of complexity. And so, it has proven difficult to reconcile the contradictory views that Iwi and hapū have regarding ownership of water.[4] There is however unity in respect of water and te taiao as taonga, and in regard to rangatiratanga as an enduring system of governance.

Having been forcibly removed from their homelands and waterways and excluded from the franchise and other forms of decision-making, Treaty claimant groups have claimed ownership in water in order to restore rangatiratanga, and, in the face of increasing degradation, to be more meaningfully involved in the rehabilitation and protection of the health and wellbeing of waterways that go to the core of their identity and sense of responsibility. In doing so they have been forced to try and make sense of competing (and complex) English Common Law doctrines and their own tikanga understandings. Acknowledging that a range of opinions exists goes a long way to helping to understand some of the problems associated with ownership.[5]

The legacy of conflict has brought ownership to the fore as a premise for rangatiratanga. Ownership of water refers to holding a property right over it. Within tikanga, property rights include control of access, regard for public good and both alienable and inalienable property rights and obligations.

Successive governments have generally refused to recognise tāngata whenua claims of ownership and proprietary rights in water, but have been willing to return title to associated lands such as river and lake beds, and to acknowledge rights to culture, such as kaitiakitanga.[6] Its inclusion in the Resource Management Act 1991 has seen kaitiakitanga come to mean something less than ownership, contrary to the depth of meaning of being a kaitiaki according to tikanga Māori, which has kaitiakitanga as one of the manifestations of ownership.[7]

The Crown has assumed ownership of freshwater in regulating its use and allowing commercial interests to profit from it. This Crown assumption is inconsistent with Te Tiriti o Waitangi.

In bringing inconsistencies such as this to the attention of the Waitangi Tribunal and the courts, claimant groups have framed their claims in different ways.

[2] He Whakaputanga o te Rangatiratanga o Nu Tireni The Declaration of the Independence of New Zealand <archives.govt.nz/discover-our-stories/the-declaration-of-independence-of-new-zealand>.

[3] The term tāngata whenua is used rather than Māori, to recognise that rights to water lie with whānau, hapū and Iwi.

[4] This is not to mention the contradictory views of parliamentary representatives. For example, refer to interview of Māori representatives from the Labour, Green, and Māori parties, August 2020.

[5] Marama Muru-Lanning Tupuna Awa: *People and Politics of the Waikato River* (Auckland University Press, Auckland, 2016).

[6] Andrew Erueti "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" (2016) 24 *Waikato Law Review* 58.

[7] Te Maire Tau *Water Rights for Ngāi Tahu: A discussion paper*. (Canterbury University Press, Christchurch, 2017).

Most commonly, rangatiratanga in respect of water is framed as something more than the right to co-manage, and much more than the narrow interpretation of kaitiakitanga that has gained traction. Some Iwi and hapū have claimed ownership to entire waterways. Others have moved beyond the Tribunal claims and secured redress mechanisms making for the overarching and urgent purpose of restoring and protecting the health and wellbeing of waterways for current and future generations. Treaty claimants are adamant that redress mechanisms be upheld and honoured and not undermined by anticipated legislative reforms. By Crown requirement, Treaty settlements intentionally avoid or defer issues of ownership and allocation. For example, Waikato-Tainui and the Crown explicitly agreed to defer any conversation about ownership.[8] Issues of allocation and proprietary rights remain unresolved.

The position of Ngāi Tahu currently is to claim rangatiratanga over the Nga Tahū takiwā and is seeking co-governance of publicly owned assets.[9] In these processes, it is argued or assumed by claimant groups that ownership, or customary title, has not been ceded or sold to the Crown. There has been a level of discussion about unextinguished customary title, both as to the beds of waterways, and to water itself.[10]

There has been a gradual shift of Waitangi Tribunal findings in relation to freshwater bodies, from ownership as at 1840 but subsequently shared resources, to ownership continuing unextinguished to the present time. A test case on ownership based on unextinguished customary title has been opened by the Waitangi Tribunal stage 2 report. Te Maire Tau observes that Treaty settlements have "fallen short of addressing the ownership of water", but that they do not necessarily negate provisions for ownership.[11]

PRAGMATIC SOLUTIONS

This research paper adopts the approach of the National Iwi Chairs' Forum who recognise the need to maintain relationships with the Crown and the New Zealand public, as well as the need to act responsibly and in good faith whilst allowing those who wish to progress a discussion on ownership. To ensure that their discussions with the Crown were well-informed, Iwi Chairs[12] facilitated a series of regional wānanga that took place over many years. They proffered Iwi generated case studies on how "rights and interests" might be recognised in different catchments,[13] and commissioned a literature review.[14] Collectively, this work affirmed that Iwi and hapū perceived and articulated their rights and responsibilities in quite different ways. They also commissioned a series of reports exploring options for allocation.[15]

The work conducted between Iwi leaders and the Crown focused on outcomes rather than philosophical debates. Recognition of rights and responsibilities would come from the outcomes of a framework. As a starting point for discussions that ensued, Crown Representatives echoed the approach of the Tribunal in advocating the need for middle ground. It was clear that there would be some mechanisms that just would not gain the support of the Crown. Iwi were similarly clear that there would need to be some form of definitive statement of recognition of rangatiratanga.

[8] Claims to the Tribunal are framed in terms of breach of "Treaty principles" given the Tribunal's empowering legislation, Treaty of Waitangi Act 1975. Claims may increasingly refer to Te Whakaputanga 1835 as more becomes known about the importance of that document, and to the United Nations Declaration on the Rights of Indigenous Peoples, see 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), 110, and Waikato-Tainui River Claims (Waikato River) Settlement Act 2010, ss64 and 90.

[9] Te Rūnanga o Ngāi Tahu "Ngāi Tahu corrects National Leader's false claim" (17 May 2021) <ngaitahu.iwi.nz>.

[10] *Te Maire Tau Water Rights for Ngāi Tahu: A discussion paper*. (Canterbury University Press, Christchurch, 2017).

[11] 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).

[12] Iwi Chairs and Iwi leaders are the mandated representatives of Iwi and hapū groups who regularly meet to discuss issues of mutual significance, create strategic plans, and engage on a rangatira ki te rangatira basis with Ministers of the Crown.

[13] 'Rights and Interests' has become a catchphrase. The authors of this discussion paper avoid the term interest as it tends to mean something less than legal rights (Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2003)). Accordingly, we prefer the term rights and responsibilities.

[14] Horiana Irwin-Easthope and others *Iwi / Hapū Rights And Interests In Fresh Water: Recognition Work-Stream Research Report Literature Review* prepared for Iwi Advisory Group. This work was supported by the Crown.

[15] Kieran Murray, Marcus Sin and Sally Wyatt "The Costs and Benefits of an Allocation of Freshwater" Report prepared for Iwi Leaders Group by Sapere Research Group Ltd, 2014; Kieran Murray and Sally Wyatt "The Incentives to Accept or reject a rights regime for freshwater" Report prepared for the Iwi Advisors Group by Sapere Research Group Ltd, 2015; D Graham, W Li and D Moore '*Essential Freshwater Regulations – Industry Impact Analysis' Report prepared for the Ministry for the Environment* by Sapere Research Group Ltd, 2020.

Taupō nui a Tia

At the May 2021 National Iwi Chairs' Forum, Iwi leaders once again put forward their vision to be the allocators of water to ensure access for a range of purposes as determined by the diverse Iwi and hapū in Aotearoa.

> **It is important to state at the outset that Iwi leaders have been reluctant to support the notion of a Commission, or any national approach to waterways governance, preferring instead to preserve the right of rangatira ki te rangatira engagement between Iwi and hapū leaders and Crown counterparts.**

It is for this reason that Iwi leaders withdrew from the Te Taikaha collective in 2021.

Having said that, we explore the potential for the proposals in the research paper as a movement towards a governance framework for waterways based on responsible use, providing an elegant solution to rise above the inevitable conflicts that exist in relation to ownership and encourages respect for difference and agreement for direction moving forward. They align with the pragmatic approach of the Iwi Chairs.

The vision of many Iwi and hapū is for vibrant and flourishing whānau members, connected to ancestral lands and waterways, and confident in their ability to exercise tino rangatiratanga with cultural integrity, or as expressed by some, mana taketake, mana motuhake, mana whakahaere and mana whanake. Iwi and hapū are relearning and reclaiming mātauranga and tikanga, including reo and maramataka. Iwi and hapū draw upon this knowledge to strengthen whānau, to shape vision and strategies, to bolster kaitiaki work, and to inform business operations. To this end there is a resurgence of papakāinga housing on lands utilised by Māori for communal living.

> **"Kia mau ki te whenua, hei papakāinga mō ake tonu", King Tawhiao. These words urge iwi and hapū to retain landholdings to ensure a place to live forever more.**

RANGATIRATANGA: PAPAKĀINGA FOR WELL-BEING ENTERPRISE & MANA MOTUHAKE

As a case study, in the face of a housing crisis, a modern day papakāinga was established at Te Pāute near Pōhara Marae in the South Waikato in 2020. The papakāinga is located on Ngāti Koroki Kahukura whenua and has transformed the lives of 11 whānau, providing healthy homes, financial stability, and connection to whenua and whānau support. The whānau are better placed to support their nearby marae. But papakāinga cannot exist in a vacuum. Holistic sustainability of tāngata whenua communities such as this requires local employment and business opportunities, and this requires access to land and water.

The papakāinga shows how the relationship between water, housing, and economic development can recognise rangatiratanga and satisfy requirements of sustainability and rehabilitation in development.

This papakāinga can be viewed as a model of access to water enabling development. In this case the use of water for housing was designed as low flow use accompanied by rainwater harvesting and its own bio-wastewater and sewage reticulation system. The papakāinga has an enterprise and social procurement dimension drawing upon the skills of tribal members for building, concreting, and landscaping.

Land for this papakāinga was made available by Ngāti Koroki Kahukura retiring land being farmed for dairy production. It is designed in accordance with permaculture values, harmonious integration of the landscape in a sustainable way. As part of their goal to reduce impacts on the adjacent Waikato River, farm practices are being adapted to lower the intensity of dairy farming and a change in land use to planting trees, orchards, and food gardens. In this situation of Māori owned private land it does not have the restrictions of land in multiple ownership held under Te Ture Whenua Māori, nor the barrier to financing that stands in the way of development of such land. But papakāinga solutions are possible on Māori Land.

Eleven whānau (45 tribal members) have new houses in this papakāinga, families who found it difficult, if not impossible, to buy into the inflated housing market, and for whom enterprise options are opening up through the papakāinga scheme.

> **Home ownership is a super-lever for rangatiratanga that connects whānau to their lands, waters, language, and culture.**

This papakāinga is a microcosm of the aspiration to integrate the 'natural and built environment' and, more inspiringly, can be seen as a model for rehabilitation, wellbeing and a 'built' environment in accordance with rangatiratanga.

Iwi and hapū express rangatiratanga in a range of ways. It seems appropriate to end this part of the paper with the following prophetic saying of Tāwhiao, the second Māori King, a saying that describes a future of prosperity for his people.[16] Following the trauma of raupatu (confiscation),[17] Tawhiao's people were embattled, weak and destitute, when he declared:

> **Mākū anō hei hanga tōku nei whare**
> **Ko ngā pou o roto he māhoe, he patatē, ko te tāhuhu he hīnau.**
> **Ngā tamariki o roto me whakatupu ki te hua o te rengarenga,**
> **me whakapakari ki te hua o te kawariki**

This translates as: "*I shall build my own house. The poles within will be made of mahoe and patatē, and the ridge pole made of hīnau. The children within will be raised on the fruit of the rengarenga and strengthened on the fruit of the kawariki.*" Tāwhiao is remembered for such visionary prophecies and this saying expresses leadership, responsibility, and resourcefulness. The specific trees that Tāwhiao would use to fashion his 'house' were not traditionally used to build houses. The plants referred to were not commonly used as food. One could gather from

[16] Linda Te Aho "Creating our own prosperity - Human rights from a Tainui perspective" (2007) 10 Yearbook of New Zealand Jurisprudence 43.

[17] By Orders in Council under the New Zealand Settlements Act 1893, the Crown unjustly confiscated approximately 1.2 million acres of land from Iwi that affiliate to Tainui waka.

Lake Karāpiro and Maungatautari

this that regardless of the humble resources available to him, Tāwhiao assumed responsibility for providing shelter and sustenance for his house of followers.

There is a wealth of meaning within these few lines: they prophesy the regeneration of a people who would be strong and stable and have a sustainable economic base. They celebrate strength, self-sufficiency, and indigeneity. They serve as a constant reminder that tāngata whenua must affirm and draw upon our own unique knowledge base and leadership.

King Tāwhiao also imagined that his ambitions for his people could be reflected in a coat of arms, and he commissioned one in 1870. It is known as Te Paki o Matariki – the widespread calm of the constellation, Pleiades. The Matariki constellation rises just after the mid-winter solstice – the time when tangata whenua continue to celebrate the dawning of the New Year and the coming of fine weather. In the context of the raupatu that occurred during Tāwhiao's reign, by naming his coat of arms Te Paki o Matariki, he prophesied that peace and calm would return to Waikato and Aotearoa.

Nowadays, the celebrations of the Māori New Year surrounding the rising of Matariki during midwinter symbolise the renaissance of indigenous concepts of time. There are many significant features of the coat of arms such as, for example, the presence of native plants, nīkau and harakeke, representing self- sufficiency, and of course, the inscription of words at the bottom – Ko Te Mana Motuhake.[18]

This case study demonstrates the holistic nature of rangatiratanga. Iwi and hapū do not advocate for rights and responsibilities in respect of waterways as an ultimate goal unto itself. Restoring and protecting the health and wellbeing of waterways for future generations is an enduring responsibility.

Access to a safe and sustainable supply of water for the various uses as determined by each Iwi and hapū is an enduring right.

[18] See Linda Te Aho "Creating our own prosperity - Human rights from a Tainui perspective" (2007) 10 Yearbook of New Zealand Jurisprudence 43.

CONTENTS

EXECUTIVE SUMMARY

PART 1. WATERWAYS, GOVERNANCE AND RANGATIRATANGA

PURPOSE STATEMENT

Rangatiratanga is the navigational course for this research, the aspiration that guides a framework for the governance which, in respect of waterways and Te Taiao secures mauri, ecosystem health, and water for domestic and commercial use. Rangatiratanga encompasses mana whakahaere decision-making throughout all relevant governance systems. In respect of resource governance, this needs to be achieved through mana whenua authorities and co-governance institutions and procedures.

Rangatiratanga governance is guaranteed in Te Tiriti o Waitangi and has been largely over-ridden by the kāwanatanga assumptions of government. Treaty Settlements are helping to restore the authority of Iwi and hapū in respect of resource management and in social and economic fields; these do not fully encompass the national scope of direction for decision-making on social-ecological and economic systems. A premise for a national body is that direction for waterways is being set nationally, and in this context, recognition for rangatiratanga needs to be both at national and catchment levels.

The Resource Management Review, *New Directions for Resource Management* (New Directions 2020) has led to preparation of the Natural and Built Environments legislation based on the recommendations of the review. This is to be accompanied by Spatial Planning and Climate Change Adaptation legislation. A centrepiece of the legislation is for a new system of national and regional spatial planning. Proposals in this research for a national 'co-governance body,' one of the recommendations of the Waitangi Tribunal and for mana whenua institutions are designed to map onto the new structures and planning systems. They are proposed as steps towards recognition of rangatiratanga in the national and catchment structures.

In the knowledge that when we take care of land and water, they will take care of us, this research seeks provision for systems that rehabilitate people with land and waterways.

TOWARDS RANGATIRATANGA

Native title, ownership in respect of waterways

> **While rangatiratanga was envisaged in Te Tiriti o Waitangi, it is yet to find its expression as an evolving living authority that is meaningful in Aotearoa today.**

The scope of powers inherent in rangatiratanga include addressing intergenerational wellbeing, climate change and the ever-expanding horizons of technology.

Waitangi Tribunal findings and developing jurisprudence lead to the position that rangatiratanga in respect of waterways is associated with ownership and holding property rights. The effect of the Crown's position that "no-one owns water" is that the Crown retains a form of governance, exercised through statute and regional authorities, that excludes tāngata whenua from exercising rangatiratanga. The western precept that water cannot be owned has allowed water to become a commodity to be exploited, and, in Aotearoa this has led to environmental ruin.

Under Crown governance, waterways have become administratively fragmented and commodified. The Coal-mines Act 1903 vested the beds of navigable rivers in the Crown without the consent of Māori.

The sole right to use water was vested in the Crown and delegated to Regional Water Boards. Under tikanga waterways are a whole, indivisible ecosystem in which the beds, banks, water column and surrounding air are part of a unified body. Geothermal energy is a part of the waterways ecosystem. In other words, waterways are taonga and the components should not be distinguished in a way that leads to fragmentation.

In customary law, titles are embedded within rangatiratanga governance that recognises all aspects of the waterways system including ancestral relationship, and provides for use and constraints to the use of water. As the Waitangi Tribunal asserts, water is a shared resource, provided for through Te Tiriti, and therefore requires some measure of co-governance.

We also look to alternatives to the impasse of ownership and non-ownership positions. An orientation of obligation and an ethics of responsibility shifts the focus to relationship and accountability.

Remedying the Māori interest through the restitution of rangatiratanga and through ensuring access to water are likely to lead to constructive decision-making partnerships in planning and governance. Water for marae and hapū, for Māori owned land and for papakāinga are imperative.

Rangatiratanga through National, Iwi, Catchment Authorities

This research takes into account the status of Treaty Settlements and also recognises Māori rights and interests that are not met through settlements. We take account of tensions between rangatiratanga residing with Iwi and hapū and, in the situation of today, the need for rangatiratanga to be expressed at the national level through legislation.

The position of Iwi Leaders is that rangatiratanga sits only with Iwi and hapū– taking account of the modern setting of Post-Settlement Governance Entities. In this view, negotiation and engagement with the Crown should proceed directly through Iwi authorities and not through a national Commission.

New Directions 2020 emphasises strengthening the involvement of mana whenua in planning and decision-making, with a "national co-governance institution, either for freshwater matters alone or with a wider focus" and through strengthening the status of Iwi Management Plans, Mana Whakahono ā Rohe and s 33 transfer of powers.

This discussion of a national Commission is pursued on the basis that law-making is the domain of central government and rangatiratanga needs to have a corresponding authority alongside that of the Crown. Furthermore, law-making is the arena for entrenching customary law and tikanga and in which Te Tiriti o Waitangi can be reinforced constitutionally.

Recognition of Māori proprietary rights during the development of legislation is a requirement under Te Tiriti o Waitangi. At the time of publishing this research, 'Māori rights and interests' are not being built into the legislation – this is signaled as work to follow.

A national framework is intended to serve a system of catchment Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga with decision-making and implementation for their catchment contexts. The proposal is for fourteen Te Oranga o Te Taiao Rūnanga to correspond with and feed into the fourteen Joint Planning Committes. The New Zealand Māori Council explores a structure of Māori authority and representation for the new National Planning Framework that reworks the provisions of the Māori Community Development Act, adapting it to the proposed regional planning system. This is explained in Part 2.

CONCEPTUAL FRAMEWORK

Te Mana o Te Wai is an example of the beneficial influence of mātauranga Māori in freshwater regulation – introducing the principle of mauri, protecting the health of water ecosystems as pre-eminent within a hierarchy of values.

Climate change and the arresting effects of COVID-19 both urge towards transformative resource management. The complexity of interconnected ecosystems and indirect local effects of anthropogenic warming call for policy that recognises interdependence between humans and nature, including at the global scale. Epistemic change continues to evolve from awareness of earth as a living organism with intelligence that emanates from the inter-relatedness of all forms of life.

Te Ao Māori knowledge systems are constituted on complexity and connectedness across metaphysical, human, and environmental spheres. We face a dilemma in drawing on mātauranga concepts such as Te Mana o Te Wai, Mana Whakahono ā Rohe, and kaitiakitanga. These have been seen to lose their integrity with tikanga when they are embedded into western law and are interpreted outside of Te Ao Māori contexts. The assimilating effect will be ameliorated by recognition of customary law. Two systems of law draw us towards the fertile ground of two authoritative bodies as references for navigating intergenerational wellbeing.

ETHICAL CONSIDERATIONS: RESPONSIBILITY AND OBLIGATION

Within diverse Iwi and hapū traditions there is a common view that water and humans are linked by whakapapa, and that whakapapa generates obligations to support the interconnection of all forms of life.

Obligation is an ethic embedded within tikanga, whereas ethics of responsibility has European philosophical roots with similar relational and accountability principles. Ethics of responsibility provide a prospective, or a forward-looking orientation to support rehabilitation with living ecosystems and restrain human exploitation.

Considerations of governance for waterways which are developed from a position of responsible care and use offer an orientation of accountability and procedure for working through the inevitable conflicts that exist in relation to ownership. Responsibility and obligation encourage respect for different traditions while addressing convergence on the need to account for inter-relatedness and complex systems, and provision for generations to come moving forward.

CONTEXT

The OECD Environmental Reviews, 1981 and 2017 identified the lack of national-level strategic planning and the need for equity in the use and benefits of water resources.

Under the RMA in 1991 the requirement to balance development with environmental protections has meant that economic development has prevailed and that implementation has proved to be inadequate in enforcing a coherent national regime and stopping degradation.

The ongoing demise of waterways and the barriers to accessing rights to waterways as provided for in Te Tiriti o Waitangi were the main drivers for litigation to prevent the transfer of state shares in Mighty River Power by the New Zealand Māori Council. Undertakings to address Māori proprietary rights in water, short of full ownership, were given by the Crown in the Supreme Court in 2012, following the Mighty River Power case. The political process stalled resolution of 'rights and responsibilities.'

Resource Management Act 1991 (RMA)
Under the RMA regime, water quality has become imperiled despite the purpose of promoting 'sustainable management of natural and physical resources' (s 5) and integration of resource management.

Under the RMA allocation through the first in, first served system is the key mechanism by which Iwi and hapū have been excluded from the benefits of sharing in the wealth that comes from access to water resources.

The Crown and the Iwi Leaders Group worked intensively to co-design reform options in 2015–2016. There has been no decision on allocation, proprietary interests and ownership, despite Māori proprietary interests being confirmed by the Supreme Court in *Paki v Attorney-General*.

Review of the Resource Management System 2020
The recommendations of *New Directions 2020* inform our analysis and the proposals for institutions to give effect to rangatiratanga.

Joint Planning Committees to replace Regional Policy Statement and Regional Plans
The most significant change proposed by *New Directions 2020* is to simplify the planning process and replace the current system of regional and territorial planning with joint plans which are consistent with spatial planning.

New Directions 2020 refers to Treaty settlement legislation which provides for co-management which often involves Iwi in cross-jurisdictional partnerships on freshwater taonga. These carry burdensome expectations to meet the requirements of Crown-defined systems.

The proposal is for combined plans and spatial planning for resource management to be prepared by a Joint Planning Committee. Combined plans will replace regional policy statements, regional plans, and district plans and reduce the current 100 plans to 14, one for each planning region. Membership would be from the constituent local authorities, mana whenua and a representative of the Minister of Conservation.

A Commission has not been provided for in the new system at this stage. We consider a Commission would support the new regime through a joint Māori-Crown authority. In making a case for a co-governance body we reiterate our view that this is a step towards rangatiratanga which is yet to be fully recognised in governance.

Climate change
Climate change is shifting the patterns of rainfall and bringing new conditions of floods, droughts, and unstable weather patterns. The Intergovernmental Panel on Climate Change (IPCC) is assessing human influences on the water cycle with attention to feedbacks from land processes at small scales and the global scale of the water cycle.

IPCC reports for regional contexts can be readily interpreted for Aotearoa. *New Directions 2020* gives specific proposals to bring climate change management into the framework of the new legislation. An adaptive system is a priority for responding to uncertainty and change.

The scope of challenges to rehabilitate waterways, introduce equitable access to water and provide for unprecedented effects on water systems from climate change in Aotearoa New Zealand are mirrored world-wide.

OPTIONS FOR VESTING

An alternative to the non-ownership position of the Crown is to vest waterways in a new form of inalienable title. We already have examples of these in the innovations of legal personality of Te Urewera and Te Awa Tupua. Tupuna title for the rivers, Te Mātāwai trust for Te Reo Māori, a Ngāi Tahu title, and a Rangatiratanga title are further options to consider.

In respect of waterways, such titles are intended to include the riverbed, the banks, the water column, and the air above the water system and thus restore river entities as a whole. Vesting may be required to for setting a price for commercial water.

EQUITY AND CORRECTING PAST EXCLUSION

Equity is a matter for governance as well as for allocation. Equity is a matter for distributive justice and fair entitlements to water resources that need to be addressed in statute.

Equity and rights are principles of redress for past exclusion from access and entitlements to water and water resources. Rights are a key reference for the recovery governance guarantees in Te Tiriti o Waitangi and to restore relationships with water that have been disrupted by Crown and settler land acquisitions. In the situation of Aotearoa restitution should be addressed through recognition of rangatiratanga. Equity (often referred to as ōritetanga) has gained prominence in Aotearoa and internationally to relieve the focus on economic values in water resources and market approaches to commercial interests.

The South Africa Water Act offers points of reference for Aotearoa in respect of addressing past exclusion, methods of establishing a new system of allocation and a pricing regime.

The Essential Freshwater policy for equitable access for tāngata whenua through development of underdeveloped land has potential advantage for those with such lands. Many Iwi and hapū are without such lands, due to historical removal from their lands.

Te Mana o te Wai and Te Mana Whakahono ā Rohe are examples of successful interventions in the resource management and a counterpart to Te Tiriti o Waitangi settlements.

The systems that mitigate against equity and the need for enabling provisions for papākainga come to life in a brief case study from Kakariki. It is a story of partitioning and fragmentation of land historically, and of land categories for economic development that exclude hapū from papakāinga and development opportunities. The evidence documents the Manawatū District Council actions in respect of roading, consents and water supply which have mitigated against the dream of whānau and hapū for establishing themselves for intergenerational housing and development.

COMMENTS

A Commission offers a procedural rather than prescriptive approach to the governance of waterways with the expertise of science, tikanga, cultural values, and expertise from other relevant domains.

PART 2.

INSTITUTIONS TO SUPPORT RANGATIRATANGA IN THE GOVERNANCE OF WATERWAYS, & TE ORANGA O TE TAIAO

GOVERNANCE

A national Commission as a co-governance body rests on Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga. The Councils are at the hapū and catchment levels and through an electoral college process elect representatives to an appointments committee of the regional Rūnanga. The proposal is for fourteen Rūnanga to correspond with the fourteen Joint Planning Committees. In addition an alternative Mana Whenua Authority is introduced. An enabling Te Mana o Te Wai / Te Oranga o Te Taiao statute is to provide a legislative framework for the system which encompasses rangatiratanga and co-governance.

Iwi Post-Settlement Governance Entities would continue to stand in their own mana and their settlement mechanisms would not be undermined.

Models of national governance structures are reviewed. An extended analysis of the New Zealand Māori Council serves as a guide for a structure that could be adapted to link with the new National Planning Framework and for a system of representation.

Other national models reviewed briefly are the Crown Forestry Rental Trust, Te Ohu Kai Moana, Human Rights Commission, Parliamentary Commissioner for the Environment, the Climate Change Commission, and the Criminal Cases Review Commission. The role of the Waitangi Tribunal as a Commission of Inquiry, including its statutory powers to make binding recommendations inform the potential authority of a Commission.

The governance structures and systems of representation of Post-Settlement Governance Entities are also canvassed. These include the Waikato River Authority, Te Awa Tupua 2017, Te Urewera 2014 and Te Rūnanga o Ngāi Tahu.

The 2020 drought in Auckland drew an emergency application from Watercare for an additional 200 million litres from the Waikato River. This illustrates the link between the source of water, and the supply of water services, a link which is not reflected in governance with Taumata Arowai under Department of Internal Affairs and waterways under Ministry for Environment. This is even more imperative with high levels of toxic reactive nitrogen posing a colorectal cancer health risk.

TE MANA O TE WAI/ TE ORANGA O TE TAIAO COMMISSION (COMMISSION)

Options for Commission structures and roles are informed by national and Treaty Settlement governance arrangements. The powers of a Commission should be to set Te Oranga o Te Taiao goals to be reviewed every five years and monitored, to make recommendations on policy with requirements for implementation or explanation of from the Minister. The Commission will be empowered to make binding recommendations in particular circumstances such as to call in consents which are in breach of Te Mana o Te Wai standards. A pricing system for commercial use of water to be jointly determined by the Commission, the Minister for Environment and Minister of Finance.

The scope of a Commission may be broad and comprehensive, involving monitoring and auditing, a new system of allocation and a pricing regime for the commercial use of water, a role in Māori interests in geothermal development, and integration with associated legislation. Or a minimal Commission could be limited to monitoring and auditing functions.

The adapted model of the New Zealand Māori Council structure has potential to join with FOMA and Post-Settlement Governance Entities for ‘mana whenua’ representation on Joint Planning Committees and on the Commission.

A unique feature of New Zealand Māori Council representation is membership of a group as a requirement for voting. Membership is of hapū or Māori committee. Voting is not an individual right. The Council, similarly to the Ngāi Tahu Te Papatipu system, favours a mixture of elections and appointments to ensure appropriate skills and independence of vested interests in planning and governance such as for Joint Planning Committees and a Commission.

The Commission could set national limits and oversee the replacement of the first in, first served allocation system. A recommendation is to unbundle the water allocation to better allow for mauri, ecosystem health priorities and evaluation of other uses, reflecting national and local priorities, conditions, and contexts.

The Commission may oversee a registry of mana whenua who have rights, interests and responsibilities at the catchment rohe level to determine the relevant mana whenua decision making groups for particular freshwater bodies.

Te Oranga o Te Taiao is to be supported by criteria based decisions for the use of water, to be authorized in the Statute. These may include biodiversity credits for climate change mitigation accounting, a biodiversity fund, reducing the use of water, and possibly tax relief to incentivise retention of native trees, planting, and afforestation.

The Commission would integrate the Climate Change Response (Zero Carbon) Amendment Act 2019, Local Government Acts, Taumata Arowai – Water Services Regulator Act 2020 and other associated legislation.

The values of Te Taiao, are to be guided by criteria to support biodiversity, low emissions, reducing water use, native trees, planting, and afforestation.

The Commission would establish a charge for the commercial use of water, including use and discharges. The payment of royalties would significantly lift economic gain in respect of the water resource and would result in more efficient decisions being made by resource consent holders. The revenue would be held for public good purposes including Māori economic development, restoration of waterways, and payment of compensation in the case of reviewing or reducing consents to manage the transition to a new allocation system.

CATCHMENT AUTHORITIES

The initial proposal for catchment authorities for this research was for Te Mana o Te Wai Catchment Boards with co-governance decision-making, thereby mirroring the co-governance structure of a national Commission.

With the National Planning Framework and Joint Planning Committees structure proposed under the Natural and Built Environments legislation, a different form of catchment organisation emerged as an alternative to a co-management system.

Option 1. Catchment Mana Whakahaere Councils, Regional Rūnanga

In the Natural and Built Environments legislation the new Joint Planning Committees change the shape of resource planning and decision-making. The Joint Planning Committees require representation of 'mana whenua,' and this leads to a question of representation on these Committees. It also raises the question of organisational structures to support representation and to facilitate catchment management and decision-making.

We propose two layers for Iwi and hapū, and Māori landowners/organisations to fit with the regional planning system. Catchment level Mana Whakahaere Councils are associations of Iwi and hapū and Māori landowners – those with relationships with the waterways of the catchment.

As a second layer, Rūnanga are executive regional bodies representing the catchment Mana Whakahaere Councils. The Rūnanga would appoint or elect representatives onto the regional Joint Planning Committees, and nominate representatives onto the Commission.

Funding from the pricing system will be available to Iwi and hapū to enable their meaningful participation in the governance/management of their waterways.

Option 2. Mana Whenua Authority - Rangatiratanga

This alternative draws together a different conceptual framework drawn from tikanga with a modern economic analysis, and maps these onto new institutions for governance of waterways. This model is proposed for consideration as a rangatiratanga approach to waterways and their management from an economics perspective. The rationale behind the approach is to give effect to Te Tiriti o Waitangi. It comes from the position that Iwi and hapū have never ceded customary title to waterways.

Authority is given solely to Iwi and hapū for setting the requirements for mauri, or ecosystem health of water; Mana Whenua Authorities have a primary role in implementing Te Mana o Te Wai in respect of determining mauri and a reserve for cultural flows, and provision for human health. The mana whenua decision-making flows from the right bestowed though rangatiratanga and the obligation stemming from whakapapa.

This is not about co-management or co-governance.

Following determinations for mauri and provision for human health, decisions for commercial use and allocation are made jointly by Mana Whenua Authorities and Regional Councils other stakeholders, within the aspirations for ecosystem health, rather than within limits.

In terms of use, water is a shared resource and Māori and the public have legal interests, responsibilities, access for beneficial use.

There should be provision for an independent auditing role for Mana Whenua Authorities. Auditing panels would involve mātauranga Māori experts, appointments through Māori peak bodies, other science experts and the Parliamentary Commissioner for Environment.

The primary statutory role of the Mana Whenua Authorities will be to restore, maintain and enhance the mauri of the river, and with stakeholders provide for human health needs and design and implement allocation in with stakeholders.

TE MANA O TE WAI STATUTE

The purpose of the statute is to provide national direction for Te Mana o Te Wai in a Te Tiriti framework. A statute will include a precautionary principle and provide for specialist remedial attention to waterways.

The statute provides for Crown governance alongside tino rangatiratanga as provided for in Te Tiriti o Waitangi. A statutory purpose to give effect to Te Tiriti o Waitangi will recognise rights and responsibilities of rangatiratanga and kaitiakitanga of taonga.

The legislation will give statutory authority to Te Mana o Te Wai.

The Waterways statute will take an integrative approach to governance, management, and regulation of all aspects of waterways and water supply. The legislation will set national direction on an allocation system, make provision for Māori rights, interests and obligations with provision for catchment decision-making appropriate to contexts.

Resourcing
The proposed framework will require corresponding resourcing for Iwi and hapū to provide the leadership regarding Te Mana o Te Wai, engagement in planning and in allocation decisions. Resourcing may be met either through government budget allocations, Regional Councils and Iwi authorities, and through a pricing system. Skills in collaborative decision-making, consensual procedures, and training in competence to work with tāngata whenua require resourcing.

PART 3. ALLOCATION AND THE WATER ECONOMY

A key requirement of mana whenua is for guaranteed access to water for cultural and economic purposes. The right to development is confirmed in the United Nations Declaration on the Rights of Indigenous Peoples, and affirmed throughout Waitangi Tribunal claims and settlements. A Commission with Te Mana o Te Wai/Te Taiao Catchment Boards, provide for the authority of mana whenua alongside the Crown, inaugurating a good faith process for decisions on a revised allocation system.

As widely agreed the first in, first served system should be replaced. Options include setting a percentage reduction of commercial allocations to be phased in over the time of current consents – the longest being 35 years. Crown-funded compensation is to be considered. At the same time, a moratorium be placed on new consents.

Allocation should be based on criteria with principles of responsibility, rangatiratanga, mauri, environmental flows, regenerative use, context and aspirations (rather than limits) for decision-making. Criteria may include:

- Allocation for Iwi and hapū, and Māori landowners
- Rehabilitative land use such as regenerative agriculture, and incentives to reduce water use
- Land use that reduces intensified dairy
- Allocation and policy for land use that supports the health of waterways, such as forestry management to reduce or eliminate sediment.
- Water and land use that reduces GHG emissions
- Elimination of detrimental externalities such as toxic discharges, sediment biodiversity loss
- Incentives for biodiversity enhancement

OPTIONS FOR ALLOCATION

A. Co-governance
In the context of the Natural and Built Environments Act, a replacement allocation system would be designed by the Commission with provision for regional and catchment level implementation and decision-making. This model proposes a partnership process involving Te Oranga o Te Taiao Rūnanga with Joint Planning Committees. Provision may also be needed for the involvement of Mana Whakahaere Councils. This proposal for decision-making on allocation by-passes Regional Councils intending to remove entrenched vested interests that have become evident in regional council politics.

B. Rangatiratanga: Māori Authorities for mauri and human health, and in collaboration with stakeholders for Allocation
Iwi and hapū in catchments would form a "Mana Whenua Authority". These would have a primary role in implementing Te Mana o Te Wai. These would be mandated with the sole authority for determining both the quantity and quality of water to be 'reserved' or retained in waterways, Allocation would be determined jointly between the Mana Whenua Authority and stakeholders including regional councils.

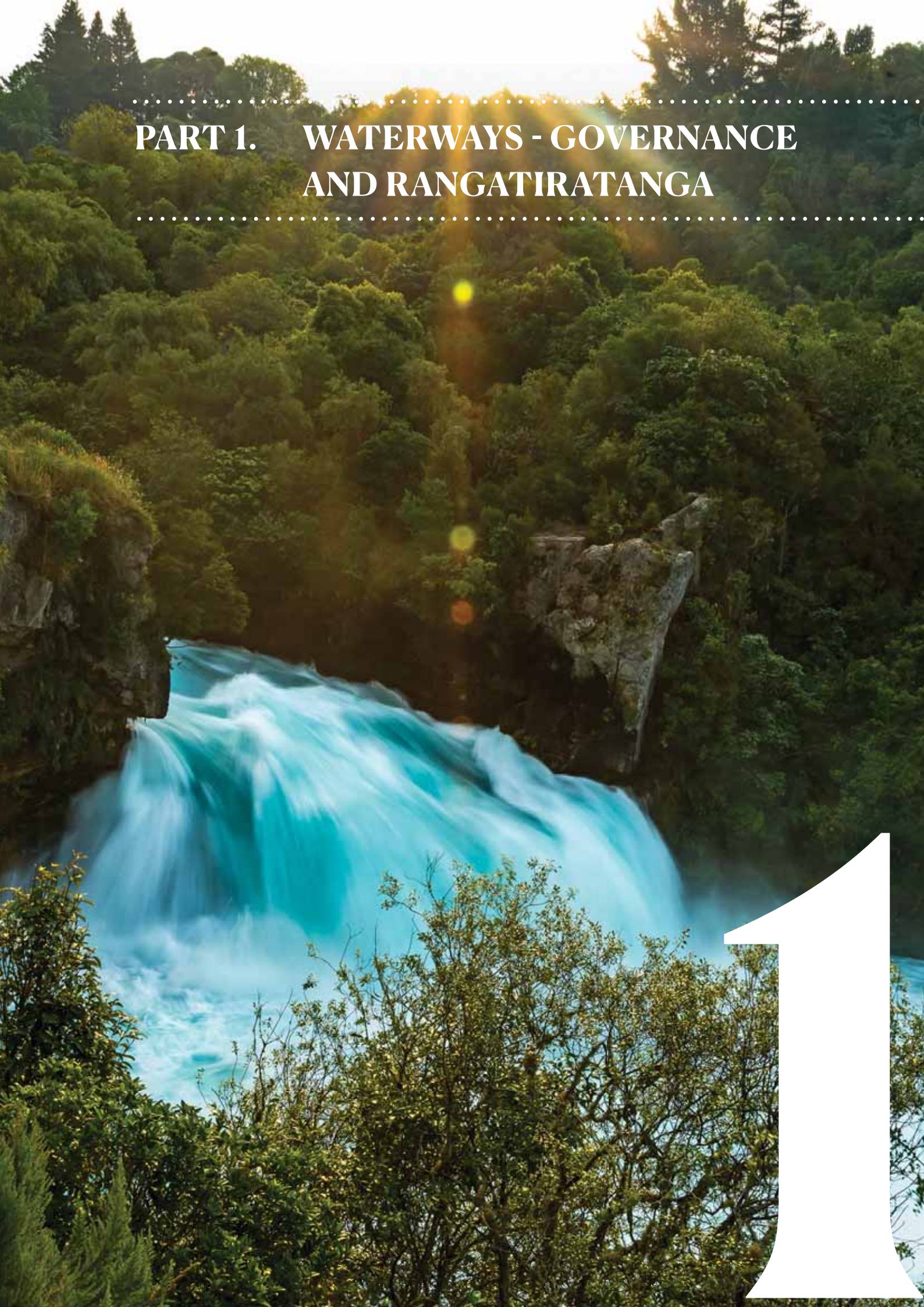
C. Whakapapa and Obligation - relational methodologies taking account of food, forests, farms, housing, health, recreation
New horizons for access to water arise from practical responses arise from the voice and life of the waterways themselves, characterised by relationships between people with water, and rehabilitating land use with the health of waterways. Whakapapa approaches are introduced in the report with two brief case studies of river communities: Papakāinga at Raukokore and 'Let the Rivers Speak' research project at Waimatā.

CONCLUSION

The proposed institutions for governance of waterways offers a gateway for further constitutionalising Te Tiriti o Waitangi. As rangatiratanga evolves it may take different institutional forms, some shaped by collaborative structures and some more autonomous, reflecting shared and overlapping interests, and our distinctive cultural, knowledge and governance histories.

The implications of unextinguished customary ownership in waterways are yet to be realised but they give force to the case for recognising rangatiratanga in governance. The institutional and statutory provisions proposed through this research offer a legal and procedural system for kāwanatanga with rangatiratanga as a Te Tiriti o Waitangi framework and constitutional basis for Te Mana o Te Wai and Te Oranga o Te Taiao

PART 1. WATERWAYS - GOVERNANCE AND RANGATIRATANGA



1

The Waitaki River is a large braided river that drains the Mackenzie Basin and runs some 110 kilometres south-east to enter the Pacific Ocean

PART 1. WATERWAYS - GOVERNANCE AND RANGATIRATANGA

INTRODUCTION AND PURPOSE

This research on the governance of waterways in Aotearoa New Zealand examines issues and options arising from the recommendations of the Waitangi Tribunal in its stage 2 report of the Freshwater and Geothermal Resources (Wai 2358, 2019).[19] Beyond the stage 2 report specifically, the research draws on the suite of Freshwater and Geothermal Resources claims and the Iwi Leaders Ngā Mātāpono ki te Wai as a framework for waterways governance and Māori rights, interests, and obligations.

The purpose of the research is to identify options for the governance of waterways which secure the mauri and ecosystem health of water and the use of water with recognition of mana whakahaere and decision-making throughout all relevant governance systems.

The research is funded by the New Zealand Law Foundation and was supported by the Minister for Environment, Hon. David Parker as contributing to innovative solutions to critical issues of shared waterways governance. Publication is supported by Ngā Pae o te Māramatanga.

The research is led by Dr Betsan Martin, Associate Research Fellow, Victoria University of Wellington, together with the New Zealand Māori Council. Linda Te Aho, Ngāti Korokī Kahukura and Ngāti Mahuta, an Associate Professor at University of Waikato, provides rangatiratanga narratives and an Iwi and hapū lens in respect of the research findings and proposals. Peter Fraser Ngāti Hauiti ki Rangitīkei draws from the wells of economic and tikanga for thinking on rangatiratanga in this research.

> **A framework for rangatiratanga governance requires Iwi and hapū catchment decision-making, and we envisage that this might be achieved via a multi-layered institutional system encompassing a national co-governance body.**

A national co-governance body is not seen as a stand-alone body, it is part of an integrated system that provides for a Te Tiriti o Waitangi framework in national direction and within Iwi and hapū authorities at the catchment level; thus a system which strengthens and resources subsidiarity, or local governance. An enabling statute would outline the parameters of national and catchment authorities and preserve negotiated redress and status of Treaty of Waitangi Settlements.

Rangatiratanga governance is guaranteed in Te Tiriti o Waitangi and has been largely over-ridden by the kāwanatanga assumptions of government. Treaty Settlements are helping to restore the authority of Iwi and hapū in respect of resource management and in social and economic fields; these do not fully encompass the national scope of direction for decision-making on social-ecological and economic systems.

We are therefore working within the context that direction for waterways is being set nationally, and that recognition for rangatiratanga needs to be both at national and catchment levels.

While one recommendation of the Waitangi Tribunal stage 2 report is for a 'national co-governance body',[20] the thinking on such a body in this research is largely developed in terms of a Commission as an institution that provides independence from government and transcends the pressures of political cycles.

[19] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019), Recommendation 7.7.3.
[20] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019), Recommendation 7.7.3.

Other options include a Trust, or a Board. With the innovation of legal personhood introduced for Te Awa Tupua and Te Urewera a further option could emerge, such as a Te Tiriti o Waitangi Trust.

During the course of this research *New Directions for Resource Management* (*New Directions 2020*) was published[21] and the recommendations for the Natural and Built Environments legislation accompanied by Spatial Planning and Climate Change Adaptation legislation are in the process of being prepared. The proposed changes are significant for the purpose of this research and analysis of *New Directions 2020* is included to identify how the Waitangi Tribunal recommendations find their place within the anticipated new structures and planning systems.

In the light of these changes which, at a high level amalgamate decision-making and planning, and concentrate more powers in the Minister for the Environment, an idea has been ventured that rather than a Commission, a co-governance body might have the independence of the Reserve Bank (under the Reserve Bank of New Zealand Act 1989). A high level of independence gives stability of purpose and strong systems of accountability to the public for financial policy that have parallel relevance for water and environmental policy. We mention this to indicate the possible scope for constitutionalising Te Tiriti o Waitangi in respect of sustainability and resource safeguards, but do not develop the prospect of this form of independence further.

The purpose section of the Natural and Built Environments legislation is a lynchpin for resource governance and is therefore a crucible for Māori[22] interests in the new system. The Review panel drafted the s 5 Purpose of the Act as follows:[23]

1. The purpose of this Act is to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o Te Taiao.

2. The purpose of this Act is to be achieved by ensuring that:

    a) positive outcomes for the environment are identified and promoted;

    b) the use, development, and protection of natural and built environments is within environmental limits and is sustainable; and

    c) the adverse effects of activities on the environment are avoided, remedied or mitigated.

Decisions about the purpose of the Act are under development at the time of finalising this research. Te Mana o Te Taiao[24] expands the specific focus of Te Mana o Te Wai in the National Policy Statement – Freshwater Management 2020 (NPS-FM 2020) to a more systemic approach and reaches more deeply into the interconnected world of whakapapa encompassing Papatūānuku and Ranginui, earth and atmosphere and beyond. Although the wording of this purpose statement may change, we are including Te Oranga o Te Taiao as a part of the rangatiratanga framework for governance.[24]

We retain our core focus on waterways and at the same time work with the framework of Te Taiao as an anticipated purpose of resource legislation.

[21] Resource Management Review Panel ***New Directions for resource management in New Zealand*** (Ministry for the Environment, 2020) (*New Directions 2020*) (also referred to as the Randerson Review).

[22] The term Māori, mana whenua, mana whakahaere, tangata whenua are used as accurately as possible for the particular context of their use

[23] *New Directions 2020* at 75.

[24] At the May 2021 National Iwi Chairs' Forum, Iwi leaders proposed a change in wording to Te Oranga o Te Taiao. Two concepts for Te Taiao were being considered for the Purpose of the Natural and Built Environments legislation; Te Mana o Te Taiao, and Te Oranga Te Taiao. We use Te Oranga o Te Taiao in this report.

Waterfall, Percy's Reserve, Maungaraki

In the knowledge that when we take care of land and water, they will take care of us, this research seeks provision for systems that rehabilitate people with land and waterways.

At the same time, it is positioned for the pragmatics of law and policy and takes account of wider issues including planning systems and climate change. We use the term waterways, rather than 'fresh water' to convey the multiple forms of water bodies and the inter-connected systems of water flows, of holding and cleansing processes from the mountains to the sea. We draw on multiple fields relevant to waterways – law, tikanga, history, the expertise of the Waitangi Tribunal, economics, and ecosystem science to evaluate options for a rangatiratanga framework for waterways.[25]

[25] Waterways and Governance Literature Review:
http://<www.response.org.nz/wp-content/uploads/2020/11/Governance-Lit-Review-Draft-Summ-Ed-1Nov20.pdf.

OVERVIEW

Broadly speaking, introducing a commission, catchment and regional authorities and a statute for freshwater comes from multiple endeavours to achieve ecosystem health standards for fresh water, is a way of giving effect to Māori rights and obligations and to recognise Crown and rangatiratanga governance as guaranteed in Te Tiriti.[26] Iwi Leaders and the New Zealand Māori Council (NZMC) have spearheaded major investigations into freshwater governance and recognition of economic interests, coming from a long legacy of Māori claims, protests and litigation.[27] Other recent initiatives come from Environmental Defence Society,[28] the Land and Water Forum[29] and advisory groups to the Essential Freshwater programme.[30]

Waitangi Tribunal recommendations opened the door to pursuing a determination in the courts on native title. Test cases are now in progress through the courts on the extent to which native title in fresh water continues unextinguished. These matters are included in the research insofar as they inform governance.

We envisage the Commission as empowered to give national direction on healthy waterways and to uphold Treaty settlements.

The scope of a co-governance body could be minimal – limited to an accountability and auditing role involving independent expertise in mātauranga Māori and possibly the Parliamentary Commissioner for the Environment. A larger scope Commission may provide recommendations on a new system of allocation, a royalties regime with a public good funding mechanism. A pricing system proposed under the co-governance model would create a funding stream with royalties going into a public good fund for the benefit of all.

In addition to different forms for co-governance, the research has also brought to light an alternative option of 'Māori Authorities' in catchments. The option of catchment level Māori Authorities was imaginatively drawn from one of the Ranginui and Papatūānuku Iwi narratives for the purpose of developing an economic approach to water in a rangatiratanga framework and as a response to the need to grapple with the use and control over water resources.[31]

The proposal of Māori Authorities would mean that Iwi, hapū, and Māori landowners in a catchment would collectively have the sole determination of the amount and quality of water required to uphold Te Mana o Te Wai. This option would also exist in conjunction with a national system of auditing and accountability for Te Mana o Te Wai standards as outlined previously. This option would bring in stakeholders for decisions for the distribution/ allocation of water for commercial use. This option is outlined in Part 2.

Principles of Te Mana o Te Wai, Mana Whakahono ā Rohe, kaitiakitanga, and mauri are already accepted in common law and statute. The purpose of investigating a framework for rangatiratanga within co-governance draws upon such provisions, which have been made incrementally, into a cohesive framework nationally and in catchments. Public good interests and provisions for commercial access are included in the scope of the research.

Proposals from this research recognise the need to maintain relationships between Iwi and hapū and the Crown and the New Zealand public, as well as the need to act responsibly and in good faith. The proposals adopt the pragmatic approach of the Iwi leaders, and also directly align with the work of the NZMC.[31]

Part 1 covers conceptual matters, the context of law, regulation and ethical considerations regarding waterways. It includes reference to the New Directions 2020 review and to options of a Commission, as well as legal person-hood and trusteeship.

Part 2 addresses the structural options of a co-governance body as a Commission and includes an option of Māori Authorities.

Part 3 is a discussion of the water economy and includes allocation alternatives to first in, first served and a pricing system for commercial use of water.

[26] This has been a topic of much debate. Provision was made for the formation of Māori Districts for self-government in the 1852 Constitution Act. Subsequent endeavours by Iwi to have these recognised in reality were suppressed. Provision for self-governing 'Native Districts' offers a glimpse of what Māori considered to be self-governing provisions within the post Tiriti colonial governance arrangements. The provision was in statute until 1986 when it was dropped from the updated Constitution Act. See B Martin supplementary research notes: Legal Plurality, Sovereignty, Solidarity Sovereignty 2020: http://www.response.org.nz/wp-content/uploads/2020/10/Legal-Plurality-Sovereignty-Solidarity-Sovereignity.pdf. See also DV Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand (2006) Waikato Law Review Taumari 120 at 120-124.

[27] Waterways and Governance Literature Review: http://www.response.org.nz/wp-content/uploads/2020/11/Governance-Lit-Review-Draft-Summ-Ed-1Nov20.pdf.

[28] Greg Severinsen and Raewyn Peart *Reform of the Resource Management System: The Next Generation Synthesis Report and Next Steps* (Environmental Defence Society, 2019).

[29] Land and Water Forum "Advice on Improving Water Quality: Preventing Degradation and Addressing Sediment and Nitrogen" (2018) <www.landandwater.org.nz/Site/Resources.aspx>.

[30] Ministry for Environment Essential Freshwater: Healthy Water Fairly Allocated (2018) <www.mfe.govt.nz/sites/default/files/media/Fresh%20water/essential-freshwater.pdf>.

[31] We acknowledge Peter Fraser for his substantive contributions to this section.

[32] ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014) and ET Durie "Indigenous Law and Responsible Water Governance" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 135-143.

TOWARDS RANGATIRATANGA

Native title, ownership in respect of waterways

We step again into the discussion of rangatiratanga and the vision of re-instating decision-making and authority over waterways and Te Taiao. While this governance provision was envisaged in Te Tiriti o Waitangi, rangatiratanga is yet to find its expression as an evolving living authority that is meaningful in Aotearoa today. The scope of powers inherent in rangatiratanga include addressing intergenerational wellbeing, climate change and the ever-expanding horizons of technology.

In today's world and in the light of the Waitangi Tribunal findings and developing jurisprudence, rangatiratanga in respect of waterways is associated with ownership and holding property rights. The focus on ownership has arisen in part because of the Crown's iteration that 'no-one owns water' which harks back to English common law.[33] Tā Taihākurei Durie notes the error of interpretation of this 18th century jurisprudence, in that what can be owned, according to Blackstone is not the flowing water:[34]

> What is owned is the access to the water and the right to use it. That is a form of property right at English law (a usufruct).

> **The effect of the Crown's position that "no-one owns water" is that the Crown retains a form of governance, exercised through statute and regional authorities, that excludes tāngata whenua from exercising rangatiratanga. The western precept that water cannot be owned has allowed water to become a commodity to be exploited, and, in Aotearoa this has led to environmental degradation.[35]**

In contrast to a commodified view of water, under tikanga waterways are a whole, indivisible ecosystem in which the beds, banks, water column and surrounding air are part of a unified body. In other words, waterways are taonga and the components should not be distinguished in a way that leads to fragmentation. The regime of separating the components of waterways began with the Coal-mines Act 1903 which vested the beds of navigable rivers in the Crown without consulting Māori or gaining their consent.[36] Under this Act the sole right to use water was vested in the Crown and delegated to Regional Water Boards. The question then arose as to whether such vesting was enough to over-ride Māori customary property rights in rivers.

According to the doctrine of native title, such extinguishment requires a clear and plain statement of extinguishment, with agreement of Māori owners or interest bearers.

In evidence to the Tribunal Jacinta Ruru said:[37]

> To reiterate in conclusion, it is not possible for statute law to supersede the common law doctrine of native title without clear and plain legislation to that effect. Thus, native title and proprietary rights are retained unless lawfully revoked.

[33] Anne Salmond "Rivers as ancestors and other realities" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 183-192. Crown lawyers for the Waitangi Tribunal Whanganui River claim argued that waterways in New Zealand cannot be owned as private property. They cited Roman law which according to the Code of Justinian, "[b]y the law of nature these things are common to mankind – the air, running water, the sea. In his Commentaries on the Laws of England, Blackstone followed the Roman precedent. Blackstone also said that freshwater users must act with due consideration for the rights of others. Salmond, above, at 186.

[34] Taihākurei Durie "NZMC Position Paper on Waterways" (unpublished paper, 2021) at [6].

[35] Linda Te Aho 'Governance of water based on responsible use – an elegant solution?' in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 143-161.

[36] Coal-mines Act 1903, s 14 (Waitangi Tribunal Te Urewera (Wai 894, 2017) vol 7 at 3355–3371); B Martin and L Te Aho, NZMC 'Waterways and Governance Literature Review' (2020) http://www.response.org.nz/wp-content/uploads/2020/11/Governance-Lit-Review-Draft-Summ-Ed-1Nov20.pdf at 11.

[37] Jacinta Ruru, answers to questions in writing, [September 2018] (paper 3.2.275(a)), p [4] in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019). See also J Ruru, The Legal Voice of Māori in Freshwater Governance: A Literature A Literature Review (Landcare Research New Zealand Ltd 2009) (doc A74), pp 82_89) in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

The Waitangi Tribunal stage 2 report included the recommendation that a test case on customary title be taken in the courts on whether native title exists in common law and has not been extinguished (at 7.7.7). This litigation can be seen as a means to re-establish governing authority over waterways with which hapū have continuing ancestral connection.

The language of customary title and of ownership should not be fully conflated. There is a risk that recognition of ownership in the context of the western system of law would mean a diminishment of the scope of customary titles. In customary law, title is embedded within rangatiratanga governance that recognises relationship, use and constraints to the use of water.

In the modern context ownership recognised under western law carries the risk of commodification and partitioning. Ownership may have echoes of land partitioning that was an intentional, ruthless strategy for alienation imposed by the Crown through individualisation of titles into fee simple alienable property. It is envisaged that titles to water would be inalienable. Furthermore, the arguments for ownership of waterways arise from continuity with custom, they are not imposed by the Crown. Contrary to possible risks, ownership reinstated under rangatiratanga opens the way to strengthening values of Te Taiao and potentially to public good values in water.

A consideration to be noted is the issue of water as a shared resource provided for through Te Tiriti. Tā Taihākurei Durie sees a plurality of interests to be recognised through Te Tiriti:[38]

> The right of control is now limited by the fact that following the influx of settlers from about 1830, the tribe no longer has exclusive control of most water bodies in the tribal territory. This must be brought into account in developing thoughts on how the customary right of control can be acknowledged today.

Taking a different course, we also look to alternatives through the perceived impasse of ownership and non-ownership positions.

> **Remedying the Māori interest through the restitution of rangatiratanga in our governance systems, and providing access to water for marae, hapū and Māori owned land, and for papakāinga are likely to lead to constructive decision-making partnerships in planning and governance. In a following section we take the orientation of obligation as an alternative to rights and discuss an ethics of responsibility as an 'elegant solution'[39] to conflicts over ownership, while retaining the importance of confirming native title.**

Rangatiratanga through National, Iwi, Catchment Authorities

This research takes into account the status of Treaty Settlements and also recognises Māori rights and interests that are not met through settlements. With this in mind, we consider a framework that encompasses Iwi and hapū as well as urban Māori and mātāwaka rights and interests. We take account of tensions between rangatiratanga residing with Iwi and hapū, and, in today's situation, the need for rangatiratanga to be expressed at the national level through legislation.

In the modern context, law-making is the domain of central government and rangatiratanga needs to have a corresponding authority alongside that of the Crown.

With national direction being set by government, provisions for rangatiratanga need to sit in the national government domain. Law-making is the arena for entrenching customary law and tikanga and in which Te Tiriti o Waitangi can be reinforced constitutionally.

Tikanga and mātauranga Māori have more than political importance; they are potent for wider public good. Signature attributes of mātauranga Māori include ancestral and

[38] ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014) at 2.

[39] Linda Te Aho 'Governance of water based on responsible use – an elegant solution?' in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019).

intergenerational obligations and the capacity for integration. Integration is a whole of system approach which, in respect of water and Te Taiao means that the mauri of water and its life-giving qualities are interdependent with land use and human wellbeing and are accounted for in the economic value of water.

Mātauranga Māori offers a system of no externalities, no discounting of pollution and loss of mauri. Introducing a price for commercial use would assist in internalising the detrimental environmental impacts of the use of water resources.

Pricing would also address the economic distortion of zero-pricing of water which, in effect, allows a public good to be captured for private wealth.

Seen in this light, a stronger place for tikanga in our governance systems would fundamentally affect how water bodies are managed and used. Tikanga can assist with governance for intergenerational wellbeing – it is prescient of an economy of living well with the earth and her regenerative capacities – the essence of sustainability and an aspiration of many sectors and interest groups – regenerative agriculture, deep sustainability, permaculture and so on.

This research leads us to proposing a rangatiratanga framework for today's situation. This takes the form of co-governance at the national level in support of a system of Māori authorities and regional councils in catchments to feed into Joint Planning Committees. At the time of writing the Natural and Built Environments legislation is being prepared and these proposals anticipate the National Planning Framework as a centrepiece of the new system.

In the following paragraphs we explain the case for a co-governance body, mindful of the strength of the argument for rangatiratanga as a stand-alone system of governance, residing only with Iwi and hapū.

We begin with concern that the preparation of the Natural and Built Environments legislation does not include Māori rights and interests, with allocation and recognition of property rights.[40]

Recognition of Māori proprietary rights during the development of legislation is a requirement under Te Tiriti o Waitangi. The Tribunal found the Crown to be in breach of Te Tiriti by refusing to recognise Māori proprietary rights during the development of the 1991 Resource Management Act"[41] (RMA). The RMA "does not provide for Māori proprietary rights in their freshwater taonga".[42] This failure could be coming full circle with the Natural and Built Environments legislation.

The Tribunal also found:[43]

> . . . past barriers (including some of the Crown's making) have prevented Māori from accessing water in the RMA's first-in, first-served system. This is a breach of the principle of equity. The Crown has admitted that Māori have been unfairly shut out but has not yet introduced reforms to address what it has called the exclusion of 'new entrants' from over-allocated catchments.

These excerpts from the Waitangi Tribunal identify areas for remedy that are national in their scope: contribution to development of legislation, recognition of proprietary rights, the system of allocation, equitable access to water. These are alongside other matters such as the need for a national system of monitoring and integration.

A national framework is intended to serve a system of catchment rūnanga with decision-making and implementation for their contexts. To this end the NZMC explores a structure of Māori authority and representation for the new National Planning Framework that reworks the provisions of the Māori Community Development Act, adapting it to the proposed regional planning system.

[40] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at 113
[41] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at xxi.
[42] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at xxi.
[43] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at xxi.

In this model Iwi and hapū together with Māori landowners are the heart of the Māori voice in the resource system. The proposal is discussed in Part 2. In respect of allocation a rangatiratanga model for Iwi and hapū, and Māori landowner decision-making is one of three options discussed for allocation. A rangatiratanga model is distinguished from a co-governance model, and from a 'whakapapa and community of interest' option.

Achieving recognition of rangatiratanga is inclusive of, and beneficial for the Crown and tauiwi. This is a two-hulled waka. We have yet to settle the full form of each hull and the pilot house to set the navigational path for living well with the earth. Those with the relationship and knowledge of the land and waters of Aotearoa should set the course for the waka.

CONCEPTUAL FRAMEWORK

A key insight from reviewing the RMA is that New Zealand's environmental and conservation legislation has been developed in a neoliberal economic setting in which economic advantage is weighed against environmental values. The impact of the higher value of growth and development is that environmental impacts can be treated as externalities.

The removal of farm subsidies by the Labour Government in the 1980s is an example. The removal of subsidies for superphosphate and fertilisers had indirect effects of reducing farming on less viable hill country and conversion to forestry or regeneration of indigenous forest – both beneficial in addressing erosion. At the same time there was pressure to intensify low country farming, and with the legacy of 'gross pollution' from discharges from abattoirs, flax mills, wool scouring and sewage, diffuse discharges from intensified meat and dairy farming added to the nutrients entering waterways.[44]

Pollution, flooding, and continuing erosion speak of the history of discounting the ecosystem health of the waterways in favour of the benefits of economic productivity. It also speaks of excluding mana whenua from influencing and contributing to ordering land use and to water quality standards and use.

> **Te Mana o Te Wai[45] is an example of the beneficial influence of mātauranga Māori in freshwater regulation – introducing the principle of protecting the health of water ecosystems as pre-eminent within a hierarchy of values.[46]**

While recognition of mana whakahaere in decision-making processes emanates from the constitutional provisions of Te Tiriti o Waitangi, mātauranga Māori brings the benefits of systems approaches to Te Taiao, more broadly encompassing human, ecological and economic spheres. Most importantly mātauranga Māori offers relational attributes which then translate into integrative policy with provision for intergenerational obligations. These considerations are developed further in following sections. Protection of water, soil, atmosphere, land and human wellbeing are aspirations held by the wider public and should be socialised as a shared public good.

Climate change and the dramatic intervention of the COVID-19 pandemic both urge for a radical shift from the current resource management frameworks that relies on cost-benefit analysis, demand and supply economics, externalities which discount pollution and human (as well as environmental) impacts of development, and sovereign rights over private property.

The complexity of interconnected ecosystems and indirect local effects of anthropogenic warming call for new thinking and policy that recognises interdependence between humans and nature, including at the global scale.

Cross currents of change show the tensions of mismatched systems, policy out of step with the situation at hand, and the inadequacy of anthropocentric world views. Presently tensions arise from the interaction between regulation for public good which can seem to encroach

[44] Catherine Knight, *Ravaged Beauty: An environmental history of the Manawatū* (Totara Press, 2018).

[45] The framework of Te Mana o Te Wai was first set out by Tā Taihākurei Durie in "Discussion Paper on a Water Policy Framework", paper presented to the Hopuhopu Symposium on Governance: Responsibility for Water and Climate Change (29 November 2014).

[46] Ministry for Environment *National Policy Statement for Freshwater Management* (2020) (NPS-FM) <www.mfe.govt.nz/sites/default/files/media/Fresh%20water/national-policy-statement-for-freshwater-management-2020.pdf>.

Young succulent shoot of a fern, symbolising growth and our unfoldng future

on private property rights.
New regulation over agricultural land such as stream fencing on farms in order to meet the requirements for the health of water, and new planning to address the housing crisis are two examples of the regulatory interface of private property and common good resources.[47] The divide cannot be absolute because the degradation of common goods is often the result of regulation that allows for private property rights that result in degraded waterways, such as through the overallocation of water.

With the benefit of the tremendous body of evidence presented to the Waitangi Tribunal, Tā Taihākurei Durie grapples with interpretation of Iwi and hapū traditions of authority and use of freshwater for the material conditions of today. An enduring consideration is the preservation of resources for generations to come, and the quest to design a legal framework that:[48]

> . . . recognises the Māori proprietary interest in water, the associated ethic of responsibility, the customary tribal control, and the general, public interest. The search is for a law that offers the general public the same protection as is proposed for Māori, while imposing on them the same responsibility for preserving the resource for future generations.

The assumptions of exploitative industrial development without an account of environmental impacts are being replaced by appreciation of complex systems, interdependence, and the integral relationship between people and nature. Many influences are converging to support epistemic change. These come from awareness of earth as a living organism with intelligence that emanates from the inter-relatedness of all forms of life. Callum Coat's attention to the interaction of male and female energies, like the interaction of the atmosphere with earth systems can be placed alongside ecosystem science concepts of the inter-relatedness of humans with nature.[49]

[47] Parliamentary Commissioner for the Environment "RMA Reform: coming the full circle" RMLA Salmon Lecture 2020, Association for Resource Management Practitioners, Auckland, at 3.

[48] ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014) at 3.

[49] F Berkes, J Colding, and C Folke (eds) *Navigating Social-Ecological Systems* (Cambridge University Press, Cambridge, UK, 2003); Callum Coats *Living Energies* (Gill Books, Dublin, 2001).

Pollution damages our waterways, destroys natural habitats and threatens human health and well being

Karan Barad offers a non-human centred world view through quantum physics in which responsibility extends to all phenomena; a view which has some resonance with indigenous thought.[50] Philosophers of ethics pull us towards a relational perspective on ontology to articulate an ethics of responsibility.[51]

Alongside and preceding these, Te Ao Māori knowledge systems are constituted on complexity and connectedness that permeate the metaphysical, human, and environmental spheres.[52] In one of the research discussions with the Climate Change Commission, a Māori informant proffered that there are no externalities in Māori economics, and thereby indicated the value of drawing on the knowledge systems of Te Ao Māori.

We face a dilemma in drawing on mātauranga concepts. Te Mana o Te Wai, Mana Whakahono ā Rohe, and kaitiakitanga have been introduced into statute and they have been seen to lose their integrity with tikanga and the order of Te Ao Māori when they are embedded into western law and are interpreted outside of Te Ao Māori contexts.[53] The assimilating effect will be ameliorated by recognition of customary law. Such recognition draws us towards the fertile ground of two sources of law, which like tributaries nurture their catchments and meet in the main course. They can also be likened to two instruments, the pūtōrino and the trumpet calibrated to the materials of their making and the expertise of their musicians. These are conditions for each to be heard and for an interplay to become possible.

[50] K Barad "Quantum Entanglements and Hauntological Relations of Inheritance: Dis/Continuities, SpaceTime Enfoldings and Justice-to-come" (2010) Derrida Today 240–268.

[51] E Levinas *Totality and Infinity* (translated by Alphonso Lingis) (Duquesne University Press, Pittsburgh, PA, 1969).

[52] Iwi Leaders Group "Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream" (2015) at n 75 citing Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic or resource management" (2000) 110 Journal of the Polynesian Society 349 at 353.

[53] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 32.

ETHICAL CONSIDERATIONS: RESPONSIBILITY AND OBLIGATION

Within diverse Iwi and hapū traditions there is a common view that water and humans are linked by whakapapa, and that whakapapa generates obligations to support the interconnection of all forms of life. Evidence given to the Waitangi Tribunal includes the following insights:

Iwi Leaders Group: [54]
The preservation of mauri is of paramount importance and the presence of mauri in all things entrusts an obligation to appreciate and respect that resource.

Tamati Cairns said: [55]
As kaitiaki of the Waikato River (or the section of their domain) the Pouakani people have an obligation to maintain the mauri of the river, The mauri is the life force of the river. This includes taking care of the physical and spiritual health of the river.

> **The concept of whakapapa, meaning 'connectedness', emphasise obligations BETWEEN rather than rights OVER. This is a critical distinction because rights and obligations arise from relationship and reciprocity.**

Obligation is an ethic embedded within tikanga, whereas ethics of responsibility has different epistemological roots although with similar relational and accountability dimensions; it is the source of community and is intrinsic to human and ecological interdependence. Ethics of responsibility provide a prospective, or a forward-looking orientation to support rehabilitation with living ecosystems and restrain human exploitation. The ruination of waterways, the destruction of biodiversity and the crisis of climate change are failures of accountability in economic systems which externalise environmental impacts of development.[56]

Indigenous peoples have enshrined values of human and environmental wellbeing in terms which express a worldview of intimate relationship with earth. Mana, mauri, manaakitanga, and kaitiakitanga are terms which can be associated with obligations for wellbeing, in particular intergenerational wellbeing.[57]

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.

Durie refers to responsibility as a higher form of ethics and order because it requires an account of effects on others and benefit to the community as a whole and carries obligations to ancestors.[58]

The quest for legal frameworks to recognise tangible and intangible dimension of taonga in the case of Te Ao Māori[59] and in other traditions including the western liberal tradition needs to take account of many larger dimensions of life that cannot be codified. Intangible dimensions include ethics, obligations, and responsibility: [60]

[54] Iwi Leaders Group "Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream" (2015) at 18.

[55] Iwi Leaders Group "Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream" (2015) at n 67.

[56] Betsan Martin "Nga Pou Rahui" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth (*Routledge Taylor and Francis Group, London and New York, 2019) at 12-34.

[57] Sir Edward Taihakurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti "Ngā Wai o te Māori, Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori, Māori and State Law" paper prepared for the NZMC, 23 January 2017 (doc E13) at [119] in *Waitangi Tribunal The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

[58] ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014) at 3.

[59] Māmari Stephens "To Protect and Serve: Finding New Ways to Protect Te Reo Māori as Cultural Property" in S Frankel and A Costi "Do Cultural and Property Combine to Make 'Cultural Property'?" Special Issue of the New Zealand Association of Comparative Law (2017) 21 Hors Serie 7-22.

[60] Betsan Martin "Nga Pou Rahui: Markers of Protection for Water and Climate" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 12-34, footnote omitted.

> . . . codes do not exhaust the ethical demand of responsibility. Ethical responsibility transcends or exceeds what is possible to legislate. The realm beyond what can be codified is the arena of transcendent values of the human spirit which reach beyond legal duty and extend to dimensions of service and dedication.

An indigenous worldview holds that the human world is but one of many dimensions of an interconnected cosmology. Kinship between all life forms, of which humans are but one manifestation, is a notion which is characteristic of a Māori world view of a 'woven universe'. Māori and other indigenous peoples hold ancient beliefs and ethics that places them in a 'familial web' with the natural world and this engenders responsible use rather than short-term exploitation. This is embodied in Te Ao Māori in concepts of kaitiakitanga and rangatiratanga.

Areas of responsibility unique to Māori include the exercise of rangatiratanga, guardianship of ancestral relationships with water, assessments of mauri and placing of rāhui restrictions to prevent over-use or damage due to pollution.

Innovation in law, such as of legal personality as an embodiment of ancestral figures may achieve recognition of their spiritual and cultural importance and protection of their 'un-ownable' significance.[61] Public trusteeship is an option which has received little consideration in Aotearoa New Zealand and is introduced below for discussion.

Waikato-Tainui's relationship with, and respect for, their waterways gives rise to the responsibilities to protect the mana and mauri of freshwater and exercise mana whakahaere in accordance with their long established tikanga. Mana whakahaere has always included the need to realise rights, interests, and responsibilities, including in relation to economic and proprietary interests. Through the Waikato River Settlement, the Crown acknowledges that if it creates or disposes of any property right or interest in the Waikato River or creates a statutory or other process to create or dispose of any property right, then Waikato-Tainui interests must be addressed in the first instance.

Waikato-Tainui take the position that resolution of Waikato-Tainui economic and proprietary rights, interests and obligations will create certainty for New Zealand's water users and allow the development of a sustainable and enduring water framework.[62]

Considerations of governance for waterways which are developed from a position of responsible care and use offer an orientation of accountability and procedure for working through the inevitable conflicts that exist in relation to ownership.[63] Responsibility and obligation encourage respect for different traditions while addressing convergence on the need to account for inter-relatedness and complex systems, and provision for generations to come moving forward.[64]

[61] Māmari Stephens "To Protect and Serve: Finding New Ways to Protect Te Reo Māori as Cultural Property" in S Frankel and A Costi "Do Cultural and Property Combine to Make 'Cultural Property'?" Special Issue of the New Zealand Association of Comparative Law (2017) 21 Hors Serie 7-22 at 19.

[62] Waikato-Tainui Position Statement, 2020.

[63] ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014).

[64] Linda Te Aho "Governance of water based on responsible use – an elegant solution?" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 143-161.

The Waikato River

CONTEXT

As early as 1981 and as recently as 2017, the OECD Environmental Review identified the lack of national-level strategic planning and the need for equity in the use and benefits of water resources. Since the introduction of the RMA in 1991, the weighting in favour of the economy has been documented by historians and policy analysts. The Waitangi Tribunal identified the underlying binary between economic development and environmental values.[65] The requirement to balance development with environmental protections has proved to be inadequate in enforcing a coherent national regime and stopping degradation.

As mentioned, the past year has seen major proposals to reform the RMA.[66] Current reform of the RMA in respect of fresh water is directed towards reversing degradation and improving water quality. The NPS-FM 2020 incorporates Te Mana o Te Wai as a first principle for water policy and sets stepping-stones to new standards.[67]

Undertakings by the Crown in the Supreme Court

Proposals for recognition of rangatiratanga and kaitiakitanga rights and obligations are predated by a long arduous process of court proceedings and petitions to government from Iwi, such as Whanganui, Waikato, and Tūhoe, dating from 1862[68] and, most recently, the Waitangi Tribunal Freshwater and Geothermal claim, stages 1 and 2.

The Waitangi Tribunal stage 1 report and the Supreme Court Mighty River Power case are pivotal.[69] The sale of 49 per cent shares in Mighty River Power hydro generation accelerated the claim for Māori interests. The report draws together a legacy of claims by Iwi and interested parties in kaitiaki and economic interests of obligation, development and of ownership. It is significant in setting out the legal basis for ownership, property, and commercial development.[70] The Tribunal proposed that claimants may be entitled to commercial redress for the use of rivers for electricity generation in the form of both compensation for past losses and royalties for future use, and also in respect of geothermal resources.[71]

In the Supreme Court the Deputy Prime Minister at the time, 2013, Hon Bill English gave undertakings on behalf of the Crown to pursue recognition of 'rights and interests' in the context of the Crown's bottom lines. The following are relevant excerpts:[72]

> In explanation of the mechanisms available to the Office of Treaty Settlements (and which are manifested in the Settlement Act), the Deputy Prime Minister explained that the framework includes 'acknowledgment of mana, rangatiratanga, and kaitiakitanga' and '[t]he provision of redress that, despite being in settlement of historical claims, is contemporary in nature, forward looking and [providing for] on-going rights and interests'.
> . . .
> Mr English summarised the Crown position as being that it acknowledges that Maori have "rights and interests in water and geothermal resources". Identifying those interests is being addressed through the "ongoing Waitangi Tribunal Inquiry" and a number of "parallel mechanisms". The Crown position is that any recognition must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues." The Court should accept that it is not an empty exercise.

65 Betsan Martin "Water Law: a new statute for a new standard of mauri for fresh water" (2019) 15(3) Policy Quarterly 55.

66 See Greg Severinsen Reform of the Resource Management System: the urban context (Environmental Defence Society, 2020); *New Directions 2020*.

67 Ministry for Environment National Policy Statement for Freshwater Management (2020) <www.mfe.govt.nz/sites/default/files/media/Fresh%20water/national-policy-statement-for-freshwater-management-2020.pdf>.

68 In 1862 Waikato-Tainui opposed the Governor's intentions of putting an iron steamer on the Waikato River. From the 1880s Kingitanga leaders fought in political arenas and the courts to address confiscations. *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 9,11. Opposition to confiscations in the 1860s is documented by every iwi, including Tūhoe. See, for example, J Binney Encircled Lands (Bridget Williams Books, Wellington, 2009); Waitangi Tribunal The Whanganui River Report (Wai 167, 1999).

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

70 Jacinta Ruru "Māori rights in water – The Waitangi Tribunal's interim Report" (September 2012) *Māori Law Review* 8.

71 Waitangi Tribunal *The stage 1 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2012) at [3.9.1].

72 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [112], [145].

Counsel for the Crown confirmed before the Tribunal that the Crown is open to discussing the possibility of Māori proprietary rights in water, short of full ownership.[73] These undertakings by the Crown were followed by an intensive work programme with Iwi Leaders. Changes in government show how the political process stalls real resolution of 'rights and responsibilities' and gives a strong case for a Commission as provision for an expert-based institution for sustained national direction on waterways.

Resource Management Act 1991 (RMA)

The RMA regime has been fateful for waterways despite the purpose of promoting "sustainable management of natural and physical resources" (s 5) and integration of resource management. "Sustainable management" is defined as providing for "social, economic, and cultural well-being". The RMA does not give effect to Te Tiriti o Waitangi, a view confirmed by the *New Directions* review. There are two main areas of concern with the RMA:

- The failure of the RMA to stop the decline of freshwater quality and protect the health of waterways and their ecosystems; and
- Despite amendments to introduce kaitiakitanga and concepts from tikanga, principally Te Mana o Te Wai, they fall short of rangatiratanga decision-making provisions.

The Crown and the Iwi Leaders Group worked intensively to co-design reform options in 2015–2016. Outcomes were disappointing in Te Tiriti terms as there has been no decision on allocation, proprietary interests and ownership, despite Māori proprietary interests being confirmed by the Supreme Court in *Paki v Attorney-General*.[74] This was mainly because the Crown did not make decisions in partnership but reserved all decision-making to itself. The Crown's bottom lines, including 'no one owns water' and 'no generic share for Iwi', meant that the Crown and Iwi Leaders Group did not reach agreement on allocation reforms.[75]

Te Mana o te Wai was introduced by Iwi leaders to give priority to the health of freshwater bodies.[76] Te Mana Whakahono ā Rohe was introduced in 2017 to improve Iwi-Council relationships and involvement in consultation and plan-making. These mechanisms were intended to provide equity for those Iwi and hapū who did not achieve co-management redress via Te Tiriti o Waitangi settlements.

Te Mana o Te Wai is a confirmed value concept in the National Policy Statement-Freshwater Management (NPS-FM 2020) conveying both ecosystem health and tikanga.[77] It is a 'fundamental concept'[78] which is focused on water quality to address the widespread concern about degrading waterways.[79] Most significantly Te Mana o Te Wai establishes a hierarchy of mauri, or ecosystem health standards, water for human health, and commercial use as a condition of the first two.

Review of the Resource Management System 2020

The review of resource management in *New Directions 2020* has come on-stream in the later stage of this research. The scope for the review of the resource management system was confined to the Essential Freshwater programme, which excluded Māori rights and interests and allocation. This raises strong concern that Māori interests will be pushed aside because of the government timeframes for the new legislation to proceed through Parliament.

Recommendations of the Tribunal include strengthening the involvement of mana whenua in planning and decision-making. They include establishing a "national co-governance institution, either for freshwater matters alone or with a wider focus",[80] and strengthening the status of Iwi Management Plans and Mana Whakahono ā Rohe and the s 33 transfer of powers.[81]

[73] *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [101].

[74] *Paki v Attorney-General* (No 2) [2014] NZSC 118, [2015] 1 NZLR 67.

[75] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at ch 6.

[76] Willie Te Aho, Chair Te Whānau-a-Apanui, Expert Advice interview (10 September 2020).

[77] NPS-FM 2020.

[78] NPS-FM 2020 at 1.3 (<www.gazette.govt.nz/notice/id/2020-go3443>).

[79] For example, Mike Joy *Polluted Inheritance: New Zealand's Freshwater Crisis* (Bridget Williams Books, Wellington, 2015); Mike Joy (ed) Mountains to Sea: Solving New Zealand's Freshwater Crisis (Bridget Williams Books, Wellington, 2018) at 16; Catherine Knight Beyond Manapouri: Fifty Years of Environmental Politics in New Zealand (Canterbury University Press, Christchurch, 2018).

[80] *New Directions 2020* at 95.

[81] *New Directions 2020* at 90, 103.

Joint Planning Committees (proposed by *New Directions 2020* to replace Regional Policy Statement and Regional Plans)

The most significant change proposed by *New Directions 2020* is to simplify the planning process and replace the current system of regional and territorial planning with joint plans which are consistent with spatial planning.[82]

Reasons cited for a simplified system include that the system under the RMA has become too complex and fragmented over time, and that it is inefficient. Inefficiency can be seen in the example of freshwater:[83]

> . . . freshwater is managed by regional councils under regional plans that give effect to national standards. Regional councils process consents related to water allocation and discharges into land and water. Local land use is managed by district councils. This includes the approval of uses or practices that can degrade the quality and availability of freshwater through increased runoff of polluted stormwater, erosion of soils, increased water use, and cumulative discharges that are not individually regulated. Freshwater catchments and the lakes and rivers they flow into are divided between districts and sometimes between regions as well.

New Directions 2020 also refers to Treaty settlement legislation which provides for co-management which then involves Iwi in cross-jurisdictional partnerships on freshwater taonga. These complex arrangements are cumbersome for Iwi and hapū that are part of multiple regional councils and which carry expectations of aggregations of Iwi and hapū to meet the requirements of Crown-defined systems.

There are multiple sources of tension and complexity across the system of regional policy statements, regional plans, and district plans, as well as Iwi Management Plans. Sources of tension include the meaning of sustainable management vis-à-vis development, pressures for urban development and housing, and special provisions for landowners. The intention for the policy framework to flow from high level to specific, and regional to local and for monitoring to provide feedback on results in a system of vertical integration is not working.

The proposal is for combined plans and spatial planning for resource management to be prepared by a Joint Planning Committee. Combined plans would replace regional policy statements, regional plans, and district plans and reduce the current 100 plans to 14, one for each planning region. Membership would be from the constituent local authorities, mana whenua and a representative of the Minister of Conservation. The Joint Committee will have authority to act on behalf of their constituent agencies with no need for further approval or ratification of plan contents.[84] In the view of *New Directions 2020*:[85]

> This change alone will greatly simplify coordinated planning within a region and create efficiencies. It will also increase the capacity of central government to provide better system stewardship because there are fewer plans to monitor. The Environment Court can likewise build its expertise in regions through its judges and commissioners assigned to IHPs and appeals.

Another important benefit is the greater efficiency in hearing processes resulting from the removal of the initial local authority hearing and providing instead for Independent Hearing Panels and a more limited appeal process.[86]

Overall, the effect of joint planning will be an increased focus system on planning rather than consenting, whereas under the RMA, consenting has greater weighting. This will have a corresponding transfer of costs from consenting to planning.[87]

The constituency of the Joint Planning Committees provides a more integrated process for mana whenua engagement as envisaged under Whakahono ā Rohe. A limitation of the Joint Planning Committees is they do not require Iwi Management Plans to be included and

[82] *New Directions 2020*at 141; Trevor Daya-Winterbottom "The Randerson review of the RMA as it relates to freshwater governance and management" paper presented at research symposium on Governance of Waterways, November 2020.
[83] *New Directions 2020* at 225.
[84] *New Directions 2020* at 235.
[85] *New Directions 2020* at 236.
[86] *New Directions 2020* at 236.
[87] *New Directions 2020* at 434-435.

considered even though these are mentioned as needing to be incorporated in several places in *New Directions 2020*.[88]

The Joint Planning Committees do not take the step of providing for a mana whenua-led process, as would be in keeping with recognition of rangatiratanga in the resource system. At this stage systems for representation on the Joint Planning Committees have yet to be designed. This requires parallel Iwi, hapū and Māori landowner, and tauiwi streams in catchments. Our proposals for mana whakahaere boards and executive rūnanga, to feed into the Joint Planning Committees is explained in Part 2. Catchment based representation of tauiwi on the Joint Planning Committees is likely to be through regional council processes.

The Commission would be able to consider the most effective implementation regime in the context of new legislation. A Commission would have independence from political decision-making and thus provide checks and balances for national-level policy.

A co-governance body such as a Commission has not been provided for in the new system at this stage. We consider a Commission would support the new regime through a joint authority. In making a case for a co-governance body we reiterate our view that this is a step towards rangatiratanga which is yet to be fully recognised in governance.

Climate change

Climate change is shifting the patterns of rainfall and bringing new conditions of floods, droughts, and unstable weather patterns. The Intergovernmental Panel on Climate Change (IPCC) is assessing human influences on the water cycle with attention to feedbacks from land processes at small scales and the global scale of the water cycle.

The forthcoming Assessment Report on climate change and water, AR6, will build on the 2008 Climate Change and Water[89] paper which documents changes in ice, the cryosphere, and projections for intensified flooding and drought globally and regionally, as well as the Special Report on Climate Change and Land.[90] This identifies the interactions between desertification, land degradation, sustainable management, food security and greenhouses gas influences on terrestrial ecosystems. The scale of impacts will vary regionally in accordance with changes in the water cycle – this in turn is influenced by vegetation cover, urbanisation, and land degradation from the certainty of intensified rainfall and heavy rainfall events.

Land is both a source and a sink of greenhouse gases (GHGs) and plays a key role in the exchange of energy, water and aerosols between the land surface and atmosphere. Land ecosystems and biodiversity are vulnerable to ongoing climate change, and weather and climate extremes, to different extents.

The IPCC analysis refers to diminished food security due to warming, changing rain patterns, and frequency of extreme weather events. There are both positive and negative effects on crop yields depending on latitudes. These in turn affect animal-based productivity and infestations of agricultural pests and diseases. An assessment of emissions and sinks from agriculture, forestry and other land use including the global system of food production (transport, fertilisers and so on) are estimated to be 21-37 per cent between 2007 and 2016.[91]

We can readily see the implications of the global patterns of climate change identified in the IPCC reports for regional contexts and to interpret these for Aotearoa. *New Directions 2020* gives specific proposals to bring climate change management into the framework of the new legislation. The emphasis on management of the built environment and need for planning for managed retreat is fitting for the legislation envisaged in the Review and offers the next step to the Climate Change Response (Zero Carbon) Amendment Act 2019.

[88] See, for example, *New Directions 2020* at 25, 56, 90.

[89] BC Bates, ZW Kundzewicz, S Wu and JP Palutikof (eds) 2008 *Climate Change and Water Technical Paper of the Intergovernmental Panel on Climate Change*, IPCC Secretariat, Geneva.

[90] IPCC, 2019: Summary for Policymakers. In: *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* [PR Shukla, J Skea, E Calvo Buendia, V Masson-Delmotte, H- O Pörtner, D C Roberts, P Zhai, R Slade, S Connors, R van Diemen, M Ferrat, E Haughey, S Luz, S Neogi, M Pathak, J Petzold, J Portugal Pereira, P Vyas, E Huntley, K Kissick, M Belkacemi, J Malley, (eds)] In press (IPCC Summary for Policymakers).

[91] IPCC Summary for Policymakers at 61; BC Bates, ZW Kundzewicz, S Wu and JP Palutikof (eds) 2008 *Climate Change and Water Technical Paper of the Intergovernmental Panel on Climate Change*, IPCC Secretariat, Geneva.

Farm fences lie underwater during recent floods

The *New Directions 2020* review proposes remedies for alignment with the Climate Change Response (Zero Carbon) Amendment Act 2019. Considering the connection of climate change with the hydraulic cycle in respect of droughts and floods, there needs to be policy that takes account of uncertainty in planning and has robust systems for evaluating emissions across supply chains and whole life cycle of projects.

Provisions for central and local government to have the powers to modify or terminate existing consented activities is essential to an adaptive system that can respond to uncertainty and change.

These have the added benefit of introducing mechanisms needed for transitions in consenting to retire consents that are environmentally detrimental and bring in a new criteria-based allocation system. Modification of consents requires national oversight along with regional council and territorial authority capacity to review and adjust consents for land uses and manage activities in accordance with catchment context and sustainability.[92]

New Directions 2020 does not elaborate on consents or for land management food security even though these are central to anticipated changes in freshwater supply and the threat of crop failures.

The scope of challenges to rehabilitate waterways, introduce equitable access to water and provide for unprecedented effects on water systems from climate change in Aotearoa New Zealand are mirrored world-wide. The OECD Study on Water[93] recognises that it is impossible to make new policy settings in one step, often because of politics and contested interests.

> **There is tension between an evolving iterative process with stakeholder engagement and the known remedies and risks of climate change that should be attended to in statute and policy. Allocation is particularly challenging and must prioritise climate change in waterways policy and governance.**

At present the RMA does not provide sufficient requirements to consider climate change in decision-making for infrastructure, procurement, and resource consents. There has been a recent amendment to remove the s 104E prohibition on consent authorities from having regard to effects on climate change when considering applications for discharge and coastal permits and ss 70A and B which restrict the ability of regional councils to make rules and regulations relating to controls on discharges of greenhouse gases.[94]

Renewable energy does not necessarily have renewal built into its systems of production – as can be seen with the Tiwai Aluminium Smelter – where, despite production with renewable hydro-energy, toxic waste, and emissions impact on the Waiau River. These, and other matters relating to the regional economy, all need to be integrated into waterways and climate change impact assessments.[95] The proposed Waterways Commission would include climate change in its mandate.

[92] *New Directions 2020* at 187.

[93] OECD Water Resources Allocation: Sharing Risks and Opportunities (2015) *OECD Studies on Water* at 105 and following

[94] See Resource Management Amendment Act 2020.

[95] R Oram "Now we can see our future" *Newsroom* (online ed, 12 July 2020).

OPTIONS FOR VESTING

This section reviews discussions about vesting, options for recognising customary authority, such as through legal personality, fiduciary duties, and public trusteeship.

An alternative to the non-ownership position of the Crown is to vest waterways in a new form of inalienable title. We already have examples of these in the innovations of legal personality of Te Urewera and Te Awa Tupua. Tupuna title for the rivers,[96] Te Mātāwai trust for Te Reo Māori, a Ngāi Tahu title,[97] and Rangatiratanga titles are further options to consider. In respect of waterways, such titles are intended to include the riverbed, the banks, the water column, and the air above the water system and thus restore river entities as a whole.

Te Awa Tupua and legal personality

Legal personality is a corporate concept which has been given an innovative application to Te Urewera National Park and to Te Awa Tupua, the Whanganui River, as an ancestral water body. These particular legal forms are through settlements of Te Urewera and the Whanganui River Treaty claims.[98] The vesting of Te Urewera and the Whanganui River as legal persons gives standing in law to these entities in their own right, via statute. This legal concept has also been applied in India, Ecuador, and Colombia.

The granting of legal personality to rivers and other entities is resetting governance for the relationship between people and nature, in a way that seeks to bridge tikanga with corporate law. Usually, human guardians are appointed to represent the interests of a legal person, which in this case is a river or other entity of nature. Significantly, a legal person such as a river or forest becomes a subject of law, and as a legal person is vested with its own rights and duties.[99]

Public Trusteeship

The doctrine of public trusteeship as a form of vesting encompasses public good interests and prospective, forward-facing responsibility. Trusteeship is a widely used form of vesting of waterways, including the United States, Australia, Costa Rica, and South Africa. It has potential as a framework for the governance of Earth's global commons, the atmosphere, oceans, and polar regions, with scope beyond the boundaries of national jurisdictions. Trust law in New Zealand is largely confined to private trusts and public trusteeship had not been developed here.

On the matter of public trusteeship Klauss Bosselmann argues that states fall short in their responsibility for the global commons because of their priority concern with sovereign interests. Bosselemann writes "[t]he public trust doctrine says that natural commons should be held in trust as assets to serve the public good".[100]

The doctrine of public trust assists in overcoming the limitations of short-term policy inherent in electoral cycles of government. The emphasis on public good acts as a counterpoint to the sway of private property interests, which are a significant factor in the degradation of waterways.[101]

[96] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 2.

[97] Ngāi Tahu exercises rangatiratanga over their freshwater and an objective is to establish Ngāi Tahu title over freshwater in the takiwā, with Ngāi Tahu regulatory and fiscal authority.

[98] It is noted that these Treaty settlement redress mechanisms fall short of the Iwi aspirations as articulated in their claims to the Waitangi Tribunal, and in the subsequent Tribunal reports. For example, see *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 9.

[99] AH Angelo "Personality and Legal Culture" (1996) 26 *Victoria University of Wellington Law Review* 395.

[100] K Bosselmann "Reclaiming the Global Commons: Towards Earth Trusteeship" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 35-56.

[101] Betsan Martin "Nga Pou Rahui" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 27 and following. See Supplementary notes in this paper on the doctrine of Public Trust.

Public trusteeship comes into focus in Aotearoa through the Wakatū case in respect of the Nelson Tenths, in which the Supreme Court confirms the fiduciary duty of the Crown in respect of contractual obligations to Māori owners.[102]

The significance of the Wakatū case is that the Crown has fiduciary duties on behalf of the Māori customary owners, which are duties in the nature of a trust. These arise either through Te Tiriti o Waitangi or through the obligations arising from a contract (in this case relating to the Crown's assumption of the New Zealand Company purchase).

The Wakatū case opens the prospect of trusteeship, first of all as an obligation by the Crown enforceable in the courts. Beyond the immediate implications of this case consideration can be given to vesting waterways in a trust with Crown and mana whenua trustee obligations for waterways with both parties having fiduciary duties as trustees of the waterways. We therefore consider there is potential here for public trusteeship of waterways – a form of vesting that is used in other jurisdictions, including Australia, South Africa and the United States, Hawai'i in particular.[103]

In Hawai'i the State constitution enshrines water as a public trust.

Water resources were diverted and captured by the sugar cane industry to the detriment of water flows, ecosystem health and indigenous cultivation. Indigenous litigants led by Kapua Sproat initiated legal proceedings in the Waiāhole case, to have waters restored to their original courses and flows.[104] In a landmark ruling in 2000, the Supreme Court of Hawai'i decided in their favour, citing the public trust doctrine contained in the State Constitution and in indigenous traditions of spiritual association with water as a resource to be managed for future generations.

For the purpose of this discussion the duty of the Crown as a trustee with fiduciary duties could be applied to waterways – in regard to a Te Tiriti duty to ensure rangatiratanga, or where the Crown has breached requirements to consult on infrastructure such as dams, or to compensate customary owners. The underlying principle of the Crown's assumption of sovereignty was that Māori customary property rights were unaffected.[105] Governance in Costa Rica, as in Hawaii, is based on the Constitution establishes the right of all citizens to a healthy and ecologically balanced environment. This extends to a right of all citizens to claim reparations for environmental damage. The citizen standing does not come from ownership, property titles or rights per se. This standing is called 'diffuse interest' and was created as a response to an international agenda for environmental and climate change policies.

Several lines of investigation are needed on the interface between trusteeship of water and customary law, aboriginal title, and the effect of any proposal for trusteeship on Te Tiriti o Waitangi settlements. Trusteeship should not be a vehicle for extinguishing customary title or diminishing rangatiratanga. A Rangatiratanga or Taonga Trust invokes the terms of Te Tiriti, allows for rangatiratanga of Iwi and hapū, and recognises Crown responsibilities.

[102] Proprietors of *Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

[103] See Supplementary note: 'Public Trusteeship of Waterways' http://www.response.org.nz/wp-content/uploads/2020/10/Vesting-Public-Trusteeship.pdf.

[104] Kapua Sproat and Mahina Tuteur "The power and potential of the public trust" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 193-217; Waiāhole I 94 Hawai'i, 9 P 3d at 133, 445.

[105] K Feint "A Commentary on the Supreme Court Decision of Proprietors of Wakatū v Attorney-General" (2017) 25 *Waikato Law Review Taumauri* 1 at 8.

EQUITY AND CORRECTING PAST EXCLUSION

Equity is a matter for governance as well as for allocation. Equity is a matter for distributive justice and fair entitlements to water resources that need to be addressed in statute.

Customary interests often fall within the considerations of equity. Equity and rights are principles of redress for past exclusion from access and entitlements to water and water resources. Rights have become a key reference for indigenous claims to recover governance guarantees in Te Tiriti o Waitangi and to restore relationships with water that have been disrupted by Crown and settler land acquisitions. In the situation of Aotearoa restitution should be addressed through recognition of rangatiratanga. Equity (often referred to as ōritetanga) has gained prominence in Aotearoa and internationally to relieve the focus on economic values in water resources and market approaches to commercial interests.[106]

The South Africa Water Act (SWA) offers many points of reference for New Zealand. The preamble refers to the purpose of achieving equitable access to recover from discriminatory laws which have prevented access to water and use of water resources. It acknowledges the national government's overall responsibility for water resources and their use and recognises the need for integrated management with delegated functions to regional levels with provisions to enable everyone to participate.

Water is held nationally in trusteeship and the Minister must ensure that water is protected and controlled in a sustainable and equitable manner for the benefit of all persons in accordance with the constitutional mandate. Included in the overarching purposes are the responsibility for equitable allocation for beneficial use and environmental values.[107]

> **The South Africa Water Act[108] achieves equity through a new licensing system that replaces any former entitlements and rectifies over-allocation. Pricing provisions for water use are to support research, the costs of planning and development, water resource protection and discharge of waste, distribution, and the costs of waterworks.**
>
> **Differential pricing for equity outcomes may take account of different geographic regions, different categories of water use and different water users, socio-economic aspects and include pricing as a mechanism to redress past racial and gender discrimination.[109]**

Pricing is set by the Minister of Water Affairs and Forestry, in consultation with the Minister of Finance.

In Aotearoa, the first in, first served system of allocation is the key RMA mechanism by which Iwi and hapū have been excluded from the benefits of sharing in the wealth that comes from access to water resources. The Essential Freshwater policy for equitable access for tāngata whenua through development of underdeveloped land has potential advantage for those with such lands. However, this is not an equity policy because many Iwi and hapū are without such lands, due to historical confiscation and alienation.

The legacy of alienations has created the situation of landlocked land and fragmented land titles which has in turn prevented access to water for marae and for development. Beyond addressing equity for Iwi and hapū, the present allocation framework does not live up to the standards of water allocation outcomes. Resilience is weakened from inability to respond to pressures on the resource and from large volumes of unused water. Weak implementation of the NPS-FM 2020 indicates poor governance. Inconsistency of water quality standards that fail environmental values and social wellbeing and equity criteria and poor access for new users does not meet equity standards nor achieve Iwi and hapū rights and interests.

[106] OECD Water Resources Allocation: Sharing Risks and Opportunities (2015) OECD Studies on Water; Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at ch 6; A Iza and R Stein (eds) RULE - Reforming Water Governance (IUCN, Gland, Switzerland, 2009).
[107] South Africa Water Act 1998, ch 1, cl 3.

There have been successful endeavours in recent years based on equity to achieve rights of engagement and policies for water quality values with tāngata whenua perspectives. The degrading state of freshwater has been identified since 2003, showing a failure by the Crown to protect freshwater taonga. The '*Fresh Start to Fresh Water*' and '*Next Steps to Fresh Water*' have not delivered restoration of water quality or rectified the issues of equity of access to water resources, participation, and governance interests.[110]

The principle of equity comes to life in a brief case study from evidence for the Ngāti Raukawa claim given to the Waitangi Tribunal at Te Tikanga Marae, Kakariki, December 2020.[111]

The Te Hakari Wetland Restoration Project is a 33.7 acre wetland that was originally farmland, and is being restored as a conservation area to improve the quality of its surrounding waterways

[108] South Africa Water Act 1998, ch 1,cl 4 and ch2, pt2.
[109] South Africa Water Act 1998, ch 4, pt 2 at [27], ch 5, pt 1 at [56].
[110] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at xxi.
[111] Evidence of Atiria Reid, 11 December 2020, Te Tikanga marae.

CASE STUDY: NGĀTI RAUKAWA

In 1914 Te Reureu land was partitioned to provide for a marae and papakāinga. Ms Reid spoke of their land blocks being too small to farm full-time in the mid-1900s and that it was not feasible to consolidate them to become economically viable. Instead, the land was leased to Pākēhā landowners (effectively strengthening their holdings) and whānau worked in gravel extraction, wool scouring for Feltex, and seasonal potato picking. This pattern continues.

In 1998 Ms Reid returned to Kakariki with her daughter and four mokopuna intending to fulfil the dreams of her uncles to build a home. The rural zoning regulations are structured in a way that prohibits papakāinga. The more fertile the land for agricultural purposes, the more land is required to build a whare (house). Rural zone 1 requires 8 ha to build a whare. Zone 2 requires 10 acres. And 1.5 acres is required to build a septic tank. Ms Reid said:

"We can't get water to our whare. How can we partition three acres to get septic tank, let alone ten acres to build whare when we have multiply owned blocks?"

There is a minimum land requirement for septic tanks in rural Manawatū. The 1.4 acres minimum requirement for a septic tank means it is possible to build on land of this acreage, however, Ms Reid said 'thats a lot of land to partition out in multiply owned blocks'. Fragmentation means that hapū can't meet this requirement.

At Kakariki they have insufficient land to provide for intergenerational living. This account includes prejudicial impacts of Manawatū District Council actions in respect of roading, consents and water supply. Land maps given in evidence showed roading circumventing Pākēhā owned farmland and being run through Māori land, adding to its fragmentation. When raw sewage was discharged into the Rangataua stream that was the end of the mahinga kai – freshwater koura and watercress. Ms Reid spoke of the difficulty of communicating a Māori perspective of waste management -

Yet she said the criteria for clean water are much simpler than interpreting complex data:

> Can you drink it?
> Can you eat food from it?
> Can you swim in it?

Poor resourcing for hapū engagement with councils is well documented, both in terms of capacity, availability, financial resourcing, and the timing of meetings which is often when whānau are at work and cannot get time off – in contrast to those from business and government who are fully resourced for meetings. Ms Reid spoke of inequities in consenting. They cannot get water for their whare, they cannot build a papakāinga, yet a Pākēhā farmer applied for water for pumpkins requiring 1000 cu water per second = 1 football field x 10 metres high per second.

Two fora have been formed by Iwi and hapū for engaging with the council. Ngāti Rangatahi are part of Ngā Manu Taiko, an inter-hapū consultative committee to respond to District Council matters. Ngā Pae o Rangitīkei is an inter-iwi forum to have a collective response to crown agencies. Their priority is the awa.

These inter-hapū forums show that these are an effective model of co-ordination at the local level and give weight to the proposal for Te Oranga o Te Taiao Rūnanga, outlined below in Part 2.

Land use categories which are important for identifying optimum economic value and productivity in land use can be seen to also work against the aspirations of Iwi and hapū and their development options. These combined with a system built on vested interests and powers of private landowners shows clearly where corrective mechanisms are needed.

Current proposals improving water quality and efficiency of the resource management system need to address equity. Equity requires a major shift in the entire system including in the rangatiratanga dimension of governance and in system of criteria-based allocation.

CONCLUDING COMMENTS

In the 21st century we grapple with different traditions for the use and control over water resources. The traditions of mana whenua are sourced in relationships with water and obligations to maintain mauri as a condition of use, with authority and law to sustain the health waterways. These inform ownership. Western systems are more contractual and underpinned by utilitarian economics with rights to use and alienate which are associated with private property - another form of ownership. The 'no-one owns' water position allows water to be free of property and ownership rights and prevents commodification, but this is undermined by the regulatory system which provides for wealth creation through access to water resources through consents.

This research leads to the view that a new level of solidarity would be inaugurated by specialist institutions dedicated to remedying outstanding matters of the governance of waterways and to rehabilitate the interfaces of kaitiakitanga, ecosystem health, human, development, and decision-making systems.

A Commission, with Mana Whakahaere Boards and Rūnanga could provide institutions to bring waterways to the centre of remedial attention, and to facilitate transitional procedures, knowledge development, and policy and regulatory advice to meet these challenges over time. Representative membership of the Crown and Rangatira will offer more interactive relational processes – a procedural rather than prescriptive approach with the expertise of science, tikanga, cultural values, and expertise from other relevant domains.

PART 2. INSTITUTIONS TO SUPPORT RANGATIRATANGA IN THE GOVERNANCE OF WATERWAYS

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PART 2. INSTITUTIONS TO SUPPORT RANGATIRATANGA IN THE GOVERNANCE OF WATERWAYS

GOVERNANCE

The drought in the Auckland catchment in 2020 and the emergency response of an application by Watercare, the subsidiary that manages Auckland's drinking water, for a further 200 million litres of water per day from the Waikato River is an example of a system that needs precautionary planning and capacity for inter-catchment management. In this case, the Minister David Parker used the emergency response of call-in powers under pt 6AA of the RMA to refer the application to a Board of Inquiry.[112]

Taumata Arowai, the new 'Three Waters' institution will go some way to addressing inter-catchment planning through national oversight. The Joint Planning Committees under the Natural and Built Environments Act will add further capacity for regional planning. There is still a need to link Three Waters with the wider governance of waterways. From a governance perspective, it is erroneous that water services and water sources are under separate regimes and different ministries. There needs to be a framework through which water services under Department of Internal Affairs and environmental waters under the Ministry for Environment are interactive. Source and supply both ultimately come from rain collected in waterways and filtered through soil, including absorbing toxic inputs on the land such as nitrates. These find their way into rivers, lakes and aquifers. Because most of the water we drink is treated water, the current structure allows us to overlook the condition of water that is supplied to water services. However in the case of reactive nitrogen, this is not visible and is not removed by standard treatment. Only pathogens are removed. Extreme treatment may remove 80% of reactive nitrogen. Recent studies of reactive nitrogen in ground water and rivers by Mike Joy show not only inordinately high levels of reactive nitrogen to be a direct result of fertiliser on pasturelands; it also exposes high correlations between nitrates in water and colorectal cancer.[113]

This example leads well into discussion on governance institutions at national and catchment levels and to recognition of rangatiratanga in these systems. The governance arrangements of Treaty Settlement Acts, the Post Settlement Governance Entities offer some guidance to governance options. Treaty Settlements[114] are modern constructs of Iwi governance which, as statutory settlements, give pre-eminence to the mana of Iwi in relation to the Crown.

A national co-governance Commission is proposed here.[115]

> **A Commission is intended to strengthen a Te Tiriti framework for resource management with independence from political fluctuations with changes in government.**

While a co-governance body was recommended by the Waitangi Tribunal these proposals encompass national and catchment institutions for the new context of major resource management reform, endeavouring to support rangatiratanga frameworks at all levels.

[112] Hon David Parker "*Auckland water consent referred to a Board of Inquiry*" (press release, 30 June 2020). Since the call-in, Watercare has revised its application.

[113] Mike Joy '*Source water: the crucial missing 'water' from new legislation*'. https://www.youtube.com/watch?v=ajiUjL3O2eM. University of Otago Summer Talk February 2021
- New Zealand (NZ) has one of the highest colorectal cancer (CRC) rates in the world, with over 3,000 new cases each year.[1] Growing international evidence has demonstrated a relationship between nitrate contamination in drinking water and an increased risk of colorectal cancer. 2-4 A meta-analysis estimated between one and eight percent of CRC cases could be attributable to nitrate contamination in drinking water.[2] In NZ, this translates to between 30-240 CRC cases and 12-96 deaths per annum. However, to date, there has been no comprehensive study of the relationship between nitrate contamination in drinking water and CRC in NZ

[114] Ngāi Tahu Claims Settlement Act 1998; Te Urewera Act 2014; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Waikato-Tainui (Waikato River) Settlements Act 2008.

[115] It is important to state up front that Iwi leaders have been reluctant to support the notion of a Commission, or national approach to waterways governance, preferring instead to preserve the right of rangatira ki te rangatira engagement between Iwi and hapū leaders and Crown counterparts.

Avon River flows through central Christchurch

The Natural and Built Environments legislation shifts the resource management system towards national planning rather than regional council consenting and it amalgamates planning and decision-making into fourteen regional Joint Planning Committees. It is oriented to more centralised decision-making, with more concentration of powers with the Minister. With this situation, a suitably constituted co-governance body would act as a counterpoint to the Minister's powers along the lines of the accountability provisions of the Climate Change Commission.

The purpose statement of the Natural and Built Environments Act is anticipated to include Te Mana o Te Taiao and a requirement to give effect to Te Tiriti o Waitangi. These purposes should be integrated into all provisions of the legislation including the national planning system and the delegated authorities of the Crown. This research was originally to address governance of waterways. The new legislation is expanding the scope to Te Taiao, to which waterways is integral. We address issues of waterways specifically while retaining knowledge of the context of Te Taiao and supporting the systems approach of Te Taiao in the legislation.

The new Joint Planning Committees change the shape of resource planning and decision-making. Membership of these Committees is to be comprised if central government, regional government and mana whenua.

This raises questions of representation and structures which will enable catchment-based representation for mana whenua and regional councils.

Discussions on the role of mana whenua in the National Planning Framework and the 14 Joint Planning Committees have led to a proposal for mana whakahaere catchment organisations or hubs. We already see the formation of inter-hapū collaboration in the Ngā Manu Taiko consultative committee and Ngā Pae o Rangitīkei as an inter-iwi association.

Mana Whakahaere Councils could be the basis of representation of Iwi and hapū. We outline a structure of Mana Whakahaere Councils feeding into fourteen regional rūnanga, provisionally called Te Oranga o Te Taiao Rūnanga. The Rūnanga may serve in providing a nominating system to the regional Joint Planning Committees, and to a national co-governance body. Broadly speaking, these options for decision-making and representation by Iwi and hapū would require a parallel system suitable for regional council representation. They lead to what may in effect become regional Joint Planning co-governance and 'co-planning' committees, and form an architecture of the new system.

In addition this research also brought to light an alternative option of Mana Whenua Authorities in catchments as the sole authorities for determining the requirements of Te Mana o Te Wai. This is a further possibility for rangatiratanga in respect of oversight of mauri and the ecosystem health of waterways.

Thus, we canvas a range of options for recognition of rangatiratanga, mindful of reservations that these do not meet the full scope envisaged for rangatiratanga. A national Commission serving Iwi and hapū Mana Whakahaere Councils linking to Te Oranga o Te Taiao Rūnanga could be a significant step towards rangatiratanga. They are achievable options within the new national and regional planning system. In respect of Te Mana o Te Wai, 'Mana Whenua Authorities' are offered for consideration as a different option for Iwi and hapū catchment located rangatiratanga.

We adopt the title Te Mana o Te Wai Commission because of waterways being the original focus for this research. With the prospect of Te Mana o Te Taiao in the purpose of the Natural and Built Environments legislation it will be more appropriate to move from a domain specific Commission, to a systemic Commission.

REVIEW OF GOVERNANCE OPTIONS

Commissions are useful for providing independent expert advice, research, leadership and auditing roles in Aotearoa New Zealand. They serve an important role in providing stability of purpose and continuity of mission that transcends political change and enhances continuity in governance.

The issues that arise in changing to the system being inaugurated by the Natural and Built Environments legislation and the Spatial Planning and Climate Change Adaptation legislation are complex and will take time to implement. They are beyond the immediate scope of legislation and would be well served by a Commission.

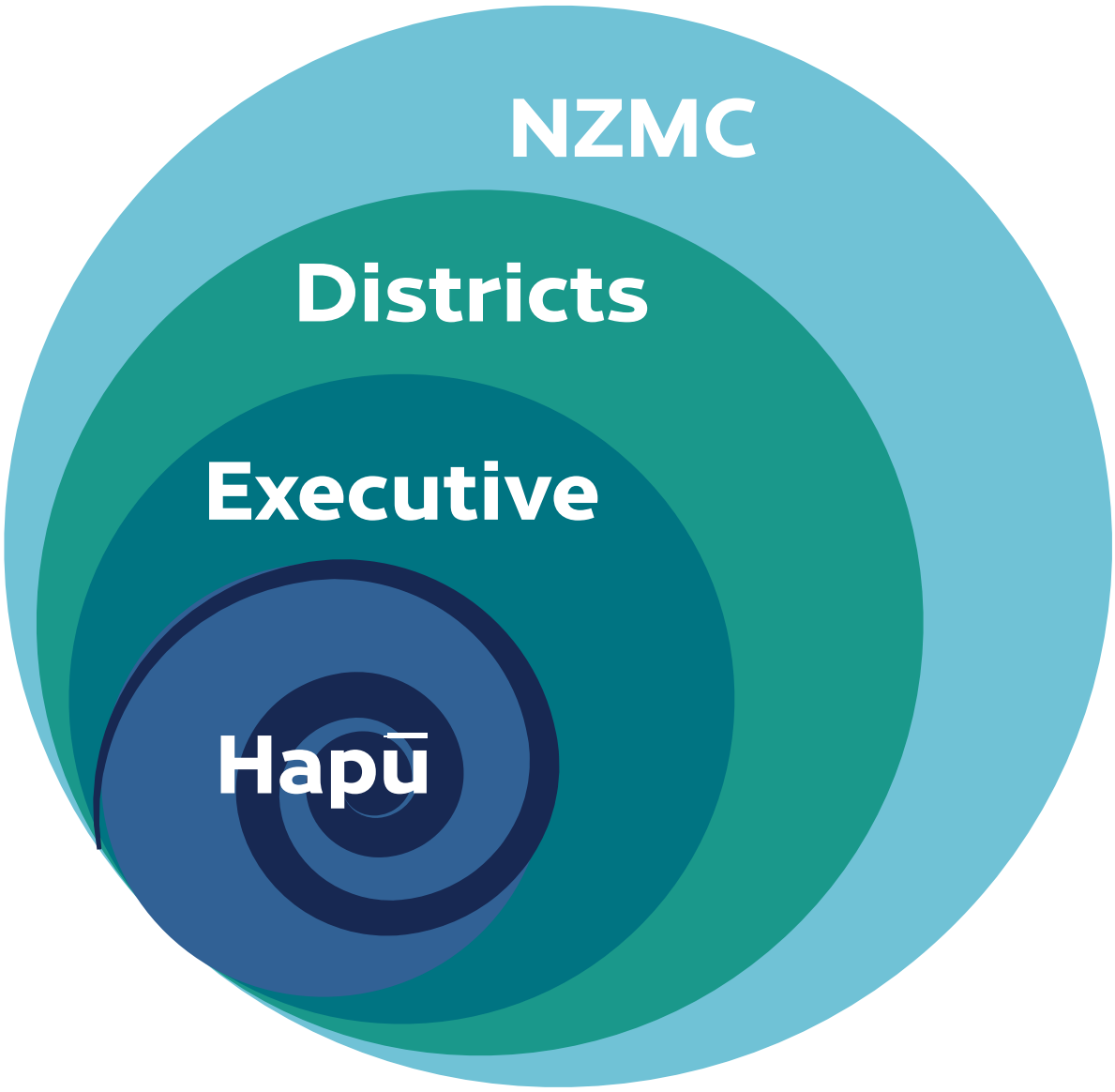
We have reviewed a number of models including both national level governance models, and Iwi governance models. National models include those designed specifically for Māori interests as well as for wider public interests and their systems of representation reflect these distinctions.

They include the NZMC, the Crown Forestry Rental Trust, Te Ohu Kai Moana, the Waitangi Tribunal, the Parliamentary Commissioner for the Environment, the Climate Change Commission, Criminal Cases Review Commission, the Children's Commissioner and the Human Rights Commission. We refer to these selectively to inform the main research interests in governance structures, Te Tiriti requirements and different methods of representation.

A national co-governance body must be representative of member constituencies and have provision for nomination or co-option of expertise.

We briefly review Post-Settlement Governance entities that have arisen from Treaty Settlements as models of governance structures, membership and representation: Te Urewera, the Waikato River Authority, Te Awa Tupua, and Ngāi Tahu.

Diagram 1: ***New Zealand Maori Council structure***



Models of National Institutions

New Zealand Māori Council
Extended attention is given to the NZMC structure and processes of representation because of its potential to inform the requirements of National Planning and the regional Joint Planning Committees. Its key assumptions are very important for creating the architecture of the new National Planning System.

A key assumption discussed below, is that hapū are the basic unit of customary society, and that these often find their modern form in urban marae and Māori organisations, including Iwi Post-Settlement Governance Entities. A second key assumption is that democratic responsibilities are not individually held, but exercised by the group, the hapū. Following on from this, participation is through the group.

> **The operating principle for the overall structure is that in Māori society, power ascends from the bottom up and not from the top down.**

A further feature relevant to the potential of the NZMC to inform new structures in the resource reforms is the adaptability of the system in response to changes in constituent communities, policy, and law.

History
The NZMC structure is embedded in statute and history. It is a product of the historic Māori search for self-government within a Treaty paradigm. It grew from concepts developed from 1860 by the Kīngitanga, Kotahitanga, and eventually, Māori politicians.[116] It was recognised by Government, albeit reluctantly, through its delineation by statute in 1900, 1945 and 1962. It reflects Māori owned infrastructures, in the pursuit of tino rangatiratanga, dating back to 1860. It was devised by Māori for Māori and was given statutory effect by Government in the spirit of what was then, for Government, a reluctant partnership.

The purpose of the legislation has been to provide for Māori self-government in partnership with the State Government.

NZMC has contributed considerably to Māori development through advocacy to a less than receptive Government, with progress being more marked by Government concessions than Government initiatives.

Structure and Representation
Hapū self-government is provided through "Māori Committees".[117] Starting from 1900 the country was divided into areas based on papakāinga that exercised authority within a given area, and which was seen to represent a hapū or an amalgamation of several hapū. Then, urban Māori communities were treated as though they were hapū. Today, the Māori of a given area elect a seven-member committee to pursue their interests in that area.

Publicly notified elections are held every three years. They begin with committees in communities and then ascend through to geographically based Executives, then to District Councils of which there are currently 16, and each District Council appoints 3 members to make up the national body, the NZMC.

To illustrate, Wellington District Māori Council is comprised of three geographically defined Executive areas (Hutt, Central and Kapiti) and each Executive has between 5 to 10 Māori committees.

The representative entities for the groups are statutory corporate entities at each level, each having the legal authority to represent the Māori people at each of the levels. This structure

[116] Māori Councils were established following meetings led by Sir James Carroll (Māori MPs), Apirana Ngata (Young Māori Party) and Īhāia Hūtana (Te Kotahitanga). Legislation provided the machinery of local self-government through District Councils delegating to Komiti Marae. The Komiti Marae adopted the system of Rūnanga (Councils), Karere (community officers) and Watene (wardens) introduced by the Kīngitanga in the 1860s. After a period of decline, the system was revived under the Maori Social and Economic Advancement Act 1945. The Act added Tribal Executive Committees. Underfunding continued to be a problem. Led by Major Reiwhati Vercoe, the Council reformed under the Māori Community Development Act 1962. This Act established the national body as a regular entity with legal authority to represent all Māori. The national body, the New Zealand Māori Council, has been influential in Māori policy development and litigation, and has maintained research and advocacy on Māori policy through the Waitangi Tribunal.

[117] Formerly called "marae committees".

enabled NZMC to legally represent all Māori in litigation from the 1980s, in relation to asset transfers to State-owned Enterprises, the transfer of state forests, farms, broadcasting assets and spectrum, and the management of te reo, fisheries, fresh water and geothermal power.

Flexibility

While there is a clear structure for the committees, executives and districts set in place by the legislation, there is scope for change and adaptation provided for in the legislation.[118] The legislation recognises the fluidity of Māori governance structures. The NZMC may alter the number and boundaries of the Districts at any time. In a similar vein the Districts can alter the Executives and the Executives can alter the Committees.

Over the years there have been several changes to these structures in response to population movements and changing allegiances.

Key Assumptions (Rationale)

In the customary system the hapū is the primary unit exercising corporate functions and each hapū is autonomous. Accordingly, in the NZMC legislation, public elections are conducted only at the hapū level. The promotion of individuals to higher echelons is by way of appointment. Some Pacific state constitutions like that of Samoa, reflect the same perspective.

A further rationale is that in custom Māori democratic rights are not held individually but are held by a group, the customary group being the hapū.

The failure to recognise and provide for the group right has been the bane of Māori customary survival ever since the transfer of hapū land to individual owners.

Since this tenurial reform was applied to all the hapū, its impact was more serious than the land confiscations. In the formulation of individual human rights, the international community did not recognise group rights until 2007, in the United Nations Declaration of the Rights of Indigenous Peoples.

[118] Māori Community Development Act 1962, s 4(4).

In North America, even the settlement of historic claims saw the return of assets to individuals rather than the group. However, Māori have resisted this in the New Zealand historic claim settlements and in the development of representational structures. The right of participation is through the group.

The same outcome is stressed in the customary conceptualisation of the hapū as characterised by descent but not defined by it, meaning in effect that participation is the key element. In this sense the term ahi kā is also used to denote the burning fires of occupation. When the hapū went to war, they did not define their strength by the numbers who were absent but by those who were there with their feet on the ground and who were bound, if not by blood, then by allegiance. It is the least that can be done, out of respect for Māori culture, that those who wish to vote in the Council elections, should have to vote as members of a community, the community where they live, or the community to which they subscribe.

Prospective adaptation
Were this structure to be adapted to define Māori representation for the purposes of the RMA and Local Government reforms, it would be necessary to redefine and repopulate the Māori Committee areas because Māori committees are not operating in several areas and populations have shifted. The Act would need to be modernised and fresh elections would need to be held.

It also needs to be borne in mind, however, that the NZMC exists for more than the management of natural resources. Over the last three years, the NZMC has contributed significantly to research and submissions on housing, health, state care of children, foreshore entitlements and rights and interests in water. Accordingly, it is considered by NZMC:

- that the District Councils, now forming Te Oranga o Te Taiao Rūnanga would appoint to Joint Planning Committees, and NZMC, with FOMA and Post Governance Settlement Entities would appoint to a Commission.
- that the appointments would be made according to regulations to ensure that those appointed are best qualified for the task.
- that the appointments should be modeled on the system for the Crown Forestry Rental Trust, involving Federation of Māori Authorities (FOMA) AND NZMC and expanded to include Post-Settlement Governance Entities, appointing jointly.

To illustrate the possibilities, the Māori committees might be reformed as hapū/hapori/marae entities forming mana whakahaere associations. There could be multiple mana whakahaere associations within each of the proposed 14 regions under the Natural and Built Environments Act. The Mana Whakahaere Councils would then feed into a representative body, a Rūnanga. In an electoral college process the Mana Whakahaere Councils would vote for representatives to an appointments committee of Te Oranga o Te Taiao Rūnanga.

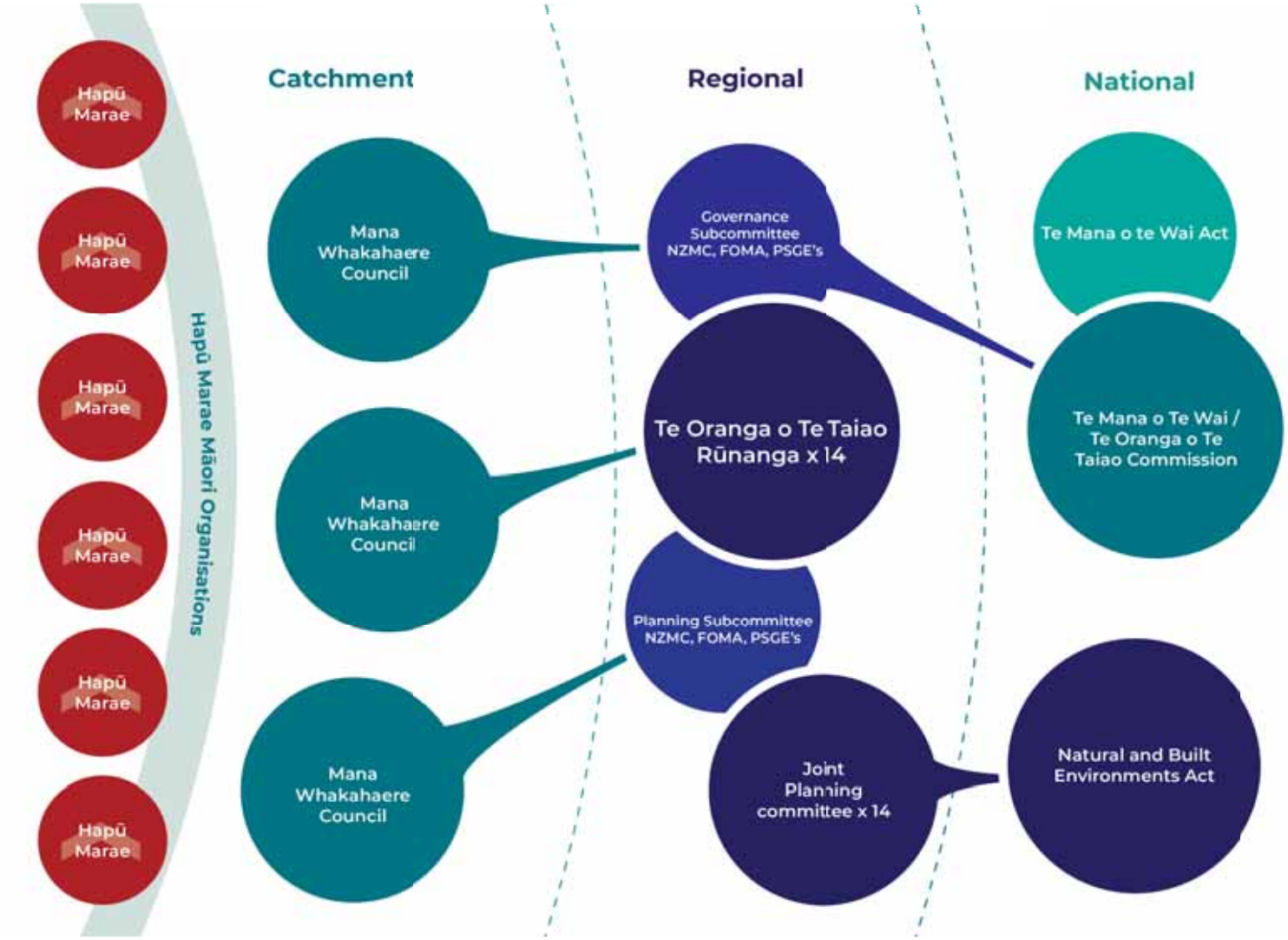
There would be 14 regional Rūnanga, adapted from the current number of 16 District Councils in the NZMC organisation. An appointments subcommittee of the Rūnanga would join with FOMA and Post-Settlement Governance Entities of the region to appoint to Regional Joint Planning Committees.

Appointment to the Joint Planning Committees would be based on criteria to ensure capability and expertise for the planning role. An electoral college ensures community level voices through the Mana Whakahaere councils, as well as for expertise in planning through appointment process and co-option.

Similarly, at the Rūnanga level, a governance subcommittee would be the vehicle for appointment to a National Commission, representing NZMC with FOMA and Post-Settlement Governance Entities appointing to a National Commission.

Were this structure to be adapted to fit with the RMA reforms, the old Council membership would presumably depart, the Act would be modernised and amended, the Māori Committee areas redefined, and fresh elections held. However, the NZMC structure exists for more than RMA planning. The NZMC has a history of promoting tino rangatiratanga in many areas, and while it does not seek an exclusive role in that area, it does seek to continue on its historic journey.[119]

[119] Tā Taihākurei Durie "The New Zealand Māori Council Structure" (unpublished paper, 2021).



Te Ohu Kai Moana (Te Ohu Kai Moana (TOKM) was established by the Māori Fisheries Act 2004, as a successor to the Māori Fisheries Commission and Treaty of Waitangi Fisheries Commission. As a national settlement, rather than an Iwi-based settlement, it provides an important reference for water. The board is made up of Iwi representatives.

TOKM Trustee Limited has a board of seven directors who are each appointed by a committee of Iwi representatives for a four-year term, to a maximum of two terms. Board members are appointed based on skills: tikanga, leadership, management, and strategic business skills.

Te Kāwai Taumata, the governance board, is made up of 11 members, 10 of which are appointed by Mandated Iwi Organisations (58 Iwi in 10 regional clusters – each cluster appoints a member), and one member is appointed by Representative Māori Organisations.

The Criminal Cases Review Commission has strong powers. It may exercise all powers necessary for performing its functions and duties (Criminal Cases Review Commission Act (CCRCA), s 14). It may regulate its own procedures (s 15) as to how it performs its functions (for example, how it obtains information, conducts interviews and so on). However, the procedures must be consistent with the Treaty of Waitangi (s 15(3)).

With regard to Trusts, the **Crown Forestry Rental Trust** is an appropriate model for consideration. It has six Trustees, three appointed by the Crown and three appointed by the Federation of Māori Authorities and the NZMC. Its role is to manage the Crown Forestry resource and investment, and it has powers to apply funds to support Māori claimants and negotiate claims. It does not have a policy development role. The experience of the Crown Forestry Rental Trust in working as a co-governance body would be a valuable reference for establishing a Commission, particularly in terms of decision-making and management of funds. This aspect may inform the structure of the proposed waterways fund.

With regard to Te Tiriti frameworks, the **Parliamentary Commissioner for the Environment** (PCE) has an obligation to take account of the principles of the Treaty in monitoring and advising public authorities. This provision has limitations in representing rangatiratanga and a Te Tiriti framework for resource governance, an aspect missing from the PCE erudite analysis of the New Directions Review.[120] The Treaty functions of the **Human Rights Commission** include better understanding of the human rights dimensions of the Treaty and the link with domestic and international human rights law. The UN Expert Mechanism on the Rights of Indigenous Peoples advised the New Zealand State in 2019 to consider appointing an Indigenous Human Rights Commissioner.

The Climate Change Commission is required to give effect to the principles of the Treaty of Waitangi. Its structure does not reflect a co-governance model but in performing its functions and duties, and exercising its powers, the Commission must consider the Crown-Māori relationship, Te Ao Māori and specific effects on Iwi and Māori.[121]

The most interesting requirements of the Climate Commission for the Te Mana o Te Wai Commission are in the accountability mechanisms from its recommendations which emanate from s 5J of the Climate Change Response (Zero Carbon) Amendment Act 2019. They are summarised as to:

- Review the 2050 target, and recommend changes, if necessary;
- Provide advice and recommendations on:
    - The Government's Emissions Reduction Plan;
    - National climate change risk assessments; and
    - Settings for the Emissions Trading Scheme.

If the Commission uses its functions under s 5J, the Minister must take the advice / recommendations into account when making a decision. If the Minister decides to depart from the Commission's advice/recommendations, it must explain its reasons why (Climate Change Response (Zero Carbon) Act 2019, s 5ZB). This provides accountability from government and public information through Parliament.

The Waitangi Tribunal's function is to inquire into claims submitted by Māori and to decide whether they are well founded. Where it concludes that a claim is well founded, it may make recommendations to the Government on how the claim should be settled. In some limited instances, the Tribunal has the power to make 'binding recommendations'. These are recommendations that the Crown must follow and may be made only for the return of certain lands to Māori ownership in specific circumstances (see for example Treaty of Waitangi Act 1975, ss 8B and 8HC).

Models of Iwi Post-Settlement Governance Entities

Te Urewera Act 2014 vests Te Urewera in itself as a legal person in perpetuity and offers a transitional procedure to a majority of Tūhoe Tribal representation on the Board. It starts with four Crown and four Tūhoe Board members and after three years changes to three Crown and six Tūhoe with a Tūhoe Chair in perpetuity. The governance of Te Urewera is structured around hapū tribal representation and engagement and, in continuity with its former national park status, has a conservation orientation and retains public access.

Similarly, **Te Awa Tupua** is vested as an ancestral legal person and, like Te Urewera, recognises the relationship of the mana whenua of Whanganui with their river. Both give prominence to mātauranga Māori in their governance and operational frameworks. Ngā Tāngata Tiaki o Whanganui, the Post-Settlement Governance Entity, replaces former trusts involved with management of the river; it receives redress and is recognised as a public authority and Iwi authority in respect of the RMA or other statutes.

The human face and legal guardians of the river, **Te Pou Tupua**, is expressed through two representatives: one of interested Iwi, and the other the Crown. Their role is to speak on behalf of the river and uphold the status of Te Awa Tupua. They exercise landowner functions and administer funds related to Te Awa Tupua.

[120] Parliamentary Commissioner for Environment "RMA Reform: coming full circle" RMLA Salmon Lecture, The Association for Resource Management Practitioners, Auckland, 2020.

[121] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5M(f).

In addition, an advisory group, Te Karewao, has two members appointed by Iwi and one member appointed by the local authorities. Te Pou Tupua and Te Karewao have provision to include additional Iwi or hapū members or services to support or assist in the functions of Te Awa Tupua. Both of these bodies are funded by the Crown.

The **Waikato River Authority** was established as an independent entity through the Waikato-Tainui Raupatu (Waikato River) Settlement Act 2010. This is explicitly designed as a Crown and River Iwi co-governance authority in recognition of the Crown's responsibility alongside that of mana whenua of the Waikato River. As in all Treaty Settlements, the Crown asserted that the matter of ownership was off the table. Co-governance is intended to keep the government accountable and engaged. The Waikato River is an ancestor of the Waikato-Tainui peoples and the authority is dedicated to the river and its people with restoration and protection for the health and wellbeing of the river for future generations.

Membership of the Authority consists of ten members, five appointed by recognised River Iwi Authorities and five appointed by the Crown. One is appointed by the Minister for the Environment, one from Regional Council and Local Authorities, and there are three independent members.

These settlements stress the indivisibility of all aspects of their respective waterways, in physical and metaphysical realms. They are significant in establishing mana whenua statutory authority in different forms over their lands and waterways – largely within the parameters of environmental management.

Te Rūnanga o Ngāi Tahu, the overarching governance entity, is underpinned by eighteen constituent Papatipu Rūnanga. Each of the Papatipu Rūnanga are represented on the Ngāi Tahu Rūnanga through an electoral college process. Papatipu elect their representative onto an appointment committee which then makes appointments to Te Rūnanga o Ngāi Tahu. Members and representatives must be affiliated by whakapapa to Ngāi Tahu.

The responsibilities of the Ngāi Tahu Rūnanga are set out in their Charter, with duties of administering assets and liabilities of the Ngāi Tahu Whānui. The central purpose of Ngāi Tahu Holdings is to grow the asset base with a view to increasing distribution of revenue to whānau and communities on an intergenerational basis. Distributions are in general for education, Te Reo Māori, environmental and marae projects.

Ngāi Tahu's leadership for recognition of rangatiratanga over its waterways and over assets is a priority and it has acted as a spearhead for other Iwi. Ngāi Tahu are proceeding with litigation on recognition of rangatiratanga over their lands and waters in their takiwā for which there is a unique provision in their settlement legislation. Recognition of rangatiratanga is not being pursued as a financial settlement or compensation in respect of water , but as governance. Approximately fifty percent of land and seventy percent of the waters of Aotearoa are in the Ngāi Tahu takiwā. Rangatiratanga sits with mana whenua as hapū and with the Rūnanga.

The exceptional impact of COVID-19 on Ngāi Tahu from the loss of tourism is lamented in the 2020 Annual Report. The stellar commercial performance of Ngāi Tahu prior to COVID-19 has reduced the $67 million distribution in 2019 to $60 million in 2020. While the loss means a re-evaluation of investment in tourism and staffing reductions it also shows remarkably stable investment outcomes.

As with other Post-Settlement Governance entities, a Charitable Trust sits alongside the Te Rūnanga for social and cultural programmes.

Review of commission structures and mechanisms for representation

On reviewing the powers of commissions, in general those powers are to make recommendations, with specific exceptions for the Waitangi Tribunal. Commissions cannot reverse decisions made by public authorities. In light of the Waitangi Tribunal's power to make binding recommendations for the transfer of certain assets, and the potential for transfer of powers under s 33 of the RMA,

> **. . . a Te Mana o Te Wai Commission must be empowered to require accountability in respect of its advice to the government.**

For this a s 5J equivalent is needed whereby the Minister must take the advice/ recommendations into account when making a decision, and if not, explain the reasons why (Climate Change Response (Zero Carbon) Amendment Act 2019, s 5ZB).

The effectiveness of Commissions in having their work influence and guide public policy varies according to its closeness or distance from government. A review of the Law Commission highlighted the tensions in the relationship between the Law Commission and the government, and concluded:[122]

> The closer the Commission gets to Government, the more imperiled its independence. The more the Commission exercises its independence, the less likely its proposals are to find favour with the Government of the day.

The constitutional dilemma between independence and effectiveness is a question of balance in the end. The Commission should not become part of the executive arm of Government but it does need to show sensitivity to the legislative aims of the Government of the day and to help fashion proposals that the Government is interested in advancing.

The Law Commission worked successfully with a collaborative model with the government in recent years. Between 1 July 2010 and 30 June 2013, the Law Commission tabled fifteen reports that included recommendations. Of those, ten were accepted fully or substantially, leading to the introduction of seven bills to Parliament. Subsequently the Commission prepared cabinet papers and draft bills for the government.

System for Representation

The representation arrangements of Post-Settlement Governance Entities as well as other Māori organisations can inform representation on a national body.

One consideration is to establish an appropriate steering group of recognised experts, such as that recently established for the Māori Health Authority under the leadership of Sir Mason Durie, to oversee appointments on a Te Mana o te Wai Commission. Iwi leaders have actively particpated in this approach.

Criteria for electing and appointing representatives on a Commission would need to prioritise skills and capability and include independence from vested interests that could conflict with Commission responsibilities. Flax roots expertise in water ecosystems and mātauranga Taiao, along with relevant governance experience, are essential areas of expertise specific to the Te Mana o Te Wai and Te Oranga o Te Taiao.

The NZMC has been specific in suggesting Māori representation options that include regional groups or Iwi clusters and kaitiaki, Iwi Leaders, NZMC, Federation of Māori Authorities (FOMA), Māori Women's Welfare League, and Te Wai Māori Trust.

The model of Crown Forestry Rental Trust, with Crown, Federation of Māori Authorities, and the NZ Māori Council (NZMC) appointments provides another basis for nomination, subject to the inclusion of Iwi Authorities. We repeat the point made above that Iwi leaders have been reluctant to support a national approach.

[122] Rt Hon. Sir Geoffrey Palmer "Evaluation of the Law Commission: Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson" (28 April 2000) at [35], [27], [50], and [231].

The provisions in Te Ohu Kaimoana for Mandated Iwi Organisations and Representative Māori Organisations, with the addition of ensuring expertise is another example for a national waterways Commission. In this model, a call for an electoral college process through Iwi and other Māori organisations would lead to a specified number of representatives on the Commission. Possibly each constituent body could determine their own electoral and nomination or appointment process.

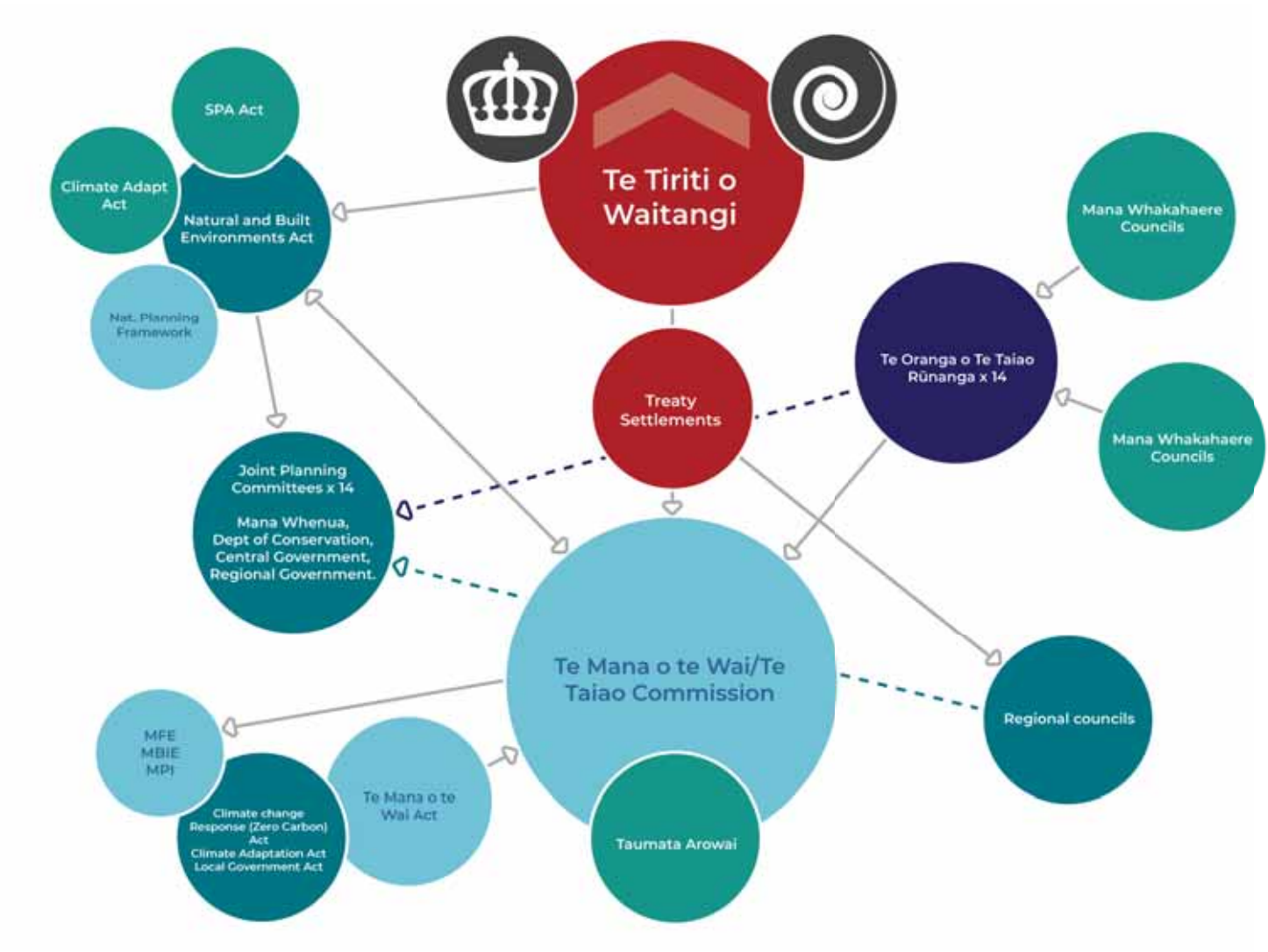
Representation could combine the community-based system of the NZMC, Iwi leaders and national body representation of Te Ohu Kai Moana. Representation through bodies represented on Te Tai Kaha could provide for diversity of Iwi and Māori interests.

There is wider relevance to addressing the matter of representation to a national body. Under the Natural and Built Environments Act, the 14 Joint Planning Committees will be comprised of government, regional council, and mana whenua representatives. Representation is a key question for the Joint Planning Committees. Although they are regional, they have similar requirements to a national body, with the need for Iwi and hapū, and Māori landowner and Māori organisational interests to be included.

Similarly, regional planning requires the involvement of expertise, and therefore requires both an electoral and nomination system.

An electoral and nomination system for a Commission needs to be designed with representation from catchment bodies and from national organisations. Thus, it would need to be organised as a layered process, with election to regional bodies proceeding to election or nomination to a Commission – envisaged as similar to the district level of the NZMC becoming the basis for National Committee appointments. Provisions for representation needs to match the distinctive roles of Joint Planning Committee and a Commission.

Diagram 3: ***Institutions and laws and their links***



Furthermore, there needs to be provision for additional appointments for expertise and for independence of vested interests in respect of audition functions.

The discussion on a Commission takes the following order:

- A Te Mana o Te Wai Commission, covering membership and scope: setting limits; allocation and unbundling; registry for hapū rights and obligations; national monitoring and auditing; integrative role; research stocktake; and economic tools including pricing and funding.
- Te Oranga o Te Taiao Rūnanga covering membership; decision-making roles in setting limits; allocation and monitoring; and dispute resolution.
- Māori Authority: a tikanga basis for Iwi and hapū decision-making for Te Mana o Te Wai. Stakeholder involvement with Iwi and hapū, and Māori landowners in allocation decisions.
- Waterways/Te Mana o Te Wai Statute: explanation; purpose including Te Tiriti o Waitangi; new institutions; precautionary principle; economic provisions; integration; and transitions.

TE MANA O TE WAI COMMISSION

In this section we take a comprehensive view of the potential roles of a Commission. The areas of work show the scope of work for national co-governance, which needs to be done elsewhere if not by a Commission. For those less favourable to a Commission, the role could be limited to auditing and monitoring as needed at a national level.

Powers of a Te Mana o Te Wai /Te Oranga o Te Taiao Commission

The powers of a Commission should be to set Te Taiao goals and for these to be reviewed every five years. Goals are to be monitored and reviewed in accordance with Te Mana o Te Wai standards. The Commission will be empowered to make recommendations on policy with requirements for implementation or explanation about departure from the recommendations by the Minister.

> **The Commission should be empowered to make binding recommendations in particular circumstances.**

An example – on the recommendation of a Joint Planning Committee or Te Oranga o Te Taiao Rūnanga, recommend calling in a consent which is in breach of Te Mana o Te Wai standards., The Commission, jointly with the Minister for Environment and Minister of Finance will determine a pricing system for the commercial use of water.

Membership
Following on from procedures for representation discussed above, the issue of membership needs to be addressed.

Options which emerge from the models at hand include equal representation, such as five or seven Crown and five or seven Māori organisations, with a Māori chair. Another option is for equal representation in the first two years. After two years, Māori representatives would be increased, plus the Chair, and the Crown representation reduced, along the lines of Te Urewera. The Commission would have capacity to co-opt expertise as required.

Crown appointees would represent science and research, Non-Governmental Organisations, the business sector and Ministries, including the Ministry for the Environment, Ministry for Primary Industries, Department of Conservation, and Taumata Arowai. Selection would be overseen by a panel representing each sector.

Equal numbers of Commission membership satisfy a democratic model of equal rights. There can also be a 60:40 representation. An alternative is to follow tikanga in which the parties order their engagement according to their respective roles as mana whenua and tauiwi. This order does not rely on equal numbers but gives priority to tikanga and manaakitanga setting protocols of hospitality and reciprocity. The obligations of manaakitanga are to provide beneficially for all, tikanga values which were introduced with Te Mana o te Wai in 2020.

Scope of Commission

Setting limits
Currently limits are set nationally through Te Mana o te Wai, the NPS-FM 2020. Te Mana o Te Wai hierarchies, the first of which is the health and wellbeing of water bodies and freshwater ecosystems, or mauri. This requires determining the quantity and quality of water to remain in the water body. The second provision for drinking water, health needs and domestic supply, and third for social, economic, and cultural well-being, now and in the future. This framework is the kind of limit setting that would be in the domain of a national body.

Allocation, royalties
The Commission would oversee the replacement of the first in, first served allocation system.

Decisions for a new system require transition plans with provision for changes to existing consents. Allocation and pricing go hand-in-hand because the current allocation is based on non-pricing which in turn has permitted over-allocation. A pricing mechanism allows for a restraint on allocation.

Furthermore, the current system of non-pricing of water supports the non-ownership regime. Introducing a pricing or royalties system can be achieved through parliamentary authority.

In respect of the dairy industry, the current system allows for the double-sided coin of irrigation and pollution. For example, for dairy production 1,000 litres of water are required to produce 1 litre of milk. Even more dramatically, dairy production consumes water equivalent to about 60 million people and produces wastewater equivalent to around 90 million. Taking this analysis further shows that in terms of the 60 million figure, 80 per cent of farms use water equivalent to only 4 million people, but the 20 per cent of farms that are irrigated use water equivalent to 56 million people.[123] Payment of a royalty for water should result in reduced use and could function as proxy for a 'buy-back' of consents.

Two options are offered for resolving a pricing and allocation system. The Crown with Iwi representatives could lead the design of a pricing and allocation system. This could then be administered and implemented by the Commission, Te Mana Whakahaere Councils and regional Councils. Or the Commission could convene a working group with a mandate to resolve an operating model for a water economy and for access to water resources. A more in-depth section on allocation follows in Part 3.

Geothermal

All forms of water are within scope for the work of a Commission: hot, cold water and springs are included as water resources and no distinction should be made between geothermal, springs, aquifers, and other waters.

During hui for this research, attention was given to geothermal resources in the light of the stage 3 Freshwater and Geothermal Resources claim to the Waitangi Tribunal. A key issue identified is that the Crown should provide the means for Māori to be able to invest in geothermal resources themselves without relying on partner investors, so that Māori are the main beneficiaries of geothermal development. Business and enterprise partnerships result in limited benefits to Māori as owners of the resource. A Commission role would be to support recommendations and facilitate implementation with the Crown.

Unbundling water permits

We recommend discussion on unbundling the water allocation system. In New Zealand, permits for environmental water, domestic supply, hydro, irrigation, and other commercial uses are linked to property rights in land. This creates a barrier to allocation decisions based on priorities or preferred criteria and is relevant to considering how to allocate water across competing applications. The case of *Hampton v Canterbury Regional Council*[124] clarified that Regional Councils cannot compare applications and allocate water to its highest value use. The Court could not go beyond the provisions of the RMA and look into the substantive reasoning for the ordering of priority because the statute (RMA) does not allow it to do so.[125]

The Tasman Resource Management Plan is an example of allocation provision specific to their context and the unique category of reserved land, set aside under Crown purchases and owned by Māori, but subject to a leasing regime with perpetual rights of renewal that was imposed on landowners in the late 1800s. In this case the Tasman Resource Management Plan provides an allocation of water that has been set aside for commercial use, specifically irrigation, which is tied to 'Māori perpetual lease land'.

[123] Russel Norman "Wairakei Pastoral: The dairy company competing with Auckland for drinking water" Greenpeace, 5 February 2021 <wwwgreenpeaceorg/aotearoa/story/wairakei-pastoral-the-dairy-company-competing-with-auckland-for-drinking-water/>.

[124] *Hampton v Canterbury Regional Council* [2016] NZRMA 369, [2015] NZCA 509.

[125] J Singh-Ladhar "Improving water allocation law and policy in New Zealand: Lessons from Australia" (PhD Thesis, University of Waikato, 2019) at 265.

Boiling water is used to prepare kai at Whakawerawera

Historically, Māori owners did not have the ability to ensure that, if land subject to a perpetual lease reverted back to them, any water permits associated with the land would likewise be handed back, resulting in the potential to receive 'dry' land. To ensure future access to water, the Tasman Regional Management Plan reserves an allocation of water within water management zones to Māori perpetual lease land, based on the amount of land that can be sustainably irrigated. New general applications for water can only continue to be granted if the reserved allocations are still available for the reserved purpose, providing priority to Māori landowner access.[126]

Unbundling would be part of comprehensive water law reform in line with the direction of the NPS-FM 2020. This would better allow for mauri, ecosystem health priorities, and evaluation of other uses, with decisions reflecting national and local priorities, conditions, and contexts.

Registry for Iwi and hapū rights, interests, and responsibilities

The Commission would administer a registry which would identify Iwi, hapū, and Māori landowners who have rights, interests, and responsibilities at the catchment level, and the representative bodies that are chosen by them.[127] It would provide a national repository of publicly available data on groups with particular relationships with a freshwater body.

The registry would be used by the Commission and the Mana Whakahaere councils (possibly supported by Te Oranga o Te Taiao Rūnanga) to determine who is the relevant mana whenua group or groups to consult with when decisions are being made about a particular freshwater body.

[126] Commentary provided by Maia Wikaira, 17 February 2021.

[127] New Zealand Māori Council submissions in reply (22 February 2019) in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

Where a resource consent for commercial use is being considered in relation to a water body in which a particular Iwi or hapū has a Te Tiriti right or interest, then the affected Iwi and hapū must be informed and properly consulted in regard to the proposed consent. The Waitangi Tribunal refers to the value of the Canadian 'super consultation' model, explained by Professor David Percy QC in his evidence.[128] This model requires the consultation process and outcome to demonstrate the effectiveness of consultation in addressing the requirements of the affected group.

Accordingly, the consultation process would require the resource consent applicant to identify the relevant group(s) to engage with regarding the affected body or bodies of freshwater (which would be made easier by the registry). This would require consultation with Te Mana Whakahaere Councils. The relevant group is given time and access to information to identify their rights and interests, and how they should be addressed. The applicant will be required to demonstrate how these are to be accommodated, given effect to, and practically recognised in the decisions that come out of the consultation process before any resource consent can be granted.

National monitoring and auditing

New Directions recommends a strengthened national monitoring system to be introduced through the Ministry for Environment. Monitoring would be incorporated into all parts of the system, with national level performance monitoring, local authority data collection and reporting and performance monitoring included for the new combined plans.[129] In our view a national framework for monitoring should sit with a Commission, with its capacity as a Te Tiriti based co-governance institution with provision for monitoring by catchments authorities. Proposals for monitoring under the Natural and Built Environments Act include:

- A nationally coordinated environmental monitoring system would be developed to ensure systematic, coordinated, and consistent monitoring nationally in line with the recommendations of the Parliamentary Commissioner for the Environment (PCE).[130]
- Stronger links would be made between the Environmental Reporting Act 2015 (ERA) and monitoring functions under the Natural and Built Environments Act, to ensure a policy response to the outcomes of state of the environment monitoring. The system would also emphasise monitoring both central and local government performance in regard to Te Mana o Te Wai and their Te Tiriti o Waitangi commitments.

In addition:

- The Commission should set goals for achieving Te Taiao standards, which are to be reviewed every five years. This to be linked with the Envirronmental reporting requirements. Goals are also to be monitored and reviewed in accordance with Te Mana o Te Wai standards.

An independent auditing role of the Commission would require accountability or oversight of an independent panel of mātauranga Māori experts and other science experts. *New Directions 2020* recommends the PCE would provide an independent audit of the functioning of the resource management system.[131]

Given the limited role of the Parliamentary Commissioner for the Environment in respect of Te Tiriti and Māori interests the auditing role should include suitably qualified Māori expertise.

Integration of existing legislation and Water Services Regulator

The Commission would integrate the Climate Change Response (Zero Carbon) Amendment Act 2019, Local Government Acts, Taumata Arowai – Water Services Regulator Act 2020 and other associated legislation. We include the much-overlooked Land Drainage Act 1908, by which every water course was viewed as a drain, and still governs gravel extraction.[132] The new Water Services Regulator, Taumata Arowai Establishment Unit, is located within the Department of Internal Affairs[133] and is established under the Water Services Regulator Act 2020.

[128] New Zealand Māori Council closing submissions in reply at [36] in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

[129] See *New Directions 2020*.

[130] Parliamentary Commissioner for Environment "RMA Reform: coming full circle" RMLA Salmon Lecture, The Association for Resource Management Practitioners, Auckland, 2020.

[131] *New Directions 2020* at 25.

[132] Tom Bennion "Freshwater: The Three Waters Reform Programme and impacts on iwi" presentation to 18th Annual Māori Legal, Business and Governance Forum, Wellington, 24 November 2020.

[133] Department of Internal Affairs <wwwdiagovtnz/Taumata-Arowai-Establishment-Unit>.

Under Taumata Arowai the responsibility for water services is removed from councils in favour of a nationally led regulatory system.[134]

The Commission would link with the water services regulation system and Taumata Arowai – Water Services Regulator Act 2020. In essence, water services are to be removed from District Councils and placed with four new regional agencies to manage water infrastructure. These are to take over drinking water, storm-water, and wastewater in their regions. Arguments for specialist regulation include the lack of long-term planning due to three-year election cycles, and years of neglect to invest in water services infrastructure.[135]

The shift towards a Water Services Regulator as a Crown entity strengthens the prospect of a domain specific water regulatory system.

Information Gathering; Stocktake of Research

> **The Commission will conduct an analysis, catchment by catchment, of the proportion of consents allocated to Māori. This would provide a basis for allocations for equity.**

The Commission will conduct an analysis of unused water in current consents to quantify water that could be returned to the allocable quantum, whether through buy-back or through regulating for the return of unused water.

The Opus Review is a reference for such analysis.[136] Where water is over-allocated, unused water could be requisitioned by the allocation body – potentially Te Oranga o Te Taiao Rūnanga – or by a body such as a trust formed under the auspices of the Commission.

The Commission will also review the assumptions of a market-based system for the redistribution of permits/allocations. The review needs to take account of externalities, including pollution, equity considerations and the favouring of better-resourced players, and resolve this with calculation of all costs through circular economy accounting. Efficiency and highest value use may not accord with the hierarchy of values.

Pricing, Funds, Compensation

Funds and payments

The values of biodiversity and ecosystem health need to be supported by incentives for land use to support the health of waterways. Incentives include biodiversity credits for climate change mitigation accounting, a biodiversity fund, and tax relief to incentivise retention of native trees, planting, and afforestation. The fund would provide payments or tax relief for agricultural and forestry practices that support Te Mana o Te Wai.

> **The Commission would profile a range of suggestions for beneficial land use and water use practices that qualify for funds, which include rehabilitative farming and forestry,[137] organic food production, and rehabilitation of native fish species.**

The amount paid is determined by the opportunity cost of land use change – and is close to the income that would have been received from changing from exotic forestry and intensified agriculture to an ecosystem health standard. Payments for ecosystem health would extend to financing for the prevention of the sale of agricultural or native forested land for development. Fees would be added to water bills to pay landowners to conserve and maintain forests on private land.

Charges

Water for human livelihood needs, and for marae and papakāinga would not be subject to charges. The Water Commission would establish a charge for the commercial use of water. The payment of royalties would significantly lift economic gain in respect of the water resource and would result in more efficient decisions being made by resource consent

[134] Department of Internal Affairs Three Waters Review <wwwdiagovtnz/Three-Waters-Review>.

[135] Jonathan Milne "Water infrastructure to be taken off councils and run by big government agencies" *Newsroom* (online ed, 22 December 2020).

[136] Stephanie May "New Zealand Water Availability and Allocation" (2015) Opus.

holders. The NZMC sees the following as expected outcomes as a result of introducing this charge:[137]

- It would help to awaken sleeper consents where people are holding on to a resource consent but not using the take rights associated with that consent. By making the charges based on consented volumes, this would encourage users to surrender unused amounts and use their allocations efficiently. This would create more headroom for Māori to be offered an appropriate allocation of water in accordance with their customary rights.
- It would remove the uncertainty surrounding commercial water rights.
- It would ensure that New Zealand receives benefit from the take of water, and the trading between different entities in relation to water, which already exists now.

The Commission would set a charge for the discharge of wastewater/pollutants into freshwater bodies. Any discharge of more than the consent-holder's allocated amount would incur a meaningful penalty, and the risk of losing their resource consent.

The funds from the introduction of charges would be held for the purposes of Māori economic development, restoration of waterways, and compensation. While the guidelines for the use of the funds may be provided at the national level, they could be administered at regional levels.

Catchment Governance and Management

Our initial consideration for recognition of rangatiratanga in catchments was for Te Mana o Te Wai catchment boards. These were envisaged as co-governance boards, convened by hapū and Māori landowners with the involvement of regional councils and stakeholders. In this scenario, decision-making would be a combination of Iwi and hapū, and Māori landowners, and stakeholders mandated through Regional Councils, thus amplifying the role of mana whenua in decision-making with stakeholders. These catchment boards were envisaged as mirroring the co-governance framework of a national Commission.

The new Joint Planning Committees under the National Planning Framework of the Natural and Built Environments legislation will change the shape of catchment management. The new National Planning Framework will reorient resource management and the setting of environmental limits towards a more amalgamated system. The consolidation into 14 Joint Planning Committees is expected to simplify planning. This number of Committees may change. Spatial or Strategic Planning Committees are also proposed under the Spatial Planning Legislation. It is not yet known whether there will be two sets of Committees, or whether they will be folded into one per region.

We are faced with envisaging new catchment processes and structures in this context. As already discussed, regional planning through the Joint Panning Committees will replace district and regional plans. This will change the function of regional and district councils in planning and shift their role to participation in Joint Planning Committees. Membership is proposed to be Mana Whenua, Territorial Authorities, Department of Conservation, Regional Councils and the Crown.

During the research a series of hui on the reforms enabled local practitioner voices to come to the fore, with discussions on key provisions of the new legislation and how to ensure full Iwi and hapū, and Māori landowner participation in the new system. This was accompanied by many examples of the barriers to participation in regional councils, anguish over the worsening state of waterways and the loss of kai, and engineering interventions resulting in loss of mauri.

The following are two options for mana whenua regional organisations. **Option 1** is for Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga feeding into Joint Planning Committees introduced above. Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga are to have mandated planning roles, parallel to the involvement of Regional Councils. **Option 2** for Mana Whenua Authorities introduces a proposal for Iwi and hapū with relationships to waterways to have the sole determination of mauri and of abstraction and discharge allowed in that water body. Wider public and commercial interests would be determined in partnership with stakeholders.

The rationale of both options is to give effect to Te Tiriti o Waitangi. The options come from the position that Iwi and hapū have never ceded or agreed to the extinguishment of customary title in waterways.

[137] *Pure Advantage, Our Regenerative Future* series (2020) <wwwyoutubecom/user/pureadvantage/featured>.

[138] New Zealand Māori Council submissions in reply (22 February 2019) Issue #1: Finer details of Water Commission model at [14]-[19] in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

Option 1. Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga in Catchments

Discussions on the new legislation and the recognition of Iwi, hapū, Māori landowners, trusts and Māori incorporations in the new system brought forward a proposal for Mana Whakahaere Councils[139] also referred to as hubs or associations. They are collaborating clusters for determining mauri standards and implementing Te Mana o Te Wai, for decision-making on aspirations and goals, setting limits, contributing to plans, and monitoring the resource system. Such collaborations are already formed in many catchments. Mana Whakahaere Councils could be the first tier of a catchment structure of mana whenua interests in resource management implementation.

A second tier would be made up of representatives of Mana Whakahaere Councils including mandated Iwi Authorities, to form an executive body in each of the 14 regions. These Te Oranga o Te Taiao Rūnanga would serve as a conduit onto regional and national bodies providing representation of those with planning skills onto Joint Planning Committees, and with governance skills onto a national Commission.

Both Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga would be constituted as statutory authorities.

Then there is the issue of involvement with Regional Councils and wider stakeholder interests and their participation in the new planning system. It is not clear at this stage how Mana Whakahaere Councils or Te Oranga o Te Taiao Rūnanga would link with Regional Councils given the challenges of participating effectively in multiple agencies.

One option for discussion is for Te Oranga o Te Taiao Rūnanga to take a convening role in a tikanga process for Regional Councils, stakeholders and wider communities of interest in catchments. Interests relevant to catchments may include forestry, farming, horticulture, tourism, and fishing. Such engagement would be to facilitate active dialogue and matters of catchment aspirations for ecosystem health, limit setting, planning, implementation issues, cultural values in waterways and other matters of resource management. Stakeholder agencies and entities would include regional councils, Forest Stewardship Council, Industry and farming sectors, environmental and conservation groups, and energy industries.

Membership

Mana Whakahaere Councils would be formed of clusters of hapū, mandated Iwi, Māori landowners, trusts, and incorporations depending on the constituency of the community. These Councils would carry out an electoral college process to call for nominations for representatives to the Te Oranga o Te Taiao Rūnanga.

Membership would be based on demonstrated expertise in relation to freshwater and resource management planning, and with knowledge of governance. They may have the power to co-opt expertise.

Role of Rūnanga

The Rūnanga, through an appointments committee would nominate representatives to the Joint Planning Committees, and similarly onto the Commission, depending on the system for representation on the Commission.

Tasks of Te Oranga o Te Taiao Rūnanga would include development of regional plans, an oversight of implementing Te Mana o Te Wai, and catchment monitoring systems.

Te Oranga o Te Taiao Rūnanga, like Regional Councils and other local authorities, would be empowered and resourced for adaptive management. The present system is not adaptive in that it is unable to respond to pressures on the resource, such as recovery of large volumes of unused water and adjustments to meet water quality standards where these are inconsistent, and do not meet environmental or equity standards in respect of Iwi and hapū rights and interests.[140] The issue of access on equity grounds was litigated by Waikato River

[139] The title Mana Whakakaere Councils is used here provisionally. The title may change as the language for the purpose settles and the new structures and processes evolve.

[140] Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28) at 1 in Waitangi Tribunal *The stage 2 report on the*

Iwi seeking preferential access to water for Iwi development of Māori land in the face of their exclusion from access to water. This was contested at the Environment Court and the proposal was ruled against on a technical point.[141]

There is an immediate need for access by Iwi, hapū, and Māori landowners and for this to be facilitated in any change and transitional process.

In this Option 1, a process is needed for all authorities to be involved with decisions in respect of upholding mauri and implementing Te Mana o Te Wai. The partnership would involve Mana Whakahaere Councils, Rūnanga and Iwi Authorities, Regional Councils linking to Joint Planning Committees. These authorities, separately and together, must have discretion to adjust rules and standards to create more stringent measures if required to uphold the mauri of specific waterways, and in respect of other resource management. The Rūnanga and Regional Councils would not be able to apply weaker standards than those set by the Water Commission and the NPS-FM 2020.

Iwi Management Plans are expected to be given additional status in the Regional Joint Plans.

Te Oranga o Te Taiao Rūnanga would work with Mana Whakahaere councils on the development of Iwi Management Plans. These relate to a raft of resource planning matters and often articulate provisions specified in Te Tiriti o Waitangi Settlements, and identify aspirations in respect of kaitiakitanga and economic development. Iwi Management Plans usually set out aspirations for mauri and for standards for water at a drinkable level and optimal habitats for fish. The new system will have decision-making roles on allocation, consenting pricing, monitoring, planning clearly mandated.

Litigation is a means to strengthen the position of Iwi, as seen with Ngāi Tahu, Waikato-Tainui, the NZMC and others: [142]

> Having witnessed the ineffectiveness of RMA provisions intended to strengthen tangata whenua voice . . . tangata whenua must insist that the strongest tools possible are needed to appropriately recognize their rights and interests in freshwater and to enable the exercise of rangatiratanga and kaitiakitanga.

The new system should minimize the need for litigation.

Te Oranga o Te Taiao Rūnanga should be empowered to confirm Joint Management Agreements between Iwi and hapū, and Māori landowners, and stakeholders as authoritative. Such agreements would be with Iwi and hapū or with a Mana Whakahaere Council as an entity, willing and able to enter into such agreements over their water body or resource. Such agreements support mana whenua roles in developing, monitoring, and enforcing water quality requirements, and thereby protecting the mauri of their waterbodies. It would also, at a minimum, entail direct involvement of mana whenua in a decision-making capacity, in the exercise of duties, functions and powers in relation to applications for water related resource consents.

Enhancing Iwi, hapū decision-making in resource management

Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga are intended to elevate the role of Māori in regional catchments, and provide for partnership. At present mana whenua participation is mainly allowed for through some Te Tiriti o Waitangi Settlement Agreements that require co-management and participation in RMA processes with the relevant Regional Councils. In most cases, these have not been adopted voluntarily (except the Wellington Joint Committee). Council capability to engage with Iwi is low in some regions.

Once established new arrangements can have a significant influence over allocation policy with in the planning process.[143] The brief of evidence to the Waitangi Tribunal in *The stage 2 report on the National Freshwater and Geothermal Resources* claim by Peter Nelson identifies only four Regional Councils that provide explicit allocations to Iwi.[144]

[141] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 28-30.

[142] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 16.

[143] Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28) at 5 in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

[144] Moutere and lower Moutere catchment, Waitaki, Lake Taupo (allocation for nitrogen discharge), and Waikato and Waipa catchment provisions for ancestral-owned Māori land: Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28) at 6 in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

If a mana whenua group applies to enter into a transfer of powers (assuming s 33 provisions will continue in the Natural and Built Environments Act) but is determined not to have either the capabilities or resources for the transfer in the best interests of the freshwater body, then that group must inform the Commission. The main point is to provide an avenue for the applicant to ensure adequate resourcing to build their capabilities to enter into such an agreement in the future. Support and resourcing would be provided by the Commission.

Decision-making
In order to avoid majoritarian decision-making a consensual process is encouraged. Guidelines for decision-making are through application of the hierarchical priorities of Te Mana o Te Wai and Te Oranga o Te Taiao. These priorities and the principles of responsibility, rangatiratanga, mauri, environmental flows, intergenerational wellbeing, regenerative use and limits and context are criteria for decision-making.

Rāhui
If the mauri of a particular freshwater body is under substantial threat, then Mana Whakahaere Councils would be empowered to impose a rāhui over that body to prevent further degradation. If there is a Te Tiriti right or interest over this freshwater body, then the decision of whether to impose a rāhui would be made at the discretion of the affected Iwi and hapū.

Hapū rights – negotiations and dispute resolution
A difficult question would be how to determine who has rights or interests over a particular freshwater body. The NZMC proposes that this could first be dealt with through a mana whenua process whereby Iwi and hapū from a particular catchment address, discuss and come to a consensus on who has rights or interests over a particular freshwater body. It is likely that some rights will be overlapping, and overlapping rights will be recorded by a Registry. If agreement is not able to be reached, then the Commission would provide a dispute resolution procedure enabling experts in tikanga and customary rights to be called in to resolve who has relationship and rights over a particular body of freshwater. The Commissioners tasked with resolving the appeal must include persons well-versed on tikanga, and use a tikanga-based process to resolve the dispute.

In the event that this decision is unsatisfactory to a particular group then they may appeal the decision to the Māori Land Court. However, parties must show that they have meaningfully engaged in good faith with the process before the litigation option would be available to them. Te Ture Whenua Māori (the Māori Land Act) incorporates provisions for dispute resolution in relation to disputes in relation to representation, and fisheries allocation. With effect from February 2021, Te Ture Whenua Māori now embodies a tikanga-based dispute resolution process that will apply more broadly, which could potentially be applied to the types of disputes envisaged here.

Resourcing and Administration of Funds

Māori Economic Development Fund

> **Funds from the pricing system will be available to Iwi and hapū at a level that is sufficient to enable their meaningful participation in the governance/management of their freshwater bodies and in the resource management system.**

It would be primarily for hapū and those exercising ahi kā as that is where the customary rights and interests in waterways and resources lie. Funds would support building capacity of hapū or Mana Whakahaere Councils to enter into co-management or transfer of power agreements.

Clean Up Fund
Te Oranga o Te Taiao Rūnanga partnering with stakeholders in the waterways ecosystem would oversee a clean-up fund which would be accessible to iwi/hapū, Mana Whakahaere Councils and the wider community to meet goals for enhancing and restoring the mauri of waterbodies. It would also be used to buy back resource consents over distressed bodies of freshwater.

Compensation
A task of the Rūnanga would be appropriately compensating hapū where a hapū is not in a position to use an allocation of water. This would apply in a situation of an agreed percentage of water to hapū as proposed in one of the recommendations of the Waitangi Tribunal.[145] In this case the percentage entitlement could be compensated or traded. Compensation would be directed to hapū and would provide funding at the appropriate local/marae level.

Option 2: Mana Whenua Authority – Rangatiratanga

An alternative was proposed during the research for an economic model derived from tikanga. This option has some correspondence with the Ngāi Tahu strategy which specifies that rangatiratanga be formalised as full authority over freshwater in the Ngāi Tahu takiwā.[146]

This model was presented during a seminar as a specific request for a rangatiratanga approach to waterways governance from an economics perspective.[147] This proposal is sketched in principle rather than fully elaborated as it is not so clearly adapted to the current system of resource management and the weight of vested interests that are embedded in governance, land ownership and a majoritarian system of decision-making. It is offered to encourage diversity of thought in line with customary authority.

> **The Te Mana o Te Wai Statute outlined in the following section could provide a statutory framework for Mana Whenua Authorities. Here authority is vested solely with Iwi and hapū for setting the requirements for mauri, or ecosystem health of water, for meeting human needs. Mana Whenua Authorities would have sole decision-making in respect of water to remain in or be returned to waterways, (a 'reserve') to ensure mauri, thus fulfilling the first requirement of Te Mana o Te Wai.**

This role would not include regional councils or other stakeholder interests. The mana whenua decision-making flows from the right bestowed though rangatiratanga and the obligation stemming from whakapapa. This is not about co-management or co-governance. The primary statutory role of the Mana Whenua Authorities will be to restore, maintain and enhance the mauri of the river.

It is a strongly held and verifiable position that Māori customary titles continue to exist in waterways and have not been extinguished. Therefore, it is rational and responsible to provide for the full exercise of mana whenua authority over waterways. Mana Whenua Authorities would draw on tikanga and the expertise needed to ascertain the quantity and quality of water to remain in waterways. The decision-makers would be independent of vested interests.

The needs of the wider public would be provided for through manaakitanga which, under tikanga also involves fulfilling public good responsibilities. Tikanga provides for recognition of the shared interests in waterways of all citizens, in terms of use, water is a shared resource and mana whenua and the public have responsibilities for its mauri, health and use as well as legal rights and interests.[148] Thus stakeholders are involved with mana whenua in decisions about the commercial use and allocation of water within the limits of ecosystem health.

Narrative
We elaborate the proposal for Mana Whenua Authorities to give a deeper rationale for this thinking through narrative. It echoes the 'envisaging rangatiratanga' opening statement. In Te Ao Māori customary governing authority, rangatiratanga is held with hapū:[149]

> Ordinarily, the hapū were autonomous and controlled the access to the natural

[145] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) ch 7, at 777: Māori proprietary rights and economic interests vis-à-vis the allocation regime.

[146] Te Rūnanga o Ngāi Tahu Ngāi Tahu Rangatiratanga over Freshwater (2019) at 14. Te Rūnanga o Ngāi Tahu was mandated to deliver two principles at Hui-ā-Iwi 2017 which give authority to progress the Ngāi Tahu Rangatiratanga over Freshwater Strategy They include 1 Ngāi Tahu will continue to exercise tino rangatiratanga over freshwater in our takiwā; 2 Ngāi Tahu shall accept a governing body that reflects Te Tiriti o Waitangi partnership.

[147] Peter Fraser 'Rangatiratanga, Wai Māori' Presentation at Waterways, Governance and Rangatiratanga seminar, VUW, Wellington, December 2020.

[148] Taihākurei Durie "NZMC Position Paper on Waterways" (unpublished paper, 2021).

[149] Taihākurei Durie "NZMC Position Paper on Waterways" (unpublished paper, 2021).

resources within their territory. Their political authority to control, was defined by the rangatiratanga or the personal mana of the hapū leaders. Their authority was characterised but not defined by their role as kaitiaki.

In the contemporary world in which rangatiratanga sits alongside, and often in contention with, Crown governance, aggregations of hapū into Iwi formations means that rangatiratanga is often expressed through these larger Iwi entities. These are particularly shaped by Treaty Settlements.

In the modern setting protection of waterways, and access to water for use and development, is being shaped by different views about ownership and authority, and by rights, interests, and obligations.

In terms of mātauranga Māori, the concept of ownership and possession are often seen as alien, as a Māori view of the world was based on whakapapa. In this relational world view, whakapapa is a dynamic interpretive method for showing how all forms of life are connected and interdependent.

Rather than creating 'rights over', it creates mutual obligations, and these refer to the material world and extend to atua. This knowledge system is upheld in Te Tiriti o Waitangi as tino rangatiratanga and undisturbed possession of taonga.

As previously discussed, the concept of water as a taonga and of whakapapa as a basis for governance is of a distinctly different order from western concepts of alienable private property and the Crown-derived concept of non-ownership. Non-ownership is a form of the Crown usurping the proprietary guarantees of Te Tiriti o Waitangi.

Working with whakapapa as a methodology, water belongs to a river, or waterway. In this conception authority is drawn from ancestral connection, obligations for protection and access for use. The responsibility of speaking on behalf of the river has come, in recent times to be bestowed on kaitiaki. Kaitiaki speak on behalf of the river, and the river sustains the people – a reciprocal relationship.

Kaitiakitanga is part of the nexus of obligations pertaining to mana whenua. It was traditionally associated with otherworldly actors (or deities), and in modern times has moved to actors in Te Ao Mārama, the human world, even more so since it was included in the RMA. Kaitiakitanga itself is not limited to a conservation or purely preservation paradigm. It includes development. Indeed, this is intrinsic to the mutual obligations that whakapapa entails.

Economic rationale

A Te Ao Māori line of thought exposes faults in the current resource management system. For example, the current allocation system of first in, first served is wrong on grounds of equity, and the zero-pricing of water is wrong because it allows the common wealth of water to be taken for privatised gain.

The non-ownership regime prevents royalties or a similar fee. A price should be paid for water that is abstracted or permitted for commercial purposes, and for discharge.

Decisions about ecosystem health, or water to be retained for Te Mana o Te Wai, and about consents for use, are currently made by Regional Councils – institutions which have been inadequate for the task.

Peter Fraser draws on three theorists, Henry George, Ronald Coase, and Daniel Kahneman Ronald Coase[150] in particular and others, covering equity, efficiency, and ownership issues. These show the ways in which current regulation works in favour of landowners. Regulations, legislative changes, and infrastructure can create capital gains, termed 'the unearned increment', which is a return greater than the opportunity cost to any form of production.

[150] Ronald Coase <en.wikipedia.org/wiki/Coase_theorem>.

In the regime of zero-pricing and absence of a tax, the benefits of access to water through allocation are capitalised into land values, and these gains are untaxed. The rules of allocation allow water to be commodified and also allow wealth gains that are privatised. While there may be efficiency gains in this system, the rules do not allow for a distributional outcome, and thus it does not work for equity outcomes. The rule that applies here is first-in, first served, which in fully allocated catchments allows for over-allocation because of zero-pricing, and excludes new applicants, the profile of which are Māori, as documented. In this system, zero-pricing and first in, first-served are two sides of the coin of wealth accumulation. It follows that those excluded by this rule are marginalised from economic gain and access to wealth.

The system proposed moves to customary derived authority of mana whenua over water in respect of determining the quantity and quality of water to remain in waterways, in other words the reserve for mauri. Provision for marae and papakāinga, and the human right of access for domestic needs are also made under tikanga. Then regulation and access for commercial use is managed jointly with users. The proposal is for a jointly-managed allocation and for imposing a price for water. The revenue from the price goes into a public good fund – thus part of the wealth gains is socialised.

Mana Whenua Authorities are an alternative to the current rules. It was originally conceived of as an alternative to the regulations under the RMA. The provisions of Te Mana o Te Wai in the NPS-FM 2020 in terms of the hierarchy of values correspond with the suggested system in terms of values, except that here mana whenua are the sole authority. We suggest that Mana Whenua Authorities can be mapped on to the system proposed in Option 1, with powers mandated accordingly. Thus Mana Whakaere Councils in collaboration with Te Oranga o Te Taiao Rūnanga would form Authorities for this specific role.

Mana Whenua Authorities/Rangatiratanga
The mana whenua authorities will decide whether there is abstraction, the quantity and quality of abstraction allowed and also impose rāhui if needed. This is where economics thinking is required.

For abstraction, 100 per cent of commercial volumes go to Iwi – as this gives Iwi a 'first option' and also resolves historical access problems. Provision for general domestic use is also required and will be facilitated by the Mana Whenua Authority. Then decisions about commercial use are made in partnership with Regional Councils and stakeholders. A 'use it or lose it' rule means that volumes that cannot be used by Iwi are then made available to everyone else. A price for commercial use will be determined, and the volumes for allocation are auctioned or tendered. In this schema two distinct issues are addressed: an equity issue of historical injustice and inequity; and a dynamic issue regarding efficient allocation. The allocation is a fixed term use right not a perpetual property right. Revenues are socialised into a sovereign fund in the same way Norway socialises North Sea Oil revenues. This would be a public good fund, such as an ecosystem health fund, or ecosystem services. The Super Fund was also proposed as an existing fund structure. Responses to this at hui have favoured an ecosystem health and capability development fund.

Mana Whenua Authorities and a Commission
In addition to the catchment organisation of Mana Whenua Authorities there is a need for national rules though an NPS or equivalent. This aspect would sit within the Te Mana o Te Wai Commission. The system endeavours to strike a balance between subsidiarity or decision-making within catchments by mana whenua, and national authority with an auditing function. This is described as a triangular relationship between "doers, rule makers, and auditors".[151]

The Commission could determine a national framework for commercial payments, such as through royalties, and also have an auditor role. This is a more reduced concept than the co-governance commission outlined above.

[151] Peter Fraser 'Rangatiratanga, Wai Māori' Presentation at Waterways, Governance and Rangatiratanga seminar, VUW, Wellington, December 2020.

Kahurangi National Park

Feasibility

Like the co-governance system this model relies on new institutional forms. The co-governance model offers a pragmatic model politically and engages mana whenua, the Crown and stakeholders at all levels. In contrast, this Mana Whenua Authority gives an exclusive role to Iwi/hapū to regulate the 'reserve' of water to be retained in waterways. That authority then continues over the use of water in partnership with stakeholders.

Given questions of political feasibility of exclusive decision-making on mauri by Mana Whenua Authorities at the catchment scale we consider the most likely option is for tāngata whenua roles in co-governance at a national level with Mana Whakahaere Councils in catchments, regional Te Oranga o Te Taiao Rūnanga feeding in to Joint Planning Committees.

The model of a Mana Whenua Authority itself is well substantiated economically, and parachutes us above the limitation of reform mind, which can be limited by the parameters of the status quo. It offers welcome creativity of thought and transformative elements to be brought into any new model.

TE MANA O TE WAI STATUTE

Explanation
The new suite of resource legislation and planning institutions starting with the Natural and Built Environments Act could bring the opportunity to transform the standardised, often static pathways of addressing discrete issues to an adaptive and complex systems approach. Overallocation, degradation, water supply, water for food production, water for Iwi and hapū, bottling and exporting water, 'three waters' are obvious issues. Most of these can be thought of as the issues that arise from a system focused on consumptive use, productivity and short-term expediency which have over-ridden 'ecological' water. The introduction of Te Mana o Te Wai sets the sails for an orientation towards waterways, and social-ecological systems that sustain them.

New legislation needs to encompass climate change and the water-climate change interface. While the link with the Climate Change Response (Zero Carbon) Amendment Act 2019, and the anticipated Climate Adaptation Act are obvious, the more far-reaching provisions need to provide for integrative procedures and strong connectivity, or feedback systems between national and catchment governance. With anticipation of changing water patterns and climate uncertainty, responsiveness is a key to adaptive systems. Capacity for complex systems approaches requires a strong learning culture in resource management, with observational knowledge of social-ecological interactions informed by mātauranga Māori, science, social research, cumulative effects, rather than discrete impacts of ecosystem dynamics and policy.

Capacity for integrative governance and the relational obligations inherent in whakapapa give rise to a culture of accountability and responsiveness that leads the way in shaping waterways and resource law. Mātauranga Māori is therefore a primary reference for governance that requires interpretive frameworks rather than prescriptive rules.

National direction that corrects the orientation of waterways policy towards the primacy of the mauri of water integrated with land use policy requires Māori involvement in decision-making in the design of the legislation and in all levels of governance and management.

The orientation for legislation outlined above needs to be translated into a jurisprudence sourced in Te Tiriti o Waitangi and partnership as the optimum pathway for designing adaptability and social-ecological systems dynamics. The following offers a start for shaping a Te Mana o Te Wai statute.

Purpose
The purpose of the statute is to provide national direction for Te Mana o Te Wai in a Te Tiriti o Waitangi framework.

A Te Mana o Te Wai statute will give effect to Te Tiriti o Waitangi with corresponding requirements on Regional Councils as delegated authorities. Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga will be mandated rangatiratanga authorities.

Treaty of Waitangi Settlements will be upheld.

The Natural and Built Environments Act is anticipated to have Te Oranga o Te Taiao in its purpose. Te Mana o Te Wai statute will also reference Te Oranga o Te Taiao.

Te Tiriti o Waitangi
The statute provides for Crown governance alongside tino rangatiratanga as provided for in Te Tiriti o Waitangi. A statutory requirement to give effect to Te Tiriti o Waitangi will recognise rights and responsibilities of rangatiratanga, kaitiakitanga, the guardianship of taonga and give practical effect to these rights and responsibilities. Giving effect to Te Tiriti o Waitangi involves:

- Iwi, hapū, and Māori participation as partners in development of legislation and policy.
- Iwi and hapū decision-making at all levels of central governance, regional governance and planning, including the National Planning Framework. This is the primary vehicle for national direction and replaces national policy statements, national environmental standards, most regulations, and national planning standards.
- Mana whenua contributors as partners for the National Planning Framework.

- Recognition of Māori proprietary rights, obligations, and interests.
- The co-design of a new national allocation system in support of Te Mana o Te Wai provisions. In essence this will provide water for Iwi and hapū, and Māori landowners, equity of access beyond that, and a criteria-based allocation and consenting system to support and enhance ecosystem health outcomes.

> **Te Mana o Te Wai will provide the framework and values for waterways and be referenced to Te Mana o Te Taiao.**

New institutions
The Act will provide enabling legislation for a Commission, Te Oranga o Te Taiao Rūnanga and Mana Whakahaere Councils as responsible authorities for catchment decision-making for waterways, in areas relevant to catchments. This includes determination of the 'reserve' of water to remain in waterways, determination of Iwi and hapū provision (at or above national guidelines), negotiation of commercial allocation, monitoring and data collection, and information sharing with communities. Iwi and hapū, and organisations registered as having an interest in a waterway will implement national standards.

An implementation process will be provided in the statute. Running a pilot for the catchment structures would test viability, resourcing requirements, and organisational systems.

Precautionary principle
The precautionary principle will be included in the purpose of the statute, as proposed by the Waitangi Tribunal. A precautionary principle is protective of biophysical limits and regenerative capacity of water ecosystems. Precautionary decision-making means taking into account the immediate and deferred effects of all actions in respect of waterways. Where there is inadequate information or uncertainty of outcomes, environmental protection should come first. This applies to all fields of human activity including policy that looks to intergenerational timeframes.

> **Knowledge of the link between human wellbeing and ecosystem health strengthens the value of precautionary and whole-of-system approaches to social, environmental, and economic policy.**

Principles
The legislation will give statutory authority to Te Mana o Te Wai and uphold the hierarchy of priorities: firstly mauri and ecosystem health, secondly provision of domestic drinking water and water for marae and papakāinga. The third – the quantum for commercial use – will be conditional on the first and second principles.

Decision-making to determine the ecosystem health reserve of water will be based on mātauranga Māori and science. There could be guidelines as a national level with provision for catchment Boards to assess the reserve appropriate to the catchment.

Integration with Water Services Regulator
The waterways statute will take an integrative approach to governance, management and regulation of all aspects of waterways and water supply. Integration will require linking with the Natural and Built Environments Act and with Taumata Arowai – Water Services Regulator Act 2020, the Climate Change Response (Zero Carbon) Amendment Act 2019, Local Government Acts, the Spatial Planning and Climate Adaptation legislation.

Provision of drinking water involves consents to municipal water providers. The Action for Healthy Waterways programme is proposing to integrate domestic water services with the wider scope of water governance. The Taumata Arowai – Water Services Regulator Act 2020 received Royal Assent on 6 August 2020. The Act establishes a Crown water regulatory body to oversee standards and ensure that water services remain in public ownership.[152]

The shift towards a Water Services Regulator as a Crown entity removes some of the responsibility from councils and brings together drinking water, storm water and wastewater management.[153]

[152] "Overhauling water infrastructure & the quid pro quo" Radio New Zealand (16 July 2020).
[153] Department of Internal Affairs Three Waters Review <wwwdiagovtnz/Three-Waters-Review>.

Bringing the water regulatory entity and the associated Water Services Regulator and Water Services legislation within the Te Mana o Te Wai Waterways statute would support the rationale of unified, integrated water governance and overcome the separation of services from source and the blindspot of the link to human health.

Further matters for a Te Mana o te Wai Statute

- Succession of entitlements – renewal of consents.
- Power to withdraw entitlements to use water such as failure to comply with conditions.
- Mechanism for dispute resolution, such as a Water Tribunal under the auspices of Te Mana o Te Wai Commission.
- Management of water charges and fund management and distribution policies.
- Stream flow reduction activities – allows the Minister, or commission to require curtailment of activities which have a negative effect on stream flow.
- Pollution prevention.
- Ensure information to the public.
- Establish a tariff authority for the pricing scheme, with objectives and procedures for access to funds.
- Compliance with international agreements and conventions

Transition to a new institutional framework for waterways

The simplest pathway for establishing a new institutional framework is an enabling statute, as outlined above, that gives statutory status to Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga. In the case of Option 2 being implemented, a similar statutory recognition of Mana Whenua Authorities would be required.

In terms of catchment institutions, a transfer of powers could achieve a similar mandate, activating a revised s 33 of the RMA which provides for a transfer of functions, powers, and duties to another public authority. The Ministry for the Environment's stocktake of s 33 states:[154]

> Transfers of functions could potentially include the policy making function and the ability to write the relevant rules or could simply be a transfer of consenting, monitoring and enforcement functions. In the latter type of transfer, the existing plan provisions continue to apply they are just administered by a different local authority.

The systems set in place by the waterways statute would be determined according to the scope of a commission and the provisions for subsidiarity at the catchment level. Preparation may involve establishing a register of Iwi and hapū associated with the Boards, recognising that this would involve a process of negotiation requiring skilled facilitation from kaitiaki, kaumātua and stakeholder interest groups.

Resourcing

It cannot be overstated that resourcing will determine the effectiveness of any policy and strategy. Inadequate resourcing has already been identified as a contributor to the failure of implementation of freshwater management, and as an impediment to Iwi and hapū ability to participate effectively in freshwater management.[155]

The new framework proposed here with governance level requirements and policy analysis will require corresponding resourcing for Iwi and hapū to provide the proposed level of leadership regarding Te Mana o Te Wai, and engagement in planning and in allocation decisions.

Resourcing may be met either through several sources including government budget allocations, contributions from Regional Councils and Iwi authorities, and through pricing mechanisms proposed below. Alongside resourcing of mana whenua, skills in collaborative decision-making, consensual procedures, and training in competence to work with tāngata whenua require resourcing.

[154] Ministry for the Environment Section 33 Transfer of Functions, Powers or Duties – a stocktake of council practice (Ministry for the Environment, Wellington, 2015) at 8.

[155] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 33.

PART 3: THE WATER ECONOMY AND ALLOCATION

3

PART 3: THE WATER ECONOMY AND ALLOCATION

INTRODUCTION

It is widely agreed that the first in, first served system should be replaced.[156]

> **The first in, first served system is operating to the advantage of settled interests in that the consenting process largely favours those with capacity to raise capital for investment and to maintain the costs and benefits of development infrastructure such as for irrigation.**

Replacement of this system to reverse overallocation and provide for Māori rights, interests and obligations is one of the most elusive aspects of reform – possibly due to the challenges of vested interests and of introducing a new system.

Exhaustive work on allocation alternatives has been brought to the table by Iwi Leaders,[157] the Land and Water Forum,[158] the NZMC,[159] The stage 2 report on the National Freshwater and Geothermal Resources claim,[160] the EDS Resource Management Review[161] and also in reports on practices of Regional Councils.[162] Allocation is also reviewed in *New Directions*.[163]

In addition, international research on allocation considers climate change and ecosystem services, strategies for resource management of complex systems, and provides examples of pricing systems to support resilience for waterways and for Te Taiao. Useful lessons can be learned from Costa Rica with familiar issues of hydroelectricity for energy, irrigation for agriculture and urban consumption, and reliance on protection of biodiversity for pharmaceuticals and landscapes for tourism. The Constitution establishes the right of citizens to a healthy and ecologically balanced environment. This extends to a right to claim reparations for environmental damage. The citizen standing does not come from ownership, property titles or rights per se. This standing is called 'diffuse interest' and was created as a response to an international agenda for environmental and climate change policies.

Governance systems have been designed to address over-exploitation of natural resources. Land use change from forestry to agriculture, mining and settlement led to fragmented habitats and loss of the capacity of ecosystems to maintain complex functioning, discussed below.

Inequitable allocation and the closely associated unresolved Māori rights and interests were at the centre the 2013 Mighty River Power case.[163] The Crown acknowledged 'rights and interests in water and geothermal resources' of Māori and made undertakings to provide mechanisms related to ongoing use and benefits of these resources.[164] These undertakings were followed by engagement and research programmes which have not brought resolution, often due to government priorities in managing political implications of providing equity for mana whenua.

A key requirement of mana whenua is for guaranteed access to water for cultural and economic purposes.[165] The right to development is confirmed in UNDRIP and affirmed throughout Waitangi Tribunal claims and settlements.[166]

The institutions proposed here provide for the authority of mana whenua with the Crown and therefore inaugurate a good faith process for a decision on a revised model for allocation. The NPS-FM 2020 gives an agreed starting point for allocation with the six principles of the Te Mana o Te Wai framework and hierarchy of obligations to ensure ecosystem health.[167]

156 *New Directions 2020*.
157 Kieran Murray, Marcus Sin and Sally Wyatt "The Costs and Benefits of an Allocation of Freshwater", Sapere Research Group Ltd, 2014; Kieran Murray and Sally Wyatt "The Incentives to Accept or reject a rights regime for freshwater", Sapere Research Group Ltd, 2015; D Graham, W Li and D Moore 'Essential Freshwater Regulations – Industry Impact Analysis', Sapere Research Group Ltd, 2020.
158 Land and Water Forum <wwwlandandwaterorgnz/>.
159 NZ Māori Council <maoricouncil.org>.
160 Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources claim* (Wai 2358, 2019).
161 Greg Severinsen Reform of the Resource Management System: the urban context (Environmental Defence Society, 2020).
162 "Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater alloca¬tion policy" (draft) in Nelson, sensitive documents in support of brief of evidence (doc F28(b)) at 486 in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources claim* (Wai 2358, 2019).
163 *New Directions 2020*, ch 11.
164 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

PLANS AND PROCEDURES FOR ADDRESSING ALLOCATION

Waterways will have a non-allocable 'reserve' for mauri and ecosystem health thus providing public good and environmental integrity values as provided for by Te Mana o Te Wai. Provision for human needs is the second public good entitlement. The allocable quantum for consumptive and non-consumptive uses then moves towards property rights in the water resources, and these are the subject of allocation decisions.

Preparation for a new system of allocation will first of all require a national engagement process in options. This could be undertaken by the Commission or other mandated agency to decide on an allocation system. As part of this task criteria will be identified for allocation that supports Te Mana o Te Wai, Te Mana o Te Taiao and equity. The regime will enable fairness of access to water for Māori and all users with provision for new users. Equity for Māori includes access to allocation as well as restitution for historic disadvantage.

A Te Mana o Te Wai statute will provide a national framework for an allocation system and make provision for catchment decision-making appropriate to catchment contexts. Te Mana o Te Wai sets the parameters for allocation with an ecosystem health reserve of water to be held in waterways, inclusive of quality and quantity of water, and provision for human health.

National level allocation decisions include a number of provisions. These include allocation for Iwi/hapū, Māori land holders which takes into account past exclusion and new opportunities for development.

Questions arise on how to address restitutive access to water, and on the nature of Māori rights. Proposals include a percentage share for Iwi and hapū, and Māori landowners. Is there a nationally set percentage share of allocable water to Iwi and hapū, and Māori landowners? Should this be the same for all Iwi and hapū, or should specific provision be negotiated in each rohe? What provision should there be for those who do not have capacity or Treaty Settlements? Could the Commission have an advocacy role if requested? What is the nature of Māori rights? Are they perpetual, inalienable, transferable? Can they be traded? Do they have to be used?

This research has led to the view that allocation for commercial use needs to be done within a criteria-based planning and consenting regime to have integrity with Te Mana o Te Wai. Our line of thought for a responsible system for consents for takes and discharges is as follows:

- Allocation for Iwi and hapū, and Māori landowners. This needs to provide access for those who have not had capital to make the necessary investments to qualify for a consent. If an applicant has the management of land, funds should be available for necessary investment with an allocation to support the use and development of the land.
- Rehabilitative land use, such as support for regenerative agriculture, reducing water use, production within renewable capacity of land and waterways.
- For land use that reduces intensified dairy – that is, it reduces the number of cows.
- Development within ecosystem health limits.
- Allocation and policy instruments for land use that supports the health of waterways, such as forestry management to reduce or eliminate sediment.
- Water and land use that reduces CO2 emissions and environmental footprints and sequesters carbon.
- Elimination of environmentally detrimental externalities, such as effects of toxic discharges, sediment from forestry, biodiversity loss.
- Incentives for biodiversity enhancement, native forestry, and native species.

PRICING

The Commission (or mandated Working Group) will prepare a regime of charges for the commercial use of water, with a transition plan. Charges are to be based on commercial resource consent holders' allocated volumes of water.

A levy or royalty on allocated water will create revenue derived from pricing for commercial use and potentially from water trading.

Pricing would be designed to incentivise reducing the use of water, and as a policy instrument to support the health of waterways, such as forestry management to reduce or eliminate sediment. The revenue is not owned by any private individual or entity such as Iwi. This revenue is for the benefit of all people – ngā tāngata katoa to be used in support of Te Mana o Te Wai and Te Oranga o Te Taiao, provided for in legislation. The revenue will be managed through an authority or trust for public good interests thereby socialising it in the same way that Norway did with North Sea oil revenue.

In addition to supporting Te Mana o Te Taiao the fund could provide payments or rebates for the return of water; tax relief could be offered for reducing water in agriculture and forestry. Payments for ecosystem health could offer financial incentives for preventing the sale of agricultural or native forested land for development. Costa Rica's funding regime to support ecosystem services is a valuable reference. Costa Rica has pioneered payments for ecosystem services, with payments being directed to reverse one of the world's highest deforestation rates. Success was achieved through a combination of market based policies of offering payments for ecosystem services and also by imposing control regulations. The Payments for Ecosystem Services scheme operates in forestry on private land and is administered through the National Fund for Forest Financing (FONAFIFO). The fund is for forest management and it is funded by a contribution from sales tax on fuels, carbon trading payments, international donor funds, and fees from contracts for ecosystem services. FONAFIFO acts as a broker between people who need ecosystem services and those who are willing to accept payment for providing such services. FONAFIFO manages the revenue through a system of trust funds which are agile and adaptive in operations.

Costa Rica pricing and funding system spans mitigation of greenhouse gases, protection of drinking water, agriculture and hydroelectricity with protection of biodiversity for ecological, pharmaceutical, landscape values and tourism. These interests are closely parallel to the priorities in Aotearoa and can inform decisions on water use on water use charges, pricing, and financial incentives to support Te Mana o Te Wai. Such decisions include:

- Applying resource rentals/charges for commercial use of water, and for costs associated with pollution, discharge, disposal of waste, and greenhouse gas emissions. The pricing strategy will take into account objectives for water resources, support beneficial use of water resources.
- Tools for financial incentives include biodiversity credits for climate change mitigation accounting and a biodiversity fund and tax relief to incentivise retention and planting of native trees for afforestation. The fund would provide payments or tax relief for agricultural and forestry practices that support Te Mana o Te Wai.

The pricing system may differentiate costs on the grounds of provision to Iwi and hapū and equity for other users, to support reduction in water use, catchment specific plans to reduce detrimental impacts of water use.

- Determine whether charges are set at national or catchment levels, and though which authority?
- Apply a pay or surrender scheme as a demand management tool.
- Utilise differential charges in respect of socio-economic needs, geographic attributes of catchments to support beneficial land use, development within ecosystem health limits, and in respect of equity considerations – taking account of prior exclusion.
- A rebate scheme for returning unused water.
- Royalties on exported water, and on plastic bottles.[169]

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

[166] *Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study* commissioned by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015) at 14.

[167] In particular Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) vol 3.

[168] NPS-FM 2020 at 5-6.

[169] Jonathan Milne "Govt challenged over end-use of water and plastic in bottling plant decision" *Newsroom* (online ed, 5 March 2021) (Otakiri Spings case).

Any reform requires socialising the need for change, options available and a democratic process for engagement. A communications strategy in support of transformative change that builds on intergenerational wellbeing and on the integrated world view of Te Taiao is a priority. It could be achieved along the lines of 'when we look after our waterways, they will look after us'.

TRANSITIONS TO NEW ALLOCATION SYSTEM

Strategies for transitioning away from first in, first served allocation have been widely debated. One strategy is to set a percentage reduction of commercial allocations to be phased in over the time of current consents – the longest being 35 years. Consideration needs to be given to Crown-funded compensation.

At the same time, a moratorium should be placed on new consents. A moratorium would include all consent holders including Māori, and therefore have a perverse effect and exacerbate inequity in the short term. During hui on the reforms a resolution on a moratorium was prepared and supported by people present, that would go a long way to resolving this by putting pressure on the system for a new equitable design for allocation:[170]

> **That an immediate moratorium on issuing freshwater consents and discharge rights be put in place, pending the successful resolution of Māori freshwater rights and interests including allocation, proprietary rights, and the full implementation of Te Mana o te Wai.**

Resources for establishing new institutions and allocation arrangements will be needed from government initially and could move to draw on income from the new pricing system. A Commission or a mandated authority would require technical/expert/tikanga support for deciding on transitions to a new allocation system. Resourcing of Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga will include meeting needs for capability development, implementation, allocation procedures and funds management to ensure full participation in the water economy.

Further strategies which are being discussed include:

- Existing consents will be cancelled and a new permit system introduced with conditions to meet new standards. Pay compensation for loss of anticipated income incurred – funded by government and income from the pricing scheme.
- Existing consents will not be automatically renewed on expiry. Rather they may be reviewed with consent holders being given the opportunity to meet the new criteria.
- Alternatively, the government could regulate for a common expiry date for all consents and then reallocate on expiry.
- Compulsory reduction across all existing consents (equal percentage, for example, 30 per cent, or could vary based on set conditions). There is a possible need for government funded buy-out.
- Find new water – from unused consented water, with rebate system to reward return of water, and funds to install rainwater harvesting tanks.

All options for change will most certainly lead to tensions with existing users – a risk which is unavoidable in the short term.

- Establish criteria for allocation permits to give priority to environmental integrity, equity, and to incentivise reducing use of water. Criteria would include:
    a. Access for Iwi and hapū, and access for other new users.
    b. Rehabilitation of land, waterways, and people in their relationship with waterways.
    c. Support for rainwater harvesting.
    d. An account of the environmental footprint of land and water use.
    e. Elimination of environmentally detrimental externalities.

- Establish an adaptive management system for the quantum of water allocations by allowing a percentage, not set volumes of available water

[170] NZMC Report of Te Tai Kaha Hui (24 May 2021) Resolution 8. Provided at Takitimu Marae, Wairoa (22 April 2021), text by Peter Fraser.

THREE FRAMEWORKS AS OPTIONS FOR ALLOCATION

In this section we outline three options for allocation, each is a unique framework although with overlapping methods. Each is under different authorities corresponding with the different institutional systems considered in this research.

1. **The first sits within a system of co-governance and works with the Commission and Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga**
2. **The second works with Mana Whenua Authorities in catchments. It gives a specified and sole role to Iwi and hapū as the authorities over mauri and Te Mana o Te Wai. These authorities link with Joint Planning Committees.**
3. **The third specifically refers to whakapapa relations and communities of interest in waterways.**

While each is distinctive there are overlapping aspects as would be expected of a system focused on the common aspiration for Te Mana o Te Wai and Te Oranga o Te Taiao.

Options for Allocation

1. Co-governance

This option involves a role for a Te Mana o te Wai Commission and for a partnership process between Mana Whakahaere Councils, Te Oranga o Te Taiao Rūnanga and Joint Management Committees. It signals a shift in orientation in local implementation with clearer recognition of tikanga in the system.

While it would seem that partnership processes for allocation would involve Te Oranga o Te Taiao Rūnanga and Regional Councils, we opt for partnership on allocation to be with Joint Planning Committees. The experience of Iwi and hapū and Māori landowners on the ground with Regional Councils is generally one of exclusion and marginalisation, and that the environment bears the costs of development. In many cases there is insufficient trust with regional councils as partners to be confident of beneficial outcomes for Iwi and hapū, and Māori landowners. The proposal for Rūnanga to work with Joint Planning Committees for decisions on allocation is intended to remove entrenched vested interests that have become evident in regional council politics. With the support of expertise from the Commission, a new allocation system will be implemented that includes:

- Assessment of 'environmental flows and levels' and 'take limits' as required in NPs-FM-2020.[171] A 'reserve' or flow for Te Mana o Te Wai is to prioritise mauri and ecosystem health in terms for quantity and quality of water. Including quality means addressing associated land management practices, such as dairy, forestry, horticulture and vegetation clearance which have direct effects on water quality, as identified in NPS-FM 2020 on integrated management.[172]

[171] NPS-FM 2020 at 317.
[172] NPS-FM 2020 at 35.

A lifeless canal irrigation system drawing water from the Waimakariri River

- Preparation of a proposal on allocation of water to Iwi and hapū as part of a regional, catchment-based scheme. Such a proposal will be designed with the direct input of Iwi and hapū.[173] An allocation has been negotiated in respect of fisheries and aquaculture and can be implemented for water. Considerations on restitutive allocation to date include the following:
    a. A percentage share of allocation to Iwi and hapū is recommended by the Waitangi Tribunal. This could be determined at a catchment by Te Oranga o Te Taiao Rūnanga in collaboration with Joint Planning Committees.
    b. A permanent share for Iwi and other commercial users, as an inalienable property right as outlined in the report on allocation commissioned by Iwi Leaders Group.[174]
    c. Provide water for Māori land and provide funds to Iwi without land in recognition of land alienation.
    d. Provide water rights to mana whenua without access to land, as a tradeable or leasable right.

A combination of these tools would support a transitional process.

The outline of a criteria-based allocation system is intended to provide a clear framework for the complex array of options for allocation. The orientation of this research is towards a transformative system in keeping with the values and principles of Te Mana o Te Wai and Te Oranga o Te Taiao: three scenarios for achieving allocation in accordance with these outcomes are outlined in the next section.

[173] Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019) at 563.

[174] Kieran Murray, Marcus Sin and Sally Wyatt "The Costs and Benefits of an Allocation of Freshwater" Report prepared for Iwi Leaders Group by Sapere Research Group Ltd, 2014.

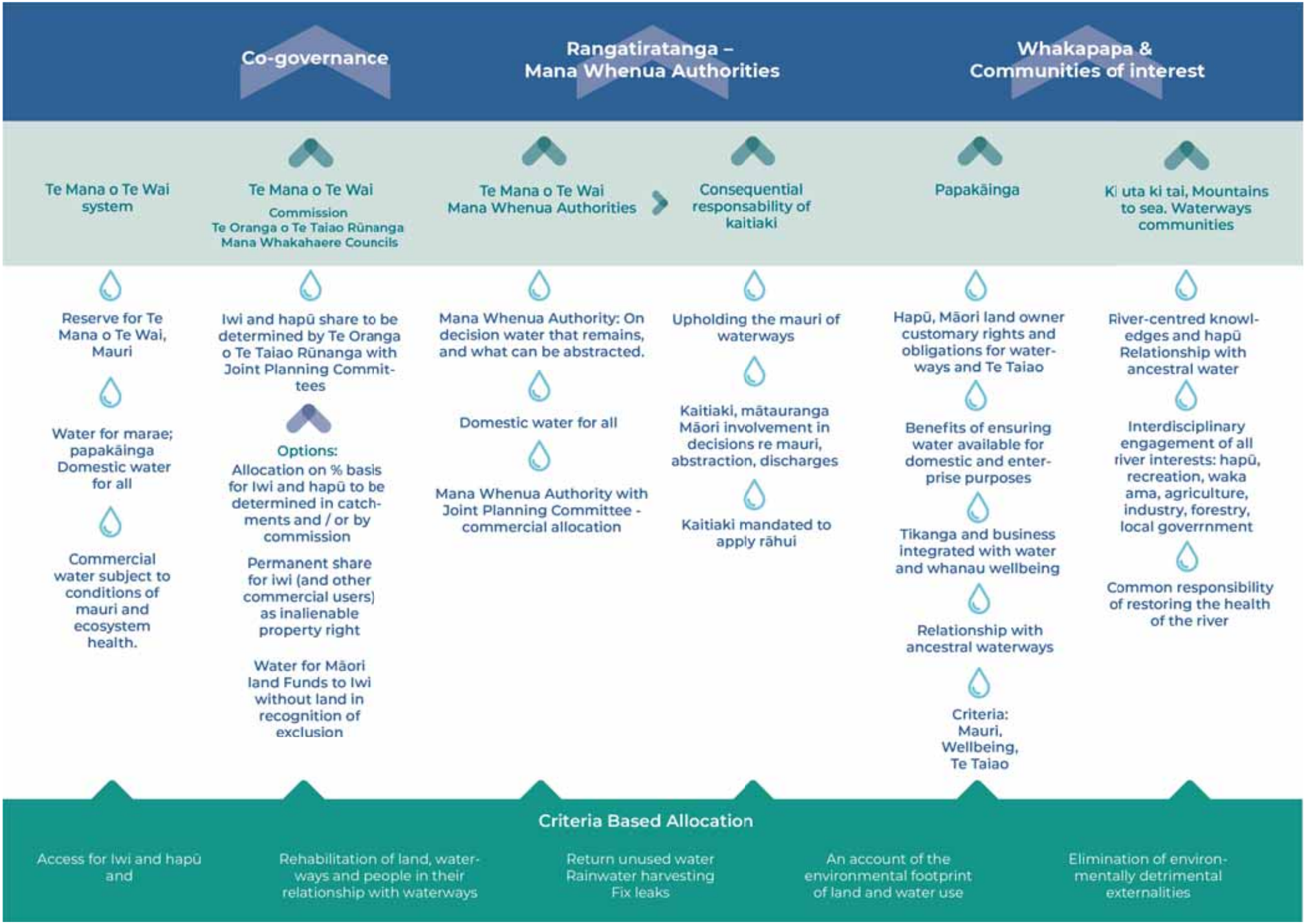


Figure 2: Indicative frameworks and options for allocation

2. Rangatiratanga: Mana Whenua Authority role in Allocation[175]

> **"I am the river, and the river is me;
> when the river is healthy the people are healthy."**

Iwi and hapū catchments would form a Mana Whenua Authority, likely to be drawn from Mana Whakahaere Councils and Te Oranga o Te Taiao Rūnanga, They will have the sole responsibility for determining both the quantity and quality of water to be 'reserved' or retained in waterways, water for human needs, and the quantum that can be allocated.

As in the previous option, decision-making about water requires ensuring the necessary expertise, and independence of vested interests to determine the following:

1. A decision on a 'reserve' and on the amount and quality of the water that remains, and what can be abstracted.
2. Following this there are two consequential roles of a rangatiratanga system of decision-making. The three tiers of decisions are:
    a. Ensuring the mauri of the river is maintained – this will include the role of kaitiaki and other experts.
    b. Assessment of drinking water and domestic supply.
    c. Determination of the water to be abstracted and allocation of the abstracted water between competing users and users.

In this model, the Mana Whenua Authorities would be the sole authority for determining mauri and the requirements of Te Mana o Te Wai – with ability to access expertise as required. When a river is of sufficient flow to allow for its use through abstraction and discharges, then decisions are to be made about the means, the amount, the distribution, and the duration of consents.

Decision-making for allocation would involve Regional Councils, interested parties and stakeholders. This would still have kaitiaki and their expert advisors holding the fundamental relationship with waterways and the associated obligations of mana whenua.

Allocation Procedures

- All water for abstraction is initially transferred to mana whenua. They will have access to water for marae, papakāinga, or land blocks. Along with access to water, funds will be made available for the investments needed for developing land. This solves an equity issue where tāngata whenua have traditionally been disenfranchised. It does not address benefits to Māori who do not have land, due to the historical process of raupatu and confiscation, and of alienation through the Māori Land Court. This is where 'unbundling' to allow water as a 'tradeable right' not linked to property could benefit Iwi. It would allow access to water to sell, or lease or leave in the waterways, independent of land ownership.[176]
- Mana Whenua Authorities with input from Regional Councils and stakeholders will have the management of the distribution of remaining water. One approach is to use market mechanisms. This solves efficiency problems as the Coase theorem maintains that efficient allocation will result regardless of the initial allocation as long as there is a well-functioning secondary market.[177] Iwi could auction water rights to other users or design a tendering process for allocating to users. A further option is to use a mixture of tendering and regulation using criteria to evaluate applications, rather than the highest tender.
- Criteria for tendering would be the same as those outlined under Option A.

As explained above this rangatiratanga model addresses past disadvantage for mana whenua, so equity is addressed and at the same time provides for the wider public access to water. This is a model closer to the conception of Article 2 of Te Tiriti o Waitangi, in that rangatiratanga over the taonga and its management rests with rangatira. The involvement of the Crown in this model is in setting national direction. Involvement of stakeholders is brought in for decision-making on commercial allocation.

[175] Peter Fraser – excerpts from a briefing on a water economy framework (personal records).
[176] Matt Dale "Discussion Paper on Water Market systems in New Zealand" (unpublished paper, 2017).
[177] Peter Fraser "Rangatiratanga, Wai Māori" Presentation at Waterways, Governance and Rangatiratanga seminar, VUW,

3. Whakapapa - Obligation and a Relational Methodology: taking account of food, forests, farms housing, health, recreation

During this research we discovered horizons of innovation and creativity in practical responses which arise from the voice and life of the waterways themselves. These are characterised by relationships between people with water and rehabilitating the needs of people in communities and land use with the health of waterways. Whakapapa approaches are best introduced with two brief case studies of river communities.

A. Papakāinga

We refer again to the Te Pāute papakāinga case study at Pōhara Marae in the Kupu Whakataki which shows the benefit of water allocation as the basis of a tikanga based housing and development enterprise. Other examples include housing developments in Raukokore[180] on the East Coast of the North Island, where access to water was a necessary precursor to providing a range of housing solutions.

> **Water storage has been the watershed for agricultural development in Raukokore.**

It was initiated by Te Whānau a Maruhaeremuri Hapū and facilitated by a loan of $30 million through the Provincial Growth Fund, providing a major impetus to economic development. Funds for housing came later from the Ministry of Housing and Urban Development through the Māori and Iwi Housing Innovation Framework for Action, alongside other funds and business investments.

Water storage is in the form of a four hectare pond to provide water for irrigating 200 hectares of land for gold kiwi fruit and macadamia nut orchards. An analysis of sustainability at the beginning required an assessment across capability, economic and environmental areas. Workforce development needs and projected employment outcomes were evaluated along with investment partnerships, and productivity projections in relation to the health of the Wai o Kaha River and the NPS standards.

In particular the priority is on maintaining cultural flows and native fish stocks. Water monitoring by the Regional Council had not been done since 2000, so Maruhaeremuri commissioned their own water assessments, including an assessment for cultural flows. The assessment provided for 15percent of water that could be abstracted for water storage, in Joint ventures are a key to this project with land owners and partner investors opening the doors to productive long term development. Raukokore River Water Ltd is joining with local businesses to maximise the benefits of their operations, focusing on investment in high value crops. This includes partnering with a neighbouring hapū in Wai Kiwi Gold for growing and marketing gold kiwifruit. Looking forward, Te Whānau ā Apanui Hapū Chair Mr Willie Te Aho said:[179]

> Funding arrangements to support the financial independence for the hapū in the long-term are being pursued. Outcomes of Treaty Settlement negotiations would be a vehicle for partnerships between the hapū, Crown and Regional Council that would ensure hapū principles of mana motuhake and consideration of non-hapū living in the area.

Whānau of Maruhaeremuri hapū have been training in horticulture and orchard management in preparation. With the projections of work for the next ten to fifteen years on irrigation management and land development whānau are returning home.

With land production expanding and employment opportunities growing the need for housing was the next urgent step. This began with 28 new relocatable cabins being opened in 2020 as an interim solution to building in a remote area. Modular cabins allowed the fast tracking of accommodation and bypassed the barriers of access to power, waste and water supply services and longer process of consenting for building on ancestral land. Papakāinga such as Te Pāute and Raukokore are activating rangatiratanga over ancestral and Māori owned land. Access to water is at the heart of the ability of hapū to live on and utilize their land.

178 Raukokore Papakāinga. https://www.waateanews.com/waateanews/x_news/MjU0MDg/Paakiwaha/Raukokore-modular-development-points-way-ahead

179 Willie Te Aho, Chair Te Whānau-a8-Apanui. Expert Advice interview. 10 September 2020.

Parī kohatu ki Pōhara, backdrop to papakāinga.

B. Waimatā

'Let the Rivers Speak' takes the legal personhood of Te Awa Tupua as its reference point. The Waimatā River project in Tūranga-nui-a-Kiwa, Gisborne, seeks 'new ways to give a river voice, and to revitalise rivers as living communities of landscapes, plants, animals and people.'[180] It leads away from anthropocentric management to river-centred knowledges.

As Marsden funded research it draws on many years of practice and scholarship across indigenous and western knowledge traditions with in-depth inquiry into the confluence of indigenous Māori custom and settler interests formalised and catalysed by Te Tiriti o Waitangi.[181]

The philosophical orientation of the research is to transcend modernist divisions between theory and practice, people and the environment, nature, and culture: and to revitalise links between the arts, humanities, technology, and the natural and social sciences. The framing of 'Let the Rivers Speak' allows for engagement with Iwi and hapū associated with the river, and with local and central government agencies, farmers, foresters, riverside residents, businesses, and those who paddle, row, fish and swim in the river. In other words, an interdisciplinary venture.

It aims to involve those with economic and cultural interests including economic benefit to share in a common responsibility of restoring the health of the river. This is a world of dynamic interactive learning processes of the river community over the space and lifetime of a river.

A 'digital river' will work with technology for bringing a virtual dimension to the geo-ecological science of the Waimatā. Other dimensions go across industry and farming, law, and the regulatory and planning roles of the regional council. Major land use and resource management challenges of forestry and farming on the Waimatā river were brought to national attention by the 2018 floods when the river suffered the deluge of slash and sediment, choking its course. Could forestry practices be brought into alignment with ecosystem health dynamics of the river?

Let the River Speak proposes engagement with the river and with the river communities that could deliver in a radical reworking of safeguards and use. The ancestral relationships of mana whenua with Te Taiao, the environment of the Waimatā combined with the dedication of project leaders underlies the feasibility of this multidimensional initiative. It is envisaged that decisions about the waterways of the Waimatā could be made from a river focus by the river community. It is not yet possible to see how distribution to mana whenua would be achieved, and what procedures or regulations allow for a system drawn from genealogies of the river and its people.

Questions arising from whakapapa and river communities model
Is it possible, ultimately, to legislate or regulate for bringing obligation and interdependence between people and with nature to the fore in a context of economic drivers and the pressures of growth? Te Mana o Te Wai is an example where values and tikanga have been brought into the regulatory framework for waterways, relying on the brilliant articulation of Te Ao Māori thought and the priority of the mauri, or health and well being of waterways.

In a different location and setting, there was intense opposition to Horizon's One Plan of the Whanganui-Manawatū Regional Council which boldly proposed an integration of the 'big four' issues of the region:[182]

> The focus of the new plan was on the 'big four' environmental issues of the region - water quality, water demand, hill-country land use and threatened indigenous habitats. The plan's aim was ... [to] set limits to natural resource use.

[180] "Making waves: Marsden success for Arts" (10 November 2020) <www.auckland.ac.nz/en/news/2020/11/10/marsden-funding-for-artshtml>.

[181] Anne Salmond "Rivers as Ancestors and Other Realities" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 183-192; Anne Salmond, Gary Brierley and Dan Hikuroa "Let the Rivers Speak: Thinking about waterways in Aotearoa New Zealand" (2019) 15(3) Policy Quarterly 45.

[182] Catherine Knight *Ravaged Beauty An environmental history of the Manawatū* (Totara Press, 2018) at 225

Te Awa Tupua as a reference point for legal personality

> The second overarching objective was to achieve a more integrated planning approach than had been possible with issue-specific planning documents, with clear connections between air, land, water and coastal resource management.

Limiting discharges of nutrients, sediment, and pathogens and into rivers was a feature of the plan in the context of intensive land use. There were unprecedented numbers of submissions in support from environmentalists and in opposition from land users (no mention of mana whenua). Federated Farmers and Horticulture NZ took challenges to the Environment Court.

The One Plan and the Waimatā 'Let the River Speak' are not fully comparable as one is a regulatory approach and the other a research approach driven by a relational epistemology. The regulatory process can achieve a change of practice and attitude, even though via a contentious process.[183] Both pathways lead back to matters of information, communication, and the tremendous importance of developing capacity and leadership at the level of subsidiarity. Catherine Knight's account of the One Plan process does not discuss the involvement of mana whenua in this drive to bring freshwater itself to the fore of the planning process.

Law and regulation can serve as a spur to responsibility in land and water use. Yet ethics is always beyond the law, a human dimension in the order of Māori Marsden's "earth consciousness"[184] or Emanuel Levinas' ethics of infinite responsibility.[185] These are the beacons for opening pathways to living well with the earth.

It is conceivable that a different form of local organisation will emerge at the Waimatā with procedures to respect the personhood of the river along with use approvals. The systems of allocation and consents, abstraction and discharge might become less implicated in commodification, segmentation and with managing the river as an object of commercial or even recreational interest, and more attuned to the mountains to sea scope and the multiple dimensions of waterways.

A dynamic system of engagement as proposed is hard to map on to the current systems of management and regulation, although it is aligned with the principles of Te Mana o Te Wai. The conception of obligation to the river and to people has increasing salience for climate change conditions where uncertainty and hazardous events require adaptive systems, and the knowledge of change in hydraulic systems. This project speaks clearly of the imperative to prepare people through experience and with knowledge from Te Ao Māori and Te Ao Pākehā for the complexity of the common destiny of people and Earth's ecosystems.

183 Catherine Knight *Ravaged Beauty An environmental history of the Manawatū* (Totara Press, 2018) at 224 and following.

184 Charles Te Ahukaramu Royal (ed) *The Woven Universe: Edited Writings of Revd Māori Marsden* (New Zealand, Marsden Estate, 2003) at 69.

185 Emanuel Levinas *Totality and Infinity* (translated ed: Alphonso Lingis (translator) (Dusquesne University Press, Pittsburgh, PA, 1969).

Conclusion

The proposed institutions for governance of waterways offer gateways for further constitutionalising Te Tiriti o Waitangi. As rangatiratanga evolves, it may take different institutional forms, some shaped by collaborative structures and some more autonomous, reflecting shared and overlapping interests, and our distinctive cultural, knowledge and governance histories.

This is a time of a wider shift towards appreciating water as the source of life and health for all. This research gives heightened attention to changes that are urgent.

It is nine years since the undertakings by the *Crown in New Zealand Maori Council v Attorney-General*[186] to take forward the multiple aspects of mana whenua obligations to waterways and to provide restitution for the loss of economic opportunity and for loss of livelihood interests in water resources. Since then, Iwi Leaders have undertaken sustained engagement with the Crown and research to present options for resolution.

The NZMC in the stage 2 inquiry and report has further substantiated options and set out the case for institutions and provisions for rights and responsibilities. It is incumbent on the Crown to give effect to these endeavours.

We have emphasised Iwi and hapū, Māori landowner interests in urging action, and wish to fully acknowledge the advocacy of the multiple environmental organisations and possibilities of the Essential Freshwater programme.

The full scope of waterways matters is complex. Attention tends to be sector-oriented: Iwi, hapū, Māori, environment, farming, industry, energy, domestic supply, waste, and infrastructure. Additionally, national policy through the RMA, NPS-FM, National Objectives Framework and Regional Council and Territorial Authorities are further layers of reference. The waterways institutions outlined in this research integrate these components of water policy.

More significantly they are a step forward in jurisprudence in recognising two systems of law and two ontologies as envisaged in Te Tiriti o Waitangi: provision for the western system of common law and statute, and Māori customary law and associated knowledge systems.

The implications of unextinguished customary ownership in waterways are yet to be realised but they give force to the case for recognising rangatiratanga in governance. The institutional and statutory provisions proposed through this research offer a legal and procedural system for kāwanatanga – rangatiratanga as a constitutional basis for Te Mana o Te Wai.

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

'Nga Rara Huarau' with permission of Colin Slow

It is said the rivers that rise in the central North Island are descendants of the great mountains that abide there, where amongst their responsibilities they bear great gifts of wellbeing from the mountains to the sea.

Rākātō Te Rangiita, Ngati Tuwharetoa

RECOMMENDATIONS

1. **The Prime Minister makes a statement of recognition of Tino Rangatiratanga of Iwi and hapū with provision for rangatiratanga to be recognized in resource legislation and policy.**

2. **A statement of rangatiratanga stands alongside legislative provisions for Te Tiriti o Waitangi, specifically in the Natural and Built Environments Act, to give effect to Te Tiriti o Waitangi.**

3. **Establish an appropriate Steering Group of recognised experts, such as that recently established for the Māori Health Authority to establish a Te Mana o Te Wai Commission in a rangatiratanga framework (a co-governance body).**

4. **The Steering Group or subgroup will proceed with determining Māori rights, interests and obligations in partnership with the Crown to be implemented alongside the Natural and Built Environments Act and associated Spatial Planning and Climate Adaptation legislation. This is linked to a new system of allocation in Recommendation 7 below.**

5. **In respect of a Te Mana o Te Wai Commission the Steering Group will:**
   - **a. Determine the powers and scope of a Commission. Considerations are to include:**
     - i Whether the Commission should be domain specific to waterways, or have a broader mandate for Te Taiao. A Te Mana o Te Wai Commission in the context of the Te Taiao Purpose of the Natural and Built Environment Act may be a solution.
     - ii. Power to make binding recommendations in particular circumstances. These would be related to requirements for upholding Te Mana o Te Wai and Te Oranga o Te Taiao and be binding to restore mauri or ecosystem and human health requirements.
     - iii. Powers to make recommendations on policy. In the case of recommendations not being followed, an explanation about departure from the recommendations is to be provided by the Minister.
     - iv. An auditing role of the Commission. Auditing would be in respect of Te Mana o Te Wai standards, breaches of allocation rules.
   - **b. Design a system of representation of Iwi and hapū and mana whenua authorities (proposed as Mana Whakahaere Councils and Te Oranga o Te Wai Rūnanga) and of Crown representatives, for which this report is a reference. Include scoping of the Māori Community Development Act 1962 to ascertain the feasibility of amendment the NZMC structure so that Mana Whakahaere Councils and Te Oranga o Te Wai Rūnanga link to the National Planning Framework and with Te Mana o Te Wai Commission.**
   - **c. Oversee appointment procedure for the Te Mana o Te Wai Commission.**
   - **d. Establish a system of representation for catchment institutions to link with Joint Planning Committees.**
   - **e. Give due consideration to Mana Whenua Authorities mandated for the sole determination of mauri and water to be retained or returned to waterways (cultural flow).**

   An Interim Commission may be an expedient first step.

6. **The Framework of the Te Mana o Te Wai Commission will include:**
   - **a. Definitions of the powers and scope of a Commission.**
   - **b. That rangatiratanga of Iwi and hapū are enabled and enhanced**
   - **c. That the mana of Treaty Settlement legislation will be upheld.**

d. That the Commission will oversee the setting of goals to achieve standards in accordance with mauri, Te Oranga o Te Taiao and Te Mana o Te Wai. These goals are to be monitored and reviewed every 5 years.
e. That all forms of water are within scope for a Commission: no distinction is be made between geothermal, springs, aquifers, and other waters.
f. That an auditing authority be appointed with expertise independent of vested interests.
g. That integration will include climate change legislation, Taumata Arowai, Local Government Act and all associated legislation.
h. That Iwi Management Plans and Joint Management Plans will be given statutory recognition in the new planning system under the National and Built Environments legislation.
i. The establishment of a national database for nitrate contamination in drinking water
j. A pricing system for commercial use of water and rebates will be prepared, to incentivise reducing water use and retaining native forests, and to eliminate detrimental externalities. Pricing to be authorized through vesting of water such as in rangatiratanga trusteeship or through Parliamentary authority.
k. A public good fund for the benefit of waterways and Te Taiao will be established from the revenue.

7. In respect of allocation
   a. The Commission, or a specialist Working Group will co-design a new national allocation system in support of Te Mana o Te Wai provisions, with guidelines for allocation along the lines proposed in this report.
   b. Allocation is to enable and provide:
   i. Water for Iwi and hapū, and Māori landowners
   ii. Equity of access for all users
   iii. Support for development within ecosystem health standards. This includes enabling regulation for papākainga and ecosystem health standards for all housing development
   iv. Support for Māori investment in geothermal resources to ensure that Māori are beneficiaries of development of geothermal resources
   v. Criteria for allocation and consenting to support equity, rehabilitative land use and enhance ecosystem health outcomes for Te Taiao. Criteria to include reducing CO2 and methane emission, de-intensifying dairy and reducing the use of water
   vi. A transitional process from first in, first served

8. Place an immediate moratorium on issuing freshwater consents and discharge rights, pending the successful resolution of Maori freshwater rights and interests including allocation, proprietary rights and the full implementation of Te Mana o te Wai.

9. Pricing and allocation systems to have a national design, with catchment authorities having decision-making pertaining to catchments, involving Mana Whakahaere Councils, Te Oranga o Te Taiao Rūnanga and Regional Councils

10. That the 2022 Government Budget, and subsequent Budgets ensure Appropriations for the effective operations of the Commission, catchment structures and implementation of Te Mana o Te Wai and Te Oranga o Te Taiao, including resourcing of public information. That full resourcing be provided to ensure that Māori are able to build capability to fully participate in and contribute to resource governance and management processes

11. A Te Mana o Te Wai Statute provide enabling legislation for a rangatiratanga framework for the Commission and associated structures and systems of representation, appointment and resourcing.

REFERENCES

Cases

New Zealand

Hampton v Canterbury Regional Council [2016] NZRMA 369, [2015] NZCA 509.
New Zealand Maori Council v Attorney-General [2013] NZSC 6, [2013] 3 NZLR 31.
Paki v Attorney-General (No 2) [2014] NZSC 118, [2015] 1 NZLR 67.
Proprietors of Wakatū v Attorney-General [2017] NZSC 17, [2017] 1 NZLR 423.

Hawai'i

Waiāhole I 94 Hawai'i, 9 P 3d at 133, 445.

Legislation

New Zealand

Climate Change Response (Zero Carbon) Amendment Act 2019.
Coal-mines Act 1903.
Constitution Act 1852.
Māori Community Development Act 1962.
New Zealand Settlements Act 1893.
Resource Management Act 1991.
Resource Management Amendment Act 2020.
Treaty of Waitangi (State Enterprises) Act 1988.

South Africa

South Africa Water Act 1998.

Treaties

Te Tiriti o Waitangi

Books & chapters in books

Fikret Berkes, Johan Colding, and Carl Folke (eds) *Navigating Social-Ecological Systems* (Cambridge University Press, Cambridge, UK, 2003); Callum Coats Living Energies (Gill Books, Dublin, 2001).

Judith Binney *Encircled Lands* (Bridget Williams Books, Wellington, 2009).

Klaus Bosselmann "Reclaiming the Global Commons: Towards Earth Trusteeship" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 35-56.

E. Taihākurei Durie "Indigenous Law and Responsible Water Governance" in Betsan Martin, Linda Te Aho and Maria Humphries- Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 135-143.

Thomas Greiber, and Simone Scheille (eds) *Governance of Ecosystem Services*. IUCN Environmental Policy and Law Paper No 79. IUCN Environmental Law Programme, Bonn, Germany 2011.

Alejandro Iza and Robyn Stein (eds) *RULE - Reforming Water Governance* (IUCN, Gland, Switzerland, 2009).

Mike Joy (ed) *Mountains to Sea: Solving New Zealand's Freshwater Crisis* (Bridget Williams Books, Wellington, 2018).

Mike Joy *Polluted Inheritance: New Zealand's Freshwater Crisis* (Bridget Williams Books, Wellington, 2015).

Catherine Knight *Beyond Manapouri: Fifty Years of Environmental Politics in New Zealand* (Canterbury University Press, Christchurch, 2018).

Catherine Knight *Ravaged Beauty An environmental history of the Manawatū* (Totara Press, 2018).

Emanuel Levinas *Totality and Infinity (translated ed: Alphonso Lingis* (translator) (Dusquesne University Press, Pittsburgh, PA, 1969).

Betsan Martin "Nga Pou Rahui: Markers of Protection for Water and Climate" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 12-34.

Marama Muru-Lanning *Tupuna Awa: People and Politics of the Waikato River* (Auckland University Press, Auckland, 2016).

Charles Te Ahukaramu Royal (ed) *The Woven Universe Edited Writings of Revd Māori Marsden* (New Zealand, Marsden Estate, 2003).

Anne Salmond "Rivers as ancestors and other realities" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 183-192.

Kapua Sproat and Mahina Tuteur "The power and potential of the public trust" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 193-217.

Linda Te Aho "Governance of water based on responsible use – an elegant solution?" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility, Law and Governance for Living Well with the Earth* (Routledge Taylor and Francis Group, London and New York, 2019) at 143-161.

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).

Te Maire Tau *Water Rights for Ngāi Tahu: A discussion paper*. Canterbury University Press, Christchurch, 2017).

Journal articles

AH Angelo "Personality and Legal Culture" (1996) 26 *Victoria University of Wellington Law Review* 395.

K Barad "Quantum Entanglements and Hauntological Relations of Inheritance: Dis/Continuities, SpaceTime Enfoldings and Justice-to-come" (2010) Derrida Today 240–268.

Andrew Erueti "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" (2016) 24 *Waikato Law Review* 58.

K Feint "A Commentary on the Supreme Court Decision of *Proprietors of Wakatū v Attorney-General*" (2017) 25 *Waikato Law Review Taumauri* 1.

Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic or resource management" (2000) 110 *Journal of the Polynesian Society* 349.
Betsan Martin "Water Law: a new statute for a new standard of mauri for fresh water" (2019) 15(3) Policy Quarterly 55.
Richardson A, Hayes J, Frampton C, Potter J. Modifiable lifestyle factors that could reduce the incidence of colorectal cancer in New Zealand. *NZ Med J*. 2016-1;129(1447)
Jacinta Ruru "Māori rights in water – The Waitangi Tribunal's interim Report"(September 2012) *Māori Law Review* 8.
Anne Salmond, Gary Brierley and Dan Hikuroa "Let the Rivers Speak: Thinking about waterways in Aotearoa New Zealand" (2019) 15(3) *Policy Quarterly* 45.
Māmari Stephens "To Protect and Serve: Finding New Ways to Protect Te Reo Māori as Cultural Property" in S Frankel and A Costi "Do Cultural and Property Combine to Make 'Cultural Property'?" *Special Issue of the New Zealand Association of Comparative Law* (2017) 21 Hors Serie 7-22.
Beth Stratford "The Threat of Rent Extraction in a Resource constrained World" (2020) 169 *Ecological Economics* 1.
Linda Te Aho "Creating our own prosperity - human rights from a Tainui perspective" (2007) *10 Yearbook of New Zealand Jurisprudence* 43.
DV Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand (2006) *Waikato Law Review Taumari* 120.

Parliamentary & government materials

Department of Internal Affairs T*hree Waters Review* <wwwdiagovtnz/Three-Waters-Review>.
Ministry for Environment *Essential Freshwater: Healthy Water Fairly Allocated* (2018) New Zealand Government <www.mfe.govt.nz/sites/default/files/media/Fresh%20water/essential-freshwater.pdf>.
Ministry for Environment *National Policy Statement for Freshwater Management* (2020) (NPS-FM) <www.mfe.govt.nz/sites/default/files/media/Fresh%20water/national-policy-statement-for-freshwater-management-2020.pdf>.
Ministry for the Environment *Section 33 Transfer of Functions, Powers or Duties – a stocktake of council practice* (Ministry for the Environment, Wellington, 2015) at 8.

Reports

BC Bates, ZW Kundzewicz, S Wu and JP Palutikof (eds) 2008 *Climate Change and Water* Technical Paper of the Intergovernmental Panel on Climate Change, IPCC Secretariat, Geneva.
Sir Edward Taihakurei Durie, Robert Joseph, Valmaine Toki, and Andrew Erueti "Ngā Wai o te Māori, Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori, Māori and State Law" paper prepared for the NZMC, 23 January 2017 (doc E13) at [119] in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources claim* (Wai 2358, 2019).
D Graham, W Li and D Moore 'Essential Freshwater Regulations – Industry Impact Analysis' Report prepared for the Ministry for the Environment by Sapere Research Group Ltd, 2020.
Horiana Irwin-Easthope, Maia Wikaira and Dayle Takitimu *Iwi/Hapū Rights And Interests In Fresh Water: Recognition Work-Stream Research Report Literature Review* prepared for Iwi Advisory Group. (2015).
IPCC, 2019: Summary for Policymakers. In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [PR Shukla, J Skea, E Calvo Buendia, V Masson-Delmotte, H- O Pörtner, D C Roberts, P Zhai, R Slade, S Connors, R van Diemen, M Ferrat, E Haughey, S Luz, S Neogi, M Pathak, J Petzold, J Portugal Pereira, P Vyas, E Huntley, K Kissick, M Belkacemi, J Malley, (eds)] In press (IPCC Summary for Policymakers).
Land and Water Forum "Advice on Improving Water Quality: Preventing Degradation and Addressing Sediment and Nitrogen" (2018).
Mai i te Maunga ki te Awa: Te Hapori o Maungatautari Freshwater Case Study commissioned report by Ngāti Koroki Kahukura Trust, Iwi Leaders Forum (2015).
Kieran Murray and Sally Wyatt "The Incentives to Accept or reject a rights regime for freshwater" Report prepared for the Iwi Advisors Group by Sapere Research Group Ltd, 2015.
Kieran Murray, Marcus Sin and Sally Wyatt "The Costs and Benefits of an Allocation of Freshwater" Report prepared for Iwi Leaders Group by Sapere Research Group Ltd, 2014.
Ngāi Tahu Annual Report 2020. https://ngaitahu.iwi.nz/investment/ngai-tahu-annual-reports/2020-annual-report/
OECD *Water Resources Allocation: Sharing Risks and Opportunities* (2015) OECD Studies on Water
Rt Hon Sir Geoffrey Palmer "Evaluation of the Law Commission: Report for the Associate Minister of Justice and Attorney-General Hon Margaret Wilson" (28 April 2000).
Resource Management Review Panel *New Directions for resource management in New Zealand* (Ministry for the Environment, 2020) (*New Directions 2020*) (also referred to as the Randerson Review).
Jacinta Ruru and Richard Meade *Discussion Document regarding iwi and hapū rights and interests in freshwater bodies*, commissioned by Kāhui Wai Māori, January 2021.
Greg Severinsen and Raewyn Peart Reform of the Resource Management System: The Next Generation Synthesis Report and Next Steps (Environmental Defence Society, 2019).
Greg Severinsen *Reform of the Resource Management System: the urban context* (Environmental Defence Society, 2020).
Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) vol 3.
Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2003).
Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources claim* (Wai 2358, 2019).
Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).

Dissertations

J Singh-Ladhar "Improving water allocation law and policy in New Zealand: Lessons from Australia" (PhD Thesis, University of Waikato, 2019) at 265.

Internet resources

Ronald Coase. https://en.wikipedia.org/wiki/Coase_theorem

Mike Joy 'Source water: the crucial missing 'water' from new legislation'. https://www.youtube.com/watch?v=ajiUjL3O2eM. University of Otago Summer Talk February 2021

He Whakaputanga o te Rangatiatanga o Nu Tireni The Declaration of the Independence of New Zealand archives.govt.nz/discover-our-stories/the-declaration-of-independence-of-new-zealand.

"Making waves: Marsden success for Arts" (10 November 2020) www.auckland.ac.nz/en/news/2020/11/10/marsden-funding-for-artshtml.

Betsan Martin supplementary research notes: Legal Plurality, Sovereignty, Solidarity Sovereignty 2020: http://www.response.org.nz/wp-content/uploads/2020/10/Legal-Plurality-Sovereignty-Solidarity-Sovereignty.pdf.

Betsan Martin. Governance Literature Review 2020 http://www.response.org.nz/wp-content/uploads/2020/11/Governance-Lit-Review-Draft-Summ-Ed-1Nov20.pdf

'Pure Advantage, Our Regenerative Future' series (2020) www.youtubecom/user/pureadvantage/featured.

'Public Trusteeship of Waterways'. www.response.org.nz/wp-content/uploads/2020/10/Vesting-Public-Trusteeship.pdf

Te Ara, Encyclopedia of New Zealand – Waitangi Tribunal – Te Rōpū Whakamana tearagovtnz/en/waitangi-tribunal-te-ropu-whakamana/page-3.

Te Rūnanga o Ngāi Tahu "Ngāi Tahu corrects National Leader's false claim" (17 May 2021) ngaitahu.iwi.nz.

Waterways and Governance Literature Review: http://www.response.org.nz/wp-content/uploads/2020/11/Governance-Lit-Review-Draft-Summ-Ed-1Nov20.pdf

Other resources

Tom Bennion "Freshwater: The Three Waters Reform Programme and impacts on iwi" presentation to 18th Annual Māori Legal, Business and Governance Forum, Wellington, 24 November 2020.

"Overhauling water infrastructure & the quid pro quo" Radio New Zealand (16 July 2020).

Briefing to Minister for the Environment, "Fresh Water : Suggested Talking Points for Iwi Chairs Forum at Hokitika – 4 December 2015", 3 December 2015 (Crown counsel, sensitive discovery documents (doc D92) at 1099 in *Waitangi Tribunal The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

Matt Dale "Discussion Paper on Water Market systems in New Zealand" (2017).

Trevor Daya-Winterbottom "The Randerson review of the RMA as it relates to freshwater governance and management" paper presented at research symposium on Governance of Waterways, November 2020.

ET Durie "Discussion paper on law and responsibility for water: towards reconciling Māori proprietary interests and public interests in water" (unpublished paper, 2014).

Taihākurei Durie "Discussion Paper on a Water Policy Framework", paper presented to the Hopuhopu Symposium on Governance: Responsibility for Water and Climate Change (29 November 2014).

Taihākurei Durie "NZMC Position Paper on Waterways" (unpublished paper, 2021).

E Taihākurei Durie "The New Zealand Māori Council Structure" (unpublished paper, 2021).

Evidence of Atiria Reid, 11 December 2020, Te Tikanga marae.

"Freshwater Allocation Practices by Regional Councils: Lessons for national freshwater alloca-tion policy" (draft) in Nelson, sensitive documents in support of brief of evidence (doc F28(b)) at 486 in

Peter Fraser – excerpts from a briefing on a water economy framework.

Peter Fraser "Rangatiratanga, Wai Māori" Presentation at Waterways, Governance and Rangatiratanga seminar, VUW, Wellington, December 2020.

Donna Hall, Principal, Woodward Law.

Hui at Takitimu Marae, Wairoa, 22 April 2021 Text by Peter Fraser.

Iwi Leaders Group "Iwi/Hapū Rights and Interests in Fresh Water: Recognition Work Stream" (2015).

Stephanie May "New Zealand Water Availability and Allocation" (2015) Opus.

Jonathan Milne "Govt challenged over end-use of water and plastic in bottling plant decision" *Newsroom* (online ed, 5 March 2021) (Otakiri Spings case).

Jonathan Milne "Water infrastructure to be taken off councils and run by big government agencies" *Newsroom* (online ed, 22 December 2020).

Hon David Parker "Auckland water consent referred to a Board of Inquiry" (press release, 30 June 2020).

Peter Nelson, sensitive brief of evidence, 11 September 2018 (doc F28) at 1 in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

Ngāi Tahu Annual Report 2020 <ngaitahu.iwi.nz/investment/ngai-tahu-annual-reports/2020-annual-report/>

NZMC Report of Te Tai Kaha Hui (24 May 2021) Resolution 8. Provided at Takitimu Marae, Wairoa (22 April 2021), text by Peter Fraser.

R Oram "Now we can see our future" *Newsroom* (online ed, 12 July 2020).

Parliamentary Commissioner for Environment "RMA Reform: coming full circle" RMLA Salmon Lecture, The Association for Resource Management Practitioners, Auckland, 2020.

Raukokore Papakāinga <www.waateanews.com/waateanews/x_news/MjU0MDg/Paakiwaha/Raukokore-modular-development-points-way-ahead>.

Jacinta Ruru, answers to questions in writing, [September 2018] (paper 3.2.275(a)), p [4]. See also J Ruru, *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Landcare Research New Zealand Ltd 2009) (doc A74), pp 82_89) in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

Te Rūnanga o Ngāi Tahu *Ngāi Tahu Rangatiratanga over Freshwater* (2019).

Waikato-Tainui Position Statement, 2020.

Willie Te Aho, Te Whānau-a-Apanui, Expert Advice interview (10 September 2020).

Commentary provided by Maia Wikaira, 17 February 2021.

Martin Workman, brief of evidence, (May 2017) (doc F6) at 25 in Waitangi Tribunal *The stage 2 report on the National Freshwater and Geothermal Resources* claim (Wai 2358, 2019).

The Huka falls in autumn