The common law doctrine of native title possibilities for freshwater

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In 2003 it was finally asserted by New Zealand's Court of Appeal that the common law doctrine of native title applies in New Zealand across its whole spectrum from rights to exclusive title. A live issue is whether it is now possible for Māori to claim ownership of specific rivers via this doctrine? This paper contributes to this growing debate by specifically exploring the possibilities afforded to Māori by the common law.

I. INTRODUCTION

In 2003, the Court of Appeal, in *Attorney-General v Ngati Apa* (*Ngati Apa*)[1] reintroduced the unqualified applicability of the common law doctrine of native title into New Zealand, clearly articulating the principle that: "[w]hen the common law of England came to New Zealand its arrival did not extinguish Māori customary title … title to it must be lawfully extinguished before it can be regarded as ceasing to exist".[2]

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[1] [2003] 2 NZLR 643 ('*Ngati Apa*').

[2] Ibid 693 (per Tipping J).

A question thus arises as to whether Māori customary title to freshwater, namely rivers, remains the property of Māori in accordance with the doctrine of native title? While the Crown claims that at common law no-one 'owns' water for it is common property, like air, the Court of Appeal warns against such presumptions (albeit in obiter and in the context of the foreshore and seabed):[3]

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in the foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

Using the *Ngati Apa* precedent, for a successful claim to rivers the legal test will require 1) Māori to prove that according to tikanga, iwi have a recognised customary property interest in a river; and 2) the Crown to fail to prove that statute law has clearly and plainly extinguished that property right. This paper thus takes the opportunity to canvass the possibilities whereby Māori could claim property rights to rivers via the common law doctrine of native title. While some important work has been done on addressing this issue, many gaps remain.[4] This paper seeks to

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[3] Ibid 668.

[4] The most relevant work is: Mark B Schroder, "On the Crest of a Wave: Indigenous Title and Claims to the Water Resource" (2004) 8 *N.Z.J. Envtl. L.* 1. See also Meredith Gibbs and April Bennett, "Māori claims to ownership of freshwater" (Aug 2007) *RMJ* 13; Benjamin Morel, "Ownership and Management of Rivers in New Zealand – Wither now for Māori interests" LLB (hons) research part of the report, Victoria University of Wellington, 2002; and, James Ferguson, "Māori Claims Relating to Rivers and Lakes" LLB (hons) research part of the report, Victoria University of Wellington, 1989 (but note that these three works do not explore the significance of *Ngati Apa*). The Waitangi Tribunal's reports are another significant source of work that has considered these types of arguments. For example, the most relevant recent report is: *He Maunga Rongo. Report on Central North Island Claims* vol 4 (2008). See also Michael S Strack, "Rebel Rivers. An investigation into river rights of Indigenous Peoples of Canada and New Zealand" PhD, University of Otago, 2007, and proceedings from the *Ngai Tahu Water Forum* held 5 February 2007, Christchurch. The more general issue of Māori rights to water have been explored internationally: see L Burton and C Cocklin, "Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and Indigenous Relations (Part 1)" (1996) 7 *Colorado Journal of International Environmental Law and Policy* 75 (and Part 2 at 331); and B Kahn, "The Legal Framework Surrounding Māori Claims to Water Resources in New Zealand: in contrast to the American Indian experience" (1999) 35(1) *Stanford Journal of International Law* 49.

contribute to the existing literature by considering the contemporary success of such a claim and the political climate suggests that it is timely do so.

In 2008, a general consensus emerged among government officials that Māori have some rights to be involved in any new governance structure for freshwater. For example, the *Proposed National Policy Statement for Freshwater Management* (released 20 September 2008) accepts that the Treaty of Waitangi is the "underlying foundation of the Crown-Māori relationship with regard to Freshwater Resources".[5] The *Proposed National Policy Statement* embraces that it is "one step in the process of addressing tangata whenua values and interests including the involvement of iwi and hapu in the management of fresh water".[6] Even the New Zealand Business Council for Sustainable Development's 2008 report entitled *A Best Use Solution for New Zealand's Water Problems* recognises iwi as a stakeholder and accepts that the current framework "has proven to be unable to incorporate customary rights under the Treaty of Waitangi into local water allocation and use" and that "iwi rights under the Treaty of Waitangi in respect of freshwater resources have yet to be resolved in many catchments".[7] Moreover, on 15th December 2008, Prime Minister John Key accepted that in the context of water allocation "Māori, without doubt, will be a clear stakeholder when it comes to that debate".[8]

But are Māori simply "very important stakeholders"?[9] According to the Ministry for the Environment *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (published in July 2005), "[T]here was widespread expectation that the appropriate role for Māori in water management is one of

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[5] Preamble. Note that this report is available to view on the Ministry for the Environment's website at: http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html (last accessed 29 March 2009).

[6] Ibid.

[7] The New Zealand Business Council for Sustainable Development, *A Best Use Solution for New Zealand's Water Problems 2008*, p 17. Note that this report can be viewed at: http://www.nzbcsd.org.nz/water/content.asp?id=444 (last accessed 29 March 2009).

[8] Juliet Rowan of The New Zealand Herald "Key offers Māori say on water" *Otago Daily Times* Monday 15 December 2008, p 1. This article can be viewed at: http://www.odt.co.nz/news/national/36055/key-offers-Māori-say-water (last accessed 29 March 2009). See also Juliet Rowan "Key to look at who owns water" *The New Zealand Herald* Monday 15 December 2008 at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10548068 (last accessed 29 March 2009).

[9] Ibid.

partnership with the Crown rather than a stakeholder relationship".[10] Many have recognised that it is unclear in law who owns water – the Crown or Māori – and many Māori in particular stress that this issue "must be addressed before any major changes to water management can be considered".[11]

This paper seeks to contribute to this growing debate by focusing on an ownership claim pursuant to the common law. It begins by exploring the history of the common law doctrine of native title in Aotearoa New Zealand. It then specifically canvasses four issues which a court will need to address in order to accept native title in rivers. Assuming that native title is found in a river, the third part canvasses the possibility of whether a court will award actual ownership of the river. The final part draws a brief conclusion to the paper.

II. A HISTORY OF THE DOCTRINE OF NATIVE TITLE IN AOTEAROA NEW ZEALAND'S COURTS

In New Zealand, law derives either from statute law (law made by Parliament) or common law (judge-made law). The common law can be described as "the law built up in the courts from generations of decided cases and administrative practices".[12] Statute law can trump common law. Customary law is the law, values and practices developed by Māori. The standard principle is that the legal system does not recognise Māori customary law, or rights derived from the Treaty of Waitangi, unless it has been incorporated into statute or is recognised by the common law doctrine of native title. This paper is focused on establishing whether Māori can use the common law to assert ownership of rivers. Thus, this part briefly traces the evolution of the common law doctrine of native title in New Zealand.[13]

A. The Treaty of Waitangi

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[10] Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, July 2005, p vii. Note that this report is available to view on the Ministry for the Environment's website at: http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html (last accessed 29 March 2009).

[11] Ibid p vii.

[12] Jeremy Finn "The English Heritage" in Peter Spiller, Jeremy Finn, and Richard Boast, *A New Legal History* (2001) chp 1, at p 2.

[13] For a comprehensive comparative understanding of the doctrine of native title: see P.G. McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-determination* (2004).

All land and waters in New Zealand were once Māori property and held by Māori in accordance with tikanga Māori (Māori customary values and practices).[14] As accepted by Chief Justice Elias in the *Ngati Apa* 2003 foreshore and seabed case, Māori customary land was property in existence when a colonial government was established by the Crown in 1840.[15] The Treaty of Waitangi, signed in 1840 between Māori and British representatives, did not create, alter or extinguish this property. The Treaty simply gave the British Crown the right to govern. Māori retained their chieftainship over their own affairs, Māori were guaranteed the same rights and privileges as British citizens living in New Zealand, and the Crown was given the right of pre-emption to purchase Māori land.[16] Specifically, the second article guarantees to Māori "their lands, villages and all their treasures",[17] or, as the English version reads: "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession".[18] The second article then states the Crown has the exclusive right of pre-emption "over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon".[19]

The Treaty of Waitangi thus endorsed the position at common law: a change in sovereignty does not extinguish Indigenous peoples' property rights, and specifically: Māori remain the proprietors until they wish to sell to the Crown. Even the English version of the Treaty endorses the position that Māori owned not only the dry land, but also the 'fisheries' and 'other properties' as stated in the text. This was consistent with the Māori world view which saw no distinction between land below and above high tide, or fresh or salt water. It was all considered one country, one garden, with, for example, patches for root vegetables, berries, eels, fish and shellfish.

B. R v Symonds 1847

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[14] Defined in Te Ture Whenua Māori Act/Māori Land Act 1993, s 129(2)(a).
[15] *Ngati Apa,* at 651.
[16] For a copy of the Treaty, see Treaty of Waitangi Act 1975, first sch, or see State Services Commission's Treaty of Waitangi website at http://www.treatyofwaitangi.govt.nz/ (last accessed 29 March 2009).
[17] This is Professor Sir Hugh Kawharu's English translation of the Māori version of the second article: see Kawharu, I., *Waitangi. Māori & Pakeha Perspectives of the Treaty of Waitangi*. (1989) at pp 319-320.
[18] See the second article of the English version.
[19] Ibid.

It was the English common law, which was imported into New Zealand after the signing of the Treaty that ensured the continuation of Māori property rights in their customary land despite the change in sovereignty. The Treaty of Waitangi simply endorsed this common law. New Zealand's now-named High Court clarified this fact back in 1847. The Judges in that case, *R v Symonds*,[20] held that Māori customary interests were to be solemnly respected and not to be extinguished at least in times of peace without their free consent. Justice Chapman stated:[21]

> … it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in time so of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows … that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi … does not assert either in doctrine or in practice any thing new and unsettled.

C. The Native Land Court

Twenty years after the signing of the Treaty of Waitangi, in the early 1860s, the government sought the means to actively encourage the conversion of the property in land owned by Māori so as to enable sales to new settlers. It established the Native Land Court.[22] The court's mandate was to enable the speedy British settlement of New Zealand. The Crown's right of pre-emption was thus waived in favour of a process whereby Māori were to apply to the court for issuance of a fee simple title which would, in effect, change the status of Māori customary land to Māori freehold land. Once a freehold title was issued, Māori were encouraged to alienate (sell, gift, lease, mortgage etc.) their land to the new settlers. The founding legislation clearly envisioned the "assimilation as nearly as possible to the ownership of land according to British law" to result in "the peaceful settlement of the Colony and the advancement and civilization of the Natives."[23]

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[20] (1847) NZPCC 387 ('*Symonds*').
[21] Ibid 390.
[22] See the Native Lands Acts of 1862 and 1865. This court later became known as the Māori Land Court.
[23] Native Lands Act 1862, preamble.

D. Wi Parata 1877

A decade after the establishment of the Native Land Court, the judiciary did an about-turn on Native title. In 1877, Chief Justice Pendergast, in *Wi Parata v The Bishop of Wellington* (*Wi Parata*)[24] declared that the doctrine of Native title had no application in New Zealand because there were no laws or rights in property existing before 1840:[25]

> On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. … But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.

This case labelled the Treaty a "simple nullity",[26] based on the reasoning that "No body politic existed capable of making cession of sovereignty"[27] because Māori were "primitive barbarians".[28]

E. Baker 1901

At the turn of the century, the Privy Council, hearing an appeal from New Zealand, *Nireaha Tamaki v Baker*,[29] retaliated and said the reasoning in *Wi Parata* "goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court".[30] Their Lordships recognised that New Zealand's legislation refers to Māori customary law and therefore:[31]

[24] (1877) 3 N.Z. Jur. (NS) 72.
[25] Ibid 78.
[26] Ibid 78.
[27] Ibid 78.
[28] Ibid 78.
[29] PC 1900 [1901] AC 561.
[30] Ibid 577 (Lord Davey).
[31] Ibid 577-578 (Lord Davey).

> It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. … one is rather at a loss to know what is meant by such expressions "native title", "native lands", "owners", and "proprietors", or the careful provision against sale of Crown lands until the native title has been extinguished, if there be no such title cognisable by the law, and no title therefore to be extinguished.

F. Ninety Mile Beach 1963

Even though the Privy Council condemned *Wi Parata*, believing that the existence of customary title was affirmed in statutes, New Zealand's judiciary continued to adhere to the *Wi Parata* reasoning. For example, *In Re Ninety Mile Beach*,[32] decided in 1963, New Zealand's Court of Appeal held that all foreshore in New Zealand which lies between the high and low water marks and in respect of which contiguous landward title has been investigated by the Māori Land Court was land in which Māori customary property had been extinguished. The reasoning of the judgment was as follows:[33]

> In my opinion it necessarily follows that on the assumption of British sovereignty . . . the rights of the Māoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark.

It was because of this case that the issue of whether the renamed Native Land Court, now the Māori Land Court, had jurisdiction to determine the status of foreshore and seabed land came before the Court of Appeal in *Ngati Apa*.

G. Te Weehi 1986

By the mid-1980s, Canada had began to reassert the doctrine of native title into their common law, introducing a spectrum that ranged from recognising Aboriginal peoples' rights to use a resource to potentially own a resource. In 1986, New

[32] [1963] NZLR 461.

[33] Ibid 468.

Zealand's High Court re-introduced part of the doctrine into our common law in the landmark case of *Te Weehi v Regional Fisheries Officer* (*Te Weehi*).[34] In this case, the High Court held that a Māori person has a right to take undersized shellfish, paua, in contravention of statute law, on the basis that he was exercising a customary right which the law had not extinguished. Williamson J found in favour of Te Weehi recognising that the establishment of British sovereignty had not set aside the local laws and property rights of Māori[35], thus concluding that because there had been no plain and clear legislative extinguishment of the fishing right the right continues to exist: "It is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply.[36] In reaching this decision, Williamson J recognised the significance of the Treaty of Waitangi for New Zealand: "obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Māori tribes prior to 1840".[37]

Justice Williamson, in *Te Weehi*, alleged: "Canadian Courts have consistently taken the view that customary rights of Aboriginal peoples must be preserved and that charters and treaties similar to the Treaty of Waitangi recognise obligations which arise as a result of those customary rights".[38] He stated that the "Canadian cases follow the general approach that customary rights of native or Aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away that right".[39] He endorsed that view, stating that in New Zealand if customary rights have not been extinguished, they are preserved.[40]

While *Te Weehi* reintroduced the doctrine, it did so in regard to native fishing rights, not title. Williamson J did not feel bound by the earlier *Wi Parata* case law, distinguishing those cases from the one he was hearing on the right to take undersized paua because it was a 'non-territorial' claim; this case was "not based upon ownership of land or upon an exclusive right to a foreshore or bank of a

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[34] [1986] 1 NZLR 680 (*Te Weehi*).
[35] Ibid 687.
[36] Ibid 692.
[37] Ibid 686.
[38] Ibid 691.
[39] Ibid 691. For example, some of the Canadian cases cited included: *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 and *Guerin v R* (1984) 13 DLR (4th) 321.
[40] See ibid 692.

river".[41] It was important for Williamson J to emphasise this aspect otherwise he would have been bound by higher court precedent (namely the Court of Appeal's *In re the Ninety-Mile Beach* decision). It was *Ngati Apa*, a case concerning land (rather than rights to resources such as fish) that conclusively put to an end the *Wi Parata* 'barbarian theory', overruled *In re the Ninety-Mile Beach*, and asserted that the doctrine could possibility extend to exclusive ownership.

H. Te Runanga o Muriwhenua 1990

In 1990, the Court of Appeal heard a case concerning the quota management system for commercial fishing: *Te Runanga o Muriwhenua Inc v Attorney-General*.[42] As part of this case, Cooke P made extensive reference to the Canadian case law, stating "[a]lthough more advanced than our own … is still evolving",[43] but is likely to provide "major guidance"[44] for New Zealand. He added that New Zealand's Courts should give just as much respect to the rights of New Zealand's Indigenous peoples as the Canadian Courts give to their Indigenous peoples.[45] Cooke P saw no reason to distinguish the Canadian jurisprudence on the basis of constitutional differences and emphasised the analogous approaches to the partnership and fiduciary obligations being developed in Canada under the doctrine of native title and in New Zealand under the Treaty of Waitangi. This comparison enabled Cooke P to confidently conclude that "[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights"[46]

I. Te Ika Whenua 1994

In 1994, the Court of Appeal concluded that neither under the common law doctrine of native title, nor under the Treaty of Waitangi, do Māori have a right to generate electricity by the use of water power in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* (*Te Ika Whenua*).[47] But in discussing the doctrine, and accepting its existence in New Zealand (although not to the extent of electricity generation) Cooke P agreed that the Treaty guaranteed to Māori, subject to British *kawanatanga*

[41] Ibid 692.
[42] [1990] 2 NZLR 641 ('*Te Runanga o Muriwhenua*').
[43] Ibid 645.
[44] Ibid 655.
[45] Ibid 655.
[46] Ibid 655.
[47] [1994] 2 NZLR 20 (*Te Ika Whenua*).

(government) their *tino rangatiratanga* (cheiftainship) and their *taonga* (tangible and intangible treasures) and "In doing so the treaty must have been intended to preserve for them effectively the Māori customary title".[48]

In this case, Cooke P referred to the Canadian case law, and the 1992 High Court of Australia case, *Mabo v Queensland (No 2)* (*Mabo*)[49] in devising the nature of native title. He explained the doctrine as:[50]

> On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.

Cooke P elaborated on the nature of native title rights stating that: they are usually communal; cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers; can only be transferred to the Crown; the transfer must be in strict compliance with the provisions of any relevant statutes; it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and if extinguishment is deemed necessary then free consent may have to yield to compulsory acquisition for recognised specific public purposes but upon extinguishment proper compensation must be paid.[51] Cooke P then explained the scope of native title in terms of a spectrum:[52]

> The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case. … At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee simple recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.

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[48] Ibid 24.
[49] (1992) 175 CLR 1 ('*Mabo*'). This landmark case recognised the common law doctrine of native title for the first time in Australia. It held that the Meriam people's native title in the Murray Islands, Queensland, was effective against the State of Queensland and the whole world because the "common law of this country would perpetrate injustice if it were to continue to embrace the enlarged notion of terra nullius" at p 58, Brennan J.
[50] *Te Ika Whenua*, 23-24.
[51] Ibid 24.
[52] Ibid 24.

As *Te Ika Whenua* was decided two years after the Australian High Court decision, *Mabo*, Cooke P stated that on the extent of the jurisdiction of the courts the very full discussion in *Mabo* "would require close study".[53] But he added: "Of course nothing said in that case is binding on a New Zealand Court. In New Zealand we would have to be guided by our conception of the strength of the competing arguments and any others relevant to this country's circumstances".[54]

J. McRitchie 1999

In *McRitchie v Taranaki Fish and Game Council (McRitchie)*[55] Richardson P, for the majority, discussed the doctrine using the then leading Canadian and Australian cases – *R v Sparrow*[56] and *Mabo* – for support that native rights "are highly fact specific".[57] He explained the test as:[58]

> The existence of a right is determined by considering whether the particular tradition or custom claimed to be an Aboriginal rights was rooted in the Aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.

Interestingly, Justice Thomas, in dissent, who found in favour of a Māori customary right to fish for introduced species, based his decision entirely on New Zealand law; no reference was made to overseas decisions.

K. Ngati Apa 2003

Finally, in 2003, the New Zealand Court of Appeal had the opportunity, in its *Ngati Apa* decision, to explicitly foresee the possibility of the doctrine of native title recognising exclusive ownership in land.[59] For example, Chief Justice Elias stated,

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[53] Ibid 25.
[54] Ibid 25.
[55] [1999] 2 NZLR 139 ('*McRitchie*').
[56] [1990] 1 SCR 1075.
[57] *McRitchie*, 147 (Richardson P).
[58] Ibid 147.
[59] Much has been written in response to *Ngati Apa*. For example, see: Richard Boast, *Foreshore and Seabed* (2005); Nin Tomas & Karensa Johnston, "Ask that Taniwha who owns the Foreshore and Seabed of Aotearoa?" (2004) 1 *Te Tai Haruru/Journal of Māori Legal*

"Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature",[60] and "The content of such customary interest is a question of fact discoverable, if necessary, by evidence".[61] Elias CJ explained "As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom",[62] or, and she quotes from a Privy Council decision, *Amodu Tijani v Secretary, Southern Nigeria*,[63] they might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference".[64] Elias CJ substantiated this possibility with reference to Canada:[65]

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

The other four justices discussed the common law doctrine of native title in similar terms. For example, Tipping J began his judgment with the words: "When the common law of England came to New Zealand its arrival did not extinguish Māori customary title … title to it must be lawfully extinguished before it can be regarded as ceasing to exist".[66] Keith and Anderson JJ, in a joint judgment, emphasised "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain".[67] Moreover, Gault P expressly recognised the uniqueness of New Zealand in the existence of the common law jurisdiction of native title and the statutory jurisdiction of Māori customary land status and stated that he prefers to "reserve the

Writing 10; Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: the Last Frontier* (2007).

[60] *Ngati Apa,* 655-656.

[61] Ibid 656.

[62] Ibid 656.

[63] [1921] 2 AC 399 (PC).

[64] *Ngati Apa,* 656.

[65] Ibid 656 (emphasis added). The Canadian case cited was *Delgamuukw v British Columbia* SCC [1997] 3 SCR 1010.

[66] Ibid 693.

[67] Ibid 684.

question of whether it is a real distinction insofar as each is directed to interests of land in the nature of ownership".[68]

No other New Zealand court has come as close as *Ngati Apa* in providing a hint as to how the courts may have developed a common law precedent in relation to land. For example, as reproduced in the opening paragraph of this part of the report, Elias CJ stated:[69]

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

The reasoning in the *Ngati Apa* decision suggests acceptance of the fact that the common law of New Zealand is unique. Chief Justice Elias stressed this reality:[70]

> In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof' … from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.

However, the precedential weight of the *Ngati Apa* case may be limited to the foreshore and seabed context. No court has yet been asked to determine whether the doctrine of native title applies to rivers. The remaining part of this part of the report thus considers whether it will be possible for iwi and hapu to substantiate ownership of rivers by relying on the doctrine of native title.

IV. APPLYING THE DOCTRINE OF NATIVE TITLE TEST TO RIVERS

Using the *Ngati Apa* precedent, it appears that the legal test for successfully pursing a claim to rivers in accordance with the doctrine of native title will require 1) Māori to prove that according to tikanga, iwi have a recognised customary property interest in a

[68] Ibid 673.
[69] Ibid 668.
[70] Ibid 562.

river; and 2) the Crown to fail to prove that statute law has clearly and plainly extinguished that property right. However, two further hurdles present themselves as preliminary barriers to exploring this two-limbed *Ngati Apa* test. One is whether native title is applicable to water? New Zealand cases certainly accept that it is applicable to dry land and land either temporarily or permanently under salt water. But is it applicable to water, and specifically the moving fresh water of a river? If native title does encompass water (and I argue below that it does) can the doctrine of native title trump the doctrine of *publici juris* of freshwater and recognise Indigenous ownership of a river? It is these four issues that would occupy the court's attention if Māori were to pursue a claim in native title to water. This part introduces these two preliminary questions and makes an assumption in the positive to allow an opportunity to focus on the two-limbed *Ngati Apa* test. The next part of the paper returns to these four questions to provide a critical answer to the raised issue.

A. Does Native Title Recognise Water?

The doctrine of native title definitely includes dry land. For example, in the 1847 *Symonds* case, Justice Chapman states that Māori "dominion over land" is "entitled to be respected".[71] The *Ngati Apa* decision accepted that the doctrine could extend to land temporarily or permanently under salt water. But does the doctrine encompass freshwater? No court has decided this issue. However, Cooke P, in *Te Ika Whenua*, discussed Māori rights "to land *and water*".[72] The Australian Native Title Act 1993 (Cth) recognises rights "to land or waters".[73] The most recent native title case to be decided by the High Court of Australia has found native title in water.[74] This observation by Elias CJ in *Ngati Apa* is surely relevant: "it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank … and on the other to the hapuka grounds … or reefs".[75]

Hence, it is argued here that it is difficult to accept that the common law doctrine of native title is exclusive of water. The purpose of the doctrine is to protect Indigenous peoples' property and it would thus seem a farce if today the doctrine

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[71] *Symonds*, 390.
[72] *Te Ika Whenua* 25 (emphasis added).
[73] See s 223(1). Note that this section is reproduced in the next part of this part of the report.
[74] *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29 (*Arnhem*). Note that this case is discussed in the next part of this part of the report.
[75] Ibid 660-661.

could be limited to land – a distinction that Māori would not have been aware of at the time when the Crown assumed sovereignty of the country. According to the Māori worldview, land and water is seen as one holistic entity: Papatuanuku (earth mother). However, assuming that it is inclusive of water, can native title trump other common law doctrines that have been developed specifically for water?

B. Does Native Title trump water specific Doctrines?

The common law relating to water "compartmentalises rivers into separate legal components: the bed, the banks, and the flowing water".[76] It also makes a distinction between parts of a river that are navigable, tidal, and neither navigable or tidal.[77] While the common law may not recognise the ability to own flowing water, it recognises riparian rights pursuant to the presumption of *ad medium filum aquae*, and rights accruing to the Crown as an extension of its prerogative rights in relation to the sea.[78]

In regard to owning flowing water, the common law characterises water as *publici juris* (common to all who have access to it) and thus not capable of being owned by anyone.[79] A New Zealand court has endorsed this doctrine: a riparian owner possesses "no property in the water of a stream flowing through or past his land but is entitled only to the use of it as it passes along for the enjoyment of his property".[80] In regard to using flowing water, the common law doctrine of riparian rights permits the riparian owner to take water from a river for ordinary purposes connected with the riparian land such as drinking, washing and supplying a reasonable quantity of livestock.[81] However, for many decades, New Zealand legislation has regulated the rights to use flowing water as per repealed statutes such as the Water and Soil Conservation Act 1967 and the current Resource Management Act 1991. According to the common law doctrine of *ad medium filum acque*, the presumption is that non-tidal riverbeds are vested in the owners of adjoining lands

[76] Morel, above n 4, p 2.
[77] See G W Hinde et al, *Hinde McMorland & Sim Land Law* vol 2 (2004) chp 21.
[78] Ben White, "Inland Waterways" in Alan Ward (ed) *National Overview* Waitangi Tribunal Rangahaua Whanui Series, vol 2, chp 14, at p 349.
[79] *Embrey v Owen* (1851) 6 Exch 353. See also Blackstone's Commentaries on the Law of England (1765) 2 Wm BI 14, 18, and Tom Bennion's discussion in "Water Issues" (March 2007) *Māori Law Review* 1.
[80] *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71.
[81] Morel, above n 4, p 4. Note Morel is quoting the *Glenmark* case, ibid.

(the riparian owners) to the half-way point between the banks of the river.[82] The fact that this rule has been in part qualified by legislation will be discussed later in this paper.

But, first, the issue here: which doctrine trumps? That is, if, on the one hand, the doctrine of native title encompasses water and thus the possibility that Indigenous peoples' own water, and on the other hand, another doctrine says that it is not possible to own water, which doctrine is correct? A similar quandary caught the attention of the Waitangi Tribunal in its consideration of the foreshore and seabed issue. The Tribunal premised its support for the position that it would have taken a bold court to recognise Indigenous ownership in salt covered land because of the maxim 'the law cannot recognise for Indigenous peoples what it does not recognise for the sovereign power'.[83] But the reasoning in *Ngati Apa* suggests a different approach: "The proper starting point is not with assumptions about the nature of property … but with the facts as to native property".[84] *Ngati Apa* stressed, first, "the entire country was owned by Māori according to their customs and that until sold land continued to belong to them"[85] and, second, the "common law of New Zealand is different"[86] to the English common law.

It is argued here that applying *Ngati Apa*, the Waitangi Tribunal's maxim should not significantly influence a court considering whether a native title claim in rivers can succeed. No court is bound by Tribunal opinions. While the courts have maintained that the Tribunal's opinions "are of great value to the Court",[87] and "are entitled to considerable weight",[88] the courts are free to dismiss such statements. As the Court of Appeal has asserted: "The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively".[89] Moreover, the Tribunal's foreshore and seabed report was the outcome of an urgent inquiry – it had limited time to hear the claim and write the report: "we have had four

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[82] Ibid p 5. Note that the presumption can and has been rebutted as discussed by Morel. For example see: *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA). In contrast see: *Re the Bed of the Whanganui River* [1962] NZLR 600 (CA).
[83] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004) 60.
[84] *Ngati Apa,* 661 (Elias CJ).
[85] Ibid 657 (Elias CJ).
[86] Ibid 668 (Elias CJ).
[87] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 662.
[88] *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC) para 59.
[89] *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 at 651 (Cooke P).

weeks in which to produce the report".[90] Significantly, the Tribunal stressed: "Unfortunately, at the Tribunal's hearing, claimant counsel did not take the opportunity to cross-examine Dr McHugh, preferring to treat his evidence as if it was a legal submission to be responded to by their own submissions".[91]

Moreover, the rules that the courts have developed for the qualification of native title do not include inconsistency with other doctrines but clear and plain statutory extinguishment. Hence, Parliament has at hand a solution to resolve the perceived conflict between native title and other common law doctrines: legislative extinguishment. Without clear and plain extinguishment, the courts should not attempt to remedy a conflict that undermines its own development of the native title doctrine. Thus native title ought to be capable of trumping other common law doctrines.

Assuming that these two preliminary tests are met, the court would now turn to the specific native title test as advanced in *Ngati Apa*: can Māori prove that according to tikanga that they have a recognised customary property interest in a river; and can the Crown prove that is has enacted clear and plain legislation that extinguishes that property right?

C. Are Property Rights in Rivers Recognised by Tikanga Māori?

According to tikanga Māori, land, air and water are one entity. This holistic notion of the environment caused no like separation between freshwater, riverbeds, and riverbanks as in English common law. The opening page of the *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* begins with several whakataukī concerning water. One reads:[92]

> Tuatahi ko te wai, tuarua whānau mai te tamaiti, ka puta ko te whenua
> *When a child is born the water comes first, then the child, followed by the afterbirth (whenua)*

Parliament, the courts, including the appeal courts, and the Waitangi Tribunal have all recognised that specific rivers are a taonga to Māori. For example, in 1998, the

[90] Waitangi Tribunal, supra n 83, xi.
[91] Ibid 53.
[92] *Wai Ora*, above n 10, p vi.

Crown recognised 14 rivers in the Ngai Tahu takiwa with statutory acknowledgments.[93] Many other settlement statutes have continued this trend. For instance, in 2008, the Crown signed agreements in principle to implement: statutory acknowledgments for four rivers in the Bay of Plenty area,[94] and co-management arrangements for three rivers in the Hawkes Bay area.[95] In reviewing past cases brought by Māori to the courts concerning water, Ben White has concluded "the outcome of so much litigation shows that there can be no doubt that Māori society had its own body of rules and customs relating to the ownership and management of rivers".[96] While it is possible that the High Court will accept that a river is a taonga, iwi will still have to establish in fact that they held property rights in that specific river. Assuming that Māori can do so, is the next barrier surmountable?

D. Are Māori Property Rights in Rivers Extinguished by Statute Law?

There exists no statute that clearly and plainly extinguishes Māori customary property rights in rivers. The Resource Management Act 1991 (RMA) is the statute that comes closest to doing this. Section 354 of the RMA specifically singles out special attention of section 21 of the Water and Soil Conservation Act 1967. While the RMA repeals this 1967 Act, section 354 of the RMA makes it clear that the repeal:

> shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

So what right did section 21 of the Water and Soil Conservation Act 1967 give the Crown? Section 21(1) made it clear that:[97]

> in respect of any specified natural water, the *sole right* to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to discharge natural water containing waste on to land or into the

[93] See Ngai Tahu Claims Settlement Act 1998.
[94] See Ngati Manawa Agreement-in-Principle, signed 18 September 2008.
[95] See Ngati Pahauwere Agreement-in-Principle, signed 30 September 2008.
[96] White, above n 78, p 347.
[97] Emphasis added.

> ground in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water, or to use natural water, is hereby *vested* in the Crown subject to the provisions of this Act.

Is simply vesting water in the Crown enough to override any Māori customary property rights in rivers? According to case law precedents, the doctrine of native title requires a clear and plain extinguishment *of Māori property rights.* For example the justices in *Ngati Apa* stressed the importance of extinguishment stemming from clear and plain legislation. Justices Keith and Anderson, in a joint judgment, emphasised "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain".[98]

While the warning in *Ngati Apa* that there may be no remaining customary land in the foreshore and seabed because of subsequent developments such as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992[99] needs to be taken note of, the test of clear and plain extinguishment should be kept at the forefront of any legislative inquiry. Here, in the context of water, the legislative inquiry would focus on the RMA and the now repealed section 21 of the Water and Soil Conservation Act 1967. But both of these statutes are silent as to Māori property rights. The initial observation thus must be that the legislation does not clearly and plainly extinguish Māori property rights.

Assuming that a claim proceeded to this point, would a court still nonetheless shy away from finding native title in a specific river? Even it was prepared to accept the existence of native title in a river, at what end of the spectrum would the court place that title: at the rights end or the ownership end?

VII. PREDICTING HOW A COURT MIGHT DECIDE A NATIVE TITLE CLAIM TO A SPECIFIC RIVER

It seems that the New Zealand courts have accepted the Canadian stance that a doctrine of native title encompasses a spectrum. For example, *Te Weehi* is evidence that native title can be held at the rights end of the spectrum: a right to collect undersized shellfish. *Ngati Apa*, albeit in obiter, indicated that it might be possible to recognise exclusive ownership equivalent to fee simple title. Interestingly, Parliament

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[98] *Ngati Apa*, 684.
[99] See discussion at ibid 650 (Elias CJ).

has recognised that the common law doctrine of native title has the potential to encompass "exclusive use and occupation".[100] The issue that deserves attention here is despite there being the possibility of a court recognising exclusive ownership, is it in reality a likely outcome of a successful native title claim to rivers? In other words, even if an iwi was successful in pursuing a native title claim to a river, would the court award what the iwi want: ownership of the river?

In the context of the foreshore and seabed scenario, eminent law academic Dr Paul McHugh argued that if given the opportunity New Zealand's courts at most would have recognised a somewhat middle ground on the rights-ownership spectrum. This middle ground has been labelled 'a bundle of rights' approach by the High Court of Australia in a majority decision. In agreement with McHugh, the Waitangi Tribunal, also deliberating in the context of the foreshore and seabed, claimed that it would have taken a "bold"[101] New Zealand court to deliver anything more than a bundle of rights. Both McHugh and the Tribunal thought it unlikely a New Zealand court would recognise even qualified exclusive ownership of the foreshore and seabed as had been advocated by Justice Kirby in a minority High Court of Australia decision.

This part therefore takes the opportunity to comparatively explore in brief detail how the High Court of Australia has dealt with Indigenous peoples' claims to exclusive ownership of natural resources and what influence those decisions might have on New Zealand's High Court.

A. Australia

1. *Yarmirr 2001*

The first Australian High Court case to accept the applicability of the common law doctrine of native title was *Mabo* decided in 1992. In response to this decision, Parliament enacted the Native Title Act 1993 (Cth). Section 223(1) of this Act states:

> The expression *native title or native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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[100] Foreshore and Seabed Act 2004, s 32(1)(a).

[101] Waitangi Tribunal, supra n 83, 60.

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
(c) the rights and interests are recognised by the common law of Australia.

In 2001, the High Court released its *Commonwealth v Yarmirr*[102] decision whereby the majority promoted the bundle of rights approach. In this case, the Court had to determine whether the common law doctrine of native title is incapable of recognising a customary interest in the sea (including the salt water and the resources in that water) and seabed in the Croker Island region of the Northern Territory that equates to ownership. It is a split decision. Gleeson CJ, Gaudron, Gummow and Hayne JJ (majority) held that there is a “fundamental difficulty standing in the way of the claimants’ assertion of entitlement to exclusive rights of the kind claimed”.[103] According to the majority, the common law public rights of navigation, fishing and the right of innocent passage cannot stand alongside exclusive native title rights and interests: “the inconsistency lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted *exclusive* rights”.[104] The majority, in interpreting the three-pronged test of section 223(1) accepted that the Native Title Act requires the two systems of law – traditional law and common law – to operate together. However, they claimed that the continued recognition of traditional law is dependent on whether the two laws can co-exist. They concluded that the starting point for a native title analysis must therefore “begin by examining what are the sovereign rights and interests which were and are asserted over territorial sea”.[105] In this case, those rights – public rights to navigate and fish, and the international right to innocent passage - trump traditional law because “These are rights which cannot co-exist with rights to exclude from any part of the claimed area all others”.[106]

[102] (2001) 208 CLR 1 (‘*Yarmirr*’).
[103] Ibid 31.
[104] Ibid 33 (emphasis added).
[105] Ibid 18.
[106] Ibid 31.

Nonetheless the majority endorsed the lower Court's finding that the claimants are able to exercise non-exclusive native title rights and interests, in accordance with and subject to their traditional laws and customs, to, for example: fish, hunt and gather for personal, domestic or non-commercial communal needs; access the area to visit and protect places which are of cultural or spiritual importance; and access the area to safeguard their cultural and spiritual knowledge.[107] Hence, the majority accepted, what has been coined as, a 'bundle of rights' – limited rights to take and have access.

The two remaining High Court Justices dissented but for different reasons. Callinan J believed that the majority went too far in recognising the possibility of non-exclusive rights, stating there could be no native title at all in the sea and seabed as it would be inconsistent with the Crown's sovereignty. Not only could there be no exclusive native ownership or rights over the sea, there could be no native title rights at all for there was "certainly no evidence in this case as to any system of law with respect to, or regulation of"[108] enforceable, effective rules to regulate the use, access, and exploitation of the sea and seabed.

At the other end of the spectrum, Kirby J believed that the majority had not gone far enough in recognising the possibility of exclusive ownership. He held that the common law doctrine of native title could, and should, recognise Aboriginal exclusive ownership of the sea and seabed but that public rights of navigation, fishing and passage should qualify it. In contrast to Callinan J, Kirby J accepted that the Aboriginal people had their own laws:[109]

> In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group … they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a 'sea country' and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group.

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[107] See ibid 1-2.
[108] Ibid 153.
[109] Ibid 101.

Kirby J emphasised: “In earlier times, they could not fight off the ‘white man’ with his superior arms; but now the ‘white man’s’ laws have changed to give them, under certain conditions, the superior arms of legal protection”.[110] He devised a different solution to that of the majority and its bundle of rights approach - qualified exclusivity:[111]

> They yield their rights in their ‘sea country’ to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the ‘white man’s’ law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide.

Kirby J, believed that this type of outcome was “precisely that for which *Mabo [No 2]* was decided and the [Native Title] Act enacted. The opinion to the contrary is unduly narrow. It should be reversed”.[112] Kirby J observed that the only limitations on recognition of native title rights and interests are those stated in *Mabo*: “namely that native title could not be recognised when to do so would ‘fracture a skeletal principle of our legal system’; or where to do so would be repugnant to the rules of natural justice, equity and good conscience”.[113]

In comparison to Kirby J, the majority in *Yarmirr* read *Mabo* quite differently. Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that the skeletal metaphor could not be used:[114]

> to obscure the underlying principles that are in issue. There are obvious dangers in attempting to argue from the several elements of the metaphor to an understanding of the principles that lead to the result that is expressed by the metaphor. It is,

[110] Ibid 101.
[111] Ibid 101.
[112] Ibid 101.
[113] Ibid 77.
[114] Ibid 32.

> therefore, not profitable to stay to consider what principles of the legal system are, or are not, part of its 'skeleton'. Rather, attention must be directed to the nature and extent of the inconsistency between the asserted native title rights and interests and the relevant common law principles.

Kirby J strongly disagreed with this reasoning, likening the majority judgment to the pre-*Mabo* legal fictions. For example, Kirby J exclaimed:[115]

> To press on with a blind adherence only to the adapted rules of the common law of England is not only inconsistent with the essential legal foundation for the step which this Court took in *Mabo [No 2]* as the basis for the new legal reasoning concerning native title. It is also incompatible with the independence and self-respect that should today be reflected in the exposition by this Court of the common law of Australia, at least where that law is concerned with vital and peculiar problems of a special Australian character. The rights of the Indigenous peoples of Australia are of that kind.

Kirby J therefore approached his judgment in a very different manner to the majority, not accepting that the common law necessarily trumps traditional law. He forcefully argued:[116]

> In short, to take a view of the common law of Australia, including as it is given recognition and protection under the Act, that would confine the native title rights of Indigenous peoples solely to those enjoyed by their forebears before European settlement of Australia could itself amount to imposing on them an unjust and discriminatory burden not imposed by the common law on other Australians.

2. *Arnhem 2008*

Seven years on, a partially differently constituted High Court of Australia bench has however moved not just from the bundle of rights approach but also the qualified ownership point to accepting exclusive ownership. In stark contrast to the majority decision in *Yarmirr*, in July 2008, the High Court, by majority, held that traditional Aboriginal owners have the right to exclude fishermen and others from tidal waters

[115] Ibid 100-101.
[116] Ibid 93.

within Blue Mud Bay in north-east Arnhem Land. The *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors*[117] has been heralded as "a victory for Aboriginal people".[118] The case required the Court to determine:[119]

> whether a grant in fee simple, made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) … confers rights to exclude from tidal waters within the boundaries of the grant persons who wish to take fish or aquatic life in those waters, including persons holding a licence under the *Fisheries Act* (NT) …

The majority (Gleeson CJ, Gummow, Hayne and Crennan JJ) held yes, that without permission from a land council a person holding a fishing licence could not fish in tidal waters within the fee simple grant areas. Fishing in those waters was to enter or remain on Aboriginal land contrary to the *Aboriginal Land Rights (Northern Territory) Act*. Kirby J concurred with the majority in his separately laid out judgment. He stressed "the need for specific and clear legislation to extinguish any traditional legal rights of the Indigenous peoples of Australia".[120] Kirby reinforced this message by citing a Canadian case that "insists that: 'Indian title … being a legal right, it could not … be extinguished except by surrender to the Crown or by competent legislative authority, *and then only by specific legislation*'."[121] Kirby agreed with the statutory interpretation approach of the majority judgment because:[122]

> - It preserves the Aboriginal interests concerned as species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect;
> - It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally *sui generis*, their history, their belated recognition, their present

[117] [2008] HCA 29 ('*Arnhem*'). This case can be viewed at: http://www.austlii.edu.au/au/cases/cth/HCA/2008/29.html.
[118] "Indigenous win in fishing rights case" posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (last accessed 29 March 2009).
[119] *Arnhem*, para 1.
[120] Ibid, para 72.
[121] Ibid, para 67
[122] Ibid, para 69.

purposes and the 'moral foundation' (now recognised in legislation) for respecting them;

- It ensures that, if the legislature of Northern Territory wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision; and
- It avoids needless argument about the suggested invalidity of the Fisheries Act that might otherwise arise if a broader operation were to be attributed to that Act.

As stated in a newspaper article following the release of the judgment: "[f]or traditional owners, the decision ends a 30-year fight for exclusive rights, while commercial and recreational fishers will be forced to negotiate terms for access".[123] As Professor Jon Altman, from the Centre for Aboriginal Economic Policy Research at the Australian National University, stated in reaction to this case: "So what people have to understand is that this gives a right of exclusion over a column of water between the low and high water mark. In that sense it's an extraordinarily significant outcome for Indigenous people because it gives them effectively a commercially valuable property right which is really unprecedented in the Australian context".[124]

C. Aotearoa New Zealand

If a New Zealand court has the opportunity to consider the extent of Indigenous property rights in rivers, the Australian case law would be considered, at most, persuasive authority. The *Arnhem* case would be of limited value to where Māori already have fee simple title in a riverbed. In New Zealand, the most movement in this regard has been made in the context of returning ownership of lakebeds to iwi pursuant to Treaty settlements. However, the statutes that have enacted these settlements have fudged the ownership issue of the water by stating that the "Crown stratum means the space occupied by water and the space occupied by air above each Te Arawa lakebed".[125] Nonetheless, the *Arnhem* case is of interest because 1) it

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[123] "Indigenous win in fishing rights case" posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (last accessed 29 March 2009).
[124] "Unprecedented commercial rights" posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (last accessed 29 March 2009).
[125] See Te Arawa Lakes Settlement Act 2006, s 11.

illustrates that a court can award exclusive title pursuant to water; and 2) it provides an excellent list of statutory interpretation principles that ought to be of interest to a New Zealand court.

In regard to the *Yarmirr* case, while there is support for New Zealand to take a *Yarmirr* majority judgment type approach to situate the far end of the native title spectrum at the point of recognising 'a bundle of rights' via the work of Dr Paul McHugh and the Waitangi Tribunal, it is argued here that such an approach is unwarranted. The majority judgment does not align with the observations in *Ngati Apa* that it is possible in New Zealand to recognise ownership. An examination of President Gault's judgment in *Ngati Apa*, for example, suggests that he did not accept the argument that Indigenous ownership would *per se* be inconsistent with the coastal marine management extolled in the Resource Management Act 1991 for "those provisions are not wholly inconsistent with some private ownership".[126] If given the chance, Gault P may well have reached a 'qualified exclusive ownership' decision in a like manner to Kirby J.

The joint judgment of Keith and Anderson JJ definitely hint at this possibility: "Subject to such qualifications arising from the circumstances of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation".[127] Keith and Anderson JJ, in contrast to the majority in *Yarmirr* accept that New Zealand's common law has allowed for individual ownership: "under the law of England which became part of the law of New Zealand in 1840 'so far as applicable to the circumstances of New Zealand', private individuals could have property in sea areas including the seabed".[128] Moreover, Elias CJ expressly rejects the argument that the different qualities in land under water compared to dry land should make private property interests in the foreshore and seabed unthinkable because of the public interest in navigation and recreation. She agrees with Keith and Anderson's JJ review that "interests in the soil below low water mark were known under the laws of England" and "it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank … and on the other to the hapuka grounds … or reefs".[129]

[126] *Ngati Apa*, 677.
[127] Ibid 679.
[128] Ibid 679.
[129] Ibid 660-661.

It is argued here that even if a New Zealand court shied away from recognising exclusive ownership in a river, it might very well be prepared to adopt a qualified exclusive ownership solution as advanced by Kirby J.

VIII. CONCLUSION

The current political environment is one where Māori seek to know whether the common law doctrine of native title is capable of recognising a customary interest in a river that equates to ownership. It is argued here that given the right factual mix, there is a distinct possibility that this could occur. If Parliament does not like this possibility, it has the right to pass clear and plain legislation that extinguishes native title in freshwater. In the meantime, the High Court ought to be receptive to hearing such an issue if it were to arose.