

**MĀORI PROPERTY AND COMMERCIAL
RIGHTS TO FRESHWATER:
The Potential for Recognition and Redress following
Judicial Decisions in 2012-2013**

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INTRODUCTION

For more than a century, Māori in Aotearoa New Zealand have sought recognition of their customary property rights in freshwater,¹ which were affirmed and guaranteed under the Treaty of Waitangi 1840 (the ‘Treaty’).² To date, however, the Crown has refused to contemplate Māori ownership of water bodies, and instead manages water based on the English common law presumption that water cannot be owned. Under this framework, Māori have been deprived of the opportunity to develop their rivers and lakes for modern commercial purposes, and have not shared in the profits made from the commercial use of their waters by others.

In 2012, tensions over the unresolved nature of Māori water rights culminated in a legal battle between Māori and the Crown in response to the Government’s proposal to partially privatise four state-owned water-using companies. While the Waitangi Tribunal agreed that the sale ought to be delayed because it would impair the Crown’s ability to provide redress for Māori water rights in future,³ the Supreme Court ultimately allowed the proposed share sales to go ahead.⁴ But, it did so on the basis of Crown assurances that Māori freshwater claims would still be addressed. The question of how to recognise and redress Māori water rights therefore remains a live issue.

The 2012-2013 litigation brought Māori water rights into the national spotlight, but it did not resolve the crucial questions of whether Māori can own water, and derive an economic benefit from its use. So, how can these issues be resolved now? This dissertation explores how Māori can seek recognition and redress for their proprietary and commercial rights in freshwater today. The first chapter provides an introduction to ‘Māori and water’ in New Zealand, outlining the current water management

¹ An overview of the long history of Māori ownership claims to freshwater is provided in the Waitangi Tribunal’s freshwater report 2012: Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [*Freshwater Report*] at 8-14.

² The Treaty of Waitangi was signed between Māori chiefs and the Crown in 1840. The English version of the Treaty states that Māori cede sovereignty to the Crown (Article One), but are guaranteed the “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” for so long as they wish to retain them (Article Two). The Māori version states that Māori cede governance (kawanatanga) to the Crown (Article One) and retain unqualified chieftainship (tino rangatiratanga) over their lands and all treasures (taonga) under Article Two. The English and Māori texts are set out in the First Schedule of the Treaty of Waitangi Act 1975. See also the English translation of the Māori text by Sir Hugh Kawharu: I. H. Kawharu *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland, Oxford University Press, 1989) at 319-321; also available at <www.waitangi-tribunal.govt.nz>. For a history of the Treaty of Waitangi, see Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, 2004).

³ *Freshwater Report*, above n 1.

⁴ *New Zealand Māori Council v Attorney General* [2013] NZSC 6 [*Supreme Court Decision*].

regime and proposed reforms, as well the Treaty settlements policy for water. It then goes on to review the 2012-2013 litigation, from the Waitangi Tribunal through to the Supreme Court.

Chapter Two turns to consider how Māori can pursue freshwater claims in the courts. Being mindful that the Treaty of Waitangi is only enforceable in domestic law where it is directly incorporated by statute, this chapter focuses on the potential for Māori freshwater property rights to be recognised in the courts under the common law doctrine of native title.⁵ Chapter Three builds on this inquiry, and aims to predict whether a court would also recognise commercial rights as a component of native title to freshwater.

Having discussed the potential for Māori proprietary and commercial rights to be recognised by the courts, the final chapter explores how these rights could be translated into reality. Here, I build on and evaluate four commercial redress options advanced in the Waitangi Tribunal: shares in water-using companies; a royalty regime for water; joint ventures; and ‘modern water rights’. Finally, I conclude that there are several promising possibilities for giving commercial expression to Māori water rights in the modern world.

⁵ The orthodox position is that the Treaty of Waitangi is an international Treaty of cession and can only be enforced in New Zealand courts where it has been referred to by legislation: *Hoani Te Heuheukino v Aotea District Māori Land Board* [1941] AC 308. For a discussion of the legal (and constitutional) status of the Treaty of Waitangi, see Matthew Palmer *The Treaty of Waitangi in New Zealand's law and constitution* (Victoria University Press, New Zealand, 2008).

CHAPTER ONE: FROM THE WAITANGI TRIBUNAL TO THE SUPREME COURT 2012-2013

In 2012-2013, Aotearoa New Zealand witnessed an intense and divisive legal battle between Māori and the Crown concerning the nature of Māori water rights. While the litigation was triggered by the Government's plans to partially privatise State-owned water-using companies, it was founded in wider Māori grievances that the current legal and political regimes for water governance fail to recognise and provide for Māori proprietary rights. This chapter sets out the context of this litigation by outlining the Māori role in the current (and proposed) water management system, the Treaty settlements policy for water, and the Government's Mixed Ownership Model (MOM) policy. It then reviews the Waitangi Tribunal, High Court and Supreme Court decisions in turn.

I. Māori and Water

A. The Resource Management Act 1991 and proposed reforms

New Zealand's legal system does not currently recognise ownership of freshwater. Instead, it regulates and manages the use of water, primarily through the Resource Management Act 1991 (RMA).⁶ The RMA sets out an all-encompassing regime for the sustainable management of land, air and water, and delegates the day-to-day management of these natural resources to regional and local councils.⁷ The key provision regarding freshwater management is s 14, which provides that no person may take, use, dam or divert water unless expressly allowed by a regional plan or resource consent.⁸

Significantly for Māori, in preparing regional plans, issuing resource consents or exercising any other function or power under the Act, decision-makers must: recognise and provide for the relationship of Māori and their culture and traditions

⁶ For an overview of resource management law, see Derek Nolan *Environmental and Resource Management Law in New Zealand* (4th ed, Lexis Nexis New Zealand, 2011). For a history of water management law, see Nicola Wheen "A Natural Flow – A History of Water Law in New Zealand" (1997) 9 Otago Law Review 71.

⁷ Section 30 of the RMA sets out the specific functions that all regional councils have in regard to water, including: to control the use of land for the purpose of enhancing and maintaining water quality and quantity (s 30(1)(c)(ii) and (iii)); to set maximum or minimum levels of water flow (s 30(1)(e)(i)); and to control the taking or use of geothermal energy (s 30(1)(e)(iii)). Central government retains some ability to influence the management of resources, primarily through the issuing of National Policy Statements.

⁸ Note that water permits are a type of resource consent issued by regional councils that permit acts that would usually contravene s 14: s 87(d). A resource consent is also required for discharges into water (s 15).

with their ancestral lands, *water*, sites, wahi tapu and other taonga (s 6(e));⁹ have particular regard to kaitiakitanga (s 7(a));¹⁰ and take into account the principles of the Treaty of Waitangi (s 8).¹¹ Although these provisions provide a legal basis for Māori interests to be recognised in the management of freshwater, they are often outweighed by other statutory considerations in practice, which has led to general Māori dissatisfaction with water governance.¹²

The lack of provision for Māori property rights under the RMA was reaffirmed in the Environment Court's recent decision in *Norris v Northland Regional Council*, which held that pending Treaty claims for ownership of a water body do not constitute a valid resource management purpose that could justify reducing the terms of water permits granted to others over those same waters.¹³

In August of this year, the Government announced its proposals for the next stage of RMA reforms, including changes to the water management regime.¹⁴ The proposed freshwater reforms include the introduction of a collaborative planning process,¹⁵ increased central government support for regional councils, and requirements to explicitly consider iwi views in decision-making.¹⁶ These changes are the first of several proposed reforms to be implemented as part of the Government's ongoing *Fresh Start for Fresh Water* programme, initiated in 2009, with the aim of reforming the national framework for freshwater management.¹⁷ The Government's

⁹ Emphasis added.

¹⁰ Kaitiakitanga is defined under s 2 of the RMA as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship'.

¹¹ Note that the Government's recent RMA reform proposals include revising and consolidating the current sections 6 and 7 into one list of matters of 'national importance': Ministry for the Environment *Resource Management Summary of Reform Proposals 2013* (ME 1119, 2013) at 11-14.

¹² Both s 6 and s 7 of the RMA include a list of several factors that are to be weighed up by decision-makers. For a comprehensive summary of Māori appeals to the Environment Court under the RMA concerning water, see Jacinta Ruru *The Legal Voice of Māori in Freshwater Governance. A Literature Review* (Lincoln: Landcare Research, 2009) at 23-49. Ruru concludes that, out of seventeen cases, Māori were only wholly successful in three cases.

¹³ *Norris v Northland Regional Council* [2013] NZEnvC 208.

¹⁴ Ministry for the Environment *Resource Management Summary of Reform Proposals 2013*, above n 11.

¹⁵ A collaborative planning process will be introduced as an alternative option to the current process for preparing and changing regional policy statements and plans contained in Schedule 1 of the RMA. This process will enable communities to have more input into the planning process and develop shared strategies for their water bodies: *Resource Management Summary of Reform Proposals 2013*, above n 11, at 28.

¹⁶ Iwi views will need to be considered before decisions relating to freshwater are made regardless of which planning process is implemented: *Resource Management Summary of Reform Proposals 2013*, above n 11, at 28.

¹⁷ The programme was originally (in 2009) called the 'New Start for Fresh Water'. The central aims of the policy were to improve allocation systems, set limits on quantity and quality of water, ensure an economic return for water, and to better incorporate community values and Treaty of Waitangi considerations into decision-making: Cabinet Paper "New Start for Fresh Water". This paper is available at <www.mfe.govt.nz> (last updated 24 September 2009). For an overview of the background

comprehensive package of water reform proposals was released in March 2013.¹⁸ It builds on the recommendations made in three reports of the Land and Water Forum (LAWF),¹⁹ as well as on advice from relevant Ministries and the Freshwater Iwi Leaders group.²⁰ Other proposals in the March paper will be developed over the next few years as part of a continuing reform process, potentially including the introduction of a market-based water system.²¹

Although the Land and Water Forum reports have acknowledged that iwi have rights and interests in freshwater and recommended greater iwi involvement in decision-making, the Forum had no government mandate to consider Māori rights to water for customary or commercial use.²² The current reform proposals similarly do not address these issues, yet the Crown has heavily relied on the *Fresh Start for Fresh Water* programme and the RMA reform process as a way to provide for Māori interests in freshwater. With major changes underway, and more to come in the future, it is both a pressing and an appropriate time to address Māori proprietary and commercial claims to freshwater.

B. Treaty settlements - direct negotiations with the Crown

One avenue available for Māori to pursue freshwater claims is through direct negotiations with the Crown under the Treaty of Waitangi settlements process.²³ However, to date the Crown has not been willing to negotiate for

to water policy reform see Fisher, R. M and Russell, S. "Water Policy and Regulatory Reform in New Zealand" (2011) 27 *International Journal of Water Resources Development* 387.

¹⁸ Ministry for the Environment *Freshwater reform 2013 and beyond* (2013).

¹⁹ Land and Water Forum *Report of the Land and Water Forum: A Fresh Start for Fresh Water* (2010); Land and Water Forum *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy and Plan-Making Through Collaboration* (2012); Land and Water Forum *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (2012). These reports are available at <www.landandwater.org.nz>. The Land and Water Forum comprises 60 stakeholder groups, including primary producers, environmental groups, 'hydro generation' industry groups and five iwi organisations: Tūwharetoa Māori Trust Board, Te Arawa Lakes Trust, Waikato-Tainui Te Kauhanganui, the Whanganui River Māori Trust Board, and Te Runanga o Ngāi Tahu. Following the first report of the Land and Water Forum, the Government issued a National Policy Statement (NPS) on freshwater to be implemented by Regional Councils within the existing RMA framework. The NPS requires Regional Councils to set objectives and limits for the allocation, flow and quality of water, and ensure those objectives are achieved: Ministry for the Environment *National Policy Statement for Freshwater Management* (2011).

²⁰ The Freshwater Iwi Leaders Group comprises leaders from the same five iwi organisations as the Land and Water Forum; see, above n 19.

²¹ The first report of the Land and Water Forum (2010) recommended that the Government consider introducing a tradeable water permit system, under which payment would be required in order to first obtain and to transfer permits: Land and Water Forum (2010), above n 19, at 2-3.

²² Land and Water Forum (2012), above n 19, at 8.

²³ The Treaty Settlements process is conducted by the Office of Treaty Settlements, which is a separate unit within the Ministry of Justice that reports directly to the Minister in Charge of Treaty of Waitangi Negotiations. The Office of Treaty Settlements negotiators enter into several stages of negotiations with representatives of the Māori claimant group, with a view to concluding a full and final deed of settlement. The negotiation process proceeds in four stages: 1) Preparing the claims for negotiations,

recognition of Māori property in water. The relevant Office of Treaty Settlements (OTS) policy states:²⁴

New Zealand law does not provide for ownership of water in rivers and lakes

... the Crown acknowledges that Māori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water... However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot... For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.

Instead, Treaty settlements relating to water bodies have focused on redress options such as protocols,²⁵ statutory acknowledgements,²⁶ and co-management solutions.²⁷ In rare cases, ownership of the *beds* of lakes or rivers has been vested in the claimant group, but the legal title has never included the water above.²⁸ Even so, the Crown's assertion that it is "not possible" to offer ownership of an entire water body in a settlement refers only to perceived political obstacles, as I argue here that there are no insurmountable legal barriers to recognising a new form of property interest in water. The tension between Māori and the Crown over unresolved ownership claims came to a head in response to the Government's proposal to partially privatise state-owned water-using companies.

and mandating the representatives for the claimant group who will have the authority to negotiate and enter a binding settlement with the Crown; 2) Pre-negotiations, where the terms of negotiation are developed and signed; 3) Formal negotiations, which may result in either an Agreement in Principle or a Heads of Agreement, and subsequently a formal Crown offer; 4) The claimant group ratifies a deed of settlement, which is then implemented through legislation. See Office of Treaty Settlements, (2002), *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future*, Wellington, at 35-80.

²⁴ Office of Treaty *Settlements*, above n 23, at 111.

²⁵ A protocol regarding water is a statement by the Minister of the Environment setting out how a government agency will exercise its functions within the relevant area and continue to interact with the claimant group.

²⁶ The Crown can agree to give statutory acknowledgement to a claimant group's statement of their special cultural, historical, spiritual and/or traditional association with a particular area. See for example Ngai Tahu Claims Settlement Act 1998, schedules 14-77; Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 37.

²⁷ In recent years, Treaty settlements have also involved innovative co-management solutions, see for example Te Arawa Lakes Settlement Act 2006; Waikato Tainui Raupatu Claims (Waikato River) Settlement Act 2010. For a discussion of co-management redress options and case studies see Jacinta Ruru "Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand" (2013) 22 *Pacific Rim Law & Policy Journal* 311-352. For a summary of Treaty settlements relating to water see Ruru *The Legal Voice of Māori in Freshwater Governance. A Literature Review* (Landcare Research, Lincoln, 2009), above n 12, at 66-73.

²⁸ The Crown will only consider vesting lakebeds and riverbeds where legally practicable, and only for rivers or lakes of 'great significance to the claimant group.' Notable transfers include the bed of Lake Taupo to Ngāti Tuwharetoa in 2007, the vesting of several lake beds under the Ngai Tahu Claims Settlement Act 1998, and the beds of several of lakes in Te Arawa. The Te Arawa Lakes Settlement Act 2006 is at pains to emphasise that water is not being vested in the Te Arawa trustees, with s 23(2) stating that the Crown retains ownership of the "stratum" (which is defined as the space occupied by the water, and air, above each lakebed) as Crown land. Furthermore, the vesting of the lakebeds in Te Arawa does not confer on them any rights or obligations to the water (s 25).

II. The Mixed Ownership Model legislation 2012

In May 2011, the Fifth National Government outlined its policy to extend the ‘Mixed Ownership Model’ (MOM) to four state-owned energy companies, thereby enabling the Crown to sell up to 49 per cent of its shareholding in each company to private investors.²⁹ Parliament passed two Acts in June 2012 to facilitate the Government’s policy. The State Owned Enterprises Amendment Act 2012 (SOE Amendment Act) allows each of the four companies to be removed from the schedules of the State Owned Enterprises Act 1986, under which they (as SOEs) are prohibited from being privatised. The companies are then to be transferred to the MOM regime. This transfer process is commenced by Order in Council, and can be applied to each company at a separate time. To date, Mighty River Power and Meridian Energy have been placed under the Mixed Ownership Model.³⁰

The Public Finance (Mixed Ownership Model Amendment Act) 2012 created a new Part 5A in the Public Finance Act 1989 that governs the MOM companies once they are listed under its schedule 5. Part 5A prevents the Crown from holding less than 51 per cent of the shares in the companies, and also prevents any person other than the Crown from holding more than 10 per cent of a class of shares.³¹ There are two provisions that provide some protection for Māori interests. Section 45X preserves the application of sections 27A-D of the SOE Act, enabling the Waitangi Tribunal to order the return of memorialised land to Māori ownership.³² The MOM regime also includes a ‘Treaty clause’ that replicates s 9 of the SOE Act.³³

²⁹ The four state-owned energy companies are Mighty River Power Limited, Meridian Energy, Genesis Power, and Solid Energy. The Meridian Energy share offer opened to New Zealanders on 30 September and the share float is expected to be completed by November 2013: see Jamie Gray “Investors warm to Meridian share offer” *The New Zealand Herald* (Online ed, New Zealand, 4 October 2013). The future of Solid Energy is uncertain due to large financial debts. A Government bailout is currently being considered: See Adam Bennett “Cracks emerge in Solid Energy bank bailout deal” *The New Zealand Herald* (Online ed, New Zealand, 3 October 2013).

³⁰ Mighty River Power became a Mixed Ownership Model company on 8 March 2013: State-Owned Enterprises Amendment Act 2012 (Mighty River Power Limited) Commencement Order 2013. Meridian Energy came under this model on 30 August 2013: State-Owned Enterprises Amendment Act 2012 (Meridian Energy Limited) Commencement Order 2013.

³¹ Public Finance Act 1989, s 45R and s 45S.

³² The Waitangi Tribunal has the power to make binding recommendations for the Crown to resume land transferred to SOEs and return it to Māori ownership where Māori claims to that land are ‘well-founded’: ss 8A and 6(3) Treaty of Waitangi Act 1975. On the initial transfer of the land to the SOE, a memorial is placed on the land title as a safeguard to advise interested parties that the land may be resumed by the Crown. For a discussion of this ‘clawback’ regime, see John Dawson “The Remedies Reports” in Janine Hayward and Nicola R Wheen *The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi* (Bridget Williams Books, 2004) 125-136, at 126-133.

³³ Section 9 of the SOE Act provides that “nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. Section 45Q is not an exact replica of s 9 as it substitutes the word “Act” for “Part”. Section 45Q(2) specifies that s 45Q(1) does not apply to “persons other than the Crown” (which presumably refers to the minority shareholders).

Section 45Q Treaty of Waitangi (Te Tiriti o Waitangi)

- (1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

This statutory incorporation of the Crown's Treaty obligations enabled Māori to bring judicial review proceedings to challenge the partial sale of Mighty River Power in the ordinary courts.

*III. The Waitangi Tribunal Freshwater report*³⁴

In February 2012, the New Zealand Māori Council along with several hapu co-claimants (subsequently supported by interested parties) filed two claims with the Waitangi Tribunal: the Wai 2357 claim concerned the Crown's intent to partially privatise the four SOE energy companies; the Wai 2358 claim concerned proposed RMA reforms.³⁵ In essence, the claimants argued that both policies were in breach of the principles of the Treaty of Waitangi because:³⁶

...Māori have unsatisfied or unrecognised proprietary rights in freshwater, which have a commercial aspect, and that they are prejudiced by Crown policies that refuse to recognise those rights or to compensate for the usurpation of those rights for commercial purposes.

The Tribunal divided the hearing into two stages.³⁷ The first stage dealt with the partial sale of the then MOM companies.³⁸ The claimants argued that they would suffer irreversible prejudice if the sale went ahead without first protecting or providing for Māori interests, because the Crown would no longer be able to offer meaningful redress after 49 per cent of shares were sold to private shareholders on a 'zero cost' for water basis. The Crown denied Māori claims that they could 'own'

³⁴ *Freshwater Report*, above n 1. Note that this final report was issued on 7 December 2012. It replaced the Tribunal's interim report that was made available on the 24 August 2012 (so that the Government could decide whether to proceed immediately with the Mighty River Power share sale) but it does not alter the substantive decisions and recommendations. See Waitangi Tribunal *Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

³⁵ The Waitangi Tribunal has jurisdiction to hear claims by any Māori that any legislation, Crown policy, Crown act or Crown omission (failure to act) is in breach of the principles of the Treaty of Waitangi, and that the claimant is prejudiced thereby: Treaty of Waitangi Act 1975, s 6.

³⁶ *Freshwater report*, above n 1, at 1.

³⁷ Stage Two of the freshwater inquiry is expected to take place in late 2013. This stage will consider whether current New Zealand laws and policies (mainly under the RMA) provide 'Treaty-consistent' recognition of Māori rights, and whether the *Fresh Start for Fresh Water* programme ought to wait for such rights to be properly defined. For the full statement of issues, see *Freshwater Report*, above n 1, at Appendix 1.

³⁸ The Tribunal agreed to hear this part of the claim under urgency because of the Government's desire to offer shares in Mighty River Power in late 2012 (though this sale was later delayed until May 2013). For the Tribunal's decision to grant an urgent hearing, see *Freshwater Report*, above n 1, at Appendix V.

particular pieces of water, and maintained that any (lesser) rights that Māori *do* have in freshwater would not be affected by the share sale.

The Tribunal agreed with the Māori claimants. It found that Māori have residual property rights in water that are akin to ownership, and that proceeding with the share sale without first providing protection for Māori interests would be in breach of the Treaty of Waitangi. This part now turns to discuss the key arguments and findings of the Tribunal's inquiry.

A. What rights to freshwater are protected and guaranteed by the Treaty of Waitangi?

1. The claimants' case

The claimants argued (and the Tribunal agreed) that at 1840 Māori had full and exclusive possession of all the water resources in New Zealand, and that Māori were guaranteed their continued possession under Article Two of the Treaty for as long as they wished to retain them.³⁹ The claimants argued that 'ownership' is the closest cultural equivalent to express Māori customary authority over their water resources. Although Māori did not view property in terms of western legal ownership, they have "little choice but to claim English-style property rights today as the only realistic way to protect their customary rights and relationships with their taonga."⁴⁰

The claimants were not asserting ownership of all water in New Zealand, but rather property rights in particular water bodies where customary ownership could be established by evidence.⁴¹ The claimants accepted that Māori water rights today are subject to shared use with the public, and to the Crown's kawanatanga rights, which include a legitimate role in the management of water. However, the Crown's sovereign rights "cannot be used to vitiate the Crown's obligation to protect property interests under Article 2."⁴² Māori must be enabled, as owners of property, to have the full use and enjoyment of their water bodies, including a right to develop and profit from it.⁴³ Unless there has been Treaty-compliant extinguishment, Māori retain property rights in their water bodies today.

³⁹ The English version of Article Two of the Treaty of Waitangi guarantees Māori "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties.... For so long as it is their wish and desire to retain" them. The Māori version guarantees Māori unqualified chieftainship (tino rangatiratanga) over their treasures (taonga).

⁴⁰ *Freshwater Report*, above n 1, at 32. The interested parties advanced an additional argument that Māori rights ought to be judged within a Māori kaupapa framework, instead of under an English legal paradigm: *Freshwater Report*, above n 1, at 34-35.

⁴¹ The claimants advanced a twelve point 'indicia of ownership' as evidence to prove customary ownership: see *Freshwater Report*, above n 1, at 32, 51-61. The 'indicia of ownership' is set out and discussed in Chapter Two of this dissertation.

⁴² *Freshwater report*, above n 1, at 33.

⁴³ *Freshwater report*, above n 1, at 33. The commercial dimension of the claim regarding a Māori right to development to commercially profit from their properties will be discussed further in chapter three.

2. The Crown's case

The Crown's essential argument rested on the common law position that 'no one can own water'. The Crown conceded that Māori do have some rights and interests in freshwater, which are yet to be fully defined.⁴⁴ But, no matter what the scope of those rights turn out to be, the Crown's ability to recognise them will not be affected by the partial privatisation. According to the Crown, the process of rights definition properly falls within the policy arena. It is best left to dialogue between the Crown and iwi, which it claimed is already occurring through the *Fresh Start for Fresh Water* programme.⁴⁵

The Crown also argued that full English-style ownership is not the best cultural equivalent for Māori rights. Instead, the Crown relied on a previous Tribunal report (Wai 262)⁴⁶ to suggest that the "true and practical expression of Māori rights in respect of environmental matters, including water resources" is kaitiakitanga (guardianship).⁴⁷ The Crown was of the view that kaitiakitanga includes control, co-management, or consultation rights, but not ownership.

3. The Tribunal's conclusions - in favour of the claimants

The Tribunal accepted that rivers - as a holistic entity - are a taonga, and agreed that 'full blown' ownership is the closest legal equivalent for Māori customary rights in 1840. It explained that the Wai 262 Tribunal focused on kaitiakitanga because of the subject matter of the claim, but that kaitiakitanga is only a part (the obligations-side) of tino rangatiratanga.⁴⁸ Because tino rangatiratanga includes these reciprocal obligations to the land, it is in fact *more than ownership*, and clearly then *includes* ownership. This finding accords with several previous Tribunal reports that have found Māori to be the owners of their lakes and rivers.⁴⁹

⁴⁴ The Crown accepted the claimants' 'indicia of ownership', but considered them to be customary proofs of *something other than ownership*.

⁴⁵ *Freshwater Report*, above n 1, at 36-38.

⁴⁶ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) [*Wai 262*]. The *Wai 262* Tribunal report is widely known as the 'indigenous flora and fauna and Māori cultural and intellectual property' claim.

⁴⁷ *Freshwater Report*, above n 1, at 37.

⁴⁸ The *Wai 262* report addressed kaitiakitanga in relation to a wide range of taonga, including cultural and intellectual property, iconic species of flora and fauna, and environmental taonga. The Tribunal had to determine how best to give effect to Māori rights in environmental taonga that were legally owned by others. On that basis, the Tribunal stressed that kaitiakitanga is the key Treaty right and is not dependent on ownership: see *Wai 262*, above n 46.

⁴⁹ The Tribunal relied on the following reports: Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1989); Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998); Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992); Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999); Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008).

The Tribunal found that the Treaty itself altered Māori water rights in three ways. First, in accordance with the principle of partnership and the expectation of settlement, Māori acceded to the ‘shared use’ of their water for non-commercial purposes with the incoming settlers. Secondly, the Crown gained the right to govern must balance the interests of the nation. But, Māori Treaty rights cannot be balanced out of existence. Third, the Treaty affirmed that Māori would have the same rights as British citizens, including the right to develop and profit from their properties by any new means that come available.⁵⁰

Summarising its conclusion, the Tribunal stated:⁵¹

our generic finding is that Māori had rights and interests in water bodies for which the closest cultural equivalent in 1840 was ownership rights, and that such rights were confirmed, guaranteed and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty of shared use with settlers. We say that the extent and nature of the proprietary right was the exclusive right to control access and use of the water while it was in their rohe.

B. Selling shares without first providing for Māori interests: a breach of the Treaty?

The Tribunal then turned to the central question of the inquiry: whether selling up to 49 per cent of Mighty River Power without first providing for Māori rights would be a breach of the Treaty of Waitangi. The claimants contended that a Treaty compliant regime would require both recognition of Māori water rights, and compensation where recognition is not possible.⁵² According to the claimants, the SOEs would be essential to providing these remedies, as the companies would need to pay for the water they use, and ought to be available as a general source of compensation for lost water rights.⁵³ The claimants argued that, after the share sale, the Crown would no longer be able to provide adequate redress because private investors would oppose any remedy that adversely affected shareholder interests.⁵⁴

The Crown maintained that the sale of minority shares in Mighty River Power would not compromise the Crown’s capacity to recognise Māori interests in water. It rejected that shares in the companies would be an appropriate solution, but insisted that they could always be bought back if so required. The Crown reminded the

⁵⁰ Article Three of the Treaty of Waitangi provides that Māori have all the rights and privileges of British subjects. The ‘right to development’ is discussed further in Chapter Three of this dissertation.

⁵¹ *Freshwater Report*, above n 1, at 81.

⁵² The claimants offered several examples of where recognition of their water rights may not be possible: where the water is being used by an SOE power generating company; where their waters have been significantly degraded; and where their waters are extensively relied on by other users, such as agricultural or urban users.

⁵³ *Freshwater Report*, above n 1, at 89.

⁵⁴ At 88-91.

Tribunal that it would be "a very serious step" to halt the planned share sale, and that where there are several Treaty-compliant options, the government is free to choose between them, and is not required to take one particular action.⁵⁵

1. What are the options for rights recognition or reconciliation?

The claimants put forward several options for recognising and giving modern expression to Māori property rights and commercial interests in water. The options included shares in the power-generating SOEs, shares plus a shareholders agreement (shares plus), a royalty regime, and 'modern water rights'.⁵⁶ The Crown advanced redress options outside of the 'ownership' paradigm. It favoured co-management schemes or consultation rights, and emphasised that it was already in negotiations with iwi through the *Fresh Start for Fresh Water* programme. The OTS policy is that return of title is only available for land, and redress for natural resources is 'cultural redress', not commercial.⁵⁷

2. The Tribunal's findings on 'nexus' and the concept of 'shares plus'

The Crown argued that there was no reason to halt the sale because there was no nexus between the asset being sold (the shares) and the claim (to rights in water), as the shares were in energy companies that do not purport to own water. The claimants argued that the nexus was obvious because the shares are in a company that controls, uses and profits from the water in which they claim proprietary rights. However, they accepted that shares alone could not be a solution, as they would not provide the control over the water resource that Māori were seeking. But, shares *plus* some additional control of the companies could form an essential component of redress. On that basis, the Tribunal agreed that there was a sufficient nexus between Māori rights and the shares, because shares plus a 'shareholders agreement' and a jointly written company constitution could provide a partial remedy to Māori claims.⁵⁸

3. A breach of the Treaty principles?

Answering the crucial question of the inquiry, the Tribunal determined that the Crown would be in breach of the Treaty of Waitangi if it proceeded with the planned share sale without first protecting Māori interests. The Tribunal found that shares in the companies would be an essential part of a remedy (for those Māori who wanted them).⁵⁹ It rejected the Crown's argument that the shares are 'fungible' and can simply be bought back after the sale. Instead, the Tribunal determined that the 'shares

⁵⁵ *Freshwater Report*, above n 1, at 88-91.

⁵⁶ At 100-103. These redress options are discussed extensively in Chapter Four of this dissertation.

⁵⁷ At 105-106. 'Cultural redress' includes things such as changes to place names, and official recognition of Māori relationships with taonga.

⁵⁸ At 119.

⁵⁹ At 121.

plus’ option would be impossible to implement after the sale because minority shareholders would prevent any shareholder agreement, preferential shares, or amendment to the constitution that provided greater rights to Māori.⁶⁰ Therefore, selling the shares would impair the Crown’s ability to actively protect Māori rights and to remedy their breach where proven.⁶¹

C. Waitangi Tribunal recommendation and government response

The Tribunal recommended that the Crown urgently convene a national hui, together with the New Zealand Māori Council, iwi leaders and interested parties, to investigate at least the ‘shares plus’ option.⁶² The Government decided that it would be more appropriate to consult only specific iwi directly affected by the Mighty River Power share sale. On 15 October, Cabinet decided to proceed with the share sales without implementing the Tribunal’s shares plus idea.⁶³

IV. The High Court decision

As a result of Cabinet’s decision, the New Zealand Māori Council and other claimants⁶⁴ commenced proceedings for judicial review in the High Court.⁶⁵ They claimed that, in order to execute the share sale, the Crown would undertake three actions that are subject to either s 9 of the SOE Act or s 45Q of the Public Finance (MOM) Act 2012, and are thereby reviewable for consistency with the principles of the Treaty. The decisions challenged were:⁶⁶

- 1) Cabinet’s direction to the Governor-General to change the status of Mighty River Power from SOE to MOM company by Order in Council (the commencement decision);
- 2) amending the constitution of Mighty River Power to permit 49 per cent ownership by private persons;

⁶⁰ *Freshwater Report*, above n 1, at 123-125. An amendment to the constitution must be passed by a special resolution, requiring a 75 per cent majority of those shareholders entitled to vote. Preferential shares can only be issued if permitted by the constitution. Therefore, when the Crown ceases to hold less than a 75 per cent majority, it will require the agreement of voting shareholders to implement these measures.

⁶¹ *Freshwater Report*, above n 1, at 143.

⁶² At 143-144. Note that Waitangi Tribunal recommendations are non-binding (except in limited circumstances relating to land resumption).

⁶³ John Key “PM announces next steps for Mighty River sale” (press release, 15 October 2012) available at <www.beehive.govt.nz>.

⁶⁴ The other claimants were the Waikato River and Dams Trust and the Pouakani Claims trust. The Waikato River and Dams Claims Trust claimed that the Crown’s decision to proceed with the sale of shares in Mighty River Power was a breach of s 64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010).

⁶⁵ *New Zealand Māori Council v Attorney General* [2012] NZHC 3338 [*High Court Decision*].

⁶⁶ *High Court Decision*, above n 65, at [48].

- 3) offering for sale and selling of up to 49 per cent of the shares in Mighty River Power.

Ronald Young J held that the commencement decision was not subject to either Treaty clause because the Executive only had discretion to decide *when* to bring the companies under the MOM regime; the policy matters, including the protection required for Treaty principles, had already determined by Parliament.⁶⁷ His Honour held that the decisions to amend the constitution and to sell the shares were not reviewable either because they were the exercise of common law powers, not statutory powers under either the SOE Act or Part 5A.⁶⁸ In addition, Ronald Young J found that even if the decisions were reviewable, they would not be inconsistent with Treaty principles because the options for redress would still be available after the sale.⁶⁹

V. The Supreme Court decision

On the 18 December, the New Zealand Māori Council was granted leave to appeal directly to the Supreme Court.⁷⁰ The Court's unanimous single judgment in February 2013 provided an overall victory for the Crown, but Māori succeeded on an important point of principle: that the Crown was bound to comply with the Treaty principles before deciding to sell the shares. This part provides an overview of the Supreme Court's decision.

A. Was the proposed sale of shares in Mighty River Power able to be judicially reviewed for breach of Treaty principles?

The Supreme Court overturned the High Court on this point and found that s 45Q *does* render the proposed share sale reviewable for compliance with the principles of the Treaty. The Court concluded that Part 5A effectively allows the Crown to do something with the shares which was previously prohibited. Thus, as the share sale is an action permitted by Part 5A, it must be conducted in accordance with s 45Q. In reaching this conclusion, the Court affirmed and followed the approach taken by the Court of Appeal in the *SOE case*, which held that s 9 was a broad constitutional principle that is not to be interpreted narrowly.⁷¹ By re-enacting an identical Treaty provision, Parliament intended s 45Q to be given the same broad application. It

⁶⁷ *High Court Decision*, above n 65, at [70]-[75].

⁶⁸ Ronald Young J applied the *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Commercial Radio Assets*] case, which held that the act of selling shares was the exercise of a common law power, not derived from statute.

⁶⁹ *High Court Decision*, above n 65, at [219].

⁷⁰ *Supreme Court Decision*, above n 4.

⁷¹ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 [*SOE case*]. Note that this case was commonly known as the *Lands case*, but has been renamed as the *SOE case* by the Supreme Court because what was at issue was not only land, but also water: *Supreme Court Decision*, above n 4, at footnote 25.

brings with it the heritage of s 9 and is invested with equal significance. Moreover, move from the application of s 9 to s 45 Q is “seamless”.⁷² Given its conclusion on this issue, the Court did not need to decide whether the commencement decision was reviewable.

B. Would the proposed share sale be inconsistent with the principles of the Treaty?

The Supreme Court explained that, before intervening, it must be brought to the conclusion that the proposed privatisation would be inconsistent with the principles of the Treaty. Referring to the test identified in the *Broadcasting Assets* case,⁷³ the Court stated:⁷⁴

There will be inconsistency, if the proposed privatisation would impair to a material extent the Crown’s ability to take the reasonable action which it is under an obligation to undertake in order to comply with the Treaty principles.

In order to determine whether the proposed Crown action would result in “material impairment” a court must:⁷⁵

assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect will not be relevantly material. To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate.

In assessing the impact of the share sale, the Court stressed that shares would only be a “proxy for the underlying claims”, and so their significance as redress should not be overstated.⁷⁶ In any event, if the Crown were required to settle claims with shares, it would be able to do so by simply buying them back.⁷⁷ The Court also emphasised that water rights, unlike land ownership, are limited to 35 year terms. And, as Mighty River Powers’ current permits must be reviewed to conform with any Treaty

⁷² *Supreme Court Decision*, above n 4, at [75]. The Supreme Court distinguished this case from the *Commercial Radio Assets*, above n 68, because here the legislation authorising the share sale also contained a Treaty clause, thereby continuing the Crown’s Treaty obligations.

⁷³ *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*].

⁷⁴ *Supreme Court Decision*, above n 4, at [90].

⁷⁵ At [89].

⁷⁶ At [136].

⁷⁷ The Supreme Court focused on ordinary shares as it expressed that the ‘shares plus’ concept would be inconsistent with the MOM scheme and would prevent the Crown from obtaining full value for the shares. It also noted that there are already private energy companies that would resist the imposition of a royalty regime; therefore the introduction of private shareholders in the MOM companies would not have a material effect on the level of opposition: *Supreme Court Decision*, above n 4, at [138]-[139].

Settlement, this protection comes close to the memorialisation protection in place for land.⁷⁸

The Court placed a lot of weight on the current social and legal environment, saying “the trend since the *SOE case* should provide reassurance that Māori claims are not being ignored.”⁷⁹ It cited several previous Treaty settlements involving water as evidence of the Crown’s increased willingness to acknowledge Māori relationships with water and to negotiate co-management regimes.⁸⁰ It also took into account the *Fresh Start for Fresh Water* process, and appeared to conclude that Māori property rights in water may be better delivered through changes to the regulatory regime, supplemented by specific settlements.⁸¹

Overall, the Court accepted that the partial privatisation may limit the scope to provide some forms of redress that are theoretically possible, but in assessing “material impairment” it must have regard to:⁸²

- a) Crown assurances that it would continue to exercise its Treaty obligations after the sale;
- b) the extent to which the remedies are reasonably in prospect;
- c) the Crown’s willingness to provide redress; and
- d) the Crown’s capacity to provide equivalent and meaningful redress.

For these reasons, the Court was not persuaded that the proposed share sale would materially impair the Crown’s ability to provide adequate redress for proven Treaty breaches.

VI. Following the Supreme Court decision

The Supreme Court’s decision effectively cleared the way for the sale of shares in Mighty River Power, and the other state-owned energy companies.⁸³ But, it is

⁷⁸ *Supreme Court Decision*, above n 4, at [136] and [141].

⁷⁹ At [148].

⁸⁰ *Supreme Court Decision*, above n 4, at [106]-[113]. See for example Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

⁸¹ *Supreme Court Decision*, above n 4, at [136].

⁸² At [149].

⁸³ The Meridian Energy share sale is currently in progress and expected to be completed by November: see above n 30 and 31. The Government’s partial asset sale policy will, however, be subject to a Citizens’ Initiated Referendum (promoted by the Labour Party and Green Party) on the question: “Do you support the Government selling up to 49 per cent of Meridian Energy, Mighty River Power, Genesis Power, Solid Energy and Air New Zealand?”. The referendum will take place between the 22 November and 13 December 2013: see Adam Bennett, “Govt sets date for asset sale referendum” *The New Zealand Herald* (Online ed, New Zealand, 30 September 2013). For further information see < www.elections.org.nz>. Note that the outcome of a Citizens’ Initiated Referendum is not binding on the

important to note that it did so on the basis of the Crown's undertakings that Māori proprietary rights to freshwater would be addressed, and that the share sale would not prejudice the redress process.⁸⁴ The question of how Māori rights can be recognised and redressed therefore remains a live issue. It is this question that the following chapters of this dissertation will explore.

Government, but is indicative of public opinion and may generate political obstacles for the Government's policy.

⁸⁴ The New Zealand Māori Council stated that the Supreme Court's decision means that the Government can no longer ignore Māori water rights. It is "an ongoing chess match where the position on the board has changed": New Zealand Māori Council "Water Claim Statement by the New Zealand Māori Council & the Claimant Management Group" (28 February 2013) *Te Kaunihera Māori o Aotearoa: New Zealand Māori Council* <www.māoricouncil.com>.

CHAPTER TWO: THE POTENTIAL TO RECOGNISE MĀORI OWNERSHIP OF FRESHWATER IN AOTEAROA NEW ZEALAND

While the high profile court action in 2012-2013 has reinvigorated debate over Māori water rights, it has certainly not resolved the central conflict between Māori and the Crown: can freshwater be owned in Aotearoa New Zealand, and if so, by whom? The Waitangi Tribunal has clearly supported the potential for Māori ownership of particular water bodies, but the Supreme Court did not need to consider the issue and it has not otherwise come before the courts.⁸⁵ It is apparent, however, from this recent and divisive legal battle that Māori proprietary rights to water must be addressed before real reconciliation between Treaty partners can be achieved. So, what is the next step? How can Māori obtain recognition of proprietary rights to freshwater today? As the Crown refuses to contemplate Māori ownership of water in Treaty settlements, relying on the common law presumption that water cannot be owned, and the RMA has continually proved a dead end for pursuing recognition of ownership rights, the solution for Māori to seek proprietary redress for freshwater claims may rest on the common law doctrine of native title.⁸⁶

The overall focus of this chapter is on the potential for a court to recognise Māori ownership of freshwater under the common law doctrine of native title. The chapter first provides a brief overview of the doctrine of native title, and then considers its application to freshwater. Here, the discussion is divided into four issues that a court would likely address in considering any such claim:⁸⁷ 1) does native title apply to freshwater?; 2) does native title trump the common law doctrine that water is a public good?; 3) do Māori have a recognised customary interest in the water body?; and 4) has native title to freshwater been extinguished by statute? The final part of the chapter offers some conclusions as to how a court might determine ownership claims to freshwater in the current legal and political climate.

⁸⁵ The Supreme Court decision was limited to deciding whether the partial sale of Mighty River Power would be inconsistent with the principles of the Treaty of Waitangi. The Court was not required to consider the nature or existence of Māori customary (or Treaty) rights.

⁸⁶ For an example of the RMA position see *Norris v Northland Regional Council*, above n 13.

⁸⁷ These criteria are based on work by Jacinta Ruru: see Jacinta Ruru, “Property Rights and Māori: A right to own a river?” in Klaus Bosselmann and Vernan Tava (eds) *Water Rights and Sustainability* (New Zealand Centre for Environmental Law Monograph Series: Volume 3, Auckland, 2011) 51-76, at 62-63. See also Ruru *The Legal Voice of Māori in Freshwater Governance. A Literature Review* (Landcare Research, Lincoln, 2009), above n 12, at 80.

VII. The common law doctrine of aboriginal title⁸⁸

Māori have the option to advance claims in the High Court by applying for a declaration that customary title to freshwater exists under the common law doctrine of native title.⁸⁹ This doctrine expresses the rule that, following the Crown's acquisition of sovereignty, the pre-existing rights of Indigenous Peoples continues as a recognised legal interest until such time as they are lawfully extinguished.⁹⁰ In *Te Runanga o Te Ika Whenua Inc Society v Attorney General (Te Ika Whenua)*,⁹¹ Cooke P explained the doctrine as follows:⁹²

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of 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.

The doctrine of native title is now well established in New Zealand, despite being historically absent from our legal system for over a century.⁹³ In 2003, it was

⁸⁸ In New Zealand, the expressions 'aboriginal title' and 'Māori customary title' are used interchangeably: *Te Runanga o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20 [*Te Ika Whenua*] at 23 (CA) Cooke P for the Court. The terms 'native' or 'indigenous' title are also used.

⁸⁹ Unlike the Treaty of Waitangi (which can only be enforced in the ordinary courts where it has been specifically incorporated by legislation), the doctrine of native title is part of the common law and is therefore justiciable in the ordinary courts.

⁹⁰ *R v Symonds* (1847) NZPCC 387. Native title can be lawfully extinguished through voluntary cession, fair purchase or legislation. See Paul G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York, 2011); Mark B. Schroder, "On the Crest of a Wave: Indigenous Title and Claims to the Water Resource" (2004) 8 New Zealand Journal of Environmental Law 1 at 28-29.

⁹¹ *Te Ika Whenua*, above n 88.

⁹² At 23-24.

⁹³ The doctrine of native title was accepted in early colonial cases: in *R v Symonds* (1847) NZPCC 387, Chapman J affirmed that native title is entitled to be respected and that it cannot be extinguished (at least in times of peace) otherwise than by free consent of the natives; see also *Re London and Whitaker Claims Act 1871* (1871) 2 NZCA. However, in the infamous case of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS (SC) 72 [*Wi Parata*], Prendergast J declared that Māori customary law does not exist in New Zealand; there were neither laws nor rights in property existing before 1840. His Honour also declared the Treaty of Waitangi to be a "simple nullity" on the basis that Māori were primitive barbarians and thus incapable of ceding sovereignty. Despite being rejected by the Privy Council in *Nireaha Tamiki v Baker* [1901] NZPCC 371, *Wi Parata* continued to influence New Zealand law: see in particular *In Re Ninety Mile Beach* [1963] NZLR 461. In 1986, the doctrine of native title was again recognised in New Zealand in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 in relation to non-territorial fishing rights. *Wi Parata* was explicitly overturned by the Court of Appeal in *Attorney-General v Ngati Apa* [2003] 2 NZLR 643 [*Ngati Apa*]. For a summary of

reintroduced without qualification by the Court of Appeal in *Attorney-General v Ngati Apa (Ngati Apa)*.⁹⁴ The Court reaffirmed that: “when the common law of England came to New Zealand, its arrival did not extinguish Māori customary title ... it must be lawfully extinguished before it can be regarded as ceasing to exist”.⁹⁵ Thus, if Māori can establish customary title to freshwater, such title remains today to the extent that it has not been extinguished by statute.

VIII. Applying the common law doctrine of native title test to freshwater

The question of whether native title applies to freshwater has not yet come before the courts. While there has been strong support from the Waitangi Tribunal that Māori have proprietary rights in freshwater, its consideration of these rights has necessarily been sourced in the Treaty of Waitangi. It is also important to note that Tribunal opinions are not binding in the courts.⁹⁶ Nevertheless, the Tribunals’ articulation of Māori water rights, particularly its consistent rejection of the common law position that water cannot be owned, is likely to be influential in the courts.

The decision in *Ngati Apa* remains the closest indication of the test a New Zealand court would apply to determine native title claims. Ruru states that, using the *Ngati Apa* precedent, a successful claim to freshwater would require: 1) Māori to prove that, according to tikanga, iwi have a recognised customary property interest in a river; and 2) for the Crown to fail to prove that the property right has been clearly and plainly extinguished by legislation. She also identifies two preliminary issues that the Court would need to address before exploring the two-limbed *Ngati Apa* test: is native title applicable to flowing freshwater? And, if so, can native title trump the water specific doctrine of *publici juris* and recognise ownership of water?⁹⁷ The following discussion will address each of these issues in turn.

A. Is native title applicable to flowing freshwater?

Ruru and Schroder both answer this question in the affirmative.⁹⁸ As evidence that the doctrine of native title extends to water, both note Cooke P’s discussion of aboriginal

the history of native title in New Zealand, see McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*, above n 90.

⁹⁴ *Ngati Apa*, above n 93.

⁹⁵ At 693 per Tipping J.

⁹⁶ See *SOE case*, above n 71, at 661; *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641 at 651.

⁹⁷ Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 62-63.

⁹⁸ Schroder, above n 90, at 36; Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 63.

title as rights over “land *and water*” in *Te Ika Whenua*.⁹⁹ Ruru also points out that, in Australia, native title is recognised as encompassing water: the Australian Native Title Act 1993 recognises rights ‘to land or waters’,¹⁰⁰ and the High Court of Australia has recently awarded native title to areas of tidal waters.¹⁰¹ In New Zealand, an observation by Elias CJ that it would be inconsistent to have different property regimes for certain parts of a beach also lends support to an approach inclusive of water.¹⁰²

Schroder further contends that native title is not limited to what can be owned under the English common law, as indigenous rights are *sui generis* in nature, and although they are recognised by the common law, they derive their content from the traditions and customs of the indigenous peoples.¹⁰³ Elias CJ affirmed this proposition in *Ngati Apa*, stating that: “the proper starting point is not with assumptions about the nature of property... but with the facts as to native property.”¹⁰⁴ The Waitangi Tribunal’s freshwater report is likely to be influential on this point, as it clearly explained that Māori tikanga regards water bodies as single and indivisible entities, encompassing the beds, banks *and the water*. Thus, taking the indigenous conception of property as the starting point for what can be owned at common law, it follows that native title does indeed extend to flowing water.

B. Does native title trump the common law doctrine of *publici juris*?

1. The common law position

The Crown heavily relied on the common law position that water cannot be owned in the Waitangi Tribunal hearing. Under the common law, rivers are divided into their separate constituent parts: the bed, the banks and the flowing water.¹⁰⁵ While the bed and the banks of a river can be legally owned, the flowing freshwater is categorised as *publici juris* (public and common to all who have access to it) and incapable of

⁹⁹ *Te Ika Whenua*, above n 88, at 25. Emphasis added. The full quote is reproduced as the text accompanying footnote 15.

¹⁰⁰ Australian Native Title Act 1993 (Cwlth), s 223(1).

¹⁰¹ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 [*Arnhem*]. See discussion of this case in Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 72-73. Note that this decision is discussed further later in this chapter.

¹⁰² Elias CJ stated that: “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 hand to the hapuka grounds ... or reefs”: *Ngati Apa*, above n 93, at [51]. See the reference to this quote in Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 63.

¹⁰³ Schroder, above n 90, at 37.

¹⁰⁴ *Ngati Apa*, above n 93, at [54].

¹⁰⁵ See Morel B.T “Ownership and management of rivers in New Zealand: wither now for Māori interests” (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, New Zealand, 2002) at 2.

being owned by any person.¹⁰⁶ Water can only be owned once it has been appropriated and contained (for example, in a bottle, or tank).¹⁰⁷

In regard to ownership of riverbeds, the common law distinguishes between rivers that are tidal, navigable or neither. In New Zealand, through a combination of statute and common law, the beds of tidal and navigable rivers are deemed to belong to the Crown.¹⁰⁸ Beds of non-tidal, non-navigable rivers, however, are presumed to be vested in the owners of the adjacent land (the riparian owners) up to the centre line of the river under the common law doctrine of *ad medium filum aquae*.¹⁰⁹ Riparian owners have no property in the water of the stream, but are afforded certain rights to take the water for ordinary purposes connected with their land, such as domestic use or watering live stock (though these rights are now regulated by the RMA).¹¹⁰ The application of this doctrine to lakebeds in New Zealand is less clear, and it has been suggested that in most cases their ownership is likely to vest in the Crown.¹¹¹

2. Which common law doctrine would trump?

With the doctrine of native title potentially recognising indigenous ownership of water, and the doctrine of *publici juris* saying that it is not possible to own water, one doctrine must prevail. Ruru argues that the reasoning in *Ngati Apa* indicates that the doctrine of native title would trump.¹¹² There, the Court of Appeal stressed that the English common law only applies in New Zealand to the extent that it is applicable to

¹⁰⁶ William Blackstone states: "...water is a moving, wandering thing, and must of necessity continue common by the law of nature so that I can only have a temporary, transient, usufructuary property therein...": Blackstone, William *Commentaries on the laws of England: in four books: Volume 2* (A. Strahan & W. Woodfall, England, 1791) at 18.

¹⁰⁷ See Office of Treaty Settlements, above n 23, at 111.

¹⁰⁸ The beds of tidal rivers are deemed to belong to the Crown as an extension of the Crown's prerogative rights over the sea: see Ben White "Inland Waterways" in Alan Ward (ed) *Waitangi Tribunal Rangahaua Whānui Series National Overview 2* (GP Publications, Wellington, 1997) at 349. The beds of all 'navigable' rivers were vested in the Crown by s 14 of the Coal Mines Amendment Act 1903, which was re-enacted as s 261 of the Coal Mines Act 1979. Although this Act has been repealed, the rights that the Crown gained to lands and waters under s 261 are preserved by s 354(1) of the RMA. The Supreme Court has recently decided that the test for 'navigability' (being a river of "sufficient width and depth" as set out in s 261) is to be determined at particular points of the river, and is not satisfied by recreational use (for example by kayak) alone: *Paki v Attorney-General* [2012] NZSC 50.

¹⁰⁹ *Ad medium filum aquae* literally means 'to the middle line of the water'. Note that Riparian ownership is only a presumption and can be rebutted: see for example *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA), where the Crown successfully argued that grants of land along the Waikato river did not give rise to riparian rights because it was intended that the river would remain in Crown ownership as a public highway.

¹¹⁰ See *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71.

¹¹¹ Ben White "Inland Waterways: Lakes" *Waitangi Tribunal National Theme Report Q* (Waitangi Tribunal 1998) at 6-7, 294; see also Schroder, above n 90, at 39-41.

¹¹² Ruru "Property Rights and Māori: A right to own a river?", above n 87, at 64-66.

local circumstances. Elias CJ clearly stated that these local circumstances include native title rights.¹¹³

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.

Keith and Anderson JJ also recognised this ‘circumstances qualification’, supporting the position that the New Zealand common law is unique.¹¹⁴ Moreover, as explained by Ruru, the courts have held that native title can only be extinguished by clear and plain legislation. Thus, it would not be qualified merely by an inconsistent doctrine of the common law.¹¹⁵

For its part, the Waitangi Tribunal has consistently rejected the Crown’s reliance on the common law position, instead finding in several reports that rivers are capable of being owned.¹¹⁶ In its 2013 decision, the Supreme Court did not need to decide whether water could be owned in New Zealand. It did, however, note that it was proceeding on the basis that the partial privatisation would not affect any future native title claims, which suggests that such claims are seen as at least possible, in spite of the prevailing common law presumption.

C. Proving iwi have a recognised customary interest in freshwater under tikanga

It has been well established in the Waitangi Tribunal, most recently in its freshwater report, that tikanga is capable of recognising customary property rights in rivers, including the water. Assuming the High Court accepts this view, Māori will then need to prove that they in fact held property rights in the particular water body.¹¹⁷ To date, there has been little consideration by the New Zealand courts of the exact requirements to prove a native title interest. It has simply been stated that the existence and content of aboriginal rights are matters of fact dependent on the evidence in each case.¹¹⁸ The claimants’ twelve point ‘indicia of ownership’, accepted at the Waitangi Tribunal, provides a strong indication of evidence that may

¹¹³ *Ngati Apa*, above n 93, at [86].

¹¹⁴ *Ngati Apa*, above n 93, at [134].

¹¹⁵ Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 65.

¹¹⁶ For a list of these reports see above n 49.

¹¹⁷ For further discussion of how tikanga recognises customary property in water see Ben White “Inland Waterways” above n 111, at 347; Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 66.

¹¹⁸ *Ngati Apa*, above n 93, at [32]; *Te Ika Whenua*, above n 88, at 24. Note also that in *Te Ika Whenua*, Cooke P observed that how indigenous title is decided “...tends to turn, not on the evidence only, but also on the approach of the Court considering the issue”: *Te Ika Whenua*, above n 88, at 24.

be produced to prove customary ownership of water bodies. These include the water body being:¹¹⁹

1. relied upon as a source of food;
2. relied upon as a source of textiles;
3. used for travel or trade;
4. used in rituals central to the spiritual life of hapu;
5. seen as having its own mauri (life force);
6. celebrated or referred to in waiata;
7. celebrated or referred to in whakatauki (Māori proverbs);
8. identified as home to taniwha;
9. identified in whakapapa as having a cosmological connection with the people;
10. under the kaitiakitanga (guardianship) of the people;
11. under the mana or rangatiratanga of the people; and
12. subject to a continued and recognised claim to land or territory in which it is situated, and title has been maintained to ‘some, if not all, of the land on (or below) which the water resource sits.’

While the Waitangi Tribunal was not asked to determine the claims of particular groups in its freshwater inquiry, it expressed that “it is likely that all iwi and hapu in New Zealand would be able to demonstrate some or all” of the above ‘indicia’.¹²⁰ Assuming Māori are able to do so in the particular case, the next question to address is whether Māori water rights have been extinguished by legislation.

D. Have Māori property rights to freshwater been extinguished by statute?

The Court in *Ngati Apa* reaffirmed that the test for determining whether native title has been extinguished by legislation is that of clear and plain intention. Keith and Anderson JJ emphasised that “...the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.”¹²¹ New Zealand courts have long endorsed the principle that customary rights cannot be extinguished ‘by a side wind’, and that where the effect of a statute is unclear, there is a presumption that the aboriginal title has survived.¹²²

There is no statute in New Zealand that clearly and plainly extinguishes native title to freshwater. Though, it is likely that the RMA – being the statute that comes the

¹¹⁹ *Freshwater Report*, above n 1, at 32 and 51-61.

¹²⁰ At 32, 51-61.

¹²¹ *Ngati Apa*, above n 93, at [148] per Keith and Anderson JJ.

¹²² In *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363 Blanchard J stated: “It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end ... customary title does not disappear by a side wind. Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived. See also *Te Weehi Regional Fisheries Officer* [1986] 1 NZLR 357 at 691-692, where Williamson J held that customary rights “may not be extinguished except by way of specific legislation that clearly and plainly takes away the right.”

closest to doing so – would be relied on in advancing such a claim. In regard to an argument that the RMA extinguishes customary rights through its regulation of the use of water, the Court of Appeal in *Ngati Apa* said of the RMA:¹²³

The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

As several cases have acknowledged that the regulation of customary rights is different to extinguishment of those rights, a claim based on the scheme of the RMA itself would likely fail.¹²⁴ However, an argument is still available as to the effect of its predecessor: the Water and Soil Conservation Act 1967. Section 354 of the RMA specifically preserves any right, interest or title to any land or water that the Crown acquired under s 21 of the Water and Soil Conservation Act before it was repealed. Section 21(1) states:¹²⁵

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 use natural water, is hereby *vested in the Crown* subject to the provisions of this Act.

While this section did not explicitly vest ownership of water in the Crown, is vesting the *sole* right to use water in the Crown enough to override Māori customary property rights? It is contended here that this provision is not sufficiently explicit to satisfy the test of a clear and plain intention to extinguish all native title rights. Unlike other statutes that have been deemed to vest ownership in the Crown, the Water and Soil Conservation Act is concerned only with use rights and is silent on ownership.¹²⁶

The Crown is unlikely to have contemplated extinguishing Māori customary property rights in enacting the Water and Soil Conservation Act, because native title was not even acknowledged in New Zealand in 1967.¹²⁷ Interestingly, the Crown's own submission to the Waitangi Tribunal on 'extinguishment' did not seek to rely on s 21 of the Water and Soil Conservation Act and accepted that the RMA is unlikely to

¹²³ *Ngati Apa*, above n 93, at [76].

¹²⁴ See for example *Yanner v Eaton* (1999) 201 CLR 351; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 [Akiba].

¹²⁵ Water and Soil Conservation Act 1967, s 21(1). Emphasis added.

¹²⁶ Contrast s 14 of the Coal Mines Amendment Act 1903 (replaced by s 261 of the Coal Mines Act 1979), which provides that the bed of navigable rivers "shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the *absolute property* of the Crown" (emphasis added). Note also that even this more strongly worded provision has been subject to differing views about whether it actually extinguishes native title and vests title in the Crown, see particularly *Te Ika Whenua*, above n 88, at 24. For a brief discussion of this debate see Rachel Kennard "The Potential for Māori Customary Claims to Freshwater" (LLB (Hons) Dissertation, University of Otago, Dunedin, New Zealand, 2006) at 15.

¹²⁷ For a brief history of native title in New Zealand see above n 93.

have extinguished any common law customary rights.¹²⁸ Assuming a court agreed that native title to freshwater has not been extinguished, whether or not it would recognise ownership rights remains to be considered.¹²⁹

IX. The potential for a New Zealand court to recognise ownership of freshwater

New Zealand courts have endorsed the Canadian position that native title falls along a spectrum. In *Te Ika Whenua*, Cooke P stated that:¹³⁰

At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.

Accordingly, even if Māori are able to successfully establish native title to freshwater, the question remains as to whether a court would be willing to award ownership, or only some lesser right, over the water body. And, if ownership were recognised, would it be exclusive? In this area, decisions of the High Court of Australia provide guidance on possible approaches that a court may take. In *Commonwealth v Yarmirr*¹³¹ the majority advocated a ‘bundle of rights’ approach, whereby the claimants were awarded non-exclusive rights to take from and access the area of sea and seabed.¹³² In dissent, Kirby J posited the solution of ‘qualified exclusivity’. On this approach, native title is recognised as ownership, but is subject to public rights such as navigation, fishing and passage.¹³³ In 2008, the High Court of Australia in *Arnhem* went beyond either approach, and accepted exclusive indigenous ownership of tidal waters at Blue Mud Bay.¹³⁴ While the persuasiveness of *Arnhem* in New Zealand would be limited to situations where Māori already have ownership of the riverbed, it

¹²⁸ Crown Closing Submissions for Stage One *The National Freshwater and Geothermal Resources Inquiry: Wai 2358* (Crown Law, Wellington, 20 July 2012) at 15-16. Note that the Waitangi Tribunal did not need to address the issue of extinguishment in stage one of its freshwater inquiry, as it was only considering the nature of Māori water rights at 1840, not today: see *Freshwater Report*, above n 1, at 76.

¹²⁹ Note that if a court were to determine that native title to freshwater has been extinguished by legislation, Māori could still bring a claim to the Waitangi Tribunal on the basis that the extinguishment was contrary to principles of the Treaty of Waitangi: s 6 Treaty of Waitangi Act 1975.

¹³⁰ *Te Ika Whenua*, above n 88, at 24.

Cooke P for the Court.

¹³¹ *Commonwealth v Yarmirr* (2001) 208 CLR 1 [*Yarmirr*]. For a discussion of this case see Ruru “Property Rights and Māori: A right to own a river?”, above n 87, 68-72.

¹³² *Yarmirr*, above n 131, at 31-33. Two Australian Federal Court cases have since followed this non-exclusive approach: *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298; and *Gumana v Northern Territory* (2005) 141 FCR 457.

¹³³ *Yarmirr*, above n 131, at 100-101.

¹³⁴ *Arnhem*, above n 101.

is highly significant in demonstrating that exclusive title to water can be awarded by a court.¹³⁵

In the current political and legal climate, predicting how a New Zealand court would determine ownership claims to freshwater is certainly not straightforward. The 2012-2013 litigation has undoubtedly alerted the judiciary to the need to resolve Māori freshwater property claims. But, it has also accentuated the complexity and public sensitivity surrounding issues of ownership. A court would therefore be very hesitant to award exclusive ownership of water bodies where public use and access would be affected.¹³⁶ However, a court may be willing to adopt the ‘qualified exclusivity’ approach, which would allow for public rights, while still providing recognition of Māori ownership. Ruru has argued that this solution would be more consistent with the observations in *Ngati Apa* than a bundle of rights approach.¹³⁷ It would also be consistent with the findings of the Waitangi Tribunal that Māori have residual ownership rights in freshwater, subject to a degree of shared use with the public.¹³⁸

Previous water-related Treaty settlements that have used legislative provisions to preserve public rights of access to waters following the vesting of the riverbeds or lakebeds in iwi ownership are illustrative of how this approach could be implemented in practice.¹³⁹ Public interests could be similarly catered for in any settlement that vested water bodies in Māori ownership.

X. Conclusion

Crown concessions during the 2012-2013 litigation have established an expectation that Māori rights to freshwater will be addressed. However, as long as the Crown maintains its policy that Treaty settlements do not provide for Māori ownership of water bodies, negotiations with the Crown are unlikely to produce the proprietary redress that Māori are seeking. Thus, Māori may need to turn to the courts, as judicial recognition of Māori ownership may prove crucial to securing a stronger position at the negotiating table. This chapter has demonstrated that, although a New Zealand court would be hesitant to award exclusive property rights to water bodies, there is a high chance that a ‘qualified ownership’ solution would be accepted. The common law doctrine of native title therefore provides a potential successful channel for Māori to pursue and achieve recognition of their proprietary rights in freshwater. In addition,

¹³⁵ Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 73.

¹³⁶ Noting similar concerns, Dr Paul McHugh has argued that if a court had been required to determine native title rights in regard to the foreshore and seabed, it would likely have followed the middle-ground ‘bundle of rights’ position. The Waitangi Tribunal agreed, stating that it would take a ‘bold’ court to go beyond that level of recognition: Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, (Wai 1071, 2004) at 60.

¹³⁷ Ruru “Property Rights and Māori: A right to own a river?”, above n 87, at 74 -75.

¹³⁸ See above n 51.

¹³⁹ See for example Te Arawa Lakes Settlement Act 2006, ss 31-33.

recognition of ownership rights would provide a stronger platform for Māori commercial claims to freshwater, which are discussed in the following chapter.

CHAPTER THREE: A MĀORI RIGHT OF DEVELOPMENT TO EXERCISE COMMERCIAL PROPERTY RIGHTS TO FRESHWATER

A crucial issue regarding the content of Māori Treaty and aboriginal rights to freshwater is whether those rights are limited to traditional uses of the resource or whether there is a right to modern forms of development, including the right to use new technologies to exploit the water resource, and to derive an economic benefit from its use. The 2012-2013 litigation contextualised this issue in regard to Māori rights to freshwater, highlighting the large commercial profit made by state-owned energy companies from the use of water. To date, the Crown has refused to negotiate for Māori participation in those profits, and it continues to take the position that Treaty Settlements do not provide for a Māori right to development in water or other natural resources.¹⁴⁰ This chapter therefore explores the potential for Māori commercial rights in freshwater to be recognised in the courts.

The first part of the chapter reviews the emergence of a right to development at international law. The second part turns to examine how the right has been treated in New Zealand by both the Waitangi Tribunal and the courts, including a discussion of the Tribunal's recent application of the Treaty right of development to freshwater. As Treaty rights are not always enforceable in the courts, the overall aim of this chapter is to predict whether a court would recognise commercial development rights as a component of native title to freshwater under the common law doctrine of aboriginal title. This question is addressed in the final part of the chapter.

XI. The Right to Development: emergence at international law

A right to modern development is recognised at international law as a universal human right,¹⁴¹ though in recent years it has also been applied specifically to Indigenous peoples.¹⁴² The 2007 United Nations Declaration on the Rights of

¹⁴⁰ Office of Treaty Settlement, above n 23, at 111.

¹⁴¹ Article 1 (1) of the United Nations Declaration on the Right to Development GA Res 41/128, A/RES/41/128 (1986) provides that: "The right to development is an inalienable human right by virtue of which every human person and *all peoples* are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised." The Declaration was adopted on 4 December 1986 with the support of New Zealand.

¹⁴² An indigenous right to development was asserted in the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991.

Indigenous Peoples (UNDRIP),¹⁴³ which the New Zealand Government affirmed in April 2010,¹⁴⁴ expressly endorses development rights, including an indigenous right to own and develop resources possessed under traditional ownership¹⁴⁵ and to engage freely in all traditional and other economic activities.¹⁴⁶ Furthermore, Article 28(1) provides:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Significantly, the Supreme Court has acknowledged that this Declaration lends support to Māori claims for commercial redress under the right to development.¹⁴⁷ The UNDRIP is not legally binding at international law, but it does establish important base standards for the treatment of indigenous peoples by those states that have affirmed it.

XII. Recognition of a Māori right to development in New Zealand

Mirroring the recognition of development rights at international law, over the last three decades there has been increasing acceptance of a right to development for Māori in New Zealand.¹⁴⁸ While it is argued below that both Māori Treaty *and* aboriginal rights may include a right to development, the New Zealand jurisprudence to date has focused on the right as sourced in the Treaty of Waitangi. Acceptance of this Treaty right to development has emerged both in court decisions and Waitangi Tribunal reports, albeit to varying degrees.

¹⁴³ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/296, A/RES61/296 (2007) [UNDRIP]. The Declaration was adopted on 13 September 2007, though New Zealand was one of only four states to vote against it, along with Australia, Canada and the United States.

¹⁴⁴ See John Key “National Govt to support UN rights declaration” (press release, 20 April 2010).

¹⁴⁵ UNDRIP, art 26(2) provides: “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of their traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”

¹⁴⁶ UNDRIP, art 20(1) provides that: “Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”

¹⁴⁷ *Supreme Court Decision*, above n 4, at [92].

¹⁴⁸ For a discussion on how the international right to development has influenced New Zealand jurisprudence, see Catherine J Irons Magallanes “International Human Rights and their Impact on Domestic Law on Indigenous Peoples’ Rights in Australia, Canada, and New Zealand” in Paul Havemann (ed) *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (Oxford University Press, Auckland, 1999) at 262-264.

In New Zealand, the right to development has been conceptualised as encompassing three different levels:¹⁴⁹

- (1) the right to develop resources to which Māori had customary and traditional uses prior to the 1840 Treaty;
- (2) the right to develop resources not known about or used in a traditional manner at 1840, under the principle of partnership with the Crown; and
- (3) the right of Māori to develop their culture, language and social and economic status using whatever means are available.

The strongest and most recent affirmations of the right to development have come from the Waitangi Tribunal. However, Tribunal opinions are not binding law, although they are given “much weight” in the courts.¹⁵⁰ With that in mind, this part now turns to examine how the Waitangi Tribunal and the courts have treated a Māori right to commercially develop resources. The latter part of the Waitangi Tribunal discussion focuses on the commercial dimension of Māori freshwater rights, as considered in the recent freshwater inquiry.

A. The Waitangi Tribunal

The Waitangi Tribunal has acknowledged that the Treaty of Waitangi was “not intended to merely fossilise a status quo, but to provide a direction for future growth and development.”¹⁵¹ The 1998 *Muriwhenua Fishing claim* Tribunal determined that Māori fishing rights are not confined to technologies used at 1840, stating “access to new technology was part of the quid pro quo for settlement”.¹⁵² The Treaty provided Māori with the option to “walk in two worlds”,¹⁵³ and in accordance with the expectation of mutual benefit from the Treaty, both parties have the right to adopt modern techniques and methods.¹⁵⁴ The *Ngai Tahu Sea Fisheries* Tribunal agreed that

¹⁴⁹ These three levels were articulated in Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai 776, 1999) [*Radio Spectrum Report*] at 30. For a discussion of recognition of each level of the Right to Development in New Zealand see Meredith Gibbs, “The Right to Development and Indigenous Peoples: Lessons from New Zealand” (2005) 33 *World Development* 1365; and Edward Greig, “The Māori Right to Development and New Forms of Property” (LLB (Hons) Dissertation, University of Otago, Dunedin, New Zealand, 2010).

¹⁵⁰ *SOE case*, above n 71, at 661-662 per Cooke P.

¹⁵¹ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motonui-Waitara claim* (Wai 6, 1989) at 52. Note that this report was first published in 1983.

¹⁵² Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1998) [*Muriwhenua Fishing Report 1988*] at 11.6.5. This report was the first to use the specific ‘right to development’ terminology, which was likely influenced by the adoption of the 1896 UN Declaration on the Right to Development.

¹⁵³ *Muriwhenua Fishing Report*, above n 152, at 10.5.4.

¹⁵⁴ At 10.5.4. The choice to ‘walk in two worlds’ has been described as the ‘principle of options’. This principle acknowledges that Māori have the right to decide and manage the course of their own

a right to development is inherent in the Treaty, saying in 1992: it is “by now a truism that Māori Treaty rights are not frozen as at 1840”.¹⁵⁵ It further held that the Crown’s duty of active protection extends to interests acquired under the right to development.¹⁵⁶

The Waitangi Tribunal has reaffirmed a Māori right to commercial development in several later decisions. For example, the *Te Arawa Geothermal* Tribunal found that the claimants’ interest in geothermal resources is not “confined by traditional or pre-Treaty needs” and includes a right to develop the resource for economic benefit.¹⁵⁷ More recently, in relation marine farming and aquaculture, the *Ahu Moana* Tribunal stated that the commercial development of resources does not depend on proof of commercial use prior to the Treaty.¹⁵⁸ In its *Petroleum report 2003*, the Tribunal found that even though petroleum was not extensively used in traditional times, there is a development right to exploit the resource in new ways and for new purposes not contemplated in 1840.¹⁵⁹

The Tribunal has also shown some support for the second and third level of the right to development. In the *Radio Spectrum Report*, the Tribunal expressed the view that “the Treaty as a whole provides support for the Māori right to develop as a people” (the third level).¹⁶⁰ Although the Tribunal’s final conclusion was based on the first level right,¹⁶¹ it also accepted that Māori have a right to develop new resources that were not known in 1840 in partnership with the Crown (the second level).¹⁶² Similarly, in its 2011 Wai 262 report, the Tribunal rejected the Crown’s argument that Māori have no right to any control over genetic and biological resources in taonga species on the basis that genetic resources were not known in 1840.¹⁶³ It found that the Treaty principles of development entitle Māori to a reasonable degree of control over these new resources.¹⁶⁴

development. The Treaty provided Māori with a choice to develop along customary or western lines, as well as a third option to ‘walk in two worlds’. It has been recognised in several Tribunal reports as an integral part of the right to development.

¹⁵⁵ Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 253.

¹⁵⁶ At 269-273.

¹⁵⁷ Waitangi Tribunal *Preliminary Report on Te Arawa Representative Geothermal Resource Claims* (Wai 153, 1993) at 41.

¹⁵⁸ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002) at 64.

¹⁵⁹ Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003).

¹⁶⁰ *Radio Spectrum Report*, above n 149, at 30.

¹⁶¹ The Tribunal accepted that the electromagnetic spectrum in its natural state was known to Māori and was a taonga: *Radio Spectrum Report*, above n 149, at 42. This decision supports a wide interpretation of both the right to development and the concept of taonga.

¹⁶² *Radio Spectrum Report*, above n 149, at 51.

¹⁶³ *Wai 262*, above n 46, at 193.

¹⁶⁴ At 194.

B. The Waitangi Tribunal and the commercial dimension of Māori water rights

The Waitangi Tribunal has considered the commercial dimension of Māori property rights to water bodies in several river reports, and most recently in its freshwater inquiry. In this latest inquiry, the claimants argued (and the Tribunal agreed) that the Treaty of Waitangi guaranteed Māori the full use and enjoyment of their property, including the right to develop and profit from it. In breach of the Treaty, the Crown, through a series of legislation, has gained and exercised control over their water bodies without their consent.¹⁶⁵ As a result, they have been deprived of the ability to develop their water bodies for their own purposes and to derive a financial benefit from their exploitation. The claimants sought recognition of their development rights and compensation for the commercial use of their properties by others. They suggested that shares in the power generating companies could be a practical form of commercial redress.

The Crown accepted the existence of the right to development, but argued that it did not apply in this case.¹⁶⁶

If the claimants are saying iwi-Māori have a proprietary (or other) right to water and this becomes a right to ownership of energy companies based on the notion of a development right, that is an incorrect stretching of the concept of development.

In advancing this position, the Crown relied on Cooke P's statements in *Te Ika Whenua* that neither Treaty nor aboriginal rights include a right to generate electricity.¹⁶⁷ The Crown has expressed a similar view in its Treaty settlements policy that the "benefits of hydro-electricity generation belong to all New Zealanders", thus it "does not provide compensation for any past interference with rivers for these purposes."¹⁶⁸ In regard to Cooke P's statements, the Tribunal referred to the subsequent *Te Ika Whenua Rivers report*, which stated:¹⁶⁹

We do not disagree with the comment of the Court of Appeal that Māori... have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Māori were entitled the full, exclusive possession of their properties, which included their rivers, and as part of that exclusive possession, they were entitled to the full use of their assets and to develop

¹⁶⁵ The legislation referred to included the Water-power Act 1903, the Water and Soil Conservation Act 1967, and the Resource Management Act 1991.

¹⁶⁶ *Freshwater Report* above n 1, at 138.

¹⁶⁷ *Te Ika Whenua*, above n 88, at 24. Note that Cooke P's full quote is reproduced as the text accompanying footnote 175 below.

¹⁶⁸ Office of Treaty Settlements, above n 23, at 111.

¹⁶⁹ *Te Ika Whenua Rivers Report*, above n 49, at 128–129. Emphasis added. This quote is cited and discussed in *Freshwater Report*, above n 1, at 139.

them to their full extent. This right of development would surely include a right to generate electricity.

The Tribunal agreed with the *Te Ika Whenua rivers* report. It concluded that the legal landscape has changed considerably since Cooke P's statements in 1994, and it is now "trite law" that indigenous people have the right to use their property to develop both culturally and economically.¹⁷⁰ In agreement with the *Whanganui river report*, the Tribunal stressed that it is not a racially based privilege that Māori should profit from their properties; it is a right possessed by all New Zealand property owners.¹⁷¹ The Tribunal agreed with the *Central North Island* and *Te Ika Whenua River* Tribunals that the use of Māori taonga to generate electricity requires Māori to be paid. It is 'absolutely fundamental' to the Treaty guarantee of property that Māori be paid or compensated for the commercial use of their interest in water bodies by others.¹⁷²

The Tribunal found that the Crown has a Treaty duty to actively protect Māori property rights, including the development right, to the fullest extent reasonably practicable. Where appropriate, recognition of Māori water rights must include a right for the property holders to obtain an economic benefit from their water bodies. Accordingly, it found that the Crown's preferred 'management' solutions fall short of the Treaty guarantees because they fail to provide for Māori commercial or development rights in their water bodies.¹⁷³ Having detailed the Tribunals' strong endorsement of Māori commercial rights, the following section turns to look at how the courts have treated the right to development.

C. New Zealand courts

The right to development has come before the courts on only a few occasions. In *Te Ika Whenua*, a Māori group challenged the Government's privatisation of two dams situated on rivers that they had outstanding property claims over at the Waitangi Tribunal. The claim required the Court of Appeal to consider whether the appellants had a right to generate electricity.¹⁷⁴ The Court held:¹⁷⁵

¹⁷⁰ *Freshwater Report*, above n 1, at 139.

¹⁷¹ See *Whanganui River Report*, above n 49, at 338.

¹⁷² *Freshwater Report*, above n 1, at 137.

¹⁷³ At 122-123. Note that the possible options for Treaty-compliant recognition of Māori property and commercial interests in freshwater will be explored in Chapter four of this dissertation.

¹⁷⁴ Note that it was not contended that the Māori groups had any property rights in the dam or that the dams were taonga, thus the transfer could only be prevented on the basis that they had a right to generate electricity from the dams.

¹⁷⁵ *Te Ika Whenua*, above n 88, at 24. The Court noted that there is no authority from any jurisdiction that aboriginal rights extend to the right to generate electricity. For a critical discussion of this decision see Robert Joseph "Frozen Rights?: The Right to Develop Māori Treaty and Aboriginal Rights" (2011) 19 Waikato Law Review: Taumauri 117.

No matter how liberally Māori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including a right to generate electricity. Such a suggestion would have been out of all contemplation of the Māori chiefs and Hobson in 1840.

The Court of Appeal reiterated the view that Treaty rights are limited to those things contemplated at 1840 in *Ngai Tahu Māori Trust Board v Director-General of Conservation*.¹⁷⁶ Ngai Tahu claimed a Treaty right to veto the Director of Conservation's issuing of permits that would allow the establishment of competing commercial whale-watching businesses. The Court accepted that "a right to development of indigenous rights is indeed coming to be recognised in international jurisprudence".¹⁷⁷ But, it found that the Treaty right of development did not extend to commercial whale watching because it was "remote from anything in fact contemplated by the original parties to the Treaty."¹⁷⁸ Despite rejecting the veto claim, the Court went on to apply a limited development right.¹⁷⁹

Although a commercial whale watching business is not taonga or the enjoyment of fisheries within the contemplation of the Treaty, certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant.

Accordingly, the Court held that Ngai Tahu had a special interest and was entitled to a reasonable degree of preference, which may include a period of protection sufficient to justify its commercial expenditure.¹⁸⁰ The Court emphasised, however, that its decision was based on unique facts and would be of limited precedential value.¹⁸¹ In *McRitchie v Taranaki Fish and Game Council (McRitchie)*, the Court of Appeal rejected a Māori right to fish for newly introduced species, but as the case turned on a specific legislative code, the final outcome is similarly limited to that context.¹⁸²

Although not using the language of a 'right to development', several cases have acknowledged Māori commercial entitlements to resources. In *Tainui Māori Trust Board v Attorney General*, the Court of Appeal considered Māori interests in the coal industry.¹⁸³ The Court accepted that coal could be a form of taonga, and Cooke P made a 'personal suggestion' the tribe would be entitled to a "substantial proportion" of the resource in any settlement.¹⁸⁴ The courts have also expressed support for Māori

¹⁷⁶ *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 [Ngai Tahu Māori Trust Board].

¹⁷⁷ At 560. The Court added that a right to development would not necessarily be exclusive of other persons or other interests.

¹⁷⁸ At 560. Note that Māori did not claim to have any property in the whales, rather the Treaty right claimed was an existing property right of control over access to resources of the sea.

¹⁷⁹ At 560.

¹⁸⁰ At 560.

¹⁸¹ At 562.

¹⁸² *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 [McRitchie].

¹⁸³ *Tainui Māori Trust Board v Attorney General* [1989] 2 NZLR 513.

¹⁸⁴ At 529.

claims to commercial fishing and timber rights, which ultimately led to large scale Treaty settlements over those resources.¹⁸⁵ The Supreme Court's 2013 decision acknowledged the Treaty right to development, stating that the UNDRIP development rights do not add significantly to the principles already recognised under the Treaty. The UNDRIP does, however, provide support for interpreting those Treaty principles broadly.¹⁸⁶

D. Summary

The Waitangi Tribunal has consistently endorsed and applied a Māori Treaty right to develop and commercially use properties and taonga known to them prior to 1840 (first level), including for uses not foreseen in 1840. This right has been clearly applied to freshwater by the Tribunal in several river reports, and in its recent freshwater inquiry. The Tribunal has also supported a right for Māori to share in newly discovered resources (second level) and to develop as a people (third level). The Court of Appeal and Supreme Court have both accepted the existence of the right to development, and the Court of Appeal has acknowledged Māori commercial rights to several natural resources. However, in direct contrast to the Waitangi Tribunal, the Court of Appeal has thus far limited the right of development to uses of the resource contemplated by the Treaty parties in 1840.

The Waitangi Tribunal's application of the right of development has necessarily been sourced in the Treaty of Waitangi,¹⁸⁷ which is only enforceable in domestic law where the Treaty is incorporated by statute.¹⁸⁸ The New Zealand courts have also tended to focus on a Treaty right of development, rather than any such right arising as part of customary title. The final part of this chapter therefore considers whether native title to freshwater would also include a right to commercial development, with the result that Māori could enforce those rights in the ordinary courts.

XIII. Would a Court recognise commercial development rights as a component of aboriginal title to freshwater under the common law?

The distinction between Māori customary and Treaty rights may prove important to the enforcement of an indigenous right to development. However, New Zealand

¹⁸⁵ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (commonly referred to as the 'Sealord deal'); Central North Island Forests Land Collective Settlement Act 2008 (commonly referred to as the 'Treelords deal'). For a discussion of the commercial fisheries settlement see Stephanie Milroy "The Fisheries Reports" in Janine Hayward and Nicola R Wheen *The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi*, above n 32, at 84-96.

¹⁸⁶ *Supreme Court Decision*, above n 4, at [92].

¹⁸⁷ The Waitangi Tribunal's jurisdiction is based on hearing claims sourced in breaches of the principles of the Treaty of Waitangi: s 6 Treaty of Waitangi Act 1975.

¹⁸⁸ See above n 5.

courts have been reluctant to draw such a distinction and it is often unclear whether the material conclusions were based on common law rights, Treaty rights, or both.¹⁸⁹ The trend has been for the judiciary to treat the rights as one and the same, based on the view that the Treaty is an affirmation of customary rights. In *Te Runanga o Muriwhenua*, Cooke P commented that for practical purposes there is no real difference between customary and Treaty rights.¹⁹⁰ However, the position is not always that simple. Clarifying the source of development rights is complicated by the courts' frequent reference to the need for the Treaty to be given meaningful contemporary application, be interpreted broadly, and adapt to changing circumstances.¹⁹¹ This reliance on the Treaty as the justification for evolving rights raises the question of whether the courts view development rights as wholly attributable to the Treaty, or whether such rights also flow from customary title.

Claire Charters has argued that customary rights are not an appropriate source of a right to development because their enforcement would require Māori to prove that they were acting in accordance with traditional tikanga, which would not often apply to modern activities.¹⁹² According to Charters, aboriginal rights are “somewhat fossilised in that they are defined by customary law.”¹⁹³ Becroft J has observed that aboriginal rights have been construed more strictly than Treaty rights.¹⁹⁴ His Honour commented that aboriginal rights are “arguably more ‘frozen in time’ than Treaty rights which are ‘living’ and take into account development and change since the Treaty was signed.”¹⁹⁵ Waitangi Tribunal statements that the Treaty was “more than an affirmation of existing rights” further suggest that the scope of Treaty rights may be wider than customary rights.¹⁹⁶

That being said, there remains strong support for the view that customary rights are also capable of developing. In *McRitchie*, the Court of Appeal acknowledged that there was “considerable force” in the argument a customary fishing right could be proved to be a right to fish for food, not confined to indigenous species.¹⁹⁷ Although the Court was not required to determine the issue, its statements indicate a wide conception of the original customary interest. Simon Young has argued that, despite being clothed in the language of the Treaty, Māori commercial entitlements to coal, timber and fisheries, have been understood as being broadly sourced in customary

¹⁸⁹ For example, the exact source of Māori commercial entitlements to fisheries, coal and timber was not explicitly acknowledged by the court. For a discussion of the source of rights in these cases, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) at 178-200.

¹⁹⁰ *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 96, at 655.

¹⁹¹ See for example the *SOE case*, above n 71.

¹⁹² Claire Charters, “Developing an Indigenous People’s Right to Development” (LLB (Hons) Dissertation, University of Otago, 1997).

¹⁹³ At 34.

¹⁹⁴ *Taranaki Fish and Game Council v McRitchie*, DC Wanganui, ORN: 5083006813-14, unreported, 27 February 1997, per Becroft J at 26 (since overturned).

¹⁹⁵ At 26.

¹⁹⁶ *Report of the Waitangi Tribunal on the Motonui-Waitara claim*, above n 151, at 10.3.

¹⁹⁷ *McRitchie v Taranaki Fish and Game Council*, above n 182, at 147.

interests.¹⁹⁸ Interestingly, Young has observed that limitations on the content of Māori rights by the Court of Appeal have been based on references to what was contemplated by the parties to the Treaty in 1840. In this sense, the Treaty can be viewed as in fact constraining the original broad customary interest.¹⁹⁹

Significant recent developments in Australia regarding the commercial dimension of native title may provide guidance for a New Zealand approach. In August of this year, the High Court of Australia unanimously upheld native title rights to commercial fishing in an area of the Torres Strait, in a decision relating to the largest native title claim to sea country in Australia.²⁰⁰ The High Court's clear acceptance that native title rights could be exercised for commercial purposes, such as the taking of fish for sale or trade, will be a highly persuasive argument in New Zealand courts that native title to freshwater similarly encompasses commercial rights.

Looking further abroad, both Canada and the United States have acknowledged that the content of indigenous title is able to evolve. The 'frozen rights' approach has long been rejected in the United States, with several early cases finding that Indian title extends to the commercial exploitation of timber and minerals.²⁰¹ In Canada, the right to development clearly exists. However, the courts have tended to limit the content of rights to the modern 'logical evolution' of a traditional activity. Most of the Canadian development cases have been based on Treaty rights,²⁰² but *R v Sappier* provides an example of an aboriginal right being able to develop into a modern context.²⁰³ In that case, a traditional right to harvest wood to construct temporary shelters was allowed to evolve into a right to harvest wood by modern means and for modern dwellings.

With clear international recognition that aboriginal rights include a right to development, it is likely that a New Zealand court would similarly conclude that native title to freshwater encompasses commercial development rights. Even if New Zealand courts were to follow the stricter Canadian approach, Māori would still have a right to develop traditional activities and resources in a modern way. As Māori traditionally used water resources prior to 1840, and in some cases even charged fees

¹⁹⁸ Young, above n 189, at 186. Note in relation to Māori entitlements to commercial fisheries Cooke P specifically declined to distinguish between the rights: *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 96, at 644, 650, 655.

¹⁹⁹ Young, above n 189, at 182.

²⁰⁰ *Akiba*, above n 124. For a discussion of this case see Butterly, Lauren "Before the High Court. Clear Choices in Murky Waters: Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia" (2013) Sydney Law Review 35 SLR 237.

²⁰¹ See *Johnson v McIntosh* (1823) 21 US (8 Wheaton) 543, 574 per Marshall CJ; *United States v Shoshone Tribe of Indian* (1938) 304 US 111; *United States v Klamath and Moadoc Tribes* (1938) 304 US 119. These cases are cited in Schroder, above n 90, at 20-21. Note that 'Indian title' is the term used for aboriginal title in the United States.

²⁰² See for example: *R v Marshall* [2005] 2 SCR 220; *R v Morris* [2006] 2 SCR 915; *R v Simon* (1985) 2 SCR 387. For a brief overview of these cases see Greig, above n 149, at 30-35.

²⁰³ *R v Sappier* [2006] 2 SCR 686.

for use and access, there is a strong argument that their native title rights to freshwater would be able to evolve into modern commercial rights.²⁰⁴

XIV. Conclusion

The 2012-2013 litigation has contextualised the impact of the discriminatory ‘frozen rights’ approach on Māori in the modern world by drawing attention to the lack of provision for Māori to benefit economically from the use of their waters. As the Crown still refuses to provide for a right of development in Treaty settlements regarding water, the solution for Māori to achieve recognition of their commercial rights may again rest within the judicial system. Although the New Zealand jurisprudence has thus far been focused on a Treaty right of development, this chapter has argued that a court would likely recognise that customary rights are also able to evolve. In applying this right to freshwater, there is conflict between the Waitangi Tribunals’ strong endorsement of commercial water rights and Cooke P’s more limited approach. But, given the change in the legal and political climate since Cooke P’s statements, it is possible that a court would prefer the more current reasoning of the Tribunal. With the Supreme Court recently acknowledging that international law supports Māori claims for commercial redress, I contend that there is real potential for a court to recognise commercial development rights as part of a successful native title claim to freshwater.

²⁰⁴ The interested parties at the Waitangi Tribunal’s freshwater inquiry 2012 offered evidence that Māori traditionally began to control the use of waters as trade routes and even charged fees for the use of water: *Freshwater Report*, above n 1, at 35.

CHAPTER FOUR: OPTIONS FOR COMMERCIAL RECOGNITION AND REDRESS OF MĀORI FRESHWATER RIGHTS

In considering the question of how Māori can seek recognition and redress for their proprietary and commercial rights in freshwater, the previous chapters of this dissertation have examined the potential for those rights to be recognised in the courts. Achieving acknowledgment of Māori water rights is only the first step. The path to redress for Māori further requires solutions for transposing those rights into reality. This chapter therefore shifts focus to explore the possible ways that Māori water rights can be given commercial expression. It takes as its starting point and builds on four commercial redress options advanced in the Waitangi Tribunal's freshwater inquiry: transferring shares in power-generating companies to Māori; introducing a royalty regime for water use; joint ventures between Māori and power-generating companies; and the creation of 'modern water rights'. This chapter discusses each of these options in turn, with the overall aim of presenting potential ways that Māori water rights can be recognised and redressed.

XV. The options for commercial redress

A. Shares and 'shares plus'

The possibility of providing Māori with shares in power-generating companies as a form of redress for freshwater claims was central to the 2012-2013 litigation, and the option has resurfaced following the recent announcement that the Meridian Energy share float is expected to take place in November.²⁰⁵ Yet, Māori interests are notably absent from the political discourse surrounding the sale, and it appears that redressing Māori claims by means of shares in Meridian is not currently being considered.²⁰⁶

In late August, a national hui was held to update the Māori King on freshwater claims.²⁰⁷ It was stressed, however, that the hui was not called in response to the Government's latest plans to partially privatise Meridian Energy.²⁰⁸ Rather, the focus

²⁰⁵For information on the Meridian share sale see above n 29 and 30.

²⁰⁶From an examination of the Parliamentary debates relevant to the Meridian share sale, it appears that Māori water rights have not been mentioned, see for example: Hansard (18 September 2013) 693 NZPD 13451; Hansard (18 September 2013) 693 NZPD 13451; Hansard (21 August 2013) 692 NZPD 12675; Hansard (26 September 2013) 693 NZPD 13790.

²⁰⁷See Elton Smallman "Hui given update on lake, river ownership claims" *The Waikato Times* (Online ed, New Zealand, 23 August 2013); Radio New Zealand News "National Māori water rights hui at Turangawaewae" (22 August 2013) *Radio New Zealand News* <www.radionz.co.nz>

²⁰⁸Radio New Zealand News "Water hui not prompted by Govt share sale plans" (21 August 2013) *Radio New Zealand News* <www.radionz.co.nz>.

of the hui was on long-term strategies to safeguard Māori water rights and co-ordinating iwi efforts. Tainui has already ruled out independently investing in Meridian, and Ngai Tahu has expressed that it is not interested in making any significant investment.²⁰⁹

For its part, the New Zealand Māori Council has warned investors about rushing in to buy shares in Meridian Energy too soon, anticipating that a favourable decision at the second stage of the Waitangi Tribunal's freshwater inquiry could affect the Government's asset sales plans.²¹⁰ At present, however, it appears that the Meridian share sale will proceed in the same manner as for Mighty River Power: without first allocating shares in the company to Māori. In this respect, the Supreme Court's finding that the Crown could always repurchase the shares is highly relevant, as it leaves the possibility of settling Māori claims with shares on the table even following the sales. The recent announcement that Mighty River Power is to buy back up to 25 million ordinary shares, as part of a capital management strategy, is evidence that shares could easily be repurchased.²¹¹

In considering the suitability of shares as redress for Māori water rights, both the Tribunal and the Supreme Court stressed that shares could only be a proxy for the underlying claims. As ordinary shareholders, Māori would not have any control over the water resource, but rather only limited rights to be paid dividends at the discretion of the company directors.²¹² Ordinary shares therefore cannot be a solution for ongoing recognition of Māori water rights. However, shares could still form an important part of a remedy as a practical source of compensation for the Crown's breaches of Māori water rights (where such breaches have occurred).

While the Waitangi Tribunal agreed that shares alone could not be an adequate remedy, it introduced the concept of 'shares plus' as a form of rights recognition, involving the creation of a special class of shares with special voting or other rights that could be vested in Māori claimants.²¹³ However, the High Court and the Supreme Court both considered the 'shares plus' proposal to be inconsistent with the requirement in Part 5A of the Public Finance Act 1989 that the Crown hold a 51 per

²⁰⁹ Radio New Zealand News "Ngai Tahu considers Meridian share investment" (3 October 2013) *Radio New Zealand News* <www.radionz.co.nz>; Waatea News "Power generator investment not right for iwi" (3 October 2013) *Waatea News* <www.waateanews.com>.

²¹⁰ Te Karere "Māori Council warns off Meridian investors" (25 September 2013) *Te Karere* <www.tvnz.co.nz>.

²¹¹ See Jamie Gray and Adam Bennett "Mighty River shares up on \$50m buy back news" *The New Zealand Herald* (Online ed. 10 October 2013). Note that this repurchasing of shares is not related to redressing Māori interests.

²¹² Under company law, a company is a legal entity in its own right separate from its shareholders. The shareholders own shares in the company but have no rights in the assets owned by the company. Shareholder rights are limited to voting in matters specified in the Companies Act 1993 or in the company constitution. While shareholders have a right to an equal share in dividends once they are issued, it is up to the Board of Directors to decide when to authorise dividends: see in particular Companies Act 1993, s 15 and ss 52-57.

²¹³ *Freshwater Report*, above n 1, at 102, 115-119.

cent interest in every class of share in the MOM companies.²¹⁴ In addition, the Courts were clearly concerned that the ‘shares plus’ proposal would prejudice the Crown’s ability to obtain full value for the shares.²¹⁵ In light of the criticism by the Courts and the Crown, it is unlikely that the ‘shares plus’ proposal would be considered further as a workable redress option. But, the use of ordinary shares as a readily available source of compensation for Treaty breaches remains a feasible future possibility.

B. A royalty regime for water

One option to provide recognition of Māori water rights is to introduce a royalty regime under which Māori would be paid for the commercial use of their waters.²¹⁶ This discussion will focus on water royalties imposed by statute, though it is also possible for royalties to be negotiated between the water-developer and relevant Māori groups on a case by case basis.²¹⁷ In regard to the practical implementation of water royalties, evidence at the Waitangi Tribunal indicated that there are no insuperable difficulties in quantifying the use of freshwater in order to value payments.²¹⁸

A royalty regime is not a new or unprecedented solution. Royalties have been imposed by statute for water and geothermal resources overseas. For example, in Western Australia a 2.5 per cent royalty is charged on geothermal energy, and various payments are imposed on the generation of hydroelectricity in both Nepal and Chile.²¹⁹ In New Zealand, royalty regimes currently exist for several resources, including coal, petroleum, gold, silver and uranium.²²⁰ Permit holders are required to

²¹⁴ Public Finance (Mixed Ownership Model) Amendment Act 2012, s 45R. See *High Court Decision*, above n 65, at 194-195; *Supreme Court Decision*, above n 4, at 138.

²¹⁵ *Supreme Court Decision*, above n 4, at 138.

²¹⁶ Note that a distinction is sometimes made between ‘royalties’ and ‘resource rentals’. Royalties are payments for extraction or depletion of a finite resource; resource rentals are payments for non-depleting use or occupation of a resource. For simplicity, the single term ‘royalty’ is used in this part. A levy is a fee collected under a statutory authority but not necessarily by government. For a summary of these and other types of charging mechanisms see Kevin Guerin *Principles for Royalties on Non-Mineral Natural Resources in New Zealand* (prepared for the New Zealand Treasury 2006) at Appendix 2.

²¹⁷ *Freshwater Report*, above n 1, at 102

²¹⁸ At 125.

²¹⁹ At 125.

²²⁰ Crown Minerals (Royalties for Petroleum) Regulations 2013; Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013. For a discussion of these royalty regimes see Ministry of Business Innovation and Employment *Review of the royalty regime for minerals: Discussion paper* (2012). Ministry of Economic Development *Review of the royalty regime for petroleum: Background to the regime and options for changes* (2012). For a summary of royalty regimes currently existing in New Zealand see Guerin, above n 216, at Appendix 1.

pay royalties to the Crown for the use of these resources under regulations pursuant to the Crown Minerals Act 1991.²²¹

The Crown has also already legislated for the right to charge royalties for the use of geothermal energy, though this power has not yet been exercised.²²² The Central North Island Tribunal has proposed that charging royalties on the use of geothermal energy and paying those royalties to Māori who have proprietary interests therein would be a way for the Crown to meet its Treaty obligations.²²³ The same approach could be applied to freshwater.

Extending royalty regimes to other natural resources has already been discussed in a 2006 policy paper prepared for the New Zealand Treasury, which outlined principles for charging royalties for non-mineral natural resources, including freshwater.²²⁴ It identified that New Zealand is facing increasing pressures on its natural resources, and recommended that royalties be implemented with the aim of ensuring that resources are allocated to their highest value, to the maximum benefit of all New Zealanders.²²⁵ It also observed that where royalties are earned on a resource owned by iwi or hapu, the revenue ought to be used for their benefit.²²⁶

A royalty regime could be applied to all commercial users of water. The Supreme Court identified that it would distort competition between energy suppliers to impose a royalty regime only on SOE and MOM companies.²²⁷ Rather, such charges would have to extend to equally to private power-generating companies.²²⁸ In the Waitangi Tribunal hearing, the Crown indicated that it could impose a wider levy, affecting multiple commercial users of water.²²⁹ As the Māori claimants accepted that no breach of the Treaty arises from the non-commercial use of their waters by the public, it seems a Treaty-compliant regime would be satisfied by charging only commercial users of water.

The Tribunal and the Courts acknowledged that private companies and investors, and the public, may resist the introduction of a royalty that impacted the profitability of the company, or resulted in consequential increases in power costs.²³⁰ Although these political obstacles may make it more difficult to implement water charges, it is

²²¹ Crown Minerals (Royalties for Petroleum) Regulations 2013, reg 12; Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013, reg 12.

²²² RMA, ss 112(2) and 360(1)(c). See discussion in *Freshwater Report*, above n 1, at 126.

²²³ *Report on Central North Island Claims*, above n 49, at 1191-1195, 1592, 1636. See discussion in *Freshwater Report*, above n 1, at 126.

²²⁴ Guerin, above n 216.

²²⁵ At 9-11 and 17.

²²⁶ At 16.

²²⁷ *Supreme Court Decision*, above n 4, at [139].

²²⁸ There are currently two large private power-generating companies in New Zealand: Contact Energy Limited and Trust Power Limited.

²²⁹ *Freshwater Report*, above n 1, at 126.

²³⁰ *Freshwater Report*, above n 1, at 128; *Supreme Court Decision*, above n 4, at [139]. Note that the Crown did, however, acknowledge that a 'modest levy' could be absorbed by the power industry and may not result in higher prices for consumers: *Freshwater Report*, above n 1, at 127.

certainly not impossible. The Crown is often required to introduce unpopular levies.²³¹ In this respect, the Supreme Court drew attention to Ronald Young J's statement.²³²

Parliament is free to introduce such changes to the water use regime as it chooses. There would be no unfairness to investors in MOMs (Mixed Ownership Models) or indeed any entity currently using water for free to be faced with a charge for the resource... investors will no doubt be aware of such potential changes.

In fact, the possibility for water charges to be introduced in New Zealand has been on the table since at least 2010, when the Land and Water Forum recommended that the Government consider introducing a market based water system.²³³

The impact of water royalties on commercial water companies, as well as the financial return afforded to Māori owners, depends on the type of royalty regime implemented. Three broad types of royalties have been identified for minerals in New Zealand:²³⁴ unit-based,²³⁵ value based,²³⁶ and accounting profit royalties.²³⁷ Unit based royalties would be the easiest to administer for freshwater, but they do not fluctuate with changes in market price, and can render some projects uneconomic. They can also act as a deterrent for investment.²³⁸

For these reasons, the Crown has opted for a combination of value-based and accounting profits royalties for minerals and petroleum.²³⁹ A similar approach could be taken for freshwater, which would minimise negative effects on the profitability of water-using companies. It was acknowledged in the Waitangi Tribunal that a royalty that is a percentage of profit instead of a fixed charge might be preferable, as it “would not affect the companies’ ability to *make* a profit”.²⁴⁰

There is a range of possibilities for implementing royalty regimes through legislation, and it appears that Māori interests could easily be provided for under such a system. The wider utility of royalty regimes in promoting efficient water use has already been acknowledged, and introducing charges for water has already been suggested. As

²³¹ The Crown offered several examples of unpopular levies that it has been required to introduce for the benefit of the country as a whole, including the Emissions Trading Scheme, ACC levies, raising GST, and raising road-user charges: see *Freshwater Report*, above n 1, at 127.

²³² *High Court Decision*, above n 65, at [228], cited in the *Supreme Court Decision*, above n 4, at [129].

²³³ Land and Water Forum (2010), above n 19, at 2-3.

²³⁴ See *Review of the royalty regime for minerals: Discussion paper* (2012), above n 220, at Appendix 8.

²³⁵ Unit-based royalties are levied on the unit volume or weight of the resource used.

²³⁶ Value based (or ad valorem) royalties are based on the sales price received when the mineral is sold, or on the deemed sales price where no sale or no arm's length sale has occurred.

²³⁷ Accounting profits royalties are payable on the net profit from the project, and allow for deductions of a range of costs associated with the project development.

²³⁸ See *Review of the royalty regime for minerals: Discussion paper* (2012), above n 220, at Appendix 8.

²³⁹ Crown Minerals (Royalties for Petroleum) Regulations 2013, regs 13-15; Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013, regs 13-15.

²⁴⁰ *Freshwater Report*, above n 1, at 128.

such, imposing royalties on the commercial use of water appears a realistic and practicable solution to providing recognition of Māori water rights.

C. Joint ventures between Māori and the power-generating companies

The only commercial redress option that the Crown expressed any real enthusiasm for at the Waitangi Tribunal hearing was the possibility of joint venture arrangements between Māori groups and the power-generating companies. It was the Crown's view that joint ventures would provide Māori with more direct control over the water resource than shares in the companies, as well as a direct profit from it. However, this redress option ultimately depends on there being sufficient commercial incentive for the companies to enter into such arrangements. In this respect, the Crown's indication that Māori could be provided with funding for the purpose of establishing future joint ventures will likely be crucial to its viability.²⁴¹

The Raukawa Claims Settlement Bill provides a model for this type of solution.²⁴² This Bill gives effect to the Treaty settlement deed signed by Raukawa and the Crown on 2 June 2012, which included, as part of the commercial redress package, the establishment of an eight million dollar fund to assist any commercial arrangements relating to the Waikato River that Raukawa and Mighty River Power may wish to enter into following the settlement.²⁴³ The payment does not impose any obligations on either party but is intended to enable and support the strengthening of commercial relationships between Raukawa and Mighty River Power.²⁴⁴ Although Raukawa has stressed that this fund was a settlement of historical grievances and does not recognise their customary or Treaty rights in their rivers, it nonetheless provides an example of how financial compensation can be used to establish an ongoing commercial relationship with the water resource.²⁴⁵ With Members of Parliament expressing favourable views of this provision during the Bill's First Reading, it seems that this is a solution that could be implemented in future water-related Treaty settlements.²⁴⁶

²⁴¹ See *Freshwater Report*, above n 1, at 107.

²⁴² The Raukawa Claims Settlement Bill passed its first reading on 8 August 2012. The Bill is currently before the Māori Affairs Select Committee. The Committee report is due on 6 February 2014. Further information is available at <www.parliament.nz>.

²⁴³ *Raukawa and Raukawa Settlement Trust and the Crown* "Deed of Settlement of Historical Claims" (2 June 2012) [*Raukawa Deed of Settlement*], at cl 6.19 – 6.24.

²⁴⁴ At cl 6.21 and 6.24.

²⁴⁵ Raukawa's view is discussed by the Tribunal in *Freshwater Report*, above n 1, at 106. Note that the settlement deed states that nothing in the deed will extinguish any aboriginal title or customary right that Raukawa may have, but also that nothing in the deed implies an acknowledgement by the Crown that such aboriginal title or interest exists: *Raukawa Deed of Settlement*, above n 242, at cl 4.6.1– 4.6.2.

²⁴⁶ See Hansard (6 August 2013) 692 NZPD 12409.

Electricity generators in New Zealand have already demonstrated a willingness to work in partnership with Māori in commercial projects. Notably, Mighty River Power currently owns and operates the Rotokawa and Nga Awa Purua geothermal plants in joint venture with the Tauhara North No. 2 Trust.²⁴⁷ Mighty River Power also has a share in the Mokai Station along with the Tauropaki Trust.²⁴⁸ Meridian Energy has entered an integrated water project with Ngai Tahu,²⁴⁹ and Contact Energy looks set to follow suit, having announced its first joint venture with iwi in 2010 for a proposed geothermal power station in Rotorua.²⁵⁰ While the majority of these joint ventures have involved geothermal resources located under land owned by Māori, there is no reason why these partnerships could not also extend to freshwater projects, given the right commercial incentives.

Joint ventures offer a promising opportunity for Māori to participate as a partner in new power stations and other future commercial developments relating to water. However, as the Waitangi Tribunal acknowledged, the problem remains of what to do in relation to existing arrangements. In reality, it is unlikely that power companies would enter into retrospective joint venture arrangements with local Māori in respect of existing power stations, and it does not appear that this option has been contemplated in relation to Mighty River Power or Meridian Energy.²⁵¹ Even so, joint ventures are certainly worth pursuing as a form of rights recognition in future developments. Though, other forms of rights redress that accommodate existing arrangements will still be required.

D. ‘Modern water rights’

The ‘modern water rights’ model involves creating direct (Crown-derived) property rights in water by legislation - in the form of permits that clearly specify the location and volume of water subject to each right - along with new institutional arrangements

²⁴⁷ Mighty River Power currently has a 65 per cent share in both the Rotokawa and Nga Awa Purua stations, as in April 2012, the Tauhara North Trust No. 2 exercised its option to purchase a further 10 per cent interest in both: Mighty River Power *Annual Report 2012* (2012) at 6.

²⁴⁸ Mighty River Power has a 25 per cent share in the Tauropaki Power Company that runs the Mokai Station. The Tauropaki Trust owns 75 per cent. See Mighty River Power *Annual Report 2012*, above n 247, at 6.

²⁴⁹ The Amuri Integrated Water Project in North Canterbury is a partnership with Ngai Tahu Property Limited and involves gaining consents to take and use water from the Waiau River for hydro generation and to discharge water for the irrigation of nearby land. The consent application for the project was lodged in October 2011, but is on hold while the Hurunui-Waiau Plan is being completed Meridian Energy Limited *Annual Report for the year ended 30 June 2012* (2012) at 27.

²⁵⁰ Contact Energy “Contact and Taheke launch geothermal joint venture” (press release, 22 February 2010) <www.scoop.co.nz>. In June 2013, the Taheke Joint Venture (Taheke 8C Incorporated and Contact Energy) announced that the project would be delayed due to market conditions, but both parties remain committed to the project. For further information see <www.contactenergy.co.nz>.

²⁵¹ *Freshwater Report*, above n 1, at 129.

for their allocation, registration, monitoring and enforcement.²⁵² The claimants proposed in the Waitangi Tribunal that, where appropriate, these water rights would be allocated to Māori, who as holders of the permits could then license or lease them on to power-generating companies and other water-users. Alternatively, Māori should have the power to issue the water permits over their waters (in effect, becoming the consenting authorities). Under this framework, Māori would be able to impose conditions on water use, and to lease the water rights in return for a resource rental.²⁵³

Adopting a modern water rights structure would revise the way that water permits are conceived of and managed in New Zealand by clearly defining them as a form of property right. At present, the nature of the interests conveyed by water permits under the RMA is highly contended. Water permits do not constitute ownership of the resource, but confer rights to take, dam, divert and use water.²⁵⁴ Section 122(1) of the RMA provides that resource consents (of which a water permit is a type) are “neither real nor personal property”.²⁵⁵ However, in *Aoraki Water Trust*, the High Court rejected the argument that a water permit is a bare license that confers no property interests.²⁵⁶ Because permits are granted on a ‘first come, first served’ basis “the grant of the first consent necessarily excludes the other. Consequently, the first enjoys an exclusive right to the resource.”²⁵⁷ The meaning and effect of this decision in regard to the nature of water permits continues to be debated.²⁵⁸

In the 2012-2013 litigation, the High Court held that water permits used by Mighty River Power did not constitute ‘a property right or interest’ in the Waikato River under s 64 of the Waikato River Settlement Act because a resource consent is not a property right in water.²⁵⁹ The Supreme Court disagreed. It stated that: “for the purposes of the Settlement Act, they [the water permits] may well be ‘property’ and are in our view certainly an ‘interest’ caught by s 64.”²⁶⁰ It thus appears that the courts are already taking steps toward recognising water permits as a form of proprietary right.

²⁵² Stephen Hodgson *Modern Water Rights: Theory and Practice* FAO Legislative Study 92. Rome: Food and Agriculture Organisation of the United Nations (2006) at 1-3.

²⁵³ *Freshwater Report*, above n 1, at 102.

²⁵⁴ See Harris Consulting, The Agribusiness Group, *Property Rights in Water: A Review of Stakeholders’ Understanding and Behaviour* (prepared for Ministry of Agriculture and Forestry Policy and Ministry for the Environment 2003) at 10-11.

²⁵⁵ However, the remaining sub-sections of s 122 go on to set out circumstances where the consents are treated in the same manner as property: RMA, s 122(2)-(3).

²⁵⁶ *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251.

²⁵⁷ At 278.

²⁵⁸ See Philip Milne “Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*” [2005] *Resource Management Theory and Practice* 146; Laura Fraser “Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991” *New Zealand Journal of Environmental Law* (2008) 145, esp. at 165-175; Olivia Nyce “Water Markets Under the Resource Management Act 1991: Do They Hold Water” (2008) 14 *Canterbury Law Review* 123.

²⁵⁹ *High Court Decision*, above n 65, at 336.

²⁶⁰ *Supreme Court Decision*, above n 4, at [81].

The creation of new property rights in water has become a widespread phenomenon around the world in recent years. A 2006 United Nations study entitled *Modern Water Rights* shows how rights similar to our RMA permits have been created and treated as property rights in many jurisdictions, and are often tradeable.²⁶¹ This global trend is, in part, based on the view that making water an economic good encourages more efficient management and use of the water resource. As noted above, the Land and Water Forum has recommended that the Crown consider introducing a water management system of this type, under which permits may be transferred or traded for money.²⁶² The Waitangi Tribunal concluded that, with New Zealand possibly heading toward a tradeable permit system, water permits “may thus become more property-like in future, not less.”²⁶³

If New Zealand were to implement a system of modern and tradeable property rights in water in future, Māori interests could be accommodated with that framework. The Land and Water Forum noted that the payments for permit trading would “realise a return for a public asset.”²⁶⁴ However, the Waitangi Tribunal explained that where Māori have proprietary rights in the water bodies concerned, they are not ‘public assets’, and suggested that the payments could instead be made to Māori. Applying the Forum’s reasoning that the purpose in charging permit holders is to provide an economic incentive for more efficient water use, and not to make money, it should not matter to whom the charge is ultimately paid.²⁶⁵ Furthermore, the 1992 commercial fisheries settlement provides an example of how Maori interests have already been successfully incorporated within a system of transferrable private property rights over resources.²⁶⁶

²⁶¹ Hodgson, above n 252. Australia is among the countries that have implemented tradeable water permit systems, and has been regarded as a pacesetter in this area. For further information on the Australian water trading system see: Mark Bartley and Douglas Fisher *Trading in Water Rights: Towards a National Legal Framework: Full Report* (Phillips Fox, 2004).

²⁶² Note that s 136 of the RMA currently allows for trading of water permits in certain situations: the whole or any part of the interest in the permit can be transferred to any owner or occupier of the same site by giving writing notice to the consent authority; or to another person on another site, or another site, if both sites are in the same catchment, where the transfer has been approved by the consent authority or is expressly permitted by the regional plan. However, in practice, very few transfers are actually occurring. For a summary of the current use of transferable water permits in New Zealand see Kim Beech “The Use of Tradeable Water Rights in New Zealand” (LLB (Hons) Dissertation, University of Otago, Dunedin, 2006) at 31-40.

²⁶³ *Freshwater Report*, above n 1, at 102.

²⁶⁴ Land and Water Forum (2010), above n 19, at 37.

²⁶⁵ *Freshwater Report*, above n 1, at 126.

²⁶⁶ In 1986, a Quota Management System was established for fisheries, whereby commercial fishers would be allocated quota to take a certain percentage of fish species each year based on the limit set for the Total Allowable Commercial Catch. Following a lengthy process of defining Māori fishing rights, an interim settlement was reached with Māori in 1989 that provided the Treaty of Waitangi Fisheries Commission with 10 per cent of the quota, and a final settlement was agreed in 1992: Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Under this settlement, Māori were provided with \$150 million, which was partly used to buy a half share in Sealords Products, New Zealand’s largest fishing company, which then owned 26 per cent of New Zealand’s fishing quota.

In the event that Māori do become the holders of water permits in future, the Supreme Court noted that it is “implausible to suggest that the use of water could be withheld from the generation of electricity.”²⁶⁷ Thus, gaining the right to own and lease water permits may not always give Māori much control over who permits are allocated to. But, proprietary recognition through the water permits would provide a basis for Māori to charge resource rentals for the use of their waters, and to impose certain conditions on water use (such as on how that use affects customary fishing).

Giving effect to Māori interests under a modern water rights system will be a gradual process. Many water permits are already allocated, potentially lasting for a term up to 35 years,²⁶⁸ and it is likely that legislation introducing a new water regime would preserve the rights of existing permit holders for their full duration.²⁶⁹ Even though it will take time to implement the modern water rights model in practice, this redress option has the potential to offer a promising and innovative solution to giving modern expression to Māori water rights.

XVI. Conclusion

This chapter has demonstrated that there are several promising possibilities for giving commercial expression to Māori water rights. The introduction of a royalty regime for the commercial use of water, funding joint ventures, and the creation of modern water rights all offer solutions for providing Māori with a direct and ongoing ability to profit from the use of their waters. Although joint ventures may be limited to providing for rights recognition in future developments, these options are not mutually exclusive, and a combination of some or all may be required to achieve appropriate recognition of Māori rights. Additionally, where Māori rights are unable to be given effect in these ways, shares in the water-using companies may offer a practical source of compensation.²⁷⁰ Ultimately, the redress methods employed may depend on the future direction that New Zealand takes in water management. Even so, this chapter has shown that, even in the event of major changes such as a move to a tradable market based system, Māori interests could still be incorporated within that

The Māori Fisheries Act 2004 finalised the allocation of Fisheries settlement assets and established the Te Ohu Kaimoana Trust, which presently has the role of administering current and new quota on behalf of iwi.

²⁶⁷ *Supreme Court Decision*, above n 4, at [140].

²⁶⁸ The maximum permissible term for water permits under the RMA is 35 years: RMA, s 123(d).

²⁶⁹ The practice in previous water-related Treaty settlements has been to preserve the rights of existing users, including for commercial activities: see for example Te Arawa Lakes Settlement Act 2006, ss 33 and 36. In some circumstances there may be scope for earlier adjustment of the water permit terms. For example, resource consents held by Mighty River Power may be subject to review following any Treaty Settlement, to ensure they reflect the settlement terms: see *Supreme Court Decision*, above n 4, at [14].

²⁷⁰ For example, compensation may be required where Māori rights in water bodies are unable to be recognised because of the priority accorded to public users who do not derive an income from the use of the water, and who cannot reasonably be expected to pay for their use.

framework. Thus, I conclude that, whatever direction our nation takes, there exists real potential solutions for recognising and redressing Māori rights to freshwater.

CONCLUSION

This dissertation has explored the potential for Māori proprietary and commercial rights in freshwater to be recognised and redressed following the high profile 2012-2013 litigation, which drew national attention to the unresolved issue of Māori water rights, and importantly, resulted in Crown assurances that those rights will be addressed. However, with the Crown's continued refusal to contemplate Māori ownership or commercial development rights in water as part of Treaty settlements, and water management reforms similarly failing to provide for those rights, the path for Māori to seek redress for their freshwater claims likely still lies within the courts.

I have argued that, in the current legal and political climate, there is a real possibility that a New Zealand court would recognise customary property rights in freshwater, including the commercial dimension, where proven under the common law doctrine of native title. Māori ownership of water bodies could be realised through a 'qualified exclusivity' approach, which would provide important recognition of Māori ownership of water, while still allowing for public use rights. It has also been demonstrated that a range of possible methods are available for giving practical effect to Māori commercial rights in water, including introducing a water royalty regime, joint ventures, and creating modern water rights.

The common law doctrine of native title may therefore provide Māori with a successful channel for pursuing and attaining recognition of their rights in freshwater. With judicial support for Māori claims, the Crown may be prompted to change its negotiating position and to give long overdue consideration to how Māori rights can be given effect in reality. This recent and divisive court battle has emphasised the need to resolve Māori water rights in order to achieve real reconciliation between the Treaty partners. This dissertation has shown that promising solutions for providing recognition and redress for Māori freshwater rights do exist, and it is time that the Crown considered these opportunities in the future of water governance in Aotearoa New Zealand.

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