A Conceptual Framework for Adjudication in Water-take Cases – A Case Study on Water Bottling.

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"*Whisky is for drinking, water is for fighting over".*

- Mark Twain.[1]

[1] As cited in *Re Barrhill Chertsey Irrigation Ltd* EnvC Christchurch C119/09, 31 October 2008 at [1].

INTRODUCTION

Water is a necessity of life and is fundamental for survival.[2] As a natural resource, water is also valued for a multitude of diverse, and sometimes competing, reasons. It remains the subject of ongoing nationwide debate concerning priorities of use as an economical tool; a cultural necessity; a component in religious practices and as a requisite for good health.[3] As part of the environment, water has been subject to different methods of governance across civilisations.[4] In New Zealand, water is also a source of legal conflict. It has been the focus of continuing national and regional level legislative intervention and technical advisory group reports and has proven a catalyst for ongoing litigation. Further, there is scope for an influx in legal disputes in the future for two interacting reasons: the prospect of water becoming a scarce resource,[5] and the conflicting values society places on water.[6]

Recently, there has been a public outcry within New Zealand over the granting of resource consents for the take and use of New Zealand water for commercial water bottling. For the interacting reasons stated above, water bottling is likely to become increasingly controversial, and an influx in litigation is likely to arise. What is now referred to as the 'blue gold of the 21st Century' poses a modern task for the judiciary - *Is the law adequately*

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2 Committee on Economic, Social and Cultural Rights, "CESCR General Comment No 15: The Right to water" (20 January 2003) E/C.12/2002/11 at [1]. See also Inga Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing, Oxford, Portland, 2012) at 2.

3 Douglas Fisher *The Law and Governance of Water Resources: The Challenge of Sustainability* (Edward Elgar Publishing, Cheltenham, 2009) at 11.

4 Douglas Fisher, above n 3, at 12.

5 Hannah Watson "Putting a Price on Freshwater in New Zealand: Can We Afford Not To?" (2018) 22 NZJEL 245 at 246; Cabinet Paper "Restoring our freshwater and waterways" (25 June 2018) CAB-18-MIN-0296.at [9]; Ceri Warnock "Human Rights and the Environment" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in New Zealand* (Thomson Reuters, Wellington, 2017) 893 at 905.

6 The fact that water cannot be substituted means that as it becomes scarcer, competition for water amongst users is bound to increase. Refer to Inga Winkler, above n 2 at 16.

accounting for the true range of values attributed to water?[7] Using water bottling as a case study, I endeavour to answer this question.

The Resource Management Act (the RMA) is the main statutory instrument governing the take and use of water in New Zealand.[8] Under the RMA, there is a general statutory presumption against water-take or use unless expressly permitted by a resource consent, regional plan or national environmental standard.[9] As a result, the onus is placed on local authorities to plan water allocation and determine what uses are appropriate under the statutory framework. Local authorities have the power to allocate water permits under s 87(d) to permit an activity that would otherwise be in contravention of the statutory presumption against water-take in s 14.[10] In making such decisions, the relevant local authority must have regard to the core principles contained in Part II of the Act. However, the broad nature of Part II, in particular s 5(2) and the definition of 'environment',[11] provides decision-makers with a wide discretionary ambit. Social, cultural, economic and ecological values can all legally be considered in the decision-making process.[12]

The central argument posed throughout this dissertation is that there are a multitude of reasons as to why individuals and groups amongst society oppose water-take applications (of which water bottling is one). Indeed, the RMA permits all such values to be taken into account (per s 5). To date, courts appear to focus purely on the diminishment of water for consumptive use, however, my analysis shows these decisions seem illogical. It is arguable

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7 Terry Anderson and Clay Landry "Exporting Water to the World" (2001) 118 Journal of Contemporary Water Research and Education 60 at 60. See also the Human Rights Commission *Human Rights and Water – Tika Tangata me to Wai* (February 2012) at 5.

8 Resource Management Act 1991.

9 Resource Management Act 1991, s 14(2). Note that s 14(3) provides exceptions for freshwater (see s 14(3)(b) where an individual is permitted to take water for their reasonable domestic needs or the drinking needs of their animals); geothermal water; coastal water; and water required by the Fire and Emergency Services (see Resource Management Act 1991, ss 14(3)(c), (d) and (e)).

10 Resource Management Act 1991, s 87(d). Alternatively, local authorities also have the power to allocate coastal permits under s 87(c).

11 As outlined under Resource Management Act 1991, s 2. See Appendix 2 for the full text of the relevant sections.

12 Refer to Appendix 2 for key provisions of the Resource Management Act 1991.

that decision-makers fail to adequately take into account the wider arguments posed in response to water bottling. Further, decision-makers appear to be struggling to construct clear *legal* reasons for differentiating between uses.[13] As water becomes scarcer and litigation increases, decision-makers will have to grapple with how to weigh all of the conflicting values that come into play. One concern is the challenge posed by addressing these values in litigation. By considering a complex web of values in decision-making, litigation will likely become more complex and unwieldy. Accordingly, the purpose of this dissertation is not to limit litigation (as this is an important aspect of the legal system and the public participation principle promoted by the RMA). Instead I seek to create a conceptual framework from which legal reasoning can be anchored and drawn from to provide clear and sound decisions. My thesis consists of a two-stage argument: we have to legally take these values into account as per the RMA; and by using a conceptual framework that I develop, decision-makers will be able to afford proper legal weight to the different values in decision-making. This will foster greater certainty and legal coherence in water-take adjudication.

Conceptual frameworks have frequently been created and used in areas where the law is unsatisfactorily open-ended or uncertain as a method of providing decision-makers with guidance on how to navigate a spectrum of claims and concerns that can be brought before a particular authority.[14] A common purpose of these rubrics is to frame better outcomes in the decision-making process. In this dissertation, I propose a conceptual framework that seeks to address the extent to which value-based arguments that may be brought before the authority are able to be supported by reference to the wider legal landscape. The parameters

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13 Refer to chapter I of this dissertation for an account of the recent judgments in New Zealand.

14 Examples of frameworks generally include: The legal framework for decision-making in disputes over burial/cremation arrangements between the deceased's family (as in Law Commission *The Legal Framework for Burial and Cremation in New Zealand* (NZLC IP34, 2013)); the Legal framework for supported or substituted decision making for those with mental disabilities who are unable to make a fully informed decision (as in Gavin Davidson and others "An International Comparison of legal frameworks for supported and substitute decision-making in mental health services" (2016) 44 International Journal of Law and Psychiatry 30.); the EU Water Framework Directive designed to create a framework for the protection and management of water resources in the European Union (see Katja Sigel, Bernd Klauer and Claudia Pahl-Wostl *Conceptualising Uncertainty in Environmental Decision-Making: The Example of the EU Water Framework Directive* (UFZ, Discussion Paper No. 8/2008, October 2008).

of this framework shall be constructed using laws beyond environmental law to inform how much weight should be given to each value or concern. For example, if a party's submission is founded upon xenophobic sentiments, a decision-maker may draw from human rights laws and treaties and, accordingly, place very little weight on the xenophobic aspects of the submission at hand.

I argue that the environmental law is best placed to deal with the issues surrounding water bottling, and thus the RMA shall be the central statute from which the parameters shall be drawn. This is because the nature of environmental law is that it is not as compartmentalised and structured as traditional notions of the law.[15] Instead, environmental problems are systemically complex; they operate in the *real* world and are interconnected with *real* social systems.[16] As a result: [17]

> Environmental law provides the overarching framework for the multidisciplinary approaches that are necessary if we are to halt the trend of environmental decay. Each strategy, on its own, cannot deal with all of the problems; together they can provide a comprehensive and holistic response. Although sociologists have suggested that ethics, economics, and education can more or less displace legal controls, the truth is that each strategy requires 'legal embeddedness' to have the necessary strength to succeed.

To effectively create a conceptual framework for decision-making, one must first address the range of values and concerns at issue in the water bottling debate. Without doing so, one cannot hope to develop a framework that adequately reflects the current social attitudes. Chapter I of this dissertation shall outline the current judicial reasoning concerning water bottling cases and the wider debate in relation to water-take and use consents. It shall respond to the question posed in this introduction and show that the judiciary are currently not adequately accounting for the true range of values attributed to water. Chapter II shall then consider the range of arguments specifically posed regarding

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15 David Wilkinson *Environment and Law* (Routledge, London, 2002), at 1.

16 See Elizabeth Fisher, Bettina Lange and Eloise Scotford *Environmental Law: Texts, Cases and Materials* (Oxford University Press, Oxford, 2013) at 23 and 49.

17 David Wilkinson, Environment and Law, above n 15, at 8

water bottling and the wider social values attributed to water as a natural resource. Finally, Chapter III shall outline how a conceptual framework will assist decision-makers in adequately addressing the range of values attributed to water. It shall then illustrate how the wider legal landscape can be drawn upon to inform and construct the parameters of the proposed conceptual framework.

Chapter I Current Judicial Opinion in Relation to Water-take

This chapter shall discuss the current climate within which the water bottling debate exists. I shall begin with a broad consideration of the issues with water allocation generally. I shall then consider and critique the decision-making in both the Environment and High Court that reflects a general sentiment of unease towards water bottling as a water use. In doing so I shall show that decision-makers are currently not adequately accounting for the range of values attributed to water.

There is a general sentiment amongst the judiciary that the current water allocation precedent is flawed and unsatisfactory. The Court of Appeal in *Central Plains Water Trust v Synlait* noted that "New Zealand law does not currently contain a stand-alone regime for the allocation of water resources".[18] Although freshwater is a key asset for New Zealand, the perceived abundance of the resource has been taken for granted by society.[19] As such, we are witnessing a diminishment of the natural resource,[20] and "claims to priority of water have assumed great importance".[21] Further, New Zealand is experiencing a surge of litigation over priority to freshwater between competing users.[22] Douglas Fisher argues that that water will continue to be the subject of competing priorities "as an element of the means of production and as an element essential for human existence".[23] The competing interests have consistently become apparent in New Zealand:[24]

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18 *Central Plains Water Trust v Synlait* [2010] NZRMA 237 at [3].

19 Refer to Land and Water Forum *Advice on improving water quality: preventing degradation and addressing sediment and nitrogen* (May 2018) at 1.

20 Land and Water Forum advice 2018 , above n 19, at 1.

21 *Central Plains Water Trust v Synlait*, above n 18, at [10].

22 Trevor Daya-Winterbottom "Water Management" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) 641 at [13.7.3].

23 Douglas Fisher, above n 3, at 12.

24 New Zealand Institute of Economic Research *Water Management in New Zealand: A road map for understanding water value* (Working Paper 2014/01, March 2014) at 1. See also Trevor Daya-Winterbottom, above n 22, at [13.10].

> Water policy in New Zealand has been in a state of flux for quite some time. The uncertainty is driven by increased competition for water [and] a lack of understanding of society's preferences.

The RMA deals with the topic of water allocation in broad terms and does not contemplate questions of priority.[25] As such, the New Zealand Human Rights Commission has warned that overallocation of water is becoming problematic,[26] and that legislative processes currently manage water-allocation between competing uses and users inadequately.[27] The Court of Appeal has also noted that litigation "in an area of law where certainty is required with respect to a vital national resource, has been unfortunate",[28] and that it may "require rethinking, in a more fundamental way".[29]

Within the wider water allocation discussion, commercial water bottling is positioned at the forefront of current affairs in New Zealand. The water bottling industry is a $200 billion industry worldwide.[30] In New Zealand, 52 companies are producing 163 million litres of bottled water, with an 8.5% growth per annum.[31] The increasing prevalence of water bottling companies has been met with increasing public scrutiny. One of the most recent (and in my view poignant) cases discussing water bottling is *Aotearoa Water Action*

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25 *Fleetwing Farms Ltd v Marlborough District Council* (HC) [1996] NZRMA 369 at 374; *Central Plains Water Trust v Synlait*, above n 18, at [10].

26 Refer to Human Rights Commission, above n 7, at 10, as cited in Ceri Warnock "Human Rights and the Environment", above n 5, at 905.

27 Refer to Ceri Warnock "Human Rights and the Environment", above n 5, at 905 – see also discussion on alternative water management processes by the Land and Water Forum: (refer to 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 Freshwater Policy- and Plan-making Through Collaboration* (April 2012); Land and Water Forum *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (October 2012); and Land and Water Forum *The Fourth Report of the Land and Water Forum* (2015).

28 *Central Plains Water Trust v Synlait*, above n 18, at [1].

29 *Central Plains Water Trust v Ngai Tahu Properties Limited* [2009] NZCA 71, [2008] NZRMA 200 at [91].

30 NZ Beverage Council "An Overview of New Zealand's Bottled Water Industry" (2019) <https://www.nzbeveragecouncil.org.nz/assets/PDFs/9ee61a0436/An-Overview-of-Water-Bottling-in-New-Zealand.pdf>, at 1.

31 At 1.

Incorporated v Canterbury Regional Council and Ors (AWA).[32] Although the facts of this case are more concerned with the categorisation of water bottling as an activity under existing resource consents, I argue that this case serves a greater purpose of demonstrating a judicial discomfort with commercial water bottling. Furthermore, Churchman J inadvertently outlines a clear gap in the law. The central theme of this chapter is that current judicial reasoning is not founded upon sound legal principles but is instead premised on a subconscious discomfort over water bottling.

The case of *AWA* involved the sale and purchase of two properties with three resource consents for the take and use of water for "industrial purposes".[33] The respondents (transferee's of the consents) wished to use the resource consents to commercially bottle water, but the applicants sought declarations for each of the resource consents that the proposed use is *not* within the scope of the old consents.[34] The sites were originally used for wool scouring and freezing works, and the volume of water permitted to be extracted under these consents was not being varied. Instead, it was the nature and effects of the use that were at issue. The central question was "whether or not the bottling of water for export falls within the definition of industrial use".[35]

Before considering the facts at issue, Churchman J outlined the background issues at play in the case, namely that the demand for water has increased over time and at times exceeds supply.[36] Thus, he argues, there has been an influx in litigation over water management, and the balancing of water users' rights.[37] In regards to these competing uses Churchman J notes:[38]

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[32] *Aotearoa Water Action Incorporated v Canterbury Regional Council and Ors* [2018] NZHC 3240 [10 December 2018].
[33] At [19] to [21].
[34] At [4] and [6] – [7].
[35] At [24].
[36] At [2].
[37] At [2].
[38] At [3], emphasis added.

> *Some of the competing water uses are not mutually exclusive*. The use of water for hydro-electric generation does not preclude the subsequent use of the same water for irrigation or industrial purposes. *Some uses are partially consumptive*, such as the use of water for cleaning or cooling purposes in a meat processing plant where much of the water is returned to the river system, albeit in a changed state**.** *Other uses, such as bottling the water for human consumption, are wholly consumptive* in the sense that none of the water at all remains at the conclusion of the process to which it is subjected.

Churchman J appears to be grappling with the difference between standard industrial uses and the use for bottled water. Further, he appears to be seeking a legal justification for the sentiment that water bottling as a use is problematic. Churchman J settles on a consumptive line of reasoning, perhaps alluding to the fact that a wholly consumptive use is of greater detriment to the environment than a partially consumptive use (whereby polluted water is returned the water source). The detriment being hinted at appears to be the lack of benefit to the area from which the water is taken. In other words, since the water is being taken in its entirety, and none is restored to the source, the area is suffering a greater loss than if the use was partially consumptive, albeit pollutive.[39] This appears to be the crux of the difference between water bottling and other industrial uses for Churchman J.

To strengthen his argument, Churchman J proceeds to cite the case of *Re Barrhill Chertsey*.[40] This case concerned several existing resource consents for the take and use of water from the Rangitata River for supplying water for stock, irrigation and electricity generation. A new entrant (Barrhill Chertsey) wished to combine these consents and the water distribution infrastructure to cover and serve a wider area.[41] The Environment Court in *Re Barrhill Chertsey* stated that the combination of all of these consents was foreseeable and reasonable and that this was a minor variation to how the water was being used. However, the Environment Court noted in obiter dictum that any distribution of the water outside of the area bounded by the catchment of the Rakaia and Rangitata Rivers would "change the very nature of the application" so much so that it would be "*a fundamental*

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[39] This follows the skewed supply and demand model I shall discuss later.

[40] *Re Barrhill Chertsey*, above n 1.

[41] *Re Barrhill Chertsey*, above n 1, at [5] as cited in *Aotearoa Water Action Incorporated v Canterbury Regional Council and Ors*, above n 32, at [80].

change in the nature of the consent".[42] The Environment Court then gives a specific example of an "extreme use" of water being "the bottling and sale overseas of that water" and notes that if such use was sought all parties accepted that a new resource consent would need to be applied for.[43] Here we not only have a judicial statement separating water bottling out from all other water-take applications, but we also have a unanimous acceptance (between the Environment Court and the parties to the dispute) that the difference in use is so drastic that a new consent would need to be granted. Once again, this conclusion appears to be founded in the idea that the water being transported away from the 'supplying' location. Although the Environment Court does not go further to explain **why** this would be an issue, it may be reasonable to infer that the line of reasoning is not too dissimilar to that of Churchman J in *AWA* and the detriment outweighs the benefits to the supplying location.[44]

Churchman J in *AWA* adopted the concept of water bottling as an "extreme use" and added that water bottling is use that is "well beyond the more traditional types of irrigation and power generation uses".[45] Further, he argues, the difference between uses would be a relevant consideration in the decision-making process.[46] The High Court concluded that water bottling could not be seen as a similar use under an objective standard,[47] and acknowledged that although water bottling is technically an industrial use (as opposed to residential or agricultural) "this does not alter the fact that the bottling of water for export is a *very different sort of activity* from operating a freezing works or wool scour".[48] Arguably, the fact that the purpose is relevant where the activity is bottling water becomes

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[42] *Re Barrhill Chertsey*, above n 1, at [40], emphasis Added. Note that in this reasoning, the disruption of mauri in the water was not discussed.

[43] *Re Barrhill Chertsey* at [41].

[44] Note that the RMA does privilege keeping water in its catchment areas – for example see s 136 whereby water permits can only be transferred between persons operating in the same site or between sites if both sites operate in the same catchment area (Resource Management Act 1991, ss 136(1) and (2)). Furthermore, note that neither court mentioned the disruption of mauri in the water as the reason for emphasizing the detrimental effect of wholly consumptive uses.

[45] *Aotearoa Water Action Incorporated v Canterbury Regional Council and Ors*, above n 32, at [90].

[46] At [90].

[47] At [127].

[48] At [140], emphasis added.

of interest because the volume of water alone does not change depending on this activity type. Therefore, something else is at issue with this particular use.

Both the Environment Court and the High Court in the above cases appear adamant that water bottling is a use that is entirely different to any other form of water-take and use such that it is "non-traditional" and "extreme". The consistent reasoning for this is the nature of the water-take. In other words, the argument posed is that since the water is being transported somewhere else, the "supplying" area is suffering a loss in the form of reduced water availability. However, I argue that this line of reasoning seems out of kilter with the complexity of the water cycle; water is evaporating and precipitating all the time, and the precipitation does not fall where it evaporated.[49] This is a key difference for water, as opposed to minerals or land, which poses an array of problems for decisions makers and legal scholars alike. Land or minerals are more easily traceable and accounted for in the decision-making process as there is no intervening natural process such as the water cycle. In this sense, water is described as "a fugitive resource due to its constant state of diffusion".[50] Throughout the judgments considered, there is no account for the role that the water cycle plays in alleviating some of these concerns from a water volume/water table perspective. Therefore, the focus on consumption by both the Environment and High Court appears an imprecise reason for differing legal approaches to the types of uses concerned as is not scientifically sound. The consumptive line of reasoning appears to simplify, or perhaps even ignore, the fugitive nature of water as a resource.

Further Churchman J appears to place more emphasis on the detriment of a wholly consumptive use (which is arguably never "wholly" consumptive as the water is regenerated by the water cycle) than on a partially consumptive use (whereby water is returned to the water source in a polluted state).[51] Arguably, the loss being alluded to (reduced water availability as a result of a wholly consumptive use) is highly detrimental because of the lack of benefit being injected back into the supplying location. Hence, the

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[49] See Hannah Watson, above n 5, at 247 where the problems unique to water management are outlined.

[50] Hannah Watson, above n 5, at 247 – i.e. it does not remain in one place.

[51] *Aotearoa Water Action Incorporated v Canterbury Regional Council and Ors*, above n 32, at [3].

'supply and demand' chain is skewed such that there cannot be a justification for the detriment suffered by the supplying location concerned. From a scientific standpoint, this appears to be a peculiar basis for a legal distinction between water bottling and other water uses. Instead, there appears to be something deeper operating in the parties' submissions and the subconscious of the judiciary based on suppositions about water bottling specifically. This is an unsurprising revelation given the aggregation of nuanced and complex values inherently tied up in the water bottling debate. Although as a society we do not always acknowledge and recognise these values explicitly, their existence can be the foundation for the tension and unease operating in the background of judicial reasoning.

This chapter has demonstrated that the unease in relation to water bottling is not well articulated by the courts. Instead, we have witnessed the judiciary grappling for legal reasons to draw distinctions between water uses that do not necessarily make scientific sense. The idea of a collection of values attributed to water as a resource has been introduced as an explanation for the judicial discomfort with water bottling. In chapter II I shall consider in depth the range of values that come into play in the water bottling debate. This exercise is undertaken on the premise that one cannot fully understand decision-making, nor can one posit a solution, without identifying and understanding the values and principles that underpin the social (and judicial) responses to water bottling.[52]

[52] Similar approaches have been taken by the Law Commission in relation to reforms to the Legal Framework for Burial and Cremation in New Zealand (above n 14, at [95] and [1.13]) and other scholarly investigations into decision-making frameworks such as Gavin Davidson and others above n 14, at 38; and Sigel, Klauer and Pahl-Wostl, above n 14, at 2.

Chapter II The Complex Web of Values Attributed to Water

Water use is a significant issue for communities worldwide. Water is also a pivotal resource in society due to its importance from an economic, ecological, societal and spiritual standpoint.[53] As a result "all views on water are linked to its fundamental functions and its relevance to life".[54] Fisher notes that: [55]

> Water is valued for a number of diverse and potentially conflicting reasons. These may be religious or secular; economic or ecological; aesthetic or political; in effect the range of value of any particular culture.

The declaration of the 2002 Paris World Water Day stressed the importance of understanding that water and culture are intertwined, and as a result, we should be promoting an understanding of this inseparable relationship.[56] Since "environmental management is premised on collective utility",[57] I argue our dealings with water should follow this general trend. In the context of US law, Crow and others argued that a "significant shortfall" of decision-making processes is that a scientific water-take analysis cannot take into account the wider range of values and beliefs attributed to water.[58] As such, new research is required to increase the understanding of ecological, spiritual and sociological outcomes from water management.[59] On this premise, the totality of interests must be understood to manage water resources in a more satisfactory manner. Despite historical and cultural differences, there is a common recognition that water is a shared resource, with "a reciprocal responsibility to ensure the sustainable use and development".[60] The management of water resources involves the coordination of a

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53 K.V. Raju and S. Manasi "Water and Scriptures: An Introduction" in K.V. Raju and S. Manasi (eds) *Water and Scriptures: Ancient Roots for Sustainable Development* (Springer, Switzerland, 2017) 1 at 3. See also Jacinta Ruru "Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand" (2013) 22 Pacific Rim Law and Policy Journal 311 at 313.

54 Raju and Manasi, above n 53, at 3.

55 Douglas Fisher, above n 3, at 11. See also the range of interests in water as discussed in Land and Water Forum Report 1, above n 27, at [6].

56 Raju and Manasi, above n 53, at 3.

57 Ceri Warnock, "Human Rights and the Environment", above n 5, at 879.

58 Shannan Crow, Gail Tipa, Doug Booker and Kyle Nelson "Relationships between Māori values and streamflow: tools for incorporating cultural values into freshwater management decisions" (2018) 52 NZ Journal of Marine and Freshwater Research 626 at 627.

59 Crow, and others, above n 58, at 627.

60 Douglas Fisher, above n 3, at 2

complex set of vertical and horizontal legal relationships in existence within wider society.[61]

Disputes over environmental values tend to be at the centre of legal disputes concerning water. While the range of values attributed to water may not explicitly feature in legal debates, "they can explain the reasons for conflicts in the first place".[62] The litigious individual may rely upon such values either explicitly or subconsciously due to the central role their values play in their everyday life. The statutory text of the RMA permits a wide range of values to be considered in decision-making. Under the overall broad judgment approach, a comparison of conflicting considerations and their relative significance to the outcome are considered.[63] Without understanding the true range and nature of values that come into play in water-take adjudication, and more specifically in the context of water bottling, one may not be adequately equipped to deal with future litigation consistently and adequately.

So far, I have demonstrated that society depends on water because it is a collective resource. The argument posed in this chapter is that currently, "there are few legal questions that take the form 'what values are in operation'".[64] An understanding of this question assists greatly in improving the decision-making process. Furthermore, this question shall assume greater importance as water becomes scarcer. As water becomes scarcer, an intrusion on individual values shall become a catalyst for an influx in litigation. As such, the following chapter shall provide a comprehensive account of the true range of values at play in the water bottling debate. In doing so, this chapter shall conclude by discussing the legal relevance of these values in decision-making under the RMA.

A Recreational/Social/Personal Interests

1 Water as a Human Right

Although it has long been recognised that water is an essential precondition to human survival, health and dignity, water has only recently been dealt with from a human rights perspective.[65] From a human rights perspective, "the human right to water entitles every person to sufficient, safe, acceptable, physically accessible and affordable water for

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61 Douglas Fisher, above n 3, at 5

62 Fisher, Lange and Scotford, above n 16, at 53.

63 *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 at [51].

64 Fisher, Lange and Scotford, above n 16, at 53.

65 Inga Winkler, above n 2, at 9

personal and domestic uses".[66] Dealing with the human right to water is difficult due to the lack of recognition under key international treaties; specifically the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.[67] However, the Committee on Economic, Social and Cultural rights has moved to clarify the human rights position of water, noting that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly as it is one of the most fundamental conditions for survival".[68] Furthermore, the UN Commissioner for Human Rights has acknowledged that it is time to consider access to safe drinking water as a human right.[69] In 2010, both the United Nations General Assembly and the Human Rights Council adopted resolutions recognising water as a human right,[70] and it is contended that the right to water is implicit in the right to an adequate standard of living guaranteed in Article 11(1) of the Social Covenant.[71] As such, it would not be unreasonable to argue that the right to water is one of the deepest forms of legal rights. Moreover, the entrenched nature of the right is recognised by constitutions across jurisdictions.[72]

The statutory provision most consistent with a right to water in New Zealand is located in the RMA, whereby individuals are permitted to take freshwater for their reasonable domestic needs and the reasonable drinking needs of their animals.[73] The RMA establishes "a base-line legal right to taking water for individual needs" and such a right is protected by the provisions under the Act, rendering members of the public somewhat of pseudo-

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66 Committee on Economic, Social and Cultural Rights, "CESCR General Comment No 15", above n 2, at [2].

67 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, opened for signature 16 December 1966, entered into force 3 January 1976, and UN General Assembly "Universal Declaration of Human Rights" (10 December 1948) 217 A (III), as discussed in Inga Winkler, above n 2, at 9. Note that the right to water can be inferred from the International Covenant on Economic, Social and Cultural Rights, art 11 and 12 (as cited in Douglas Fisher, above n 3, at 86-87).

68 Committee on Economic, Social and Cultural Rights, "CESCR General Comment No 15", above n X, at [3], as cited in Winkler, above n X, at 10.

69 Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 16 August 2007, A/HRC/6/3 at [66], as cited in Winkler, above n 2, at 11.

70 Winkler, above n 2, at 37

71 Winkler, above n 2, at 98, and also Douglas Fisher, above n 3, at 86-87.

72 See for example constitutions of: South Africa, Art. 27(1)(b) and (2); India, Art 21 (as part of the wider right to life); and Uruguay, art 47 as cited in Human Rights Commission, above n 7, at 9.

73 Refer to Resource Management Act 1991, s 14.

rights holders.[74] However, New Zealand does not have a written constitution and the right to water as a human right is not explicitly acknowledged through statute. Notwithstanding this, arguably access to water is seen as a right in New Zealand which explains the uproar from society when this 'right' is perceived to have been infringed upon. The reasons for this are twofold. Firstly, "even if the human right to water is not expressly recognised so as to ensure an entitlement to water, such a right is the basis upon which normative values are attributed formally to water".[75] The unique characteristics of water render it a life-supporting resource.[76] Consequently, the right to water is founded in the right to life (and need for water to sustain this right).[77] The foundational relationship must not, however, be confused with a conflation of the two points. They are two distinct causal points. Given our need for sustenance, we recognise a right to water. Given our right to water, we thus feel threatened whenever a slight infringement is made upon these rights. Given that water is a necessity for life, "it is thus not surprising that disputes over the collective use of water… have a long pedigree".[78] From this, both the ownership and privatisation by proxy arguments come into stark focus (as discussed below). Secondly, the human rights discourse is also inextricably linked with the cultural and spiritual discussions below. It is argued that the desire to uphold a human right in water is, in part, driven by individual and collective ties to water from a cultural and religious foundation across the most diverse societies.[79] The subconscious understandings of the cultural and religious importance of water and the historical entrenchment of such practices also result in a human right to water, deriving from "continuous activities over the years".[80] In other words, what occurs as a result of habitual practices develop a set of social norms from which a customary rule of law arises.[81]

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[74] Ceri Warnock, "Human Rights and the Environment", above n 5, at 902-903.

[75] Douglas Fisher, above n 3, at 89

[76] Inga Winkler, above n 2, at 2 –argues that just as important as the recognised right to food at 10.

[77] Refer to Douglas Fisher, above n 3, at 15, for commentary on the fundamental need for water to sustain human life; see also Secretary General of the UN commentary on the relationship between the need and right dichotomy in the context of water (World Health Organisation (2003), *The Right to Water* (Geneva: World Health Organisation) as cited in Douglas Fisher, above n X, at 86.

[78] Fisher, Lange and Scotford, above n 16, at 552.

[79] Douglas Fisher, above n 3, at 86.

[80] Douglas Fisher, above n 3, at 89

[81] Douglas Fisher, above n 3, at 89. – based on the idea that long before human rights were codified in written law, water was regarded as a resource to which everyone was entitled (Fisher at 86)

2 Ownership Debate

In this dissertation, I do not attempt to resolve the ownership debate. Instead, I seek to shine a light on people's perceptions of water ownership in New Zealand. I shall argue that individual perceptions of water ownership influence the water bottling debate based on assumed entitlements to the resource.

The common law position in New Zealand is that water is owned by noone. Instead, the Crown holds the water on trust for the mutual use and enjoyment of the public at large.[82] The RMA is silent on the issue of ownership but designates power to Local and Regional Councils to allocate water resources to potential users.[83] Despite this, there have been claims to property rights by Māori by virtue of their Indigenous title. The common law doctrine of native title conflicts with the common law position that water is owned by no one unless it can be shown that the native title has been expressly diminished by the Crown. In other words, Māori title "must be extinguished before it can be regarded as ceasing to exist".[84] The Court of Appeal in *Ngati Apa* found that the introduction of the English common law did not diminish Māori customary title.[85] Further, the Supreme Court noted that the Waitangi Tribunal has held that Māori claims to waters are "well-founded" and are "in the nature of ownership".[86] However, it must be noted that the Supreme Court has not addressed the issue of Māori ownership of water itself.[87] Thus ownership disputes between the Crown and Māori remain unresolved.

Once water is extracted and piped into a bottle, it becomes the property of the consent holder and any previous claim to ownership is diminished.[88] This becomes problematic when those with perceived rights or interests in water have not permitted the extraction in the first place. Therefore, perceptions of embedded property rights are a catalyst for debates

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82 Ceri "Human rights and the Environment", above n 5, at 903.

83 Refer to Resource Management Act 1991, s 14.

84 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [185].

85 At [183].

86 *New Zealand Māori Council v the AG* [2013] NZSC 6 at [10].

87 *Ngai Tahi Property Ltd v Central Plaints Water Trust* [2009] NZSC 24 (interim decision) settled by agreement prior to hearing (see Trevor Daya-Winterbottom, above n 22, at [13.7.3(5)]. Of importance is that the Court of Appeal was required to consider the issue in *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 at [85] and noted that the Supreme Court had questioned the *Fleetwing* principle such that it is a presumptive factor, but cannot be determinative in a case. *Synlait* was also granted leave to appeal but settled before the date of hearing – for further discussion see Trevor Daya-Winterbottom, above n 22, at [13.7.3].

88 Te Maire Tau *Water Rights for Ngāi Tahu* (Canterbury University Press, Christchurch, 2017) at 11.

in the water bottling field. These debates will continue until the Crown resolves the ongoing debate with Māori over water ownership.

3 Government Intervention/Privatisation Opposed

From the dialogue of human rights and water ownership, a further contention arises around what I shall term "privatisation by proxy". That is to say, the Crown and Government are privatising water through the distribution of a public resource for private consumption by those who are willing or able to afford purchasing bottled water.

In one study conducted by Anderson and Landry, the most prominent motivator for resistance to water bottling was to do with government intervention.[89] The resistance centres around the commonly held belief that water is a common good for all.[90] However, where a consent to extract and bottle the water is permitted, it is argued that a default property right arises.[91] Granting a consent to bottle water that would otherwise be free to the public creates issues from both a Māori and Pākehā perspective (for differing reasons). For Pākehā, the resistance is inextricably tied up with the notion of water as a human right as the privatisation of a resource required for survival is threatening for civilisation (as discussed above).[92] For Māori, the opposition to privatisation is more complex. There is a clear conflict between the neoliberal paradigm and Māori culture. From a neoliberal standpoint, it is contended that resource consents under the RMA create "a value chain". Consents are granted that increase the value of the land (because it remains with the land). Additionally, the use of the resource (i.e. water) under the consent generates profit because it converts the resource into products to be sold domestically and internationally.[93] Therefore, whilst the consent itself does not constitute a direct property right, "it may imply

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89 Terry Anderson and Clay Landry "Exporting Water to the World" (2001) 118 Journal of Contemporary Water Research and Education 60 at 61.

90 Founded in the common law position that water is not owned by anyone but is instead held on trust by the Crown for the mutual use and enjoyment of everyone in society.

91 For further discussion on this point refer to: Thomas Gibbons "Property Rights in Resource Consents: Some Thoughts From Law and Economics" (2012) 25 NZULR 46 at 46 – s 122(1) RMA is not conclusive on the issue of property rights in resource consents; Ceri Warnock "Human Rights and the Environment" above n 5, at 906; Ian Williams "The Waitaki River" [2005] NZLJ 177 at 179 - "consents share so many characteristics of property that it is tempting to treat them as property"; *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 23, [2005] 2 NZLR 268 at [35]– water permits are akin to a licence plus a right to use the resource, rendering similar to a profit a prendre; *Armstrong v Public Trust* [2007] NZRMA 573, [2007] 2 NZLR 859 at [23] – the Court concluded that common law property rights in relation to joint tenancy were not excluded by s 122 of the RMA.

92 Human Rights Commission, above n 7, at 17-18.

93 Te Maire Tau, above n 88, at 10-11.

an indirect property right of sorts".[94] For Māori, this perceived privatisation is opposed due to their long-standing claim to water.[95] The question posed becomes: "how can the Crown allow the water to be extracted when there is no clear evidence of ownership"?[96] Moreover, to privatise water would intrude on the mauri of the water. An economic focus on water conflicts with the spiritual and life-sustaining value of the natural resource to Māori.

4 Xenophobia

Moreover, I argue that there are sentiments (overtly or covertly) of xenophobia present in the water bottling debate. From the discussion on (perceived) ownership and human rights to water, xenophobic undertones emerge where other racial groups are seen to infringe on the existing rights to water. Media coverage on the issue in New Zealand indicates a general presumption that the main group involved in the extraction of water for water bottling are Asian.[97] News articles perpetuate racially motivated distaste to the activity by playing on a widespread belief that larger overseas corporations are 'taking our water from us'. By creating an us-versus-them dichotomy, media bias is adopted and replayed by New Zealand society at large. In actual fact, the majority of bottled water produced in New Zealand is consumed domestically. Of the 163 million litres of bottled water produced annually, only 27.9 million litres of water is exported.[98] Further, the largest exporter of New Zealand water is the United States of America, constituting 46% of New Zealand exports, followed by China and Hong Kong who collectively export 44% of New Zealand water.[99] From these statistics, one may posit that the role of the media has hyperbolised the Chinese involvement in water extraction in New Zealand and has created sentiments of xenophobia across the country.

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[94] Te Maire Tau, above n 88, at 11.

[95] At 11 – the implied right conferred through consent process disregards the inherent water ownership held by Māori.

[96] At 11 – arguably disregards the second article of the Treaty of Waitangi.

[97] For example see: One News "Water activists concerned after Chinese bottling company reveals plans for second Canterbury plant" (2 February 2019) <https://www.tvnz.co.nz/one-news/new-zealand/water-activists-concerned-after-chinese-bottling-company-reveals-plans-second-canterbury-plant>; Newshub "'Put New Zealanders first': Protestors take to Christchurch streets calling for end to local water being sold offshore" (9 March 2019) < https://www.newshub.co.nz/home/politics/2019/03/put-new-zealanders-first-protestors-take-to-christchurch-streets-calling-for-end-to-local-water-being-sold-offshore.html>; Stuff NZ "Bottling expansion could see 9 billion litres of pristine Christchurch water sold overseas" (2 February 2019) https://www.stuff.co.nz/business/110325548/bottling-expansion-could-see-9-billion-litres-of-pristine-christchurch-water-sold-overseas.

[98] NZ Beverage Council, above n 30, at 3.

[99] At 3.

B Ecological and Environmental Interests

5 Waste of the Industry

Ecocentric values also come into play in the water bottling debate. From an eco-systemic standpoint, environmental law is associated with the preservation and maintenance of the natural environment for current and future generations. Water, as a natural resource, *must* be included in "any tolerably broad concept of the environment".[100] Any activity with adverse effects on the environment caused by pollutants is readily understood to be detrimental to the area concerned. One of the most basic arguments against water bottloig is that its commercial production infringes upon the ecocentric values associated with the environment.

Since the water bottling industry is "the major demander of bulk water", concerns over the effects of bulk extraction are far-reaching.[101] Not only are there concerns over the effects on water sources, but arguments are also raised about the energy expended to bottle water, and the amount of plastic involved in the bottled water industry. The quantity of water required to be extracted for bottled water impacts the "springs, rivers, local ecosystems, agriculture, wells and other water users", and concerns are raised about the depletion of groundwater supplies for the community. [102] Furthermore, it has been stated that "the ultimate absurdity" exists in the waste and inequality within the bottled-water trade.[103] A significant amount of energy is expended to bottle and transport water to places that already have water in excess and freely accessible.[104] The energy used to produce and distribute bottled water is between 1,000 and 2,000 times more energy than required for tap water.[105] King argues that the process of bottling and shipping the water worldwide "consumes extreme amounts of energy required to manufacture, clean, fill, process, label, and transport bottled water".[106] Furthermore, where bottled water is being transported long-distance,

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100 Wilkinson, above n 15, at 46.

101 Anderson and Landry, above n 89, at 63.

102 Daniel Jaffe and Soren Newman "A more perfect commodity: Bottled water, Global Accumulation, and Local Contestation" (2013) 78 Rural Sociology 1 at 10 and 12. See also Nancy Hofmann and Bruce Mitchell "Evolving Toward Participatory Water management: The *Permit to Take Water Program* and Commercial Water Bottling in Ontario" (1995) 20 Canadian Water Resources Journal 91 at 96 - majority of respondent's main concern was that groundwater supplies may decrease significantly because of commercial water taking.

103 Richard Wilk "Bottled Water: The pure commodity in the age of branding" (2006) 6 Journal of Consumer Culture 303 at 319.

104 At 319.

105 Jaffe and Newman, above n 102, at 10.

106 Anthony King and others "Behaviours, Motivations, Beliefs, and Attitudes Related to Bottled Water Usage at Weber State University" (2015) The Journal of the Utah Academy of Sciences, Arts, and Letters

energy costs can be equal to (or more than) the energy required to produce the bottle in the first place.[107] The absurdity in this is that energy is being consumed in large amounts to transport water between first world countries where water is already accessible and clean. The inefficiency is abundantly clear when we note that the energy is not being expended to turn the water into a new commodity.[108] As members of the public are becoming increasingly aware of the environmental impacts of bottled water, social movements across the globe demonstrate their distaste and discomfort towards these effects.[109]

On top of the energy concerns, currently at the forefront of the western world's conservation efforts is the reduction in plastic use and plastic waste. Bottled water acts in direct contradiction to these efforts. Annually, billions of plastic bottles are discarded into the land and ocean as a direct consequence of bottled water.[110] Statistically, 41% of the polyethene terephthalate (PET) discarded in the USA alone is from bottled water.[111] Although efforts are made to recycle plastic bottled, most water bottles are made from virgin PET.[112] Furthermore, the manufacturing process for water bottles involves melting down small pellets and injecting this into a mould.[113] These pellets are toxic, and if leaked into the water systems can be detrimental.[114] Respondents in a qualitative survey commonly stated that their reasons for not consuming bottled water included concerns about the waste or environmental impacts and preferring to use reusable bottles with tap water to combat the plastic waste battle.[115]

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191 at 194. Also note that where the volume of the bottle increases, bottles are likely to be made of a stronger plastic (Polycarbonate) which requires 40% more energy to produce than the basic PET (P.H. Gleick and H.S. Cooley "Energy Implications of Bottled Water" (2009) 4 Environ. Res. Lett. 1, at 2).

107 Gleick and Cooley (2009), above n 106, at 6.

108 C.f. to irrigation or farming uses whereby energy consumption is still a big issue in the industry but can be justified to a degree on the basis of using in a process to generate a new product at the end.

109 Peter Gleick *Bottled and Sold: The Story behind Our Obsession with Bottled Water* (Island Press, Washington, 2010) at 145.

110 Wilk, above n 103, at 319

111 King and Others, above n 106, at 194 - Annually, 2.4 billion tonnes of PET is discarded in the USA. See also Gleick and Cooley (2009), above n 106, at 2 - PET stands for polyethylene terephthalate – a form of polyester used in the manufacture of plastic bottles and clothing.

112 Gleick and Cooley (2009), above n 106, at 3. Note it was recorded in King and Others' study that 50% of respondents recycled the bottles and 38% reused the bottles for their own personal use (above n 106, at 199).

113 Gleick and Cooley 2009, above n 106, at 2.

114 See for example the recent leakage of the pellets into water systems in Christchurch, Belfast Site.

115 King and Others, above n 106, at 198

C Economic Interests

6 The commodification of nature

With the cultural, social and ecological values in mind, the affront to public consciousness in the context of bottled water can be partially understood with reference to the theme of commodifying nature. It has been argued that: "bottled water sits at the intersection of debates regarding the social and environmental effects of the commodification of nature and the ways neoliberal globalisation alters the provision of public services". [116] Since water precipitates from the sky for free, critics have found absurdities and contradictions when it becomes a valuable consumer good. However, water demands a "special symbolic status in the world of goods" because it is a necessity for survival.[117] From a neoliberal standpoint, the desire to increase the market by formalising transactions makes "even a basic necessity such as water a commodity".[118] As such, it will always carry a value that can be commodified. It is contended that "bottled water is a form of cultural consumption",[119] and as such relies on people's choices to consume bottled water. This reliance is thus encouraged through marketing campaigns and government schemes to depict natural water as dangerous or contaminated, or not as healthy as bottled water.[120]

Furthermore, in Christchurch, the position has been exacerbated due to the chlorination of local water. In January 2018 a resolution was reached by Christchurch City Council to temporarily chlorinate water in response to concerns around the safety of the groundwater wellheads.[121] Christchurch has a relatively unique water supply network as the water is transported straight from the aquifers (through pipes) to households across the city.[122] However, water extracted from the same aquifers for water bottling is not required to be chlorinated.[123] As such any individual wishing to continue to drink unchlorinated water

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116 Jaffe and Newman, above n 102, at 1.

117 Wilk, above n 103, at 305.

118 Mangala Subramaniam an Beth Williford "Contesting Water Rights: Collective Ownership and Struggles against Privatization" (2012) 6 Sociology Compass 413 at 414.

119 Wilk, above n 103, at 307.

120 At 310.

121 Bridget O'Brien *Below Ground Well Heads and Drinking Water Supply Status Update* (Christchurch City Council, Supplementary Report 18/43326, January 2018) at [5.36].

122 See: David Williams "Council Manager Makes Legal Threat over Water Report" (4 September 2018) Newsroom <https://www.newsroom.co.nz/2018/09/03/219715/council-manager-makes-legal-threat-over-water-report#>.

123 One News "Why does tap water in Christchurch need chlorine when bottled water doesn't?" (27 April 2018) < https://www.tvnz.co.nz/one-news/new-zealand/why-does-tap-water-in-christchurch-need-chlorine-bottled-doesnt>.

must become a consumer of bottled water. Although classified as a temporary issue, the deadline for removing the chlorine from the water source has continually been pushed back in Christchurch.[124] The chlorination has been the subject of extensive pushback from the public, with some arguing that it is "the biggest single issue facing Christchurch's mayor and councillors" in the upcoming election.[125]

On the premise that water is a human right, the commodification of water acts as a direct contradiction to this contention. Those who see the commodification of water as a danger aim to link this to the right to water.[126] The UN Committee on Economic, Social and Cultural rights note that by treating water as an economic good, there is a risk of undermining its value as a social and cultural good.[127] The entire idea of paying for water is offensive to many on a multitude of grounds.[128] By placing a monetary value on the extraction and consumption of water, we fail to take into account the cultural and social values attributed to water. These values cannot be understood from a marketing/economics standpoint and are thus lost some way along in the equation.[129] Instead, the economic mindset seeps into the consenting process and affects access to the water in the first place. We can begin to see the role of economics taking priority within decision-making already. In *Maclaurin v Gisbourne District Council* one of the key contentions before the Environment Court was "that the consent prioritises the economic benefits of the water extraction over the sustainable management of the resource".[130] Moreover, in the wider

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[124] The deadline for removing chlorine from all public water supplies was originally intended to be May 2019. This was initially pushed back to June and is currently set as September 2019 in some areas – see: Community and Public Health "Working towards safe drinking water for everyone" (15 July 2019) Community and Public Health <https://www.cph.co.nz/your-health/drinking-water/>.

[125] See David Williams, above n 122.

[126] Winkler, above n 2, at 9.

[127] Subramaniam, above n 118, at 415.

[128] Wilk, above n 103, at 315. Note that this especially the case from a Māori perspective – to be discussed below.

[129] Subramaniam, above n 118, at 414.

[130] *Maclaurin v Gisbourne District Council* A159/2003 at [17]. Interestingly, the Court neglected to address this issue in their judgment and instead focused on whether the resource was being sustainably managed (without considering the sub-contention that economics was being prioritised over the sustainable management). This could be read as the economic values being incorporated within the sustainable management debate. The issue with this is that it has not been explicitly mentioned (or in fact even hinted to) which would suggest that it has been ignored entirely.

context of water management, economics has already taken its place with the establishment of 'water-trading' schemes in Lake Taupo.[131]

Water has to be affordable due to its characteristic as a necessity for life.[132] Water bottling companies increase their profit margins by adding a dollar figure to what is essentially "a free resource".[133] As New Zealand experiences over-allocation of the resource in some areas, competition over the resource increases between users and concerns over quantity arise.[134] It is, therefore, argued that "water has an economic value, given the increasing level of competition between users".[135] Watson argues that there is a "scarcity value" associated with water.[136] Commercial companies take advantage of the 'scarcity value' by using a free resource and adding a dollar figure to it for their gain entirely.[137] Furthermore, any commodification of the resource will result in a commercial competition over price and will close off the water market for a portion of society who are unable to pay for bottled water. In essence, it creates a luxury out of a necessity and encourages a class system whereby access to water depends on income. The contention here is that there is already long-standing recognition that access to water is a human right, or that access to water should be universal. Furthermore, one may argue that an impending environmental crisis is being commodified for a neoliberal gain. Whilst we work towards globally ensuring the realisation of these goals, bottled water acts as a means of changing the debate from access to clean water, to what price is put on this clean water.

7 Supply/demand issue

It is contended that the problem with the current 'arrangement' under the RMA regarding water-take for bottling water is that the benefit is conferred entirely upon those who demand the resource.[138] As a result, the supply and demand balance is entirely skewed and the supplying area is left with a reduced resource, no monetary compensation, nor any

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131 Refer to Hugh McDonald and Suzi Kerr Trading *Efficiency in Water Quality Trading Markets: An Assessment of Trade-Offs* (Motu Economic and Public Policy Research, Working Paper 11-15, December 2011) at 1.

132 Winkler, above n 2, at 137.

133 David Parker "David Parker: Profiteers can pay for Privilege" *The New Zealand Herald* (online ed, Auckland, 31 May 2016).

134 Watson, above n 5, at 246. See also the Human Rights Commission, above n 7, at 12 – competition is particularly prevalent in the Canterbury, Waikato and Manawatu Regions.

135 Watson, above n 5, at 274.

136 At 275.

137 At 278.

138 Anderson and Landry, above n 89, at 62.

recognition of the multitude of factors listed above. In New Zealand specifically, the common law position that no one owns water results in the government's reluctance to 'sell' water to water extraction companies.[139] Instead, such companies are afforded the rights to take and use water at little to no cost and sell for billions of dollars, all of which is profit for the company, not the supplying area. This I shall term, the "double-edged sword" whereby there is a great deal of loss with minimal realisable gain to the supplying area.

In countries where rights to water are well defined and the citizens of the exporting area financially benefit from water-take and export, commercial exporting is often more supported.[140] For example, Vancouver operates a system whereby the water company concerned must pay an annual fee for the option to extract water, and further royalties to the city based on a sliding scale per gallon as and when the water is extracted and exported.[141] A referendum revealed that the satisfaction and approval of the extraction scheme were incited by the internalisation of the benefits.[142] One suspects that the internalisation of the benefits evens out the balance and repositions some of the benefits on those supplying the resource, allowing a more harmonious relationship to exist.

In a study conducted in Canada, the majority of respondents favoured some form of monetary payment to the township involved in the water extraction process.[143] This was premised on the notion that there should be some recompense for the taking of the water, but also that there should be a contribution to the degradation and deterioration of services in the area used to access the water (such as road traffic deteriorating the roads).[144] Furthermore, politicians have expressed their concerns over the extraction of water with little return to the community where there are potentially serious effects on the supply and everyday life of the citizens of the areas concerned.[145] A double-edged sword, therefore, exists in the case of water bottling because "contemporary society balances the interests of individuals to be free from risk and the interests of other individuals to benefit from a risk-creating activity".[146] Where one set of individuals are not benefitting, the ability to justify the activity becomes more difficult. However, politicians proceed to recognise the

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139 Human Rights Commission, above n 7, at 13.

140 Anderson and Landry, above n 89, at 62.

141 At 63.

142 At 63.

143 Hofmann and Mitchell, above n 102, at 97.

144 At 97.

145 At 98. See also David Parker, above n 133.

146 Royden Somerville, "A Public Law Response to Environmental Risk" (2002) 10 Otago LR 143 at 145.

difficulties with charging for one type of water extraction alone.[147] The concern is that charging for one type of water extraction leads to the pricing of all water-takes and becomes a step closer to fully privatised water schemes.[148]

D Spiritual/Traditional/Identity Interests

8 Religious Value

Religions often stake a conscious claim or interest in water due to their religious relationship with water. Water is a requisite for many cultural practices, playing a central role in religions and beliefs.[149] Some practices rely on the provision of water, other practices relate to the perceptions of water; some practices relate to the overall way of life and the relationship between life and water itself.[150] All such relations are consciously understood to be a pivotal element in the value attributed to water, and any encroachment on the religious practices are directly understood to be an affront to the religious beliefs and practices requiring water for their operation.

Examples of where the provision of water plays a pivotal role in religious dogmas and practices can be found in the five main religions of Buddhism, Christianity, Judaism, Hinduism and Islam, as well as other historical religions. In Islamic practices, although the faith does not allow worship of tangible objects, ritual cleansing with water is a mandatory component of wudu or ablution (Islamic prayer).[151] Mosque's reserve an area for ablution to enable all worshippers to cleanse before prayer. Similarly, Jewish practices use water in their mikveh's (cleansing bath) to achieve ritual purity. In the Christian faith, water is used in many practices. For example, water is used to cure the sick; priests are washed with water at their consecration; and water is used for the ritual of baptism, whereby an individual is cleansed, initiated and incorporated into Christ.[152] Finally, in Hindu practices, water is an inevitable element. Ritual sprinkling is the process of cleansing the place where a ceremony is conducted and the utensils that are to be used for

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147 See for example (15 March 2017) 720 NZPD 16556; (22 March 2017) 721 NZPD 16891, 16984.

148 As above.

149 Winkler, above n 2, at 18. See also Douglas Fisher, above n 3, at 86: "water is the life-giving element… it is a sacred gift from the gods and must be handled with care".

150 Winkler, above n 2, at 188.

151 M.A. Siraj and M.A.K. Tayab "Water in Islam" in K.V. Raju and S. Manasi (eds) *Water and Scriptures: Ancient Roots for Sustainable Development* (Springer, Switzerland, 2017) 15 at 30-31.

152 Y. Moses "Perspectives on Water and the Bible" in K.V. Raju and S. Manasi (eds) *Water and Scriptures: Ancient Roots for Sustainable Development* (Springer, Switzerland, 2017) 59 at 68-70.

the ceremony with water.[153] Furthermore, Hindu's are required to provide guests with water to wash their hands and legs and to sip to cleanse themselves when they enter their home.[154]

One can see from all of the examples above that the sacredness of water leads to the mandatory inclusion of water in all religious practices. As such, I argue that even if these practices are not engaged in by all of society, the knowledge of such practices and the historical relevance of such practices subconsciously guides our understandings of water. Therefore, we position ourselves according to the inclusion of water in religious practices and, therefore, water forms a significant part of our cultural identity.

From a different standpoint, people's perceptions of water also shed light on the value attributed to the resource. An example of this can be found within Hinduism and the relationship with the River Ganges. It is the body of water itself which commands the label of sacrament across India.[155] Under the Hindu faith, it is believed that the River Ganges is a "direct secretion from the cosmic body of Vishnu, in effect the divine in liquefied form".[156] Immersion in the water, coming into contact with the water, or simply casting one's eye upon the River Ganges dissipates the sins of those who perform such actions, after which "death itself cannot defile one who has been given Ganges water".[157] As such, the river is treated as a receptacle for the sins of the unredeemed; a place for people to wash away their sins and receive the healing powers of the river.[158] A landmark case in India (and indeed environmental law across the globe) considered the damage pollution was having on the *sacredness of the river itself*.[159] In 1985 M.C.Mehta asked the Supreme Court of India to clean up the River Ganges based on Article 21 of the Indian Constitution guaranteeing life and liberty.[160] The Supreme Court went one step further and undertook a trial akin to a mass tort action.[161] The Supreme Court imposed requirements on the State

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153 Sudhakara Sharma and M.S. Shruthi "Water in Hindu Scriptures: Thank You, Water!" in K.V. Raju and S. Manasi (eds) *Water and Scriptures: Ancient Roots for Sustainable Development* (Springer, Switzerland, 2017) 89 at 122.

154 Sharma and Shruthi, above n 153, at 122.

155 Sudipta Sen *Ganges: The Many Pasts of an Indian River* (Yale University Press, New Haven, London, 2019) at 28; Oliver A. Houck *Taking Back Eden: Eight Environmental Cases that Changed the World* (Island Press, Washington, 2009) at 100.

156 Sudipta Sen, above n 155, at 32; see also Houck *Taking Back Eden*, above n 155, at 100.

157 Sudipta Sen, above n 155, at 32; see also Houck *Taking Back Eden*, above n 155, at 100.

158 Sudipta Sen, above n 155, at 343-344.

159 Oliver Houck "From Sacred Places: The Nikko Taro and the Taj Mahal" (2009) 31 U. Haw. L. Rev. 369 at 408.

160 At 408-409.

161 At 410.

and industries polluting the river to clean up their operations or cease action.[162] The River Ganges has maintained the abiding faith of Hindu's over centuries through the practice of a pilgrimage,[163] whilst remaining separate from commercialisation and neoliberalism.[164] That is to say, that the River Ganges is "consumed as a substance of ritual necessity but not bought and sold like gold or silver on the open market".[165] The Supreme Court confirmed this approach when they refused to undertake a cost-analysis when requiring industries to clean up the Ganges. In one of the earlier Ganges cases, the Supreme Court noted that "the closure of tanneries may bring unemployment, loss of revenue *but the life, health and ecology have greater importance*".[166] As a result, an economic and commercial focus on water appears discordant with the spiritual and religious perceptions of water.

The case of *Grunke v Otago Regional Council* outlines the interaction of the provision and perception of water in practice.[167] Grunke submitted that as a nun she regards water as a symbol of baptism, which in turn represents life.[168] As a result, the pollution of water bodies translates into a representation of death.[169] Grunke's understanding of water on a spiritual level meant that any disturbance to the purity of water had implications on the symbolisation it portrayed and the harmony with which she (and others alike) could interact with the resource.

9 *Māori Interests*

Although I do not attempt to draw a conclusion on the debate around Māori ownership of water (a discussion which continues between iwi and the Crown), accounting for Māori values and interests is critical when discussing the value attributed to water in New Zealand. The foundational arguments that result in ownership discussions rest in the value

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[162] Houck "From Sacred Places, above n 159, at 410-411.

[163] Sudipta Sen, above n 155, at 20.

[164] It must however be noted that the polluted state of the Ganges is extreme. In 1984 the River Ganges caught fire (see Houck *Taking Back Eden*, above n 155, at 100). The pollution does not appear to be as problematic as the removal of the water (c.f. to the decision in *Aotearoa* as well as Māori spiritual values and issues with the removal of water as disturbance of mauri). See the subsequent Ganges litigation brought by M.C. Mehta (*M.C. Mehta v. Union of India* [1987] 4 SCC 463 [Mehta I]; and *M.C. Mehta v. Union of India* 1988 AIR 1115, 1988 SCR (2) 530 [Mehta II]).

[165] Sudipta Sen, above n 155, at 33.

[166] *M.C. Mehta v. Union of India* 1988 AIR 1115, 1988 SCR (2) 530 [Mehta II], above n 164, at 555, as cited in Houck *Taking Back Eden*, above n 155, at 411, emphasis Added.

[167] *Grunke v Otago Regional Council* C8/1996 (PT).

[168] At 3.

[169] At 3.

attributed to water.[170] It is these foundational points that form the basis of my discussion in this chapter.

Water is both culturally and spiritually significant for many indigenous peoples across the globe in addition to being the basis of subsistence.[171] The relationship between iwi and freshwater is founded in Whakapapa; freshwater is a taonga and Kaitiakitanga is intergenerational.[172] In this sense, "water is inextricably tied to their distinctive way of life".[173] For Māori, many rivers across the country are viewed as Tupuna (ancestors) and the individual's identity is intricately linked to their ancestral river.[174] The link between an identity and a river surrounds the underlying notion amongst Māori culture that humans and water are intertwined. This notion is depicted within a common Māori saying: 'Ko au te awa, ko te awa ko au' which translates as 'I am the river and the river is me'.[175]

Many Treaty of Waitangi claim settlement statutes describe the relationships between iwi, hapu and whanau with the cultural, spiritual and historical associations with rivers. Specifically, in relation to the Waikato River, the statement of significance to the Waikato-Tainui iwi reads as follows:[176]

> The Waikato River is our tupuna (ancestor) which has mana (spiritual authority and power) and in turn represents the mana and mauri (life force) of Waikato- Tainui… Our relationship with the Waikato River, and our respect for it, gives rise to our responsibilities to protect te mana o te Awa and to exercise our mana whakahaere in accordance with long established tikanga to ensure the wellbeing of the river. Our relationship with the river and our respect for it lies at the heart of our spiritual and physical wellbeing, and our tribal identity and culture.

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170 For examples of ownership discussions see: *AG v Māori Council* [2013] NZSC 6; Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012); Jacinta Ruru "Māori legal rights to water: Ownership, management, or just consultation?" (2011) 7 *Resource Management Theory & Practice* 119; Jacinta Ruru "Undefined and unresolved: Exploring indigenous rights in Aotearoa New Zealand's freshwater legal regime" (2009) 20 *Journal of Water Law* 236; Jacinta Ruru "Indigenous Restitution in Settling Water Claims" above n 53.

171 Winkler, above n 2, at 190.

172 Land and Water Forum, report 1, above n 27, at vii.

173 Winkler, above n 2, at190.

174 James Morris and Jacinta Ruru "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14 AILR 49 at 49.

175 At 49.

176 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 8(3).

At each location, different values are supported by the river or site concerned, and the values shall differ amongst hapu and iwi.[177] Some of the bases for challenges have been due to: the recognition of wāhi tapu;[178] the impacts on the mauri of the river and the relationship with their taonga;[179] and the interference with tikanga.[180] The overarching relationship between water identity remains a constant through Māori culture, but conflicts with economic uses of water such as commercial water bottling.

10 Affiliation with the Natural World

Finally, I argue that the spiritual and traditional values associated with water are also indirectly affecting society's relationship with water. This is due to the historical roots of our affiliation with water as part of the natural world (moving away from the organised religion discussed above). Sociologically speaking, it is this history that roots our appreciation of nature. The process of social conditioning normalises the macro-level significance water is afforded and elevates the elemental importance of water above the four other elements of nature. In other words, the value we attribute to water is subconsciously operating and members of society do not necessarily realise that the discomfort over commercial water use (such as water bottling) is rooted in the operation of the subconscious.

In the western world, our historical and traditional practices are largely affiliated with the use or requirement of water. For example, when tracing the origins of the significance of water, it is observed that "Water is more than a symbol of the natural world; it is usually seen as the *very substance of the natural world"*.[181] From a pagan/animistic standpoint, the sacred power of water to connect individuals with nature composes a dialogue of purity

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[177] Crow and others, above n 58, at 637.

[178] *Minhinnick v Watercare Services Ltd* [1997] NZRMA 553 at 554 – proposed construction of a sewerage system in Auckland running through the Matukuturua Stonefields was challenged by Māori on the basis that the area was recognised as wāhi tapu and it would be offensive and objectionable to carry out the activity on the site.

[179] *Wakatu Inc v Tasman District Council* [2012] NZRMA 363, [2012] NZEnvC 75 at [4]-[5] – Māori challenged the use of water outside the catchment area as it would have significant impacts on the mauri of the river and would interfere with the relationship between Tangata Whenua and their taonga.

[180] *Ngati Kahu Ki Whangaroa Cooperative Society Ltd v Northland Regional Council* [2001] NZRMA 299 at [109] – [115] in relation to the establishment of oyster farms, Māori contended that the farm was in direct contrast to their tikanga and undermined the special relationship they had with the Whangaroa Harbour as a source of seafood. See also *Te Runanga o Taumarere v Northland Regional Council* [1996] NZRMA 77 at 85 for a similar contention raised by Māori in relation to the discharge of human waste into a waterway valued as a source of kaimoana (seafood)

[181] Wilk, above n 103, at 308, emphasis added.

and sacrament that must be respected and praised in its natural form, for use in the human world.[182] As a result, the connection with a greater being is translated in the connection with nature, and the practices outlined above act purely as a portal through which this connection is achieved. In turn, water is considered "a natural right" because the water itself is a gift of nature.[183] I argue that the sacred nature of water has been subconsciously carried through society to the present day notwithstanding individual beliefs (or non-beliefs) and society's understanding of the importance of water is formed through a historical lens.

E The Legal Relevance of the Range of Values

From this chapter one can appreciate the multiplicity of values at play when one expresses their discomfort or disapproval towards water bottling consents in New Zealand. It must be noted that not all of these values apply in every situation: they interact with each other and are dependent upon the individual concerned in each scenario. These values comprise a spectrum of extreme anthropocentric to ecocentric values and represent the value pluralism present in environmental decision-making. Arguably, the RMA accommodates all values as valid considerations under Part II of the Act, provided they can be classified as adverse effects of the activity concerned. This is because the RMA "is as much about enabling social, cultural and economic wellbeing, as it is about environmental bottom lines and conservation".[184] The inherent tension within Part II of the RMA "is what makes the RMA an accepted framework within which today's society can debate how our natural and physical resources are to be used".[185]

It is argued that "on the face of it, Part II of the [RMA] is promising. It expressly lists relevant considerations for decision-making in respect of water".[186] The wide framing of s 5(2) is seemingly deliberate to import a great deal of flexibility for the decision-maker.[187] However, the suggestion that Part II provides "substantive guidance to decision-makers is

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[182] For example, the water and land in ancient Egypt belonged to the Pharaoh (understood to be a living god on earth) and as such any worship of gods was inextricably linked to the river. See Fisher, above n 3, at 13.

[183] Fisher, above n 3, at 85.

[184] Bal Matheson and Simon Berry "Water" in Derek Nolan (ed) *Environmental & Resource Management Law* (4th ed, Lexis Nexis, Wellington, 2011) 519 at 1.

[185] At 1.

[186] Nicola Wheen "The Resource Management Act 1991: A "Greener" Law for Water?" (1997) 1 NZJEL 165 at 180.

[187] At 187.

optimistic".[188] A common contention is that "whenever any kind of value judgment is required… other difficulties follow".[189] Williams argues that the RMA:[190]

> …creates a complex system for the resolution of environmental conflict…by Part II, the Act is front-end loaded with a set of unquantifiable values at multiple, indiscriminate poles – present, future, environmental, economic, Māori, Pākehā. Part II is at once a source of bottomless justification and conflict.

Wheen argues that the purpose and principles sections of the RMA "entrench disputes rather than… promote dispute resolution".[191] Implementing the RMA requires a series of value judgements due to the principles-based nature of the legislation. The lack of guidance around the values and principles seems to result in a lack of consistency in decision-making.[192] Williams argues that part of the reason that Part II is so broad in scope is that "it was always contemplated that the RMA would supply a framework within which more detailed provisions would be developed".[193] Regional Plans do not address the range of issue discussed above, if at all.[194] Although this is understandable due to the political nature of the debate, the substituted detail contemplated during the drafting stage of the RMA is still lacking. As a result, there is currently a legal lacuna. This thesis argues that a conceptual framework will go a long way in solving the lack of guidance imported into Part II of the RMA. Chapter III shall, therefore, work to explain the benefits of creating and adopting a conceptual framework in environmental decision-making for water-take cases. It shall then outline the method from which the parameters of the framework shall be constructed and provide examples of this in action by drawing on some of the values discussed in this chapter.

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188 I H Williams, "The Resource Management Act 1991: Well Meant but Hardly Done" (2000) 9 Otago LR 673 at 676.

189 Wheen "A greener law for water?", above n , at 194.

190 I H Williams, above n 188, at 693.

191 Nicola Wheen, "Belief and Environmental Decision-making: Some Recent New Zealand Experience" (2005) 15 Journal of Environmental Law and Practice 297, at 299.

192 New Zealand Institute of Economic Research, above n 24, at 21.

193 IH Williams, above n 188, at 686.

194 See the Otago Regional Plan "Regional Plan: Water for Otago" (1 July 2018) to be discussed in more detail overleaf as an example.

Chapter III "The Conceptual Framework"

As the analysis in Chapter II shows, a plain reading of s 5 of the RMA would deem all of the values discussed as valid legal considerations under the RMA. Thus, all values would become relevant factors in the decision-making process. The challenge arises for decision-makers where there is a plurality of values to be considered without much guidance on the weight to be attributed to each. For instance, the Otago Regional Plan ("ORP") provides minimal guidance on the values that should be taken into account in decision-making. Although the ORP discusses the importance of the waterways to Otago's communities and their social, economic and cultural well-being,[195] it does not address all values at play. To illustrate, Part 4 of the ORP addresses Māori perspectives (in particular the perspective of Kai Tahu) and acknowledges the importance of water in the practice of Kaitiakitanga and its role in ceremonial occasions conducted by Māori.[196] However, the plan does not address wider religious/spiritual values associated with water, nor does it address the wider arguments at play in the water-take and water bottling debate. Therefore, the ORP is not particularly helpful as a tool to direct decision-making in the value sphere.

The reality is that the combination of the plurality of values along with the growing scarcity of water as a resource will result in an influx in legal disputes. Such legal disputes are not restricted to litigation: they manifest in many different legal forums.[197] Therefore, decision-makers, including the judiciary, will face the prospect of having to address the diverse range of values in their decisions. To consider the true range of values at play without limitation under Part II of the RMA could render litigation more unwieldy and challenging. Although one of the central themes of Part II is to consider the policy factors at play under s 5, s 7(b) also promotes a theme of efficiency in the management of natural resources.[198] As succinctly outlined by the Court of Appeal, "there is a need to achieve procedural efficiency, rather than permitting it to be swamped by aspiring to substantive perfection".[199] Where there is minimal guidance from which to manage the influx, decision-makers will attempt to grapple with the relevance of the range of values at play.

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195 Refer to Otago Regional Plan, above n 194, at [3.2.1] and [5.1]. Note that this is similar wording to s 5 of the RMA.

196 Refer to Otago Regional Plan, at [4] – particularly, [4.5] and [4.7]. See also Schedule 1D listing the array of cultural and spiritual values associated with each water body of significance to Kai Tahu.

197 For example, see Land and Water Forum Reports, above n 27; the debate on Māori ownership of water in the Waitangi Tribunal, above n 170, New Zealand Freshwater Policy Statement 2014, and the assigned working group, and Plan Change applications (see *Wakatu Inc v Tasman District Council*, above n 179).

198 Resource Management Act 1991, ss 5 and 7(b); refer also to *Central Plains Water Trust v Synlait Ltd*, above n 87, at [75] – [78] for discussion on the two themes at play and how they interact.

199 *Central Plains Water Trust v Synlait Ltd*, above n 87, at [92].

A conceptual framework will assist decision-makers and work to fill the current legal lacuna. Moreover, a conceptual framework will assist in adhering to the theme of efficiency promoted by s 7(b) of the RMA. I shall, therefore, propose a conceptual framework that will help decision-makers (including the judiciary) determine how much weight should be attributed to the plurality of values at play. The weight shall be dependent upon whether the wider legal landscape upholds or rejects the particular values. The parameters of the conceptual framework shall be inspired by the underlying rationale that a common law system operates as a seamless web. The notion of law as a seamless web was arguably introduced by Maitland, who discussed how the law is characterised by organic unity and strong connections amongst disciplines.[200] However, Dworkin outlines the applicability of the rights thesis in 'hard cases' and discusses the concept of the law as a seamless web to assist in such cases. [201] Dworkin notes that the ideal theory of adjudication is that "judges should apply the law that other institutions have made; they should not make new law".[202] Where this ideal cannot be fully realised, Dworkin urges the judiciary to guide their 'novel decisions' by consistency with the law and ensure that their reasoning can be justified by virtue of the law as a whole.[203] By applying the reasoning of a philosophical judge Hercules, Dworkin notes that litigants are entitled to ask Hercules to treat the law as if it were a seamless web.[204] In this, Dworkin suggests that the Court must construct "a coherent justification" for their views based on the wider legal landscape.[205] Further, from a natural law perspective, Finnis argues that the law presents itself as a seamless web.[206] The seamless nature of the law means that law and morality are intertwined, and the law as a whole seeks to coordinate social behaviour.[207] As such areas of law interact and complement each other such that there is consistency within the law.

I argue that although there are differing views on how to interpret the concept of a seamless web, the common law proposition should apply to the RMA where it is reasonable and

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200 F.W. Maitland *A Prologue to a History of English Law* (1898) 14 L. Qtrly Rev. 13.

201 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at 81-130, and 115 respectively.

202 At 82.

203 At 86-88.

204 At 116.

205 At 116.

206 John Finnis *The Authority of Law in the Predicament of Contemporary Social Theory* (1984) 1 Notre Dame J.L. Ethics & Pub. Pol'y 115 at 120.

207 Leora Batnitzky *A seamless web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law* (1995) 15 OJLS 153 at 159. Note that this is one conception of the operation of the law – a legal positivist perspective critiques the 'seamless' notion of the web.

practicable. Previous RMA decisions in New Zealand have advocated for a wider understanding of environmental law based on the context of New Zealand law more generally. For example, the High Court in *Montessori Pre-School Charitable Trust v Waikato District Council* stated that "while there is a good distance to go, there is a clear tendency for [the law] to move towards becoming a seamless whole, each part developing in sympathy with neighbouring parts".[208] Other areas of the law shall, therefore, be drawn upon to inform the decision-making process. The practise of drawing from the wider legal landscape in environmental decisions is not a novel concept. Under the RMA the practice has been adopted many a time regarding resource consent applications, plan change applications and the challenging of abatement notices.[209]

To clarify, this dissertation is not seeking to reform the law, nor is it seeking to reduce litigation per se. Rather, it is seeking to provide a conceptual framework to complement the operation of the RMA within the wider legal context. In doing so it seeks to provide a basis for decision-makers to provide legally justifiable reasons for their decision with clarity. To illustrate how the framework shall operate, this chapter shall seek to draw on some of the values outlined in chapter II and demonstrate how to assess the weight to be attributed to each. For the purposes of this dissertation, I have selected only a portion of the values discussed in chapter II.

F Xenophobia and Human Rights

In short, this section will argue that xenophobia should be given little to no weight in the decision-making process. The reasoning for this is founded in both domestic human rights statutes and international treaties, as well as common law principles. Since all human rights laws work to prevent discriminatory conduct, challenging water bottling on the grounds of xenophobic values would be antithetical to the wider legal landscape.

Section 19 of the New Zealand Bill of Rights Act ("NZBORA") protects the freedom from discrimination on the grounds set out under s 21 of the Human Rights Act 1993

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[208] *Montessori Pre-School Charitable Trust v Waikato District Council and Anor [2007] NZRMA 55* at [18]. In the context of trade competition and the definition of trade competition within the RMA in comparison to the Commerce Act and beyond.

[209] See for example: *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] NZRMA 395 in relation to appealing a resource consent; *Wakatu Inc v Tasman District Council*, above n 179, in relation to plan change applications; and *Zdrahal v Wellington City Council* [1995] NZRMA 289, [1995] 1 NZLR 700 in challenging abatement notices.

("HRA").[210] One of the prohibited grounds of discrimination is race.[211] Although there is no hierarchy amongst the prohibited grounds in New Zealand, racial discrimination is commonly regarded as "the *raison d'être* for anti-discrimination legislation".[212] As such, if one were to adopt a more nuanced approach to s 21 of the HRA, racial discrimination may be subject to a stricter response than other prohibited grounds.[213] Section 6 of the NZBORA requires an assessment to be undertaken between the enactment in question (in this case the RMA) and the NZBORA.[214] This is to ensure that, where possible, legislation does not operate contrary to human rights laws. Wheen discusses the relationship between the NZBORA and the RMA and argues that the NZBORA provides "enormous potential to persons affected by the exercise of powers… under the RMA".[215] It is argued that "the common law principle of legality supports the approach in s 6 of seeking a rights-consistent meaning" as the principle promotes legislative consistency across the legal landscape.[216] Furthermore, the seamless web argument furthered above also supports this proposition.

Section 6 of the NZBORA operates as a mechanism to constrain open-ended administrative power (such as that operating under the wide ambit of Part II of the RMA) to ensure a rights-consistent approach is adopted. Further, s 6 NZBORA can apply to the interpretation of a statute even where ambiguity is not present.[217] Therefore, the interpretive tool in s 6 of the NZBORA could be used to construct some parameters around section 5 of the RMA (where although not ambiguous, there is a large ambit for discretion). This would mean that the ambit of discretion permitted under Part II of the RMA could be restricted in light

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[210] See New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, s 21 for grounds.

[211] Human Rights Act 1993, s 21(1)(f). See also s 21(1)(e) ethnic and national origins as a related and applicable prohibited ground.

[212] Being 'the reason for existence' as in Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) 366 at 370.

[213] Must be noted that this is not hard law, instead a strong argument posed for a nuanced approach to the concept of discrimination under s 21 HRA based on the classification of rights system in the United States of America and Canada, see Huscroft, above n 212, at 373.

[214] New Zealand Bill of Rights Act 1990, s 6. See also Sylvia Bell, Paul Roth and Christopher Jury *Brookers Human Rights Law* (Online loose-leaf ed, Thomson Reuters) at [BOR6.03].

[215] Nicola Wheen "The Angle Grinder, the Swastika, and the Airport: Resource Management and the New Zealand Bill of Rights Act 1990" (1995) 4 Bill of Rights Bulletin 54 at 54.

[216] *Brookers Human Rights Law*, above n 214, at [BOR6.10]. Note that this principle underpins the purpose of this dissertation – seeking to adhere to the concept of the law as a seamless web and drawing from external legislation to interpret the broad nature of Part II RMA.

[217] At [BOR6.04]. The word "can" in section 6 means that even where ambiguity is absent, any other meaning can be considered in the interpretation of the statute.

of the human rights instruments. Such an interpretation would likely prohibit infringements on the right to freedom from discrimination.[218]

The High Court in *Zdrahal v Wellington CC* specifically addressed the relationship between the NZBORA and the RMA.[219] In citing the case of *Ministry of Transport v Noort*, the High Court confirmed the importance of the rights and freedoms contained in the NZBORA. The Court stated that "to achieve consistency and the reasonable limits, an enactment may require to be construed in a limited or abridged form".[220] The High Court noted that there was no doubt that the NZBORA applied to the rights in this instance.[221] However, the specific wording of the RMA can be taken to override the exercise of the freedom of speech where this is objectionable or offensive and proportionate.[222] Although *Zdrahal* discusses using the RMA to limit a right provided for under the NZBORA (whereas the water bottling debate requires the protection of a freedom), both outcomes can be determined by understanding that the RMA can be interpreted using the NZBORA. The underlying rationale in *Zdrahal* was that limiting the right could be demonstrably justified *in a free and democratic society.* The same principle can be adopted when interpreting the RMA to prevent discriminatory conduct where it is justifiable *in a free and democratic society*.

Applying this to the water bottling debate, chapter II of this dissertation acknowledged that media involvement in the debate has fuelled a xenophobic undertone. Accepting arguments against water bottling based on xenophobic sentiment arguably constitutes a breach of s 19 NZBORA.[223] Moreover, taking a more nuanced approach, the racial element adds a further level of severity to any potential breach of s 19. Although these rights may not be directly

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218 Nicola Wheen "The Angle Grinder, the Swastika and the Airport", above n 215, at 54.

219 See *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 – in the context of freedom of expression and whether abatement notices can be issued to limit freedom of expression where this is deemed to be objectionable or offensive in terms of Resource Management Act 1991, s 322.

220 At 710 – citing the case of *Ministry of Transport v Noort* [1992] 3 NZLR 260.

221 See also Nicola Wheen "The Angle Grinder, the Swastika and the Airport", above n 215, at 55-56 whereby Wheen discusses how the NZBORA was enacted long before the RMA and as such one can infer that the legislature intended that rights and freedoms would be upheld by those empowered to act under the RMA.

222 *Zdrahal*, above n 219, at 710.

223 Note the NZBORA applies to public bodies – so the practice of Court or Decision-makers accepting such arguments would be the contravening action, not the submissions in and of themselves. See Nicola Wheen "The Angle Grinder, the Swastika and the Airport", above n 215, at 59 – the NZBORA has been confirmed as applying to abatement notices and imposing conditions on Resource Consents. However, Wheen questions whether there is an instance under the RMA where the NBORA would not apply to an individual exercising powers or functions conferred on them by the RMA.

attributable to overseas entities, the RMA should be interpreted in a manner that is consistent with the wider values espoused by the legal landscape. A literal interpretation of Part II of the RMA (in particular s 5(2)) would permit xenophobic arguments. However, using a similar method as outlined by s 6 NZBORA, the statutory language of the RMA should be read down to ensure that decision-making is consistent with the NZBORA and the rights promoted by the wider legal landscape.[224] On this interpretation of s 5(2) of the RMA, little weight should be afforded to xenophobic arguments in the decision-making process that the wider law finds abhorrent. Moreover, international treaties to which New Zealand is a party also support this analysis. As a member of both the GATT and GATS agreements, New Zealand is prevented from trading in a discriminatory manner.[225] However, I shall not discuss this point in detail as it begins to move beyond the remit of this dissertation.

G Competing Users and Competition Law

Chapter II of this dissertation argued that water in New Zealand has economic value due to increasing competition between users of the resource.[226] As such, water has become a commodity. This section shall argue that submissions founded on an anti-competitive ethos should be given little weight in the decision-making process. This is because both the RMA and wider competition laws in New Zealand promote the operation of competition.

Competition is best defined as "the action of seeking to gain what another attempts to gain at the same time".[227] Under the RMA, there are countless sections requiring decision-makers, consent authorities and plan makers to disregard trade competition and its effects in their respective roles. Specifically, s 104(3)(a)(i) requires the consent authority to disregard trade competition when considering a resource consent application.[228] Further, s 95D(d) requires consent authorities to disregard trade competition and its effects when determining whether the activity is likely to have adverse effects on the environment that

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[224] Brookers Human Rights Law, above n 214, at [BOR6.07]. See also Nicola Wheen "The Angle Grinder, the Swastika and the Airport", above n 215, at 57 – noting that by affirming rights and freedoms through the RMA will assure BORA rights are given their widest scope.

[225] See for example The General Agreement on Tariffs and Trade [GATT] 55 UNTS 194 (signed 30 October 1947, entered into force 1 January 1948); and the General Agreement on Trade in Services [GATS] 1869 UNTS 183 (signed 15 April 1994, entered into force 1 January 1995).

[226] Watson, above n 5, at 274.

[227] *Montessori Pre-School Charitable Trust v Waikato District Council*, above n 208, at [14] – citing the Shorter Oxford Dictionary.

[228] Resource Management Act 1991, s 104(3)(a)(i). Also discussed in *Montessori Pre-School Charitable Trust v Waikato District Council*, above n 208, at [6].

are more than minor.[229] The definition of 'trade competition' can be understood within the wider context of New Zealand law. Baragwanath J in the High Court noted that both the common law and the Commerce Act 1986 ("CA") promote the public interest in competition.[230] The overall purpose of the CA is to "*promote competition* in markets for the long-term benefit of consumers within New Zealand".[231] Furthermore, under the common law, restraint of trade is prima facie invalid due to public policy reasons (unless the contractual clause in question can satisfy the reasonable test).[232] The common law doctrine of restraint of trade has been preserved by the Contract and Commercial Law Act 2017.[233]

The promotion of competition is founded on the idea that competition is not an end in itself, but as a means to an end.[234] The 'end' is in ensuring the long-term welfare of consumers in New Zealand by preventing monopolies.[235] As such, the commodification of nature as a means of creating trade competition must not be afforded weight in the decision-making process due to the common law and statutory recognition of the benefit of competition in New Zealand. As stated in the High Court, based on the wider legal landscape, "it is reasonable to infer that s 104(3)(a) has a similar purpose" in *promoting* competition in New Zealand's resources.[236] However, the debate around water bottling focuses more squarely on competition between users. Therefore, the competition between users is arguably not in 'trade'. As a result, the statutory and common law mandates on disregarding trade competition and its effects do not directly apply. Despite this, the principles and rationale behind the promotion of competition are still relevant. Just as there is a benefit in encouraging competition in trade, it is argued that there may be value in looking at how competition between users promotes a more efficient use of water. If we as a society can move beyond the negative connotations of commodifying nature, competition between users could work to solve some of the deeper issues with water allocation in New Zealand. It is argued that competition will inevitably encourage better water allocation regimes in

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229 Resource Management Act 1991, s 95D(d).

230 *Montessori*, above n 208, at [18]

231 Commerce Act 1986, s 1A, emphasis Added. As discussed also in *Montessori*, above n 208, at [18]

232 See Jeremy Finn "Illegality" in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (5th ed, Lexis Nexis, Wellington, 2016) 445 at [13.9.2].

233 In replacement of s 11(a) of the Illegal Contracts Act 1970; see now Contract and Commercial Law Act 2017, s 84.

234 Ian Gault, David Blacktop, David Carter, Barry Allan, Linda Howes, Rae Nield, Austin Powell, John Walsh, Daisy Williams *Gault on Commercial Law* (Online loose-leaf ed, Thomson Reuters), at [CA1A.01].

235 At [CA1A.01].

236 *Montessori*, above n 208, at [18].

place of the problematic first-in-first-served regime.[237] This is because where water is scarce, competition will force a change in thinking on how we allocate the resource to best serve long-term benefits for society. In other words, competition can act as a means of achieving sustainable management of the resource. This is squarely within the central purpose of the RMA.

Conclusively, although the general reasoning around competition benefitting the wellbeing of society can be applicable here, the end goal is an efficient allocation of water (not to prevent monopolies per se). The strict bar on taking into account trade competition would not apply explicitly, but advocacy for competition within New Zealand society is still a relevant rationale for endorsing competition between users. Therefore, the voices of anti-competitive individuals should arguably be given less weight in the decision-making process because competition acts as a means to an end for efficient water allocation. Furthermore, the quantity considerations so frequently adopted by Courts shall, theoretically, act as a backstop to ensure that a base level of water is readily available for society as a whole.

H Spiritual Values and the law and religion debate

This section shall argue that the weight to be given to Māori values is elevated above that of Pākehā values. This is due to the enshrined recognition of Māori values in the RMA and other legislation, as well as the constitutional elevation afforded to Māori values. However, I shall seek to draw comparisons between Pākehā and Māori spiritual values in assessing the weight to attribute to religious and spiritual values more generally. I shall also draw from human rights statutes and treaties.

It is commonly accepted that New Zealand is a secular state.[238] In this sense, New Zealand does not have a State religion, and separation between law and religion is recognised. However, some have argued that Māori rituals "have been eagerly co-opted to function as a sort of civil religion in New Zealand".[239] The Cabinet manual lists Te Tiriti o Waitangi as one of the sources of New Zealand's unwritten constitution and is a founding document of the New Zealand government.[240] A modern challenge for the State is, therefore, that a

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[237] The current allocation regime is confirmed in *Fleetwing*, above n 25.

[238] Rex Adhar "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23 OJLS 611at 622.

[239] At 631. See also Fiona Wright "Law, Religion and Tikanga Māori" (2007) 5 NZJPIL 261 at 284.

[240] Cabinet Office *Cabinet Manual 2017* at 1.

balance must be found between respecting indigenous spirituality and interests in a system that commits to religious neutrality.[241] Secularism is not necessarily a problem when litigating based on religious or cultural beliefs. Freedom of thought, conscience and religion is adhered to where the State does not select a particular religion to associate with.[242] Instead, secularism promotes non-discrimination based on religion and is inclusive of all religions in society.[243] In this manner, secularism is "a second-order principle".[244] In other words, secularism derives its persuasiveness from the "first-order principle" of freedom of religion.[245]

The NZBORA protects the right to freedom of thought, conscience and religion.[246] This includes both the freedom to believe and the freedom not to believe.[247] As with the freedom from discrimination (discussed above), the rights contained in the NZBORA are not absolute. However, Rishworth argues that the essential nature of freedom of thought to autonomy and democracy means that the freedom under s 13 has "a strong claim to primacy in the Bill of Rights".[248] Where possible legislation should be interpreted consistently with the rights and freedoms. The issue with the freedom of thought conscience and religion is that this is a right to your thoughts and beliefs; there is no positive obligation on the State towards religious believers.[249] On the other hand, the RMA imports a positive obligation on the State (and decision-makers) to consider and protect Māori interests. Sections 6(e), 7(a) and 8 of the RMA all provide "a strong base for Māori to voice their concerns relating

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241 Adhar, above n 238, at 612 – Adhar argues that currently indigenous 'religions' or spirituality is privileged.

242 Heiner Bielefeldt "Freedom of Religion or Belief – A Human Right under Pressure" (2012) 1 OJLR 15 at 25.

243 At 25.

244 At 25-26.

245 At 25-26.

246 New Zealand Bill of Rights Act 1990, s 13.

247 Heiner Bielefeldt, above n 242, at 22.

248 Paul Rishworth "Freedom of Thought, Conscience and Religion" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) 277 at 277, see also Fiona Wright, above n 239, at 285 whereby the freedom is described as "the essence of individualism". Note that the freedom is based on International Covenant on Civil and Political Rights 999 UNTS 171, opened for signature 16 December 1966, entered into force 23 March 1976, art 18 whereby the freedom of religion is one of only a handful of rights that are non-derogable even in time of public emergency. The General comment for Article 18 described the freedoms it protects as being "far reaching and profound" (Human Rights Committee "General Comment 22: The Right to Freedom of Thought, Conscience and Religion" (30 July 1993) CCPR/C/21/Rev.1/Add.4 at [1]).

249 See *Mendelssohn v Attorney General* [1999] 2 NZLR 268 for discussion on lack of positive state obligations by the Court of Appeal – as cited in Rishworth at 307. See also Fiona Wright, above n 239, at 285: s 13 protects the autonomy in matters of belief or religion.

to the use of freshwater".[250] Furthermore, Te Tiriti o Waitangi imports a positive obligation on the State, as part of the constitutional fabric, to consider Māori interests. Therefore, one may argue that the freedom contained under s 13 of the NZBORA is given a *positive* "legal basis for Māori interests" by both the RMA and the Treaty of Waitangi.[251] The Māori specific sections are not additional to s 5 but are a mandatory consideration under s 5. It is likely that the reason for the Māori specific sections under the RMA is to recognise the constitutional imperative attributed to Te Tiriti o Waitangi and Māori interests more generally.

Although Tikanga Māori is not itself a religion, the law/religion debate is inevitably engaged because some Māori values are inherently spiritual.[252] This is because Tikanga Māori combines rules with values and procedures with principles.[253] It has been generally accepted that there are difficulties with considering Māori spiritual and traditional values in environmental adjudication. Adhar notes that the difficulty with spiritual beliefs is that "it is hard to grapple with metaphysical matters".[254] The case of *Bleakley v ERMA* noted that adverse effects are much more difficult to establish in the absence of empirical evidence.[255] However, since Māori interests are mandatory considerations under the RMA, decision-makers have not been able to side-step around the issue, despite any reluctance to handle disputes over intangible effects.[256] Challenges to resource consents have, therefore, been brought based on spiritual values alone.[257] What tends to occur is that Māori concerns are given more weight if they are tangible and intangible metaphysical effects are dealt with through conditions to the consent.[258] As outlined by Wheen, "even deeply held beliefs

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250 Jacinta Ruru "Indigenous Restitution", above n 53, at 324.

251 At 325.

252 Fiona Wright, above n 239, at 264 and 266.

253 At 264.

254 Adhar, above n 238, at 632.

255 *Bleakley v ERMA* [2001] NZLR 213 at 286.

256 Adhar, above n 238, at 634.

257 See for example *Waihi Gold Co v Waikato Regional Council* EnvC Auckland A146/98, 15 December 1998 which confirms that metaphysical effects do not need to have their genesis in physical effects. See also *Wakatu Inc v Tasman District Council*, above n 179, where it was recognised that Māori cultural values were highly important in this application despite the fact that there was no physical effects at [113]. Note, metaphysical (intangible) beliefs undoubtedly fall within the ambit of s 6 RMA – see Nicola Wheen "Environmental Decision making" above n 191, at 314.

258 See for example *Mahuta v Waikato Regional Council* Environment Court A91/1998 at 268 whereby the Court note that because the cultural interests of the Waikato-Taunui people can be provided for in other ways that avoid tangible harm to the river, the perceptions (i.e. spiritual concerns) "do not deserve such weight as

with serious, but unproven, consequences are unlikely to halt an otherwise beneficial proposal" where no comprise is reached (or reachable).[259] What is important however, is that intangible beliefs are still a mandatory consideration under the RMA.

Whilst spiritual concerns would be legally valid and capable of attracting some weight in the decision-making process, evaluating these values has proved challenging in the Courts. The Environment Court in *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* noted that "the specialist nature of the [Environment] Court enables it to determine the probative value of the evidence without the need to apply the strict rules of evidence".[260] Furthermore, the Environment Court noted that environmental proceedings "are about people and communities and future generations; they include cultural and religious issues as well as economic".[261] As such, the decision-maker's responsibility is to consider the interests of the public at large "*or to a particular community, cultural or religious group"*.[262] As such, the principles of the Evidence Act must be used to assist in receiving evidence about spiritual or religious values, but the specialist nature of the Environment Court means that the threshold for admissibility is lowered due to provisions such as s 276 of the RMA.[263] Furthermore, relevant considerations in evaluating metaphysical beliefs and values have been outlined by the Environment Court in *Ngati Hokopu ki Hokowhitu v Whakatane District Council*.[264] As such, some headway has already been made when dealing with the issue of how to evaluate value-based claims. The considerations outlined by the Environment Court begin to deal with any floodgate's argument as the hearsay and corroboration rules under the Evidence Act will act as a barrier to frivolous claims based on beliefs.[265]

Other considerations under s 5 include providing for people and communities and their cultural values.[266] Therefore, s 5 also provides for the collection of religious and spiritual values associated with other cultures in New Zealand society. The spirituality inherent in

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to prevail over the proposal and defeat it". See also *Wakatu Inc v Tasman District Council*, above n 179, at [75].

259 Wheen "Environmental Decision Making", above n 191, at 300.

260 *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council*, above n 209, at [27].

261 At [30].

262 At [30], emphasis added.

263 At [40], see also Resource Management Act 1991, s 276 which gives discretionary power to receive evidence oral or written by Māori.

264 *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC) at [53].

265 *Wakatu Inc v Tasman District Council*, above n 179, at [25].

266 As outlined in the Resource Management Act 1991, ss 5(2) and 2 [definition of environment].

Māori values is also the foundation of other religious values attributed to water. As such, some of the difficulties with Māori spiritual values discussed above will also apply to the evaluation of spiritual Pākehā values. If the courts are to consider spiritual concerns despite their difficulties in adjudication, arguably the same (or a similar) process for hearing and considering intangible evidence can be adopted for both Māori and Pākehā spiritual values alike. Adhar argues that "indigenous culture and religion are invariably intertwined".[267] Both Māori and Pākehā values concerning water are ecocentric; they focus on the 'natural state' of the water and its importance in such a state.[268] This ecocentric focus aligns with the central purpose of the RMA.[269] On the basis that both Māori and Pākehā spiritual values follow a very similar line of ecocentric reasoning, the constitutional imperative can be adhered to by giving *more weight* to Māori interests than other spiritual values. The specific mandate in Part II of the RMA to deal with Māori values arguably requires an elevation of Māori interests in decision-making.[270] However, scholars have argued that there is still value in providing for wider spiritual and religious interests in decision-making.[271] A strong public policy reason pointing towards attributing weight to religious or spiritual interests is succinctly outlined by Rishworth:[272]

> Freedom of thought, conscience and religion… has instrumental value in facilitating democratic government. While not all may be accommodated in public policy democracy is best served when all have an equal chance to contribute.

Therefore, all spiritual values can be considered under the RMA. This is because they are founded on the rights and freedoms under the NZBORA and positive obligations are imposed on the State by Part II of the RMA. However, different weights must be accorded to the spiritual concerns depending on their source. Te Tiriti o Waitangi, alongside the mandatory provisions in the RMA relating specifically to Māori interests and the existence

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267 Adhar, above n 238, at 611.

268 Note that this natural state is a spectrum discussion - sometimes more about keeping the water in its natural location – i.e. the River Ganges is not necessarily in its natural state anymore due to pollution, but the water must still remain in its original location. Other times, about keeping it clear and pure (i.e. Māori). This is not a problem because if we elevate Māori values due to their constitutional importance, then cleanliness and location are both adhered to. See Chapter II for a more in-depth discussion.

269 Resource Management Act 1991, s 5 – sustainable management of the resource.

270 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* EnvC Auckland A67/2004, 1 May 2004 at [412] – "While all cultures have to be considered, in appropriate cases we are bound, in achieving the broad purpose of the Act, by those requirements to have particular sensitivity to particular Māori issues".

271 Rafael Domingo "Why Spirituality Matters for Law: An Explanation" (2019) Oxford Journal of Law and Religion 1 at 1.

272 Rishworth, above n 248, at 278.

of Settlement Acts specifically acknowledging the importance of Māori interests in water, elevate the weight to be afforded to Māori values above other religious and spiritual values. However, other religious or spiritual values should still be afforded *some* weight in decision-making under the RMA. The specialist nature of the Environment Court means it is well equipped to weigh up the probative value of intangible evidence brought before them, drawing from the methods already established for Māori spiritual evidence.

Finally, it must be noted that the outstanding issue between iwi and the Crown in relation to rights and interests in water will impede effective decision-making.[273] As such, there must be some urgency adopted by the Crown in addressing the conflict.

I Conservation and the definition of 'indirect effects'

From the wider legal landscape, we also see an emphasis on health,[274] conservation and protection of the environment.[275] However, the weight to be attributed to the wider environmental effects of bottled water (such as energy consumption and plastic production) is unclear. A significant legal issue raised by the ecocentric/conservation argument is that the definition of 'indirect effects' remains uncertain. Currently, there is an inconsistency in the scope of indirect effects between the statutory wording and litigation. The RMA construes indirect effects widely and technically encompasses everything.[276] The High Court has accepted that *on the face of it*, the statutory wording places no limits on the range of effects that can be considered under s 104(1)(a).[277] Therefore, the indirect effects of water bottling (such as energy consumption and plastic bottle production and use) should all theoretically be considered at the application stage.

However, the question of how far indirect effects actually reach is a tricky legal issue in practice. The Environment Court accepted in *Hexton Residents* that constructing an accessway is a direct consequence of the proposed water bottling plant and should be considered as a "flow-on effect" under s 104(1)(c).[278] However, in comparison, energy

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[273] Land and Water Forum *Advice on Improving Water Quality,* above n 27, at 1.

[274] See for example: Health Act 1956.

[275] See for example: Conservation Act 1987; Resource Management Act 1991; National Parks Act 1980; Reserves Act 1977.

[276] See definition of effects under Resource Management Act 1991, s 3.

[277] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552 at [17].

[278] *Hexton Residents Society Inc & Ors v Gisborne District Council W104/2006,* at 37. Affirmed in *Hexton Residents Society Inc v Gisborne District Council* [2010] NZEnvC 24.

consumption and plastic bottle production arguably constitute more of an indirect from the proposed activity.[279] An example of a narrower approach being taken to indirect effects (although not directly on point) concerns greenhouse gas emissions and climate change. The majority in the Supreme Court has concluded that the effects of climate change are not to be considered due to the carved-out exception of s 104E.[280] Furthermore, if a resource consent is applied for to extract coal, the indirect effects of this activity that will inevitably occur from burning the coal (its sole purpose) also cannot be considered in that application.[281] As such, it is questionable as to whether similar reasoning would apply to the energy consumption argument in water bottling cases. However, Elias CJ dissented in both Supreme Court cases and noted the absurdity in this line of reasoning. In *Greenpeace NZ Inc v Genesis Power Ltd* Elias CJ noted that:[282]

> …the converse of the legislative judgment that the use of renewable energy has benefits for climate change and is always to be considered by decision-makers seems to me to be that use of non-renewable energy has disadvantages which must weigh in granting consents or in setting rules.

An almost identical statutory regime in New South Wales is provided for under the Environmental Protection Act 1994 (Qld) (EPA).[283] Recently, the Land and Environment Court were required to consider an application for an open-coal mine in a valley near Rocky Hill under the regime.[284] In reaching their verdict, the Land and Environment Court outlined that the following were all valid considerations under the EPA: impacts on existing, approved and likely preferred uses;[285] visual impacts;[286] impacts on amenity value;[287] social impacts (including way of life, community values, access to and use of facilities, culture, health and wellbeing, surroundings, property rights, and fears and

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279 It may be argued that the accessway is a tangible, one-off effect, whereas energy consumption and plastic bottle production and use are ongoing, intangible effects.

280 See *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112 at [65].

281 *Buller Coal*, above n 277, at [118].

282 *Greenpeace New Zealand*, above n 280, at [43].

283 Environmental Protection Act 1994 (Qld), s 4.15(1).

284 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, at [1].

285 At [57] – [89].

286 At [90] – [222].

287 At [223] – [269].

aspirations);[288] impacts on climate change;[289] and economic and public benefits of the proposal.[290]

The Land and Environment Court concluded by stating that the application could not be granted because it would not be a sustainable use of the resource and would cause *"substantial environmental and social harm"*.[291] However, most importantly the Court noted that the application had come at the wrong time because: [292]

> …the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided.

Given the similarities between the statutory language of the RMA and the EPA, one must consider whether Elias CJ's decision is more persuasive, especially given the current ecological climate. When considering indirect effects from a non-climate change related activity, *Hexton Residents* noted that the "consequential and flow on effects" from the water bottling plant such as the construction of an accessway to the plant are effects that should be considered under s 104(1)(c).[293] The difficulty with the 'indirect effects' of energy production and consumption is that they are more consistent with effects related to climate change, yet they are generated from an activity that is not necessarily a climate change concern in itself. What is clear, however, is that the definition of "indirect effect" is an issue that needs to be addressed in the future. It must be understood how far the definition of "indirect effects" reaches to enable a conceptual framework to adequately account for the range of values at play.

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288 At [270] – [421].

289 At [422] – [556].

290 At [557] – [687].

291 At [696], emphasis added.

292 At [699].

293 *Hexton Residents Society Inc & Ors v Gisborne District Council*, above n 278, at 37-38.

CONCLUSION

This dissertation has worked to show that water as a resource is complex and there is a plurality of competing and complementing values attributed to it. Under the current approach to decision-making, courts have taken a myopic approach to water and have focused on the quantity of water being extracted. However, when we place this decision-making in the context of water bottling something changes. The discomfort present in judicial reasoning is reflective of the wider discomfort of modern New Zealand society. Chapter I demonstrated how decision-makers began to grapple with their discomfort without a solid framework from which to ground their reasoning. It is inevitable that as water becomes scarcer as a resource, the values that members of society attribute to water shall come into focus and play a more active role in litigation. An influx in litigation is, therefore, likely to arise. As such, it is desirable to have a conceptual framework to ground decision-making in something of substance. In other words, where decision-makers are asked to deal with the spectrum of values attributed to water, the weight to be attributed to each must be determined from a legal perspective, drawing from the existing legal landscape. This is in line with the jurisprudential understanding of the law presenting itself as a seamless web. A conceptual framework, therefore, compliments the RMA as it provides more comprehensive guidance for the discretionary ambit permitted under Part II of the RMA. A conceptual framework that aligns with the wider legal landscape can help to fill the current legal lacuna.

The values discussed in this dissertation range from an anthropocentric to an ecocentric focus; consisting of social, cultural, economic, ecological and legal cores. However, Chapter III began to demonstrate how principles of law can be drawn from a wider legal landscape to provide a quasi-objective standard from which to attribute weight. In this manner, the principle of public participation can be adhered to whilst also ensuring consistency and efficiency before the law. The most palpable step forward is to build on the conceptual framework to address all values outlined in Chapter II (and beyond). To do so would create a comprehensive legal foundation for judicial reasoning. From there, one may hope that Part II of the RMA shall become less of a minefield and shall be a more positive catalyst for legally coherent dispute resolution.

Furthermore, as I have mentioned at the end of Chapter III, clarity must be sought in the definition of "indirect effects". From a conservation standpoint, it is unclear whether the inevitable effects associated with water bottling (consumption of energy, production of plastic, transportation of water globally) would be given weight in New Zealand. However,

the approach taken in New South Wales provides an enlightening and refreshing style to resource management. Given that the statutory wording is similar between jurisdictions, there may be hope yet that the RMA can be a forum for the wider debates at play and the conceptual framework can assist in grounding such debates.

Appendix 1 - Glossary of Māori Terms

Hapu	Sub-tribe, to be pregnant
Iwi	Tribe, bone
Kaitiakitanga	Guardianship, stewardship
Mana	Authority
Māori	The Indigenous People of New Zealand
Mauri	Life Force
Pākehā	Non-Maori/European
Tangata Whenua	People of the land
Taonga	Treasure
Te Tiriti o Waitangi	Treaty of Waitangi
Tikanga	Maori custom, Maori Law
Wāhi Tapu	Sacred Place
Wai	Water
Whakapapa	Genealogy

Appendix 2 – Key Provisions of the Resource Management Act 1991

Section 2 – Interpretation

environment includes—

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

water—

(a) means water in all its physical forms whether flowing or not and whether over or under the ground:

(b) includes fresh water, coastal water, and geothermal water:

(c) does not include water in any form while in any pipe, tank, or cistern

3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

Part II – Purpose and Principles

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:
(aa) the ethic of stewardship:
(b) the efficient use and development of natural and physical resources:
(ba) the efficiency of the end use of energy:
(c) the maintenance and enhancement of amenity values:
(d) intrinsic values of ecosystems:
(e) *[Repealed]*
(f) maintenance and enhancement of the quality of the environment:
(g) any finite characteristics of natural and physical resources:
(h) the protection of the habitat of trout and salmon:
(i) the effects of climate change:
(j) the benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

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