

**MĀORI OWNERSHIP OF FRESHWATER:**  
*Legal Paradox or Potential?*

**MAIA MOANA ELIZABETH WIKAIRA**

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours),  
at the University of Otago - Te Whare Wānanga o Otākou

October 2010

## HE MIHI - ACKNOWLEDGEMENTS

*E iti noa ana, nā te aroha*

To *Jacinta*, I owe you a great deal of gratitude, not least for the support you have given me this year in producing a piece of work of which I am truly proud. You have taken me on a legal education the value of which far exceeds its four short years. You are a pillar of strength, and a *pou whirinaki* for all *tauirā* Māori who come through law at Otago. I am honoured to have spent my time under your tutelage.

*E te wahine rangatira, aku mihi maioha ki a koe.*

To *Ethan*, *kore rawa ngā mihi aroha e mutu e taku tau.*

Thank you for the love and support you have given me this year.

To *Julia, Danielle, Laura* and *Carolyn*, thanks for being fantastic flatmates during this busy year.

Lastly to my *whānau* - *Mum, Dad, James* and *Matiu* - *nei rā te mihi ki a koutou mō tō koutou aroha, tō koutou āwhina, tō koutou tautoko i ahau kia whai haere i ngā iti kahurangi o tēnei ao.* I am truly fortunate to have the best *whānau* in the world. *Ki ōku tungāne*, thank you for the laughs and the memories. *E mā, e pā*, you are my inspiration in everything that I do, and I will never be able to thank you enough for everything you have given me over the years.

I dedicate this *tuhinga roa* to you.

*Nāku noa, nā Maia*

*Ko Tongariro te maunga, ko Tongariro te awa, ko Taupō-nui-a-Tia te moana,  
ko Ngāti Tūwharetoa te iwi, ā, ko Te Heuheu tonu te tangata.  
Ko tēnei te mihi ki te hau kainga; koutou te mana whenua, koutou ngā kaitiaki  
e manaaki ana i ngā wai Māori o tōku rohe, o Tūwharetoa.*

*Ko te wai Māori he taonga tuku iho, kāore he take tua atu i tēnei:  
ki te kore te wai, matemate katoa tātou. Nō hea tēnei kupu? 'Mā ori' – 'mā ori ori':  
i heke mai te wai i te rangi, i a Ranginui, ki runga i a Papatūānuku.*

Freshwater is a treasure that has been passed down to us, there is no more important issue:  
if there is no water, we all die. Where does this word "Ma ori" come from?

It encapsulates the continual descent of water from  
Ranginui, the Sky Father, to Papatūānuku, the Earth Mother.

Lennie Johns - *Ngāti Tūwharetoa*

Karakia Mihimihi  
*Wai Ora: Report of the Sustainable Water  
Programme of Action Consultation Hui*  
Taupō Hui  
4 March 2005

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## INTRODUCTION

At the signing of the Treaty of Waitangi in 1840, Aotearoa/New Zealand entertained two distinct world views, one Māori and one Pākehā,<sup>1</sup> and both underpinning differing notions of 'law' in this country.<sup>2</sup> Since then, both the New Zealand Law Commission and the Waitangi Tribunal have remarked that it was inherent in the Treaty's terms that tikanga Māori would be respected.<sup>3</sup> However, it is trite to say that attempts to bring together these distinct legal systems have seen the Pākehā system of law assume supremacy over tikanga Māori and the rights and interests inherent therein.

Freshwater law in this country is no exception. For Māori, freshwater is a taonga of immense value. Tikanga Māori is the source of an intrinsic relationship between Māori and their waterways and water bodies - it validates and regulates this sacred bond. However, the recently released Report of the Land and Water Forum recognises that, "[f]or iwi, contemporary discussion of freshwater evokes legacies of loss and exclusion and the denial of rights and responsibilities".<sup>4</sup> Indeed, the development of Aotearoa/New Zealand's freshwater law has marginalised Māori engagement with freshwater<sup>5</sup> despite Treaty jurisprudence calling for a secure place for Māori values within Aotearoa/New Zealand society.<sup>6</sup>

Undeterred, Māori contentions of unrealised rights and interests in freshwater have never faltered, with some maintaining that Māori own this resource in accordance with tikanga Māori. This contention has been revived in Aotearoa/New Zealand's political arena in recent

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<sup>1</sup> I adopt the practice of Nin Tomas and Kerensa Johnston of adopting these terms to differentiate world views rather than racial groups: "Ask That Taniwha who Owns the Foreshore and Seabed of Aotearoa" [2004] *Journey of Māori Legal Writing* 11 at 12.

<sup>2</sup> See generally: Stuart Banner "Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand" (1999) 24 *L & Soc Inquiry* 807; ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 *OLR* 449 ["Will the Settlers Settle?"]; Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

<sup>3</sup> Law Commission, above n 2, at 78, 95.

<sup>4</sup> Land and Water Forum *Report of the Land and Water Forum: A Fresh Start for Freshwater* (2010) <[www.landandwater.org.nz](http://www.landandwater.org.nz)> at vii.

<sup>5</sup> For further discussion, see Chapter 1.

<sup>6</sup> Law Commission, above n 2, at 95.

years as successive governments have sought to reform freshwater law. In fact, as recently as 8 October 2010 the Te Wai Māori Trust, established through a nationwide iwi agreement to represent iwi interests regarding freshwater,<sup>7</sup> has declared that “[t]he Government will be unable to resolve competing interests over the use of fresh water until it engages with iwi and Māori over ownership of New Zealand waterways”.<sup>8</sup>

The freshwater ownership debate highlights the very live issue of the place of tikanga Māori in contemporary Aotearoa/New Zealand and raises some significant legal questions. The value of a successful claim to ownership is that it “increases an owner’s control and authority in management, and Māori are naturally concerned about their level of influence in natural resource management without it”.<sup>9</sup> Accordingly, much is riding on this claim to ownership, but is it too much? Is it legally correct for Māori to be asserting ‘ownership’ of freshwater based on a legal system that is seemingly adverse to such a concept? What are the implications of such recognition for tikanga Māori? Moreover, if ownership of freshwater is legally justified under tikanga Māori, how will the dominant legal system respond to such a contention? Will it recognise Māori ownership or choose to ignore it? And if there is to be recognition, to what extent will it be afforded? These are the questions that this dissertation will explore.

Chapters one and two begin by contextualising the issue. Chapter one describes the current legal framework for water management in Aotearoa/New Zealand and assesses the present ability of Māori to meaningfully engage with freshwater. Chapter two then looks in more detail at the arena of freshwater reform to provide necessary background to the Māori assertion to ownership of freshwater in recent years. Chapter three outlines a tikanga Māori approach to freshwater in order to understand the Māori assertion to ownership of freshwater within its own legal paradigm. Chapter four will then explore both the Western view of ownership and its foundations, and the use of the term by Māori in claiming rights and interests in freshwater. The Māori contention will be examined against tikanga Māori as outlined, to attempt to understand and analyse the accuracy of a Māori claim to ownership

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<sup>7</sup> Te Wai Māori Trust “Freshwater Fresh Start Depends on Iwi Engagement” (press release, 8 October 2010) <[www.scoop.co.nz](http://www.scoop.co.nz)>.

<sup>8</sup> Ibid.

<sup>9</sup> James Morris “Affording New Zealand rivers legal personality: A new vehicle for achieving Maori aspirations in co-management?” (LLM Thesis, University of Otago, 2009) at 4.

in accordance with tikanga Māori. Finally, chapter five will examine the dominant Pākehā system of law, its perception of ownership of freshwater in Aotearoa/New Zealand, and its response to contentions of Māori ownership. This chapter concludes by providing an outline of how these two legal systems might reconcile their approach to freshwater law in this country.

## CHAPTER ONE: AOTEAROA/NEW ZEALAND'S CURRENT LEGAL FRAMEWORK FOR FRESHWATER

Aotearoa/New Zealand's state legal system does not currently recognise either Crown or Māori ownership of water. Instead, the state assumes control over the resource by delegating responsibility for its management to local authorities through the Resource Management Act 1991 ('RMA').<sup>10</sup> However, the Crown does recognise the importance of water to Māori and allows for some level of regard to Māori interests in decision-making. This is given effect through provisions in both the RMA and Local Government Act 2002 (LGA), and Treaty settlement mechanisms.

The purpose of the RMA is to "promote the sustainable management of natural and physical resources".<sup>11</sup> Its enactment saw an integrated approach to resource management which, for the first time, attempted to bring together the management of Aotearoa/New Zealand's natural and physical resources,<sup>12</sup> including freshwater.

The primary management provision regarding freshwater is s 14 which regulates the taking, use, damming, or diversion of water. Control over the regulation of these activities, as well as control over the quantity, level, and flow of water in any water body is delegated to regional councils under s 30.<sup>13</sup> This section also provides regional councils with the ability to control the use of land in order to maintain and enhance water quality, water quantity and ecosystems in water bodies,<sup>14</sup> and to control discharges into water.<sup>15</sup> Further provisions of the RMA regarding water management include water quality classes in schedule 3, water conservation orders under Part 9, and the ability of a regional council to make a water

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<sup>10</sup> Resource Management Act 1991 (RMA), ss 14 and 30. This is under the assumption that "governing bodies closest to resources are the most appropriate to govern the use of those resources.": Suzi Kerr, Megan Claridge and Dominic Milichich *Devolution and the New Zealand Resource Management Act 1991* (Motu Economic and Public Policy Research Working Paper 98-7, New Zealand Treasury, 1998) at 8 <[www.motu.org.nz](http://www.motu.org.nz)>.

<sup>11</sup> RMA, s 5(1). 'Sustainable management' is further defined: see RMA, s 5(2).

<sup>12</sup> Tony Randerson "Resource Management Act 1991" in DAR Williams (ed) *Environmental and Resource Management Law* (Butterworths, Wellington, 1997) 55 at 60.

<sup>13</sup> RMA, s 30(1)(e).

<sup>14</sup> RMA, s 30(1)(c).

<sup>15</sup> RMA, s 30(1)(f).

shortage direction provided by s 329. The water management provisions of the RMA are indeed extensive, and their administration principally the domain of local authorities.

### *Opportunities for Māori participation in freshwater management*

Part II of the RMA contains a number of principles, three of which are of particular significance for Māori. The provisions state that all persons exercising functions and powers under the Act: shall provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga (s 6(e));<sup>16</sup> shall have particular regard to kaitiakitanga (s 7(a));<sup>17</sup> and shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) (s 8). These Part II principles provide scope for Māori interests to be recognised in the management and utilisation of freshwater in RMA processes.

In addition, the RMA contains a number of requirements to promote Māori participation in local authority decision-making. In preparing and changing policy statements and plans, local authorities must take into account any relevant iwi planning documents registered with the authority,<sup>18</sup> and must ensure they engage in consultation.<sup>19</sup> Section 35A<sup>20</sup> also

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<sup>16</sup> Note that 'wāhi tapu' and 'taonga' are not defined in the Act but case law has attempted to bridge this gap. For 'wāhi tapu' see generally: *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001; *Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council* EnvC Auckland A 80/02, 17 April 2002; *Canterbury Regional Council v Waimakariri District Council* EnvC C5/2002, 25 January 2002; *Minhinnick v Watercare Services* [1998] 1 NZLR 63; *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360; *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496; *Ngāti Maru v Thames Coromandel District Council* HC Hamilton CIV2004-485-330, 27 August 2004. For 'taonga' see: *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213.

The need of Courts to define these terms and the ramifications for the concepts themselves, have been subject to much criticism. See: Prue Kapua "Review of the Role of Māori Under the Resource Management Act 1991" *Resource Management Theory and Practice* [2007] 92 at 94; Nin Tomas "Implementing Kaitiakitanga Under the RMA 1991" (July 1994) NZELR 39 and Nicola Wheen "Belief and Environmental Decision-Making: Some Recent New Zealand Experience" (2005) 15 *Journal of Environmental Law and Practice* 297 ["Belief"].

<sup>17</sup> Kaitiakitanga is defined under s 2 of the RMA as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship'.

<sup>18</sup> RMA, ss 61(2A)(a), 66(2A)(a) and 74(2A)(a).

<sup>19</sup> RMA, Sch 1, Part 1, cls 3(1)(d) and 3B.

<sup>20</sup> Inserted by s 16 of the Resource Management Amendment Act 2005.

imposes a duty on local authorities to keep records about iwi and hapū within their district or region, including contact details and areas over which local iwi and/or hapū exercise kaitiakitanga. This section is aimed at enhancing the consultation requirements by ensuring that the right people are contacted to engage in this process.

As the general framework under which local authorities operate in Aotearoa/New Zealand,<sup>21</sup> the LGA also provides a clear onus on local authorities to ensure that Māori participation in decision-making occurs. Section 4 outlines the parts of the LGA that contain an intention to facilitate this outcome. It sources these requirements in both the Crown's responsibility to take account of the principles of the Treaty of Waitangi, and to also maintain and improve opportunities for Māori to contribute to local government decision-making processes.<sup>22</sup>

Specific provisions recognising Māori participation in the decision-making process include s 77(1)(c). This section requires councils, when making a significant decision in relation to land or a body of water, to take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna and other taonga.<sup>23</sup> The principles of consultation outlined in s 82 also require a local authority to have in place processes for consulting with Māori.<sup>24</sup>

A more significant form of authority for Māori in local resource management is also possible under sections 33 and 36B of the RMA. Section 33 provides for the transfer of one or more of a local authorities functions, powers or duties to an iwi authority, and section 36B allows for joint management agreements between local and iwi authorities.<sup>25</sup>

Treaty of Waitangi settlements have also resulted in mechanisms for recognition of the Māori relationship with water. These include protocols, statutory acknowledgements of

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<sup>21</sup> Department of Internal Affairs "Local Government Act 2002" (2008) [localcouncils.govt.nz](http://localcouncils.govt.nz) <[localcouncils.govt.nz](http://localcouncils.govt.nz)>.

<sup>22</sup> Local Government Act 2002 (LGA), s 4.

<sup>23</sup> See also: LGA, ss 14, 76, 81 and 82.

<sup>24</sup> LGA, s 81(2).

<sup>25</sup>The one and only JMA to be created under s 36B so far is the agreement between Taupō District Council and the Tūwharetoa Māori Trust Board: *Joint Management Agreement between Taupō District Council and the Tūwharetoa Māori Trust Board On behalf of Ngāti Tūwharetoa Iwi* (signed 17 January 2009) <[www.taupodc.govt.nz](http://www.taupodc.govt.nz)>.

statements of association, deeds of recognition, the vesting of a lakebed or riverbed in hapū or iwi governance entities and co-management agreements.

Protocols are statements issued by a Minister or statutory authority setting out how a government agency will: “exercise its functions, powers and duties in relation to specified matters in the claimant group’s interest, interact with the claimant group and provide for its input in decision-making”.<sup>26</sup> Protocols concerning freshwater are issued by the Minister for the Environment.<sup>27</sup>

A statutory acknowledgement is a Crown acknowledgement of hapū or iwi statements of cultural, spiritual, historical and traditional association with a particular area.<sup>28</sup> Statutory acknowledgements have a number of positive effects for Māori participation in freshwater management. They are recorded on statutory plans;<sup>29</sup> can be used as evidence of association with a statutory area;<sup>30</sup> require consent authorities to forward summaries of resource consent applications to identified hapū or iwi governance entities;<sup>31</sup> and require consent authorities, the Environment Court and the Historic Places Trust to have regard to statutory acknowledgements in certain operations.<sup>32</sup> This type of mechanism is the most prolific form of redress adopted in treaty settlements.

Deeds of recognition may follow on from a statutory acknowledgement regarding waterways and water bodies. These deeds require “that the governance entity be consulted,

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<sup>26</sup> Office of Treaty Settlements *Healing the Past, Building a Future* (2nd ed, Office of Treaty Settlements) at 100, 133.

<sup>27</sup> Ministry for the Environment *Treaty settlements or Deeds of settlement that may have implications for the Proposed National Policy Statement for Freshwater* (ME 941, Ministry for the Environment, 2009) at 9 <[www.mfe.govt.nz](http://www.mfe.govt.nz)> [“Settlement implications for NPS”].

<sup>28</sup> See for example Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 37. Under this Act the Crown statutorily acknowledged the statements made by Ngāti Tūwharetoa of their particular cultural, spiritual, historical and traditional association with, and use of the geothermal energy and geothermal water located in the Kawerau Geothermal system: s 46.

<sup>29</sup> Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 42. Note however that this is for public information only and the information is not part of the statutory plan (unless adopted by the relevant consent authority), nor is it to be considered in the preparation and change of policy statements and plans by local authorities: s 42(2)(b)(ii).

<sup>30</sup> Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 44.

<sup>31</sup> Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 43.

<sup>32</sup> However, they are not binding as deemed fact on these bodies. Nor on parties to proceedings before these bodies or any other person able to participate in those proceedings: Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 44(2).

and regard be had to its views, as provided for in the deed of settlement and in each deed of recognition”.<sup>33</sup>

The vesting of lakebeds or riverbeds in hapū or iwi governance entities involves the transferring of fee simple title of the land to a claimant group. This has only occurred in a handful of cases where rivers and lakes are of “great significance to the claimant group”.<sup>34</sup> Notable transfers are the beds of several Te Arawa Lakes under the Te Arawa Lakes Settlement Act 2006 and the bed of Lake Taupō to Ngāti Tūwharetoa in 2007.<sup>35</sup>

Co-management or joint management involves a negotiated agreement between Māori and Crown interests regarding the management of waterways or water bodies. Major examples are joint-management of Te Waihora (Lake Ellesmere) between Te Rūnanga o Ngai Tahu and the Crown<sup>36</sup> and the recent Waikato River Settlement that provides for co-management of the Waikato River between the Crown and Waikato-Tainui.<sup>37</sup>

### *Current Māori participation in freshwater management*

Despite a number of mechanisms to participate in freshwater management, Māori continue to face difficulties in contributing to decision-making processes under the current legal framework. In a 2006 address reviewing the role of Māori under the RMA, Kapua stated that, “the introduction of what was lauded as revolutionary recognition of Māori interests in resource management has not carried through to result in outcomes that reflect the earlier plaudits”.<sup>38</sup> The design of the Act’s purpose and principles and problems of cultural

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<sup>33</sup> Ministry for the Environment “Settlement implications for NPS”, above n 27, at 11.

<sup>34</sup> Office of Treaty Settlements, *Building a Future*”, above n 26, at 129.

<sup>35</sup> Under the Deed of Settlement for Lake Taupō, signed on 10 September 2007, between the Crown and Tūwharetoa Māori Trust Board.

<sup>36</sup> See: Ngai Tahu Claims Settlement Act 1998 and *Te Waihora Joint Management Plan: Mahere Tukutahi o Te Waihora* (Te Rūnanga o Ngai Tahu/Department of Conservation, Christchurch, 10 December 2005) <[www.doc.govt.nz](http://www.doc.govt.nz)>.

<sup>37</sup> See: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Note also that the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Bill 143-2 (2010) is currently before parliament. It gives effect to separate deeds of recognition with Ngāti Tūwharetoa, Raukawa and Te Arawa regarding co-governance and co-management of the Waikato River and its catchments within the rohe (territory) of these River iwi.

<sup>38</sup> Kapua, above n 16, at 93.

comprehension and conciliation, namely the definition of Māori terms and concepts included in the RMA by non-Māori decision makers and variable relationships between Crown entities and Māori, have all contributed to the perceived failure of the current framework.<sup>39</sup>

Sections 6(e), 7(a) and 8 of the RMA do provide considerable scope to advance recognition of the Māori relationship with water in RMA processes. However, situated in Part II, they form only one of many competing considerations to be balanced in any given decision.<sup>40</sup> Moreover, interpretation of the Māori concepts in these provisions has often resulted in Māori beliefs conceding to otherwise beneficial proposals when presented with an impasse between the two.<sup>41</sup> Such concessions are often the result of a reduction of the meaning of a given term to catchphrase categories of “mythical, spiritual, symbolic or metaphysical”.<sup>42</sup> This recognition removes the focus from the significance of the concept in its cultural base and the resulting weight that it should be accorded, and focuses the consideration on its intangible and unquantifiable nature,<sup>43</sup> to then be weighed against others in the balancing process. Such an approach dilutes the nature of these provisions, and their subsequent value for Māori in RMA processes.

A number of recent reports on Māori participation in local authority decision-making processes also recognise variable relationships between tangata whenua<sup>44</sup> and local authorities.<sup>45</sup> While some hapū and iwi speak of good relationships, others report a feeling

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<sup>39</sup> See: Cabinet Paper “Improving the Resource Management Act 1991” (13 September 2004) Ref: CAB Min (04) 30/10 at 28; Kapua, above n 16; Linda Te Aho “Indigenous Challenges to Enhance Freshwater Governance and Management in Aoteroa New Zealand – The Waikato River Settlement” (2009) 20 WL 285 at 287.

<sup>40</sup> Waitangi Tribunal *The Whanganui River Report* (WAI 167 Waitangi Tribunal 1999) at 330 [“Whanganui River”].

<sup>41</sup> Wheen “Belief”, above n 16, at 300.

<sup>42</sup> *Beadle v Minister of Corrections* EnvC Auckland A74/02, 4 April 2002 at [436].

<sup>43</sup> See generally: Wheen “Belief”, above n 16; Cindy McCan and David McCan *Water: Towards a Bicultural Perspective* (Centre for Resource Management, Lincoln, 1990) at 1.

<sup>44</sup> Indigenous people of the land. Note that Māori translations for this dissertation are generally taken from PM Ryan *Raupō Dictionary of Modern Māori* (2nd rev ed, Penguin Group, North Shore, 2008).

<sup>45</sup> Ministry for the Environment *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (ME674, Ministry for the Environment, 2005) [“Wai Ora”]; Kahui Tautoko Consulting Ltd *Māori Participation and Engagement with Local Government* (LGIS 2009/19 Department of Internal Affairs 2009), Te Puni Kōkiri *Te Kotahitanga o te whakahaere rawa: Māori and council engagement under the Resource Management Act 1991* (Te Puni Kōkiri 2006).

of exclusion and the inability or unwillingness of local authorities to work with tangata whenua.<sup>46</sup> Reports noted that even in areas where relationships are generally good, iwi and hapū seek a more active role in decision-making. They highlighted a distinct lack of engagement at the policy and plan making stage of decision-making, instead local authority relationships with Māori tending primarily to be based on consultation.<sup>47</sup> This focus continues to relegate Māori to a reactive rather than proactive role in decision-making.<sup>48</sup>

The Explanatory Note to the Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 2009 recognised this. It outlined that poor integration of iwi management plans into local authority plans and policies require Māori to continue to operate on the back foot, by objection through the consents process or the courts.<sup>49</sup> In addressing this issue, the Bill's purpose was to elevate the status of iwi management plans as they relate to the setting of regional policy statements and district plans,<sup>50</sup> to ensure "tangata whenua are considered more effectively at the front end of the planning process".<sup>51</sup> However, the Bill was defeated on its first reading earlier this year.<sup>52</sup>

Further highlighting the fragility of Māori engagement with local government is the slow uptake of the provisions which allow abdication of local authority powers to Māori, either in part or in full. As yet no transfer of local authority powers has occurred pursuant to s 33, and one joint management agreement is in existence.<sup>53</sup> Kapua notes that instead councils have been preoccupied with Memoranda of Understanding and Charters of Understanding with Māori, "which generally state that there are no legal rights and obligations that flow

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<sup>46</sup> Ministry for the Environment "Wai Ora", above n 45, at 11-12.

<sup>47</sup> Kahui Tautoko, above n 45, at 125, 127; Ministry for the Environment "Wai Ora", above n 45, 29-31.

<sup>48</sup> See also: Nigel Taptiklis "Ko au te awa, ko te awa ko au: I am the river, and the river is me" (August 2010) 27 *Te Awa: The River, The Magazine of the Green Party of Aotearoa New Zealand* 9 at 10.

<sup>49</sup> Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 87-1 (2009), Explanatory Note.

<sup>50</sup> Resource Management (Enhancement of Iwi Management Plans) Amendment Bill 87-1 (2009), Explanatory Note, cl 4.

<sup>51</sup> (21 July 2010) 666 NZPD 12593.

<sup>52</sup> It was negatived on 4 August 2010: New Zealand Parliament "Resource Management (Enhancement of Iwi Management Plans) Amendment Bill" (2010) Legislation: Bills <[www.parliament.nz](http://www.parliament.nz)>.

<sup>53</sup> *Joint Management Agreement between Taupō District Council and the Tūwharetoa Māori Trust Board On behalf of Ngāti Tūwharetoa Iwi* (signed 17 January 2009) <[www.taupodc.govt.nz](http://www.taupodc.govt.nz)>.

from the document”,<sup>54</sup> and that “it would be fair to say that in instances where such memoranda have been entered into, Maori have been severely disappointed at their partners reaction when faced with the hard decisions”.<sup>55</sup>

Treaty settlement mechanisms such as protocols, statutory acknowledgments, deeds of recognition and the vesting of lakebeds or riverbeds in Māori governance entities also present difficulties in their recognition of the Māori relationship with freshwater. Although their effect is to make Māori values relevant,<sup>56</sup> the recognition of such mechanisms is often heavily qualified.<sup>57</sup> They do not affect rights and obligations at law.<sup>58</sup> Nor do they provide for Māori rights or interests in freshwater, in fact in some cases they expressly prohibit such rights.<sup>59</sup>

Co-management agreements do go much further in achieving Māori aspirations regarding freshwater. In particular, the Waikato-Tainui Waikato River Settlement was described as an “impressive precedent” by Māori Party co-leader Hon Tariana Turia,<sup>60</sup> and the beginning of a “new era of co-governance over the [Waikato River]”<sup>61</sup> by Minister for Treaty of Waitangi Negotiations Hon Chris Finlayson. However, these agreements as yet remain few in number. Thus, only time will tell whether this ‘new era’ is to be of universal application when further iwi call for the use of co-management agreements.

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<sup>54</sup> Kapua, above n 16, at 98.

<sup>55</sup> Ibid.

<sup>56</sup> Nicola Wheen “Legislating for indigenous peoples’ ownership and management of minerals: A New Zealand case study on pounamu” (2009) 20 *Management of Environmental Quality: An International Journal* 551 at 557 [“Legislating for indigenous peoples”].

<sup>57</sup> For an example of the limitation placed of the relevance of statutory acknowledgements see the Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, ss 42(2)(b) and 44(2).

<sup>58</sup> Wheen “Legislating for indigenous peoples”, above n 56, at 557.

<sup>59</sup> For example: Section 58 of the Te Arawa Lakes Settlement 2006 clearly states that ‘the environment protocol does not have the effect of granting, creating, or providing evidence of an estate or interest in, or rights relating to, resources managed or administered under the Resource Management Act 1991’. Section 73(1) of the Te Uri o Hau Claims Settlement Act 2002 contains a standard ‘limitation of rights’ provision regarding statutory acknowledgements and deeds of recognition: ‘Neither a statutory acknowledgement nor a deed of recognition has the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind relating to, a statutory area’. Section 171(1)(a) of the Ngāi Tahu Claims Settlement Act 1998 expressly prohibits rights of ownership to the waters of Te Waihora (Lake Ellesmere) accruing as a result of the vesting of ownership of the lakebed in Te Rūnanga o Ngāi Tahu. This too is standard legislative practice.

<sup>60</sup> (6 May 2010) 662 NZPD 10830 at 10831.

<sup>61</sup> (6 May 2010) 662 NZPD 10830 at 10843.

Therefore, the current legal mechanisms are mostly inadequate in effecting Māori participation in water management. Statutory and institutional barriers often prevent a more proactive position for Māori in the decision-making process, and many Māori remain unsatisfied.

However, reform of freshwater law in Aotearoa/New Zealand is occurring. The process presents an opportunity for Māori to gain a meaningful role at the decision making level, thereby ensuring adequate Māori engagement with freshwater. Yet, the situation is hardly so clear cut. The Government's momentum on reform is well underway and the issues to be addressed are seen to be of 'national significance', not just significant for Māori. This recipe presents a risk of Māori concerns falling by the wayside as the reforms push through. The following chapter briefly outlines the reform environment, in particular, the position of Māori within it; and explores why ownership of water has become so politically contentious in recent years.

## CHAPTER TWO: 'A NEW START FOR FRESH WATER': CHALLENGES AND OPPORTUNITIES

In recent years, successive governments have begun to respond to growing recognition of the scarcity of water resources and the perceived inadequacies of the nation's freshwater management and allocation models.<sup>62</sup> Government reports released over the last few years state that, under pressure from a growing population and intensifying economic use, the quality and availability of New Zealand's freshwater has been deteriorating.<sup>63</sup> The Dominion Post summarises, "[w]aterways from which people could once drink are now not fit for swimming. In rural areas pollution is being caused by nutrients, microbes, sediment and other contaminants washing into water from the land; in urban areas by stormwater runoff, sewage leaks and factory discharges".<sup>64</sup>

Allocation is also a particularly troublesome issue. The effect of case law on the water permit regime has been to issue de facto property rights to water users under a first in time principle.<sup>65</sup> This rule has been further bolstered by subsequent decisions that recognise permit recipients as having a legitimate expectation of non-interference with their grant, which consent authorities are obliged to respect in the issuing of subsequent water permits.<sup>66</sup> Fraser highlights that "the creation of private property rights may shift the balance of

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<sup>62</sup> Ministry for the Environment and Ministry of Agriculture and Forestry *Freshwater for the Future* (INFO158, Ministry for the Environment, 2006) at 2; Cabinet Paper "New Start for Fresh Water" <[www.mfe.govt.nz](http://www.mfe.govt.nz)> (last updated 8 June 2009).

<sup>63</sup> Land and Water Forum, above n 4, at viii. See also: Ministry for the Environment "Wai Ora", above n 45; Ministry for the Environment and Ministry of Agriculture and Forestry's *Freshwater for the Future* (April 2006) INFO158; Cabinet Paper "New Start for Fresh Water", above n 62.

<sup>64</sup> The Dominion Post Editorial "Moves to protect water use will benefit everyone" *The Dominion Post* (New Zealand, 25 September 2010) <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>65</sup> This was first developed in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257.

<sup>66</sup> *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268. This is in direct contradiction to s 122(1) of the RMA which states that, "A resource consent is neither real nor personal property". For further discussion see: Tom Bennion "Water Issues" (March 2007) *Māori Law Review* 1; David Grinlinton "The nature of property rights in resource consents" (2007) *RMB* 37.

decision-making and action towards right holders, at the expense of other stake holders and the environmental resource".<sup>67</sup>

### *Freshwater Reform*

Action points to address these issues are already underway. A proposed National Policy Statement for Freshwater Management was presented in 2008 "to help guide decision-making on freshwater management ... at national, regional and district levels".<sup>68</sup> Water was identified as a top priority for phase two of the RMA reforms after the successful implementation of phase one, with the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009. In September this year the Land and Water Forum presented its report of shared outcomes, goals and long term strategies for fresh water, commissioned pursuant to the current National-led Government's 'New Start for Fresh Water' programme.<sup>69</sup> Ruru highlights that the Government has made a significant acknowledgment of the rights and interests of Māori in the development of further freshwater regimes under this programme.<sup>70</sup> For example, a 2009 Cabinet Paper presenting the programme stated:<sup>71</sup>

The rights and interests of Māori in New Zealand's freshwater resources remain undefined and unresolved, which is both a challenge and an opportunity in developing new water management and allocation models.

'Challenge and opportunity' defines the position of both Treaty partners. For Māori, on one hand the reforms offer an opportunity to feed the issues identified in chapter one into reform dialogue, in order that past inadequacies regarding Māori engagement at the decision-making level are rectified. Alternatively, the now pressing nature of freshwater

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<sup>67</sup> Laura Fraser "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145 at 193.

<sup>68</sup> Ministry for the Environment *Proposed National Policy Statement for Freshwater Management* (INFO 295, Ministry for the Environment, 2008) <www.mfe.govt.nz>.

<sup>69</sup> Cabinet Minutes "Progress of Phase Two of the Resource Management Reforms" CAB Min (09) 34/6A <www.mfe.govt.nz> (last updated 30 September 2009).

<sup>70</sup> Jacinta Ruru "Undefined and Unresolved: exploring Indigenous rights in Aotearoa New Zealand's freshwater legal regime" (2009) 20 WL 236 at 236 ["Undefined and Unresolved"].

<sup>71</sup> Cabinet Paper "New Start for Fresh Water", above n 62, at [79].

quality and quantity at a national level may see a Government approach that subsumes Māori interests into that of ‘all New Zealanders’.

The very real potential for either outcome to eventuate is clear from the diverse views regarding Māori participation in freshwater management that have been circulating in the absence of clarity on the issue. Māori have previously been referred to by Prime Minister John Key as ‘very important stakeholders’ in the context of water allocation,<sup>72</sup> whereas consultation with Māori on the issue reveals a widespread expectation that the appropriate role for Maori in water management should recognise their status as Treaty partners.<sup>73</sup> Recognition of a mere stakeholder interest would arguably afford no greater protection to Māori rights and interests than that which already exists, and is therefore unacceptable to Māori.

### *Who owns freshwater in Aotearoa/New Zealand?*

In an attempt to define and resolve Māori rights and interests, some Māori have drawn attention to the fact that the ownership of water is unclear in Aotearoa/New Zealand’s current law and that this must be resolved before further decisions are made about the future of the nation’s freshwater management regime, and the role afforded Māori therein. They argue that Māori own the water based on a longstanding relationship with the resource under tikanga Māori for which White contends, “there can be no doubt ... had its own body of rules and customs relating to the ownership and management of rivers and lakes”.<sup>74</sup>

The Crown however has been reluctant to pursue this argument, in the past advancing both the English common law doctrine of *publici juris* as authority for the proposition that no one

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<sup>72</sup> Juliet Rowan “Key to look at who owns water” *The New Zealand Herald* (New Zealand, 15 December 2008) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>73</sup> Ministry for the Environment “Wai Ora”, above n 45. Note also that Māori are not alone in this thinking. At variance with Key’s statement, the Proposed National Policy Statement for Freshwater Management accepts that the Treaty of Waitangi is the “underlying foundation of the Crown-Maori relationship with regard to Freshwater Resources” (above n 68, at 1) and the recent Land and Water Forum report also speaks of Māori as ‘Treaty partners’ (above n 4, at 13).

<sup>74</sup> Ben White “Inland Waterways” in Alan Ward (ed) *Waitangi Tribunal Rangahaua Whānui Series National Overview 2* (GP Publications, Wellington, 1997) 347 at 347 [“National Overview”].

owns water,<sup>75</sup> or that the Crown now owns water subject to statutory developments.<sup>76</sup> Moreover, the assumption of control by the Crown is justified on the ground that their role is simply one of management on behalf of all New Zealanders.<sup>77</sup>

The freshwater ownership debate highlights the very live issue of the place of tikanga Māori in contemporary Aotearoa/New Zealand. Keown has described Aotearoa/New Zealand's legal system as a blanket with Māori concepts only operating in those areas where there are holes or where the blanket simply provides no cover. He attributes this thinking to the dominant legal system attempting to resolve two fundamentally different worldviews within a framework that has been developed in accordance with one world view, that of Pākehā. This is now prevalent and has the power to enforce its ideology;<sup>78</sup> in simple terms, it is a monocultural legal framework.

In addressing this issue the New Zealand Law Commission has stated:<sup>79</sup>

If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.

Thus the contention of Māori ownership of freshwater presents challenges and opportunities also for the Crown. The reforms clearly represent a major amendment to freshwater management for the nation; an amendment that Māori must play a significant part in if the consequences of inadequate provision for Māori rights and interests in freshwater which have marred the past, are ever to be meaningfully rectified. So what then are these Māori

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<sup>75</sup> The English common law doctrine of *publici juris* recognises flowing water as 'common to all who have access to it' thus illustrating that it is incapable of ownership: Jacinta Ruru *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Landcare Research, Lincoln, 2009) at 83 ["Legal Voice"].

<sup>76</sup> In particular s 21(1) of the Water and Soil Conservation Act 1967.

<sup>77</sup> New Zealand Press Association "Maori Party questions Government ownership of fresh water" *The New Zealand Herald* (New Zealand, 23 March 2007) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>78</sup> Blair Keown "Ownership, Kaitiakitanga and Rangatiratanga in Aotearoa/New Zealand" (2006) *Te Tai Haruru: Journey of Māori Legal Writing* 66 at 66 (Emphasis added).

<sup>79</sup> Law Commission, above n 2, at 95.

rights and interests in freshwater? And what is the meaning of a 'tikanga Māori' foundation for Māori 'ownership' of freshwater? The following chapter seeks to answer these now pressing questions by outlining a tikanga Māori approach.

## CHAPTER THREE: A TIKANGA MĀORI APPROACH TO FRESHWATER\*

To fully comprehend the Māori assertion to ownership of freshwater, it must be considered in context. This requires an appreciation of the underlying philosophical and jurisprudential foundation of the assertion – an appreciation of tikanga Māori. The approach is not novel. The Court of Appeal as early as 1913 recognised that “the existence and content of customary property is determined as a matter of the custom and usage of the particular community”.<sup>80</sup> However, the importance of the exercise in this context is made more apparent by a widespread association of the term ‘ownership’ with Western legal theory.<sup>81</sup> It thus becomes necessary to investigate the Māori legal paradigm from which the claim to ownership is based.

### *Tikanga Māori: A Māori legal system*

Tikanga Māori is the foundation of the Māori relationship with freshwater. Mead describes tikanga Māori as “the set of beliefs associated with practices or procedures to be followed in conducting the affairs of a group or individual”.<sup>82</sup> Durie refers not to tikanga Māori but to

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\* This chapter describes *a* tikanga Māori approach to freshwater, which is necessary for the purpose of this general introduction to a Māori world view. It is important however to recognise that this is not *the* tikanga Māori approach - such a generalisation cannot be made of the whānau, hapū and iwi of Aotearoa/New Zealand and their distinctive local variations in ways of doing things. However, in the words of Durie, “while Māori law is subject to regional variations, it is more remarkable for the large areas of commonality” (Durie “Will the Settlers Settle?”, above n 2, at 451). Thus to better understand Māori claims, recognised as distinct from non-Māori, it is helpful to start with *a* Māori approach. The importance of this starting point (and it is no more than that) is that upon its foundation local and regional characteristics can and must be built.

<sup>80</sup> *Ngāti Apa v Attorney General* [2003] 3 NZLR 643 at [32] as per Elias CJ referring to the decision of *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 351.

<sup>81</sup> For a Pākehā perspective see Renee Kiriona “Lakes will be handed over to Te Arawa” *The New Zealand Herald* (New Zealand, 13 December 2003) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; “Tainui wants to own water in river claim” *Timaru Herald* (New Zealand, 5 April 2007). For a Māori perspective see: Marama Muru-Lanning “River Ownership: Inalienable Taonga and Impartible Tupuna Awa” (2009) 6(2) *SITES* 32 at 50 [“River Ownership”]; Hirini Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 273; Eddie Durie “The Law and the Land” in Jock Phillips (ed) *The Land and the People* (Allen & Unwin / Port Nicholson Press, Wellington, 1987) 78 at 78 [“Law and the Land”].

<sup>82</sup> Mead, above n 81, at 12.

'Māori custom law' as, "values, standards, principles or norms by which the Māori community generally subscribed for the determination of appropriate conduct".<sup>83</sup> Further definitions<sup>84</sup> have in common the notion that tikanga Māori is "values oriented – not rules based".<sup>85</sup> The distinction is important because while tikanga Māori provides a body of governing rules,<sup>86</sup> it is the values underlying tikanga Māori that dictate those rules in providing the "primary guide to behaviour".<sup>87</sup> These values include<sup>88</sup> whanaungatanga,<sup>89</sup> mana,<sup>90</sup> tapu,<sup>91</sup> utu<sup>92</sup> and kaitiakitanga.<sup>93</sup>

### *Tikanga Taiao: Tikanga Māori and the Environment*

The values that lie beneath tikanga Māori are in turn shaped by a world view in which, "Māori [see] themselves not as masters of the environment but as members of it".<sup>94</sup> This intrinsic relationship stems from whakapapa, a genealogical association linking Māori with all natural resources and their associated deities.<sup>95</sup> Under a Māori world view,<sup>96</sup> the creation of the environment is founded in the separation of Ranginui (the Sky father) and Papatūānuku (the Earth mother). Once cloaked in darkness from the unyielding embrace of Ranginui and Papatūānuku, their successful separation by Tāne-mahuta brought light to the

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<sup>83</sup> Durie "Will the Settlers Settle?", above n 2, at 452.

<sup>84</sup> See Law Commission, above n 2, at 15-17.

<sup>85</sup> ET Durie "Custom Law: Address to the New Zealand Law Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 at 331 ["Custom Law"].

<sup>86</sup> Law Commission, above n 2, at 2.

<sup>87</sup> Law Commission, above n 2, at 17.

<sup>88</sup> This list is taken from Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9 cited in Law Commission, above n 2, at 28.

<sup>89</sup> Relationships, kindship.

<sup>90</sup> Power, control, prestige, charisma.

<sup>91</sup> Sacred, set apart.

<sup>92</sup> Reciprocity.

<sup>93</sup> Guardianship.

<sup>94</sup> Durie "Custom Law", above n 85, at 328.

<sup>95</sup> Ibid.

<sup>96</sup> Note that creation narratives differ among Māori in form and substance. This world view is but one, however it is arguably the best known. It is for this reason, and the strong influence of this narrative on Māori relationships with the environment, that I have chosen it to explain a Māori world view of the environment. For further reading see: Michael Reilly "Te fimatanga mai o ngā atua - Creation Narratives" in Tānia Ka'ai et al (eds) *Ki te Whaiao: An Introduction to Māori Culture and Society* (Pearson Education NZ Ltd, Auckland, 2004) 1.

world, which their offspring sought to shape in the form it appears today.<sup>97</sup> Walker highlights that the sequence of these narratives is self-validating, in the sense that the progression from the creative activities of gods and demi-gods to the activities of real men, allow Māori to trace their origins back to the gods through whakapapa.<sup>98</sup> Thus “the whole cosmos of the Māori unfolds itself as a gigantic ‘kin’”.<sup>99</sup>

### *Tikanga Wai Māori: A tikanga Māori approach to Freshwater*

Tikanga Māori therefore, plays a pivotal role in understanding the Māori claim to ownership of freshwater. It was tikanga Māori that Hon Minister of Māori Affairs Dr Pita Sharples drew on when declaring in an address to the Indigenous Legal Water Forum last year, “there is little or no distinction between us and the water and land that surrounds us ... we as indigenous peoples are honour bound to play an active role as tangata tiaki”.<sup>100</sup> Captured in this assertion are three fundamental tenets that guide a tikanga Māori approach to freshwater: an identity bestowed by divine forebears that shapes a Māori world view; a value system suitably designed; and consequent control that is a product of both the imparted legacy, and duly adopted obligations guided by identified values.

#### *(a) Ko au te awa, ko te awa ko au - I am the river, the river is me: Identity\**

The origin of water can be traced back to the separation of Ranginui and Papatūānuku and their continuing tears for one another. Rain is said to represent Ranginui’s lament for Papatūānuku, and the mist is Papatūānuku’s tears for her beloved Ranginui.<sup>101</sup> Thus the genealogical approach to the environment is distinctly present in waterways and water bodies. Rivers, lakes and streams are intimately bound to people through whakapapa and

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\* This Whanganui iwi whakataukī or proverb describes the spiritual, cultural and historical relationship of Whanganui Māori with the Whanganui River.

<sup>97</sup> Reilly, above n 96, at 3-5.

<sup>98</sup> Ranginui Walker “The Relevance of Maori Myth and Tradition” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Books, Auckland, 1992) 171 at 171-172.

<sup>99</sup> J Prytz Johansen *The Maori and his Religion and its Non-Ritualistic Aspects* (Ejnar Munksgaard, Copenhagen, 1954) at 9 cited in Reilly, above n 96, at 10.

<sup>100</sup> Tangata tiaki: guardians. Hon Dr Pita Sharples (Keynote address to Indigenous Legal Water Forum, Dunedin, July 2009).

<sup>101</sup> Jim Williams “Resource Management and Māori attitudes to water in southern New Zealand” (2006) 62 *New Zealand Geographer* 73 [“Water in southern New Zealand”].

may be recognised as a manifestation of “tupuna”<sup>102</sup> or their great feats.<sup>103</sup> The Waitangi Tribunal, in its Whanganui River Report, acknowledged that this bond extends beyond personification to fundamental belief.<sup>104</sup>

Thus personal identity stems from the ability to link oneself with an area and its associated resources, including freshwater. Speaking of this phenomenon regarding Te Parawhau<sup>105</sup> descendants, kaumātua<sup>106</sup> Te Iti Tito remarked, “[w]hen you stand on your marae you would say, ‘Tangihua is the mountain, Wairoa is the river, as is its mana,’ and people know where you come from”.<sup>107</sup> Tito’s statement is a pepeha, a tribal proverb or saying, that locates the Te Parawhau people in both time and space, acknowledging their long association with their mountain and river.

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<sup>102</sup> Also known as “tipuna”. See generally: Marama Muru-Lanning “Tupuna Awa and Sustainable Resource Knowledge Systems of the Waikato River” (2007) 1(Article 6) MAI Review 1-6 at 1 <[www.review.mai.ac.nz](http://www.review.mai.ac.nz)>; *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* EnvC Auckland A67/2004, 18 May 2004; Waitangi Tribunal *Mohaka River Report* (WAI 119 Waitangi Tribunal 1992) at 2.5.

<sup>103</sup> Ben White writes that: “In the case of Taupo ... Ngati Tuwharetoa traditions about the beginnings of their associations with the lake and its naming are centred upon the ancestor Tia. Similarly Te Arawa trace the beginnings of their associations with the Rotorua lakes to the explorations of Ihenga. Nga Puhī hold that the actions of their ancestor Ngatikoro and his sons account for the origins of Lake Omapere. And the history of Waikaremoana is redolent with the traditions of Ngati Kahungunu, Ngati Ruapani and Ngai Tuhoe that account for the origin of the lake and many of its geological features: “Inland Waterways: Lakes” *Waitangi Tribunal Rangahaua Whanui Series* (Waitangi Tribunal 1998) [“Lakes”].

<sup>104</sup> Waitangi Tribunal “Whanganui River”, above n 40, at 38. Stephen O’Regan illustrates the point when he states, “[i]t was through these atua [gods] that our old people related to the physical world. The physical world was those atua ... water was Tangaroa [God of the Sea]. They were not silly, they knew water was wet and all that, but they also knew it as Tangaroa. There was a unity in their perceptions”: “Māori Perceptions of Water in the Environment: An Overview” in Edward Douglas (ed) *Waiora, Waimaori, Waikino, Waimate, Waitai: Maori Perceptions of Water and Environment* (Centre for Maori Studies and Research, University of Waikato, Hamilton, 1984) 8 at 9.

<sup>105</sup> North Island tribe, located to the north and south of Whāngārei, and inland: Rāwiri Taonui “Whāngārei tribes - Tribes of Whāngārei” (2009) *Te Ara - the Encyclopedia of New Zealand* <[www.TeAra.govt.nz](http://www.TeAra.govt.nz)>.

<sup>106</sup> Elder.

<sup>107</sup> Interview with Te Ihi Tito, Te Parawhau Kaumātua (Mana Epiha, ‘Wai Ora’ Waka Huia, Māori Television, 8 August 2010).

Implicit in pepeha is the delineation of well defined and known territories,<sup>108</sup> the origins of which can be traced back to the migration of eponymous ancestors from Hawaiki.<sup>109</sup> McCan and McCan write that:<sup>110</sup>

When territorial boundaries are determined they are often derived from the ancestral waka journey: the actual waka route often forms the basis of coastal boundaries; the naming of features (such as mountains or rivers) by the canoe passengers gives them claim to those areas; and, incidents occurring along the way are interpreted as signs from the gods that certain locations were meant to be avoided or settled.

These migrations formed the basis for Māori social and spatial organisation. McCan and McCan explain that all descendants of passengers who came to Aotearoa/New Zealand in the same waka<sup>111</sup> form a 'loose association' of related tribes or iwi. Iwi form a tighter unit, which in turn is composed of a number of hapū or sub-tribes. Durie states that "political power was vested at the basic community or hapu level".<sup>112</sup> McCan and McCan add that hapū "have been described as the major autonomous military and resource-holding unit, each with its own definite boundaries within the iwi territory".<sup>113</sup>

Hapū held, and continue to hold, their resources collectively.<sup>114</sup> Individual rights are rights of use, with the underlying authority vested in the collective.<sup>115</sup> Thus ones personal rights are not absolute and inherent in and of themselves, but a product of both belonging and contributing to a particular community.<sup>116</sup> No individual holds an interest separate from the local community, nor do they possess the ability to alienate said resources: "[n]othing could alter the reality that land is held by the ancestral community".<sup>117</sup>

Moreover, the primacy of whakapapa, and collegiality of tenure is central to the Māori recognition of landscapes as whole and indivisible entities unable to be compartmentalised.

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<sup>108</sup> McCan and McCan, above n 43, at 12.

<sup>109</sup> Jim Williams, "Ngā hekenga waka - Canoe migrations" in Tānia Ka'ai et al (eds) *Ki te Whaiiao: An Introduction to Māori Culture and Society* (Pearson Education NZ Ltd, Auckland, 2004) 26 at 29.

<sup>110</sup> McCan and McCan, above n 43, at 11.

<sup>111</sup> Migratory canoe.

<sup>112</sup> Durie "Will the Settlers Settle?", above n 2, at 449.

<sup>113</sup> McCan and McCan, above n 43, at 11.

<sup>114</sup> Durie "Custom Law", above n 85, at 329.

<sup>115</sup> Ibid.

<sup>116</sup> Durie "Will the Settlers Settle?", above n 2, at 453.

<sup>117</sup> Ibid, at 453 and 454.

Williams writes that, “[t]o Māori the land [is] indivisible from the waters and all resources associated with either”.<sup>118</sup> This wholeness extended to waterways and water bodies, for which it was antithetical to divide into “constituent parts of water, bed and banks, or of tidal and non-tidal, navigable and non-navigable portions”.<sup>119</sup> By the same token tikanga Māori is adverse to possession or ownership of a waterway or water body as if a mere commodity, for whakapapa precludes such a position of dominance.<sup>120</sup>

*(b) Ngā Uaratanga: Values*

The inherent link between identity and the surrounding environment provides a framework of values by which to govern this relationship, and for which I offer only a few general enlightenments. Waterways and water bodies are said to have mauri, or “vital essence; the spark of life kindled at the conception of all things”.<sup>121</sup> The importance of not altering mauri presents itself in the classifications given to water in various states. From waiora (water of life), which can restore damaged mauri, to waimate (dead water) which has completely lost its mauri, categories abound.<sup>122</sup> Loss of mauri occurs through biological pollution such as a discharge of contaminants or effluent into freshwater resources, but also through the mixing of waters, which results in ‘cultural pollution’.<sup>123</sup> The preservation of mauri is of paramount importance.

Together with mauri, freshwater is said to have its own mana or power, thus deserving of respect and protection as a taonga, or highly prized resource of immense material and

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<sup>118</sup> Williams “Water in Southern New Zealand”, above n 101.

<sup>119</sup> Waitangi Tribunal “Whanganui River”, above n 40, at 39. An earlier description of water as ‘a whole and indivisible entity, not separated into bed, banks and waters’ in the Tribunal’s Mohaka River Report (above n 104, at 3.7) was adopted by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24 (*‘Te Ika Whenua’*).

<sup>120</sup> Waitangi Tribunal “Whanganui River”, above n 40, at 46.

<sup>121</sup> Williams “Water in southern New Zealand”, above n 101, at 74.

<sup>122</sup> For further discussion see: Edward Douglas “He Timatanga” in Edward Douglas (ed) *Waiora, Waimaori, Waikino, Waimate, Waitai: Maori Perceptions of Water and Environment* (Centre for Maaori Studies and Research, University of Waikato, Hamilton, 1984) 5 at 5; Tim Rochford “Te korero wai: Maori and Pakeha views on water despoliation and health” (Masters in Public Health Thesis, University of Otago, 2004); Williams “Water in southern New Zealand”, above n 101.

<sup>123</sup> Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 25.

spiritual value.<sup>124</sup> The Waitangi Tribunal has repeatedly accepted evidence that waterways and water bodies are taonga of claimant hapū and iwi groups.<sup>125</sup> What is more, the Crown has also afforded certain claimants this recognition upon ‘settling’ Treaty claims.<sup>126</sup> Freshwater resources are taonga tuku iho, literally “ancestral treasure[s] handed down”.<sup>127</sup> They are living beings who simultaneously carry the identity and prestige of ancestors and descendants through whakapapa, thereby promoting a continuing bond.<sup>128</sup> Inherent in this bond is not only reciprocity as between descendants and ancestors, but an obligation of preservation for future generations, so that they may enjoy as fruitful a relationship with the resource as their forebears.<sup>129</sup>

Regulation is provided through tapu and rāhui. Tapu meaning sacred or set apart,<sup>130</sup> has various manifestations. Barlow explains that there are two sides to tapu, both good and bad.<sup>131</sup> An illustration of the former is the manner in which freshwater is revered for its associated tapu healing qualities. In fact water remains today a central feature of many spiritual practices. Application of the latter may be the restriction or prohibition of access to certain areas due to an aituā<sup>132</sup> that has occurred in a waterway or water body. Rāhui, while similar in its restrictive nature, is seen as a conservation mechanism.<sup>133</sup>

The corollary of Māori engagement with water under this ethos was that if hapū and iwi looked after waterways and water bodies, they would in turn be looked after.<sup>134</sup> Extensive

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<sup>124</sup> Waitangi Tribunal *Te Ika Whenua Rivers Report* (WAI 212 Waitangi Tribunal 1998) at 86 [“Te Ika Whenua”].

<sup>125</sup> Waitangi Tribunal: *Report of the Waitangi Tribunal on the Kaituna River Claim* (WAI 4 Waitangi Tribunal 1984) [“Kaituna River”]; *The Pouakani Report* (WAI 33 Waitangi Tribunal 1993); *Mohaka River Report* (WAI 119 Waitangi Tribunal 1992) [“Mohaka River”]; “Whanganui River”, above n 40; “Te Ika Whenua”, above n 124.

<sup>126</sup> Te Awara Lakes Settlement Act 2006, Recital 2, Preamble,.

<sup>127</sup> Waitangi Tribunal “Whanganui River”, above n 40, at 41.

<sup>128</sup> Waitangi Tribunal “Te Ika Whenua”, above n 124, at 86.

<sup>129</sup> Waitangi Tribunal “Mohaka River”, above n 125, at 2.6.

<sup>130</sup> Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 128.

<sup>131</sup> Ibid.

<sup>132</sup> Misfortune, death.

<sup>133</sup> Barlow, above n 130, at 105.

<sup>134</sup> Interview with Brian Pou, Mangakāhia Kaumātua (Mana Epiha, ‘Wai Ora’ Waka Huia, Māori Television, 8 August 2010).

evidence on the centrality of waterways and water bodies for Māori as both a food source and a means of transportation abound.<sup>135</sup>

*(c) Te Whakahaere: Authority and Control*

A tikanga Māori approach to freshwater resources conflicts with a human centred approach to the environment, as it expressly prohibits the ‘owning’ of resources. Durie writes:<sup>136</sup>

In the beginning land was not something that could be owned or traded. Maoris did not seek to own or possess anything, but to belong. One belonged to a hapu that belonged to a tribe. One did not own land. One belonged *to* the land.

How then can tikanga Māori be understood to effect control or authority over an environment with which one stands in harmony? The preceding discussion highlights that tikanga Māori at once bestows descendants with a legacy and necessitates an obligation to maintain, protect and sustain it: it both bestows and necessitates authority and control. This is manifest through the concepts of rangatiratanga, mana and kaitiakitanga.

Rangatiratanga is unique for its incorporation into the Māori text of the Treaty of Waitangi under Article II.<sup>137</sup> This illustrates that in 1840 the Crown recognised Māori authority and control over their landscapes. The Waitangi Tribunal as interpreter<sup>138</sup> has defined ‘te tino rangatiranga’ as ‘full chieftainship’, ‘tribal self-management’ and ‘full authority, status and prestige as regards Māori possessions and interests’.<sup>139</sup> The Te Ika Whenua Rivers Report

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<sup>135</sup> White “Lakes”, above n 103, at 251; Waitangi Tribunal “Whanganui River”, above n 40, at 36; Waitangi Tribunal “Te Ika Whenua”, above n 124, at 12-13, 13-14; Waitangi Tribunal “Mohaka River”, above n 125, at 2.6, 2.8, 2.12; Waitangi Tribunal “Kaituna River”, above n 125, at 3.5.

<sup>136</sup> Durie “Law and the Land”, above n 81, at 78. See also: Mead, above n 81, at 273.

<sup>137</sup> Te Tiriti o Waitangi 1840, Te Tuarua: “Ko te Kuini o Ingarani ka wakarite ka wakaee ki nga Rangitira ki nga hapu-ki nga tangata katoa o Nu Tirani te *tino rangtiratanga* o o ratou wenua o ratou kainga me o ratou taonga katoa.” (emphasis added) <[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)>.

<sup>138</sup> Treaty of Waitangi Act 1975, s 5(2). Under this section the Waitangi Tribunal has exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

<sup>139</sup> See Waitangi Tribunal *The Ngai Tahu Report* (WAI 27 Waitangi Tribunal 1991) at 4.6.6-4.6.7; Waitangi Tribunal “Mohaka River”, above n 125, at 5.22; Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (WAI 8 Wellington 1985) at 67.

also notes that it is generally accepted that when applied to taonga, the term means authority and control.<sup>140</sup> Ward is of the view that:<sup>141</sup>

[T]he term 'rangatiratanga' was used in 1840 to refer not to abstract concepts such as 'sovereignty', but rather to the local rights and responsibilities of chiefs, tribes and individuals towards their property and towards each other.

Mana is similarly described. The Waitangi Tribunal's Report on the Manukau Claim remarked that mana and rangatiratanga were "really inseparable".<sup>142</sup> In their view both mana and rangatiratanga denote authority. However, mana "personalises the authority and ties it to status and dignity".<sup>143</sup> Marsden defines mana as "spiritual authority and power",<sup>144</sup> recognising it as a whakapapa construct that is sourced in the deities, but is handed down to their descendents as agents.<sup>145</sup> Thus 'mana whenua' has become a common term to describe those tangata whenua who hold mana over their land.<sup>146</sup> Firth's early description of mana supports this recognition:<sup>147</sup>

In regard to land [mana] usually denotes the superior power or prestige and intimacy of association which a tribe possesses with regard to its territory as compared with the relation of other tribes to it.

In addition, rangatiratanga and mana are inextricably linked to kaitiakitanga, as many believe the former concepts are a necessary pre-condition of the latter.<sup>148</sup> Kaitiakitanga is often loosely described as guardianship, but Kawharu is critical of such an interpretation.

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<sup>140</sup> Waitangi Tribunal "Te Ika Whenua", above n 124, at 89.

<sup>141</sup> Alan Ward *An Unsettled History: Treaty claims in New Zealand today* (Bridget Williams Books, Wellington, 1999) at 6.

<sup>142</sup> Waitangi Tribunal "Manukau Claim", above n 139, at 8.3.

<sup>143</sup> Ibid.

<sup>144</sup> Te Ahukaramū Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (The Estate of Rev. Māori Marsden, Masterton, 2003) at 4 (emphasis added).

<sup>145</sup> Ibid.

<sup>146</sup> Barlow, above n 130, at 61-62.

<sup>147</sup> Raymond Firth *Economics of the New Zealand Maori* (2nd ed, Government Printer, Wellington, 1972) at 391.

<sup>148</sup> See Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic of resource management" (2000) 110 *Journal of the Polynesian Society* 349 at 353; M Mutu *The use and meaning of Māori words borrowed into English for discussing resource management and conservation* (Unpublished discussion paper for Conservation Board Chairpersons, Conference 10 February, 1994) at 2 cited in Mere Roberts (et al) "Kaitiakitanga: Maori perspectives on conservation" (1995) 2 *Pacific Conservation Biology* 7 at 14.

She states “[a] problem has developed ... where *kaitiakitanga* has become almost locked into meaning simply ‘guardianship’ without understanding of ... the wider obligations and rights it embraces”.<sup>149</sup> Her statement is noteworthy for its recognition of the dual functions of tikanga Māori that I have described. Kawharu states that *kaitiakitanga* incorporates “a nexus of beliefs that permeates the spiritual, environmental and human spheres” and embraces “social protocols associated with hospitality, reciprocity and obligation (*manaaki, tuku and utu*)”.<sup>150</sup> *Kaitiakitanga* therefore, can be seen to define the role of tangata whenua in relation to their landscapes.<sup>151</sup> Thus it is the process by which a tikanga Māori framework is translated into practice.<sup>152</sup>

Accordingly, my examination of rangatiratanga, mana and *kaitiakitanga* clearly indicates both a perception of authority and control, and the exercise of that authority and control over the landscape occupied by hapū and iwi alike. But can these concepts amount to ownership? And more importantly, do they have to? This chapter has sought to illustrate a tikanga Māori approach to freshwater to lay a foundation for the discussion of the Māori assertion of ‘ownership’ of the resource. The following chapter shall examine the concept of ownership under Western legal theory, and the use of the term by Māori in claiming rights and interests in freshwater. The Māori contention shall be examined against tikanga Māori as outlined, to attempt to understand and analyse the accuracy of a Māori claim to ownership in accordance with tikanga Māori.

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<sup>149</sup> Kawharu, above n 148, at 351.

<sup>150</sup> Ibid.

<sup>151</sup> Keown, above n 78, at 80.

<sup>152</sup> M Ross “*Kaitiakitanga and Resource Management: Incorporating Ancient Knowledge and Values*” (Draft Discussion Paper, July 1993) cited in Juliane Chetham “*Kaitiakitanga and the Resource Management Act: Tangata Whenua, participation, and morality*” (MSc Geography Thesis, University of Auckland, 1998) at 36.

## CHAPTER FOUR: 'OWNERSHIP' AND ITS MANY NUANCES

That Māori have chosen the term 'ownership' to frame rights discourse in the freshwater arena is clear. But in doing so, they have adopted a concept that is overtly present in a Western legal system, and is therefore commonly understood under the framework of that system. Indeed the concept of ownership in a Western legal paradigm imports its own distinct set of values. Harris asserts that "property talk, lay and legal, deploys ineliminable ownership conceptions".<sup>153</sup> From a Māori perspective this presents both concerns and challenges: concern to enquire into the nature of the contention posed and the effect it may have on tikanga Māori, and challenge in the sense that any ownership claimed will inevitably encounter Western conceptions of freshwater ownership as advanced by the Crown, which inform the status quo. These include the English common law doctrine of *publici juris* holding that water is a public resource incapable of ownership, and statutory developments demonstrating Crown assumption of freshwater ownership.

This chapter will address the first of these issues, the second left for resolution in chapter five. Having earlier introduced that ownership is prohibited under tikanga Māori,<sup>154</sup> this chapter looks at the concept of ownership in a Western legal system. The aim here is to assess whether the Māori assertion of 'ownership in accordance with tikanga Māori' is in fact paradoxical.

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<sup>153</sup> JW Harris *Property and Justice* (Clarendon Press, Oxford, 1996) at 5.

<sup>154</sup> See chapter 3, above n 136. See also: Mead, above n 81, at 273.

However, in order to understand the Māori assertion of ownership one must first understand 'ownership'. I propose to do so by unpacking ownership through reference to its liberal origins, for these origins have informed Western conceptions of property to the present day.<sup>155</sup> Hence Purdy writes that the following phrase by Sir William Blackstone is almost Shakespearean in its familiarity:<sup>156</sup>

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Viewed in modern Western terms, Blackstone's words may indeed be a familiar and romantic statement of 'right'. But what is the source of these rights? To answer this question we must first investigate a liberal world view.

### *A traditional Western approach to property: man and society*

The liberal conception of property takes the individual as the ultimate unit in society, rendering society as nothing more than the totality of its members in their private relationships: society is an artificial secondary creation of individuals.<sup>157</sup>

The classic liberal narrative about man and society as advanced by Locke, is that God created men in a 'state of nature' and gave them the world in common.<sup>158</sup> The prominence of the individual in Locke's narrative is strikingly apparent in his statement that "[t]he Earth, and all that is therein, is given to Men for the Support and Comfort of their Being".<sup>159</sup> As highlighted by Parekh, Locke's was a negative communism in the sense that the world was

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<sup>155</sup> Jedediah Purdy *The Meaning of Property: Freedom, Community and the Legal Imagination* (Yale University Press, New Haven & London, 2010).

<sup>156</sup> William Blackstone *Commentaries on the Laws of England. Book the Second*. (3rd ed, Clarendon Press, Oxford, 1768) at 2 cited in Purdy, Jedediah *The Meaning of Property: Freedom, Community and the Legal Imagination* (Yale University Press, New Haven & London, 2010) at 1.

<sup>157</sup> Bhikhu Parekh "The Cultural Particularity of Liberal Democracy" (1992) 40 *Special Issue Political Studies* 160.

<sup>158</sup> John Locke *Two Treatises of Government: A critical edition with an introduction and an apparatus criticus by Peter Laslett* (2nd ed, Cambridge University Press, Cambridge, 1967) at 304.

<sup>159</sup> *Ibid.*

not a collective human property, but rather that it belonged to no one until appropriated for individual use.<sup>160</sup> This appropriation of land occurred when one mixed the property he owned in himself with the land through labour, and in so doing subdued that parcel of land as his own, to which another had no title.<sup>161</sup> Having sufficiently acquired and demarcated property, Locke, who despised 'waste', contended one must "make use of it to the best advantage of life and convenience",<sup>162</sup> thus rationalising industry.<sup>163</sup>

### *Locke's theories develop: the 'incidents of ownership'*

While Parekh notes that "liberalism has mellowed over the years and become self-critical,"<sup>164</sup> I observe that Locke's writing has much influenced Western ideas of property so as to remain relevant to the present day. In particular, writing of the liberal concept of ownership, Honoré reduced Locke's propositions to 'standard incidents' of legal ownership which Keown observes are strongly supported under New Zealand law.<sup>165</sup> In the main they are the rights to exclusive possession and security, the rights to use and management, the rights to income and capital, the incident of transmissibility, and the prohibition of harmful use.<sup>166</sup>

Exclusive possession is built upon the very notion of individualism inherent in the Western liberal construct.<sup>167</sup> Having successfully appropriated what was once held in common, a

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<sup>160</sup> Bhikhu Parekh "Liberalism and colonialism: a critique of Locke and Mill" in Bhikhu Parekh and Jan Nederveen Pieterse (eds) *The Decolonisation of Imagination: Culture, Knowledge and Power* (Zed Books Ltd, London and New Jersey, 1995) 81 ["Liberalism and colonialism"].

<sup>161</sup> I import use of the masculine to align with the language of the original source: Locke, above n 158, at 304.

<sup>162</sup> Locke, above n 158, at 306.

<sup>163</sup> Indeed Parekh comments that "Locke's juxtaposition of 'Industrious' and 'Rationale' is striking": "Liberalism and colonialism", above n 160, at 84.

<sup>164</sup> *Ibid*, at 97.

<sup>165</sup> Keown, above n 78, at 74.

<sup>166</sup> AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, London, 1961) 107 at 113 ["Ownership"]. For a discussion of the presence of liberal conceptions of ownership in the approach to land adopted by New Zealand's legal system, see: Keown, above n 78, at 67.

<sup>167</sup> Keown, above n 78, at 72.

primary tenet of the incident is non-interference.<sup>168</sup> Accordingly, protection of the right can be achieved only when rules allot exclusive physical control to one person rather than another.<sup>169</sup> In this sense exclusive possession allows for a general right of security, “availing against others”.<sup>170</sup> It is “the foundation upon which the whole superstructure of ownership rests”,<sup>171</sup> thus from this cornerstone flow the remaining rights as presented by Honoré.<sup>172</sup>

Having established exclusive possession one may exercise the rights to use and to manage. The right of management encompasses the power to admit others to one’s land, to permit others to use one’s things, to define the limits of such permission, and to contract effectively in regard to the use and exploitation of the thing owned.<sup>173</sup>

The rights to income and to capital represent the economic incidents of ownership and the resultant commodification of resources owned. These rights were central to the rationality of, and indeed duty to engage in, industry as posited by Locke.<sup>174</sup> The right to capital consists of the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it.<sup>175</sup> Honoré highlights alienation as the most important aspect of the right to capital. It is the “right of one owner to transfer entitlement to another”.<sup>176</sup> In this regard, Keown emphasises the finality of alienation – an enduring relationship with the thing owned is only possible to the extent that commercial ties to that [thing] remain.<sup>177</sup>

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<sup>168</sup> Honoré “Ownership”, above n 166, at 113 - 114; James Penner “Ownership, Co-Ownership and Justification of Property Rights” in Timothy Endicott, Joshua Getzler and Edwin Peel (eds) *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, New York, 2006) 166 at 167.

<sup>169</sup> Honoré “Ownership”, above n 166, at 114.

<sup>170</sup> *Ibid*, at 119.

<sup>171</sup> *Ibid*, at 113.

<sup>172</sup> Keown, above n 78, at 72.

<sup>173</sup> Honoré “Ownership”, above n 166, at 116.

<sup>174</sup> Locke, above n 158, at 306 - 320.

<sup>175</sup> Honoré “Ownership”, above n 166, at 118.

<sup>176</sup> Margaret Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 80 *Colum L Rev* 1667 at 1668.

<sup>177</sup> Keown, above n 78, at 73.

Transmissibility is the incident that makes provision for the transfer of interests to successive generations. Of interest is Honoré's reference to the economic interest of transmissibility which he uses to justify the incident:<sup>178</sup>

An interest which is transmissible to the holder's successors is more valuable than one which stops with his death. This is so because ... the alienee or ... the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing.

Finally, the construct of ownership prohibits ones use of the land should it be harmful to other members of society. Of note is the point of prohibition. It is not harm to the environment that is prohibited, but harm "injurious to a fellow human".<sup>179</sup> Keown points out that sustainability and conservation only enter the equation to the extent that conduct contrary to private autonomy also affects these considerations.<sup>180</sup>

Though writing in 1961, in unpacking ownership into 'incidents', Honoré's 'rights' attain a sense of relativity for the modern eye. What's more, they represent a fundamental step in the process of solidifying liberal conceptions of property from narrative to institution.

### *Ownership and tikanga wai Māori*

Ostensibly tikanga wai Māori does have a number of commonalities with the liberal concept of ownership. From whakapapa stem use rights and the recognition of the incident of transmissibility. Rights to manage are also sourced in whakapapa, and exercised through activities such as the imposition of tapu and rāhui. Rights to income were realised in the sense that "food was a species of wealth",<sup>181</sup> and the prohibition of harmful use was present, though its ambit extended to the concepts of conservation and sustainability.<sup>182</sup> Moreover, hapū and iwi maintained exclusive territories. However, the underlying rationale of liberal

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<sup>178</sup> Honoré "Ownership", above n 166, at 120 - 121.

<sup>179</sup> Keown, above n 78, at 73.

<sup>180</sup> Ibid, at 73.

<sup>181</sup> Firth, above n 147, at 291.

<sup>182</sup> Honoré "Ownership", above n 166, at 113.

ownership and tikanga wai Māori can never convincingly equate despite their commonalities.

Ownership is premised on individual identity, central to that fundamental tenet of exclusive possession. Framed in the language of rights and liberties, it is a distinctly anthropocentric concept. By contrast tikanga wai Māori concerns collective identity<sup>183</sup> and reciprocity. Inherent in the concepts that attract resemblance to the incidents of ownership is the obligation to protect and preserve that to which one has a 'right'. The distinction is well drawn in reading Professor Sir Hugh Kawharu's translation of Article 3 of Te Tiriti o Waitangi, the Māori text of the Treaty, as compared with the English text.<sup>184</sup> In doing so one observes that, "tikanga" as it appears in the Māori text, which is included in the English text as "rights and privileges", is translated by Kawharu as meaning "rights and duties".

Thus at the heart of each conception of 'property' lie fundamentally different values that contribute to the very existence of each world view. Accordingly, to adopt a liberal conception of ownership *in accordance with tikanga Māori* to advance freshwater rights in New Zealand would be to import a paradox under tikanga Māori, and to erode those very values from which a Māori world view sources its existence. In modern times the importance of maintaining tikanga Māori baselines is imperative for the long-term survival of Māori.<sup>185</sup> Adoption of a liberal conception of ownership by Māori could encounter the same difficulties inherent in the incorporation of tikanga into New Zealand's statute books - a re-defining of tikanga in such a way that results in an alien form of its former construct.<sup>186</sup> The uneasy difference here is that in adopting liberal ownership Māori would be culprits rather than mere witnesses to the denigration of tikanga Māori.

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<sup>183</sup> That humans are but one aspect of the natural environment.

<sup>184</sup> Article III concerned Māori acquisition of those allowances afforded British citizens: Treaty of Waitangi 1840, Article III.

<sup>185</sup> Ani Mikaere "How will Future Generations Judge us? Some Thought on the Relationship between Crown Law and Tikanga Māori" in Ani Mikaere (ed) *Mā te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework* (Te Wānanga-o-Raukawa, Ōtaki, 2009) 10; Annette Sykes "The Consequences of Departing from Kaupapa Māori Baselines: Ko ngā Whakatūpatō inā ki te Motuhi mai ko ngā Kaupapa Māori i tōna Tūāpapa" in Ani Mikaere (ed) *Mā te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework* (Te Wānanga-o-Raukawa, Ōtaki, 2009) 90.

<sup>186</sup> Tomas, above n 16. For a general discussion of the merits and disadvantages of incorporation of Māori customary law into legislation see: Natalie Coates "Me Mau Ngā Ringa Māori i ngā Rākau a te Pākehā? Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago, 2009).

### *Lost in translation*

So is this indeed what is occurring when Māori assert ownership of freshwater? Are they adopting the liberal conception of ownership to frame rights arguments in the freshwater arena? I observe that this is not the case. Rather, use of the term ownership to frame rights to freshwater by Māori is a clear illustration of the precedence that state law, and indeed the primacy of its Western source, continues to have over tikanga Māori. For the dominant language of the law is Pākehā,<sup>187</sup> and accordingly tikanga Māori conceptions about freshwater must be framed in Western terminology to advance claims in both lay and legal environments.

As pointed out by Muru-Lanning, there is in fact no lexeme for the English verb ‘to own’ in Te Reo Māori.<sup>188</sup> Rather, the imperfect nature of translation simply deems ‘ownership’ the most appropriate term to represent assertions of rangatiratanga, mana and kaitiakitanga over freshwater as understood in accordance with tikanga Māori. Statements by those advancing rights to freshwater make this clear. Hon Minister of Māori Affairs Dr Pita Sharples, who has spoken in favour of Māori ownership of freshwater, informs us that “by water ‘ownership’ he [is] not talking about title but about ‘the systems – the Maori one, the parliamentary one – coming together to work out kaitiakitanga [guardianship], management, whatever’”.<sup>189</sup> He writes:<sup>190</sup>

For us, it is not a question of ownership rights, but how we honour our collective responsibilities to respect and protect the environment and communities that give us our identity, our rangatiratanga, our mana.

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<sup>187</sup> English. Te Reo Māori (s 3, Māori Language Act 1987) and Sign Language (s 6, New Zealand Sign Language Act 2006) are the only official languages of New Zealand, yet English is the predominant language by virtue of its widespread use.

<sup>188</sup> Muru-Lanning “River Ownership” above n 81, at 33.

<sup>189</sup> Audrey Young “Sharples urges debate on water ownership” *The New Zealand Herald* (New Zealand, 11 December 2009) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>. See also: New Zealand Press Association “Call for iwi to have more say on water” *The New Zealand Herald* (New Zealand, 28 July 2009) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; Pita Sharples “Māori perspectives on water resources” *The New Zealand Herald* (New Zealand, 15 December 2008) <[www.herald.co.nz](http://www.herald.co.nz)>; Pita Sharples “Māori add value to freshwater policy” (press release, 10 December 2009) <[www.scoop.co.nz](http://www.scoop.co.nz)>.

<sup>190</sup> Sharples “Māori perspectives on water resources”, above n 189.

Iwi leaders at the Iwi Māori National Summit on Freshwater in December 2009 also recognised:<sup>191</sup>

Ownership is seen to be important because it speaks to the inherent and inalienable relationship between Iwi and Hapū and ngā Wai Māori [freshwater]. But it is also laden with English law baggage that is not consistent with our tikanga and relationships with Wai Māori.

This 'English law baggage' is well entrenched and inherent in non-Māori responses to Māori assertions of water ownership. Attempts to explain the consequences of the Māori claims are misrepresented from the outset by adoption of liberal notions of ownership as the means of communication. Among them consequent rights to exclusive possession and income are most notably preached as reasons to vehemently oppose the realisation of Māori assertions.<sup>192</sup> The problem with this reasoning reflects the problem with the use of the term ownership - it imports the norms of one culture to explain those of another. While the act is responsive in the sense that the term ownership has been adopted by Māori, to stop at this step would be to preclude recognition that such adoption is forced by a monocultural legal framework. However, drawing contrasts between liberal ownership and tikanga Māori concepts illustrates that such concepts are apt to describe themselves, and this has indeed occurred for a number of years.

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<sup>191</sup> Sacha McMeeking "Background Paper 6: Freshwater Management" (paper presented at the National Iwi Leaders Hui, Ipipiri/Bay of Islands, 4 and 5 February 2010) <[www.iwichairs.maori.nz](http://www.iwichairs.maori.nz)>. The 10 December 2009 Summit was held in Wellington and led by Ngāti Tūwharetoa in conjunction with the leadership of Ngāti Tahu, Whanganui, Tainui and Te Arawa. Forty iwi groups were in attendance: Tūwharetoa Māori Trust Board "Iwi Leaders Forum Discusses Management of Freshwater" (2010) 1 Te Kotuku 4 <[www.tuwharetoa.co.nz](http://www.tuwharetoa.co.nz)>.

<sup>192</sup> See Renee Kiriona "Lakes will be handed over to Te Arawa" *The New Zealand Herald* (New Zealand, 13 December 2003) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; "Tainui wants to own water in river claim" *Timaru Herald* (New Zealand, 5 April 2007).

### *'Ownership as Belonging'*

But what then of 'ownership'? Is it to be relegated to the pātaka<sup>193</sup> as yet another failed attempt to harmonise Māori and Pākehā legal systems under the guise of a dominant framework?<sup>194</sup> My earlier investigation of a tikanga Māori approach to the environment showed clearly demarcated boundaries within which strong manifestations of authority over and control of the natural environment were present. This was a necessary part of enhancing, protecting and preserving that which they had been bestowed by whakapapa. The Waitangi Tribunal in its seminal report on the Whanganui River addressed the issue as such:<sup>195</sup>

[W]hether with regard to the land or the river, Maori saw themselves as permitted users of ancestral resources. With regard to the prospective threat from other descent groups, they thought in terms of 'possession' and 'control'. Within their own hapu, their use of resources was always conditional on obligations to ancestral values and future generations, but they did not think in terms of 'ownership' at English common law, with its rights of use and alienation independent of the local community.

It does not follow that, in matching Maori and English laws, Maori were to be deemed to own nothing. Nor would it follow as a result ... the Crown would be deemed to own all.

If we assess ownership in terms of both its *form* - that being the fundamental doctrines that lie behind the concept, and its *function* - the effect of authority and control in allowing the regulation of said resources, it might be said that while Māori did not own in *form*, they owned in *function*. What is more, if we accept that tikanga wai Māori and ownership equate in function but not in form, then we must further accept the limitation of our use of the 'form of ownership'. As canvassed, ownership is derived not only from a Western construct, but deeper still, a liberal source. When assessed in this manner, 'ownership' is seen not as a settled institution, fixed and omnipotent, but a result of human achievement. Purdy notes

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<sup>193</sup> Repository.

<sup>194</sup> I say 'another' because this has been the criticism of statutes that seek to be inclusive of Māori concepts - they *accommodate* tikanga Māori rather than give effect to it in its pure form. See: Ani Mikaere (ed) *Mā te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework* (Te Wānanga-o-Raukawa, Ōtaki, 2009).

<sup>195</sup> Waitangi Tribunal "Whanganui River", above n 40, at 49.

that Blackstone himself touched on this very notion in writing of the liberal concept of property:<sup>196</sup>

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title.

Hence Purdy writes of the liberal construct of property as a 'legal imaginary':<sup>197</sup>

... stories and unspoken presuppositions that detail why and how their practices are legitimate, beneficial or natural, ... lend shape to the practices of everyday life and help define the purposes and limits of power.

Stone highlights that Māori 'rights' jurisprudence can be categorised into three distinct phases: rights recognition, rights protection and rights development.<sup>198</sup> The distinction between ownership on the one hand and tikanga Māori on the other can be seen as a necessary element of rights recognition - it highlighted the fundamental distinctions between Māori and Western world views. But the course of time has seen distinctions become less clear cut, and the maintenance of black and white may be at the risk of opportunities found in shades of grey.<sup>199</sup> However, in recognising the 'form of ownership' - that to which tikanga Māori is adverse - as a particular liberal construct, one can see that 'Māori ownership' with its own form and function is both valid and validated.

Noble would call this form of ownership "owning as belonging".<sup>200</sup> He describes it as assuming "a largely inextricable connection and continuity between people and the material

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<sup>196</sup> William Blackstone *Commentaries on the Laws of England. Book the Second*. (3rd ed, Clarendon Press, Oxford, 1768) at 2 cited in Purdy, Jedediah *The Meaning of Property: Freedom, Community and the Legal Imagination* (Yale University Press, New Haven & London, 2010) at 1.

<sup>197</sup> Purdy, above n 156, at 160.

<sup>198</sup> Damian Stone "Who's the Boss - Tensions in Asset Management" (paper presented to the Māori Law Society Conference, Wellington, 3 September 2010).

<sup>199</sup> Or at the risk of detriment in upholding a distinction which is not as clear cut as it first seems. In fact Ben White, in the 'Inland Waterways' chapter of the Waitangi Tribunal Rangahaua Whānui: National Overview (which summarises key issues arising from claims to the Waitangi Tribunal) records that "the Crown strenuously argued that Maori customary law did not recognise ownership of lakes". This proves the potential for loss that arises from such a black and white approach: White "National Overview", above n 74, at 347.

<sup>200</sup> Brian Noble "Owning as Belonging/Owning as Property: The Crisis of Power and Respect in First Nations Heritage Transactions with Canada" in Catherine Bell and Val Napoleon (eds) *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (UBC Press, Vancouver, 2008) 465.

and intangible world”.<sup>201</sup> Such a form of ownership complements rather than contrasts tikanga Māori concepts of rangatiratanga, mana and kaitiakitanga and indeed finds harmony with Durie’s earlier statement of ownership, which I again outline below:<sup>202</sup>

In the beginning land was not something that could be owned or traded. Maoris did not seek to own or possess anything, but to belong. One belonged to a hapu that belonged to a tribe. One did not own land. One belonged *to* the land.

This form of ownership is given formal recognition in the United Nations Declaration on the Rights of Indigenous Peoples. The instrument is significant, for Indigenous peoples had direct influence in its drafting. Articles 25, 26, 27 and 28 refer to ‘traditional ownership’. Article 25 reads:<sup>203</sup>

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their *traditionally owned* or otherwise occupied and used lands, territories, *waters* and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Speaking of Article 25, Lenzerini states that:<sup>204</sup>

Here there is a reference to a legal aspect that is not usually valid according to the Western vision. This legal aspect is traditional ownership. It is not a title of property; it is not a title of ownership that would usually be valid according to the Western way of thinking. This means that this Declaration turns its eyes toward the conception of Indigenous peoples.

Mikaere writes that “[i]t is certainly not the case that tikanga Māori is rigidly fixed in the past. Like any successful system of law it is adaptable: what cannot be sacrificed are the

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<sup>201</sup> Noble, above n 200, at 465 - 466. Noble’s discussion of ‘owning as belonging’ is remarkable for its poignancy. He contrasts this with ‘owning as property’, distinguishing the advancement of ‘owning as belonging’ from what he describes as “acquiescing to the problematic liberal political trend of translating First Nations practices into various versions of ‘owning as property’” (at 466). His statement is therefore telling of the wide reaching and deeply penetrating nature of the liberal ‘legal imaginary’ for indigenous peoples of many areas of the world.

<sup>202</sup> See above n 136.

<sup>203</sup> United Nations Declaration on the Rights of Indigenous Peoples, Article 25 <[www.un.org](http://www.un.org)> (emphasis added).

<sup>204</sup> Federico Lenzerini “The United Nations Declaration on the Rights of Indigenous Peoples: Amending for Five Centuries of Wrongs” (paper presented at the Ngā Pae o te Māramatanga 4<sup>th</sup> International Indigenous Conference, 6 - 9 June 2010) <[www.traditionalknowledge2010.ac.nz](http://www.traditionalknowledge2010.ac.nz)>.

underlying principles".<sup>205</sup> It is my contention that under this analysis, the adaptive nature of tikanga Māori need not be called into action for anything more than the comfortable addition of 'ownership' to Māori vocabulary.

In the dominant Western framework of our legal system, 'Māori ownership' is a positive tool to describe rangatiratanga, mana and kaitiakitanga to a non-Māori audience. Importantly, it does not replace, but explains tikanga wai Māori. Thus it is a tool which bridges the gulf between two cultural frameworks whose concepts are naturally to be understood in their own language. It is a tool which respects difference rather than enhances acquiescence. It is also a tool of challenge - for it recognises that 'ownership as property' is not altogether 'Western', but rather it is 'liberal'. In this way it challenges the 'legal imaginary' that maintains the status quo to open its imagination further to the wide panorama of ownership - and its many nuances.

Having made out a claim of 'Māori ownership' of freshwater in accordance with tikanga Māori, what remains to be seen is how the dominant Pākehā legal system will respond. The following chapter investigates this issue, looking specifically at a Western approach to freshwater ownership and investigating its position in recognised law. Finally, it provides an outline of how these two legal systems might reconcile their approach to freshwater law in Aoteroa/New Zealand.

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<sup>205</sup> Ani Mikaere "Seeing Human Rights through Māori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence, Special Issue: Tikanga Māori me te Mana i Waitangi 53 at 58.

## CHAPTER FIVE: RECONCILING LEGAL SYSTEMS

That Māori have a conception of ownership, albeit in a different form and function to liberal ownership, cannot be denied.<sup>206</sup> Recognition of landscapes as whole and indivisible entities means that this applies equally to running water as an integral part of that whole: “[t]hough its molecules may pass by, as a water regime it remains”.<sup>207</sup> But in the face of such recognition, to use the words of Keown, there is no clear ‘hole’ in the ‘blanket of state law’ in which ‘Māori ownership’ of freshwater may comfortably take residence. Dawson points out that in the process of decolonisation Indigenous peoples can expect a degree of resistance by those who occupy positions of influence within the state legal system<sup>208</sup> and that much of this resistance will take place in the domain of ideas.<sup>209</sup> His statement is an acknowledgement of the strength of the liberal ‘legal imaginary’ described by Purdy which remains ever present in the water ownership debate. For, despite its silence on ownership of freshwater, state law and its ideology comes not without opposing views of the control of the freshwater resource.

In the assumption of control over freshwater the Crown has relied on two main arguments: that ‘no one owns water’ as it is a public resource, or that the effect of statutory developments has been to place any ownership of water into the hands of the Crown. With so much at stake for Māori in the face of further freshwater reforms it is time that the ‘challenges and opportunities’ regarding Māori rights and interests in freshwater declared

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<sup>206</sup> In fact, in testifying before the Native Land Court in the *Rotorua Lakes* case Captain Gilbert Mair (whom Frame states spent a great part of his working life among the Awara and was acknowledged by them as an expert in custom) stated “... no land in New Zealand has been more absolutely, more completely and more thoroughly under Maori owners’ customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experience that has been used or that can show more marks ownership, individual or tribal than those lakes, and the surrounding lands ...”: National Archives, Wellington, File CLO 174 Part 2 cited in Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 123.

<sup>207</sup> Waitangi Tribunal “Whanganui River”, above n 40, at 50.

<sup>208</sup> It is important to note that Aotearoa/New Zealand’s representative democracy, coupled with our nations Pākehā/non-Māori majority effectively places all voting New Zealanders in a ‘position of influence’ within the state legal system regarding Māori rights. The enactment of the Foreshore and Seabed Act 2004 is a painful example of the tyranny the majority can exude with this influence.

<sup>209</sup> John Dawson “The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law” (2008) 12(1) *Journal of South Pacific Law* 56 at 56.

by the National-led government were taken up. Accordingly, I conclude that there is only one feasible option - reconciliation of 'ownership' of freshwater through a bicultural legal framework.

This chapter is divided into three parts. It first examines the arguments used by the Crown and non-Māori to maintain the status quo. Next it critiques their application within recognised law. Finally, it discusses the inadequacies of a monocultural legal approach and proposes a bicultural framework for ownership of freshwater.

### *Crown contentions of Ownership and Control of Freshwater*

#### *(a) English Common Law*

The common law approach to freshwater is to compartmentalise the resource into separate components of bed, banks and flowing water.<sup>210</sup> The traditional approach to flowing freshwater at common law was that it was incapable of being owned, but rather that it remained in common. Blackstone put it thus:<sup>211</sup>

“[T]here are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; ... Such (among others) are the elements of light, air, and water; ... All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

...

For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein.

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<sup>210</sup> Waitangi Tribunal “Whanganui River”, as above n 40, at 39.

<sup>211</sup> William Blackstone *Commentaries on the laws of England: in four books: with notes selected from the editions of Archbold, Christian, Coleridge, Chitty, Stewart, Kerr, and others; Barron Field's Analysis, and additional notes, and a life of the author by George Sharswood* (G.W. Childs, Philadelphia, 1865) at 401, 403.

Of note is Blackstone's recognition of water as remaining in common. It remains in Locke's 'state of nature', to be owned by no one. It can be seen that English water law is sourced in liberal notions of common property and natural rights.<sup>212</sup> Regarding such a source Bennion makes a striking observation, "the reference to the law of nature is important. The basic notion that flowing water cannot be owned *has no more objective grounding than this*".<sup>213</sup>

While water could not be owned, it was thought that land under water could.<sup>214</sup> Indeed, expressing the English common law position in 1912, Edwards J in *Tamihana Korokai v Solicitor-General* stated that "[a] lake in contemplation of the English law is merely land covered by water, and will pass by the description of land".<sup>215</sup> Accordingly, common law rights to water were in the most part derivative rights afforded to owners of land - that being the beds of waterways and water bodies.<sup>216</sup>

The common law further distinguished between tidal and non-tidal and navigable and non-navigable waterways. Tidal waters were "regarded as an extension of the sea and navigable in law to the highest point. The river bed was deemed to belong to the Crown".<sup>217</sup> Whereas, the common law presumption of *ad medium filum aquae*<sup>218</sup> deemed owners of land adjacent to non-tidal, non-navigable rivers and streams the owners of beds of the watercourse to the centre line.<sup>219</sup> This allowed them certain riparian rights of use.<sup>220</sup> According to White, the

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<sup>212</sup> Joshua Getzler *A History of Water Rights at Common Law* (Oxford University Press, Oxford, 2004) cited in Bennion, above n 66, at 2.

<sup>213</sup> Bennion, above n 67, at 2 (Emphasis added).

<sup>214</sup> Nicola Wheen "A Natural Flow – A History of Water Law in New Zealand" (1997) Vol 9 No 1 OLR 71 at 78 (footnote 44) ["A Natural Flow"]. Bennion comments that "rights to water are intimately tied to land, simply because that is a more certain "thing" that the law can deal with": Bennion, above n 66, at 3.

<sup>215</sup> *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 351.

<sup>216</sup> With the exception of public rights of navigation over tidal rivers: *Paki v Attorney-General* [2009] NZCA 584 at [32].

<sup>217</sup> *Halsbury's Laws of England* (4ed 2004) vol 49(3) Water at [760] cited in *Paki v Attorney-General* [2009] NZCA 584 at [32].

<sup>218</sup> Literally 'to the middle line of the water'.

<sup>219</sup> *In re the Bed of the Wanganui River* [1962] NZLR 600 at 609. See also: Wheen "A Natural Flow", above n 214, at 78 (footnote 44).

<sup>220</sup> See *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71. Note however that riparian rights are readily rebuttable. In *Mueller v Taupiri Coal-mines Ltd* (1900) 20 NZLR 89 (CA) the Crown successfully argued that its grants of land along the Waikato River did not give rise to the presumption as at the time of grant it had been intended that the river would remain in Crown ownership as a public highway.

application of the doctrine of *ad medium filum aquae* to lakes in Aotearoa/New Zealand is doubtful, the approach of the Crown being instead a tacit assumption of title to lake beds.<sup>221</sup>

**(b) Legislation**

When states that statutory encroachment on customary and common law regarding freshwater occurred in a piecemeal fashion from the mid-1800s.<sup>222</sup> At first, progressive legislative enactments were reactions to the needs and challenges of settlement and slowly implemented laws relating to the control, use or management of water.<sup>223</sup> Though now consolidated in the RMA, some of these legislative enactments (including the RMA) have since been used to support the Crown contention that water is either owned by the Crown; or that, while remaining incapable of ownership, its management and control lies in the hands of government for the benefit of all New Zealanders.<sup>224</sup>

In recent years the latter proposition has gained favour with constituents, and more modern legislative devices have assisted in its maintenance. For example, the Te Arawa Lakes Settlement Act 2006 vested the beds of Te Arawa Lakes in Te Arawa, with the 'Crown stratum' (the space occupied by water and air above the beds of vested lakes) to be retained by the Crown.<sup>225</sup> In vesting the *space* occupied by water and air rather than the water or the air itself, the Crown maintains and serves to strengthen the liberal proposition that water cannot be owned.<sup>226</sup>

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<sup>221</sup> Ben White "Lakes" *Waitangi Tribunal National Theme Report Q* (Waitangi Tribunal 1998) at 6-7, 294.

<sup>222</sup> When "A Natural Flow", above n 214, at 80. For further discussion of the legislative development of water law to its present form in the RMA see Nicola When "The Resource Management Act 1991 and Water in New Zealand: Impact and Implications" (LLM Thesis, University of Otago, 1995).

<sup>223</sup> When "A Natural Flow", above n 214, at 82.

<sup>224</sup> Enactments relied upon include s 14 of the Coal Mines Amendment Act 1903 ('CMAA'), s 21(1) of the Water and Soil Conservation Act 1967 ('WSCA') and s 14 of the RMA.

<sup>225</sup> Te Arawa Lakes Settlement Act 2006, s 23.

<sup>226</sup> Maria Bargh "Submission on Water Issues in Aotearoa New Zealand" (Submission to the Office of the High Commissioner for Human Rights on Water Issues in Aotearoa New Zealand, 7 April 2007) at 5 <[www2.ohchr.org](http://www2.ohchr.org)>.

## *English Common Law and Legislation - An Investigation*

The proposition that water cannot be owned pursuant to English common law and subsequent statutory enactments is a monocultural legal proposition which conflicts with recognised common law. That the English common law was to apply to New Zealand unmodified by local circumstances is an erroneous proposition in recognised law. Judicial acknowledgement that the prior property interests of Indigenous peoples were to be respected has existed in this country as early as 1847 with the decision of *R v Symonds*.<sup>227</sup> However, its strongest recognition was to come in the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa* ('*Ngāti Apa*') regarding application to the foreshore and seabed.<sup>228</sup> Elias CJ stated:<sup>229</sup>

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

The Court's decision endorsed the application of the common law doctrine of native title in Aotearoa/New Zealand in respect of territorial claims.<sup>230</sup> The doctrine essentially recognises that upon the transfer of sovereignty to a colonising power customary property formerly held by the Indigenous people remains intact until such time as it is clearly and plainly extinguished.<sup>231</sup>

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<sup>227</sup> *R v Symonds* (1847) NZPCC 387.

<sup>228</sup> *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 ('*Ngāti Apa*'). Albeit obiter statements in the context of the foreshore and seabed.

<sup>229</sup> *Ibid*, at [17].

<sup>230</sup> The doctrine was earlier reintroduced by *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, however its scope was limited. Williamson J, constrained by the earlier decision of the Court of Appeal in *In re the Ninety-Mile Beach* [1963] NZLR 461 (which held that foreshore in New Zealand was land in which Māori property had been extinguished) acknowledged the continued application of Māori property rights on the basis that the claim before him was 'non-territorial'. For a fuller discussion of the history of the doctrine of native title in Aotearoa/New Zealand see: Ruru "Legal Voice", above n 75, at 76 <[www.landcareresearch.co.nz](http://www.landcareresearch.co.nz)>.

<sup>231</sup> *Ngāti Apa*, above n 231, at 643.

Ruru states that using the *Ngāti Apa* precedent a successful claim to freshwater would require both: Māori to prove that, according to tikanga Māori, iwi have a recognised customary property interest in a river; and a failure on the part of the Crown to prove that statute law has clearly and plainly extinguished that property right.<sup>232</sup> She also identifies two further hurdles as preliminary barriers to exploring the *Ngāti Apa* test: whether native title is applicable to flowing fresh water and whether the doctrine of native title trumps the water specific doctrine of *publici juris*. Ruru's identification of preliminary barriers is sensible, for my discussion has served to highlight that the dominance of the law as it stands rests on the dominance of ideas about the nature and origin of 'law', and its ability to permeate and influence majority thinking.

Putting to one side the first element of Ruru's four pronged test, it becomes apparent that the latter three elements directly challenge prevailing assumptions that no one owns water as a matter of both common law and 'reason',<sup>233</sup> or that statutory developments have since vested ownership in the Crown. Accordingly, it becomes necessary to examine these elements.

*(a) Is native title applicable to flowing fresh water and does it trump the water specific doctrine of publici juris?*

Having identified these preliminary issues, Ruru then discusses both and answers each in the affirmative.<sup>234</sup> Regarding the extension of native title to water she notes Cooke P's discussion of aboriginal title as rights to 'land and water' in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General ('Te Ika Whenua')*.<sup>235</sup> Moreover, she points out that a recent Australian High Court decision awarding native title pursuant to salt water demonstrates

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<sup>232</sup> Ruru "Legal Voice", above n 75, at 75.

<sup>233</sup> A term used prolifically by Locke to justify his classic liberal narrative. See Locke, above n 158, at 522; Parekh "Liberalism and colonialism", above n 160, at 88.

<sup>234</sup> Ruru "Legal Voice", above n 75, at 82 - 84.

<sup>235</sup> *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 23 (*'Te Runanganui o Te Ika Whenua'*) cited in Ruru "Legal Voice", above n 75, at 82.

the viability of this approach,<sup>236</sup> and in the context of Aotearoa/New Zealand, identifies a statement by Elias CJ's hinting at such an outcome.<sup>237</sup>

Informative, I believe, is Elias CJ's statement that "the *existence* and extent of any such customary property interest is determined in application of *tikanga*".<sup>238</sup> And further, "[t]he proper starting point is not with assumptions about the nature of property, but with the facts as to native property".<sup>239</sup> My discussion has served to illustrate that *tikanga* Māori recognises water systems as whole and indivisible entities and that this applies equally to running water as an integral part of that whole: "[t]hrough its molecules may pass by, as a water regime it remains".<sup>240</sup> Accordingly, it is contended that native title in flowing fresh water can indeed be recognised.

The doctrine of *publici juris* was identified by Ruru as another challenge for native title. I have already outlined that the Court in *Ngāti Apa* recognised that the English common law, as it was to apply in New Zealand, was to be modified by local circumstances. A strong statement to that effect is apparent in the judgment of Elias CJ:<sup>241</sup>

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

Keith and Anderson JJ also recognised the "'circumstances' qualification".<sup>242</sup> Of relevance is their quotation of the 1910 decision of *Baldick v Jackson*.<sup>243</sup> In this decision Stout CJ specifically referred to Māori whaling practices and the assumptions of the Treaty of Waitangi as local circumstances deeming a statute of Edward II treating whales as a Royal

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<sup>236</sup> *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29 ('*Arnhem*') cited Ruru "Legal Voice", above n 75, at 82.

<sup>237</sup> *Ngāti Apa* [2003] 3 NZLR 643 at 660-661 cited in Ruru "Legal Voice", above n 75, at 82.

<sup>238</sup> *Ngāti Apa*, above n 228, at [49] (Emphasis added).

<sup>239</sup> *Ngāti Apa*, above n 228, at [54].

<sup>240</sup> Waitangi Tribunal "Whanganui River", above n 40, at 50.

<sup>241</sup> *Ngāti Apa*, above n 228, at [86].

<sup>242</sup> *Ngāti Apa*, above n 228, at [134].

<sup>243</sup> *Baldick v Jackson* (1910) 30 NZLR 343.

fish inapplicable. Keith and Anderson JJ comment that the ‘circumstances qualification’ is “well and relevantly demonstrated”<sup>244</sup> by this decision.

Hence it is apparently clear from the decision in *Ngāti Apa* that native title can trump the English common law doctrine of *publici juris*. As outlined by Ruru, native title is not to be qualified by other common law doctrines, but by clear and plain statutory extinguishment,<sup>245</sup> to which I now turn.

***(b) Has native title in freshwater been extinguished?***

According to *Ngāti Apa*, the onus of proving extinguishment falls with the Crown, and the test for extinguishment requires it be “clear and plain”.<sup>246</sup> Keith and Anderson JJ expressed that “native property rights are not to be extinguished by a side wind”.<sup>247</sup> A strong statement regarding extinguishment is also to be found in Tipping J’s reasoning, “[u]ndoubtedly Parliament is capable of effecting such extinguishment but, again *in view of the importance of the subject matter, Parliament would need to make its intention crystal clear*”.<sup>248</sup>

The decision of *Ngāti Apa* contains strong judicial statements of a protective approach to legislative inquiry as to extinguishment. In light of these statements, and the subsequent enactment of the Foreshore and Seabed Act 2004, it is contended that the observations made by Kirby J in recent decisions of the High Court of Australia regarding native title are of high relevance. The first was the 2008 decision of *Griffiths and Another v Minister for Lands, Planning and Environment and Another*<sup>249</sup> where Kirby J stressed that:<sup>250</sup>

Australian legislatures, on this subject, must be held accountable to the pages of history. If they intend deprivation and extinguishment of native title to occur, reversing unconsciously despite the long struggle for the legal recognition of such rights, then they must provide for such an outcome in very specific and clear legislation that unmistakably has that effect.

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<sup>244</sup> *Ngāti Apa*, above n 228, at [134].

<sup>245</sup> Ruru “Legal Voice”, above n 75, at 84.

<sup>246</sup> *Ngāti Apa*, above n 228, at [154].

<sup>247</sup> *Ngāti Apa*, above n 228, at [154].

<sup>248</sup> *Ngāti Apa*, above n 228, at [185] (Emphasis added).

<sup>249</sup> *Griffiths and Another v Minister for Lands, Planning and Environment and Another* [2008] HCA 20

<sup>250</sup> *Ibid*, at [107].

In the later 2008 decision of *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors*<sup>251</sup> Kirby J again expressed “the need for specific and clear legislation to extinguish any traditional legal rights of the Indigenous peoples of Australia”.<sup>252</sup> Moreover, he outlined ‘principles of construction’, which he interpreted as stemming from adoption of a specific and clear approach to interpreting legislation purported to extinguish native title:<sup>253</sup>

It preserves the Aboriginal interests concerned as a species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect;

It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally sui generis, their history, their belated recognition, their present purposes and the ‘moral foundation’ ... for respecting them.

It ensures that, if the legislature ... wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision;

It avoids needless argument about the suggested invalidity of [an Act] that might otherwise arise if a broader operation were attributed to that Act.

In turning to consider statute law it must first be stated that no statute clearly and plainly extinguishes native title in freshwater. However, in advancing such a claim, it is likely that the RMA (through both its overall regulatory framework, and more specifically through s 14) and s 21(1) of the Water and Soil Conservation Act 1967 (‘WSCA’) will be relied upon.

As described in chapter one, the RMA provides an overarching regulatory framework for freshwater management in Aotearoa/New Zealand. Section 14 prohibits the taking, use,

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<sup>251</sup> *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29 (‘*Arnhem*’).

<sup>252</sup> *Ibid*, at [72].

<sup>253</sup> *Arnhem*, above n 251, at [69]. Note that I have amended Kirby’s case-specific references under these principles to emphasise their generality of application.

damming, or diversion of water. However, in *Ngāti Apa* the Court of Appeal said of the RMA:<sup>254</sup>

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

It is likely therefore that any contention of extinguishment pursuant to the express provisions and overall scheme of the RMA itself will not be satisfied. However, s 354 of the RMA has the effect of preserving s 21(1) of the WSCA.<sup>255</sup> Section 21(1) reads:<sup>256</sup>

the *sole* right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to discharge natural water containing waste on to land or into the ground in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water, or to use natural water, is hereby *vested in the Crown* subject to the provisions of this Act.

In light of case law precedents regarding the test as to extinguishment, it must be asked whether s 21(1) of the WSCA extinguishes native title in natural water. More specifically, is the vesting of water in the Crown enough to override Māori customary property? Under the approach of plain and clear extinguishment as expressed by *Ngāti Apa* and the most persuasive and helpful pronouncements of Kirby J, it is contended that the need for clear and plain extinguishment would require express contemplation of Māori property interests for those interests to be extinguished. Thus I observe that the contention of extinguishment as per s 21(1) of the WSCA not does appear to meet the legislative test.

The foregoing investigation of the claims advanced by those who oppose recognition of 'Māori ownership' of freshwater reveals that these claims can indeed be negated with reference to their own legal source.

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<sup>254</sup> *Ngāti Apa*, above n 228, at [76].

<sup>255</sup> As highlighted by Ruru: "Legal Voice", above n 75, at 85.

<sup>256</sup> Water and Soil Conservation Act 1967, s 21(1).

*(c) Truly 'Native'? - The Limitations of Native Title*

Having engaged in initial analysis regarding the *Ngāti Apa* test thus far with success, it appears one element remains to be considered. That is, 'according to tikanga Māori, iwi can prove a recognised customary property interest in a river'. Subject to fact specifics, my earlier discussion serves to have answered this question sufficiently, again in the affirmative. Thus, having met the initial tests, are Māori to take comfort that native title is the answer to final recognition of Māori rights and interests in freshwater?

A closer examination of 'fact specifics' renders the response a resounding 'no'. The doctrine has many limitations. First, it places the onus of proof on Māori not only to establish the existence of a recognised customary property interest, but also to show that interest has remained in existence to the present day. Thus the Waitangi Tribunal, in their Report on the Crown's Foreshore and Seabed Policy, describe the doctrine as 'preservationist' and not one that remedies the loss of customary rights.<sup>257</sup> A brief perusal through the long account of Waitangi Tribunal claims alone will reveal the problem with such a doctrine - the process of colonisation wherein Māori were prohibited from maintaining relationships with their hapū and iwi environs, serves to effectively limit the jurisdiction of native title enquiries.

Moreover, successive decisions within Aotearoa/New Zealand have operated to limit the application of native title in both nature and content, precluding a right to development. In *Te Ika Whenua Cooke P* held that the doctrine of native title did not extend as far as to recognise a right to generate electricity by harnessing water power.<sup>258</sup> In addition, in *McRitchie v Taranaki Fish and Game Council*<sup>259</sup> Richmond P, for the majority of the Court of Appeal, stated that the test for an aboriginal right "is determined by considering whether the particular tradition or custom claimed to be an Aboriginal right was *rooted* in the Aboriginal culture of the particular people in question".<sup>260</sup> This formulation arguably

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<sup>257</sup> Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071 Waitangi Tribunal 2004) at 46.

<sup>258</sup> *Te Runanganui o Te Ika Whenua*, above n 235, at 24.

<sup>259</sup> [1999] 2 NZLR 139.

<sup>260</sup> [1999] 2 NZLR 139 at 147 (Emphasis added).

restricts the content of indigenous title to traditional customs and usages.<sup>261</sup> The joint effect of these decisions has been to render tikanga as static and fixed in nature.

What is more, despite hard-fought recognition through the Courts, albeit potentially limiting in scope, the government of the day remains free under the doctrine to plainly and clearly legislate away the rights and interests afforded. Notwithstanding Cooke P's theoretical moral safeguard of 'accountability' for such prejudicial legislative action, the Foreshore and Seabed Act 2004 is evidence of the possibility of a legislative response to judicial findings in support of customary property in freshwater.

Finally, and tied to the foregoing analysis, the doctrine is "but another example of the dominant legal system constraining a minority within the terms and limitations of its own discourse".<sup>262</sup> Taiake Alfred writes that:<sup>263</sup>

Indigenous leaders who engage in arguments framed by a Western liberal paradigm cannot hope to protect the integrity of their nations. To enlist the intellectual force of rights-based arguments is to concede nationhood in its truest sense. 'Aboriginal rights' are in fact the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state.

Therefore, reliance on native title alone perpetuates a monocultural legal framework. Accordingly, if the development of Aotearoa/New Zealand's freshwater law is to follow the doctrine to the letter it would truly remain a case of blankets and holes. If this country is to rectify the injustices of the past, we must advance the development of our law with the aim of recognition and respect for its dual origins. The task may be deemed a challenge, but the significance of the current reforms presents the Crown and Māori with the opportunity.

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<sup>261</sup> A further issue with this decision is the way that legislation inconsistent with native title appears sufficient to distinguish it without clear and plain extinguishment: Taki Anaru "Analysis of the Ngaati-Ruanui Heads of Agreement" (1999) *Indigenous Peoples and the Law: An online institute of law affecting indigenous peoples* <[www.kennett.co.nz/law/indigenous](http://www.kennett.co.nz/law/indigenous)>.

<sup>262</sup> RP Boast "Treaty rights or aboriginal rights" [1990] NZLJ 32 at 33.

<sup>263</sup> Taiake Alfred *Peace, Power Righteousness: An Indigenous Manifesto* (Oxford University Press, Ontario 1999) at 140 cited in Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi revisited: perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005).

However, this does not mean that the doctrine of native title is to be swept aside as but merely incidental in the development of a bicultural framework. For the part it has already played is to be regarded as nothing short of significant. Native title provides the basis for the contention that claims advanced by those who oppose recognition of 'Māori ownership' of freshwater can indeed be negated with reference to *their own legal source*. The conclusion is important because it compels one to question the framework of ideas that has long lain uncontested in the suppression of tikanga Māori. In doing so, new holes appear in the blanket of the law and its potency is diminished. Coupled with evidence of 'Māori ownership' in accordance with tikanga Māori, an opportunity to implement a bicultural framework is established.

### ***A Bicultural Framework for Freshwater Law in Aotearoa/New Zealand***

In the main, this dissertation has been about explaining that Māori can, and indeed do, 'own' waterways and water bodies in accordance with tikanga Māori. To conclude that such a finding automatically results in the exclusion of non-Māori from use, enjoyment and management of waterways and water bodies would be to overlook the careful distinction drawn between 'owning as property' and 'owning as belonging', and to unduly prejudice the realisation of Māori rights and interests in freshwater with liberal conceptions. For the impetus for recognition of 'Māori ownership' as I observe, is not to return to a time where Māori own all to the *complete* exclusion of others. Rather it is to meaningfully tip the balance of our legal system toward a bicultural approach. That Māori must continue to assert their rights and interests in a language foreign to their very form is evidence of the considerable re-alignment that must occur. However, premised upon a bicultural framework, resolution of the tensions between Māori and non-Māori can occur.

*(a) The Treaty of Waitangi: a blueprint for resolution*

Aotearoa/New Zealand is fortunate in that the Treaty of Waitangi provides “a blueprint for how two peoples [can] live together in the same place”.<sup>264</sup> It is recognised as a founding document in the history of Aotearoa/New Zealand<sup>265</sup> and is to be regarded as “part of the fabric of New Zealand society”.<sup>266</sup> Written in two versions, both Māori and English, much has been made of the differences between the texts of the Treaty of Waitangi. Article I of the English version of the Treaty ceded “sovereignty”<sup>267</sup> to the Crown, while Article II guaranteed to Māori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess”.<sup>268</sup> The Māori version however, expressed the same as “kawanatanga” in Article I, with the retention by Māori of “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa” in Article II. Kawharu has translated the former as ‘complete government’ and the latter as ‘the unqualified exercise of their chieftainship over their lands, villages and all their treasures’.<sup>269</sup>

In the face of these differences, the Courts, the Waitangi Tribunal and the Crown have turned to the ‘principles of the Treaty’ to ascertain meaning. Within these principles has developed the concept of ‘partnership’. Writing in 1988 in the climate of impending law reform in resource management that was to become the RMA, a resource management law reform core group proposing a Treaty based model recognised that the concept of partnership “has become probably the single most important and widely accepted Treaty principle”.<sup>270</sup> The rhetoric remains true today with ‘partnership’ discourse prevalent in both Crown and Māori Treaty dialogue.<sup>271</sup> That such a principle is central to a bicultural

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<sup>264</sup> Ruru “Undefined and Unresolved”, above n 70, at 236.

<sup>265</sup> Office of Treaty Settlements, above n 26, at 11.

<sup>266</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210, per Chilwell J.

<sup>267</sup> Treaty of Waitangi 1840, Article I (English Text).

<sup>268</sup> Treaty of Waitangi 1840, Article II (English Text).

<sup>269</sup> Treaty of Waitangi 1840, Kawharu Translation <[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)>.

<sup>270</sup> Mike Barns *Resource Management Law Reform: A Treaty Based Model - The Principle of Active Protection* (Working Paper No. 27, Ministry for the Environment, 1988) at 2.200.

<sup>271</sup> The Report of the Land and Water Forum is the latest Crown commissioned work to state that Māori and the Crown are ‘Treaty partners’: Land and Water Forum, above n 4, at 13. See also: Small, Vernon “Row Brews Over Who Owns NZ’s Water” *The Dominion Post* (New Zealand, 23 March 2007) <[www.arena.org.nz](http://www.arena.org.nz)>; McMeeking, above n 191, at 2.

framework for freshwater is without a doubt, but chapters one and two serve to highlight that putting into effect ‘partnership’ can lead to less than equal consideration of Māori interests.

The Waitangi Tribunal however, whom Ruru stresses for more than a quarter-century has been exclusively focusing its mind on Treaty relationships within a bicultural framework,<sup>272</sup> interpreted the ‘uncertainty’ as this: that the Crown’s sovereignty (kawanatanga) is to be qualified by tino rangatiratanga.<sup>273</sup> In light of the discussion of Māori rangatiratanga, mana and kaitiakitanga in this paper as evidence that Māori do have a claim to ownership of freshwater in accordance with tikanga Māori, the Tribunal’s focus is apt to describe a bicultural framework for upcoming freshwater reform.

Is this formulation to be a source of alarm for New Zealanders? Of significance is the work of Palmer, in which he identifies that numerous accounts from the various institutions that exercise public power in Aotearoa/New Zealand (referring to Parliament, Cabinet, the Courts and the Waitangi Tribunal) have led to a lack of common formulation about the meaning of the Treaty that has impeded public understanding of its interpretation. In addressing this need he characterises the interpretation of the Treaty that is common to all institutions as:<sup>274</sup>

An agreement upholding the Crown’s legitimacy, in *governing* New Zealand for the benefit of all New Zealanders, in exchange for the Crown’s *active protection of the rangatiratanga*, or authority of hapū, iwi and Māori generally to use and control their own interests, especially in relation to land, fisheries and te reo Māori and their other tangible and intangible taonga or valued possessions.

Palmer’s configuration lends itself to recognition of the Tribunal’s approach, showing common acceptance by all institutions.

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<sup>272</sup> Jacinta Ruru “The Waitangi Tribunal” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 127 at 138.

<sup>273</sup> *Ibid*, at 135.

<sup>274</sup> Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 150 (Emphasis added).

Further supporting this approach is Aotearoa/New Zealand's commitment to the United Nations Declaration on the Rights of Indigenous Peoples in April this year.<sup>275</sup> Respected Māori jurist, Sir Eddie Durie, has lauded the commitment to the Declaration as "the most significant day in advancing Māori rights since 1840".<sup>276</sup> He sees the Declaration as providing for "how the bare bones of the Treaty should now be fleshed out",<sup>277</sup> thereby contributing greater certainty and helping to define relationships between Māori and Pākehā in Aotearoa/New Zealand. He comments:<sup>278</sup>

People have always asked, well what does the Treaty really mean? No one has been 100 per cent sure on what it means. This takes it another step further forward.

Consisting of 46 articles which contain "principles that are consistent with the duties and principles inherent in the Treaty",<sup>279</sup> the Declaration indeed provides much clarity going forward. For example, Article 26 recognises 'traditional ownership' in 'lands territories and resources' and notes that:<sup>280</sup>

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

This statement complements the recognition of tino rangatiratanga accepted by Aotearoa/New Zealand's institutions and provides objectives as to its implementation. Thus the Declaration further informs and enhances a bicultural framework for resolution of freshwater ownership within Aotearoa/New Zealand.

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<sup>275</sup> New Zealand offered its support on 20 April 2010. See: New Government "National Govt to support UN rights declaration" (press release, 20 April 2010). This came three years after initially opposing the Declaration alongside America, Australia and Canada during the Declaration's adoption by the United Nations General Assembly in 2007: United Nations Department of Public Information "General Assembly adopts Declaration on Rights of Indigenous Peoples" (2007) United Nations General Assembly (Ref: GA GA/10612) <[www.un.org](http://www.un.org)>. To view the Declaration see: <[www.un.org](http://www.un.org)>.

<sup>276</sup> Duncan Garner "Signing marks 'most significant day' for Maori since 1840" *3 News* (New Zealand, 21 April 2010) <[www.3news.co.nz](http://www.3news.co.nz)>.

<sup>277</sup> Interview with Sir Eddie Durie regarding United Nations Declaration on the Rights of Indigenous Peoples (Kathryn Ryan, Nine to Noon, Radio New Zealand, 22 April 2010).

<sup>278</sup> *Ibid.*

<sup>279</sup> Pita Sharples "Supporting UN Declaration restores NZ's mana" (press release, 20 April 2010) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

<sup>280</sup> Declaration of the Rights of Indigenous Peoples, Article 26.3.

*(b) Tino Rangatiratanga: a Māori position*

Despite my assertions above it is likely that the perpetuating ‘legal imagination’ within many will be keen to define ‘tino rangatiratanga’, and accordingly ‘Māori ownership’, and the extent to which it does indeed qualify the ‘government’ of Aotearoa/New Zealand.<sup>281</sup> To rule on this issue would be to engage in such behaviour in a presumptuous manner. The point of proposing a bicultural framework for impending freshwater reform has been to encourage Crown-Māori discourse on the issue with a framework discussion of ‘Māori ownership’. However, in seeking to dispel certain assumptions I aim to outline my observations of a Māori position on aspirations for ‘Māori ownership’, keeping in mind that variance in opinion is naturally to be expected.<sup>282</sup>

My observations in chapter one outline a failure to respect tikanga Māori associations with freshwater and a failure to uphold tino rangatiratanga guaranteed to Māori in respect of their freshwater rights and interests.<sup>283</sup> Thus despite accommodation of Māori rights and interests in freshwater law through legislative incorporation of issues of substance and procedure, tikanga Māori has fallen largely at the whim of a monocultural legal framework.

Durie has written that “[u]ltimate justice for indigenous peoples depends on political power-sharing”.<sup>284</sup> Yet, in the context of parliamentary sovereignty and legal positivism Māori assertions of rights and interests based on tikanga Māori and the Treaty of Waitangi remain vulnerable to retention of monocultural political power. As a result, policy decisions favouring Māori often proceed from ‘a position of momentary convenience’, rather than a ‘principled basis’.<sup>285</sup>

It is overtly apparent that a key focus of Māori aspirations regarding freshwater is to restore respect for tikanga wai Māori - the Māori way of doing things as regards freshwater. Such

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<sup>281</sup> This ‘need to define’ Māori rights and interests is overt in many quarters, most notably, the judicial pronouncement of legislative incorporations of tikanga (see Kapua, above n 16, at 94) and the realm of politics where Māori assertions such as water ownership are interpreted and analysed under an unfamiliar world-view and legal framework.

<sup>282</sup> For example, for an outline of the many varied Māori positions on ownership of the Waikato River alone see Muru-Lanning “River Ownership”, above n 81, at 50.

<sup>283</sup> With co-management agreements being the main exception, see above n 60.

<sup>284</sup> ET Durie “Justice, Biculturalism and the Politics of Law” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) 33 at 33.

<sup>285</sup> Durie, above n 277.

an implementation can only satisfactorily occur if Māori authority and control over their freshwater resources is accorded effect. In contemplating the meaning of such a proposition it is as well to keep in mind the words of Tipene O'Regan:

I am not saying that ... because my river ... represents an atua, that [it] should not be touched or used. One of the more endearing characteristics of Māori is their capacity to tie the practical together with their theological beliefs. Naturally, for Māori people, this synthesis has got to be done within a framework which makes sense to them in Māori terms.

...

Māoridom has always been looking for a balance and finding it. What we are saying though, increasingly, is that our side of that balance has got to be recognised, our perceptions have got to have their status.<sup>286</sup>

O'Regan's statement speaks to the mistaken impression of Māori as 'anti-development' or 'problematic'<sup>287</sup> and serves rather to illustrate a practical approach to a bicultural framework to freshwater ownership, which acknowledges the need for balance and compromise. However, the effective recognition of tino rangatiratanga, mana and kaitiakitanga; of 'Māori ownership' of freshwater, requires real weight to be afforded to tikanga Māori in the balancing of factors. Thus it is important to heed the words of McCan and McCan:<sup>288</sup>

Maori work with notions of compromise ... but it is important to know that there are issues that Maori feel cannot be compromised. It is also important to know that many Maori have already made considerable compromises and feel that they are already working from a compromised position.

And those of Mason Durie, "[s]ometimes, public access may be a lower priority than the recognition of tribal property rights; and sometimes Māori may be more effective conservators than the state".<sup>289</sup>

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<sup>286</sup> O'Regan, above n 104, at 10.

<sup>287</sup> Ministry for the Environment "Wai Ora", above n 45, at 17.

<sup>288</sup> McCan and McCan, above n 43, at 43.

<sup>289</sup> Durie "Te Mana", above n 123, at 47.

Finally, in cautioning the approach of the Government to current freshwater law reforms, I draw on the words of the Resource Management Law Reform Core Group of 1988, “[major law reform] should be carefully utilised so as not to provide apparent solutions for Maoridom which in fact do not alter their current position”.<sup>290</sup> Writing 22 years on from that statement it seems the advice was not heeded. However, in the advancement of a bicultural legal framework for freshwater law in Aotearoa/New Zealand the opportunity to recognise and provide for Māori rights and interests in freshwater - to provide for tikanga wai Māori - is an opportunity that appears no longer a challenge.

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<sup>290</sup> Barns, above n 270, at 1.000.

## CONCLUSION

This dissertation has assessed the Māori assertion of ownership of freshwater in light of significant freshwater reforms before Aotearoa/New Zealand. What has become clear is that Māori *do* own water in accordance with tikanga Māori. Their concept of ownership is premised upon rangatiratanga, mana and kaitiakitanga derived from an inextricable bond to the freshwater resource. Māori ownership is different from the liberal conception of ownership 'as property', seeking rather to view ownership 'as belonging'. This distinction does not invalidate its existence but rather seeks to challenge the maintenance of a liberal 'legal imaginary' that maintains the status quo.

This status quo has been damaging for Māori participation in freshwater management, thereby marginalising their rights and interests in the development of Aotearoa/New Zealand's freshwater regime. However, current freshwater reform holds a significant opportunity to rectify this unsatisfactory state of affairs. This will only occur if Māori are recognised as owners of freshwater and afforded due respect in the reform arena going forward. The opportunity to do so in an environment of mutual benefit and understanding is presented through the adoption of a bicultural framework that recognises the distinct status of tikanga Māori. It is time that Aotearoa/New Zealand's Government turned its mind to such an opportunity in seeking to resolve Maori rights and interests in freshwater.

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