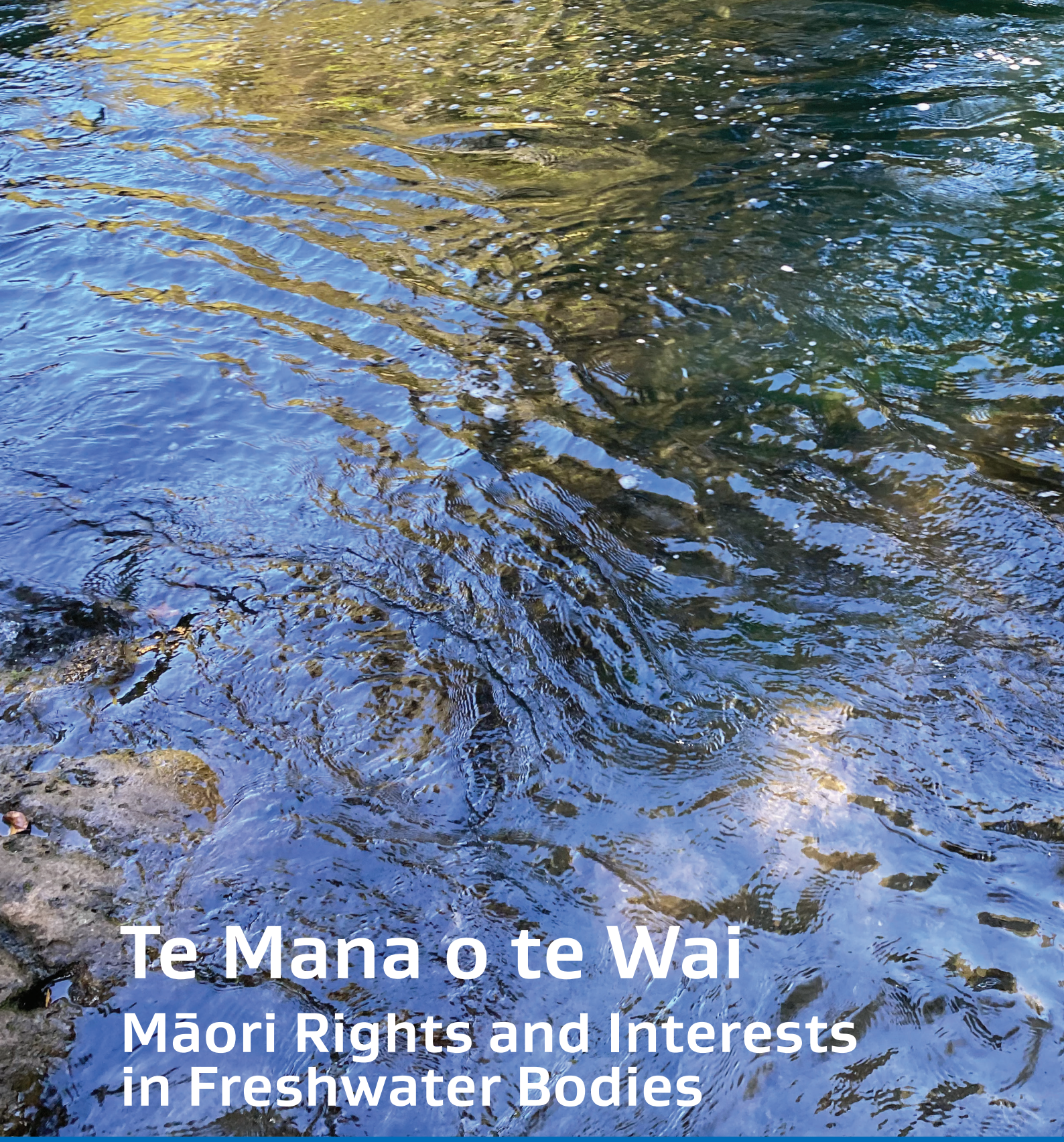

Te Mana o te Wai

Māori Rights and Interests in Freshwater Bodies

THE HEALTH OF OUR WAI,
THE HEALTH OF OUR NATION

Kāhui Wai Māori Report to Hon Minister David Parker
August 2021

Te Mana o te Wai

Discussion Document Regarding Māori Rights and Interests in Freshwater Bodies

By Professor Jacinta Ruru and
Dr Richard Meade

Commissioned by Kāhui Wai Māori

He wai ringiringi mai ngā kamo o Ranginui
Ka heke ki a Papatūānuku
Ka rere ko ngā awa o manaaki
Kia tōpū ki ngā moana o aroha
Waiho mai ko te rangatiratanga ki ōu uri
I heke mai i ngā atua o te pō.

PRELIMINARY MATERIAL

1. Kāhui Wai Māori have asked us to provide a brief high-level Western-informed legal and economic discussion document into Māori rights and interests in freshwater, including the rights and interests of iwi, hapū and Māori landowners, for dissemination to a broad audience. The expectation is that this is a contextual overview compilation of existing material.

2. We emphasise that this discussion document has been prepared with little time and should be understood in this light. The contract for our services was offered on 21st December 2020. The full draft discussion document was due 13th January 2021.

3. Professor Jacinta Ruru FRSNZ (Raukawa, Ngāti Ranginui) is a professor of law at the University of Otago and holds an inaugural University Sesquicentennial Distinguished Chair, Co-Director of Ngā Pae o te Māramatanga New Zealand's Centre of Māori Research Excellence, fellow of the Royal Society Te Apārangi, recipient of the New Zealand's Prime Minister's Supreme Award for Excellence in Tertiary Teaching, and a member of Kāhui Wai Māori. Her extensive research considers Indigenous' peoples' rights, interests, and responsibilities to own and care for lands and waters. She holds a PhD from the University of Victoria, Canada.

4. Dr Richard Meade is Principal Economist of Cognitus Economic Insight, a research fellow at Auckland University of Technology (in economics, and social science and public policy), and Auckland Vice President of the Law & Economics Association of New Zealand. He has a PhD in industrial organisation and regulation from Toulouse School of Economics, with a sub-specialisation in the economics of ownership (e.g. cooperatives, collectives). His consulting and research practice areas include institutional economics, and environmental/resource economics (which he has taught at both Auckland University of Technology, and Auckland University). Dr Meade has been advising on and researching issues of relevance to Māori since 1992, at which time he helped devise Ngāi Tahu's tribal governance arrangements and was the iwi's commercial advisor and negotiator in its settlement negotiations. He has subsequently advised numerous iwi in their settlement negotiations, multiple iwi organisations on policy, commercial and governance matters, and been expert witness in resumption applications before the Waitangi Tribunal.

INTRODUCTION

5. Water matters to us all, and there appears to be broad agreement that we need to better manage water use and to restore the health of waterways. At the same time there is significant national consensus that Māori rights and interests in water also need to be resolved. Te Tiriti o Waitangi and *Te Mana o te Wai* provide frameworks for recognising the rights, interests and responsibilities of Māori and all citizens of Aotearoa New Zealand to better own, govern, manage, use, and care for water bodies.
6. We have structured this Discussion Document in a Question / Answer format covering a broad range of interconnected law and economic issues specific to advancing respectful reconciliation of Māori rights and interests in water bodies.
7. While it is a collaborative effort, due to the split in subject areas, the legal content in this Document is the responsibility of Professor Ruru, while the economic content is the responsibility of Dr Meade. Dr Meade's economic analysis takes no position on the nature and extent of any Māori rights and interests in water – rather it starts from the presumption that such rights and interests might be found to exist in specific water resources, and explores the economic implications arising in that case.
8. The views expressed in this Document are those of the authors and not of any institutions with which they are affiliated, or of any clients for whom they have acted or are acting for.

TIKANGA MĀORI – WHAT ARE THE RESPONSIBILITIES IN MĀORI LAW TO CARE FOR AND USE WATER BODIES?

9. Water bodies are the moving lifeblood of Papatūānuku. Mother and water are the sustenance of life.[1] Water bodies have mauri and wairua, and are intergenerational taonga for iwi, hapū, and Māori landowners.
10. Water bodies have kinship relationships with iwi, hapū, and Māori landowners connected through whakapapa. The whakapapa and connectivity with water bodies cannot be broken. Iwi, hapū and Māori landowners cannot give this whakapapa away.[2]
11. Iwi, hapū and Māori landowners must be able to exercise tino rangatiratanga and mana whakahaere, through the practice of their tikanga – Māori law – including manakitanga and kaitiakitanga. These are intergenerational responsibilities to water.
12. Tikanga Māori, then and now, provides a dynamic legal system of tenure to balance protection and use of water. This tenure includes values that can guide contemporary rights and responsibilities to own, govern, manage, care for, use, alienate, and occupy water bodies. These rights also have an economic dimension.
13. There are many options based within a kaupapa Māori paradigm to enable the contemporary practice of tino rangatiratanga and mana whakahaere including the application of economic values and property rights and interests in water.

[1] Dover Samuels, "Wai u waiora" 2018, unpublished, prepared for Kāhui Wai Māori.

[2] Moana Jackson, "It's quite simple really"(2007) 10 *Yearbook of New Zealand Jurisprudence* 33.

TINO RANGATIRATANGA – WHAT DID TE TIRITI O WAITANGI GUARANTEE?

14. Te Tiriti o Waitangi is Aotearoa New Zealand's founding constitutional document. Interpretation of te Tiriti is informed by He Whakaputanga o Ngā Rangatira o Ngā Hapū o Niu Tireni, an earlier covenant signed in 1835.

15. Te Tiriti o Waitangi guaranteed to Māori their continuing tino rangatiratanga of their taonga. Freshwater is a taonga.

16. The Waitangi Tribunal is the permanent commission of inquiry with the "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".[3]

17. The Waitangi Tribunal has consistently stated in its many reports over the last 40 years that tino rangatiratanga means the authority to control and is "a standing qualification of the Crown's kāwanatanga".[4]

18. The *Stage 1 Freshwater* Waitangi Tribunal 2012 stated that te Tiriti changed the relationship of Māori with water in three ways.

    a. First, te Tiriti enabled non-Māori to settle in Aotearoa New Zealand and therefore Māori "consented that settlers would have access to and use of New Zealand's waters".[5]

    b. Second, te Tiriti gave the Crown a right to govern which entails balancing interests of the nation and the environment. But Māori Treaty rights cannot be balanced out of existence.[6]

    c. Third, te Tiriti created a bicultural nation and thus gave "Māori the option of walking in two worlds" meaning that "the Treaty conferred a development right on Māori as part of the quid pro quo for accepting settlement".[7]

19. This *Freshwater* Tribunal noted that Māori owe the Crown duties of reasonableness and cooperation, and the Crown owes to Māori duties of active protection and historical and contemporary redress. The Tribunal stated:

> *"If the claimants and the interested parties have residual proprietary rights (as the case examples suggest that they do), then the Crown's Treaty duty is to undertake in partnership with Māori an exercise in rights definition, rights recognition, and rights reconciliation".*[8]

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3 Treaty of Waitangi Act 1975, s 5(2).

4 Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* Waitangi Tribunal 2012, Wai 2358, page 103 (*Stage 1 Freshwater and Geothermal Resources Claim*). See J Ruru, "The Waitangi Tribunal" in M Mulholland and V Tawhai (eds) *Weeping Waters. The Treaty of Waitangi and Constitutional Change* (Wellington: Huia Publishers, 2010) pp 127-142.

5 *Stage 1 Freshwater and Geothermal Resources Claim*, page 103.

6 *Stage 1 Freshwater and Geothermal Resources Claim*, page 105.

7 *Stage 1 Freshwater and Geothermal Resources Claim*, page 106.

8 *Stage 1 Freshwater and Geothermal Resources Claim*, page 107.

HOW HAS AOTEAROA NEW ZEALAND STATE LAW ERODED MĀORI TINO RANGATIRATANGA OF FRESHWATER?

20. The origin of Aotearoa New Zealand state law is modelled on the inherited English legal system.

21. This system divides water into compartments and has different rules depending on whether one is talking about, for example, the river or lake bank or bed, or water that is navigable or not.

22. For example, take the *ad medium filum aquae* rule that holds where land is bounded by a non-tidal, non-navigable river the presumption is that the boundary is the centre line of the river. This means that owners of riparian lands own to the middle line of the rivers.

23. This rule eroded Māori tino rangatiratanga. It was not a voluntary relinquishment. Where Māori sold land abutting water, they had no idea that they were also selling the adjacent riverbed to the mid-point of the river. Māori had no idea of this law. This English applied law in New Zealand does not align with Māori law.

24. The Waitangi Tribunal has found the operation of the *ad medium filum aquae* rule in breach of te Tiriti o Waitangi.

25. The Supreme Court agrees. As the then Chief Justice Elias wrote in her opening judgment in the *Paki* case in 2014, the original owners would not have agreed to transfer their riparian lands if that meant a transfer of the riverbed as well "because the Waikato River was essential to their identity and was an important tribal property valued for its spiritual qualities as well as for sustenance provided by food resources obtained from it".[9]

26. The *ad medium filum aquae* rule is just one example of how tino rangatiratanga was eroded.

27. Another example is the operation of the Resource Management Act 1991 (the **RMA**). Many times, the Waitangi Tribunal has found this Act to be in breach of te Tiriti. One reason is because: "the Crown refused to recognise Māori proprietary rights during the development of the Act" and therefore the RMA "does not provide for Māori proprietary rights in their freshwater taonga". As the Tribunal has also found "Further, past barriers (including some of the Crown's making) have prevented Māori from accessing water in the RMA's first-in, first-served system. This is a breach of the principle of equity. The Crown has admitted that Māori have been unfairly shut out but has not yet introduced reforms to address what it has called the exclusion of 'new entrants' from over-allocated catchments".[10]

9 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, para 3.

10 Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*. Pre-publication version. Waitangi Tribunal, 2019, Wai 2358, page xxi (*Stage 2 Freshwater and Geothermal Resources Claim*).

28. This erosion of tino rangatiratanga has arisen due to the Crown's failure to properly recognise and provide for Māori rights and interests in water. As a consequence, for the most part, Māori have been excluded from owning, governing and managing water in accordance with their tino rangatiratanga, tikanga Māori and Te Tiriti.

HAVE IWI, HAPŪ, AND MĀORI LANDOWNERS ALWAYS BEEN FRUSTRATED WITH THIS AOTEAROA NEW ZEALAND STATE LAW?

29. Yes.

30. Iwi, hapū, and Māori landowners did not knowingly and voluntarily relinquish their tino rangatiratanga over their rivers, which were and still are taonga. The Waitangi Tribunal has found this to be true in regard to many water catchments across the country. [11]

31. There is a long history of iwi, hapū, and Māori landowner action to seek justice from the Crown, including in the courts, from 1840 onwards.

32. Nearly thirty years ago, in 1992, the Waitangi Tribunal rejected Crown arguments that rights recognition for Māori in water bodies are "novel or radical". The Tribunal reminded the Crown of a number of early cases, including the *Lake Omapere* case where the Judge, in 1929, rejected "the Crown's contention that the ownership of the bed of the lake passed by the Treaty of Waitangi to the Crown" instead emphasising "in 1840 it would have been impossible for the Crown to assume a right of ownership" because it was "unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown".[12]

33. The Crown is well aware of this frustration. For example, in 2005, the Ministry for the Environment held 17 hui with Māori across the country and accepted:

> *"One of the most striking and consistent themes to emerge from the hui is the anger, pain and sorrow many Māori individuals and communities feel due to the current state of New Zealand's freshwater resources, particularly the effects of pollution and over-allocation of water. Many things underlie these feelings – pain at the damage which has been caused to Papatūānuku (the waterways are seen as her veins) and the mauri of waterways, the cultural offence caused by practices such as sewage and effluent discharge, the damage to and loss of mahinga kai, damage to the health of those who rely on that mahinga kai, the loss of cultural wellbeing caused by degradation of the mauri of the waters, the cumulative effects on all aspects of wellbeing and much more."* [13]

[11] For example, the Waitangi Tribunal made this finding in the *Te Ika Whenua Rivers Report* Waitangi Tribunal 1998, Wai 212, page 101 (*Te Ika Whenua Rivers Report*).

[12] Waitangi Tribunal, *Mohaka River Report* Waitangi Tribunal 1992, Wai 119, pages 65-66.

[13] Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui.* Ministry for the Environment, 2005, page 5.

WHAT ABOUT THE COMMON LAW DOCTRINE OF NATIVE TITLE? SHOULDN'T THIS DOCTRINE PROTECT MĀORI PROPRIETARY INTERESTS IN WATER IN ADDITION TO TE TIRITI?

34. Yes, it should.

35. Aotearoa New Zealand's legal system has at its core an inherited English common law. As part of this common law there exists the doctrine of native title. Essentially, this doctrine holds that on the acquisition of the territory, whether by settlement, cession or annexation, the colonising power, England, acquires a radical or underlying title which goes with sovereignty. Radical title is vested in the Crown and subject to existing native rights.[14]

36. This doctrine was first utilised by a New Zealand court in 1847: "it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers". [15]

37. While an 1877 case held that the doctrine had no application in this country because there were no laws or rights in property existing before the Europeans arrived, that case was overruled in 2003 by *Attorney-General v Ngāti Apa*.

38. In 2003, the Court of Appeal, in *Attorney-General v Ngāti Apa*, reintroduced the doctrine of native title's applicability holding that: "[w]hen the common law of England came to New Zealand its arrival did not extinguish Māori customary title . . . title to it must be lawfully extinguished before it can be regarded as ceasing to exist". [16]

39. The question is thus whether Māori customary title to fresh water remains the property of Māori in accordance with the doctrine of native title?

40. The courts have not yet been asked to directly answer this question.

41. While the Crown claims that at common law no-one 'owns' water for it is common property, like air, the Court of Appeal in 2003 warned against such presumptions (albeit in the different context of the foreshore and seabed). The Court stated: [17]

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

42. Now read that same quote, but replace 'foreshore and seabed' with 'water'.

[14] See definition in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23-24.

[15] *R v Symonds* [1847] NZPCC 387, 390.

[16] *Attorney-General v Ngati Apa* [2003] 2 NZLR 643, 693.

[17] *Ngati Apa* 668.

WHAT NEEDS TO BE PROVED IN A SUCCESSFUL NATIVE TITLE CASE TO FRESHWATER?

43. *First*, is the doctrine of native title applicable to water?

44. The doctrine definitely includes dry land. The *Ngāti Apa* decision contemplated that it could extend to land temporarily or permanently under salt water.

45. In Australia, the Australian Native Title Act 1993 recognises rights "to land or waters"[18] and the High Court of Australia has found native title in water. [19]

46. It is likely that the doctrine in Aotearoa New Zealand is inclusive of water. The purpose of the doctrine is to protect Indigenous peoples' property. It would appear a farce if the doctrine could be limited to land – a distinction that Māori would not have been aware of at the time when the Crown assumed sovereignty of the country. According to the Māori worldview, land and water is seen as one holistic entity: Papatūānuku.

47. *Second*, can the doctrine trump other common law doctrines including the one that holds that at common law the water cannot be owned because it is a common good?

48. It appears so.

49. As the Court of Appeal in the *Ngāti Apa* decision stated: "The proper starting point is not with assumptions about the nature of property . . . but with the facts as to native property".[20] *Ngāti Apa* stressed "the entire country was owned by Māori according to their customs and that until sold land continued to belong to them"[21] and the "common law of New Zealand is different"[22] to the English common law.

50. Moreover, the rules that the courts have developed for the qualification of native title do not include inconsistency with other doctrines – the only way to dissolve the doctrine of native title is by clear and plain statutory extinguishment.

51. *Third*, can an iwi, hapū, and Māori landowners prove that, according to its tikanga, that they have a recognised customary property interest in a precise, say, river?

52. It should be straight forward for iwi, hapū, and Māori landowners to prove that a water body is a taonga. Parliament, the courts, including the appeal courts, and the Waitangi Tribunal have all recognised that many waterways are a taonga to Māori. But this test requires Māori to establish in fact that they held property rights to specific water. The twelve point 'indicia of ownership' framework or a Kaupapa Māori approach set out at paragraphs 67 and 68 below may be helpful here.

53. *Fourth*, can the Crown identify any statute law that has clearly and plainly extinguished the native title property rights alleged in water?

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[18] See s 223(1).

[19] *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29.

[20] *Ngati Apa*, 661 (Elias CJ).

[21] *Ngati Apa*, 657 (Elias CJ).

[22] *Ngati Apa*, 668 (Elias CJ).

54. There exists no statute that clearly and plainly extinguishes Māori customary property rights in waters.

55. The RMA is the statute that comes closest to doing this. Section 354 of the RMA repeals the Water and Soil Conservation Act 1967 but states that the new rules contained in the RMA:

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

56. So, what right did the Water and Soil Conservation Act 1967 give the Crown? Section 21(1) of this Act stated:

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

57. Is simply vesting water in the Crown enough to override any Māori customary property rights in rivers? According to case law precedents, the doctrine of native title requires a clear and plain extinguishment of Māori property rights. The initial observation thus must be that the legislation does not clearly and plainly extinguish Māori property rights.

58. Therefore, in summary, iwi, hapū and Māori landowners have a strong case for being able to rely on the doctrine of native title to recognise their continuing proprietary rights and responsibilities in water.

BUT, IS IT IN ACCORDANCE WITH TIKANGA MĀORI TO CLAIM 'OWNERSHIP' OF WATER BODIES?

59. This issue came up in the *Freshwater* Waitangi Tribunal 2012.

60. Māori claimants argued that at 1840 Māori had full, undisturbed, and exclusive possession of all water. They argued that the closest English cultural equivalent to express this Māori customary authority is 'ownership': "Māori have little choice but to claim English-style property rights today as the only realistic way to protect their customary rights and relationships with their taonga".[23]

[23] *Stage 1 Freshwater and Geothermal Resources Claim*, page 38.

61. Interested parties in this claim, stated:

> *"It is not that English-style property rights are offensive to Māori or unknown to Māori, but rather it is offensive that Māori rights should not be considered to have given rise at the very least to English-style property rights. This is because the obligations imposed on Māori as part of their reciprocal relationships with their taonga require them to care for those taonga (manakitanga and kaitiakitanga). And such care cannot take place without rights of access, rights to control the access of others, rights to place conditions on access, and the authority to control how the taonga (water) will be used. In all of these ways, property rights are essential and the 'rights of Māori to their waterways are akin to ownership'".* [24]

62. They emphasised that as Pākehā began to arrive in the country, Māori extended their control of "the use of waters as trade routes and even charging fees for the use of water"[25] and the Treaty provides "the choice of Māori to walk in two worlds: to resist assimilation and protect their mātauranga Māori and tikanga (knowledge and law) but also to benefit commercially from development".[26]

63. The Tribunal agreed that:

    a. "te tino rangatiratanga was more than ownership: it encompassed the autonomy of hapū to arrange and manage their own affairs in partnership with the Crown" (original emphasis).[27]

    b. both Treaty texts support a finding of ownership at 1840.[28]

    c. tino rangatiratanga was the closest cultural expression of full blown ownership in 1840, and tino rangatiratanga is "a standing qualification of the Crown's kāwanatanga".[29]

64. The Tribunal held:

> *"Our generic finding is that Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership rights, and that such right were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with the incoming settlers".*[30]

65. We add that any sharing should be done in a tikanga Māori compliant and led manner, through the exercise of tino rangatiratanga and mana whakahaere. Sharing legitimately can only be done by Māori voluntarily, acting on an informed basis and in their own interest.

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[24] Above, pages 43-44.

[25] Above, page 44.

[26] Above, page 44.

[27] Above, page 101.

[28] Above, page 102.

[29] Above, page 103.

[30] Above, page 110.

HOW COULD IWI, HAPŪ, AND MĀORI LANDOWNERS PROVE TINO RANGATIRATANGA OF WATER BODIES?

66. Proof is necessarily sourced in tikanga Māori and te Tiriti o Waitangi.

67. Māori claimants in the Freshwater Waitangi Tribunal 2012 claim introduced a twelve point 'indicia of ownership' framework for establishing customary proof of ownership:[31]

    1. The water resource has been relied upon as a source of food;
    2. The water resource has been relied upon as a source of textiles or other materials;
    3. The water resource has been relied upon for travel or trade;
    4. The water resource has been used in the rituals central to the spiritual life of the hapū;
    5. The water resource has a mauri (life force);
    6. The water resource is celebrated or referred to in waiata;
    7. The water resource is celebrated or referred to in whakataukī;
    8. The people have identified taniwha as residing in the water resource;
    9. The people have exercised kaitiakitanga over the water resource;
    10. The people have exercised mana or rangatiratanga over the water resource;
    11. Whakapapa identifies a cosmological connection with the water resource; and
    12. There is a continuing recognised claim to land or territory in which the resource is situated, and title has been maintained to 'some, if not all, of the land on (or below) which the water resource sits'.

68. Lead counsel for the interested parties preferred a Kaupapa Māori framework based in highlighting "the interrelationships between whenua . . . Te Miina o Papatūānuku, manaakitanga, kaitiakitanga, and tangata whenua" rather than the claimants' 'indicia of ownership' framework because "the rights of indigenous cultures must be judged within their own cultural framework, not that of England, and that this can be accommodated by the common law".[32]

69. There is already a long practice of iwi, hapū and Māori landowners providing proof of their tino rangatiratanga in regard to freshwater bodies as is evidenced in Māori Land Court judgments, Waitangi Tribunal reports and Treaty of Waitangi claim settlements. The Māori Land Court, in particular, has a history of hearing and deciding such matters, especially for land, since 1862.

[31] Above, page 38.

[32] Above, page 42.

WHAT ARE THE LEGAL SOURCES FOR ADVANCING MĀORI RIGHTS AND INTERESTS?

70. Te Tiriti o Waitangi, which is informed by He Whakaputanga o Ngā Rangatira o Ngā Hapū o Niu Tireni, is the starting basis for legal recognition of tino rangatiratanga of water bodies.

71. The United Nations Declaration on the Rights of Indigenous Peoples is an important international declaration that complements and supports the reconciliation for the practice of Māori rights and interests.

72. The common law, particularly the doctrine of native title, is another important legal source for recognising Māori rights and interests in water bodies.

73. There exists a specialist Māori Land Court operating under Te Ture Whenua Māori Act 1993 that accepts land is a taonga tuku iho and provides mechanisms for the retention and utilisation of Māori land for the benefit of its owners, their whānau, and the hapū. This law accepts some land is still held customarily.[33] Māori customary land is defined as "land that is held by Māori in accordance with tikanga Māori".[34]

74. *Te Mana o te Wai* provides an important and useful framework for giving effect to advancing Māori rights and interests in water bodies, including economic values.

75. Today, these sources provide the legal basis for recognising iwi, hapū, and Māori landowners their inherited, intergenerational, collective rights and interests in freshwater bodies.

WHAT ARE SOME OPTIONS FOR A PRINCIPLED WAY TO GOVERN TO ACHIEVE *TE MANA O TE WAI*?

76. Since 1840, Māori have been articulating, designing, and sharing options for governing Aotearoa New Zealand in a te Tiriti o Waitangi compliant manner. Significant work has already been done.

77. *Matike Mai Aotearoa* is an important contemporary constitutional report by Māori that provides several options for advancing a bicultural nation. While this report is not specific to water bodies, it contains different scenarios for governance that could provide a basis for creating new water governance regimes.[35] Its models are premised on tino rangatiratanga and kāwanatanga spheres with spaces for shared decision-making where appropriate.

78. There is of course, also, considerable work by Māori specific to developing pathways to create a bicultural governance for water bodies.

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33 Te Ture Whenua Māori Act 1993, s 129(1)(a).

34 Te Ture Whenua Māori Act 1993, s 129(2)(a).

35 He Whakaaro Here Whakaumu Mo Aotearoa: *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, January 2016).

79. Specifically, the Freshwater Iwi Leaders Group has developed and shared numerous reports and videos to achieve reconciliation.[36] In addition to developing *Te Mana o te Wai*, the Iwi Leaders' *Ngā Matapono ki te Wai* is an important framework that sets out values, objectives, governance, and allocation principles, along with a transitional phase, to realise Te Mana o Te Wai, the value of water resources (including economic) and enduring future iwi relationships with water bodies.[37]

80. The Iwi Leaders have also done extensive work to advance a water allocation work programme during 2016–17, that suggested a combination of allocations to Māori including iwi and hapū and Māori landowners for commercial purposes; reasons of equity, and to meet their cultural needs and customary uses. This was commended by the *Stage 2 Freshwater* Waitangi Tribunal.

81. Iwi, hapū and Māori landowners throughout the country have been leading in negotiating innovative reconciliation settlements helping the Crown to start to acknowledge its past breaches of te Tiriti o Waitangi albeit within tight Crown set boundaries that do not permit recognition of Māori ownership of freshwater bodies. Features include:

    a. Crown apologies for eroding iwi rangatiratanga and Crown aspirations to "begin a process of healing . . . building a relationship of mutual trust and co-operation".[38]

    b. Fee simple ownership of some lakebeds, vested in tribal entities, such as Lake Taupō, Te Waihora, Te Arawa Lakes.

    c. Acceptance that some water bodies are ancestors, for example, the Waikato River is "our tupuna which has mana and in turn represents the mana and mauri of Waikato-Tainui". And the recognition that Te Awa Tupua, as the face of the Whanganui River, is a "legal entity with all the rights, powers, duties and liabilities of a legal person".[39]

    d. Joint management agreements with regional councils as permissible under the RMA, for example the Waikato Raupatu River Trust and Waikato District Council Joint Management Agreement.

    e. Joint management agreements with the Department of Conservation, for example, Te Waihora.

    f. Statutory acknowledgements requiring local authorities, the Environment Court and Historic Places Trust to have regard to these acknowledgements.

    g. Ability for the Department of Conservation, the Ministry for the Environment, and the Minister of Fisheries to set out in protocols how to interact with the Trustees of the Te Arawa Lakes Trust.

[36] See https://iwichairs.maori.nz/our-kaupapa/fresh-water/.

[37] See https://iwichairs.maori.nz/wp-content/uploads/2015/06/Nga-Matapono-ki-te-wai-Framework.pdf.

[38] Te Arawa Lakes Settlement Act 2006, section 9.

[39] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 14(1).

h. New Strategy Governance Groups.

i. Recording and using official Māori names for water bodies.

j. Customary and commercial freshwater fisheries redress.

82. These negotiated agreements provide a basis to be built upon as the Crown becomes more prepared to recognise the full extent of Māori rights and interests in water bodies, including their economic values.

83. The Waitangi Tribunal has shared many ideas and recommendations for more than 40 years. For example, in 1999, the *Whanganui River* Waitangi Tribunal recommended:[40]

a. "We propose first that, whatever is done, the authority of Atihaunui in the Whanganui River should be recognised in appropriate legislation. It should include recognition of the Atihaunui right of ownership of the Whanganui River, as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds.

b. We further propose that any settlement should protect existing use rights for their current terms and provide for continuing public access. Broad parameters for the terms of access will, however, need to be agreed. It should be clear that the public right is theirs not as of right but by permission.

c. The settlement may require joint management of the Whanganui River on a regular basis, and in that event, it should allow for the deployment of Atihaunui people. It would be necessary to provide funding for the functioning of the Whanganui River Maori Trust Board, and, if need be, this might be built into local authority levies.

d. In addition, the current application for a water conservation order would need to be further deferred until settlement is reached, since there may be matters that the Minister needs to address.

e. Subject to the above, we propose two options for consideration in negotiations:

(a) Owner approval: The first option is that the river in its entirety be vested in an ancestor or ancestors representative of Atihaunui, with the Whanganui River Māori Trust Board as trustee. Any resource consent application in respect of the river would require the approval of the trust board. This would give greater effect to Atihaunui's rangatiratanga and would maintain the 'management' regime of the RMA. A resource consent would still have to be sought if the owner's approval is given. An amendment to the regional plan relating to the river would be needed, setting out that the board's consent is required before a resource consent is applied for.

(b) Consent authority: The second option is that the Whanganui River Māori Trust Board be added as a 'consent authority' in terms of the RMA, where the Whanganui River is involved, to act severally and jointly with the current consenting authority for any particular case, and that both must consent to an application for the consent to be exercised. In terms of section 2 of the Act, consent authorities are currently the Minister of Conservation, a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority. Rights of appeal under the Act would be preserved."

[40] Waitangi Tribunal, *The Whanganui River Report* Waitangi Tribunal 1999, Wai 167, page 343.

84. Interestingly, the *Te Ika Whenua Rivers* Waitangi Tribunal reflected "what might have happened to the beds of rivers had it not been for the *ad medium filum aquae* rule". The answer: the riverbeds would have remained as Māori customary title: "the ownership and tino rangatiratanga of the greater portion of the Te Ika Whenua rivers would not have passed from their hands by virtue of the land sales".[41]

85. The more recent *Stage 2 Freshwater* Waitangi Tribunal 2019 clearly laid out what is wrong with the current legal regime and what needs to be done to fix it. For example: [42]

> *"We recommend that the Crown arrange for an allocation on a percentage basis to iwi and hapū, according to a regional, catchment-based scheme. We also recommend an allocation for Māori land development, and that the feasibility of royalties and other forms of proprietary redress be investigated."*

86. The New Zealand Māori Council, especially in writings led by Sir Eddie Taihakurei Durie, has made several recommendations for transitioning towards a more bicultural way to govern water in Aotearoa New Zealand. Durie has authored several papers, including ''Law, Responsibility and Māori Proprietary Interests in Water"[43] and "The waters of the Māori: Māori law and State Law".[44]

87. Linda Te Aho and Martin Betson, along with the New Zealand Māori Council, have recently published a Discussion Paper detailing proposals for improving the governance of water bodies including creating a new *Te Mana o te Wai* Waterways statute, establishing a new Water Commission and new *Te Mana o te Wai* catchment boards.[45]

88. Inspiration can also be sought from overseas. For example, in Australia, the Victoria State Government has just handed back two billion litres of water to the Gunaikurnai Land and Waters Aboriginal Corporation to use for cultural, environmental, or economic purposes.[46]

89. It is possible in law to recognise Māori rights and interests in water bodies.

90. We now turn to economics to help consider further what this might mean.

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[41] *Te Ika Whenua Rivers Report*, page 101.

[42] *Stage 2 Freshwater and Geothermal Resources Claim*, page xxiv.

[43] Taihakurei Durie, 'Law, Responsibility and Māori Proprietary Interests in Water' http://www.response.org.nz/wp-content/uploads/2013/02/Durie-Full-Law-Water-Responsibility-ed-2014.pdf

[44] Edward Taihākurei Durie et al *The waters of the Māori: Māori law and state law* 2017. See https://researchcommons.waikato.ac.nz/handle/10289/11811.

[45] Te Aho, L., Martin, B. and P. Fraser, 2020, *Waterways, Governance, Rangatiratanga, Summary Research Discussion Paper*, November.

[46] See Troy McDonald and Erin O'Donnell 'Victoria just gave 2 billion litres of water back to Indigenous people. Here's what that means for the rest of Australia" *The Conversation*, 30 November 2020 https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674

WHAT DOES ECONOMICS HAVE TO SAY ABOUT MĀORI HAVE RIGHTS AND INTERESTS IN WATER?

91. Economics is not directly concerned with determining who is *entitled* to own or control any given resource. Determining entitlements is typically a matter left to the courts or political process (about either of which economics has plenty to say, hence economics does indirectly speak to questions of entitlement). However, economics is definitely and *directly* concerned with narrower questions such as the efficiency (or even equity) of different types of ownership and control, and of different types of owner. Some of these questions are explored further below.

HOW DO MĀORI CONCEPTS SUCH AS TINO RANGATIRATANGA AND MANA WHAKAHAERE IN RELATION TO WATER TRANSLATE INTO ECONOMIC NOTIONS?

92. Rangatiratanga, tino rangatiratanga and mana whakahaere are cultural concepts specific to Māori culture and custom.[47] Rangatiratanga and mana whakahaere share notions such as a right to exercise authority, self-governance, and self-management. Tino rangatiratanga conveys overlapping notions of self-determination, and stronger notions such as sovereignty, autonomy, self-government, domination, rule, control, power.

93. Central to all these notions is the idea of Māori having an ability to decide – i.e. exercise some measure of control – in some relevant domain, with that ability to decide protected in te Tiriti.

94. Implicit in this ability to decide, as protected in te Tiriti, is the ability of Māori to exercise choices over how such resources are used. That applies to their own use (or non-use) of those resources, but also in the use (or non-use) of those resources by others. Also implicit is that Māori would be able to exercise this ability over time and would only allow others to use waters over which they exercise such choices if it was in their interest to do so.

95. Iwi, hapū and Māori landowners having an ability to exercise choices over how water resources are (not) used by themselves or others have strong overlaps with economic notions such as ownership and property rights.

96. Overarching notions of governance and self-determination embedded in the more general concepts of rangatiratanga and mana whakahaere as they apply to resources like water also clearly imply that Māori were guaranteed in te Tiriti "agency" over the relevant resources. As such, iwi, hapū, and Māori landowners could be expected to use

[47] For the purposes of this discussion, Dr Meade used definitions of these terms available from https://maoridictionary.co.nz/. Dr Meade acknowledges he is not an expert in Māori culture and custom, and is attempting to apply his understanding of economics to interpret these terms in an economic sense. He further acknowledges that it will be important for these interpretations to be discussed and debated.

that agency to maximise their own welfare – e.g. any sharing of water resources would had to have improved the welfare of the relevant Māori, if they were freely exercising that agency. In short, concepts of rangatiratanga and mana whakahaere as they apply to water resources are consistent with Māori having property rights over, or ownership of, those resources, enabling them to be used in a way that maximises their welfare.

97. As far as economics is concerned, Indigenous collective ownership in water is an entirely plausible and legitimate alternative to individual property rights being defined and enforced by parliament or the courts, with its own associated efficiency and equity implications.[48] This is because economics does not prejudge that property rights in water are individual rights held by individual Māori. Nor does it presuppose that ownership takes any given legal form. It is entirely consistent with this construction to suppose that Māori collectives such as iwi, hapū, or Māori landowning entities possess collective ownership rights in water defined and enforced by Māori custom.

SHOULD RIGHTS TO CONTROL, MANAGE, PROTECT, OR USE WATER BE DISTINGUISHED FROM PROPERTY RIGHTS IN, OR OWNERSHIP OF, WATER?

98. No. Given the above discussion, the distinction would appear to be moot.

99. According to prominent economic authors on the subject, **property rights** are "formal or informal rules that govern access to and use of . . . [tangible or intangible] assets . . ." (emphasis added).[49]

100. Property is often called a "bundle of sticks" because it comprises – to varying degrees, and depending on the situation – rights to:

    a. Derive "value" from the asset – where "value" can be monetary (e.g. commercial) or otherwise (e.g. social, cultural, spiritual, environmental);

    b. Exclude others from using the asset; and

    c. Transfer the asset (i.e. control and use of the asset) to others.[50]

[48] Nor does it prejudge that Māori would wish to permanently alienate their ownership rights, even if they could – just as natural resources can be used "sustainably" for the benefit of future generations, so too can resources optimally be retained if that matches the inter-generational preferences of those resources' owners..

[49] Anderson, T. and F. McChesney (eds.), 2003, *Property Rights: Cooperation, Conflict and Law*, Princeton University Press, at p. 1.

[50] The branches of economics concerned with matters of ownership and control (e.g. institutional economics, property rights literature, contract theory) share the common thread that owners/principals possess *residual* control rights over, and rights to enjoy the *residual* returns generated by, any given resource or activity. In other words, they exercise control that has not already been granted to or taken by others (e.g. via contract, or regulation), and enjoy the produce of a given resource or activity left over after pre-existing claims over that produce have been satisfied (e.g. loan repayments made to lenders, wages paid to employees, taxes or regulatory fees paid to government, etc).

101. The New Palgrave Dictionary of Economics defines a **property right** to be:[51]

> *"A property right is a socially enforced right to select uses of an economic good. . . . no one may legally use or affect the physical circumstances of goods to which you have Private property rights without your approval or compensation. . . ."*

102. Furthermore, from the Oxford Dictionary of Economics, ownership is defined to mean (emphasis added):[52]

> *"The right to exclusive **use** of an asset. The owner of an asset normally has the **right to decide what use shall be** made of it, and cannot be deprived of it except by law. The state, however, claims the right to regulate the use of many assets, and to tax income derived from them. The use that can be made of land and buildings is subject to planning permission, and rent from them is subject to income tax. The state also has rights of compulsory purchase of land needed for public works. Other people have contractual rights over assets, such as tenancies; and the general public has some rights, for example public rights of way. The **extent to which ownership confers exclusive control over the use of an asset is thus a matter of degree**."*

103. Each of these sources points to ownership of an asset or resource being defined by a party enjoying some measure – on a continuum rather than absolutely – of exclusive use and control rights over that asset or resource:[53]

    a. This is regardless of whether the asset or resource is used (or non-used) directly by that party, or voluntarily transferred by them to third parties on an incomplete or non-permanent basis (with or without associated payment);

    b. It is also regardless of whether or not government retains (incomplete) regulatory control over the resource use, or taxes any income derived from that use or the transfer of use to others.

104. Relatively unfettered control and use rights that are long-term or perpetual are in effect outright ownership. For example, a perpetually-renewable lease over land, with peppercorn rentals and lessee discretion over land use, is substantively equivalent to freehold title. However, even short-term or limited use rights (e.g. leases for particular land uses, or annual catch entitlements in the case of commercial fisheries) also represent a form of ownership.

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[51] Alchian A., 2008, "Property Rights", in *The New Palgrave Dictionary of Economics*, Living Edition, Palgrave Macmillan, London, https://doi.org/10.1057/978-1-349-95121-5_1814-2.

[52] Hashimzade, N., Myles, G. and J. Black, 2017, *A Dictionary of Economics* (5 ed.), Oxford University Press.

[53] It is worth emphasising that tradable property rights to pollute the air (e.g. New Zealand Units permitting the discharge of greenhouse gas emissions) or water (e.g. nitrates discharge allowances) amount to a form of ownership right over the relevant resources. In this case it is a right to use the air or water as "sinks" for the relevant pollutants. To the extent the allocation of such tradable ownership rights conflicts with the allocation of other rights to use those resources, they represent possible constraints on the creation of additional property rights to use those resources in other ways.

105. This means even short-term control or use rights in relation to water are substantive forms of ownership. Long-term or perpetual control or use rights are more so.

106. Any distinction between rights and interests on the one hand, and property rights or ownership on the other, are therefore semantic – in terms of their economic substance – if those rights and interests include control and use rights.[54]

107. Where iwi, hapū and Māori landowners' rights and interests in water include obligations, for example, to protect the integrity and health of waterways for the benefit of present and future generations, these are conceptually similar to the idea that the exercise of use rights can legitimately be regulated when that better serves society's interests, or voluntarily constrained when that better serves the relevant private (e.g. inter-generational) interests.

108. Just as "ownership" or "property rights" in water resources can co-exist with (e.g.) water quality regulation, so too can they co-exist with cultural obligations to protect those resources.

109. Recognising that rights and interests might be substantively equivalent to ownership takes nothing away from the notion that identity can be intimately related to the existence, condition, and ability to use a given asset or resource. Economics recognises that the ability to control resource use can produce a wide range of contributions to wellbeing (such as a sense of identity to those who control that use).

WILL RECOGNISING MĀORI RIGHTS AND INTERESTS IN WATER PRIVATISE WATER?

110. Not really, since effectively it already has been.

111. While the RMA maintains the pretence that long-term water use rights (i.e. water permits) are not property rights, in substance they exhibit the key features of ownership – i.e. the ability to use or control use of a resource, and an ability to transfer those rights to third parties.

112. However, the RMA administratively allocates such rights on a first-come-first-served basis, enables trading in only a relatively high-cost way, does not guarantee rights renewals, and charges nothing per se for the use of water. Importantly, once water permits are secured, in principle they can be traded at full economic value to those who manage to secure a permit allocation.

113. Recognising iwi, hapū, and Māori landowner rights and interests in water will potentially change how water is administered, and how its benefits can be enjoyed, but the RMA has already privatised water, albeit on a time-limited basis, and with high transaction costs and property right uncertainties.

[54] Note that ownership is not of an asset or resource per se. Rather, ownership refers to the possession of some bundle of use rights attaching to the relevant asset or resource. See Alchian, A. and H. Demsetz, 1973, "The Property Rights Paradigm", *Journal of Economic History*, 33(1), March, 16-27.

IS IT POSSIBLE TO CHARGE FOR WATER USE?

114. Yes, even though the current RMA regime imposes no charge on users of a key natural resource.

115. This is to be contrasted with other natural resources such as oil and minerals managed under the Crown Minerals Act 1991, under which permit holders who exploit those resources must pay royalties to the Crown.[55] As stated by the ministry that administers the Crown minerals regime:[56] "Royalties are set to ensure the Crown receives a fair financial return for the development of its minerals to the benefit of New Zealand."

116. If Māori or others are found to have rights and interests in specific water resources sufficient to enable them to control use of those resources, this opens up the possibility of royalties or other charges being levied for water use. In the same way that charging a royalty to overseas users of New Zealand's oil and other mineral resources ensures a fair return to the nation for that use, levying a water royalty or other use charge would ensure that overseas water users are not able to exploit that resource without fairly recognising its underlying ownership.[57]

IF WATER IS OWNED BY MĀORI, WHAT BENEFITS SHOULD THEY EXPECT?

117. Economics uses a "total economic value" (TEV) framework for assessing the range of benefits attaching to natural resources such as waterways, as illustrated in Figure 1.[58] That framework is general enough to recognise that values attaching to water can be social, cultural, spiritual or environmental values as much as they are commercial values.

118. The framework recognises both use values, and non-use values.

119. Use values for water include the values of consumptive (e.g. irrigation) and non-consumptive (e.g. swimming) uses, which can be commercial or non-commercial values. Use values also include option values – i.e. the value to use water in the future rather than now.

120. Non-use values include existence values (e.g. the social, cultural or spiritual values attached to the simple existence of a water resource), and bequest values (the value of being able to leave a resource so that it can be used for the benefit of future generations).

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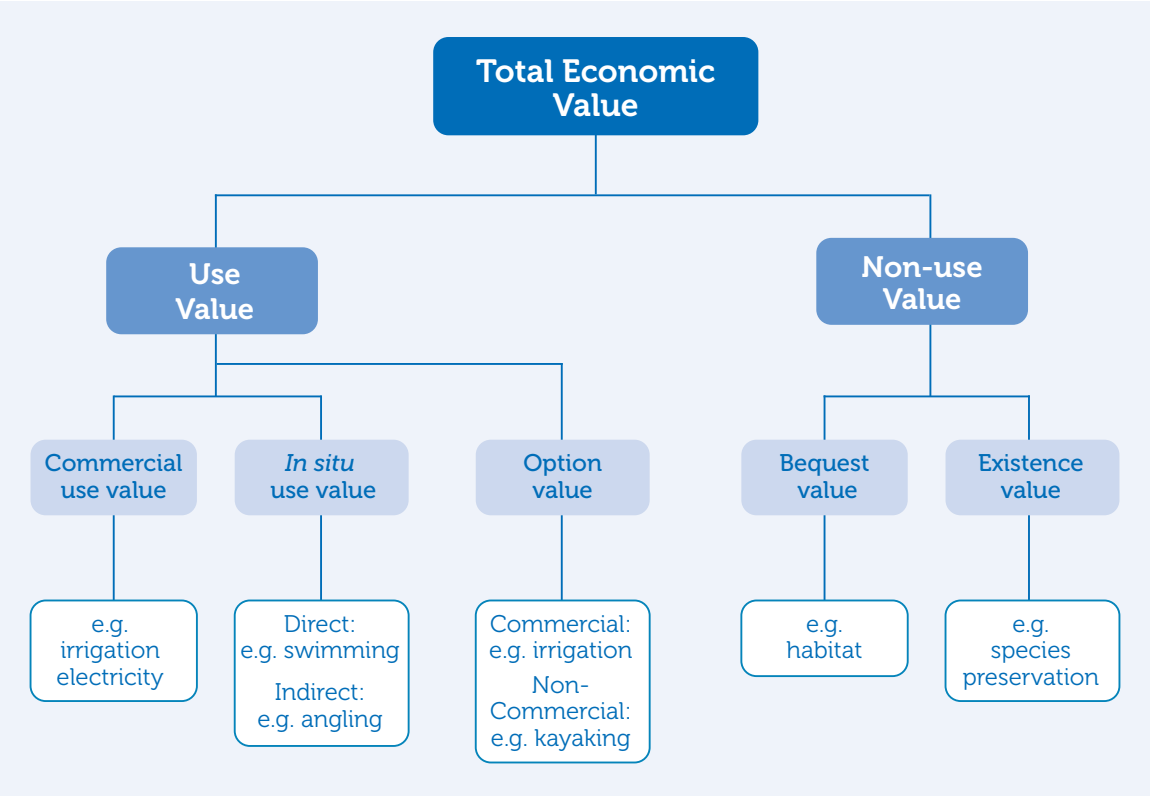
55 s. 99H.

56 Ministry of Business, Innovation and Employment website, https://www.nzpam.govt.nz/permits/minerals/fees-royalties/.

57 In fact, overseas buyers who purchase water permits off existing permit holders already pay a market price for water (to the benefit of the seller), and potentially make other contributions to New Zealand (e.g. via employment and investment). However, potential remains under existing water allocation rules for them to secure water permits without needing to make any contribution in recognition of underlying water ownership, which the RMA pretends does not arise (in contrast to the Crown minerals regime).

58 For example, see Sharp, B. and G. Kerr, 2005, *Option and Existence Values for the Waitaki Catchment*, report prepared for the Ministry for the Environment, January.

Figure 1 – Total Economic Value Framework for Waterways



Source: Figure 1 from Sharp, B. and G. Kerr, 2005, *Option and Existence Values for the Waitaki Catchment*, report prepared for the Ministry for the Environment, January

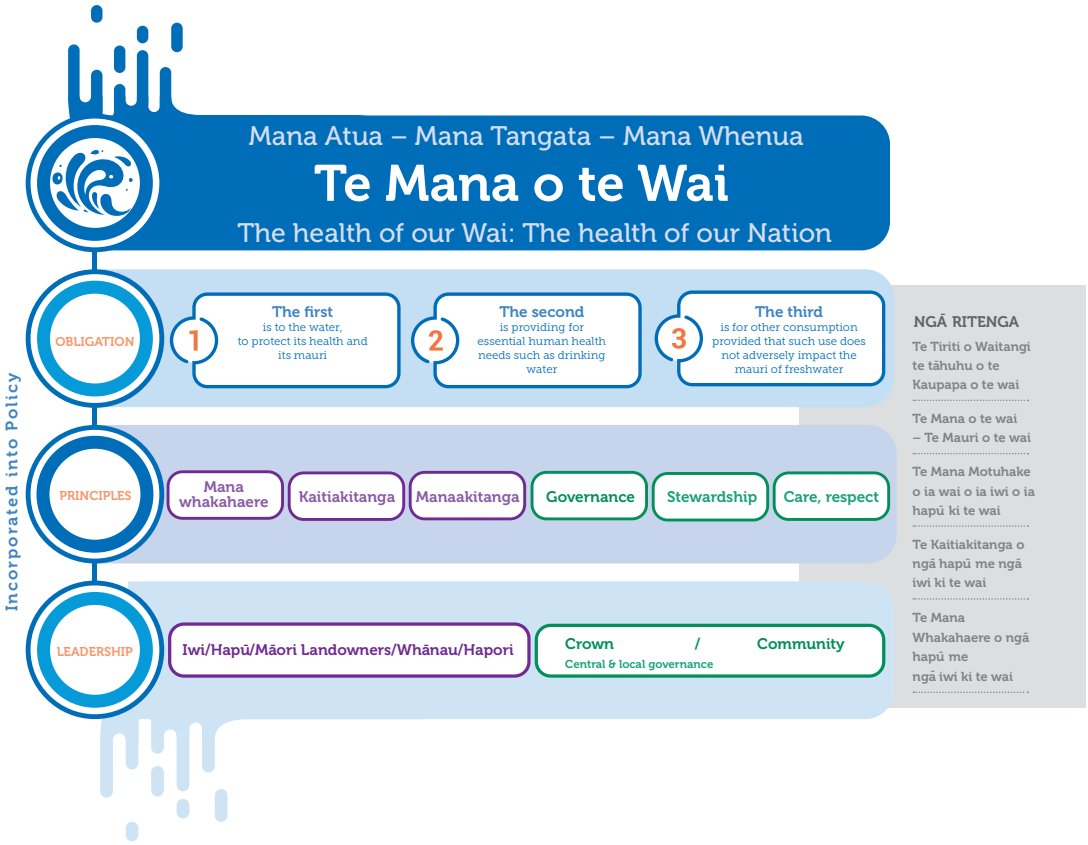
121. All of these values can be considered direct benefits that a water resource owner would wish to be able to enjoy.

122. Additionally, a water resource owner might benefit by transferring some of their use rights (permanently), or all of their use rights (temporarily), to third parties. In that case they benefit from any valuable thing they receive in return (e.g. proceeds of sale of use rights and/or any royalties attaching to resource use).[59] They might also benefit in other ways – indirectly – such as through employment or investment opportunities created through third-party water use, or if third parties use water in ways that align with the owners' preferences (e.g. leasing water rights to parties who use those rights in ways that enhance water quality, or conserve water for future generations).

[59] Under the Crown minerals regime, the Crown can both sell permits to extract minerals as well as charge royalties on any profits generated through the use of such permits. This generates two sources of return to the Crown's minerals ownership.

123. This TEV framework highlights how commercial values are only one component of total economic value. Of particular relevance here are the cultural use and non-use values Māori attach to water, and the associated obligations to protect waterways themselves, to provide for human needs, and only after these have been provided for to provide for other water uses. These obligations are emphasised in *Te Mana o te Wai*, as illustrated in Figure 2. Seen in this light, giving priority to these cultural values – rather than just focusing on commercial values (for example) – would fundamentally affect how water bodies are managed and used.

Figure 2 – Priority of Obligations Highlighted in Te Mana o Te Wai



Source: Figure 1 from *Kahui Wai Māori, 2019, Te Mana o te Wai: The health of our wai, the health of our nation*, Report to Hon Minister David Parker, April.

HOW DOES EFFICIENCY OF WATER USE AFFECT HOW WATER SHOULD BE OWNED?

124. In principle, rights to ownership of a resource, and the efficiency with which that resource is used, are distinct questions.

125. "Who rightfully owns what" is a question of fact and law.

126. By contrast, "who can make best use of a resource" is a question of efficiency, addressing who can generate the most benefits (including social, cultural, and spiritual benefits, as well as commercial benefits) from that resource, which may or may not be the party that owns the resource. Economics is well-equipped to address such efficiency questions, even if rightful ownership is determined on other bases.

127. Additionally, some forms of ownership are more efficient than others. For example, property rights that are clearly defined and legally enforceable, and transferable with low transaction costs, are generally regarded to be more efficient than rights lacking these features. But this too does not address how ownership should rightfully be assigned.

128. From an efficiency perspective (though not from an equity, fairness, or rights perspective), economists are often relaxed about initial ownership assignments. This is because of an expectation that, over time at least, such rights should increasingly find their way to the most socially-desirable (i.e. most "efficient") uses, irrespective of how initial ownership in such rights is (re)allocated.[60] This optimism hinges on ownership rights being tradable with low transaction costs, and on the absence of wealth constraints that might impede high-value users from securing use rights. It also relies on efficiently being able to construct contractual or other arrangements for securing long-term use rights (where such long-term security is important for sustaining necessary long-term investments in related activities), and positive or negative side-effects ("externalities") of resource use not being severe.

129. To the extent these conditions are not satisfied, residual inefficiency in water use can be expected if the initial ownership (re)assignment is not already efficient.

130. In principle, this is no different to other resources – e.g. wealth constraints or transaction costs can mean that the incidence of home ownership is not necessarily fully efficient.

131. Also, it is normal for the identity of highest-value resource users to change as technologies, market circumstances and social preferences change. This means no ownership assignment can be expected to remain efficient forever, and hence that ownership reassignments should commonly be expected to occur to some degree over time if efficiency is to be sustained.

HOW DOES WATER OWNERSHIP AFFECT THE ACHIEVEMENT OF SOCIAL OBJECTIVES?

132. In principle, private ownership of a resource does not mean that social preferences for things like environmental quality or sustainability cannot be addressed.

133. It is common for regulation to limit the types of uses a privately-owned resource can be put to in order to achieve wider societal objectives, including environmental protection or preserving resources for the benefit of future generations.

[60] This is a paraphrasing of the famous "Coase Theorem" as set out in Coase, R., 1960, "The Problem of Social Cost", *Journal of Law & Economics*, III, October, 1-44.

134. Owners would naturally expect to have some say in the shape of any such regulation, and this is usually achieved via either national or local government processes.

135. Moreover, to the extent that Māori rights and interests in water specifically include governance or other control rights, this means that Māori would naturally expect to have a commensurate say in how any such regulations are developed and implemented for enhancing water quality of preserving water for future generations. This would be in addition to any general governance or other control rights Māori may possess (under te Tiriti, or otherwise), which might also give Māori a say in how any such regulations are developed and implemented. Precedent for this is found in commercial fisheries management.

136. Iwi, hapū and Māori landowners would profess to have particular preferences over how natural resources like water should be managed. These include attaching importance to sustaining water quality and the integrity of waterways, and to ensuring that future generations get to properly enjoy the benefits of natural resources. Indeed, as natural, long-term local resource owners, Māori should be expected to be less likely than some other potential resource owners to over-exploit water resources with costs to the environment or future generations.

137. Recognising Māori rights and interests in water might therefore align, rather than conflict with, wider social objectives for water management, especially where existing management provisions are seen to have fallen short of achieving those objectives.

IF MĀORI OWN WATER, CAN ONLY MĀORI USE WATER?

138. No.

139. Even though the right to use and control use by others is a necessary component of ownership, those use and control rights are seldom unfettered (e.g. are subject to law and regulation), and will need to respect realities "on the ground", such as the public's need to access water for the necessities of life (as recognised in *Te Mana o te Wai*).

140. Any iwi, hapū, or Māori landowner found to have perpetual ownership rights in any given water resource will have to decide whether it is better to use (or not use) the resource themselves, and whether some or all of their use rights might better be used by someone else. This remains true even if any perpetual ownership rights are treated as taonga tuku iho (i.e. inter-generational treasures) or vested in water bodies themselves.

141. Since short-term or partial water use rights can be separately granted to third parties, perpetual ownership of the underlying water resource can be retained even if other rights are granted. This is consistent with traditional Māori land uses, for example, with short-term use rights being granted while perpetual rights are retained.

142. The ownership of other resources help to understand this. For example, land can simultaneously be owned and leased. Likewise, fish quota can be perpetually owned (via individual transferable quota) but temporarily used by others. Hence, water could be subject to time-limited use rights that are enjoyed separately from underlying

perpetual ownership rights. Importantly, separating perpetual/underlying ownership rights from use rights also allows for water bodies to be owned collectively – or owned by themselves – in perpetuity while use rights can be owned and managed on different bases.

IF MĀORI RIGHTS AND INTERESTS TO WATER ARE RECOGNISED, HOW MIGHT THAT RECOGNITION OCCUR?

143. This requires consideration of multiple questions, regarding the creation and/or reallocation of new and existing control and use rights, including in situations where existing use rights are fully- or even over-allocated, and possibly over an extended transition period.

144. If it is established that iwi, hapū and Māori landowners are entitled to shared or exclusive control rights over some or all water resources, this implies that new governance arrangements are warranted for how the relevant water resources are used and protected, by whom and when (and under what circumstances). These might include over-arching national-level governance arrangements (e.g. some form of national "water commission"), but will likely also require catchment-level arrangements (e.g. perhaps via local "catchment boards") – in each case with the extent of Māori governance reflecting the required level of Māori control rights, and the required level of governance sharing (e.g. with the Crown).[61]

145. As well as addressing allocation issues (i.e. who should be entitled to what use rights), such governance bodies will also need to be involved in determining how to make trade-offs between different use rights and the restoration or preservation of water body health. They will also need to be involved in addressing over-allocation issues – such as through retiring certain existing use rights as they expire, or through a programme of purchasing such rights.[62]

146. If Māori are entitled to determine such questions as of right, it is natural to expect that their interests will extend beyond just governance of the relevant water resources to also include the right to either use those water resources, or derive benefits from other parties' use of those resources.

147. This could include deriving income from resource use via royalties and/or sale of use rights (once existing use rights have been retired, or with a transition period over which such mechanisms are implemented).[63]

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[61] For a possible approach to establishing such arrangements, see Te Aho, L., Martin, B. and P. Fraser, 2020, *Waterways, Governance, Rangatiratanga*, Summary Research Discussion Paper, November.

[62] In principle, where existing use rights have been overallocated, there is a case for extinguishing those rights, though questions of compensation by the culpable authorities then arise. Who should pay for purchasing use rights is also a live question, with possibilities including the Crown, and perhaps Māori holders of water rights and interests, such as through ring-fencing some or all royalties or use right sales proceeds for as long as is required to achieve resource restoration objectives.

[63] Precedent for a staged transition to recognising underlying Māori ownership rights starting from a position in which those rights were inadequately recognised is provided by reform of the Māori Reserved Lands and Māori Vested Lands.

148. Additional questions that such governance bodies would need to address include the precise form of any rights and interests. While underlying Māori rights and interests might be defined and recognised by the Tribunal, the Courts and/or Parliament, subsidiary rights might be the result of more decentralised decision-making (perhaps under delegated authorities, or simply by agreement of the relevant parties). These include whether to define short-term or partial use water rights that can be used and traded separately from the underlying rights from which they are derived. They also include whether use rights are absolute (i.e. invariant to changing water body conditions), or proportional (e.g. rising or falling as water availability or water body health fluctuate).

HOW MIGHT BENEFITS DERIVED BY MĀORI OWNERS BE SHARED OR APPLIED?

149. These are fundamentally questions of political economy – i.e. how they are addressed hinges on political and legal decisions as much as they do on purely economic considerations.

150. As above, while the rightful owners of any given resource should naturally expect to derive economic benefits from that ownership, there is a question about the timeframe over which such benefits accrue, and also about how those benefits might be applied. To the extent that Māori holders of water rights and interests wish to apply the benefits of those rights and interests to restore waterways to health and/or resolve over-allocations of use rights, this could create significant benefits to other water users (and non-users – e.g. those who value the existence of healthy waterways even without using those waterways) over a potentially lengthy transition period.

151. Applying those benefits to enhance Māori economic development could likewise produce benefits enjoyed by other water users – e.g. by providing them with extra markets, investment partners/opportunities, or improved water quality.

ARE THERE OTHER WAYS THAT EXISTING WATER USERS MIGHT BENEFIT EVEN IF MĀORI RIGHTS AND INTERESTS IN WATER ARE BETTER RECOGNISED?

152. Certainly.

153. In addition to the possible use of returns to water rights and interests being ring-fenced or otherwise applied for water body restoration, institutional improvements that better reflect Māori rights and interests could also benefit other water users.

154. This is principally because the existing RMA arrangements are both costly and uncertain. Water permits can be traded, but in costly ways. Moreover, water permits are time-limited, and Regional Councils cannot commit to renewing such permits if parties need secure long-term access to water to support related investments (e.g. in farming infrastructure).

155. If recognising Māori rights and interests in water results in better forms of water rights, lower-cost water trading, and/or an improved ability to secure long-term access to use rights, then existing water users could benefit in terms of securing more valuable water rights even while Māori secure an increased share and/or underlying ownership of use rights.[64] This could lead to additional benefits in terms of efficiency of water resource use, reduced conflicts over its use, and improved investment incentives.[65]

IF MĀORI RIGHTS AND INTERESTS TO WATER ARE RECOGNISED, MIGHT THE CROWN FACE OTHER OBLIGATIONS TO MĀORI?

156. Whether and how Māori rights and interests in water (whatever they may be) should now be recognised is a separate question to whether the Crown or any other party is culpable for those rights and interests not having been recognised sooner. Even if the Crown or such other parties could be said to be culpable, it is yet a different question as to whether they should – or can – compensate the relevant Māori for any delay in recognising or denial of their rights.[66]

157. While some settlements for historical (i.e. pre-September 1992) Treaty claims include redress components relating to waterways and their governance (e.g. in relation to the Waikato River), they do not cover use rights, and post-1992 Treaty breaches also remain to be resolved. This points to a possible need for bespoke arrangements in relation to water rights and interests (e.g. perhaps including direct compensation, and/or tax-exemption on income arising from water rights and interests).

IF MĀORI HAVE RIGHTS AND INTERESTS IN WATER, IS GOVERNMENT ACTION NEEDED TO DEFINE AND ENFORCE THOSE RIGHTS AND INTERESTS?

158. Property rights economists stress that government may or may not be involved in creating or enforcing property rights.[67] It tends to play a greater role when it is hard for private parties – but still socially desirable – to define and enforce them.[68]

[64] Similar arguments are made, and developed further, in Murray, K. and S. Wyatt, 2015, *The Incentives to Accept or Reject a Rights Regime for Fresh Water*, report prepared for the Iwi Advisors Group, Sapere Research Group.

[65] For a discussion of these benefits, see Murray, K., Sin, M. and S, Wyatt, 2014, *The Costs and Benefits of an Allocation of Freshwater to Iwi*, report prepared for the Iwi Advisors Group, Sapere Research Group.

[66] Any delay or denial up until when Māori rights and interests are established should be regarded differently to delay or denial subsequent to their establishment. Furthermore, realistically, any significant change in institutional arrangements for water control and use will take time to develop and implement, perhaps requiring a significant grace period before questions of culpable delay or denial arise.

[67] For a discussion of how small and medium-sized groups can be particularly effective in self-managing common pool resources like waterways without government intervention, see Ostrom, E., 2010, "Beyond Markets and States: Polycentric Governance of Complex Economic Systems", *American Economic Review*, 100, June, 641-672.

[68] For example, see Anderson, T. and F. McChesney (eds.), 2003, *Property Rights: Cooperation, Conflict and Law*, Princeton University Press.

159. In general terms, private parties invest in defining rights up to the point where the extra benefits of competing for resources equals the cost of doing so – because competition is costly, such parties can benefit from collectively defining rules governing resource competition.[69] Externally-imposed rules can be necessary and desirable when a greater number or more diverse group of people compete for resources (since it can be harder for them to agree rules in such cases).

160. Thus, at any given catchment level, it might be possible for water owners and users to agree their own mechanisms for recognising and enforcing any rights and interests in water newly recognised for Māori or others. That said, their costs of doing so might be much lower if national-level measures are developed that provide them with templates that can be tailored to their specific circumstances. Furthermore, legislative change or other national-level measures might be required to enable either local solutions, or nationwide solutions. In these latter cases, government action may be either needed, or simply more efficient than multiple bespoke local solutions (especially where parties are too diverse or numerous to agree their own solutions).

IF MĀORI HAVE RIGHTS AND INTERESTS IN WATER, DO WATER MARKETS NEED TO BE CREATED TO TRADE THEM?

161. Not necessarily, although it might be more efficient in some cases to do so.

162. As long as rights and interests are traded, a market (or more properly, marketplace) for such rights and interests can be said to exist. However, just as some forms of property rights can be more efficient than others, so too can different types of marketplaces for rights and interests in water.

163. Depending on how markets are structured (e.g. centralised auctions vs bilateral trading), they can deliver benefits such as low costs of trading, which are important for achieving efficient ownership. They also deliver benefits in terms of price discovery (revealing the "true" value of traded rights and interests), and liquidity (no pun intended, referring to having sufficient market depth that trades can be executed without moving prices).

164. Water markets, like electricity markets, involve additional complexities, in that not all trades are equal. Specifically, different water uses (e.g. consumptive for irrigation vs non-consumptive for hydro generation) have different impacts on water resource quantity and quality. Mechanisms are needed to "vet" water trades to ensure such impacts are acceptable. Approaches range from administrative solutions such as under the RMA, through to highly-sophisticated "smart markets" such as those used for electricity trading (where transmission constraints must be respected) which automatically vet proposed trades.[70]

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[69] For an assessment of the costs of implementing a rights-based water regime in New Zealand, see Murray, K., Sin, M. and S, Wyatt, 2014, *The Costs and Benefits of an Allocation of Freshwater to Iwi*, report prepared for the Iwi Advisors Group, Sapere Research Group.

[70] For a description of how smart markets can be applied to water trading, see Raffensperger, J. and M. Milke, 2017, *Smart Markets for Water Resources: A Manual for Implementation*, Global Issues in Water Policy Volume 12, Springer International Publishing.

165. Which type of trading arrangement is best will hinge on the specific features of the relevant water catchments, and types of rights and interests attaching to water in those catchments. In catchments with a small possible number of buyers and sellers or trades, simpler and lower-cost trading arrangements are likely to be more suitable than in catchments with numerous traders and a high number of possible trades (which can support more sophisticated and costlier trading arrangements).

166. Policy or other collective choices also affect these questions. Creating national trading templates that can be implemented locally could reduce setup costs and enable more sophisticated arrangements to be used more widely. Likewise, creating standardised short-term use rights that are more likely to be traded (and traded more frequently and for a wider range of purposes) would support more sophisticated trading arrangements than if only perpetual or non-standardised rights are created/allocated, since they would be traded far less frequently.[71]

WHAT ARE HIGH-LEVEL ECONOMIC IMPLICATIONS OF RECOGNISING MĀORI RIGHTS AND INTERESTS IN WATER?

167. Figure 3 provides a schematic representation of how recognising Māori rights and interests in water might give rise to a range of impacts.

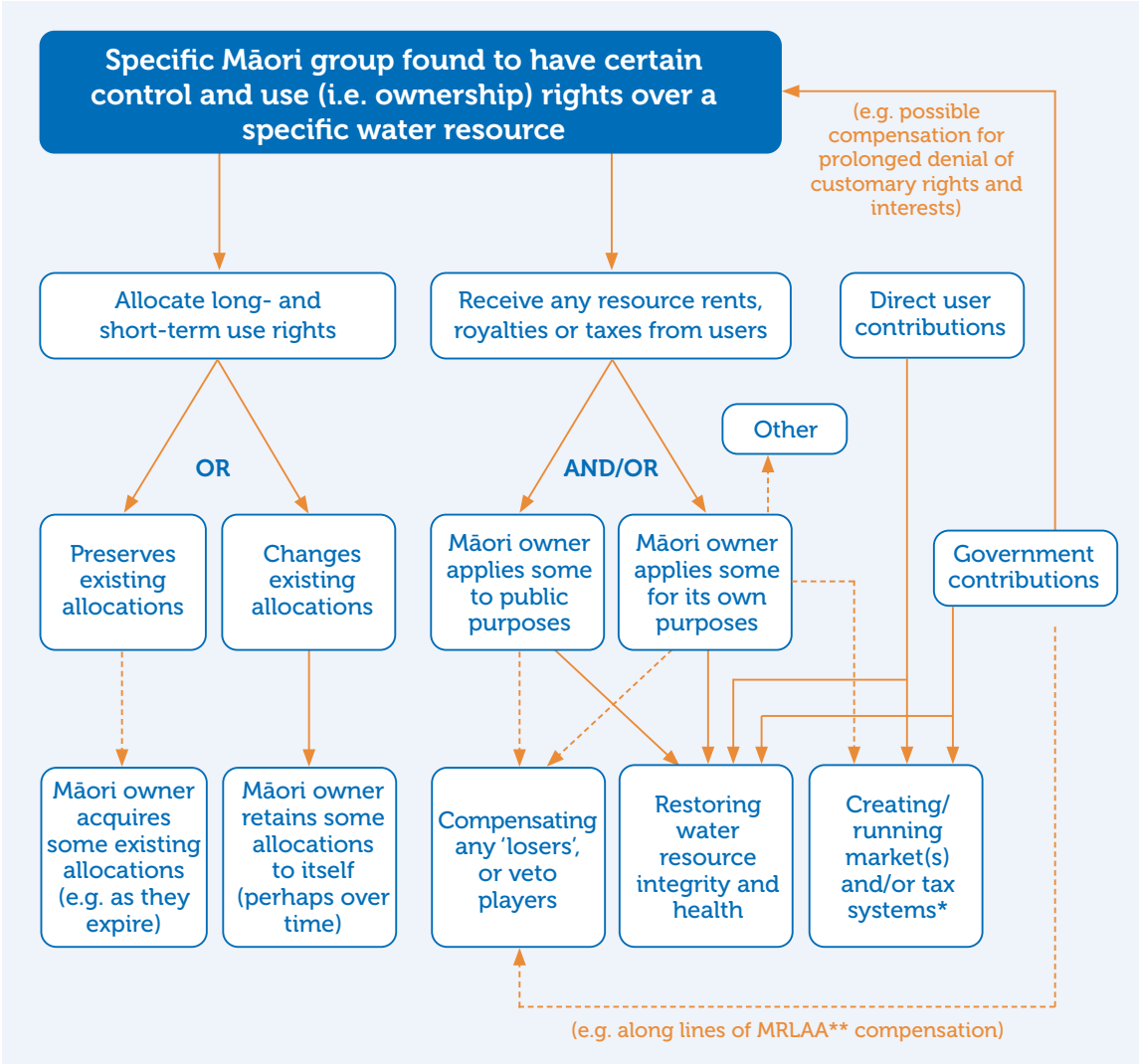
168. The nature and extent of any Māori rights and interests in specific water resources is yet to be determined. Likewise, the precise manner in which they might be recognised, and the timeframe and process for their recognition, are also yet to be determined. As such, only very general high-level economic implications can be offered.

169. One possibility is that any Māori rights and interests in specific water resources are very narrow, or not widely applicable, and can be recognised without substantive changes to existing water institutions. In that case recognising such rights and interests would have little impact on existing water users and other water stakeholders, and likely modest impact also on the relevant Māori. At the same time, leaving existing water institutions substantively unchanged would mean any inefficiencies, distortions and failures of the current system – e.g. over-allocations, water quality issues, capture of economic rents by parties allocated water permits, permit renewal insecurity – would persist.

170. Another possibility is that certain iwi, hapū, and Māori landowners are found to have very strong rights and interests in specific water bodies, and substantive institutional changes are made to recognise those rights and interests in those specific resources. This would result in a greater share of water-related economic value being captured by the relevant Māori, and better reflection of their values in ongoing management of the relevant resources. Some existing users – of the affected resources – would likely face a decline in their share of water allocations. Users of other resources might not be affected at all if reforms are targeted only at the relevant resources.

[71] Creating ACE in commercial fisheries to complement ITQ deepened trading in fishing rights (see Hale, L. and J. Rude (eds), 2017, *Learning from New Zealand's 30 Years of Experience Managing Fisheries Under a Quota Management System*, The Nature Conservancy). Likewise, creating short-term water use rights to complement perpetual access rights resulted in more water market trading in the Murray-Darling Basin in Australia (see Crase, L., O'Keefe, S., Wheeler, S. and Y. Kinoshita, 2015, "Water Trading in Australia: Understanding the Role of Policy and Serendipity", in Burnett, K., Howitt, R., Roumasset, J. and C. Wada (eds), *Routledge Handbook of Water Economics and Institutions*, Routledge).

Figure 3 – Schematic Representation of Possible Impacts of Recognising Māori Rights and Interests in Water



* Profits from market (or tax system) operation – if any (could be break-even/not-for-profit model) – retained by relevant owner(s).

**Māori Reserved Land Amendment Act 1997.

171. However, the affected users – and other water stakeholders in the relevant resources who are concerned with matters such as water quality – would enjoy countervailing benefits. The former in terms of enjoying potentially more valuable water ownership rights (even if over a smaller share of water), the latter in terms of enjoying more sustainable water management. These efficiency gains, which serve to mitigate any equity costs from reallocations – as do the equity gains to Māori of such reallocations – might be constrained if the relevant resources and rights and interests are not widespread. This is because bespoke solutions may be required in that case, which could be costly to implement. By contrast, bespoke solutions might provide particular benefits to the affected parties (i.e. by better reflecting their specific circumstances).

172. Finally, iwi, hapū, and Māori landowners might be generally found to have very strong rights and interests in a wide range of water bodies, with substantive institutional changes made to recognise those rights and interests. The high-level impacts are broadly as for the preceding case, but more widespread. Additionally, if nation-wide institutional changes are required, this means that more costly solutions might be warranted (e.g. due to economies of scale in institutional reform). That could potentially enhance the efficiency gains from reforms, and therefore mitigate any equity costs from reallocation to a greater degree (and likewise enhance the equity gains to Māori from reallocation). That could possibly be achieved while still preserving the ability to tailor solutions to specific catchments and provide a wider range of possibilities for achieving reform benefits.

173. Each of these scenarios would also be associated with varying degrees of property rights residual insecurity, and hence with varying levels of improvements in long-term investment certainty. Additionally, recognising Māori rights and interests in water may also give rise to varying liability considerations (e.g. damage to persons or third party property from uncontrolled water releases). A comprehensive assessment of all these implications would be warranted once the nature and extent of Māori rights and interests in water are better understood, and how they are to be addressed is better known.

CONCLUSION

174. We offer this brief Document as a considered and informed discussion of key legal and economic issues relating to the recognition of iwi, hapū, and Māori landowner rights and interests in water bodies. We acknowledge that there will be many other perspectives on these matters, such as mātauranga and ecological understandings. It is essential that all these issues continue to be properly explored.

175. There is further work to be done to recognise Māori rights and interests in water – not doing this work risks perpetuating weaknesses in how we use and protect the water resources on which we all depend. It is essential that this work is done with open, honest, considered, and respectful debate. We hope that this Document makes a useful contribution to our country as Māori proprietary and economic rights and interests in water gain the political attention required to advance the full ambit of 'rights definition, rights recognition and rights reconciliation'.

Kia whakarāpopoto ngā kōrero ki te whakatauki: He manga wai koia kia kore e whitikia?