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SWIMMING UPSTREAM? THE ESTABLISHMENT OF A PROPERTY RIGHTS FRAMEWORK FOR FRESHWATER RESOURCES IN NEW ZEALAND[1]

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I INTRODUCTION

> Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Garrett Hardin's famous piece, *The Tragedy of the Commons*,[2] is a sombre reminder that the vast majority of natural resources are finite. Regimes of open access to natural resources (referred to by Hardin as the 'freedom of the commons') have subsequently been replaced with regimes of statutorily-created property rights, 'commoditising' resources to enable their sustainable development. However, as a public good, any property rights created in natural resources must continue to be constrained by the greater social interest.

New Zealand currently does not confer property rights in natural resources which fall under the Resource Management Act 1991 (the RMA). This is expressly recognised within the RMA itself.[3] Instead, a system for the management of resources is provided, with a focus on decentralisation of decision-making powers to local and regional authorities. This paper focuses on the adequacy of this current regime and whether property rights are required to achieve certain social objectives, in respect of freshwater resources.[4]

To this end, a discussion of the current regime under the RMA leads the author to conclude that greater security of rights in water is required in New Zealand. The decision in *Aoraki Water Trust v Meridian Energy Ltd*[5] is cited as an example of the inadequacies of the 'first in, first served' approach to water allocation under the current regime, and it

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[2] Garrett Hardin "The Tragedy of the Commons" *Science* (13 December 1968).
[3] Resource Management Act 1991 s 122. Section 122 states that a resource consent is "neither real nor personal property."
[4] In respect to the term 'freshwater' the definition provided for by section 2 of the Resource Management Act 1991 is adopted, that is, 'freshwater' means 'all water except coastal water and geothermal water resources'. In addition, the use of the term 'freshwater' is limited largely in this paper to water flows of river systems, rather than static water resources such as lakes.
[5] *Aoraki Water Trust v Meridian Energy Ltd* (30 November 2004) HC Timaru CIV 2003 476 000733 Chisholm and Harrison JJ.

is recognised that the trade of water rights (which would promote the movement of water from low value to high value uses) is grossly under-utilised.

In determining the approach in which New Zealand show now take, the experiences of other property rights regimes are drawn upon, namely the Australian approach to freshwater resources allocation, and the New Zealand fisheries regime of 'property' rights. Under both regimes discussed, property rights in natural resources are viewed as essential to promote the efficient allocation of resources to high value uses, whilst encouraging more investment in those resources.

Applied to the context of freshwater resources in New Zealand, the conclusion is reached that first, before any attempt to establish a property regime in freshwater resources is made, Crown ownership over (and therefore authority to control) those resources must be determined vis-à-vis Māori under the Treaty of Waitangi. Otherwise freshwater resources must continue to be managed, not owned privately.

Secondly, whilst the application of 'property' as a traditional paradigm is infeasible in regulating a public good such as freshwater resources given the overarching social interests in such resources, 'property' as a gradated sense of rights based upon relative exercises of control over resource is desirable and necessary if water is to be allocated and managed efficiently and in a sustainable manner.

Although the RMA expressly rejects the notion that resource consents are property, significant elements of property are evident in the legislation, suggesting that perhaps a legislative overhaul is not essential. Instead, what may be required is a concerted effort at the regional and local levels to enhance the security of rights as registrable instruments, and the promotion of greater transferability of those rights under comprehensive regional plans.

II THE CURRENT NEW ZEALAND FRAMEWORK

The current New Zealand framework for rights in water has its origins in the English common law riparian doctrine. Derived from land ownership, riparian rights permitted usufructuary access and use of surface water flow to the middle of a river (known as the ad medium filum aquae doctrine).[6] Like other common law jurisdictions, New Zealand sought to better manage increasing conflicts over water use and degrading water quality through legislative intervention.[7]

Riparian doctrine was largely extinguished under the Water and Soil Conservation Act 1967 (the WSCA) which vested the exclusive rights to take, divert, and dam water in the Crown.[8] Apart from limited statutory rights,[9] no person had a right to take, use or divert water without the written consent of the Minister.[10]

A The Resource Management Act 1991

The WSCA was both repealed and replaced by the current legislative regime for resource management in New Zealand, the Resource Management Act 1991 (the RMA). The RMA adopts the vesting provision of the WSCA, and provides limited statutory rights to take and use water for domestic and stock purposes[11] plus for a limited number of other purposes.[12] All other uses are permitted only if they are provided for under a regional plan or granted via a resource consent issued by a local authority. [13]

In consideration of whether or not to grant a resource consent under the RMA, a local authority is to have regard to the purposes and principles of the RMA, of which the

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[6] Hinde, McMorland, & Sim *Butterworths Land Law in New Zealand* (Butterworths, Wellington, 1997) para 2.232.
[7] Joshua Getzler *A History of Water Rights at Common Law* (Oxford University Press, New York, 2004) 44.
[8] Water and Soil Conservation Act 1967 s 21(1).
[9] Water and Soil Conservation Act 1967 s 21(1).
[10] Water and Soil Conservation Act 1967 s 21 (1A).
[11] Resource Management Act 1991 ss 3(b) and (e).
[12] Those purposes include: to exercise recognised customary activities by Māori (section 17A); the use of geothermal waters by tangata whenua (section 14(3)(c)); and for fire-fighting purposes (section 14(3)(e)).
[13] Resource Management Act 1991 s 3(a).

promotion of sustainable management is to be the paramount consideration.[14] Matters of national importance must also be recognised and provided for.[15] These matters include the preservation of the natural character of lakes and rivers,[16] the relationship of Māori and their culture with water and taonga,[17] and the protection of recognised customary activities.[18]

Other matters that decision makers must have particular regard to include kaitiakitanga (stewardship),[19] the efficient use and development of resources,[20] the maintenance and enhancement of the quality of the environment,[21] and the benefits of renewable energy.[22] Further, the principles of the Treaty of Waitangi must be taken into account.[23] Despite the array of considerations that must be accounted for however, in reality permits are granted upon a 'first come, first served' basis.[24]

A resource consent may be granted for a duration of up to 35 years,[25] with the possibility of review according to conditions specified in the consent,[26] or in order to enable the levels, flows, rates or standards of water set in a regional plan to be met,[27] or when required by new national environmental standards set under the RMA.[28] No provision for compensation exists under the RMA to account for the reduction or extinguishment of rights.

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[14] Resource Management Act 1991 s 5(1).
[15] Resource Management Act 1991 s 6.
[16] Resource Management Act 1991 s 6(a).
[17] Resource Management Act 1991 s 6(e).
[18] Resource Management Act 1991 s 6(g).
[19] Resource Management Act 1991 s 7(a). 'Kaitiakitanga' is defined under section 2 of the Resource Management Act 1991 as meaning, 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.'
[20] Resource Management Act 1991 s 7(b).
[21] Resource Management Act 1991 s 7(f).
[22] Resource Management Act 1991 s 7(j).
[23] Resource Management Act 1991 s 8.
[24] Ford, Butcher, Edmonds, & Braggins *Economic Efficiency of Water Allocation* MAF Technical Paper No. 2001/7 Prepared for MAF Policy (November 2001, Ministry of Agriculture and Fisheries, Wellington) 18.
[25] Resource Management Act 1991 s 123(d).
[26] Resource Management Act 1991 s 128(1)(a).
[27] Resource Management Act 1991 s 128(1)(b).
[28] Resource Management Act 1991 s 128(1)(ba).

A water permit, as a resource consent, is owned separately from title to land and may therefore be transferred in whole or in part to any occupier or owner in respect of which the permit is granted,[29] and to another person on another site, or to another site, if both sites are within the same catchment, aquifer, or geothermal field.[30] The transfer of a water permit is however qualified by the requirement that the transfer must be expressly provided for in a regional plan and be approved by the relevant consent authority.[31]

B Discussion of the Present Framework

From a property rights perspective, the RMA expressly rejects any notion that a resource consent is either real or personal property.[32] Instead, from the outset, the RMA has focussed solely on the management of resources. A significant influence in the reluctance of the New Zealand government to create rights of ownership in natural resources most likely stemmed from Māori sentiment that questions of ownership under the Treaty of Waitangi were to be settled outside of a legislative framework.[33] Māori were of the view that before any question of management of natural resources arose, the question of ownership of those resources must first be settled.[34]

Difficulties have arisen in the absence of clearly defined property rights in water resources however. The events surrounding the disputed rights of users in the Waitaki

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[29] Resource Management Act 1991 ss 136(1) and (2).
[30] Resource Management Act 1991 s 136(2).
[31] Resource Management Act 1991 s 136(2).
[32] This is stated under section 122 of the Resource Management Act 1991. Although this paper will progress on the footing that water rights under the RMA are not 'property', due to the clearly expressed will of Parliament, it is suggested that absent section 122 there would be a very strong argument that a water permit does confer a right in 'property' over a resource. The concept of 'property' with respect to natural resources will be discussed further below.
[33] Morris Te Whiti Love "Ten Years of the Resource Management Act for Maori" Speech delivered to the Resource Management Law Association, Auckland Branch (Resource Management Law Association, Auckland, 6 December 2001).
[34] Janine Hayward *The Treaty Challenge: Local Government and Maori* An Overview Report Commissioned by the Crown Forestry Rental Trust (2002, Crown Forestry Rental Trust, Wellington) 44.

Catchment provide a good illustration of those difficulties, litigated at the High Court in the case of *Aoraki Water Trust v Meridian Energy Ltd.*[35]

1 Aoraki Water Trust v Meridian

The *Aoraki* decision concerned the application by the Aoraki Water Trust to obtain a resource consent (in the form of a water permit) from the Canterbury Regional Counsel (the CRC) to take and divert water from Lake Tekapo for agricultural irrigation purposes. Meridian had established structures in place (under long-standing resource consents) for the intake and control of water for electricity generation purposes, slightly 'down lake' of Aoraki's proposed taking site.[36]

Meridian was in opposition to Aoraki's application, claiming that the water in the Waitaki Catchment was already fully allocated.[37] Meridian argued the principles of non-derogation from grant, and legitimate expectation of non-erosion by future grant meant that the CRC could not issue new water permits inconsistent with Meridian's existing rights, which were acquired on a, 'first-come, first-served' basis.[38] It was submitted that a water permit was a valuable right, not merely a permission or privilege, as argued by Aoraki.[39]

The Court found that, whilst a permit is not real or personal property (as expressed in the RMA),[40] the CRC could not derogate from the existing rights of Meridian by granting later inconsistent grants and Meridian possessed a legitimate expectation that its rights would not be eroded. The Court reasoned that, unless principles of non-derogation and legitimate expectation were applied to an existing permit, the sustainable management objectives of the RMA would be defeated by later inconsistent

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[35] *Aoraki Water Trust v Meridian Energy Ltd* (30 November 2004) HC Timaru CIV 2003 476 000733 Chisholm and Harrison JJ.
[36] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 1 Chisholm and Harrison JJ.
[37] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 2 Chisholm and Harrison JJ.
[38] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 23 Chisholm and Harrison JJ.
[39] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 23 Chisholm and Harrison JJ.
[40] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 26 Chisholm and Harrison JJ.

grants. [41] Consequently, approving the 'first-in, first-served' approach to resource allocation,[42] the Court held that the pre-existing rights holder "enjoys an *exclusive* right to the resource."[43]

With the decision in *Aoraki* effectively signalling that the Waitaki Catchment was a fully allocated resource, the Government acted contrary to the RMA's philosophy of governmental non-interference in individual cases[44] and exercised the call-in powers of the Minister over all pending resource consent applications under the RMA.[45] In the absence even of a regional plan to deal with the future administration of the Catchment, the Resource Management (Waitaki Catchment) Amendment Act 2004 was then enacted, creating an independent Board to formulate a regional plan for the allocation of water in the Waitaki Catchment over twelve months (due the end of September 2005). [46]

The *Aoraki* proceeding highlights first, the need to have clearly defined property rights in water which are not subject to interference by third parties. Meridian, faced with insecurity over the extent of its water rights was forced to litigate over the matter, leaving the judiciary to remedy the apparent defects of the RMA. Such a situation is unlikely to encourage investment in water resources if the perceived risks to the existence of water rights are greater than the perceived benefits of a investment.

Secondly, *Aoraki* identifies the need to have in place mechanisms to allow the continued sustainability and transferability of water resources in the event that a resource is fully allocated. Following the outcome of the *Aoraki* decision, Aoraki and any other interested group could acquire water rights in the Waitaki Catchment only through

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[41] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 28 Chisholm and Harrison JJ.
[42] The Court cited *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 as authority for the 'first-in, first-served' approach to water allocation.
[43] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32, para 31 Chisholm and Harrison JJ (emphasis added).
[44] This was emphasised by Rt Hon Geoffrey Palmer in the 2nd Reading of the Resource Management Bill (28 August 1990).
[45] Resource Management Act 1991 s 140.
[46] Ministry for the Environment "Waitaki Catchment" < http://www.mfe.govt.nz > (last accessed 14 July 2005).

transfer of those rights under the RMA,[47] however with no regional plan in existence, water could have potentially remained with existing users in a non-sustainable or low-use manner.

2 *Trade in water rights*

Whilst the RMA provides for the transfer of water permits (albeit in a limited sense),[48] this has proven to have had little utilisation, perhaps through a lack of public knowledge of the ability to transfer permits, or the potential benefits of transfer, and the abundance of water resources in many regions.[49]

An example of one of the few transfer schemes established under the RMA is in respect of the Oroua Catchment managed by the Manawatu-Wanganui Regional Council. The scheme was fuelled by growing demand for water by irrigators and concerns over the effects of abstraction and pollution on water quality.[50] A minimum flow regime has been established, whereby in periods of water scarcity the trade of water entitlements would be encouraged to promote the efficient reallocation of water. [51] The small geographical size of the Catchment, its limited number of users, and the diverse seasonal irrigational requirements of agricultural uses are the underlying reasons that the scheme was seen as feasible.[52] The Plan's success still remains to be seen but represents an example of how, and in what circumstances, trade in water might be realised under the RMA.

Whilst water markets may be workable under the existing RMA framework through a more pro-active approach of promotion and public education by local

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[47] Transfers of water rights may only proceed under certain conditions under s 136 of the RMA.
[48] Resource Management Act 1991 s 136.
[49] Harris Consulting *Property Rights in Water: A Review of Stakeholders' Understanding and Behaviour* Report Prepared for MAF Policy and Ministry for the Environment (November 2003, Ministry of Agriculture and Forestry, Wellington) 18.
[50] Mike Kearney and Jim Skinner *Transferable Water Permits Two Case Studies of the Issues* MAF Policy Technical Paper 97/12 (December 1997, Ministry of Agriculture and Fisheries, Wellington) 10.
[51] Kearney and Skinner, above n 47, 11.
[52] Kearney and Skinner, above n 47, 11.

authorities,[53] it is necessary to first address security and clarity in those water rights before such a development can take place.[54] For example, under the present regime, a consulting report prepared for the Ministry of Agriculture and Fisheries (MAF) in November 2003 found that the quality of title for resource consents was hugely variable among regions.[55] Conditions of use were alterable in the transfer of permits[56] and in the granting of further consents upstream, the latter being highly likely to derogate from the rights of existing users.[57] This issue was of course emphasised in the discussion of *Aoraki Water Trust v Meridian*,[58] above.

III COMPARATIVE REGIMES IN NATURAL RESOURCES

A useful tool in helping to determine whether a property rights framework is necessary to ensure the efficient and sustainable allocation of our freshwater resources in New Zealand is to consider similar experiences of foreign jurisdictions. Here, the approach of the Australian states will be discussed. In addition, the establishment of a property rights for saltwater fisheries in New Zealand under the Fisheries Act 1986 (and subsequent Acts) will be examined as an example of the application of property rights to natural resources in a local context.

A The Australian Approach to Water Rights

Like New Zealand, Australian water law derives its origins from English common law. However, the need for legislative intervention to promote sustainability and efficient allocation mechanisms has been a significantly more pressing issue given the extreme climatic conditions on the continent. The exclusive rights to take, dam, and divert

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[53] Ford, Butcher, Edmonds, & Braggins, above n 21, 19.
[54] Ford, Butcher, Edmonds, & Braggins, above n 21, 18.
[55] Kearney and Skinner, above n 47, 11.
[56] Ford, Butcher, Edmonds, & Braggins, above n 21, 18.
[57] Harris Consulting, above n 46, 17.
[58] *Aoraki Water Trust v Meridian Energy Ltd,* above n 32.

freshwater were therefore placed in the Crown at a much earlier stage, for example, in 1886 by Victoria,[59] and in 1912 by New South Wales.[60]

1 The COAG reforms

"[T]he need for property right arrangements to be put fully in place"[61] was the principal submission of the 1994 Council of Australian Governments (COAG), which set the future policy direction for water reform in Australia. Whilst complete consistency between states in the form of entitlements was not seen as ultimately desirable, the COAG reforms sought to consolidate emerging state policies in respect of water rights.[62]

The aims of the reforms were to correct inefficiencies in water use, prevent further degradation of rivers, and promote better water use.[63] To achieve these objectives the proposed actions included: the separation of water rights from land title (primarily to facilitate trade); allocations for the environment; increased public consultation; and clearly specified allocations in terms of ownership, reliability, transferability, and volume.[64]

All Australian states have subsequently taken steps to amend their legislative and administrative frameworks in the implementation of the COAG reforms.[65] Victoria is currently in the process of overhauling its legislative and administrative frameworks.

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[59] Productivity Commission *Water Rights Arrangements in Australia and Overseas: Annex C: Victoria* Commission Research Paper (2003, Productivity Commission, Melbourne) 4. (Hereafter "Productivity Commission Annex C: Victoria")

[60] Productivity Commission *Water Rights Arrangements in Australia and Overseas: Annex B: New South Wales* Commission Research Paper (2003, Productivity Commission, Melbourne) 6. (Hereafter "Productivity Commission Annex B: New South Wales")

[61] D E Fisher "Rights of Property in Water: Confusion or Clarity" 21 EPLJ 200.

[62] Brian Haisman *Impacts of Water Rights Reform in Australia* International Working Conference on Water Rights: Institutional Options for Improving Water Allocation (12-15 February 2003, Hanoi, Vietnam) 13.

[63] Poh-Ling Tan *Diving into the Deep: Water Markets and the Law* Paper presented to the Australian Institute of Public Affairs conference *Establishing Australian Water Markets* (August 2004, Institute of Public Affairs, Melbourne) 1.

[64] Chief Executive Officers' Group on Water *Report to the Council of Australian Governments* (April 2003, Natural Resource Management Ministerial Council, Australia) para 14.

[65] Poh-Ling Tan, above n 60, 1.

A variety of allocation mechanisms are utilised by the Australian states, with all allocations granted initially by administrative means. Whilst some allocations remain attached to land (for example, stock and domestic use rights, and some water rights within irrigation districts) many allocations are now granted in the form of tradeable components separated from land title to facilitate trade. For example, in New South Wales water is allocated through a freely tradeable access component (specifying a rate of extraction or volume of water to be extracted), plus a use approval (specifying the use to which the water may be put at a particular location).[66] A similar situation exists in Queensland,[67] and is proposed under the Victorian White Paper.[68]

Bulk entitlements may be granted under some jurisdictions to electricity providers, urban water suppliers, or irrigation districts. In Victoria a bulk entitlement is capable of being allocated separately to an environmental use.[69]

Several Australian jurisdictions provide for a tiered system of priority in water rights. New South Wales, for example, gives priority in all but the most extreme circumstances to the environment and prioritises various types of licences.[70] The White Paper on water reform in Victoria (issued in June 2004) has the following approach to priority: first, rights held by the Crown assume paramount priority; secondly, allocations for the environment, authorities, tourism, and recreational values assume a mid-level priority; and thirdly, individually held rights including licences, irrigation rights, and consumptive rights assume the lowest priority.[71]

The duration of water rights varies between jurisdictions, with the duration of rights dependent on the perceived balance to be struck between encouraging security and

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[66] Water Management Act 2000 (NSW) ss 56, 89.
[67] Productivity Commission *Water Rights Arrangements in Australia and Overseas: Annex D: Queensland* (2003, Productivity Commission, Melbourne) 24. (Hereafter "Productivity Commission Annex D: Queensland")
[68] Victorian Government Department of Sustainability and Environment *Securing Our Water Future Together: White Paper* (June 2004, Department of Sustainability and Environment) 44. (Hereafter "Victorian Government White Paper")
[69] Victorian Government White Paper, above n 65, 44.
[70] Productivity Commission Annex B: New South Wales.
[71] Victorian Government White Paper, above n 65, 19.

meaningful investment, and ensuring the representation of social and environmental interests. Consequently, the Victorian White Paper proposes a 15-year review of all allocations with almost no prospect of variation or termination of allocations in between reviews, [72] whereas South Australia issues licences in perpetuity but subject to review at any time.[73]

Despite the push for full property rights in water by the COAG reforms, there has yet to be any real recognition of a right to compensation when rights are reduced or terminated. Legislative recognition of a right to compensation exists only in New South Wales and Western Australia, and only in limited circumstances.[74]

The environment as a legitimate user of water was expressly recognised by the COAG reform policy, [75] whereby provisions for the environment were required to be, "clearly and unequivocally defined and codified," prior to the establishment of tradeable water markets. [76] The majority of Australian jurisdictions do not however provide for separate allocations for the environment, but include environmental flow objectives within other allocations.[77]

New South Wales allows for environmentally specific allocations in limited circumstances,[78] and, as mentioned, Victoria permits bulk entitlements for environmental uses.[79] Rejecting the placement of environmental conditions upon existing licences as effectively relegating the environment to the status of a residual consideration, the

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[72] Victorian Government White Paper, above n 65, 29-30.
[73] Water Resources Act (SA) s 29.
[74] For example, under the Rights in Water and Irrigation Act 1914 Sch 1 cls 39(1), (2), and (5) (WA), substantially amended in 2000, compensation is payable if a water licence is varied only if the pre-existing use was reasonable, authorised, consistent with the objects of the RWIA, and the effects of the exercise of the power are permanent, unfair, and unreasonable with respect to other licence holders in the area.
[75] Natural Resource Management Standing Committee *A National Approach to Water Trading* (November 2001, Natural Resource Ministerial Council, Commonwealth of Australia, Canberra) para 7.2.
[76] Natural Resource Management Standing Committee, above n 71, para 7.2.
[77] Productivity Commission *Water Rights Arrangements in Australia and Overseas* (2003, Productivity Commission, Melbourne) 60.
[78] Water Management Act 2000 s 89 (NSW).
[79] Victorian Government White Paper, above n 65, 44.

Victorian White Paper proposes creating Water Reserves, that is, bulk shares allocated to the environment as a form of cap on water use.[80]

2 *The Murray-Darling Basin*

The Murray-Darling Basin represents an example of a water rights transfer scheme within the largest surface water system in Australia. The Basin straddles five states[81] and is currently governed by the Murray-Darling Basin Agreement 1992 (the Agreement), which determines each state's allocation to the water resource.[82]

In 1997, a cap on water consumption was agreed between the states in the promotion of active trade in water entitlements.[83] Trade was further fuelled by the separation of land title to water rights in all jurisdictions, as proposed by the 1994 COAG reforms. In addition to trade within jurisdictions, the Murray-Darling Basin is also currently the centre of a Pilot Inter-State Water Trading Project, provided for under the Agreement.[84] The project enables the permanent transfer of private water rights, with the object of increasing efficient allocations to high value uses, whilst at the same time protecting the environment.[85]

In this latter respect, a number of approaches have been trialled to internalise the environmental costs of water transfers within the water market.[86] Such measures have included a type of 'exchange rate' whereby, "[a] reduction in the actual volume of water

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[80] Victorian Government Department of Sustainability and Environment *Securing Our Water Future: Green Paper (*August 2003, Department of Sustainability and Environment) 27.
[81] Productivity Commission *Water Rights Arrangements in Australia and Overseas: Annex A: Murray-Darling Basin* Commission Research Paper (2003, Productivity Commission, Melbourne) 1. (Hereafter "Productivity Commission Annex A: Murray-Daring Basin")
[82] Productivity Commission Annex A: Murray-Daring Basin, above n 77, 14.
[83] Megan Dyson & John Scanlan *Trading in Water Entitlements in the Murray-Darling Basin in Australia – Realizing the Potential for Environmental Benefits?* World Conservation Union <http://www.iucn.org>.
[84] Murray-Darling Basin Agreement 1992 Sch E.
[85] Murray-Darling Basin Agreement Sch E cl 1(c).
[86] Dyson & Scanlan, above n 79.

that can be taken is applied to transfers upstream in recognition of decreasing security of supply..."[87]

Within the first two years of the Project's implementation, the vast majority (some 90%) of water transfers were to South Australia, [88] explained by South Australia's status as the driest of the Australian states whilst also having the highest value crops per volume of water consumed.[89] The environmental impact of the transfers has been said to be minimal given their small number, however, "from a salinity perspective and in the long-run, inter-state trading can be expected to have a negative impact on river salinity."[90]

The Murray-Darling Basin system is just one example of the concerted effort by the Australian authorities to enhance property rights in water and encourage water transfers. The separation of water rights from land title has gone far in achieving these goals.

Nevertheless, following the decisions of the High Court of Australia in *Mabo v Queensland,*[91] where native title was recognised by the common law of Australia, and *Yanner v Eaton,*[92] where customary hunting rights were found not to have been extinguished by the vesting of property in fauna in the Crown, the closer examination of Aboriginal customary rights and ownership in natural resource regimes in Australia is likely to be inevitable. The consequences for this on the security of existing property rights may be significant, as illustrated by the New Zealand fisheries regime, below.

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[87] Dyson & Scanlan, above n 79.
[88] Mike Young, Darla Hatton MacDonald, Randy Stringer, and Henning Bjornlund *Inter-State Water Trading: A Two Year Review* Prepared for the Murray-Darling Basin Commission (December 2000, Commonwealth Scientific and Industrial Research Organisation, Australia).
[89] Dyson & Scanlan, above n 79.
[90] Young, Hatton MacDonald, Stringer, and Bjornlund, above n 84, 3.
[91] *Mabo v Queensland* (No 2) (1992) 175 CLR 1 (HCA).
[92] *Yanner v Eaton* [1999] HCA 53 (7 October 1999).

B The New Zealand fisheries regime

The New Zealand fisheries framework provides a useful example of the establishment of a property rights regime in a natural resource, specifically here to provide for the utilisation of fisheries resources while ensuring their continued sustainability.[93]

The Fisheries Amendment Act 1986, amending the Fisheries Act 1983, first introduced a Quota Management System (QMS) for the allocation of fisheries stocks in New Zealand. The current legislative regime (in a transitional phase between the Fisheries Act 1983 and the Fisheries Act 1996) is based upon an annual Total Allowable Catch (TAC) set by the Minister.[94]

In setting the Total Allowable Commercial Catch (TACC), the Minister is to have regard to non-commercial interests including those customary interests of Māori, and recreational interests.[95] The TACC is then allocated personally in the form of Individual Transferable Quotas (ITQ's), comprised of a number of individually allocated shares.[96] The number of shares (of equal value) allocated to a person are determined by that person's provisional catch history.[97]

Under the fisheries scheme ITQ's exhibit strong, but reduced, property characteristics in comparison with earlier legislation. ITQ's are, and have been,[98] registered interests capable of being caveated,[99] mortgaged,[100] and transferred,[101] with a

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[93] Fisheries Act 1996 s 8(1).
[94] Fisheries Act 1996 s 13. A component of the TAC is the Total Allowable Commercial Catch (TACC), set by the Minister under section 20 of the 1996 Act.
[95] Fisheries Act 1996 s 21(1).
[96] In order to exercise the ITQ a fishing permit, or a high seas fishing permit, must be acquired by a user under section 89 and section 113G.
[97] Fisheries Act 1996 ss 32 and 47.
[98] The general characteristics of ITQ's regarding tradeability, security, perpetuity, and their ability to be caveated, were set out under section 27 of the Fisheries Act 1996.
[99] Fisheries Act 1996 s 147.
[100] Fisheries Act 1996 s 136.
[101] Fisheries Act 1996 s 132. Under section 132 subsection 2 however, a part of an ITQ is non-transferable, and under subsection 4 provisional individual transferable quotas are transferable only by operation of law.

certified copy of a record of ITQ deemed to be conclusive evidence of ownership.[102] Yet, since the passage of the Fisheries Act 1996 Amendment Act 1999, ITQ's are no longer automatically issued in perpetuity.[103]

Under the Fisheries Act (and previous enactments) the Minister is clearly capable of diminishing rights in fisheries through the reduction of the TAC, which consequently reduces all ITQ's proportionately.[104] The effects of reduced TAC on rights holders are partially mitigated through the requirement that unencumbered shares owned by the Crown must be transferred proportionately to quota owners.[105] Further, as a creation of statute, the 'property' rights created by the fisheries legislation since 1986 are inherently susceptible to diminution and extinguishment without compensation, discussed further in respect of property rights generally, below.

1 The fisheries regime and Māori

The establishment of the QMS system for New Zealand fisheries in 1986 coincided with the growth of legal and political assertion by Māori over the rights to access and manage their fisheries, guaranteed to them under Article II of the Treaty of Waitangi 1840.[106] The milestone decisions of *Te Weehi v Regional Fisheries Officer*,[107] holding that Māori customary rights were preserved under the Fisheries Act 1983, and *NZ Māori Council v AG*,[108] combined with the QMS's effective exclusion of part-time Māori fisherman,[109] laid the foundations for a Māori challenge to any Crown attempt to establish ownership rights in fisheries.

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[102] Fisheries Act 1996 s 168.
[103] Fisheries Act 1996 Amendment Act 1999 s 85. Previously section 27 of the Fisheries Act 1996 had provided that ITQ's were issued in perpetuity.
[104] Fisheries Act 1996 s 22.
[105] Fisheries Act 1996 s 22(1).
[106] Andrew Day *Fisheries in New Zealand: The Maori and the Quota Management System* Report Prepared for The First Nation Panel on Fisheries (March 2004, First Nation Panel on Fisheries, Vancouver) 1.
[107] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
[108] *New Zealand Maori Council v Attorney-General* [1987] NZLR 641 (CA).
[109] Brookers Fisheries Law (Brookers, Wellington, 1995) Introduction para 0.08(1) (Last updated 2 July 2005).

In *Ngai Tahu Maori Trust Board v AG*,[110] several Māori applicants joined to seek injunctions against the Minister taking any further action in respect of the implementation of the QMS.[111] Greig J was satisfied that a strong case existed whereby Maori, before 1840, had highly developed and controlled fisheries over the entire coastal area inhabited by them.[112] The Judge referred to *Te Weehi v Regional Fisheries Officer*[113] and the Treaty of Waitangi in finding that the Crown was prevented from doing anything under the Fisheries Act 1983 to restrict those rights of Māori,[114] and subsequently issued the injunctions sought.

The result for Maori was the passage of the Maori Fisheries Act 1989 as an interim solution by Government,[115] followed by the greater 'Sealord Deal', under which Māori were to receive a 20 percent share of the annual quota whilst ensuring the continued recognition of customary fishing rights.[116] The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 finalised the settlement, barring future Māori claims.

The New Zealand fisheries regime is a clear example of the problems generated when attempting to create an economically efficient regime of property rights in a natural resource without first establishing unambiguous title and authority of the Crown to do so.[117] However, it has also been suggested that the forced dispute resolution between Māori and the Crown has been a positive outcome of the establishment of the QMS, which acted as a catalyst in active settlement and redistribution.[118] Whether Māori are satisfied with the outcomes of the QMS settlement though, is debateable.

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[110] *Ngai Tahu Maori Trust Board v AG* (2 November 1987) HC Wn Registry CP559/87, CP610/87, CP614/87, Greig J.
[111] *Ngai Tahu Maori Trust Board v AG,* above n 106, 2 Greig J.
[112] *Ngai Tahu Maori Trust Board v AG,* above n 106, 6 Greig J.
[113] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
[114] *Ngai Tahu Maori Trust Board v AG,* above n 106, 8 Greig J.
[115] This Act established the Maori Fisheries Commission, which was to purchase 10 percent of already allocated quotas under the QMS. Also created by the Act was Aotearoa Fisheries Ltd, a company created to utilise half of the purchased quotas. The remaining 50 percent of quotas were then leased on an annual basis, preferably to Maori fishermen.
[116] This is now recognised under the Fisheries Act 1996. Section 186 recognises customary rights of Māori, whilst section 44 recognises that Te Ohu Kai Moana Trustee Ltd is entitled to 20 per cent of quota.
[117] Richard Boast "Maori Fisheries 1986 – 1998: A Reflection (1999) 30 VUWLR 111, 134.
[118] Andrew Day *Fisheries in New Zealand: The Maori and the Quota Management System* Report Prepared for The First Nation Panel on Fisheries (March 2004, First Nation Panel on Fisheries, Vancouver) 7.

IV IS PROPERTY REQUIRED THOUGH?

A Desirable characteristics of 'property'

The Australian freshwater resources regime and the New Zealand saltwater fisheries regime have clearly recognised property rights as the most appropriate mechanism to achieve certain ends. These characteristics include exclusivity, alienability, flexibility, security of tenure, and transferability.[119] In particular, it is suggested that economic efficiencies of enhanced trade between users whilst ensuring sustainability was the primary motivation in both cases. Despite a purported desire to create 'property' in these resources, both statutorily created regimes function in the absence of a right to compensation, a characteristic supposedly inherent in the concept of property.

1 Economic benefits of trade and investment

Aristotle, in 333 BC, wrote that, "when everyone has a distinct interest, men will not complain of one another, and they will make progress, because every one will be attending to his own business."[120] Aristotle's ideas still hold for those advocates of private property rights today. An illustration of this is the Australian experience above, where the paramount motivation for the creation of more secure rights in freshwater resources has been to promote the efficient transfer of rights from low value to high value uses.[121] The perception has been that clearly defined rights of sufficient duration to allow for meaningful investment and separated from title to land, will best maximise social welfare.[122]

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[119] Anthony Scott & Georgina Coustalin 'The Evolution of Water Rights" 35 Nat Res Jnl 821, 823.
[120] Jeremy Waldron "Property" in Edward N Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Fall 2004 Edition) electronic access at <http://plato.stanford.edu/archives/fall2004/entries/property/> (last accessed 24 August 2005).
[121] Chief Executive Officers' Group, above n 61, para 14.
[122] Dr John J Pigram *Tradeable Water Rights: The Australian Experience* Prepared for Centre for Water Policy Research, NSW (21 June 1999, Taiwan Institute for Economic Research, Taipei) 8.

Logically, the need for a market in trade for water rights will only arise in the situation of a fully allocated resource, property rights in those resources not fully allocated will be allocated through administrative means.[123] Similarly, a water right does not have to be classified as a pure property right to enable its transfer. This is of course the current state of affairs under the RMA in New Zealand.[124] More secure rights merely promote the efficiency of those transactions.

However, the Australian position advocating for the establishment of 'full' property rights in water[125] is limited by the reality that a pure market approach to water allocation is infeasible, due to the need to account for environmental interests and particularly in the New Zealand context, the interests of Māori. The difficulties in establishing a system of property rights based solely on economic efficiencies has been clearly illustrated by the experience of creation of the Quota Management System in New Zealand fisheries, where it was legally uncertain as to whether the Crown was in fact able to allocate the resource at all.[126]

In respect of the environment, the Environmental Defender's Office (Australia) has expressed the opinion that: [127]

> It is all very well to... decide that wealth maximisation requires moving water to its highest value use, but this is essentially a one dimensional view... It ignores the complicated effects of water extraction on other aspects of the environment and ignores cumulative and long term effects which are not adequately taken into account by market or property based mechanisms.

Through the creation of secure property rights of significant duration and a presumption of renewal, the establishment of meaningful investment may provide a counter-weight to the effects of a market-based approach to water allocation. By minimising the risk of arbitrary interference by the state and third parties, holders of

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[123] Kearney & Skinner, above n 47, 9.
[124] Resource Management Act 1991 s 136.
[125] D E Fisher, above n 58.
[126] Richard Boast, above n 113, 134.
[127] Environmental Defender's Office *Inland Rivers, Regulatory Strategies for Ecologically Sustainable Development* (Environmental Defender's Office, Melbourne, 1994) 123.

water rights are provided with an incentive to seek to maximise benefits over time, requiring the promotion of the sustainability of the freshwater resource.

Therefore, the creation of secure property rights in freshwater made be necessary, but not sufficient in balancing other societal interests with trade and investment. An integrated approach between regulatory and market mechanisms is desirable. [128]

2 Compensation for statutorily created property rights

Compared to the benefits of trade and investment which may occur under reasonably secure property rights, the ability to claim compensation in the event that a property right is reduced or extinguished exists only in the highest form of property rights. In the New Zealand and Australian colonies, the common law did not recognise rights in water as property, and subsequently no claim for compensation existed.[129] The establishment of statutorily created rights in property therefore raises the important question of whether these rights are compensable in the absence of a statutory provision to that end.

This issue has been discussed on several occasions in the High Court of Australia in terms of section 51 of the Australian Constitution, which provides that the Australian Parliament, "shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ...(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

In *Health Insurance Commission v Peverill*,[130] the High Court found that the reduction of a statutorily created right to receive monetary benefits under the Health Insurance Act 1973 (Cth) was not an 'acquisition of property' under section 51(xxxi) of the Constitution. It was held that in the absence of any antecedent proprietary right, no

[128] Poh-Ling Tan, above n 60, 5.
[129] Getzler, above n 4, 43.
[130] *Health Insurance Commission v Peverill* (1993) 179 CLR 226 (HCA).

claim for compensation can exist in the event that a statutorily created right is reduced or extinguished.[131] Rights of that 'kind', it was said, "are inherently susceptible to variation."[132]

The reasoning in *Peverill* was subsequently applied to the natural resources context in *Commonwealth v WMC Resources Pty Ltd*,[133] where compensation was sought by WMC following the extinguishment of a petroleum exploration permit covering a section of the continental shelf. It was found that the rights possessed by WMC under the exploration permit had no existence except by a Commonwealth statute,[134] and no compensable benefit or advantage was acquired by the Commonwealth upon extinguishment of the permit.[135]

WMC Resources was distinguished from the earlier decision of the Court in *Newcrest Mining (WA) Ltd v Commonwealth*,[136] which had found that the extinguishment of Newcrest's mining leases by legislation extending the Kakadu National Park had amounted to an acquisition of property by the Commonwealth. The basis for the distinction was that through the extinguishment of Newcrest's rights, the property of the Commonwealth was enhanced through the elimination of the Commonwealth's liability to have minerals extracted from its land.[137]

In the New Zealand context, the issue of compensation for the deprivation of property rights in fisheries under the Quota Management System was examined by the High Court in *Cooper v AG*.[138] There, Baragwanath J noted that New Zealand has no equivalent protection of property rights to the Fifth Amendment of the US

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[131] *Health Insurance Commission v Peverill,* above n 126, 237 Mason CJ, Deane and Gaudron JJ.
[132] *Health Insurance Commission v Peverill,* above n 126, 237 Mason CJ, Deane and Gaudron JJ.
[133] *Commonwealth v WMC Resources Pty Ltd* (1998) 194 CLR 1 (HCA).
[134] *Commonwealth v WMC Resources Pty Ltd*, above n 129, 29 Toohey J.
[135] *Commonwealth v WMC Resources Pty Ltd*, above n 129, 17 Brennan CJ, 38 Gaudron J.
[136] *Newcrest Mining (WA) Ltd v Commonwealth* (1996) 190 CLR 513 (HCA).
[137] *Commonwealth v WMC Resources Pty Ltd,* above n 129, 17 Brennan CJ, 37 Gaudron J.
[138] *Cooper v AG* [1996] 3 NZLR 480 (HC) Baragwanath J.

Constitution.[139] This argument logically extends to section 51(xxxi) of the Australian Constitution also.

Baragwanath J found that New Zealand's constitutional safeguard of property rights was to be found under Chapter 29 of the Magna Carta, in which, "no freeman shall be... disseised of his freehold or liberties, or free customs... but... by the law of the land."[140] The Judge went on to observe that in his opinion it would not be possible to argue that statutorily created rights could not be then taken away by statute.[141] This sentiment reflects the common law prerogative right of eminent domain possessed by the Crown, exercised in New Zealand predominantly under the Public Works Act 1981.[142]

Applied to the context of freshwater resources, although statutorily created rights in water may be classified as 'property', they are unlikely to attract a right of compensation upon their reduction or extinguishment under the reasoning of *WMC Resources*. Compared to the pre-existing right of the Crown in that case to the minerals in the land concerned, there were no equivalent rights possessed by the Crown in respect of the control of freshwater resources. Indeed, it was not until the passage of the Water and Soil Conservation Act 1967 that rights to take, use, and divert water were vested in the Crown,[143] and therefore any 'acquisition' by the Crown of rights existing solely under statute would not confer any benefit on the Crown.

Further, it has been argued that, in any event, compensation should not be payable upon the reduction or extinguishment of rights in water as a matter of policy.[144] By applying the reasoning inherent in the American Public Trust doctrine, public authorities are obliged to keep under review granted property rights, with the power to amend those rights in the public interest without the payment of compensation.[145]

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[139] *Cooper v AG*, above n 134, 483 (HC) Baragwanath J.
[140] *Cooper v AG*, above n 134, 483 (HC) Baragwanath J.
[141] *Cooper v AG*, above n 134, 495 (HC) Baragwanath J.
[142] Hinde, McMorland, and Sim, above n 3, para 1.024.
[143] Water and Soil Conservation Act 1967 s 21 (repealed).
[144] Alex Gardner "Water Resources Law Reform in Western Australia – Implementing the COAG Water Reforms" 19(1) EPLJ 6, 27.
[145] Alex Gardner, above n 140, 27.

This seems to be the predominant approach taken in the Australian states. Apart from limited circumstances in Western Australia and New South Wales,[146] compensation is not available for the reduction or extinguishment of rights in water, suggesting that the desire for 'full' property rights in water has yet to be realised and may even not be realised. In comparison, California, Colorado, and Chile all provide for a statutory claim to compensation. [147]

B 'Property'

Whilst it is established that clearer and more secure rights in property appear to promote trade and investment, and may provide a right to compensation in some cases when those rights are reduced or diminished, it is necessary to consider whether a regime in 'property' is in fact vital to ensuring these desired outcomes. In this regard, it is first important to examine what is meant by the term 'property'.

"The word 'property' is a word of the widest import,"[148] and therefore one faces difficulties exacting any exhaustive meaning of the term. However, it is suggested that 'property' is broadly a description of the exercise of a relative level of socially permissible power or control over a thing or a resource.[149] This approach is preferred to a more orthodox approach whereby a right in property must possess a set of exhaustive 'characteristics' in order to be considered 'property'.[150]

Whilst viewed by Sir William Blackstone in the 17th Century as, "that sole and despotic dominion which one man claims and exercises over the things of the world, in

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[146] Rights in Water and Irrigation Act 2000 (WA) Sch 1 cls 39(1), (2) and (5).
[147] Productivity Commission *Water Rights Arrangements in Australia and Overseas* (2003, Productivity Commission, Melbourne) XIX
[148] *Yanner v Eaton,* above n 88, para 137 Callinan J.
[149] Kevin Gray & Susan Francis Gray "The Idea of Property in Land" in Susan Bright & John Dewar (eds) *Land Law: Themes and Perspectives* (1998, Oxford University Press, Oxford) 15.
[150] The classical judicial declaration of 'property' was by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247-8. There his Lordship held that, "before a right of an interests can be admitted to the category of property… it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

total exclusion of the right of any individual in the universe,"[151] a more permissive approach to property recognises that there may well be gradations of 'property', dependent upon the relative exercise of control and power over different things or resources.[152] This latter argument is particularly relevant in the context of natural resources, where varying societal interests may require a system of prioritised rights to a particular resource in order to be workable.[153]

The level of socially permissible power capable of being exercised over a piece of land, for example, has historically been large due to the societal perception of the importance of private ownership, and remains significantly unregulated by the State today. Derived from the feudal doctrine of tenure, a fee simple (which in law is of course the largest form of estate)[154] has the potential to have an unlimited duration of tenure, and exhibits characteristics including exclusivity, alienability, and enforceability against interference by third parties (for example, under the land-based torts of trespass and nuisance).[155]

Yet the control of rights in land by a landowner under a fee simple is not absolute. All titles in land are deemed to be derived either directly or indirectly from the Crown which retains a prerogative right of eminent domain,[156] and further, acting in the wider social interest the State may limit property rights in land through legislation.

Examples of limitations of individual control over land in New Zealand include powers of entry of a dog control officer if an offence under the Dog Control Act is reasonably believed to have occurred,[157] the power of an enforcement officer to enter onto land if he or she has reasonable cause to suspect an offence has been committed

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[151] SN Katz (ed) *William Blackstone: Commentaries on the Laws of England: A Facsimile of the 1765-69* 4ed (1979, Chicago University Press, Chicago) 2.
[152] Gray & Gray, above n 144, 15.
[153] This is the view taken by several of the Australian jurisdictions discussed above.
[154] Hinde, McMorland, and Sim, above n 3, para 1.029.
[155] Hinde, McMorland, and Sim, above n 3, para 1.029.
[156] Hinde, McMorland, and Sim, above n 3, para 1.024.
[157] Dog Control Act 1996 s 14.

against the Land Transport Act 1998,[158] the power of an owner of a drainage scheme for the purpose of operating and maintaining that scheme,[159] and a gas meter-reader's power of entry under the Gas Act 1992.[160] Despite these limitations, the possessor of the right in land is still considered to have a right in 'property'.

1 Property in natural resources

Whether or not 'property' exists in natural resources is a more complex question, as the level of control and power exercisable over natural resources has been inherently limited by reason of the divergent nature of those resources. An attempt to apply traditional paradigms of 'property' to resources such as wild animals, flowing water, and oil, natural gas, and air, has been a long recognised difficulty for they have, "little respect for property lines."[161]

At common law there was no form of absolute or full beneficial ownership in fire, light, air, water, and wild animals (the exploitation of oil and gas of course being a relatively recent phenomenon).[162] The approach of the common law was similar to earlier Roman law which deemed these resources, "by natural law common to all."[163] The rationale for this relaxed legal position was the abundance of supply of these resources which were capable of common use without conflict.[164]

The English common law riparian doctrine governed rights to freshwater resources, and was influenced in its development by the nature of water as a dynamic medium, capable of diversion, abstraction, and degradation.[165] A landowner acquired riparian rights over surface water flow of a river *ad medium filem aquae* (or to the

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[158] Land Transport Act 1998 s 119.
[159] Local Government Act 1974 s 517ZC.
[160] Gas Act 1992 s 50.
[161] Charles Donahue Jr, Thomas E Kauper, and Peter W Martin *Property: An Introduction to the Concept and the Institution* (3ed) (1993, West Publishing Co, St Paul, Minnesota) 244.
[162] *Yanner v Eaton,* above n 88, para 24 Gleeson CJ, Gaudron, Kirby and Hayne JJ.
[163] J Moyle *The Institutes of Justinian Translated into English* (Clarendon Press, Oxford, 1913) 35.
[164] D E Fisher, above n 58, 203.
[165] Getzler, above n 4, 43.

'middle line' of a river),[166] and could take, divert, and dam water from a river's natural flow, so long as it was effected, "without sensible diminution or increase and without sensible alteration in its [that is, the river's] character or quality."[167] Compared to wild animals, for example, riparian rights existed independently of possession by 'capture', although of course water could also be appropriated by a riparian landowner.[168]

Like riparian doctrine, the common law position on minerals was not dependent on the 'capture' of the resource.[169] Minerals were viewed as the property of the owner of the land situated above those minerals under the doctrine *cujus est solum ejus est usque ad coelum* (whereby a landowner owns everything under the sky down to the centre of the earth).[170] Unlike riparian doctrine however, a landowner seeking to extract minerals was not generally required to act with consideration to third party interests, and was limited only by the prerogative right of the Crown to the ownership of all gold and silver.[171]

2 *Statutory vesting of property in natural resources*

Natural resources have become increasingly regulated by the state as a reflection of the social interest and the need to account for externalities in the sustainability and management of these resources. In New Zealand, the exclusive rights to take, divert, and dam flowing water resources are vested in Crown.[172] Further, all petroleum, gold, silver, and uranium in land is deemed the *property* of the Crown,[173] as are all wild animals until they are lawfully killed, taken, or held by a person.[174]

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[166] Hinde, McMorland, and Sim, above n 3, para 2.232.
[167] *Young v Bankier Distillery Co* [1893] AC 691, 698-699 (HL) Lord Macnaghten.
[168] Bryan Clark "Migratory Things on Land: Property Rights and a Law of Capture" 6(3) EJCL 1, 7-8.
[169] Bryan Clark, above n 162, 12.
[170] Hinde, McMorland, and Sim, above n 3, para 12.0008.
[171] Hinde, McMorland, and Sim, above n 3, para 12.0008.
[172] Water and Soil Conservation Act 1967 s 21 (repealed and replaced by the Resource Management Act 1991).
[173] Crown Minerals Act 1991 s 10.
[174] Wild Animal Control Act 1977 s 9(1).

The effect of these statutory deeming provisions on 'property' in natural resources has been examined by the Australian High Court in the case of *Yanner v Eaton*.[175] There, the Court was required to determine the Crown's proprietary interest in fauna under section 7(1) of the Fauna Conservation Act 1974 (Qld) (since repealed), which provided:[176]

> All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the *property* of the Crown and under the control of the Fauna Authority.

Finding that the Crown did not possess full beneficial or absolute ownership in fauna under the legislative provision,[177] the majority found that the statutory vesting of 'property' in fauna in the Crown may be viewed as, "nothing more than 'a fiction expressive in legal shorthand of the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource.'"[178]

The Crown's interest in exercising power and control over fauna represented a form of guardianship over a socially significant resource,[179] but also from a policy perspective extended to benefits received by the Crown of exacting royalties and penalties under the provisions of the legislation.

The reasoning of the Court in *Yanner v Eaton* has also been applied to the freshwater context in Australia, whereby the provisions vesting exclusive rights to take, use, dam, and divert water resources are considered to merely grant the Crown a right of primary access to publicly manage water resources, rather than to vest absolute beneficial ownership in the Crown.[180]

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[175] *Yanner v Eaton,* above n 88.
[176] *Yanner v Eaton,* above n 88, para 8 Gleeson CJ, Gaudron, Kirby and Hayne JJ. (Emphasis added) The Nature Conservation Act 1992 (Qld) has replaced the Fauna Conservation Act 1974 (Qld), providing under section s 83 that, "all protected animals are the property of the State."
[177] *Yanner v Eaton,* above n 88, para 22 Gleeson CJ, Gaudron, Kirby and Hayne JJ.
[178] *Yanner v Eaton,* above n 88, para 28 Gleeson CJ, Gaudron, Kirby and Hayne JJ.
[179] *Yanner v Eaton,* above n 88, para 29 Gleeson CJ, Gaudron, Kirby and Hayne JJ (with reference to Roscoe Pound).
[180] DE Fisher *Water Law* (2000, LBC, Sydney) 91.

It is evident that different levels of state control will exist in respect of different natural resources, demonstrated in the High Court of Australia's decision in *Western Australia v Ward*.[181] There, the Court found that the Crown's property in minerals was not merely 'guardianship', but full dominium.[182] In such a case the reduction or extinguishment of a right in minerals would entail compensation under the reasoning of *Newcrest Mining Co.*[183]

Despite the ability of the Crown to reduce or extinguish statutorily created 'guardianship' rights without the payment of compensation, the Court in *WMC Resources v Commonwealth*,[184] nevertheless found there that the statutorily created right constituted 'property'. In fact, this was not disputed between the parties.[185] This strengthens an argument that rights in natural resources are fundamentally different from non-statutory rights,[186] but may still be considered 'property' on a graduated sliding scale of relative levels of permissible social control over various resources.

Recognising that the application of 'pure' property rights to freshwater resources is unworkable (due to the need to account for societal interests), it is submitted that, in the promotion of the efficient allocation and trade of freshwater resources among users, rights in property become increasingly necessary as resources are subject to greater demand and degradation. Provided that rights are clearly defined, a workable system is possible with relatively abundant freshwater resources, as currently demonstrated under the RMA.[187] However, elements of property rights, particularly quality of title and transferability do become increasingly vital as competition increases over freshwater resources and those resources reach full allocation.

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[181] *Western Australia v Ward* (2002) 191 ALR 1.
[182] *Western Australia v Ward,* above n 175, 113-4 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.
[183] That reasoning suggests that if a valuable benefit is 'acquired' by the Crown in reducing or extinguishing a statutorily created right, it will be compensable.
[184] *Commonwealth v WMC Resources Pty Ltd,* above n 129.
[185] *Commonwealth v WMC Resources Ltd,* above n 129, 27 Toohey J.
[186] Chief Executive Officers' Group, above n 61, para 13.
[187] Leaving aside the express provision that resource consents are not real or personal property under section 122, it is of course arguable that rights under the RMA already demonstrate proprietary attributes including transferability and permanence, for example.

V A PROPERTY RIGHTS FRAMEWORK IN NEW ZEALAND?

A Interests to be Balanced

As already alluded to in the context of the environment and indigenous rights, the creation of a framework for property rights must adequately account for a number of interests. These include the interests of consumers, of industry (including irrigation and other agricultural uses), and recreational users for example. Environmental considerations include maintaining visual amenity, water quality, and minimum flows, protecting flora and fauna, and controlling sedimentation and erosion.

In the New Zealand context, the unique relationship between Māori and the Crown under the Treaty of Waitangi 1840 warrants separate consideration, especially in light of the limited recognition such interests have received in the jurisdictions of Australia and the United States, for example.[188]

1 Maori Interests in Freshwater Resources

The unique relationship between Māori and the Crown under the Treaty of Waitangi 1840 (the Treaty) is of special significance in the ownership and management of natural resources. Article I of the Māori version of the Treaty provides that Māori ceded "te Kawanatanga katoa," or the governance over their land,[189] and Article II provides that Māori are guaranteed, "te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa," or the unqualified exercise of their chieftainship over their lands, villages, and treasures.[190] Under the English version, Article I of the Treaty Māori leaders gave the Queen, "all the rights and powers of sovereignty over their land," whilst

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[188] Currently the extent of legislative recognition for indigenous interests in Australia is limited to the Native Title Act 1993 in New South Wales. Some recognition of indigenous interests is recognised in the planning stage of allocations of most Australian states. In the United States, Federal Reserve rights confer fixed water allocations upon Native American Indians with the creation of a reservation.

[189] Treaty of Waitangi 1840 (Maori Version) Article I.

[190] Treaty of Waitangi 1840 (Maori Version) Article II.

Article II guaranteed Māori, "full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties."[191]

In resolving the apparent textual ambiguities of the Treaty, the international law principle of contra proferentem provides that when a when a text is ambiguous, it must be construed against the party who drafted it, in this case the English.[192] Under this principle Māori cede Kawanatanga (governance), but retain te tino rangitiratanga (chieftainship) over their lands, villages, and treasures.

(a) Maori ownership of natural resources

This importance of the contra proferentem rule of treaty interpretation for Māori in the context of the ownership and management of natural resources is significant, and raises the real question of whether Māori property rights can be harmonised with private property rights. The determination of ownership of resources as a priority for Māori has been effectively sidelined by the Crown in the passage of the RMA, and completely ignored in the establishment of the QMS of private property rights in fisheries.[193] It was inevitable that litigation was to follow by Māori seeking to protect their claims to ownership and rights of management over resources, and the same situation is more than likely to reoccur if freshwater resources are made subject to private property rights.[194]

Already in freshwater resources, the Waitangi Tribunal has made several significant decisions concerning the need for the Crown to recognise Māori ownership of those resources. In the *Whanganui River Report*,[195] for example, it was found that, "in Māori terms, the Whanganui River is… a single and indivisible entity, which was owned in its entirety by Atihaunui in 1840."[196] Breaches of the Treaty by the Crown included the

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[191] Treaty of Waitangi 1840 (English Version) Article II.
[192] Lord McNair *The Law of Treaties* (Clarendon Press, Oxford, 1961) 464.
[193] Morris Te Whiti Love "Ten Years of the Resource Management Act for Maori" Speech delivered to the Resource Management Law Association, Auckland Branch (Resource Management Law Association, Auckland, 6 December 2001).
[194] Richard Boast, above n 113.
[195] *Whanganui River Report* Wai 167 (GP Publications, Wellington, 1999).
[196] *Whanganui River Report,* above n 191, 337.

deprivation of the Atihaunui of their possession and control of the river, and the failure to protect the rangitiratanga of Atihaunui over the river. Consequently, the Tribunal recommended for the Crown recognition of Atihaunui control and ownership in any settlement reached.[197]

Before any property regime is established in freshwater resources in New Zealand therefore, Māori claims to ownership of those resources must first be determined.[198] In the absence of a prior determination of ownership rights, the Crown is likely to be in breach of the Treaty of Waitangi and will be forced to settle Maori grievances in a similar fashion to the fisheries example. This is clearly undesirable.[199]

(b) Maori interests under the RMA

In the context of the management of freshwater resources, the RMA of course refers to the relationship of Māori and their culture with water, waahi tapu, and other taonga,[200] and the protection of recognised customary activities[201]as matters of national importance, the concept of kaitiakitanga (stewardship) as a matter in which decision makers must have particular regard, and the principles of the Treaty of Waitangi[202] which must be taken into account in achieving sustainable development under the RMA.[203]

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[197] *Whanganui River Report,* above n 191, 347.

[198] This view was expressed by Maori in *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (July 2005, Ministry for the Environment, Wellington) 7.

[199] Unless of course the perspective of Andrew Day is promoted. However, this merely encourages Crown breaches of the Treaty and creates forced settlements which may be unsatisfactory for all parties concerned.

[200] Resource Management Act 1991 s 6(e).

[201] Resource Management Act 1991 s 6(g).

[202] These principles were first elucidated non-exhaustively in the decision of the Court of Appeal in *NZ Maori Council v Attorney General* [1987] NZLR 641 (CA). There, the Court said that the Treaty of Waitangi envisaged the principles of partnership and good faith (see p 664 per Cooke J), as well as the Crown's duty to govern (see pp 665-6 per Cooke J; p 716 per Bisson J), provide active protection of Maori, and remedy past breaches (see p 664 per Cooke J) The possibility of a principle of consultation was discussed, but sidelined due to perceived practical difficulties in drawing the parameters of such a principle (see p 683 per Richardson J).

[203] Resource Management Act 1991 s 8.

In this respect, Judge Whiting in *Ngati Rangi Trust v Manawatu-Wanganui RC*,[204] found that, in taking into account Maori interests under the RMA, a balancing exercise is required with other competing interests to enable the overarching purpose of sustainability to be achieved.[205] In that case, Māori of the Whanganui River claimed that diversion of the River's waters by the Tongariro Power Development scheme was culturally offensive and debilitating to its people, both physically and spiritually. In reducing Genesis Energy's resource consent from a 35-year to a 10-year duration, the Judge recognised Māori spiritual and cultural interests, whilst at the same time accounting for the "significant contribution" the power scheme made to hydro-electric power production in New Zealand.[206]

The implication of the decision in *Ngati Rangi Trust* for the creation of a property rights regime in freshwater resources is that the need to take into account the interests of Maori may reduce the security of those rights. A proposed transfer, mixing, or diversion of a water source may be rendered infeasible if offended Māori cultural and spiritual values are not outweighed by competing interests, for example. The Draft Waitaki Catchment Water Allocation Regional Plan goes even further than this, providing that the mixing of waters within the Waitaki Catchment would be encouraged *only* if there are no significant adverse effects upon the cultural values of tangata whenua.[207]

Nevertheless, it is the opinion of the author that, provided ownership to resources is established, private property rights in freshwater resources may co-exist with the preservation of Māori customary rights and those matters existing under the RMA. Whilst property rights may be weaker, it is imperative that those Maori interests continue to be recognised.

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[204] *Ngati Rangi Trust v Manawatu-Wanganui RC* (18 May 2004) AO67/2004 Environment Court Auckland Judge Whiting.
[205] *Ngati Rangi Trust v Manawatu-Wanganui RC*, above n 193, para 401 Judge Whiting.
[206] *Ngati Rangi Trust v Manawatu-Wanganui RC*, above n 193, para 65 Judge Whiting.
[207] Draft Waitaki Catchment Water Allocation Regional Plan (February 2005) Policy 9.

B The Water Programme for Action

The less than desirable outcomes of the Waitaki Catchment proceedings in late 2004 were of large influence on the Government's proposed reconsideration of the allocation of freshwater resources in New Zealand. The Water Programme for Action (WPA) was released by the Ministry for the Environment (MFE) in late 2004, comprising of thirteen proposed actions supported by Cabinet.[208]

These actions include: developing national policy statements and environmental standards; creating special mechanisms for regional councils (including powers to progressively constrain existing consents in the case of over-allocated or degraded freshwater resources); enhancing the transfer of allocated water between users (a pilot registry system for recording transfers is suggested in this respect); enhancing Maori participation in national and regional planning; developing an ability for regional councils to allocate water to priority uses by hearing applications for consents upon a comparative basis (rather than on a 'first-come, first-served' basis); and allowing regional councils to utilise market mechanisms in the allocation of water (for example, by a tendering or auctioning process).[209]

In order to realise these actions, legislative amendments are suggested in respect of establishing priorities to water use and powers to progressively constrain existing consents in the case of over-allocated or degraded water resources.[210] However, notably absent from the WPA is any mention whatsoever of a belief that full property rights in water resources are necessary to implement the proposed actions.

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[208] Cabinet Paper "Water Programme for Action – Consultation on Policy Direction" (15 December 2004) POL (04) 320 para 18.
[209] Cabinet Paper, above n 197, para 18.
[210] Cabinet Paper, above n 197, para 19.

C Does New Zealand Require Property Rights in Freshwater Resources?

In the absence of the determination of ownership of New Zealand's natural resources, it is suggested that a framework in property rights for freshwater resources is undesirable and will most likely result in breaches of the Treaty of Waitangi. Even in the event that ownership to natural resources is determined, 'full' property rights in water are untenable, as traditional 'property' paradigms in this sense resist application to natural resources given the interdependence of users and the overarching societal interest.

If one accepts that there may be gradations of control and power, and consequently 'property', in a resource, then New Zealand would benefit from greater property rights in freshwater water in regard to higher security and certainty of those rights (but such rights are not essential in the present state of relatively abundant freshwater resources). However, in the absence of a determination of ownership of those resources, it is suggested that the current legislative framework be largely retained, with minor legislative amendments bolstered by greater administrative involvement in enhancing efficient water allocation. In this respect, the WPA appears to be a step in the right direction.

By hearing applications for resource consents on a comparative basis and through the utilisation of market mechanisms, the potential inefficiencies of allocation of water rights under the present 'first in, first served' scheme may be avoided. After the initial grant of a resource consent however, encouraging further efficient allocation of water rights through transfer mechanisms requires rights to be clearly defined and secure. A sufficient level of 'property', or control and enforceability, in the resource is necessary. The adoption of a pilot registry would be beneficial in this regard, specifying the particulars of a right in terms of duration, exclusivity, alienability, rates or volumes of extraction, and any limiting conditions upon the right.

The re-allocation of water from low value uses to high value uses is achievable under the current legislation given the permissive nature of local authorities' discretion

under section 136 of the RMA.[211] Water rights are issued separately from land title, and if approached on a catchment-by-catchment basis, regional authorities have an important role in the establishment of trading schemes. The Murray-Darling Basin is a useful example of such a scheme operating in practice.

Possible legislative intervention may include the creation of temporary transfers (to allow for seasonal variations)[212] and separate components of water permits (for example, separate access and use components).[213] However, in the absence of more secure rights, the provision of information to users, under-allocated resources, and the promotion of water trading by regional bodies, trading will remain limited.

Whilst it is necessary to enhance proprietary interests in water rights to facilitate trade, property rights in natural resources must cater for the internalisation of externalities, particularly with respect to the environment. The creation of a statutory power to progressively limit water rights to a fully allocated resource is desirable for the protection of the environment, as is establishing the environment as a priority user of water resources.[214] Although minimum environmental flows provide some security for the environment, the approach of Victoria in the creation of bulk environmental entitlements would see environmental interests being regarded as more than residual concerns of individual permit holders.

In addition, the reduction or extinguishment of statutorily created property rights does not entail a right to compensation,[215] posing a formidable hurdle in the establishment of complete security in water rights. Through more efficient allocation

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[211] This of course has been achieved under regional plans, seen in respect of the Oroua Catchment as discussed, and is under consideration in the Draft Waitaki Catchment Allocation Regional Plan.
[212] Ministry for the Environment *Water Programme of Action: Water Allocation and Use* Technical Working Paper (June 2004, Ministry for the Environment, Wellington) para 10.9.1.
[213] An aspect that can be drawn from the experience of the Australian jurisdictions as a response to the COAG reforms.
[214] Both actions of course proposed under the Water Plan for Action and also seen in New South Wales , for example.
[215] In this regard refer to the discussion regarding compensation for statutorily created rights, above at Part IV A 2.

mechanisms however, the need for drastic alteration to resource consents would be reduced and kept to a minimum.

VI CONCLUSION

This paper has examined whether New Zealand should adopt a property rights framework to provide for the allocation of freshwater resources. To help determine this question the current legislative regime under the RMA was examined, as was the Australian experience in water rights, and the New Zealand fisheries regime as a further example of the creation of property rights in natural resources.

It was found that property is essentially a concept relating to the exercise of a permissible level of control or power by a person over a thing. In the context of natural resources, only a limited amount of control was historically exercised by the Crown, however the realisation that natural resources are necessarily finite has seen natural resources placed under the control of private entities to promote sustainability in the greater social interest. Yet through the Crown's retention of the prerogative right of eminent domain in the absence to a right for compensation under statutorily created rights, the application of a traditional paradigm of 'property' to natural resources has been significantly hampered.

In addition, externalities created by private property rights regimes require internalisation, particularly in respect to the environment. This necessarily imposes a limitation on the extent to which a right in freshwater resources may be considered property, yet through the establishment of priorities of water use and clear minimum water flows and standards, rights may still remain sufficiently secure.

In the New Zealand situation, it has been illustrated through the discussion of the property rights regime in fisheries, that before the Crown may divest control of resources to private entities, ownership of those resources must first be determined. In the fisheries example, the Crown did not in fact possess the control of the natural resource, and

through privatisation of the resource rendered itself subject to Treaty claims by Māori and forced settlement. Such a result is likely if the same path is pursued by the Crown in respect of freshwater resources.

It is concluded therefore that the establishment of property rights to freshwater resources in New Zealand first requires the settlement of Māori claims under the Treaty to ownership of those resources. Nevertheless, the establishment of property rights may not even be necessary or desirable in the present situation, if the current legislative framework can be adapted to provide greater security in existing rights. However, by attributing the level of control that 'property' confers to a right in water, and the allocation of water resources by market mechanisms on a comparative basis rather than by a 'first in, first served' practice, the economic benefits of increased investment and trade will best be recognised.

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