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CO-GOVERNANCE OR CROWN GOVERNANCE?

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Abstract

This paper examines Māori rights and interests in water resources, emphasising the Crown's obligation to legally recognise these rights under the Treaty of Waitangi, doctrine of customary title, and international law. The Waitangi Tribunal has recognised that Māori rights and interests, as protected by the Treaty of Waitangi, equate to ownership, and encompass the exercise of tino rangatiratanga over water resources. This places an onus on the Crown to recognise these rights in law. Utilising three conceptual models of indigenous rights - the rights to culture, property, and political authority (tino rangatiratanga) - this paper assesses the extent of the Crown's recognition. In lieu of ownership, the Crown has implemented co-management and co-governance arrangements within Treaty settlements and the forthcoming Water Service Entities Bill. It is argued that, in these reforms, the Crown has focused on the right to culture model, resulting in significant gaps in recognition of Māori rights to property and political authority. This paper argues that the Crown has failed to recognise Māori ownership rights and tino rangatiratanga over water resources.

Key Terms: '*co-governance' ,'tino rangatiratanga','Treaty of Waitangi', 'Water Services Entities Bill', 'right to culture'*.

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I Introduction

In recent years, Aotearoa New Zealand has garnered global attention for its innovative legal arrangements aimed at recognising indigenous rights and interests in water resources. These arrangements include co-governance and co-management arrangements.[1] Despite this, the Crown has failed to recognise Māori tino rangatiratanga over, and ownership of, water resources to the full extent of the Crown's obligations under the Te Tiriti o Waitangi/Treaty of Waitangi (the Treaty) and its principles.[2]

This dissertation's impetus lies in one such legal arrangement: Water Service Entities Bill, a central Bill within a series of amendments collectively known as the Affordable Water Reform. The reform comprises three main components: the establishment of an independent Crown water service regulator, the introduction of a new regulatory framework for drinking water, and the reform of water delivery services.[3]

This co-governance arrangement has sparked vigorous debate. It has prominently surfaced in the political arena in anticipation of the 2023 election, become a focal point in the 'stop co-governance arrangements', and remains intertwined with the ongoing and contentious freshwater debate.[4] Amidst the controversy, the Treaty and its role in the reform have been overshadowed. It is imperative to consider the Māori's water rights and interests and the Crown's responsibility to legally acknowledge these rights under the Treaty.

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[1] Linda Te Aho "Te Mana o te Wai: An indigenous perspective on rivers and river management" (2019) 35 River Res Appl. 1615 at 1618.

[2] This dissertation uses "the Treaty" to refer to the whole agreement, unless stated otherwise. The differences between the two Treaty texts are discussed in Part III.

[3] Tim Chambers and others "Beyond muddy waters: Three Waters reforms required to future-proof water service delivery and protect public health in Aotearoa New Zealand" (2022) 135 N. Z. Med. J. 87 at 87.

[4] Adam Pearse "Local Government Minister Kieran McAnulty's comments on democracy concern Opposition amid water reform debates" (16 April 2023) NZ Herald <nzherald.co.nz>; Amelia Wade "Rātana gets political: Christopher Luxon calls co-governance conversation 'divisive,immature'" (24 January 2023) Newshub <newshub.co.nz>; Cabinet Office Circular "Protecting and Promoting Iwi/Māori Rights and Interests in the New Three Waters Service Delivery Model: Paper Three" (14 June 2021).

This dissertation is structured into five distinct parts, each contributing to a comprehensive exploration of Māori rights in water and the Crown's recognition of these rights. In Part II, I delve into Andrew Erueti's three conceptual models of indigenous rights: the right to culture, property and political authority (tino rangatiratanga model).[5] Part III establishes the three primary sources of Māori rights and interests in water. The Waitangi Tribunal has determined that in 1840, Māori rights and interests equated to complete authority and customary ownership.[6] Therefore, this section argues that Māori tino rangatiratanga over, and ownership of, freshwater are guaranteed by the Treaty and that customary ownership of water has not been extinguished. This places an obligation on the Crown to recognise these rights.

Part IV and V critically assess the Crown's current recognition of Māori rights and interests in freshwater. One approach the Crown has taken to recognise Māori water rights is through Treaty Settlements and the Water Service Entities Bill's co-governance and co-management arrangements. I argue that these arrangements have failed to recognise Māori property and tino rangatiratanga rights over water resources. Instead, the Crown has opted to confine Māori rights and interests to a right to culture model. The Crown has usurped Treaty guarantees. Part VI explores three approaches for the Crown to better recognise Māori water rights, advancing a right to property and tino rangatiratanga model.

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[5] Andrew Erueti "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" (2016) 24 Wai L Rev 58.

[6] Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (WAI 2358, 2012) at 110.

II The Three Conceptual Models of Indigenous rights - An Analytical Framework

This dissertation will utilise Erueti's three Indigenous rights models as an analytical framework to evaluate the Crown's recognition of Māori water rights in the Treaty settlements and Water Service Entities Bill. Three principal models are in focus: the right to culture, property and political authority.[7] The right to culture model places emphasis on protecting traditional ways of life, procedural rights to participate in decision-making and tribal self-management of property.[8]

In recent years, the right to culture model has stirred controversy in indigenous rights discussions. Karen Engle has criticised indigenous rights movements for prioritising the right to culture over "strong self-determination claims".[9] While these cultural rights are important to the claims of iwi, they represent just one facet of Māori rights and interests. Placing excessive emphasis on cultural aspects, or narrowing the focus solely to culture, results in an overly simplistic approach to recognising Māori rights.[10] Therefore, it is crucial to complement Māori cultural rights with other conceptual models.[11]

In New Zealand, indigenous rights can also be based on a property model. The right to property model seeks to restore a "resource base" of property rights and provide monetary compensation to Māori.[12] Some iwi have obtained property rights to natural resources like fisheries, forests and aquaculture by arguing that Māori inherently possess property rights in these resources.[13]

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[7] Erueti, above n 5, at 58.
[8] At 58.
[9] Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010).
[10] Erueti, above n 5, at 59.
[11] At 59.
[12] At 59.
[13] At 59.

Indigenous rights also extend to political authority. The political authority model refers to the right to tino rangatiratanga, self-government, and self-determination.[14] Tino rangatiratanga is grounded in various concepts, particularly prior sovereignty and the international law right of self-determination.[15] According to these concepts, indigenous people of Aotearoa were once independent, holding complete control over their lands and peoples, and are therefore entitled to recognition of their right to self-determination/tino rangatiratanga.[16] This aligns with the views expressed by the Tribunal:[17]

> Tino rangatiratanga has been interpreted as absolute authority and can include freedom to be distinct peoples; the right to territorial integrity of their land base, the right to freely determine their destinies; and the right to exercise autonomy and self-government.

Tino rangatiratanga envelops both political authority and proprietary rights, making it a suitable framework for understanding the guarantees under the Treaty.[18] I will refer to this as the "tino rangatiratanga model".

III Sources of Māori right and interests in water

This Part outlines the three primary sources of Māori rights and interests in water, as well as the corresponding rights and duties of the Crown. These rights derive from the Treaty, the doctrine of customary title, and international law.

A *Protections under the Treaty*

The Treaty, signed in 1840 between Māori and the Crown, represents a "contract or reciprocal agreement" between the two parties.[19] In the first article, Māori gave governance rights to the Crown, and in the second article, Māori retained tino

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[14] At 59.
[15] At 60.
[16] At 60.
[17] Waitangi Tribunal *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake* (WAI 2417, 2015) at 36.
[18] Erueti, above n 5, at 60.
[19] Waitangi Tribunal *Te Roroa Report* (WAI 83, 1992) at 30.

rangatiratanga rights over their properties - that is, “chieftainship over their lands, villages and all treasures.”[20] Or, as the English version reads “full exclusive and undistributed possession of their Lands and Estates Forests, Fisheries and other properties”.[21] Both texts contain a provision for equal citizenship, affording Māori “all the rights and privileges of British settlers”.[22]

1 Treaty Principles

Over time, the courts and Waitangi Tribunal have elucidated Treaty principles in law, forming the foundation and guiding principles for the Crown's current obligations. These principles encompass the Treaty as a whole, considering its underlying intent and spirit.[23] Treaty principles are not static, they are constantly evolving and adapting to changing circumstances.[24] Importantly, there isn’t a definitive list of these principles, and both the courts and Waitangi Tribunal sometimes use different language to give substance to the principles.[25]

The courts often liken the Treaty relationship to a partnership, where each treaty partner must act reasonably and in utmost good faith towards the other.[26] The Waitangi Tribunal also stresses these duties but derives them from reciprocity and mutual benefit.[27] A recent Waitangi Tribunal report emphasises that partnership is a much stronger concept than participation.[28] Underpinned by tino rangatiratanga, partnership means at least joint

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[20] Ian Hugh Kawharu *Waitangi: Māori and Pakeha perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319-320.
[21] Treaty of Waitangi 1840, art 2.
[22] Art 3; Te Tiriti o Waitangi 1840, art 3.
[23] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663; Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2002) at 77.
[24] Te Puni Kōkiri, above n 23, at 77.
[25] At 77.
[26] At 77.
[27] At 80-82.
[28] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (WAI 2575, 2023) at 78.

decision-making between the Crown and Māori groups. Partnership should not be confined to mere "contributions to" or "participation in" decision-making.[29]

The Treaty was founded on a central exchange; kawanatanga granted the Crown the right to govern and make laws, in return, Māori retained the right to exercise tino rangatiratanga over their land, resources and people.[30] However, the Crown's kawanatanga is not unfettered.[31] The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori authority over their tikanga, resources and people, and enable Māori to manage their own affairs in accordance with their customs.[32]

The principle of reciprocity captures the "essential bargain" or "solemn exchange" agreed to in the Treaty by Māori and the Crown.[33] The Crown cannot govern the territory without the permission of Māori, therefore, the Crown should respect Māori interests in that territory. Recognising these interests may require, at the very least, extensive and meaningful consultation with Māori.[34]

The principle of active protection obligates the Crown to act honourably, employ fair processes, consult extensively and where appropriate, make decisions in consultation with those whose interests are to be protected.[35] This includes the Crown's obligations to actively protect Māori tino rangatiratanga.[36] As the Tribunal noted "the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern State' is key to the active protection of tino rangatiratanga".[37] However, this

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[29] At 78.
[30] Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (WAI 2540, 2017) at 21.
[31] At 21.
[32] At 21.
[33] Te Puni Kōkiri, above n 23, at 81.
[34] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 560.
[35] Te Puni Kōkiri, above n 23, at 93-100.
[36] Waitangi Tribunal *Tauranga Moana 1886-2006: Report on the Post-Raupatu Claims Volume 1* (WAI 215, 2010) at 22; Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (WAI 2490, 2015) at 23; Waitangi Tribunal *Te Whanau o Waipareira Report* (WAI 414, 1998) at 215.
[37] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (WAI 2490, 2015) at 23.

guarantee of tino rangatiratanga isn't absolute. The Crown must only do what is reasonable in the given circumstances.[38]

2 The Waitangi Tribunals' findings on the nature of Māori water rights

In 2012, the Waitangi Tribunal clarified Māori water rights and interests protected by the Treaty.[39] Freshwater claimants principally advanced for a property-based model, aiming to establish "proprietary interests in particular water resources".[40] The Waitangi Tribunal agreed that both versions of the Treaty supported a finding of ownership at 1840, with tino rangatiratanga representing the closest cultural expression of full-blow ownership at that time.[41] The Waitangi Tribunal also affirmed that tino rangatiratanga subsumes proprietary rights; stating "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."[42] Tino rangatiratanga serves as "a standing qualification of the Crown's kawanatanga".[43] The Waitangi Tribunal reached the following conclusion:[44]

> Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership. Those rights were then confirmed, guaranteed, and protected in the Treaty of Waitangi, save to the extent that the Treaty bargain provided some sharing of waters with incoming settlers… The nature and extent of the proprietary right was the exclusive right of hapū and iwi to control access to and use of the water while it was in their rohe.

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[38] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.
[39] Waitangi Tribunal, above n 6.
[40] At 8.
[41] At 102.
[42] At 101.
[43] At 103.
[44] At 81.

It is essential to acknowledge that the Western concepts of property rights and ownership do not fit comfortably within a tikanga Māori system.[45] Under tikanga, the human relationship with water extends beyond mere possession and encompasses:[46]

> … the originating ancestral relationship and the ongoing cultural and spiritual relationship with the waterway; the use of resources associated with the waterway; the exercising of control and authority over resources; and the fulfillment of obligations to conserve, nurture and protect the waterway.

The use of Western ownership concepts to define Māori water rights is a source of tension. While many Māori consider ownership as the strongest conceptual tool for protecting and exerting authority over waterways, others oppose this notion, arguing the language of ownership conflicts with their view of certain water bodies as ancestors.[47] As noted by Carwyn Jones, "Māori legal traditions [are] not recognised in their own terms but instead only through the closest legal equivalent from the Western legal tradition".[48] This limits the potential of Māori traditions to influence Aotearoa's legal landscape, reinforcing the dominance of Western frameworks as the default lens, rather than granting tikanga an equal status. Nonetheless, there is significant support that Māori possessed rights akin to ownership, along with the ability to exercise authority and control over the water.[49]

3 Qualifying Māori water rights and Treaty obligations

While the Waitangi Tribunal concluded the Treaty protected both Māori authority and ownership of freshwater, neither interests are absolute or unqualified. The Waitangi Tribunal identified two obligations placed on Māori that modified their rights at the time

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[45] At 137.
[46] At 51.
[47] IC Solutions Ltd "Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui. Whiringa a Rangi" (2014) Iwi Chair Forum <http://iwichairs.Māori.nz/our-kaupapa/fresh-water/> at 11.
[48] Carwyn Jones *New Treaty, New Tradition – Reconciling New Zealand and Māori Law* (University of British Columbia Press, Vancouver, 2016) at 98.
[49] IC Solutions Ltd, above n 47, at 11.

of signing the Treaty.[50] Firstly, there was a general expectation that non-Māori would be able to access and use water resources for non-commercial purposes.[51] However, this access was subject to Māori terms as Māori retained the right to refuse access and use under Article 2 of the Treaty.[52] Secondly, the Treaty granted the Crown a right to govern, which entails the responsibility of striking a balance between the interest of the nation and the best interests of the environment.[53] But Māori Treaty rights cannot be disregarded or balanced out of existence.[54]

The Waitangi Tribunal identified obligations imposed on the Crown by the Treaty. The Crown has a duty to "actively protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimant's relationship with their taonga; in other words, te tino rangatiratanga."[55] The Waitangi Tribunal emphasised that the management of water bodies must be carried out in accordance with a "sliding scale" of kaitiaki rights.[56] Some claimants have expressed concerns that this model might be reduced to mere kaitiaki influence through consultation, potentially side-lining rangatiratanga and mana in favour of a narrow interpretation of kaitiakitanga.[57]

B *The Doctrine of Customary Title and Water in Aotearoa*

The doctrine of customary title stands as another significant legal source for acknowledging Māori rights and interests in water bodies. This doctrine recognises that Māori have exercised customary property rights over land and natural resources since the

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[50] Waitangi Tribunal, above n 6, at 78.
[51] At 77.
[52] At 78.
[53] At 78.
[54] At 105.
[55] At 79.
[56] At 69.
[57] Edward Taihākurei Durie and others *Ngā Wai o Te Māori: Ngā Tikanga me Ngā Ture Roia - The Waters of the Māori: Māori Law and State Law* (Paper prepared for New Zealand Māori Council, 23 January 2017) at 66.

time it was first occupied by them.[58] The Crown's acquisition of sovereignty did not extinguish Māori customary title.[59] In *Attorney-General v Ngati Apa,* the Court of Appeal recognised that customary property rights exist and that such rights continued until lawfully extinguished.[60]

The *Ngati Apa* principle was applied in *Paki v Attorney-General (No* 2).[61] There, the Supreme Court found the common law presumption that the Crown obtained title to the bed of the river in accordance with the ad medium filum aquae could not apply unless it was consistent with Māori customs.[62] The issue had to be determined on a case-by-case basis, depending on the customary law of the tribe in question.[63] In a more recent case, *Re Edwards (No 2),* the High Court determined that Whakatohea hapū and other applicant groups were entitled to statutory recognition, under the Marine and Coastal (Takutai Moana) Act 2011 of customary title over certain marine and coastal area.[64]

4 Has Customary Title Been Extinguished?

This case law demonstrates that common law presumptions did not displace customary law. To displace it, there would need to be express statutory extinguishment, and the onus lies on the Crown to prove this extinguishment with clear and plain intent.[65] In Aotearoa, the legislative approach to water has primarily centered around the Crown's role in management and allocation, rather than the issue of ownership.

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[58] Jacinta Ruru and Richard Meade *Te Mana o te Wai Māori Rights and Interests in Freshwater Bodies* (Kāhui Wai Māori, August 2021) at 8.
[59] *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [17].
[60] At [49].
[61] *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.
[62] At [60].
[63] Durie, above n 57, at 54.
[64] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025, [2022] 2 NZLR 772.
[65] *Ngati Apa v Attorney-General*, above 59, at [148].

The Crown has chosen to avoid addressing ownership directly and has maintained the position that "no one owns water" at common law.[66] However, in asserting that nobody owns the water, the Crown is simultaneously disclaiming its ownership of water. This stance contrasts with legislation like the Crown Minerals Act 1991, which expressly provides that "all petroleum, gold, silver, and uranium" is "property" vested in the Crown.[67]

In the context of rivers and lakes, the Crown may argue that Māori customary rights were impliedly extinguished through legislation like the Water and Soil Conservation Act 1967, the Resource Management Act 1991, and the Water Power Act 1903, which excluded Māori from participating in resource development and governance without their consent.[68] There is ongoing debate surrounding whether this is explicit enough to extinguish customary title.[69]

Thus, there exists no statute that definitively and unequivocally extinguishes Māori customary property rights to water.[70] Legislation governing or regulating water use neither acknowledges Māori customary rights in water nor addresses the issue of ownership. In the absence of such clarity, it is possible to argue that Māori have ownership rights in water. Elias CJ in *Ngati Apa* did not dismiss this possibility; instead, she alluded to the potential for exclusive ownership by referencing the development of the doctrine in Canada:[71]

> The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the

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[66] Betsan Martin and Linda Te Aho *Ka Māpuna: Towards a Rangatiratanga Framework for the Governance of Waterways* (Petone: Response Trust, Wellington, 2021) at 31.
[67] Crown Minerals Act 1991, s 10; Ruru, above 58, at 21.
[68] See Water and Soil Conservation Act 1967; Resource Management Act 1991; and Water Power Act 1903.
[69] Coal Mines Act 1979, s 261(2).
[70] Ruru, above n 58, at 10.
[71] *Ngati Apa v Attorney-General*, above 59, at 656.

custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidence equivalent to those recognised by fee simple title.

C International law and Māori water rights

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) has been hailed as a "landmark" milestone for Indigenous rights.[72] The New Zealand government's ratification of the Declaration in 2010 established obligations to give effect to the protected rights within it.[73] Despite the Declarations non-binding legal status, it still offers substantial support and holds the potential to be "genuinely transformative" for Māori rights.[74] The Declaration acknowledges several rights that are already recognised by the Crown in its dealing with Māori, particularly concerning water. The Declaration advances the right to culture, recognising that indigenous people have:

1. the right to practice their cultural traditions and customs, including the right to develop and protect culturally significant sites;[75]
2. the right to participate in decision-making in matters that affect their rights;[76]
3. the right to "maintain and strengthen their distinctive spiritual relationship" with traditionally owned or occupied waters;[77]
4. the right to "conservation and protection of the environment and productive capacity of their…resources";[78] and

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[72] Claire Charters "The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples" (2007) 4 NZYIL 121.
[73] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007); Simon Power "Ministerial Statement: UN Declaration on the Rights of Indigenous Peoples - Government Support" (20 April 2010) 662 NZPD 10229.
[74] Carwyn Jones and Mark Hickford "Introduction" in Carwyn Jones and Mark Hickford (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (1st ed, Routledge, Abingdon, 2019) at 3.
[75] *United Nations Declaration on the Rights of Indigenous Peoples*, above 73, art 11.
[76] Article 18.
[77] Article 25.
[78] Article 29(1).

5. the right to "determine and develop priorities and strategies for the development or use of their…resources".[79]

Several rights recognised in the Declaration surpass the Crown's current recognition of Māori interests in water resources. The Declaration advances the following rights to property, thus challenging the existing mechanisms for recognition:[80]

1. Indigenous peoples have the right to subsistence and development;[81]
2. Indigenous peoples have the right to traditionally owned resources, with the state obliged to give legal recognition and protection to these resources;[82] and
3. Indigenous peoples have the right to redress for "resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged";[83]

Significantly, the Declaration advances the political authority dimension of indigenous peoples' rights and interests in natural resources, including water. The Declaration endorses:

1. Indigenous peoples right to self-determination;[84]
2. Indigenous peoples right to autonomy or self-government;[85]
3. The obligation on the state to obtain "informed consent before adopting and implementing legislative or administrative measures that may affect them";[86]

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[79] Article 32(1).
[80] Andrew Erueti "Conceptualising indigenous rights in Aotearoa New Zealand" (2017) 27(3) NZULR 715 at 725.
[81] *United Nations Declaration on the Rights of Indigenous Peoples*, above 73, art 20.
[82] Article 26(1),(2),(3).
[83] Article 28(1).
[84] Article 3. Article 3 equates most closely with the tino rangatiratanga model.
[85] Article 4.
[86] Article 19.

4. The obligation on the state to obtain informed consent prior to the approval of any project affecting the utilisation of indigenous peoples' resources, particularly in connection with the development of water;[87] and
5. The right "to the recognition, observance and enforcement of treaties… with States or their successors and to have States honour and respect such treaties."[88]

5 Evaluating the impact of the Declaration on Māori water rights

The Supreme Court referred to the Declaration when interpreting the principles of the Treaty, where they had statutory recognition.[89] The Court acknowledged that "the Declaration provides some support for the view that those principles should be construed broadly".[90] However, the Court expressed skepticism about the Declaration's potential to introduce new obligations unless initiated by the Crown.[91]

Nevertheless, the Declaration can contribute significantly to the internalisation of norms across various levels of social, political, and legal spheres. For example, the New Zealand Human Rights Commission linked the Treaty and the Declaration as "strongly aligned and mutually consistent", noting that, therefore, "the Declaration assists with the interpretation and application of the Treaty Principles".[92] The Waitangi Tribunal recognised the UNDRIP as a universally accepted indigenous rights Declaration, which holds particular relevance for the application of the principles of the Treaty.[93]

The Declaration can be viewed as an expansion of Māori rights and interests concerning water, which were protected in the Treaty. This expansion reaffirms the Treaty's interpretation, recognising tino rangatiratanga and "exclusive and undistributed

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[87] Article 32(2).
[88] Article 37.
[89] *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [92].
[90] At [92].
[91] At [92].
[92] Jones, above n 74, at 3.
[93] At 3.

possession" of property as self-determination and self-governance over water rights. This perspective contrasts with the Crown's more limited interpretation of kaitiaki interests in water as the predominant expression of rangatiratanga. This interpretation denies Māori complete decision-making authority and control over water.[94]

D *Summary of Māori water rights*

The Treaty recognises the continuing right to political authority over natural resources. The Waitangi Tribunal established that the customary interests held by Māori in water bodies, as guaranteed by the Treaty, are akin to proprietary rights.[95] These rights extend to tino rangatiratanga.[96] The common law doctrine of customary title supports Māori proprietary rights to water, so long as they can be established in the courts. The Declaration recognises the right to culture, traditional ownership over natural resources and the right to exercise tino rangatiratanga over resources. There exists a clear obligation on the part of the Crown to recognise Māori rights.

IV Means of recognising and protecting Māori water rights and interests

This Part will critically analyse how the Crown has sought to recognise Māori water rights. Despite the Crown's refusal to acknowledge Māori ownership of freshwater bodies, it has negotiated alternatives, primarily in the form of co-management and co-governance agreements arising from Treaty settlements.

A Co-governance and co-management arrangements over water as an alternative to ownership

In the case of Te Arawa Lakes, Te Arawa and the Crown negotiated an agreement given effect in the Te Arawa Settlement Act 2006. This agreement forms a co-management

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[94] Waitangi Tribunal, above n 6, at 38.
[95] At 110.
[96] At 101.

entity consisting of iwi and regional and district councils.[97] Its overarching vision is to ensure the preservation of the lakes and their surrounding catchments for both present and future generations.[98] This recognises the deep historical ties of the iwi to their ancestral lakes and allows iwi to provide cultural advice concerning the lake. This aligns with the right to culture model, aimed at protecting the historical and cultural bonds between the iwi and the lake while also facilitating their participation in decision-making processes.[99]

However, the issue of ownership regarding the water remained unresolved, or some would argue, was explicitly rejected. The Act introduced a troubling form of ownership that can be characterised as both legally innovative and convoluted.[100] The Crown retains what is referred to as the "Crown's stratum", encompassing the space occupied by the water and the air above each Te Arawa lake bed.[101] While the Crown denied that this stratum implies ownership of the water itself, Te Aho suggests that these mechanisms were created to prevent Māori from owning water and the space above it, thereby averting any potential charges for its use.[102] This approach precludes any future recognition of water ownership or exclusive control, rejecting both the property and tino rangatiratanga models.

In connection with the North Island's largest river, the Waikato River, the Waikato-Tainui tribes engaged in negotiations that led to the enactment of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. This Act also places particular emphasis on the right to culture model through its co-management arrangements, involving iwi in

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[97] Te Arawa Lakes Settlement Act 2006, s 48.
[98] Section 49.
[99] Erueti, above n 5, at 58.
[100] Linda Te Aho "The 'False Generosity' of Treaty Settlements: Innovation and Contortion" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) at 110.
[101] At 110.
[102] Linda Te Aho "Governance of water based on responsible use - an elegant solution?" in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (ed) *Responsibility Law and Governance for Living Well with the Earth* (Milton, Routledge, 2019) 143 at 151.

decision-making processes.[103] This Act brought into existence the Waikato River Authority, comprising an equal number of members appointed by both the Crown and iwi.[104]

The primary responsibility of the Waikato River Authority is to oversee the realisation of the vision and strategy aimed at restoring and protecting the health and well-being of the Waikato River for future generations.[105] One significant advantage of the Waikato River Authority's governance structure is its ability to create an "integrated, holistic and coordinated approach to the implementation of the vision and strategy and the management" over the Waikato River.[106] The Waikato River Authority wields significant influence over the river's use by granting resource consents, as it constitutes over half of the representation on the hearing committee.[107]

Joint management agreements are required between Waikato-Tainui and the regional council.[108] Additionally, the Act provides for local councils to better integrate Waikato-Tainui tribes into the Resource Management Act (RMA) planning processes.[109] This allows iwi participation in the consent-granting process for various activities that impact the Waikato River. This includes the preparation of an integrated "river management plan" and an "environmental plan" that local councils must consider when formulating planning documents.[110]

What stands out as significant about the Waikato-Tainui River Settlement, though, is the provision that explicitly defers any conversation surrounding ownership of water. The Act acknowledges that the Crown and Tainui hold distinct views concerning their relationship with the river, which the Crown would seek to describe as including

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[103] Erueti, above n 5, at 58.
[104] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22.
[105] Section 22(2)(a).
[106] Section 22(2)(b).
[107] Sections 25 and 31.
[108] Section 42.
[109] Durie, above n 57, at 72.
[110] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, above n 104, ss 35 and 55.

ownership.[111] The settlement does not aim to reconcile these differences.[112] Consequently, the agreement refrains from recognising the property and tino rangatiratanga model.

More recently, the Crown reached an innovative Treaty settlement through the enactment of the Te Awa Tupua Act 2017. This Act establishes a governance structure similar to the Waikato River settlement, forming a trust called Te Pou Tupua with equal iwi and government representation tasked with co-managing the river.[113] Similar to the Waikato agreement, the primary focus is on ensuring the future health and well-being of the river and its people.[114] Provisions are included to facilitate the iwi's involvement in the Resource Management Act planning and consent-making processes related to the river.[115] There are limitations to this arrangement. For instance, the Whanganui River and Waikato River tribes cannot prevent the issuing of natural resources consents for activities like water extraction, diversion or dam construction on the river.[116]

The Act granting legal personhood to the Whanganui River represents recognition of cultural rights.[117] This formal acknowledgment aligns with the spiritual recognition by the Whanganui iwi, where the river is regarded as a tupuna.[118] It aligns with Whanganui iwi's tikanga that encompasses not only the river but also its beds and banks, from the mountains to the sea.[119] Under the Act, the fee simple estate of the parts of the riverbed owned by the Crown is vested in this legal person.[120] This arrangement certainly goes further than what was outlined in the Te Arawa Lakes Settlement by including the

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[111] Section 64(1)(a).
[112] Section 64(1)(b).
[113] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.
[114] Section 19.
[115] Sections 8 and 63.
[116] Durie, above n 57, at 72.
[117] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, above n 113, s 14.
[118] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[119] Section 12.
[120] Section 41.

"subsoil, plans affixed to the bed, water-occupied space, and the airspace above the water" within the definition of the bed.[121]

However, by vesting the river with legal personality, the Act effectively side-stepped the issue of ownership of the water itself because the vesting of the bed does not create a corresponding proprietary right to the water.[122] As Fleur Te Aho notes "the legal personality device can be properly understood as a 'compromise to prevent iwi from gaining ownership'."[123] While parts of the Whanganui River are vested in Te Awa Tupua, the private property rights in the river bed are not affected, nor are public use and access rights.[124] While Te Awa Tupua will own its riverbed, it will have no rights to the waters it contains. This means the iwi cannot derive any benefits from the use of this resource, rejecting both the property and tino rangatiratanga model.

There are other co-management agreements that have gone a step further in acknowledging Māori ownership interests in water, involving vesting fee simple ownership over a lake or river bed.[125] This was implemented in the case of Te Waihora (Lake Ellesmere), yet it did not arise from a Treaty settlement.[126] To an extent, the Te Waihora agreement reflects the property model as Ngāi Tahu gained a property-like rights. By vesting the title of the bed to Te Waihora, along with the certain adjacent land that was not the conservation estate, Ngāi Tahu acquired some authority over the lake.[127]

This authority allowed them to exercise control over various aspects, such as regulating eel fishing levels, removing grazing stock from their land, and participating in riparian planting to enhance water quality.[128] However, this arrangement primarily centered on

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[121] Section 7.
[122] Section 46(1)(a); Te Aho, above n 100, at 114.
[123] Fleur Te Aho "Treaty Settlements, the UN Declaration and Rights Ritualism in Aotearoa New Zealand" (2020) UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS 33 at 38.
[124] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, above n 113, s 46(1)(a).
[125] Ruru, above n 58, at 14.
[126] At 14.
[127] N Kirk and P.A Mermon "Role of indigenous Māori people in collaborative water governance in Aotearoa/New Zealand" (2012) 55 J. Environ. Plan. Manag. 941 at 950.
[128] At 950.

land management, rather than water management. Ngāi Tahu's involvement was primarily limited to advocating their interests with the local government regarding the water catchment.[129]

B Co-governance and co-management arrangements - the right to culture model

These co-management and co-governance arrangements have provided tangata whenua a voice in environmental decision-making. However, these arrangements are primarily directed at promoting the right to culture model.[130] They do so by acknowledging iwi/Māori's customary practices, spiritual and historical connections, and, to varying extents, facilitating Māori involvement in decision-making related to water management.[131] Their overarching aim is to restore the well-being of the water bodies for the benefit of future generations. These cultural aspects are important to iwi.

However, in advancing the right to culture model, the Crown does not address Māori's right to property. The Crown explicitly defers any consideration of such proprietary interests.[132] The Crown does not entertain the idea of Māori having rights to use, occupy and exploit the natural resource. Instead, for the Crown tino rangatiratanga equates with the protecting and preserving of the natural resource, ensuring it can be cared for and utilised by both the present and future generations of tangata whenua, and shared with tauiwi (non-Māori). Consequently, the unresolved issues concerning water ownership persist, along with the questions surrounding political authority over them. Te Aho notes:[133]

> It is generally accepted by Māori that the various co-management arrangements…deal primarily with the restoration and protection of the health and wellbeing of the waterways, not the issue of recognising their rights and interests in their water bodies.

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[129] At 950.
[130] Erueti, above n 5, at 58.
[131] At 58.
[132] Martin, above n 66, at iv.
[133] Te Aho, above n 100, at 112.

The absence of recognition of property rights or tino rangatiratanga places constraints on Māori when resorting to co-management and co-governance arrangements. These arrangements continue to reflect the constraints of a self-dictated process where the legal and political authority of the State is never truly open to renegotiation.[134] As summarised by Durie:[135]

> The effect of the Crowns position that "no-one owns water" is that the Crown retains a form of governance, exercised through statute and regional authorities, that excludes tangata whenua from exercising rangatiratanga.

V Water Service Entities Bill and Māori interests

The Water Service Entities Bill purportedly includes provisions acknowledging the Crown's responsibility to uphold the Treaty.[136] This section analyses whether the Crown is advancing Māori interests and rights within the water service delivery model.

A Governance arrangements

The day-to-day governance rests with water service entities, tasked with providing safe, reliable and efficient water services in their respective area.[137] The governance of the water service entities consists of a two-tier structure, involving a corporate governance board and a regional representative group. Under the Bill, an independent, competency-based, corporate board will be established to govern the water services entity.[138] All decisions related to the operation of the water service entities must be made by or under the authority of the board. [139]

Additionally, the Bill will establish a regional representative group for each of the ten water service entities.[140] These groups will comprise an equal number of territorial

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[134] Te Aho, above n 123, at 39.
[135] Martin, above n 66, at 15.
[136] Cabinet Office Circular, above n 4.
[137] Water Services Entities Bill 2022 (136-5), cl 12.
[138] Clause 56(1).
[139] Clause 56(2).
[140] Clause 27.

authority representatives and mana whenua representatives.[141] Mana whenua will possess equal voting rights to their local government counterparts. Mana whenua, whose rohe or takiwā is within the service area, will appoint their representatives through a kaupapa Māori process.[142] The regional representative group will have five primary roles, which include:

1. Appointing and removing the board members of the entity through a board appointment committee.[143]
2. Participating in the process of setting the entity's strategic and performance expectations, and approving the strategic direction of the entity, often through a statement of intent.[144]
3. Monitoring and reviewing the performance of both the board and the entity.[145]
4. Approving the appointment and remuneration policy prepared by the board appointment committee.[146]
5. Performing any other duties or functions required by the Bill.[147]

At first glance, the co-governance arrangement may appear significant, with some commentators hailing it for establishing a statutory co-governance framework across Aotearoa.[148] However, upon closer examination, there is only one co-governance mechanism within the Bill - the regional representative group - and its authority and power will be circumscribed.

While mana whenua will hold a joint and equal representation alongside territorial authorities in the regional representative group, their role is confined to primarily

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[141] Clauses 27(3)(a) and (b).
[142] Clause 33.
[143] Clause 38.
[144] Part 4.
[145] Clause 139.
[146] Clause 40.
[147] Clause 28(e).
[148] Sienna Yates “Margaret Mutu: Call it what you want, co-governance isn’t going away” (7 may 2023) E-tangata <e-tangata.co.nz>.

oversight and strategic influence over the water service entities. Their influence is restricted to their five primary roles.[149] Mana whenua, through their role in the regional representative group, will not be actively involved in the day-to-day governance or the operational management of the water service entities, outside of their five limited roles.

Instead, this governance falls under the corporate governance board's jurisdiction, which will assume responsibility for the operational management of the water service entities. The board holds the highest decision-making power and influence regarding the water services' quality, accessibility, efficiency and performance.[150] Yet, there is no co-governance arrangement, explicit requirement for mana whenua representation, nor is there a whakapapa requirement within this board.

Instead, the board is only required to collective possess knowledge and experience related to the principles of the Treaty, mana whenua perspectives, mātauranga, tikanga and te ao Māori.[151] This raises the question: if mana whenua do not have an equal say in the day-to-day operations of the water service entities, how can these entities genuinely expect to successfully give effect to these principles? Furthermore, how can "mana whenua perspectives" accurately be represented if mana whenua themselves are not part of the board?

Mana whenua representation on boards enables direct advocacy and participation in governance, decision-making, and water management. In contrast, a board with mana whenua perspective only requires an understanding of an iwis connection to the water, offering no guarantee of advocacy. In any such scenario, if the board collectively composes of some individuals with knowledge of these principles, it could potentially consist entirely of Pākehā. This could result in a failure to fully realise Māori interests and may lead to limited or superficial recognition of place-based cultural knowledge. Mana whenua must provide their input throughout the entity, including day-to-day

[149] Water Services Entities Bill 2022 (136-5), above n 137, cl 28.
[150] Clause 3.
[151] Clause 57(1).

operations, as they possess the authority on how these operations can best give effect to the principles of the Treaty, tikanga and te ao Māori.

This governance arrangement falls short of the Treaty. It provides no recognition of political authority (tino rangatiratanga), opting instead for a reform approach that facilitates shared decision-making. As argued above, even then, the participation of mana whenua in decision-making remains constrained within the regional representative group. This sits within the right to culture model as it grants procedural rights (iwi participation in decision-making).[152] However, it falls short of granting stronger rights, such as autonomous decision-making powers for Māori, as guaranteed by the Treaty.

B Te Mana o te Wai Statements

The Bill introduces provisions for Te Mana o te Wai Statements. Mana whenua, whose rohe or takiwā includes a freshwater body within the service area, may provide Te Mana o te Wai Statements for the water service entities.[153] These statements allow mana whenua to define what Te Mana o te Wai means to their specific rohe or takiwā. Operationally, these statements can take the form of an Iwi Management Plan, Culture Impact Statement or similar documents.[154]

The board of the water service entities must engage with the mana whenua to prepare a response to the Te Mana o te Wai statement for water services.[155] This response must be delivered within a two-year time frame.[156] It must include a plan detailing how the entity intends to fulfill its obligations and implement Te Mana o te Wai, to the extent that it applies to the entities duties, functions and powers.[157]

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[152] Erueti, above n 5, at 58.
[153] Water Services Entities Bill 2022 (136-5), above n 137, cl 140.
[154] An Iwi Management Plan (IMP) is a resource management plan prepared by an iwi, rūnanga, or hapū to exercise their kaitiaki roles. IMPs outline key concerns related to natural and physical resource utilisation. See Michelle Thompson-Fawcett, Jacinta Ruru and Gail Tipa "Indigenous Resource Management Plans: Transporting Non-Indigenous People into the Indigenous World" (2017) 32 Plan. Pract. Res. 259 at 261.
[155] Water Services Entities Bill 2022 (136-5), above n 137, cl 141.
[156] Clause 142.
[157] Clause 141.

Mana whenua are able to exercise kaitiakitanga through the preparation of these Te Mana o te Wai Statements.[158] This clause is directed at the right to culture model because it seeks to enhance Māori's stewardship and cultural/spiritual connections to the water. However, this emphasis on the right to culture model has resulted in a lacuna in terms of Māori's right to property and tino rangatiratanga. While mana whenua can express their roles as kaitiaki, Māori still have less than full ownership. As established in Part III, Māori possessed proprietary rights akin to ownership over water bodies.[159] This covers not only the private right to own but also the public right to control. This includes but is not limited to kaitiakitanga.[160] As Durie aptly states "kaitiakitanga is an incident of ownership, not an alternative to ownership"[161]

The right to tino rangatiratanga is also rejected. The Crown's interpretation of tino rangatiratanga, in relation to the water reform, equates with kaitiaki rights as exercised through Te Mana o te Wai statements. There is no reference of tino rangatiratanga in relation to the water bodies within mana whenua's rohe or takiwā in the Bill. Mana whenua are not given sole decision-making authority over water bodies in their rohe, as guaranteed by the Treaty. Instead, mana whenua's role is confined to submitting statements and offering advice for consideration by the decision-makers - the water service entities and the board.

As a result of this provision, when the water service entities make decisions concerning the water delivery or infrastructure in those rohe, they must give effect to Te Mana o te Wai. However, the onus of response and decision-making still rests with the water service entities. The water service entities still retain the ultimate authority to determine the extent to which Te Mana o te Wai and kaitiakitanga are applicable to water services functions and powers related to water management.[162]

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[158] Cabinet Office Circular, above n 4, at 1.
[159] Waitangi Tribunal, above n 6, at 110.
[160] Durie, above n 57, at 38.
[161] At 23.
[162] Water Services Entities Bill 2022 (136-5), above n 137, cl 141.

Further concern arises from the Bill's lack of provisions addressing accountability mechanisms if the water service entities fail to give effect to Te Mana o te Wai statements. Additionally, there are no provisions preventing these entities from selectively choosing which aspects of the statements to which they wish to give effect to. The only requirement placed upon the water service entities is to respond and include a plan for implementing Te Mana o te Wai.[163]

Te Mana o te Wai statements can be seen as a convenient tool that the Crown can use to grant iwi some level of kaitiakitanga, all while maintaining exclusive control and authority. Tino rangatiratanga should not be forgotten in favour of a narrow interpretation of kaitiakitanga. Iwi should retain the ability to assert their ownership, governance and authority over freshwater in their rohe.

C Statutory recognition of the Treaty and Te Mana o te Wai

Clause 4 provides that all persons performing or exercising duties or powers under the Bill must give effect to the principles of Te Tiriti o Waitangi/ Treaty of Waitangi and Te Mana o Te Wai.[164] The water service entities are therefore required to give effect to Te Mana o Te Wai to the extent that it pertains to their functions and powers.[165] This clause constitutes the strongest legislative direction with its "to give effect to" aspiration.[166] The requirement for decision-makers to "give effect" to the Treaty principles and Te Mana o te Wai means Māori interests must, to some degree, be acknowledged and provided for within the water service delivery arrangements.

The Supreme Court has recognised that "give effect" imposes a more stringent obligation to adhere to the Treaty principles.[167] The courts are likely to interpret the language of

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[163] Clause 41.
[164] Clauses 4 and 14(2).
[165] Clause 140.
[166] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [43].
[167] *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]; and *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24].

clause 4, "must give effect to", in line with the similarly worded Conservation Act 1987.[168] This interpretation could require substantive outcomes for iwi, surpassing mere procedural steps.[169] However, the Bill does not provide further guidance on how decision-makers should uphold the Treaty beyond clause 4. This indicates that clause 4 is a "general effect" clause, leaving the specifics of how to "give effect" to the Treaty principles at the discretion of those exercising authority under the Bill.

Further, this clause exclusively focuses on giving effect to the principles of the Treaty, omitting any requirements to give effect to the text of Te Tiriti. Some critics have observed that while the Treaty principles offer flexibility, they ultimately fail to provide the same degree of self-determination, authority, and mana to Māori as adhering to the text of the Treaty itself.[170]

D Operating principles of the Water services entities

The Bill requires water service entities to establish early and meaningful partnerships with Māori to give effect to Te Mana o te Wai and facilitate the incorporation of mātauranga Māori, tikanga Māori and kaitiakitanga.[171] Early partnership and engagement with Māori is a positive and essential step towards meeting Treaty obligations. Yet, the Bill lacks clear guidance on how decision-makers will operationalise these processes. This may include the formal and informal processes the decision-makers will employ to effectively engage with mana whenua.[172] Without such specificity, there is a risk that this requirement can become a checkbox exercise. This clause is directed at the right to culture model because it seeks to provide Māori with some procedural rights in decision-making and protection of the traditional way of life.

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[168] *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation,* above n 167, at [52].
[169] At [52].
[170] Dominic O'Sullivan and others "A critical review of the Cabinet Circular on Te Tiriti o Waitangi and the Treaty of Waitangi advice to ministers" (2021) 21(6) Ethnicities 1093 at 1093-1907; Heather Came and others "The Waitangi Tribunal's WAI 2575 Report: Implications for Decolonising Health Systems" (2020) 22(1) HHR 209 at 213.
[171] Water Services Entities Bill 2022 (136-5), above n 137, cl 13(d).
[172] Thompson-Fawcett, above n 154, at 267.

E Ownership of entities

The Bill does address the issue of ownership. However, it does so without recognising Māori rights and interests. It directs that local authorities will have exclusive ownership of the entities through shares held on behalf of their communities.[173] These entities will assume ownership of the water infrastructure, including the revenue, previously held by local authorities.[174] While the water assets and service delivery remain in public ownership, Māori are excluded from ownership rights.[175] This approach reflects the Crown's adherence to the common law doctrine, which classifies freshwater as a public resource, ultimately rejecting the property model for Māori. This denies Māori the right to exclude, use the resource and to reap any benefits.

F The Water Service Entities Bill - Right to culture model

On its face, the Bill seems to incorporate Māori interests and provide opportunities for iwi participation in decision-making. It has done so through four primary mechanisms: the establishment of the regional representative group, the introduction of Te Mana o te Wai statements, statutory recognition of the Treaty/Te Mana o te Wai, and the operating principles of the water service entities.[176] These clauses go beyond merely granting Māori the general right to participate in decisions related to water service delivery and extend to co-governance arrangements and shared decision-making beyond tribal-specific settlements. However, I argue these mechanisms reflect the right to culture model.[177]

Much like the Treaty co-management and governance arrangements, the Bill focuses on protecting the indigenous right to culture. That is, the expression of kaitiakitanga without ownership, participation in decision-making that may impact them, and the

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[173] New Zealand Department of Internal Affairs *Transforming the system for delivering three water services: Summary of proposals* (Te Tari Tariwhenua Internal Affairs, June 2022) at 32.
[174] At 32.
[175] At 32.
[176] Water Services Entities Bill 2022 (136-5), above n 137, cls 4, 13, 27 and 140.
[177] Erueti, above n 5, at 58.

historical/cultural connections of Māori with the water.[178] While these cultural rights are important to iwi, Māori rights in this Bill should not be exclusively restricted to the culture model. Over emphasising culture or limiting the recognition of rights to water to this dimension oversimplifies the recognition of Māori rights to water, which is the case here.[179]

While promoting the right to culture, the Bill simultaneously rejects the property model, which would grant iwi relatively extensive rights, including exclusive control over access to and use of water in their rohe. Furthermore, this Bill provides no recognition of any form of political authority. For the Crown, tino rangatiratanga equates with co-governance, iwi exercising kaitiakitanga through Te Mana o te Wai and early engagement with iwi. This falls short of granting Māori tino rangatiratanga and property rights, guaranteed by the Treaty. This dissertation now explores three options for advancing these rights. As pointed out by Erueti:[180]

> … This requires a more historic-centered approach that recognises and accepts that Māori possessed and continue to assert tino rangatiratanga. Māori political authority is not a privilege then, but a right based on prior sovereignty that was wrongly taken away and continues to be denied to Māori.

VI The Way Forward

A Governance arrangements - relational sphere

Governance arrangements should, at a minimum, establish fifty-fifty partnerships between mana whenua and governmental actors throughout the entire framework of the delivery model. While this is presently maintained at the regional representative group level, there exists no explicit requirement for this joint decision-making to extend throughout the entire apparatus of the Bill. Power-sharing arrangements should not be

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[178] Water Services Entities Bill 2022 (136-5), above n 137, cls 13, 27 and 140.
[179] Erueti, above n 5, at 58.
[180] Erueti, above n 80, at 726.

limited to just one part of the reform structure, as this still falls short of the Crown's obligations under the Treaty.

The co-governance approach used within the regional representative's groups must extend to the board appointment committee and the corporate governance board. In such a scenario, decision-making authority would be jointly held by mana whenua and governmental actors. Co-governance at the board level would elevate the role of mana whenua in decision-making at the highest level, granting them substantial influence over the day-to-day governance and operational decisions of the water service entities.

Integrating mana whenua's insights, skills and expertise into the governance board is essential to provide an authentic representation of "mana whenua perspectives". Mana whenua's deep knowledge and experience in environmental management, rooted in their unique relationship with their rohe and waterways, are invaluable.[181] These attributes equip mana whenua with practical, effective and necessary competencies to influence decision-making and shape the day-to-day operations of water service entities.[182] Mana whenua's role would no longer be confined to a lesser interest of kaitiaki influence, through early engagement or mere participation through Te Mana o te Wai statements.[183]

There is still tension with a co-governance approach. While pragmatic, the co-governance structure still follows an inherently Western model, with appointed representatives making formal statutory decisions on behalf of these various groups.[184] This model may be foreign to many Māori and may not easily facilitate their participation.[185] Co-governance can be considered a step towards realising the principles of the Treaty, but it does not represent the final goal.

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[181] Connie Buchanan "Carwyn Jones: The value of sharing the decision-making" (23 April 2023) E-tangata <e-tangata.co.nz>.
[182] Water Services Entities Bill 2022 (136-5), above n 137, cls 13 and 140.
[183] Clauses 13 and 140.
[184] Marama Muru-Lanning "The Key Actors of Waikato River Co-Governance: Situational analysis at work" (2012) 8(2) AlterNative 128 at 130.
[185] At 130.

While it recognises the authority of iwi in decision-making, it does so only within the context of iwis' ability to function within Crown-established systems. The Crown would still be responding with a right to culture model by allowing iwi more effective participation in decision-making. As Muru-Lanning argues, the focus on co-governance at all levels avoids the need to determine the complex political and legal issues of ownership.[186] The Crown would still be rejecting the property model. Furthermore, the co-governance approach still fails to recognise the tino rangatiratanga model. It falls short of recognising authority entirely independent of the Crown, despite this being guaranteed under the Treaty. This approach restricts the full recognition of Māori rangatiratanga in governance.

B Ownership - towards rangatiratanga

In this dissertation, ownership has been deliberated as a challenging yet practical means of recognising the customary relationship that Māori had with water bodies prior to colonisation. Closely linked to the claim of ownership is also the claim of tino rangatiratanga over water, protected by the Treaty.[187] Therefore, often, Māori claims for rights and interests in water have been oriented around ownership. This focus on ownership arises from the challenge of fully accommodating comprehensive recognition of the tino rangatiratanga model within the existing constitutional framework, where the Crown has exclusive sovereignty.[188]

For instance, in the Freshwater Report, the claimants consistently framed their arguments in terms of ownership rather than tino rangatiratanga. Ownership, within a property rights framework, bestows a degree of control and decision-making authority over resources that the current legal framework fails to acknowledge fully. This includes the right to use, restrict access to and exploit water resources.[189] Property rights could be afforded to

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[186] At 130.
[187] Martin, above n 66, at iii.
[188] Durie, above n 57, at 39.
[189] Erueti, above n 80, at 738.

Māori. As Erueti infers "practically speaking, a claim to ownership can accommodate the Crown right to govern".[190]

C Mana whenua authority - tino rangatiratanga sphere

An approach that recognises tino rangatiratanga would require a reframing of the constitutional set-up whereby mana whenua would obtain complete authority. Mana whenua would have sole decision-making and authority over particular bodies of water in their rohe. This approach is not about co-management or co-governance. Rather, it is about a closer concertion of what was affirmed and guaranteed in Article 2 of Te Tiriti, in that rangatiratanga rests over taonga and its governance rests with rangatiratanga. Furthermore, it comes from the position that Māori customary title continues to exist.

While this approach challenges the existing structure which recognises the Crown as the exclusive governing authority, it would offer greater security for Māori interests by not limiting their legitimacy to Western legal concepts. Mana whenua would utilise tikanga as the legal framework governing water bodies. Statutory recognition of mana whenua authority would be required. It must be acknowledged that such an arrangement is distant from the current reality in Aotearoa. However, as Nin Tomas argues, the co-existence of the Crown's sovereignty and Māori tino rangatiratanga can be viewed as "successive, co-existing layers of power and authority lying over the territory of Aotearoa/New Zealand".[191] Thus, acknowledgment of tino rangatiratanga over water bodies is not outside the realm of possibilities.

VII Conclusion

Māori rights and interests in water, as protected by the Treaty, are akin to proprietary rights and extend to tino rangatiratanga. The current approach taken by the Crown to recognise Māori water interests, as evidenced through Treaty settlements and the

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[190] At 738.

[191] Nin Tomas "Māori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (ed) *Property Rights and Sustainability the evolution of property rights to meet ecological challenges* (Martinus Nijhoff, Leiden, 2011) at 232 at 233.

proposed Water Service Entities Bill, reinforces that water cannot be subject to ownership. In lieu of ownership, the Crown has negotiated co-management and co-governance arrangements. These mechanisms have played a crucial role in securing Māori participation in decision-making processes.

However, there is an evident lacuna in these reforms. The Crown has failed to address Māori property rights and rejected calls for tino rangatiratanga over water. Instead, the Crown persists in promoting the right to culture model concerning Māori water rights. Overemphasis on this model has led to a reductionist approach to recognising Māori rights, rejecting property and tino rangatiratanga model.

The Crown still fails to meet its Treaty obligations. This dissertation advocates for the recognition of tino rangatiratanga for Māori in relation to water, echoing Durie's observation that “while rangatiratanga was envisaged in Te Tiriti o Waitangi, it is yet to find an expression as an evolving living authority that is meaningful in Aotearoa today”.[192]

[192] Martin, above n 66, at 15.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) is 7971 words.

VIII Bibliography

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